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## I. INTRODUCTION

Justice Richard Sanders contested 148 documents that the State of Washington redacted or withheld under exemptions in the Public Records Act (“PRA”), RCW 42.56 *et seq.*<sup>1</sup> After extensive analysis, the superior court required that the State produce six of the contested documents, plus three duplicates.<sup>2</sup> The court correctly found that the Attorney General’s Office (“AGO”) prevailed on 94 percent of its exemption claims (96 percent after removing the three duplicates),<sup>3</sup> and had “acted in good faith throughout this process.”<sup>4</sup> Reviewing the parties’ claims and arguments, the court ruled that “[o]n balance, the measure of success tips overwhelmingly in favor of the Attorney-General’s Office.”<sup>5</sup> The court’s rulings, with the exception of those identified in the State’s cross-appeal, are correct, supported by the evidence, and should be affirmed.

But because Justice Sanders “prevailed” under the PRA on a handful of documents, the superior court held that it was compelled to award some fees, costs, and penalties. It awarded Justice Sanders

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<sup>1</sup> Before recodification at RCW 42.56, the PRA was known as the “Public Disclosure Act” (“PDA”), RCW 42.17 *et seq.* This Brief uses the citations from the current codification, with the previous citations in footnotes.

<sup>2</sup> CP 1361-1437 (Opinion); 1630-33 (Opinion on Motion for Partial Reconsideration); 1712-25 (Amended Court’s Opinion, incorporating changes in reconsideration opinion).

<sup>3</sup> CP 1846; 1854-55.

<sup>4</sup> CP 1866.

\$55,443.12 in attorney fees and costs (37.5 percent of the \$127,955 he sought),<sup>6</sup> plus \$18,112 in penalties (of the \$614,670 sought).<sup>7</sup>

Justice Sanders now argues, among other things, that the superior court improperly imposed a penalty of \$3 a day – below the \$5 statutory minimum – for the State’s omission, on its original exemption log, of a “brief explanation” of its claimed exemptions under RCW 42.56.210(3).<sup>8</sup> This argument misstates the court’s penalty award (which was \$8 per day, including \$3 attributable to the “brief explanation” violation), and implies that the PRA separately authorizes a penalty for failure to provide a “brief explanation.” It does not. The court erred in imposing any monetary penalty relating to the “brief explanation” provision.

Additionally, the superior court erred in including in its penalty calculation the period of time (562 days) attributable to the Court, mainly when the matter was under advisement. The State is not criticizing the superior court for any delay, but rather notes that it had no control over how long the decision was pending. The court erred in assessing penalties for the days attributable to the court.

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<sup>5</sup> CP 1846.

<sup>6</sup> Justice Sanders had requested a total of \$806,018.06 for the six different documents on which he “prevailed” – equivalent to \$134,336 per document. CP 1654; 1673-74.

<sup>7</sup> CP 1845 and 1848.

<sup>8</sup> Formerly RCW 42.17.310(4).

More fundamentally, the State cross appeals the superior court's failure to dismiss the Complaint on the basis that Justice Sanders received all the documents he requested. Justice Sanders' attorney, Kurt Bulmer, modified his initial document request to make it co-extensive with a prior document request by Tim Ford, representing the Building Industry Association of Washington ("BIAW").<sup>9</sup> The State promptly provided the same documents and exemption log to Mr. Bulmer that it had given to the BIAW. The court correctly held that "Mr. Ford's [BIAW's] request was broader than, or at least as broad as, Mr. Bulmer's request";<sup>10</sup> that the AGO made a "legally sufficient search for public records in response to Mr. Bulmer's request[;] and that its disclosure complied with the PDA."<sup>11</sup> Justice Sanders did not utter one word of objection to the State's PRA response until more than a year later, when he filed this action.<sup>12</sup>

Because Justice Sanders received everything he requested, the State did not deny him the opportunity to inspect or copy any public record. It was unnecessary for the court to review any documents; it should have summarily dismissed Justice Sanders' Complaint.

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<sup>9</sup> CP 170-71, ¶¶ 24-27 (Declaration of La Dona Jensen, AGO Public Records Manager).

<sup>10</sup> CP 1365.

<sup>11</sup> CP 1363.

<sup>12</sup> CP 171, ¶¶ 26-27.

## II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

### A. Assignments of Error.

1. The superior court erred as a matter of law in not dismissing the Complaint, where Justice Sanders' request, as modified, was for all documents that the State produced to BIAW, and the State timely produced exactly those documents to Justice Sanders.

2. The superior court abused its discretion by including in the per diem penalty award to Justice Sanders 562 days attributable to the court, over which the State had no control.

3. The superior court abused its discretion by increasing the \$5-per-day penalty to \$8 per day based on the State's failure to provide a "brief explanation" of its exemptions under RCW 42.56.210(3),<sup>13</sup> where no statutory authorization exists for an additional penalty under that provision.

### B. Issues Pertaining to Assignments of Error.

1. An agency does not violate the PRA when a requestor receives all the documents he sought. *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012, 1015 (2004). Did the State comply with the PRA by producing to Justice Sanders all documents provided to Tim

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<sup>13</sup> Formerly RCW 42.17.310(4).

Ford of the BIAW, where the production was as broad, if not broader, than the production Justice Sanders requested? (Assignment of Error No. 1).

2. RCW 42.56.550(4)<sup>14</sup> requires a court to award a penalty for “each day that [the requestor] was denied the right to inspect or copy” public records. The case on which the court relied, *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004), addresses only delays attributable to the requestor’s conduct. Did the superior court err in calculating a penalty that included the 562 days attributable to the court, over which the State had no control? (Assignment of Error No. 2).

3. The PRA’s penalty provision, RCW 42.56.550(4),<sup>15</sup> authorizes penalties only where an agency denies the right to inspect or copy a public record, or fails to timely respond to a request. The PRA section requiring that an agency provide a “brief explanation” of the claimed exemptions, RCW 42.56.210(3),<sup>16</sup> does not authorize any penalties. Did the superior court err in increasing the per diem penalty for failing to provide this “brief explanation” of its exemptions? (Assignment of Error No. 3).

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<sup>14</sup> Formerly RCW 42.17.340(4).

<sup>15</sup> Formerly RCW 42.17.340(4).

<sup>16</sup> Formerly RCW 42.17.310(4).

### III. STATEMENT OF THE CASE

**General Background.** This PRA action is the second of two lawsuits that Justice Sanders filed against the State relating to ethics violations he committed in January 2003. The violations arose from Justice Sanders' *ex parte* contacts with residents of the Special Commitment Center ("SCC") on McNeil Island on January 27, 2003. During the visit, Justice Sanders discussed the issue of "volitional control" with SCC residents who had cases before the Supreme Court, despite the fact that the Justices were then circulating draft opinions in *In re Det. of Thorell*, 149 Wn.2d 724, 73 P.3d 708 (2003),<sup>17</sup> involving issues of volitional control.

In April 2004, after an investigation, the Commission on Judicial Conduct ("CJC") brought charges against Justice Sanders. Following a hearing, it held by clear, cogent, and convincing evidence that Justice Sanders' acts "impaired the integrity and appearance of impartiality of the judiciary and, thus, give rise to Canon violations," *i.e.*, Canons 1 and 2A of the Code of Judicial Conduct.<sup>18</sup> The Washington Supreme Court

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<sup>17</sup> CP 243-55 at 8:21-23 (Corrected Amended Commission Decision). Justice Sanders also accepted a document from Ralph Spink, an SCC resident who at the time had a matter filed in the Washington Supreme Court. CP 243-55 at 9:5-11.

<sup>18</sup> CP 243-55 at 8:2-6.

affirmed,<sup>19</sup> and the United States Supreme Court denied Certiorari.<sup>20</sup>

In Justice Sanders' first lawsuit against the State, referred to as the "Defense Action," he demanded that Washington State taxpayers fund his defense of the CJC proceedings and all appeals. Justice Sanders lost that case in the superior court and the Court of Appeals, and now has appealed to the Washington Supreme Court.<sup>21</sup> In this second action, "the PRA action," brought two months after the Defense Action, Justice Sanders demanded that he receive documents that the State had withheld or redacted in response to his request for documents relating to his SCC visit.

**The PRA Request and the AGO's Response.** On June 15, 2004, Justice Sanders' attorney, Kurt Bulmer, sent a PRA request to the AGO seeking public records relating to

[a] visit by Justice Richard Sanders to the Special Commitment Center on McNeil Island January 27, 2003 and subsequent actions by the Commission on Judicial Conduct in regards to this visit. This records request includes records both before and after the visit, the planning for the visit and follow ups after the visit.<sup>22</sup>

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<sup>19</sup> *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, 145 P.3d 1208 (2006).

