No. 93562-9

FILED

SEP 08 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 332411

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

Kittitas County Superior Court Cause No.13-2-00074-4

KITTITAS COUNTY, a municipal corporation and political subdivision of the State of Washington

Plaintiff/Respondent

v.

SKY ALLPHIN, ABC HOLDINGS, INC., and CHEM-SAFE ENVIRONMENTAL, INC.

Defendants/Appellants

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

The following appeal alleges multiple violations of the Public Records Act ("PRA") based on Kittitas County's obstruction, delay, and denial of access to requested public records because of related litigation between the County and the requester, Mr. Allphin. The County's violations are specifically tied to records it denied or delayed. Some of the records involve multiple violations of the PRA. Mr. Allphin requests this Court reverse the trial court's grant of summary judgment to the County, reverse and release the records in the two envelopes that were sealed by the trial court, and grant Mr. Allphin summary judgment. Mr. Allphin has bore years of delay and expense to review public records that should have been made available to him promptly.

First, the Kittitas County Superior Court improperly sealed two envelopes of public records submitted for *in camera* review. The trial court incorrectly concluded these public records constituted attorney work product and that the County and the Washington State Department of Ecology ("DOE") were on the same "legal team," despite the two separate agencies not having any joint prosecution agreement, the DOE's repeated disclaimer of work product protection over the records, and the County and the DOE being adverse parties in this lawsuit.

Second, the trial court erred when it concluded that the County did not violate the PRA after it denied access to 50 emails on April 2, 2013 and then slowly and methodically released the majority of these records over several installments and several months. The trial court incorrectly concluded that the County's delay did not violate the PRA's mandates that an agency not distinguish among persons requesting records, that an agency provide fullest assistance, and that an agency respond promptly to requests. Finally, the trial court incorrectly concluded that the County did not violate the PRA when the County falsely claimed not to possess several public records, including one key record referred to by the parties as the "smoking gun memorandum," and then used the record in its case against Mr. Allphin in a related federal lawsuit.

Even though the County's manner of proceeding created a relatively complex procedural history, the PRA and caselaw supporting Mr. Allphin's claims are well established. Rather than analyze Mr. Allphin's claims, however, the trial court signed the County's proposed orders wholesale, basing its conclusion on an entirely new theory that an agency can be excused from its violations of the PRA if its search for public records was "reasonable."

No Washington court has ever applied a blanket "reasonableness" defense to violations of the PRA, particularly where the requester's claims

are all tied specifically to records wrongfully denied. To perpetuate this blanket "reasonableness" defense would be a grafting of an entirely new standard on the PRA in conflict with the PRA's own terms and its policy of construction in favor of disclosure and open government.

ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

A. Assignments of Error

Assignment of Error No. 1. The trial court erred when it sealed two envelopes of public records submitted for *in camera* review and denied Mr. Allphin summary judgment as to those records. CP 964-974 (December 19, 2013 order) and CP 3059-3219 (sealed records); CP 2966-2973 (February 27, 2015 order) and CP 3220-3390 (sealed records).

Assignment of Error No. 2. The trial court erred when it granted summary judgment to the County and denied Mr. Allphin's cross motion for summary judgment based on its conclusions that the County "lawfully" withheld records pursuant to its exemption logs and that the County did not unlawfully deny Mr. Allphin access to many of those records that the County subsequently released. CP 2981-82, ¶¶ 1, 4, 9.

Assignment of Error No. 3. The trial court erred when it granted summary judgment to the County and denied Mr. Allphin's cross motion for summary judgment based on its conclusions that the County fulfilled its statutory duties to respond promptly and without delay, not to

distinguish among requests, to respond in good faith, and to provide the requester with "fullest assistance". CP 2981-82, ¶¶ 1, 5-7, 10-11.

Assignment of Error No. 4. The trial court erred when it granted summary judgment to the County based on the County's "reasonable search" defense, erred when it concluded that the material facts were uncontroverted as to the reasonableness of the County's search, and erred in denying Mr. Allphin's cross motion for summary judgment as to the wrongfully delayed, denied, and missing records. CP 2978-84, ¶¶ 2-3, 12.

Assignment of Error No. 5. The trial court erred when it granted summary judgment to the County and denied Mr. Allphin's cross motion for summary judgment based on its conclusion that the "smoking gun memorandum" was not a responsive County record that the County had a duty to provide to Mr. Allphin. CP 2981-84, ¶¶ 8, 12.

B. Issues Pertaining to the Assignments of Error

1) Did the trial court wrongly seal public records withheld by the County as attorney work product despite those records consisting of County emails unrestrictedly exchanged with staff at a state agency, when no joint prosecution agreement existed, when the emails contain no indicia of confidentiality, and when the County had to sue the DOE?
2) Did the County violate the PRA when it withheld records pursuant to exemption logs, sued Mr. Allphin for injunctive relief, and then

released many of the initially withheld records as a result of adverse court rulings and based on Mr. Allphin's challenge?

3) Did the County violate its duty to provide a "prompt response," and other statutory obligations, when the County delayed its response to Mr. Allphin's request with serial installments, preemptively sued Mr. Allphin for no other reason than to interfere with related litigation, and refused to advance judicial proceedings after enjoining records?

4) Did the trial court incorrectly conclude that the County was absolved from liability for denying access to non-exempt public records, unreasonably delaying releases, and other statutory violations, based on the County's assertion that it conducted a "reasonable search"?

5) Did the County violate the PRA when it silently withheld the "smoking gun memorandum" for 646 days and only released it upon Mr. Allphin's demand after the County filed the record in sworn pleadings in a related federal lawsuit?

II. STATEMENT OF THE CASE

A. Procedural Background

Mr. Sky Allphin filed a request for public records with the County on October 17, 2012, requesting records related to his waste disposal business operations. CP 1462, 1480. Mr. Allphin operates two family businesses, Chem-Safe Environmental, Inc. and ABC Holdings, Inc.

(collectively, "Mr. Allphin"). The County shut down operations in 2011 for the alleged lack of an operating permit and an alleged spill. Mr. Allphin disputes the allegations, which are the subject of *ABC Holdings, Inc. v. Kittitas County*, 187 Wash.App. 2756 (Div. 3 2015) (review requested) and *Chem-Safe v. Kittitas County*, U.S. E.D. Wash. No. 1:14-cv-03021-SAB. Mr. Allphin's records request included email correspondence between the County and the DOE. CP 1462, 1480.

On February 22, 2013, about four months after his public records request, the County sued Mr. Allphin for filing the request for public records. CP 1-8. Mr. Allphin had complied with his duties as a records requester and had not made demands of the County other than it release the responsive records. See e.g. CP 1462-64, 1497. The County moved for a temporary restraining order (TRO) and would not grant a minor extension to Mr. Allphin's co-counsel, who was contacted and appeared the day before the hearing was set. CP 194-310. When Mr. Allphin and the family businesses filed affidavits of prejudice against the judges (who had been involved in the other litigation), the County's attorney arranged a telephonic hearing with a neighboring judge, without notice to Mr. Allphin, and obtained the TRO ex parte. CP 196-197, 307-308.

The TRO enjoined Mr. Allphin from requesting, receiving, or possessing a broad and undefined number of public records. CP 92-97.

The TRO further restrained the DOE from releasing public records. *Id.* Mr. Allphin objected. CP 194-341. In subsequent hearings, where Mr. Allphin's counsel was notified, the initial TRO was vacated entirely against Mr. Allphin and narrowed to specifically identified emails. CP 557-563, 661-677. Only the DOE was enjoined from releasing any of the TRO emails. CP 661-677. The TRO emails were specifically identified on the County's amended 4/2/2013 exemption log by author, recipient, date, time, and subject matter. CP 661-677.

The County had earlier represented that it could submit the records for *in camera* review by March/April 2013. CP 49:21-22. The County represented that it would submit "the records to be reviewed *in camera* by close of business on Thursday March 28, 2013, before the matter is set for hearing on Monday, April 1, 2013." *Id.* However, after obtaining the ex parte TRO, the County delayed for over four months and refused to submit the records for review. CP 678-780, RP 207:8-12, 208:5-13. Finally, Mr. Allphin moved the Court to vacate the TRO or order the County to lodge the records for *in camera* review. CP 680-712.

At the hearing set for Mr. Allphin's motions, the County submitted a sealed envelope of records to the judge and represented that it contained

the 11 emails identified by its cover index.[1] CP 781, RP 213:21-214:6, 215:23-217:23. The County represented to the Court that it no longer claimed exempt the remaining records previously enjoined by the TRO, and now only sought court review and protection of the 11 emails listed on the cover index. CP 781, RP 216:8-12. Between May 24, 2013 and the September 9, 2013 hearing, the County had released many of the previously withheld and enjoined emails. CP 1468. Similar to the emails' identification on the exemption logs, the cover index identified the 11 emails specifically by author, recipient, date, and time. CP 781.

The County did not submit any briefing or explanation to support its request that the 11 records be sealed. Mr. Allphin had submitted briefing for his argument that any attorney-client privilege or work product protection was waived when the parties unrestrictedly shared the materials between separate government agencies. CP 699-712. Mr. Allphin also questioned whether the withheld records contained the kind of attorney mental impressions protected by the work product rule. CP 699-712. On September 30, 2013, the Court issued an 8-page memorandum decision that concluded the records were work product, that no waiver had occurred because the County and the DOE were members

[1] As later discovered, the County's envelope contained many more and different records. See discussion, below, at pp. 9-10, 19-22.

of the same "legal team", and that the 11 records should be sealed. CP 782-789.

By December 2013, the County had still not entered an order on the Court's memorandum decision. Mr. Allphin noted an order for presentation, together with motions for an order setting a reasonable timeline for the County to complete its serial installments and for a statutory award as to those records wrongly withheld under the 4/2/2013 exemption log. CP 791-92, 799-800, 938-948. At the hearing, the Court entered the order on its memorandum decision. CP 975-976. The Court denied Mr. Allphin's other motions without prejudice, pending leave to amend Mr. Allphin's Answer, Counterclaims, and Affirmative Defenses. CP 963, RP 250:11-17. On January 28, 2014, the County notified Mr. Allphin in writing that it had completed its records response. CP 1495.

Mr. Allphin's Amended Answer, Counterclaims, and Affirmative Defenses were entered on March 4, 2014. CP 1018-1031. The County obtained new counsel on March 5, 2014.[2]

About one month later, the County admitted that the envelope of records it had submitted for *in camera* review contained additional and different records than the 11 emails represented to the Court and to Mr.

[2] The County has had at least 4 or 5 "lead" attorneys, and the early and more egregious violations do not lie with the County's present counsel.

Allphin. CP 1038-1087. At least 8 additional records had been stuffed in the envelope, and one of the records represented to be submitted *in camera* was not included at all. CP 1041, ¶¶ 4, 6-7, 11. The County moved to expand the sealing order over these records. CP 1038-1039. Mr. Allphin objected and requested the release of the records and sanctions for abusing the judicial processes of *in camera* review and sealing public records. CP 1088-1092.

The trial court denied the County's motion and Mr. Allphin's requests. CP 1098-1099; RP 280:13-24. The trial court found the County's method of having the records sealed to be "very, very troubling," RP 267:17-19, which it based on a detailed chronicling of the lawsuit, RP 272-78. In the end, however, the trial court denied the request to modify the sealing order, RP 278:20-23, RP 280:19-24, and strongly urged the parties to settle the case, RP 279:25-280:12 (directing Mr. Allphin to "send them a letter [. . .] and then we can be done with this").

The County released additional records over the summer of 2014, and the parties filed cross motions for summary judgment. CP 1211-1212; 1431-1432. The Court heard oral argument on December 23, 2014. CP 2721. The parties sought permission from the Court to file supplemental briefing as to 16 responsive records released after the summary judgment hearing. CP 2731, CP 2862-2882. The Court ruled for the County and

entered the County's proposed orders. CP 2883-2890. The County moved for certification as final judgment in anticipation of this appeal. CP 2987. The Court certified judgment as final, over Mr. Allphin's objections. CP 2927-2944, 2985-2990. Mr. Allphin appealed. CP 2991-3056.

B. Factual Background

The trial court proceedings can be viewed as occurring in two stages. The first stage occurred in 2013 and centered on the County's denial and withholding of records listed on the 4/2/2013 exemption log. The second stage culminated in late 2014 when the parties moved for summary judgment and *in camera* review of 21 challenged records.