<sup>20</sup> *Sanders v. Washington State Comm'n on Judicial Conduct*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 137, 169 L. Ed. 2d 29 (2007).

<sup>21</sup> *Sanders v. State*, 139 Wn. App. 200, 202, 159 P.3d 479, 480 (2007), *review granted*, \_\_\_ Wn.2d \_\_\_ (2008).

<sup>22</sup> CP 170 (Jensen Decl. ¶ 21); 181-82 (PRA request).

In particular, Justice Sanders requested communications between the Department of Social and Health Services (“DSHS”), the CJC, the AGO, and Washington Supreme Court Justices, as well as internal records and communications of the DSHS and the AGO.<sup>23</sup>

The AGO confirmed receipt of Justice Sanders’ request on June 24, 2004, and estimated it would take ten business days to respond.<sup>24</sup> As a courtesy to Justice Sanders, the AGO Public Records Manager, La Dona Jensen, also wrote to Mr. Bulmer that Tim Ford, an attorney for the BIAW, had made a similar request for all records relating to the CJC’s charges against Justice Sanders and Justice Sanders’ request for a defense of the CJC proceeding.<sup>25</sup> As the superior court held – and as evident from a comparison of the BIAW and Justice Sanders’ requests<sup>26</sup> – the former was at least as broad, or broader than Justice Sanders’ request.<sup>27</sup>

The information about the BIAW request triggered a phone call

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<sup>23</sup> CP 170, ¶ 21; 181-82.

<sup>24</sup> CP 170, ¶ 22; 184-85. Because Mr. Bulmer asked for documents not in the AGO’s possession, Ms. Jensen, told Mr. Bulmer that he should contact other agencies directly for their own documents. CP 170, ¶ 23; 184; *see Limstrom v. Ladenburg*, 136 Wn.2d 595, 604 n.3, 963 P.2d 869, 873 n.3 (1998) (an agency does not have to go outside its own records to identify or locate a requested record).

<sup>25</sup> Mr. Ford had requested “records related to the charges filed by the [CJC]” regarding Justice Sanders’ visit to the SCC and specific subcategories, including “[a]ll internal records and communications from the Office of the Attorney General related to the above matter or any request for representation on the matter.” CP 174-75.

<sup>26</sup> *Compare* CP 174-75 (BIAW request) *with* CP 181-82 (Bulmer request).

<sup>27</sup> CP 1364-65.

from Mr. Bulmer to Ms. Jensen on July 8, 2004. Mr. Bulmer told Ms. Jensen that Justice Sanders wanted to modify his PRA request to be co-extensive with Mr. Ford's request.<sup>28</sup> Ms. Jensen confirmed, in a letter to Mr. Bulmer, that he "wished to expand [his] request for documents to those which were disclosed to Tim Ford with [the] BIAW."<sup>29</sup>

Based on Justice Sanders' request, on July 8, 2004, the AGO forwarded to Justice Sanders an exact copy of the BIAW production (approximately 1,075 pages), along with the "Tim Ford Entire Document Index" identifying the documents produced, withheld, or redacted, and the bases upon which the State withheld or redacted individual documents.<sup>30</sup>

For the next year, neither Mr. Bulmer nor Justice Sanders challenged the AGO's understanding of the scope of Justice Sanders' PRA request, the adequacy of the production, or the exemptions claimed.<sup>31</sup>

**The PRA Lawsuit and the AGO's Subsequent Productions.** On July 22, 2005, while he was pursuing the Defense Action, Justice Sanders filed this PRA lawsuit. Justice Sanders sued the State after it objected to

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<sup>28</sup> CP 171, ¶ 25; 187.

<sup>29</sup> CP 171, ¶ 25; 187.

<sup>30</sup> CP 171, ¶ 26; 187-224 ("Entire Document Index"). The index also disclosed the document's numbers, type, number of pages, author, recipients, and title.

<sup>31</sup> CP 171, ¶¶ 26-27. Mr. Ford also never objected to the State's response. CP 170, ¶ 20.

discovery in the Defense Action.<sup>32</sup> This PRA lawsuit was the first time that the State learned Justice Sanders believed he was entitled to more documents than those in the Tim Ford/BIAW production. After receiving the Complaint, the State retained outside counsel, who performed a second review of the materials. Shortly afterwards, the State made two additional productions to Justice Sanders.<sup>33</sup> The first, on September 14, 2005, consisted of 58 documents (“Supplemental Production”<sup>34</sup>):

- 11 duplicates (identical documents given multiple Bates numbers);
- 7 documents already produced but mistakenly listed on the original index as withheld or redacted;
- 5 non-responsive documents produced simply to “avoid dispute”;
- 2 documents on which the State originally redacted personal email addresses;
- 1 CJC document (39 pages);<sup>35</sup>

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<sup>32</sup> A lawsuit’s existence does not bar a request, but the PRA “was not intended to be used as a tool for pretrial discovery.” *Limstrom*, 136 Wn.2d at 614 n.9, 963 P.2d at 879 n.9.

<sup>33</sup> CP 1084-85.

<sup>34</sup> CP 375; “Supplemental Production Documents” Binder [hereinafter “SP Binder”]. The State submitted both the Supplemental Production and *In Camera* documents to the court in binders that, by Stipulated Order, presumably have been forwarded to the Court of Appeals. Of the 58 documents produced in the supplemental production, the State originally withheld 33 based on PRA exemptions. The remainder were, as the court found, duplicates, withheld originally as non-responsive, or, in fact, previously produced. CP 1368-69 n.6.

<sup>35</sup> The State withheld the CJC documents based on the then-ongoing CJC proceedings. *See* WASH. CONST. ART. IV, § 31(2); RCW 2.64.111; CJCRP 11. CJC documents become public “as of the date of the hearing” if they were the basis of finding of probable

- 13 email cover sheets transmitting documents relating to existing litigation;
- 5 emails about logistics relating to existing litigation;
- 13 emails communicating attorneys' selected facts and opinions about existing litigation; and
- 1 copy of court cases and rules compiled by an attorney.<sup>36</sup>

The State informed Justice Sanders that the documents in the last four categories, *i.e.*, emails and work product, fell within the PRA's "controversy" exemption but because the documents were substantively innocuous, the State produced the documents to minimize the disputed items.<sup>37</sup> The State expressly disclaimed any waiver:

Some of the documents we are providing today are cover sheets including computer icons for attached privileged communications or attorney work product. By producing the cover sheets and the electronic icon for the underlying documents, the State does not waive any privilege or exemption from disclosure as to the underlying attached documents.<sup>38</sup>

On September 15, the State produced five additional documents

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cause. *See* CJCRP 11(b). These documents were not publicly available when Justice Sanders made his records request. Because Justice Sanders started the PRA lawsuit after the CJC hearing and the documents already were in his possession, the CJC consented to their release. CP 159-60, ¶¶ 3-5 (Decl. of Mary Tennyson).

<sup>36</sup> SP Binder (letter of February 14, 2006 to the court, submitted with binder, explaining the supplemental production).

<sup>37</sup> CP 1084-86 (Thomsen Supp. Decl.); 1093 (letter about supplemental production).

<sup>38</sup> CP 1093.

after deciding that it could produce one document in redacted form and four other documents originally withheld as “non-responsive.” The State explained: “To avoid unnecessary dispute and without waiving its position that the documents are non-responsive, the State is providing you with copies of those documents.”<sup>39</sup> One final document was produced with a corrected redaction on September 27.<sup>40</sup>

**The State’s Exemption Logs.** When it initially produced the documents in 2004, the AGO gave Justice Sanders an exemption log, referred to as the “Tim Ford Entire Document Index.”<sup>41</sup> The AGO provided a revised exemption log on September 15, 2005, reflecting the Supplemental Production and describing documents still subject to the controversy exemption and the attorney-client privilege.<sup>42</sup> On September 27, 2005, the State provided another version of the log,<sup>43</sup> making various clerical changes, such as removing references to “non-responsive documents” that the State had provided to Justice Sanders; correcting a reference to show that the State produced a particular document with redactions and did not withhold the document in its entirety; editing the

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<sup>39</sup> CP 115; 227 ¶¶15; 378.

<sup>40</sup> CP 995-99.

<sup>41</sup> CP 187-224.

<sup>42</sup> CP 1084-86, ¶¶ 3-10 (Thomsen Supp. Decl.); CP 1096-1109 (log).

<sup>43</sup> CP 1115-25.

subject/recipient columns to correctly reflect the names on redacted emails; adding a “cc” column; and making clerical changes on some of the description lines to assist Justice Sanders in reviewing the claimed exemptions.<sup>44</sup>

**The Parties’ Summary Judgment Motions.** Justice Sanders had asked for a show cause hearing on July 23, 2005.<sup>45</sup> The parties agreed to continue the hearing to October 7, 2007 to allow for the supplemental production and to permit Justice Sanders to conduct certain discovery.<sup>46</sup> Both the State and Justice Sanders then filed summary judgment motions on the sufficiency of the State’s production.<sup>47</sup> The court required another 35-day continuance,<sup>48</sup> and heard oral argument on the summary judgment motions on February 10, 2006.

To assist the court in its *in camera* review and eliminate the need for extensive oral argument about each document, the State submitted with its motion an “Appendix A” consisting of a cover sheet for each document the State withheld or redacted, which detailed the reasons for the

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<sup>44</sup> CP 1085-86, ¶ 6.

<sup>45</sup> CP 97-100 (Justice Sanders’ motion to show cause).

<sup>46</sup> CP 1087, ¶ 11.

<sup>47</sup> CP 106-378 (State’s motion); 391-1046 (Justice Sanders’ response).

<sup>48</sup> CP 1087.

treatment.<sup>49</sup> Justice Sanders moved to strike Appendix A,<sup>50</sup> but nevertheless responded to each argument in it.<sup>51</sup> Although offered an evidentiary hearing, particularly on Justice Sanders' agreement to accept the BIAW production in response to his PRA request, Justice Sanders declined and submitted his case on the motion papers.<sup>52</sup>

**The State Overwhelmingly Prevails.** On January 12, 2007 – eleven months after hearing the parties' motions<sup>53</sup> – the court issued a written decision.<sup>54</sup> In that 76-page opinion, the court considered each of the 115 documents submitted *in camera*,<sup>55</sup> plus each of the 33 Supplemental Production documents for which the State initially had claimed exemptions.<sup>56</sup> Of the 148 documents, the court sustained the AGO's claim of exemption on all but ten, three of which were duplicates.

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<sup>49</sup> CP 127-154.

<sup>50</sup> CP 381-89.

<sup>51</sup> CP 1298-1360.

<sup>52</sup> CP 1362 (Court's Opinion); CP 1221; RP (2/10/05) 85-86 (“[W]e believe the record before Your Honor is more than sufficient for you.”).

<sup>53</sup> A timeline of the various motion and ruling dates is at CP 1841-42.

<sup>54</sup> CP 1361-1437 (Appendix). The court requested a uniform use of the terms “disclose” and “produce.” It defined “disclose” to mean indicating a document's existence to a PRA requestor. “Disclosed” documents may or may not be “produced,” *i.e.*, made available for inspection, depending on whether an exemption is validly claimed. The court stated a “document is never exempt from disclosure” (e.g., an exemption log), but its “production” may be withheld under PRA exemptions. RP (2/10/06) 4-5.

<sup>55</sup> “*In Camera* Binder”; *see supra* note 34 (discussing submission of *in camera* binder).

<sup>56</sup> *See supra* note 34 (of 58 documents in the Supplemental Production, only 33 initially withheld based on PRA exemptions). The court reviewed the 33 Supplemental

The State moved for partial reconsideration on January 22. On July 27, 2007, the court modified its opinion and sustained the AGO's claimed exemption on one additional document, reducing the number on which Justice Sanders prevailed to six (plus three duplicates).<sup>57</sup> The court described the State's failure to produce one of these as a "de minimis violation."<sup>58</sup>

The court prepared two Appendices to its Opinion further stating its reasoning: Appendix A for the "*In Camera* documents"; and Appendix B for the State's Supplemental Production.<sup>59</sup> In the appendices, the court recited its decision and each party's position on each document.

As the court stated in its later Order on fees and penalties, "the measure of success tip[ped] overwhelmingly in favor of the [AGO]."<sup>60</sup> The court noted that the State prevailed on 96 percent of the claimed exemptions when factoring in duplicates,<sup>61</sup> and three of the four "major

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Production documents after Justice Sanders challenged this "late" production.

<sup>57</sup> CP 1630-32 (Court's Opinion on Motion for Reconsideration); 1712-25 (Amended Court's Opinion, incorporating rulings on reconsideration). The documents on which the AGO's exemption claims were denied, after reconsideration, are: *In Camera* documents 30, 32, 94, 72 (partial denial), 103 (duplicate of 94), 104 (duplicate of 30), and Supplemental Production documents 3, 32 (part of document 72), and 57 (de minimis).

<sup>58</sup> CP 1437 (Supplemental Production Document 57).

<sup>59</sup> CP 1375-1437.

<sup>60</sup> CP 1846.

<sup>61</sup> CP 1846; 1854-55.

issues”<sup>62</sup> in the case (and most of the fourth, the applicability of the claimed exemptions).<sup>63</sup>

After reviewing each document the State withheld or redacted, the court correctly noted that “[n]early all of the [State’s] claims for exemption are made pursuant to [RCW 42.56.290<sup>64</sup>], the work product [“controversy”] exemption.”<sup>65</sup> It concluded that the lawsuits the State had identified as a basis for work product<sup>66</sup> were “litigation that fits comfortably within the judicially developed standards for relevant to a controversy” under the PRA and that the State “supplie[d] evidence that there were controversies encompassed by [RCW 42.56.290] during the time when the records withheld from production were created and at the time their production was requested by Justice Sanders.”<sup>67</sup>

**The Court Awards Limited Fees and Penalties.** On September 21, 2007, the court issued its Order on Justice Sanders’ motion for fees,

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<sup>62</sup> CP 1858, ll. 22-25.

<sup>63</sup> CP 1858-60; *see* discussion *infra* Part IV.D-E (discussing issues of fees and penalties).

<sup>64</sup> Formerly RCW 42.17.310(1)(j).

<sup>65</sup> CP 1370.

<sup>66</sup> The three cases that the State identified as “controversies” were *Thorell*, 149 Wn.2d 724, *In re Det. of Spink*, a petition for review from a Court of Appeals decision, and *Sanders v. State*, Justice Sanders’ lawsuit for a taxpayer-funded defense of the CJC charges. CP 1370-71.

<sup>67</sup> CP 1370.

costs, and penalties.<sup>68</sup> Because Justice Sanders prevailed on a handful of documents, the superior court held it had “no discretion in the decision to award some costs and some fees,” as well as some penalties.<sup>69</sup> Applying established Washington law,<sup>70</sup> the court allocated Justice Sanders’ attorneys fees and costs between his successful and unsuccessful claims, and awarded part of the penalties he sought.

In its allocation, the court considered the parties’ respective success on the issues in the case. It ruled that while Justice Sanders had established that the AGO had not provided a “brief explanation” of its exemptions in the exemption log as required by RCW 42.56.550(3),<sup>71</sup> the only contested issue there involved the remedy available to Justice Sanders. Justice Sanders had sought two remedies: a declaration barring the AGO from supplementing its log to provide a full explanation, and production of each document where a brief explanation was missing. The court rejected both of Justice Sanders’ proposed remedies and held that the appropriate remedy was the consideration of fees and penalties. Thus,

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<sup>68</sup> CP 1844-70 (order and incorporating transcript of oral ruling).

<sup>69</sup> CP 1846:19-21; 1857:8-14; 1861:8-14.

<sup>70</sup> See *Tacoma Pub. Library v. Woessner*, 90 Wn. App. 205, 951 P.2d 357 (1998); *Limstrom*, 136 Wn.2d 595, 963 P.2d 969.

<sup>71</sup> Formerly RCW 42.17.340(4).

“the AGO prevailed on the issue[s] of remedies.”<sup>72</sup> The AGO also established that it had made a legally sufficient search of public records,<sup>73</sup> and that the AGO’s September 2005 supplemental production was not “ipso facto a compelled disclosure of wrongfully held records entitling Justice Sanders to penalties.”<sup>74</sup>

The court then gave a proportionate weight to each of the “major issues”: ten percent to the issue of the remedy for noncompliance with the “brief explanation” requirement; 20 percent each to the “sufficiency of the [AGO] search” and the “effect of subsequent voluntary production of records”; and 50 percent to the issue of the State’s withholding of documents that it held should have been produced.<sup>75</sup> The court noted that Justice Sanders prevailed only on “a small part” of the “withholding” issue. Nevertheless, the court awarded Justice Sanders 75 percent of the fees and costs attributable to the “withholding” issue, *i.e.*, 75 percent of 50 percent of his total fees and costs, rather than a pro rata sum based on the few claimed exemptions that the court denied. The court’s decision

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<sup>72</sup> CP 1856.

<sup>73</sup> CP 1846:12-13; 1856:2-10.