The first stage of the lawsuit involved 50 records claimed to be exempt attorney work product and listed on the County's 4/2/2013 exemption log. CP 92-97, CP 661-677. The exemption log demonstrated on its face that the records had been shared between agencies with no claim or assertion of confidentiality or common interest. CP 668-677. In fact, the County had to name the DOE as an adverse party and enjoin the DOE because the DOE disagreed that the emails constituted protected work product and intended to release the emails. CP 5, CP 32:23-33:2. Over the months following its claimed exemption as to the 50 emails on April 2, 2013, the County released 41 of the 50 records. CP 1468. The County released most of these as a direct result of the trial court's May 6,

2013 ruling that previously disclosed records could not be returned, sequestered, and destroyed as requested by the County. RP 84:10-24; CP 2207, CP 562-63. As the Court put it, "the cat's out of the bag". *Id.*

The second stage spanned from 2013-2015 and encompasses Mr. Allphin's claims for relief under the PRA and his request that the Court review a second set of records withheld by the County as work product. The claims include unlawful delay, failure to provide fullest assistance, the unlawful distinguishing of his requests, the failure to act in good faith, the abuse of judicial process, and the wrongful denial of specific records.

(1) The County used an "installment process" to serially postpone its release of public records.

The County sent 16 installments, approximately monthly, over the years between 2012 and 2014. CP 1462-63, 1482-95, 1108-14. At least one installment contained as few as seven email chains. CP 1464, 1492. The County provided no explanation why it required a month to review and provide seven emails. *Id.* The County typically represented with its installment that there were more records to review and disclose. *Id.* Mr. Allphin had no indication how long the County would delay its production through the installment process. *Id.* After more than a year had passed, Mr. Allphin moved the court to order the County to provide a reasonable estimate of its timeline for completing its response. CP 799-800.

Despite the earlier representations that "many" additional records existed, see e.g. CP 1486-88, 1494, the County only produced one more installment in January 2015, after Mr. Allphin's motion for a timeline. CP 1494-95. Further, the County's one additional installment of January 13, 2014 contained 219 individual emails, of which 211 had previously been provided. CP 1464.

Many of the County's later installments contained very few records. In the November 2013 installment, the County produced only 7 records. CP 1113, 1492. Similarly, the December installment consisted of only 19 emails. See CP 1113, CP 1494. The July installment identified 44 emails; the August installment identified 28 emails, CP 1489; the September installment identified 21 emails, CP 1490; and the October installment identified 43 emails. CP 1112.

The County's statement that it released over 20,000 pages of records is misleading because of great duplication in its releases. For example, the 5/23/12, 2:39 p.m. email to Ms. Becker was released 16 separate times; Ms. Lowe's 5/24/12; 11:16 a.m. email was released 16 separate times; and Ms. Barber's 6/26/12; 3:25 p.m. email was released 20 separate times. CP 1465. Similarly, a 10-page letter from US Ecology Idaho, dated 12/6/10, was released 53 separate times. CP 1465. Further, initial releases mostly included duplicates of court pleadings, CP 1465,

1106, despite Mr. Allphin expressly asking the County on November 19, 2012, not to flood the response with court filings, CP 1465, 1497.

(2) The County filed this PRA lawsuit to interfere with Mr. Allphin's defense in related proceedings.

The County's pursuit of the ex parte TRO was timed to interfere with Mr. Allphin's defense in related Superior Court and Appellate Court proceedings being prosecuted by the County. CP 1474; 197-98, 264, 266-71; 311-258. Within days of obtaining the ex parte TRO, the County scheduled a contempt hearing, at which Mr. Allphin was restrained from using the key records in his defense. CP 197, ¶ 14, CP 264-65; see also CP 1474, CP 311-325. The County also immediately filed a motion in the Court of Appeals, requesting judicial notice of the ex parte TRO to preclude Mr. Allphin's defense with the records. CP 197-98, 266-71.

After obtaining the ex parte TRO, the County failed to follow-through with its request for *in camera* review until Mr. Allphin noted the motion over 4 months later. CP 49. The County delayed and obstructed releases of records important to Mr. Allphin. CP 1463-68. Two of the records on the County's 4/2/13 exemption log (10:42 and 12:46 emails) were withheld from review until December 23, 2014. CP 1470-71.

(3) The County's lawsuit prevented and delayed the DOE's release of records over which the DOE claimed no exemption.

If not for the injunctive proceedings initiated by the County, the DOE would have provided Mr. Allphin with the alleged "work product" documents. CP 32:23-33:2 (stating "the Ecology public records officer agreed not to release communications made between Ecology and the Kittitas County Deputy Prosecutor until the County could seek court protection of documents characterized as attorney work product communications between Ecology and the County's attorneys"); CP 5:1-3 (alleging same in County's Complaint). Only the County has claimed the email correspondence to be exempt work product. CP 1467.

The DOE even released a legal opinion letter of its counsel stating that the emails were not protected under the attorney client privilege, that no joint prosecution agreement existed, and that the unrestricted exchange of records between the DOE and the County would constitute waiver of any protection from disclosure. CP 1467, 1499. The DOE's attorney's conclusions are consistent with the County's former attorney's conclusion that "DOE is not my client (Kittitas County is), therefore, these emails are not attorney-client privileged". CP 1467-68, 1500.

Despite these admissions, the County still sued Mr. Allphin, not for the alleged PRA purposes of protecting work product, but to interfere

with Mr. Allphin's defenses in the related litigation. CP 26. As the County knew, and in the legal opinion of the DOE's attorney, any sharing between the DOE and the County of the information "would likely result in a waiver of any associated privilege." CP 1499.

Additional factual background for the claims submitted on the cross motions for summary judgment is provided and discussed below.