<sup>74</sup> CP 1846:12-16; 1856:11-20.

<sup>75</sup> CP 1858-60.

resulted in greater award than what a pro rata award would have dictated.<sup>76</sup>

The court also imposed a penalty of \$8 per day: the \$5 minimum plus \$3 for failing to provide a “brief explanation” in the AGO’s exemption log. It held that there were “two records at issue, relating to two different proceedings within the overarching controversy”: the PDA request, and the CJC complaint and investigation.<sup>77</sup> Then the court multiplied \$8 by two records and by 1,132 days (from the State’s initial production to the date of the final production after the court’s order), to arrive at the total penalty of \$18,112.<sup>78</sup>

The court held that a minimum per diem penalty was supported by the fact that “there [was] no pattern of shifting exemption[s] here”; the AGO “prevailed in the vast majority of its claims of exemption”; and that “the AGO acted in good faith throughout this process.”

The record here is that [the AGO] made a timely disclosure initially and that the disclosure was at least as broad, perhaps broader than the disclosure requested by Justice

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<sup>76</sup> CP 1860-61. The court declined to limit the award of fees based on a pro rata approach according to the number of denied exemptions. The court noted that under that approach, Justice Sanders would have been entitled to only about five percent of the 50 percent of the total fees and costs he claimed. CP 1860.

<sup>77</sup> CP 1847.

<sup>78</sup> CP 1847; *see also* CP 1842 (State’s timeline chart).

Sanders, because it also conformed to the request for disclosure made [to Tim Ford/BIAW].<sup>79</sup>

In its calculations, however, the court concluded that the PRA required the inclusion of 562 days attributable to the court,<sup>80</sup> even though the State had no control over that period. The court erroneously held it had no discretion to hold otherwise under *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 90 P.3d 463 (2003).<sup>81</sup> This appeal and cross-appeal followed.

#### IV. ARGUMENT

##### A. The Court Should Dismiss Justice Sanders' Complaint.

Judicial review of an agency action under the PRA is *de novo*. Although courts liberally construe the PRA in favor of disclosure,<sup>82</sup> courts also must interpret the PRA according to its plain meaning whenever possible, with the primary goal of giving effect to legislative intent. *Yousoufian*, 152 Wn.2d at 437, 98 P.3d at 471. While the PRA generally requires agencies to disclose public records upon request, the PRA

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<sup>79</sup> CP 1865-66.

<sup>80</sup> See CP 1842 (State's timeline chart). This period included 336 days the summary judgment motions were under advisement, 191 days the motion for reconsideration was under advisement, and the court's own 35-day continuance.

<sup>81</sup> CP 1847.

<sup>82</sup> *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 100, 117 P.3d 1117 (2005). Justice Sanders authored the *Spokane Research* decision, filed August 11, 2005, three weeks after he filed his Complaint in this case.

exempts certain categories of documents and excuses an agency from producing documents not requested. “[W]here a listed exemption squarely applies, disclosure is not appropriate.” *Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007).

**B. The State Satisfied the PRA By Providing the BIAW Production to Justice Sanders.**

Justice Sanders failed to raise a genuine issue of material fact about his agreement to accept, in response to his PRA request, the production provided to the BIAW. Justice Sanders’ attorney, Mr. Bulmer, did not object to Ms. Jensen’s understanding in her July 8, 2004 letter that Justice Sanders “wished to expand [his] request for documents to those which were disclosed to Tim Ford with BIAW.”<sup>83</sup>

Justice Sanders does not deny the existence of an agreement to accept that production; his attorney states only that he never agreed with Ms. Jensen “to narrow [the] request to exclude documents which would otherwise be covered by the original request.”<sup>84</sup> But, as the court correctly ruled, “Mr. Ford’s [BIAW’s] request was broader than, or at least as broad as, Mr. Bulmer’s request.”<sup>85</sup> Justice Sanders declined an evidentiary

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<sup>83</sup> CP 165-72 (Jensen Decl.); 187; *see also* CP 1256-59 (Jensen Supp. Decl.).

<sup>84</sup> CP 475-76 (emphasis added).

<sup>85</sup> CP 1365.

hearing on any issues surrounding the agreement between Mr. Bulmer and Ms. Jensen.<sup>86</sup>

The superior court did not rely on the agreement in its rulings; it made “no findings about this issue [the existence of an agreement] because it is not material to the decision in this case.”<sup>87</sup> However, the agreement and the State’s production of the BIAW documents to Justice Sanders should have been dispositive. In fact, the court’s reasoning on “materiality” establishes that the State satisfied the PRA by producing to Justice Sanders the broader group of documents produced to Mr. Ford:

I conclude that under the P[R]A an agency that receives two concurrent requests for the same records discharges its responsibility for each request if it makes one legally sufficient search and discloses the same records to each. This conclusion applies here where the two requests direct a search for the same records during the same time period, as here. If one request directs a search of a slightly larger universe of records, the agency discharges its responsibility to each requestor if it makes one search and discloses the results of the broader search to each. [I] conclude that the AGO made a legally sufficient search for public records in response to Mr. Bulmer’s request and that its disclosure complied with the [PRA].<sup>88</sup>

As a matter of law, the AGO provided Justice Sanders the opportunity to review and copy all documents he requested. *See Sperr v.*

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<sup>86</sup> CP 1362 (Opinion at 2); RP (2/10/05) 85-86.

<sup>87</sup> CP 1365.

<sup>88</sup> CP 1365-66.

*City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012, 1015 (2004) (city did not violate PRA when requestor received all the documents he sought); *Kleven v. City of Des Moines*, 111 Wn. App. 284, 295, 44 P.3d 887, 892 (2002) (requestor did not prevail under the PRA because the city never refused to disclose records).

**C. Alternatively, this Court Should Affirm the Superior Court's Rulings on the Applicability of the PRA Exemptions.**

If this Court does not remand for entry of judgment in the State's favor based on Justice Sanders' acceptance of the BIAW production, the Court should affirm the court's rulings on the applicability of the PRA exemptions to the documents at issue. The AGO does not contest the court's thorough Opinion regarding the documents and their groupings, or the arguments on which each party prevailed and their "weights."

**1. The State consistently asserted the same exemptions.**

Justice Sanders argues that the AGO "shifted" the exemptions in its various logs. This is not true. As the court held in its opinion on fees and penalties, "there [was] no pattern of shifting exemption[s] here."<sup>89</sup>

Justice Sanders' argument relies on the fact that in the Entire Document Index accompanying the original 2004 production, the State cited to the "controversy" exemption for certain documents, while in the

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<sup>89</sup> CP 1865.

September 2005 logs, the State added a separate attorney-client privilege exemption for some of those entries under RCW 42.56.070(1)<sup>90</sup> (the “other statutes” provision) and RCW 5.60.060(2) (attorney-client privilege).<sup>91</sup> That purported “change” is explained, however, by the fact that at the time of the BIAW production, the State, relying on *Hangartner v. Seattle*, correctly interpreted the controversy exemption to include attorney-client privilege.<sup>92</sup> 151 Wn.2d 439, 453, 90 P.3d 26 (2004) (controversy exemption “will include some documents also covered by the attorney-client privilege”). The State later elected to separate out the work product and attorney-client privilege exemptions to assist Justice Sanders in reviewing the claimed exemptions.<sup>93</sup>

As detailed in the State’s declarations filed in opposition to Justice Sanders’ summary judgment motion, the differences between the State’s September 15 and September 27 exemption logs are ministerial. The State removed references to “non-responsive” documents produced to Justice Sanders, added a “cc” column, and made a few other corrections to assist

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<sup>90</sup> Formerly RCW 42.17.260(1).

<sup>91</sup> See Opening Br. of the Hon. Richard B. Sanders [hereinafter “Opening Brief”] at 38 n. 28. The Opening Brief also refers to CP 443-44 for the proposition that “[t]he AGO now [in Appendix A] claimed at least 20 documents as exempt under the attorney-client privilege,” but CP 443-44, the declaration of a paralegal in the office of Justice Sanders’ counsel, nowhere makes that statement.

<sup>92</sup> CP 1087 ¶ 15; 1157-72 at 60:14 to 65:12 (Batten Dep.).

<sup>93</sup> CP 1086 ¶ 6; 1113.

Justice Sanders.<sup>94</sup> Justice Sanders’ claim that the State repeatedly changed its substantive exemptions – and that the court “manufacture[d] ‘exemptions’ to shield the AGO from liability”<sup>95</sup> – are unfounded.

**2. The court correctly applied the “controversy” exemption.**

Justice Sanders’ argument that the court misapplied the “controversy” exemption also is groundless. That exemption provides:

Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.