III. ARGUMENT

A. This Court reviews the trial court's conclusion on *in camera* review and summary judgment de novo.

The PRA, RCW 42.56, is "a strongly worded mandate for broad disclosure of public records." *Soter v. Cowles Pub. Co.,* 162 Wash.2d 716, ¶ 22, 174 P.3d 60 (2007). The PRA "should be liberally construed and its exemptions should be narrowly construed in favor of disclosure." *Id.*; RCW 42.56.030. The PRA promotes open government and reflects the American principle that "full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." *Hearst Corp. v. Hoppe,* 90 Wash.2d 123, 127-28, 530 P.2d 246 (1978). The legislature tasks the judiciary with liberal construction of the PRA to further "the people's insistence that they have information about the

workings of the government they created." *Nissen v. Pierce Co.*, No. 90875-3, pg. 21 (August 27, 2015) (citing RCW 42.56.030).

RCW 42.56.550 provides for *in camera* review of challenged records. To seal the records after *in camera* review, the "trial court must find that a specific exemption applies *and* that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest." *Soter,* ¶ 64 (emphasis in original).

Judicial review is de novo when agency action is challenged under the PRA. RCW 42.56.550(3). The Court's de novo review "shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3); *Wash. State Dept. of Trans. v. Mendoza de Sugiyama,* 182 Wash.App. 588, ¶ 9, 330 P.3d 209 (Div. 2 2014).

By statute, the County bears the burden of proof to establish that a particular public disclosure exemption applies, RCW 42.56.550(1), *Soter,* ¶ 23, and bears the burden to prove that its estimate of time to respond to a public records request is reasonable, RCW 42.56.550(2); *Adams v. Wash. State Dep't of Corrections,* No. 32012-0-III, p. 30 (Div. 3 Sept. 1, 2015). The legislature has legislatively weighed many competing policies before delineating the narrow exceptions to the general requirement that agencies

release records upon request. Withholding a record is only appropriate where "a listed exemption squarely applies." *Soter,* ¶ 22.

To promote open government and to penalize offending agencies who deny access to public records, the PRA includes a penalty and fees provision. RCW 42.56.550(4). As "can be seen, an agency denies a public records request at great peril." *Soter,* ¶ 56.

B. The trial court incorrectly sealed two envelopes of public records based on the County's erroneous theory that two unrelated government agencies create attorney work product when they email one another.

Upon Mr. Allphin's motions for *in camera* review, CP 699-712, CP 1431-32, the County submitted two envelopes of public records to the trial court. Though the County has withheld hundreds of other records, Mr. Allphin challenged those records withheld under a claim of attorney work product when the exemption logs showed that the records were shared openly between the County and the DOE. *Id.* Mr. Allphin's first challenge to the denial of such records involved 50 emails listed on the County's 4/2/13 exemption log. Mr. Allphin's second challenge combined 21 emails withheld pursuant to various exemption logs under the same erroneous claim of work product. The trial court incorrectly concluded that both envelopes contained emails (1) that constituted attorney work product and (2) that any protection had not been waived.

As to the first set of records, the trial court failed to find that disclosure would "clearly not be in the public interest" and "would substantially and irreparably damage a person or a vital government interest". CP 975-76. RCW 42.56.540, *Soter*, ¶ 64. The trial court also erred in not releasing the first set of records as a sanction for the County's inexcusable abuse of two highly-sensitive judicial processes: *in camera* review and sealing of public records.

(1) The contents of the envelope submitted by the County to the Court for *in camera* review on September 9, 2013 should be released as a sanction for abusing judicial processes.

The County misrepresented to the Court and to Mr. Allphin that it was submitting only 11 discretely identified emails for the Court's *in camera* review. CP 781, RP 215:23-216:12. The Court issued a memorandum decision that expressly recites at least four separate times that the envelope submission contained "eleven (11) emails". CP 971, 972, 974. The Court entered an order reciting that the envelope contained "eleven (11) emails". CP 965. The trial court perpetuated the misrepresentation that the envelope contained "eleven (11) emails" and that the court had "in fact reviewed the emails". CP 973; RP 276:25-277:6.

Only when new counsel appeared for the County did the County "come clean" with its abuse of the process. CP 1038-1099. The County

then admitted that the envelope actually contained additional and different records and did not include one identified record at all. CP 1041-42, ¶¶ 4, 6-7, 11. The County admitted that one email discretely identified as an "Email from Rivard to Suzanne Becker on 7/18/11 at 7:31 a.m." was not included in the envelope. CP 1041-42, ¶ 6. The County further admitted that an entirely different and undisclosed email, identified as "James Rivard to Zera Lowe, cc-ing Norm Peck, at 12:46 p.m. on July 19, 2012", was included in the envelope. CP 1041-42, ¶ 6. The County went on to admit that 8 additional records had been stuffed into the envelope, but not disclosed to Mr. Allphin. CP 1042, ¶ 7.

The misrepresentations were not excusable, inadvertent, or reasonable. The 50 emails on the County's April 2, 2013 exemption log are specifically identified by type, author, recipient(s), date, time, number of pages and subject line, as required by the PRA. *Progressive Animal Welfare Soc. v. Univ. of Wash.*, ("PAWS") 125 Wash.2d 243, 271, fn. 18, 884 P.2d 243 (1994). The specific records were sharply contested and extensively discussed, in and out of the courtroom, including three hearings on May 6, May 17, and June 6, 2013. CP 1414:5-8; RP 50-204.

No credible excuse exists to have slipped eight (8) of these records into the envelope. CP 1085:9-11 (County acknowledges that Mr. Allphin has "no way to verify that these additional records were, in fact, submitted

to the Court for *in camera* review"). No credible excuse exists to have added an undisclosed record nor for the County to leave out one record, all under the representation – written and oral – that these "11 (eleven) emails" comprised the envelopes' total contents. CP 781, RP 215:23-216:12. Mr. Allphin's counsel and the trial court inquired about additional records at the hearing, but the County affirmed that it only sought review of the eleven. RP 215:23-217:23.

When the County admitted its abuse of the two highly sensitive processes, Mr. Allphin objected, requested release of the records, and requested sanctions. CP 1082-92. Rather than release the records, however, the County moved to expand the sealing order. CP 1038-39. Though the trial court found the County's abuse of the process "very, very troubling," RP 267:17-19, the trial court denied the County's motion as well as Mr. Allphin's requests. CP 1097-99; RP 280:19-24. The trial court suggested that it would "solve this problem [...] at a later time," if the parties could not settle. RP 280:22-24: RP 280:7-12.

Accordingly, this Court will find that the envelope of records sealed by the trial court does not contain those 11 records listed on its cover index. Cf. CP 3059-3219 with CP 781. The records should be publically released, regardless of their PRA exemption status, as a sanction for violating the *in camera* review and sealing processes. Every

Washington court of justice has inherent power to control the conduct of judicial proceedings and may, in its discretion, place reasonable restrictions on litigants who abuse the judicial process. RCW 2.28.010(3); *Yurtis v. Phipps*, 143 Wash.App. 680, ¶ 31, 181 P.3d 849 (Div. 3 2008). A reasonable consequence of the County's abuse of the judicial processes is to preclude the County from benefitting from the processes.

Alternatively, this Court should reverse the trial court's conclusion that the records constituted attorney work product and that the protection was not waived when the County and the DOE unrestrictedly shared the emails between the agencies, with no joint prosecution agreement, and with no indicia of confidentiality. As discussed more fully in the following section, two independent agencies that have no joint prosecution agreement, and admit that there is no privilege between themselves, cannot share communications without waiver, yet later claim to be on the same "legal team" for purposes of denying access to public records.

(2) The trial court wrongly sealed records that were openly communicated between the two agencies, here adverse parties, constituting a waiver of the attorney work product protection.

Similar to the records sealed in the first envelope, the trial court sealed 21 additional records on February 27, 2015, all of which were emails openly and unrestrictedly shared between County officials and

DOE officials. CP 2966-2973. The 21 emails are identified by date, time, author, recipient, and subject matter. *Id.* The 21 emails were those identified by Mr. Allphin from several County exemption logs as being withheld under a claim of attorney work product despite the open inter-agency sharing of the emails. CP 2973.

Notably, records 2 and 21 of that list were not sent or received by an attorney at all, but transferred between the County's non-attorney staff Mr. James Rivard (CP 1386) and the DOE's non-attorney staff Mr. Norm Peck. CP 1471, 1573-74. On its face, there is no basis to withhold as exempt attorney work product these two non-attorney staff emails. As for the remaining 19 records, County attorney Zera Lowe is identified as an author or recipient of the email, but any protection has been waived.

These 21 records likely do not contain exempt communications in the first place. Because Mr. Allphin has been able to review the nature of communications over which the County had asserted the work product protection, Mr. Allphin has reason to believe the records are not work product in the first place. After the trial court denied extension of a broad, undefined TRO, the County released many records it had originally claimed to be exempt work product. CP 557-563. The releases include the County's withholding of non-privileged communications. CP 1767-72. Some of those records contained only messages such as "My calendar is

clear tomorrow. What time do you want to meet?", CP 1760, yet the County claimed them exempt. CP 1742.

Such emails are not mental impressions, thoughts, and theories protected by the work product doctrine. *Soter,* ¶ 30. Further, the emails were not marked with "confidential", "work product", or other indicia of intent to protect from disclosure. CP 2236-2479. The emails were correspondence between separate, independent agency employees and shared without a claim of privilege or protection. They were not mental impressions that warrant the attorney work product protection. *Limstrom v. Ladenburg,* 136 Wash.2d 595, 611, 963 P.2d 869 (1998).

Second, any protection was waived. The "To" and the "From" lines identified in the County's exemption logs demonstrate that each of these emails consists of communication between County employees and DOE employees. CP 1505-1512 (copy of County's 4/2/13 exemption log). The County did not inadvertently send these records. Rather, the County waived any protected, privileged, or confidential right to these records upon dissemination to a separate, third-party governmental agency not involved in the County's litigation with Mr. Allphin. The deliberate disclosure of protected materials results in a waiver of the protection. ER 502; *Sitterson v. Evergreen School Dist. No. 114,* 147 Wash.App. 576, ¶ 18, 196 P.3d 735 (Div. 2 2008).

That the County had to sue the DOE heightens the absurdity of the County's claim of work product protection. *See, e.g., Harris v. Drake,* 152 Wash.2d 480, 495, 99 P.3d 872 (2004) ("widely accepted that if a party voluntarily discloses documents to an opposing party, then any possible work product protection for those documents is waived") (citing *Limstrom v. Ladenburg,* 110 Wash.App. 133, 145, 39 P.3d 351 (Div. 2 2002)).

The DOE was not a member of the County's "legal team", *Soter,* ¶¶ 28, 34, as applied to any of these records. There is no evidence supporting the County's theory that "certain of Ecology's professional and technical personnel" were part of the Kittitas County Civil Deputy Prosecutor's "legal team." CP 31:16-19; 32:13-16. There exists no joint prosecution agreement. CP 1467, 1499. Both the County's former attorney and the DOE's attorney had concluded that the records are not attorney-client privileged. CP 1467, 1499-1500; see also RP 18:20-19:1 (County attorney agreeing during ex parte TRO hearing that waiver would occur when trial court hypothetically asks whether a County attorney's legal strategy would lose its protected status if disclosed to the DOE).

The phrase "legal team" arose in this lawsuit based on references to *Soter, see e.g.* ¶ 26. In *Soter,* the Washington Supreme Court decided in a 5-4 decision that the records created by a school district's retained investigative team in anticipation of litigation following a student's death

constituted work product. *Id.* at ¶ 26. Most of the records were handwritten notes regarding interviews of witnesses taken by attorneys or members of the legal team. *Id.* at ¶¶ 20, 28, 41.

The critical distinction between *Soter* and the present case is that the school district in *Soter* hired the private investigator specifically for the purposes of preparing for the lawsuit. *Id.* at ¶¶ 9-11. In the present case, the County did not hire the DOE. The DOE was not the County's expert, technician, or private investigator. The County and DOE had no joint prosecution or defense agreement. CP 1467, 1499. Rather, the independent regulatory agencies emailed each other without claim of confidentiality. The DOE has repeatedly declined to assert the position that it was a member of the County's "legal team".

At summary judgment, the County raised for the first time the "common interest rule" as authority for its withholdings. CP 1466-67, ¶ 5. The County did not state that ground for exemption on any of its many exemption logs, public records release letters, or pleadings. See CP 2234, 2484-2553. The County should not be permitted to raise the "common interest" theory post facto. Even if an agency could retrofit an exemption theory late in litigation, the County here is foreclosed from doing so because none of its exemption logs mention the "common interest" theory.