RCW 42.56.290.<sup>96</sup> “Controversy” is used in the statute “as a threshold requirement for application of the work product rule to exempt documents from disclosure under the act. The work product rule requires litigation, either anticipated litigation or actual, past or present litigation.” *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995, 1001 (1993).

The court identified three cases that were “controversies”: *Thorell*, *Spink*, and Justice Sanders’ lawsuit seeking a taxpayer-funded defense of the CJC charges.<sup>97</sup> Each document for which the State claimed the

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<sup>94</sup> CP 1084-88.

<sup>95</sup> Opening Brief at 18.

<sup>96</sup> Formerly RCW 42.17.310(1)(j).

<sup>97</sup> See *supra* note 66.

controversy exemption involves one of these cases.<sup>98</sup>

Justice Sanders also argues that the exemption does not encompass *In Camera* document 35 because the document does not expressly mention any of these three controversies. However, as is clear from the State's Appendix A and the court's rulings, the controversy is reasonably inferred from related, contemporaneous documents relating to the litigation.<sup>99</sup>

Justice Sanders argues that *In Camera* documents 59, 60-63 and 67 also fall outside the controversy exemption. These emails, however, all in the same string, relate to materials that Justice Sanders accepted from an SCC resident, Mr. Spinks, whose case was before the Supreme Court.

Justice Sanders urges that *In Camera* documents 73, 75, 78-80 and other documents regarding his request for a taxpayer-funded defense do not relate to "controversies." These documents, however, dated a few months before Justice Sanders sued the State for a defense, are adversarial in tenor,<sup>100</sup> which is not surprising given that Justice Sanders had

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<sup>98</sup> See "*In Camera* Binder"; see *supra* note 34. If necessary, this Court may perform an *in camera* review. See RCW 42.56.550(3) (formerly RCW 42.17.340(3)) ("Courts may examine any record in camera in any proceeding brought under this section."). An *in camera* review is the "generally acknowledged device for determining whether a privilege is to be honored." *Snedigar v. Hoddersen*, 114 Wn.2d 153, 167, 786 P.2d 781 (1990); see also *Limstrom*, 136 Wn.2d at 615, 963 P.2d at 879 ("[T]he only way that a court can accurately determine what portions, if any, of the files are exempt from disclosure is by an *in camera* review . . .").

<sup>99</sup> CP 1395.

<sup>100</sup> For example, *In Camera* document 73 contains references to a "critical stage" and to

previously sued for a taxpayer-funded defense in another ethics matter.<sup>101</sup>

The AGO “reasonably anticipated” litigation by Justice Sanders.

*Hangartner*, 151 Wn.2d at 449, 90 P.3d at 31.

**3. The court correctly applied the PRA exemption for attorney-client privilege.**

The attorney-client privilege is a recognized exemption under the PRA’s “other statutes” provision, RCW 42.56.070(1).<sup>102</sup> The privilege “applies to confidential communications for advice between attorney and client during the course of the attorney’s professional employment and extends to written communications from an attorney to his client.” *Amoss v. University of Wash.*, 40 Wn. App. 666, 687, 700 P.2d 350, 362 (1985). The privilege applies where the communications reflect a request for, or the giving of, legal advice. *R.A. Hanson Co., Inc. v. Magnuson*, 79 Wn. App. 497, 502, 903 P.2d 496, 499 (1995).

Justice Sanders argues that the court erred in “expansively” applying the attorney-client privilege “to all communications between an attorney and client, regardless of whether the client is seeking legal

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“settlement” in communications with Justice Sanders’ counsel.

<sup>101</sup> See *In re Disciplinary Proceeding Against Sanders*, 135 Wn.2d 175, 955 P.2d 369 (1998).

<sup>102</sup> Formerly RCW 42.17.260(1). The “other statute” is RCW 5.60.060(2). The Supreme Court recognized the attorney-client privilege as a PRA exemption in *Hangartner*, 151 Wn.2d at 451, 90 P.3d at 19.

advice.”<sup>103</sup> The court did not so rule.<sup>104</sup> Justice Sanders takes the court’s language out of context.

Justice Sanders first cites to CP 1375 as support for his statement that the court applied the privilege “expansively.” However, the court is merely rebutting Justice Sanders’ argument under *United States v. Chen*, 99 F.3d 1495 (9<sup>th</sup> Cir. 1996), that “the attorney-client privilege . . . only protects actual legal advice.”<sup>105</sup> The court disagreed, noting that, “the limitation in *Chen* [*i.e.*, the crime fraud exception] is a narrow exception to what is otherwise an expansive view of the privilege – the exception applies when the client hires an attorney for purposes other than legal advice or representation.”<sup>106</sup> The superior court did not take “an expansive view” of privilege; it was referring to the “expansive view” referred to in *Chen*.

Justice Sanders also relies on CP 1724, challenging the court’s statement that “[o]nce an attorney-client relationship exists, any communication arising from the relationship is privileged. . . .”<sup>107</sup> The

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<sup>103</sup> Opening Brief at 30-34 (citing CP 1375 and 1724).

<sup>104</sup> Even if the court had erred in applying the attorney-client privilege to any document (it did not), the controversy exemption also exempted virtually every document at issue. RAP 2.5(a).

<sup>105</sup> CP 1375 (reciting Justice Sanders’ position about *In Camera* document 1).

<sup>106</sup> CP 1375.

<sup>107</sup> The court actually stated: “Once an attorney-client relationship exists, any

court made that statement, however, in reference to the common interest doctrine, to rebut Justice Sanders' suggestion that the privilege is limited "to communications between an attorney and client, or between two attorneys serving the same client, that convey legal advice."<sup>108</sup>

The court's statement at CP 1724, in fact, paraphrases the controlling Washington case, *Hangartner*. In addressing the scope of the privilege under the PRA, *Hangartner* stated: "The attorney-client privilege is a narrow privilege and protects 'only communications and advice between attorney and client'; it does not protect documents that are prepared for some other purpose than communicating with an attorney." 151 Wn.2d at 452, 90 P.3d at 32.

Finally, Justice Sanders complains about the court's application of the attorney-client privilege to emails between the AGO and a former DSHS employee, Bernie Friedman, as well as communications between the AGO and Supreme Court Justice Gerry L. Alexander. Both Mr. Friedman and Justice Alexander submitted declarations to the effect that they did not intend to solicit or receive legal advice. However, the State's

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communication arising from that relationship is privileged, unless waived or controlled by a recognized exception to the privilege." CP 1724.

<sup>108</sup> CP 1724.

rebuttal declarations<sup>109</sup> and an *in camera* review of the subject documents,<sup>110</sup> evidence the privileged nature of the communications between the AGO and its clients, DSHS and the Supreme Court. As the superior court noted, Mr. Friedman and Justice Alexander cannot unilaterally waive the privilege for DSHS and the Supreme Court, who were holders of the privilege.<sup>111</sup>

**4. The court correctly recognized that the attorney-client privilege and work product doctrine encompass the “common interest” doctrine.**

In arguing that “no common interest exemption” exists under the PRA,<sup>112</sup> Justice Sanders misstates the State’s position and the court’s ruling. The common interest doctrine is an exception to waiver of the attorney-client privilege or work product doctrine, not a separate exemption or privilege. As stated in *Avocent Redmond Corp. v. Rose Elecs.*, 516 F. Supp. 2d 1199, 1202 (W.D. Wash. 2007):

The “common interest” or “joint defense” privilege is an exception to the general rule that the voluntary disclosure of a privileged attorney-client or work product

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<sup>109</sup> CP 1050-51 (Decl. of Liz Dunbar, DSHS Deputy Secretary, about the DSHS privilege and Mr. Friedman’s inability to waive it); 1052-53 (Decl. of Kathleen Mix, Chief Deputy Attorney General, regarding legal advice to Justice Alexander).

<sup>110</sup> *In Camera* Document #22 (Friedman), referenced in the Court’s Opinion at CP 1388, and *In Camera* Document #77 (Alexander), referenced at CP 1415-16.

<sup>111</sup> CP 1388 (cannot waive agency’s privilege); EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 272-73 (4<sup>th</sup> ed. 2001).

<sup>112</sup> Opening Brief at 27-28.

communication to a third party waives the privilege. The privilege protects the confidentiality of communications passing from one party to the attorney of another party when made to further a joint effort.