The PRA requires agencies to provide an explanation of how a

claimed exemption applies to the record. RCW 42.56.210(3); *City of Lakewood v. Koenig,* 182 Wash.2d 87, ¶10, 343 P.3d 335 (2014) (stating that the "plain language of RCW 42.56.210(3) and our cases interpreting it are clear that an agency must identify 'with *particularity*' the specific record or information being withheld and the specific exemption authorizing the withholding")(emphasis in original).

The County's exemption logs failed to provide any explanation as to how the work product or attorney-client privilege applied to the challenged emails. Every record submitted for *in camera* review was withheld under an exemption log that provided no explanation, but cited only "attorney work product" and a long string cite of statutes, civil rules, and cases. See CP 1468, CP 1505-1512 (copy of County's 4/2/13 exemption log). The logs lacked any explanation, let alone in sufficient detail, to permit Mr. Allphin to determine whether the denied records were properly withheld, all of which is a separate violation of the PRA. *Lakew*ood, ¶ 10, stating an "agency must provide sufficient explanatory information for requestors to determine whether the exemptions are properly invoked." See also *Sanders,* 169 Wash.2d 827, ¶ 19, 240 P.3d 120 (2010) (noting that "[c]laimed exemptions cannot be vetted for validity if they are unexplained"); *Adams,* No. 32012-0-III, p. 11 (stating that it "is improper under the PRA to provide exemption information in

such vague terms that 'the burden [is] shifted to the requester to sift through the statutes cited . . . and parse out possible exemption claims.'") (citing *Lakewood,* ¶ 11).

Furthermore, the "common interest rule" is not a statutorily-listed exemption; it is not a statutory privilege at all; nor is it even an extension of the work product doctrine. The rule "is merely a common law exception to waiver of privilege that applies when parties share a common interest in litigation." *Sanders,* ¶ 38-39. The DOE and the County did not share a interest in litigation, just as they were not on the same "legal team".

Even assuming, arguendo, that the emails are work product, the emails should have been disclosed under the qualified immunity exception to the work product privilege. CR 26(b)(4); see also *Soter,* ¶ 77 (Johnson, C., Johnson, J.M., sitterson, Chambers, JJ., dissenting) ("Work product is not an absolute protection from disclosure, particularly in the context of the broad mandate for public access to agency documents"). The broad disclosure requirements for the sake of open government in the PRA further support that conclusion.

C. The trial court erred when it granted the County's motion for summary judgment and denied Mr. Allphin's motion for summary judgment.

The parties filed cross motions for summary judgment, reserving a penalties hearing. CP 1434. Summary Judgment is proper to resolve PRA

litigation. See e.g. *Soter,* ¶ 18. The government agency expressly bears the burden of proof under RCW 42.56.550 to show that the agency's refusals to release records "is in accordance with a statute that exempts" release, RCW 42.56.550(1), and/or, that the agency's estimate of time to respond is reasonable, RCW 42.56.550(2).

(1) Mr. Allphin prevailed in obtaining the release of several records initially withheld by the County pursuant to the County's 3/27-28/13 and 4/2/13 exemption logs.

The trial court erred when it concluded that the County did not deny Mr. Allphin access to records in violation of the PRA when the County withheld records on March "27-28", 2013 and April 2, 2013, and only produced the records as a result of Mr. Allphin's insistence and these court proceedings. CP 1467-69, ¶¶ 6-6.2; see also earlier motion at CP 791-98, 825-937. The trial court's summary judgment ruling should be reversed and granted to Mr. Allphin. The trial court's final ruling even contradicts its earlier finding that "respondents in this case have prevailed more than the plaintiffs." RP 245:11-12. In fact, the County only succeeded in sealing seven of the 50 records withheld on the April 2, 2013 exemption log, which is roughly a 14% success rate. CP 1470-71.

An agency violates the PRA when it denies access to a requested public record. RCW 42.56.550. When the requester "prevails against an agency in any action in the courts seeking the right to inspect or copy any

public record," the requester is entitled to statutory fees and a daily penalty. The County claimed exempt and withheld 50 discrete records pursuant to its 4/2/13 exemption log. CP 1468. After the 4/2/13 withholding, the County released most of the emails over several months and several installments. CP 2231-32, 2236-2479.

The requester is the "prevailing party" even if the agency "voluntarily" provides the records after being sued. *Spokane Research & Defense Fund v. City of Spokane,* 155 Wash.2d 89, ¶ 26, 117 P.3d 1117 (2005) (citing *Coalition on Gov't Spying v. King County* ("COGS"), 59 Wash.App. 856, 801 P.2d 1009 (Div. 1 1991) (voluntary disclosure of records did not shield agency from paying fees, costs, and penalties) and *Tacoma Pub. Library v. Woessner,* 90 Wash.App. 205, 951 P.2d 357 (Div. 2 1998) (obtaining the record from another source did not moot appeal)). See also *Neighborhood Alliance of Spokane Co. v. Co. of Spokane,* 172 Wash.2d 702, ¶ 39-40, 261 P.3d 119 (2011).

In *Spokane Research,* the Court concluded that the requester could prevail on his motion for fees, costs, and penalties related to records claimed exempt by the City of Spokane, even though the City released the records as a consequence of a separate lawsuit. *Spokane Research,* ¶ 27. The Court made clear that causing the disclosure is not necessary to obtain prevailing party status. *Id.,* ¶ 28. Otherwise, an agency could "resist

disclosure of records until a suit is filed and then disclose them voluntarily to avoid paying fees and penalties." *Id.* The Court stated that condoning such a strategy would "flout the purpose of the PDA." *Id.*

It does not matter if the requester initiated suit, or as here, the County initiates suit; the requester is entitled to mandatory, statutory fees, costs, and penalties to the extent the requester prevails. *Spokane Research*, ¶ 30 ("Fees, costs, and penalties are awarded for 'any action in the courts.'"); RCW 42.56.550. It is not even necessary that a lawsuit be filed for the requester to be the "prevailing party" entitled to fees, costs, and penalties. See *Zink v. City of Mesa,* 162 Wash.App. 688, ¶ 91, 256 P.3d 384 (Div. 3 2011); see also *Freedom Foundation v. Wash. State Dept. of Transp.,* 168 Wash.App. 278, ¶ 37, 276 P.3d 341 (Div. 2 2012) (penalties appropriate against agency that initially redacted records over-broadly and subsequently provided records with narrower redactions).