*See also P.J. v. State of Utah*, 247 F.R.D. 664 (D. Utah 2007) (“Attorney work product may be disclosed to persons who share a common interest without waiving the privilege”); *Jeld-Wen, Inc. v. Nebula Glasslam Int’l Inc.*, \_\_\_ F. Supp. 3d \_\_\_, 2008 U.S. Dist. LEXIS 18821 (S.D. Fla. 2008) (“litigants who share unified interests [may] exchange . . . information to adequately prepare their cases without losing the protection”); *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299-1300 (D.C. Cir. 1980) (declining to construe “common interests” as narrowly limited to co-parties; applying the doctrine to work product).

In this case, the communications between the AGO and the King and Snohomish County prosecutors regarding Justice Sanders’ recusal in *Thorell* and other cases, fall within the “controversy” exemption, and waiver is precluded by the “common interest” doctrine. Under Washington statutes, county prosecutors may act for the State with respect to alleged sexually-violent predator cases. *See* RCW 71.09.025, .030. Of necessity, the AGO and county prosecutors work closely to coordinate their positions on common issues presented by the cases brought by SCC residents. The common interest doctrine does not require an express

agreement where clients have the same goals and interests with respect to pending litigation. *See* EPSTEIN, *supra*, at 615.<sup>113</sup>

**5. The State did not waive its claims of exemption.**

The AGO did not waive its claims of exemption through its Supplemental Production, its submission of subsequent exemption logs, its omission of a “brief explanation” on its exemption log, or through the testimony of its 30(b)(6) designee.

Justice Sanders argued that the State’s Supplemental Production constitutes “waiver [of exemptions] several times over.” This is incorrect. The PRA requires an agency to “establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.” RCW 42.56.550(1).<sup>114</sup> The AGO did so. Courts should encourage agencies to supplement document disclosures when warranted by subsequent review. *See, e.g., Kleven*, 111 Wn. App. at 297, 44 P.3d at 893 (production of tape upon discovery of mistake, and correction of previous representation, does not violate the PRA).

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<sup>113</sup> Justice Sanders argues that the State’s Appendix A, “raised the AGO’s ‘common interest’ claim for the first time.” But the State consistently asserted that the attorney-client privilege and work product doctrine applied to the communications between the AGO and county prosecutors, and referenced the common interest doctrine. *See* CP 124-26 (State’ motion for summary judgment); *see also* CP 1072 at n.19 (State’s reply and opposition to cross-motion).

Moreover, the Washington Supreme Court has rejected Justice Sanders' argument that an agency may not assert additional or different PRA exemptions. In *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d 243, 253, 884 P.2d 592, 598 (1994), the Court held that the PRA does not limit an agency to the exemptions it initially asserts:

[I]f agencies were forced to argue exhaustively all possible bases under pain of waiving the argument on review, the goal of prompt agency response might well be subverted. We therefore decline to consider only those bases cited by the University in its letter denying disclosure.

Justice Sanders also argues that the absence of a "brief explanation" of how each exemption applied to each document waived any applicable exemptions. The court properly recognized that the PRA does not provide such a remedy:

No provision of the [PRA] or judicial construction thereof causes an exempt public record to lose its exemption by reason of agency action or inaction in response to a request for inspection.

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[T]he [State's] violation of the brief explanation requirement in [RCW 42.56.210(3)] does not entitle Justice Sanders to production of otherwise exempt records and does not preclude this court from requesting an explanation for consideration during *in camera* examination.<sup>115</sup>

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<sup>114</sup> Formerly RCW 42.17.340(1).

<sup>115</sup> CP 1367-68.

Instead, the court held that the remedy was to consider the brief explanation issue when awarding fees, costs, and penalties.<sup>116</sup>

Finally, Justice Sanders repeats his criticism that the State's invocation of PRA exemptions is "in direct and sweeping contradiction to the AGO's CR 30(b)(6) testimony."<sup>117</sup> This argument is unsound. The State's 30(b)(6) witness, Deputy Attorney General Shirley Battan, did not "contradict" anything. She candidly explained that, while she was the most knowledgeable person about the general process by which the State assessed whether PRA exemptions applied to documents sought by Mr. Ford/BIAW,<sup>118</sup> individual Assistant Attorney Generals would know more about how particular exemptions applied to specific documents:

Q. Do I take it from that answer that the best person to determine the controversy that is being asserted with respect to any claim of privilege under Section J, would be the individual attorney general whose document is at issue?

A. In my opinion, yes.<sup>119</sup>

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<sup>116</sup> CP 1368. Because the PRA does not authorize an award of penalties for an inadequate "brief explanation," the court erred in imposing an additional \$3-per-day penalty. *See* discussion *infra*.

<sup>117</sup> Opening Brief at 38; 35 n. 25 ("AGO should not be allowed to contradict its own 30(b)(6) witness"); 45 ("AGO ultimately repudiated its own CR 30(b)(6) designee").

<sup>118</sup> CP 1087, ¶ 15 (Thomsen Supp. Decl.); 1172 (excerpts of Battan dep.).

<sup>119</sup> CP 1087, ¶ 15; 1161, 1170 (excerpts of Battan dep.). The State also explained this fact at the deposition: "Ms. Battan is the designee and person most knowledgeable as to all the documents – the process and all the documents that are on the Tim Ford log." CP 1171 (emphasis added).

Ms. Battan nevertheless testified about the controversies on which the State generally based its exemption claims:

There were a number of things going on at the time or that had gone on. Obviously there were cases in the Supreme Court. There was a concern about whether there should be recusal, there was the threatened lawsuit on the reimbursement, and then of course the public records issues themselves.<sup>120</sup>

The State identified the same “controversies” as the bases for exempting various documents under the PRA.

**6. The court correctly exercised its discretion in denying Justice Sanders’ motion to strike Appendix A.<sup>121</sup>**

Justice Sanders argues that the AGO’s Appendix A to its summary judgment motion<sup>122</sup> “contains inadmissible evidence that should have been stricken.”<sup>123</sup> The State, however, did not submit Appendix A as “evidence.” Appendix A merely consists of cover sheets submitted to assist the court in its document review. Each sheet summarized an *In Camera* document (without disclosing the contents) and detailed the State’s position as to how the PRA exemption applied.

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<sup>120</sup> CP 1087, ¶ 15; 1159-60; 1162-65 (excerpts of Battan dep.).

<sup>121</sup> RP (2-10-06) p. 12, l. 7-8.

<sup>122</sup> CP 127-54.

<sup>123</sup> Opening Brief at 35 n. 25.

Justice Sanders responded to each cover sheet. The court created its own appendix by reciting verbatim the State's Appendix A and Justice Sanders' responses, before stating its rulings.<sup>124</sup> The State's Appendix A expedited the court's review and eliminated the need for extensive oral argument on each document.<sup>125</sup>

The State's use of coversheets is an accepted practice in public record cases. *Currie v. IRS*, 704 F.2d 523, 530 (11<sup>th</sup> Cir. 1983) (court properly relied upon coversheets for an explanation of the exemptions that applied to documents withheld from FOIA request); *Vaughn v. Rosen*, 383 F. Supp. 1049, 1052 (D.D.C. 1974) (submission of representative sample of documents, together with the reason why material was exempt from disclosure, was an acceptable approach in deciding FOIA issues).

**D. The Court Acted Within its Discretion in Calculating its Award of Justice Sanders' Attorney Fees.**

The superior court has discretion to decide the amount of attorney's fees to award a "prevailing" party. *Progressive Animal Welfare Soc'y v. University of Wash.*, 114 Wn.2d 677, 688, 790 P.2d 604, 609

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<sup>124</sup> CP 1375-1434.

<sup>125</sup> Justice Sanders argues that he could not assess the controversy exemptions on Appendix A because "the AGO did not provide in its explanation the dates the document was created." But the State included the dates on the exemption log, which lists the same "TF number" for each document as Appendix A.

(1990). A court does not abuse its discretion unless the exercise of its discretion is “manifestly unreasonable or based upon untenable grounds or reasons.” *Id.* at 688-89, 790 P.2d at 609.

The superior court exercised its discretion under well-settled law to allocate Justice Sanders’ attorney fees and costs between his successful and unsuccessful claims. An award “must be related to that portion of attorneys fees and costs involved in successfully compelling disclosure of information, not for denied disclosure of the remaining information.” *Tacoma Pub. Library*, 90 Wn. App. at 225, 951 P.2d at 367; *Dawson*, 120 Wn.2d at 800, 845 P.2d at 1005 (fees “should relate only to that which is disclosed and not to any portion of the requested documents found to be exempt”); *Limstrom*, 136 Wn.2d at 616, 963 P.2d at 880 (same).

The court reasoned that of the “four major issues in the case,” “Justice Sanders prevailed on only one of those issues [*i.e.*, alleged wrongful withholding of documents], and there only a small part of it.”<sup>126</sup> On that one issue, the court noted that the State “prevailed on nearly 96 percent of its [exemption] claims.”<sup>127</sup> The court weighed the issue as “50 percent” of the disputed issues and, although Justice Sanders’ prevailed on between four and six percent of the documents (depending on the

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<sup>126</sup> CP 1858.

<sup>127</sup> CP 1854-55.

inclusion of duplicates), the court awarded him 37.5 percent of the total fees and costs he sought. The court's award was generous. *See Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 856, 60 P.3d 667, 676-77 (2003), *aff'd in part, rev'd in part*, 152 Wn.2d 421, 98 P.3d 463 (2004) (affirming 20% discount of fees).

Justice Sanders now admits that a party is entitled to only "the portion of costs and fees involved in successfully compelling disclosure of documents," but he insists that, "there was no basis to segregate Justice Sanders' fees."<sup>128</sup> His argument, however, relies on one case, *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006), which does not involve the PRA and is factually inapposite.

In *Mayer*, the Court could not reasonably segregate attorney fees between Consumer Protection Act and Product Liability Act claims. 156 Wn.2d at 693, 132 P.3d at 123. But here, the court easily segregated fees and costs by identifying and determining the relative "weight" of each issue. The court's exercise of discretion is neither manifestly unreasonable nor based upon untenable grounds.

Moreover, Justice Sanders' description of the issues on which the State prevailed is incomplete and, as a result, misleading. For example, he

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<sup>128</sup> Opening Brief at 42.

states that “[t]he trial court also characterized the Subsequent Production Documents as a separate issue, and opined that the AGO also prevailed on that issue, even though the trial court ruled at least some of those records were exempt and improperly withheld.”<sup>129</sup> The “Subsequent Production issue” was not how many exemptions the court denied, but rather

whether the AGO’s subsequent production of records earlier claimed exempt was ipso facto a compelled disclosure of wrongfully withheld records entitling Justice Sanders to penalties under Section .340(4). I concluded that it was not, and instead conducted a review of those records to determine if each claim of exemption was valid even though the record had been earlier produced.<sup>130</sup>

In other words, the issue was whether because of the production’s timing, Justice Sanders automatically received penalties for every document produced after the initial production. The State prevailed on that issue.

If, as the State requests, this Court determines that the AGO satisfied its PRA obligations by giving Justice Sanders the documents provided to Tim Ford for the BIAW, then Justice Sanders is not entitled to any attorney fees, costs, or penalties. If, on the other hand, this Court affirms the court’s rulings on the underlying issues and the State’s claimed exemptions, the Court also should affirm the superior court’s award of fees, costs, and penalties. Under no condition should this Court award

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<sup>129</sup> Opening Brief at 43.

<sup>130</sup> CP 1856.

Justice Sanders the sum he seeks, which would be equivalent to \$134,336 for each of the six documents on which he “prevailed.”

**E. The Court Correctly Calculated Penalties, Except for its Inclusion of the Days Attributable to the Court, and Imposition of a Penalty for Omission of a “Brief Explanation.”**

If the Court declines to rule that the State’s initial production to Justice Sanders in July 2004 satisfies the PRA as a matter of law, then it should affirm the court’s calculation of penalties with two exceptions: the Court should exclude the period attributable to the trial court, and reverse that portion of the penalty related to the omission of the “brief explanation” from the exemption log.

**1. The court correctly exercised its discretion in deciding that a \$5 a day penalty should apply to two “records.”**

Although a court must award a statutory penalty to a party who “prevails against an agency in any action,” the amount is discretionary, as long as it is no less than \$5 and no more than \$100 per day. RCW 42.56.550(4).<sup>131</sup> The Court of Appeals reviews the superior court’s ruling on the appropriate daily penalty for abuse of discretion. *Yousoufian v. The Office of Ron Sims*, 137 Wn. App. 69, 75, 151 P.3d 243, 247 (2007); *Prison Legal News, Inc. v. Washington State Dep’t of Corrs.*, 154 Wn.2d 628, 648, 115 P.3d 316, 326 (2005).

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<sup>131</sup> Formally RCW 42.17.340(4).

In setting the penalty, a court is to consider whether an agency claimed an exemption in bad faith. *Hangartner*, 151 Wn.2d at 452, 90 P.3d at 32. In *Yousoufian*, the Court of Appeals elaborated on the applicable criteria:

[T]he minimum statutory penalty should be reserved for such “instances in which the agency has acted in good faith, but through an understandable misinterpretation of the PDA or failure to locate records, has failed to respond adequately.” Then, working up from the minimum amount on the penalty scale, instances where the agency acted with ordinary negligence would occupy the lower part of the penalty range. Instances where the agency’s actions or inactions constituted gross negligence would call for a higher penalty than ordinary negligence, and instances where the agency acted wantonly would call for an even higher penalty. Finally, instances where the agency acted willfully and in bad faith would occupy the top end of the scale.<sup>132</sup>

137 Wn. App. at 80, 151 P.3d at 248-49.

Justice Sanders cites *Yousoufian* in arguing that “[a]gency actions that constitute ordinary negligence, gross negligence, wanton behavior, or that are made willfully in bad faith demand higher penalties.”<sup>133</sup> But *Yousoufian* says that ordinary negligence “would occupy the lower part of the penalty range.” Here, the State was not negligent. Even in the few

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<sup>132</sup> The court defined “willful misconduct” as the “intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has the duty to do when he or she has actual knowledge of the peril that will be created and intentionally fails to avert injury.” *Yousoufian*, 137 Wn. App. at 79, 151 P.3d at 248.

<sup>133</sup> Opening Brief at 45.

instances where the court ordered production, it acknowledged “the issue presented [was] complex and the decision a close decision.”<sup>134</sup>

The court correctly concluded that the State “acted in good faith throughout the process” and made a “timely disclosure initially and that the disclosure was at least as broad, perhaps broader than the disclosure requested by Justice Sanders . . .”<sup>135</sup> The court acknowledged (among other indicia of good faith) that the State “immediately contracted with an independent law firm to conduct a full examination of the exemptions that it had claimed”<sup>136</sup> and produced additional records that the State concluded could be produced “even though it maintained its right to claim exemption[s] for those documents.”<sup>137</sup> While the court held that the State did not satisfy the “brief explanation” requirement, such “noncompliance had minimal impact on the case.”<sup>138</sup>

The Supreme Court has held that an agency acts in good faith under the PRA when it relies on counsel’s advice, or reasonably believes that a statute bars the documents’ disclosure. *Lindberg v. County of Kitsap*, 133 Wn.2d 729, 747, 948 P.2d 805, 814 (1997). It is undisputed

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<sup>134</sup> CP 1866.

<sup>135</sup> CP 1866.

<sup>136</sup> CP 1866.

<sup>137</sup> CP 1867.

<sup>138</sup> CP 1867.

here that the State relied on its lawyers' advice in determining what documents to produce, redact, or withhold.<sup>139</sup>

In contrast, in *Yousoufian*, the Court of Appeals held that King County's actions demonstrated a lack of good faith when there was "a complete lack of coordination"; "absolutely no effective oversight"; no "effective system for tracking a PDA request to ensure compliance"; and the county had made "misrepresentations" and "incorrect" statements, and was "negligent in the way it responded to [the] PDA request at every step of the way." *Yousoufian*, 137 Wn. App. at 72-73, 151 P.3d at 245; *see also Yousoufian*, 152 Wn.2d at 426-27, 98 P.3d at 465-66. Similarly, in *American Civ. Liberties Union v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 975 P.2d 536 (1999), the Court of Appeals held that the trial court abused its discretion in awarding a penalty of only \$5/day when the agency wanted to avoid the cost and inconvenience of copying 13 pages of responsive records. This case contains no facts anything like these.<sup>140</sup>

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<sup>139</sup> CP 165-69, ¶¶ 15-18 (Jensen Decl.); 161-64 (Battan Decl.); 1084-87 (Thomsen Supp. Decl.).

<sup>140</sup> As he did at the superior court, Justice Sanders tries to establish the State's "bad faith" by quoting an email exchange referring to him as "Brutus." But the State voluntarily produced the email. The court also upheld the State's initial exemption claim for the document, finding it exempt under the "controversy" exemption because it illustrated the attorneys' internal thought processes in deciding how to respond to Justice Sanders' *ex parte* contacts. The email has nothing to do with the State's approach to his PRA request.

Justice Sanders claims that the court ordered a \$3 per diem penalty for violation of the “brief explanation” requirement, below the statutory minimum of \$5. The court’s order is plain; the court added the \$3 to the statutory minimum of \$5, to arrive at a total penalty of \$8 per day.<sup>141</sup> To suggest otherwise is misleading.