Mr. Allphin prevailed as to the records initially claimed exempt and withheld by the County on March "27-28", 2013 and April 2, 2013, but then released by the County during the following months of litigation. CP 1468-69. Possibly, the "lowest hanging fruit" of Mr. Allphin's efforts was recovery of the six emails withheld pursuant to the County's March "27-28," 2013 exemption log, which were withheld under a claim of "attorney-client communications between legal counsel and client",

despite no attorney being copied on the emails. CP. 1469, 1566-67, 1569-70. As a direct result of Mr. Allphin's challenges and defense in the suit, these six records were released by the County on July 3, 2013, 98 days after being wrongfully denied. CP 1469. The County has never provided an explanation for this wrongful withholding, but apparently obtained summary judgment as to these records under its broad "reasonable search" defense. This conclusion should be reversed and judgment entered for Mr. Allphin as to these six records and the 41 similarly released records claimed exempt and withheld on April 2, 2013.

Though Mr. Allphin's persistence certainly "caused" the disclosures of the wrongly denied records, "prevailing party status" is not "conditioned on causing disclosure." *Spokane Research,* ¶ 29. "Rather, the 'prevailing' relates to the legal question of whether the records should have been disclosed on request." *Id.* Rather than disclose the emails on request, the County claimed exempt and denied access to the public records. CP 1468-69. The subsequent or related events "do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time." *Id.* "[P]ermitting an agency to avoid attorney fees by disclosing the document after [suit was filed] . . . would undercut the policy behind the act." *Id.* at ¶ 29.

The County has argued that the claimed exemptions as to these records were proper and, therefore it did not violate the PRA by subsequently deciding to waive its initial proper claim of exemption. However, review of the disclosed records makes clear that they did not contain work product or attorney client privilege at all and should never have been withheld from Mr. Allphin. CP 2231-32, 2236-2479.

Furthermore, a subset of the records withheld on April 2, 2013 involves the additional PRA violation of over-redaction. CP 1473. Nine such records contain redaction in their entirety, rather than minimally for the purposes of the claimed exemption. RCW 42.56.210; *Amren v. City of Kalama,* 131 Wash.2d 25, 32, 929 P.2d 389 (1997). *See* entirely redacted emails from the County's 4/2/13 exemption log at CP 1473, CP 1722-65.

As these records were later released, Mr. Allphin's belief that the County over-redacted the records was verified. Compare CP 1722-41 (redacted) with 1743-1769 (unredacted). The comparison demonstrates that there was nothing privileged or confidential in the communications. CP 1473. For example, compare the redacted statement, "Very helpful. Thanks, Mary Sue. Have a great evening, and rest of your week. Hopefully I won't pester you any further" at CP 1730 v. CP 1743. Similarly, compare CP 1739 with CP 1754, redacting the non-exempt statement, "It is okay with me if you are there Norm." The nine emails in

this series, CP 1722-41, show complete, block-style redactions, without attempting to comply with the minimal redaction requirement of the PRA.

The County demonstrated gross ineptitude or intentional disregard of its PRA responsibilities in relation to the County's April 2, 2013 exemption log records. The County wrongfully withheld these 50 records under an improper claim of attorney work product, which even if the records had been attorney work product, the protection was waived. When challenged by Mr. Allphin, the County released 41 of the 50 records from the April 2, 2013 exemption log and the six challenged records on the March 27-28, 2013 exemption log. The records' content lack privileged communications. Mr. Allphin prevailed as to these records on his claim of wrongful denial for the corresponding number of days from the County's withholding to the date of the County's release. CP 1468, CP 1536-41. Furthermore, the County violated its duty to provide a sufficient explanation for the withholding as to all the records on the March 27-28, 2013 and April 2, 2013 exemption logs, *see above* pgs. 26-28, and over-redacted nine records from the April 2, 2013 exemption log.

(2) The County intentionally and unlawfully delayed its records response, unlawfully distinguished Mr. Allphin's request, and failed to provide fullest assistance.

The PRA contains several provisions that emphasize that an agency must respond to a records requester "timely" and "promptly". See RCW 42.56.100 (requiring "fullest assistance" and "the most timely possible action on requests"); RCW 42.56.080 (prohibiting agencies from distinguishing requests or treating requesters differently); RCW 42.56.520 (responses "shall be made promptly by agencies"), RCW 42.56.550; WAC 44-14-08004, *Soter,* ¶ 23, ¶ 64; *Limstrom,* 136 Wash.2d at 603-604, 963 P.2d 869. Further, the PRA provides a requester a remedy when an agency is dilatory. RCW § 42.56.550(2) provides:

> Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

Mr. Allphin filed such a motion and requested the trial court review and order the County to finish its response within a timely manner on December 9, 2013, which was over a year after the request was filed. CP 799-824. The motions for a timeline and fees were denied "without prejudice," pending amendment of pleadings. CP 963, RP 250:11-17. The County quit its delay tactic the following month by announcing it was closing its response. CP 1464.

"The PRA unequivocally commands an agency to respond promptly to a public record request." *Zink,* ¶ 34 (citing *Yousoufian 2010*, 168 Wash.2d 444, 465, 229 P.3d 735). "Specifically, within five business days of receiving a public record request, an agency must respond by either (1) providing the record, (2) acknowledging that the agency has received the request and providing a reasonable estimate of the time required to respond, or (3) denying the request." *Id.* In *Zink,* the court concluded that a 30-day delay for producing letters was reasonable because the requester had filed 21 separate requests that the agency had to review manually. *Id.,* ¶ 44.

In *Limstrom*, the Court acknowledged that a "basic policy of RCW 42.17 is to protect the public interest in 'free and open examination of public records,'" and that "government agencies have a duty to respond promptly to disclosure requests." *Limstrom v. Ladenburg*, 98 Wash.App. 612, 615-17, 989 P.2d 1257 (Div. 2 1999) (rejecting argument that the county's estimate of 30 days was unreasonable when the county in fact provided records within 15 days). The 30-day timelines in *Zink* or *Limstrom* are not even close to the 16 month timeline involved here. Nor can it be argued that Mr. Allphin's one request was more complex for the County than the 21 requests at issue for the City of Zink.