Moreover, Justice Sanders relies entirely on *Citizens for Fair Share v. Dep’t of Corrs.*, 117 Wn. App. 411, 431, 72 P.3d 206 (2003), to support his argument that “[t]he AGO’s violation of the brief explanation requirement is separate from the AGO’s wrongful withholding of documents and a separate penalty assessment is proper.” But *Citizens* actually supports the AGO’s position. Although it involved the State’s admitted failure to cite an exemption for nondisclosure of certain information and the failure to provide any “explanation to Citizens in response to their request,” these omissions were treated as a “single PDA violation.” *Id.* at 437. Moreover, the Court remanded the case so that the trial court could determine “what portion of Citizens’ attorney fees and litigation costs are attributable to this single PDA violation”; statutory penalties were not addressed. *Id.* Justice Sanders’ argument about the “\$3 per day penalty” is neither factually nor legally supported.

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<sup>141</sup> CP 1847; 1867-68 (“I determine this [additional penalty for violation of the ‘brief explanation’ requirement] to be \$3 per day for each of the two records for a total penalty”).

**2. The court correctly declined to impose penalties for each document that the State voluntarily produced after its initial production.**

Justice Sanders also cites no authority for his argument that “[t]he trial court should also have awarded penalties for all of the Subsequent Production Documents,” and there is none. He cites to *West v. Thurston County*, \_\_\_ Wn. App. \_\_\_, 183 P.3d 346 (2008), for the proposition that an agency cannot avoid fees and penalties where it has disclosed public documents only after a suit is filed. *West*, however, is distinguishable.

In *West*, Thurston County failed to produce any attorney’s fee invoices sought in a PRA request until the requestor brought a lawsuit. The Court applied retroactively an amendment to the PRA, RCW 42.56.290, providing that the PRA expressly requires an agency to produce attorney fees invoices (albeit redacted for work product). *Id.* The Court also held that the county had relied on questionable authority in withholding the production.

The *West* facts are a far cry from those here, where the AGO produced all of the BIAW documents to Justice Sanders, and, as soon as it knew that Justice Sanders challenged the scope of the production, hired

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of \$8 per day.”) (emphasis added).

outside counsel and produced additional documents. The State acted throughout in good faith; no such finding existed in *West*.

**3. The court erred when, in calculating the penalty, it included the days attributable to the court.**

In performing its penalty calculations, the court erred by including the 562 days attributable to the court. The court had the parties' original summary judgment motions under advisement for 336 days and the State's motion for reconsideration an additional 191 days. The court also continued the original motion hearing by 35 days.<sup>142</sup> The court mistakenly reasoned that the PRA did not permit the court to "stay the counting of days" under RCW 42.56.550(4),<sup>143</sup> despite the fact that the State had no control over the delays attributable to the court:

There have been delays in this case. I bristle internally when the time taken by this court is counted as time with the case under advisement. I use the term "under advisement" when I am called upon to decide something after all of the material has been submitted to me. I consider an *in camera* project such as this to be quite a different matter. It is much more akin to a significant civil bench trial.<sup>144</sup>

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<sup>142</sup> A timeline showing these delays is at CP 1841-42.

<sup>143</sup> Formally RCW 42.17.340(4).

<sup>144</sup> CP 1864.

The court concluded, however, the “[l]aw does not permit me to stay the counting of days required by [RCW 42.56.550(4)],” and cited to *Yousoufian*, 152 Wn.2d 421, 98 P.3d 463, as the controlling authority.

But in *Yousoufian*, the Supreme Court held that the PRA does not allow the court to reduce the penalty period based on delays that the requestor “could have limited.” See *Yousoufian*, 152 Wn.2d at 438, 98 P.3d at 471 (emphasis added). The recent *Soter* decision reaffirms *Yousoufian*’s limited holding: “The trial court may not reduce the penalty period, even if the requestor could have filed suit against the agency sooner than it did.” *Soter*, 162 Wn.2d at 756, 174 P.3d at 63 (citing to *Yousoufian*) (emphasis added). The *Yousoufian* decision did not address other types of delays, such as those attributable solely to the court.

RCW 42.56.550(4), the PRA’s penalty provision, also does not require a court to include such delays. Interpreting the statute to require inclusion of such delays places an agency in an impossible predicament. An agency cannot force a court to act. Nevertheless, the agency runs the risk of being severely penalized for delays that are not of its making.

The Court of Appeals should reverse the court’s penalty ruling to the extent that it includes delays attributable to the court, and either refer this matter to the Clerk for recalculation of the penalties, or remand it to the superior court with instructions to do so.

**4. The court erred in imposing a penalty for omission of a “brief explanation” on the exemption log.**

The superior court abused its discretion in penalizing the State for omitting the “brief explanation” required by RCW 42.56.210(3).<sup>145</sup> As the court correctly recognized, “[t]he PDA does not provide a specific consequences for failure to provide the required brief explanation.”<sup>146</sup> The court then ruled, without any statutory authorization, that the remedy for violating the requirement is consideration of fees and penalties relating to any document wrongfully withheld.<sup>147</sup>

The PRA requires an agency only to “establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.” RCW 42.56.550(1).<sup>148</sup> An agency can meet that requirement in court submissions. *See, e.g., Progressive Animal Welfare Soc’y*, 125 Wn.2d at 253, 884 P.2d at 598 (court not limited to the bases for nondisclosure claimed by agency when originally denying disclosure); *Kleven*, 111 Wn. App. at 297, 44 P.3d at 893 (correction of previous erroneous representation does not constitute PDA violation).

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<sup>145</sup> Formerly RCW 42.17.310(4).

<sup>146</sup> CP 1367.

<sup>147</sup> CP 1367.

<sup>148</sup> Formerly RCW 42.17.340(1).

The PRA section authorizing fees and penalties, RCW 42.56.550(4),<sup>149</sup> does not authorize an award of penalties if an agency omits a “brief explanation of how the exemption applies to the record withheld.” This section authorizes penalties only where an agency has improperly denied “the right to inspect or copy any public record” or failed to “respon[d] to a public record request within a reasonable amount of time . . . .”<sup>150</sup> The “brief explanation” provision is found in a different section, RCW 42.56.210(3),<sup>151</sup> which contains no reference to penalties.

The remedy when an agency fails to provide a “brief explanation” is an order requiring the agency to provide an adequate explanation. *See, e.g., In re In-Store Adver. Sec. Litig.*, 163 F.R.D. 452, 457 (S.D.N.Y. 1995) (party entitled to cure deficient privilege log); EPSTEIN, *supra*, at 662. In this case, no order was necessary, because prior to the hearing, the State provided detailed explanations of each claimed exemption.

**F. Justice Sanders is Not Entitled to his Attorney’s Fees and Costs on Appeal.**

Justice Sanders cites RCW 42.56.550(4)<sup>152</sup> as a basis for his attorney fees and costs on appeal. But he is not entitled to any fees and

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<sup>149</sup> Formerly RCW 42.17.340(4).

<sup>150</sup> Formerly RCW 42.17.340(4).

<sup>151</sup> Formerly RCW 42.17.310(4).

<sup>152</sup> Formerly RCW 42.17.340(4).

costs unless he prevails, and then only to the extent that he prevails in the arguments he asserts in this appeal. If this Court holds (as it should) that the State's PRA response was sufficient as a matter of law because Justice Sanders received what he requested in July 2004, the Court should reverse the court's entire fee, cost and penalty award.

#### V. CONCLUSION

The State complied with its PRA obligations by responding fully to Justice Sander's request for documents produced to the BIAW. Alternatively, the Court should affirm the superior court's orders except as specifically stated herein.

Dated this 22<sup>nd</sup> day of August, 2008.

DANIELSON HARRIGAN LEYH & TOLLEFSON LLP

By 

Timothy G. Leyh, WSBA #14853

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BY *[Signature]*  
DEPUTY

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

No. 35920-1-II

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THE HONORABLE RICHARD B. SANDERS,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

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**AFFIDAVIT OF SERVICE**

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I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 22<sup>nd</sup> day of August, 2008, I caused a true and correct copy of the Brief of Respondent and Cross-Appellant State of Washington to be served on counsel of record in the following manner:

**BY LEGAL MESSENGER**

Paul Lawrence  
Matthew Segal  
Preston Gates & Ellis  
925 Fourth Avenue, Suite 2900  
Seattle, WA 98104

DATED this 22<sup>nd</sup> day of August, 2008.



LINDA BLEDSOE

SUBSCRIBED AND SWORN TO this 22 day of August, 2008.



  
NOTARY PUBLIC in and for the  
State of Washington, residing at  
Lake Stevens  
My commission expires 2-19-10