In the present case, the County drew out its response over 16 months before indicating its intent to close its response, and even then, the County released additional responsive records, as late as April 25, 2014, July 25, 2014, and January 13, 2015. CP 1463-65, 1472; CP 2734-95. Several of the County's 16 monthly installments included a letter representing that there were "more records to review" and disclose. CP 1464, 1482-95. The County was using the installment process to extend serially the County's response.

After Mr. Allphin's December 2013 motion for a timeline, the County only produced one more installment in January 2014 before notifying that it was finished. CP 1494-95. The County's one additional installment of January 13, 2014 contained 219 individual emails, of which the County had previously provided 211 of these emails, thus demonstrating that the County was artificially holding open its installment responses for purposes of delay. CP 1464. In fact, the County's installments over the last 7 months of its response contained very few new records. In the November installment, the County produced only 7 records, CP 1113, CP 1492; only 19 emails in December, CP 1113, CP 1494; only 44 emails in July; only 28 emails in August, CP 1489; only 21 emails in September, CP 1490; and only 43 emails in October. CP 1112.

Further demonstration of bad faith and delay includes the serial production of duplicate records. The County's statement that it released over 20,000 pages of records is misleading because of the great duplication in the County's releases. For example, the 5/23/12, 2:39 p.m. email to Ms. Becker was released 16 separate times; Ms. Lowe's 5/24/12; 11:16 a.m. email was released 16 separate times; and Ms. Barber's 6/26/12; 3:25 p.m. email was released 20 separate times. CP 1465. Similarly, a 10-page letter from US Ecology Idaho, dated 12/6/10, was released 53 separate times. CP 1465. Further, the initial releases by the County mostly included duplicates of court pleadings, CP 1465, 1106, despite Mr. Allphin expressly asking the County on November 19, 2012, not to flood the response with court filings, CP 1465, 1497.

The County similarly stalled and delayed in the lawsuit it filed against Mr. Allphin. After obtaining its amorphous ex parte TRO, on April 4, 2013, allegedly for purposes of seeking *in camera* review, the County took zero steps to advance the lawsuit or submit records for such review. Only upon Mr. Allphin's motions and note for hearing did the "eleven emails" get submitted for *in camera* review. CP 680-780. Two emails from the 4/2/13 exemption log (the long contested 10:42 and 12:46 emails) were not submitted for *in camera* review for over a year and a half. CP 1470-71. The County filed no brief or written explanation when it

submitted its records for *in camera* review on September 9, 2013. Again, Mr. Allphin had to advance the proceedings in December 2013, even noting presentation of an order on the trial court's memorandum decision (for which failure, the trial court sanctioned the County). In fact, the County did not advance the proceedings one step until it retained new counsel, who filed the County's first motion on April 11, 2014, over a year after the County obtained the ex parte TRO. CP 1038-39.

The County's time logs evidence that the search for records in the Health Department was complete as early as March or April 2013. CP 1390, 1403; see also CP 2555-56, CP 2587, CP 2591. The Fire Marshall's time records indicate that all records had been provided by October 24, 2012. CP 2556, CP 2614. If the County Health Department and the Fire Marshall were finished with their search and review of records as early as April 2013, why did it take the County almost another year to release the records and notify Mr. Allphin that it was finished? The answer is that the County was using this lawsuit and installment process to interfere with the related litigation, not for any valid reason under the PRA. CP 1463.

Rather than provide a prompt response to the request for public records, the County spent a huge amount of time and resources to sue Mr. Allphin in early 2013. The date that the County sued Mr. Allphin should be used as the proper starting date for assessing the wrongful delay and

denial of records. If the County had the time and resources to lodge this lawsuit by that time, and its staff had finished their search for public records, the County had the time and resources to review and release the requested public records. The County delayed release of hundreds of records after suing on February 22, 2013, all of which can be tallied for purposes of a penalty at a subsequent penalties hearing. CP 1463.

WAC 44-14-04003(6) provides: "Routine extensions with little or no action to fulfill the request would show that the previous estimates probably were not "reasonable". [. . .] An estimate can be revised when appropriate, but unwarranted serial extensions have the effect of denying a requestor access to public records." Even though installments are permitted, "an agency cannot use installments to delay access by, for example, calling a small number of documents an 'installment' and sending out separate notifications for each one. The agency must provide the 'fullest assistance' and the 'most timely possible action on requests' when processing requests." WAC 44-14-04004.

The County's delayed installments effectively denied Mr. Allphin's right to access public records. There was no justification for the County to stretch its production over 16 installments and almost two years, with installments containing as few as seven emails. The County blatantly disregarded its PRA duties.

(3) The recently developed "reasonable search" caselaw has no application to Mr. Allphin's counterclaims.

The trial court erred when it concluded that the County conducted a reasonable search, and, therefore, Mr. Allphin had no recourse for the County's violation of the PRA. CP 2981. The County moved for summary judgment motion on the premise that its affidavits of a "reasonable search" absolved it from liability for its many and various PRA violations. See e.g. CP 2667. The County relies on recent caselaw that adopts the Freedom of Information Act (FOIA) standard for claims alleging an inadequate search for records. *See, Neighborhood Alliance,* 172 Wash.2d 702, 261 P.3d 119. The caselaw has no application to the present case. This is not a reasonable search case.

First, Mr. Allphin did not allege in the counterclaims that the County's search efforts were inadequate or not reasonably calculated to uncover responsive records (though he strenuously contested the defense when the County raised it on summary judgment). See CP 1453, citing counterclaims. Rather, the counterclaims are based on the wrongful denial of actual records and specifically tied to actual records.

Second, the record demonstrates that after the County's 16-month long and delayed records production, Mr. Allphin objected and notified the County that it had failed to release many records known to exist. CP

1471-73, ¶ 8, Ex. M-1 to M-3. Mr. Allphin knew or believed these records to exist because he had possession of many of them. CP 1472. Though not strictly concerned about receiving duplicates of the records, Mr. Allphin suspected the County was "silently withholding" records with similar characteristics. *Id.* "Silent withholding" is the forbidden practice of not disclosing a withheld record to a requester. *PAWS,* 125 Wash.2d at 270, 884 P.2d 243; *Zink,* ¶¶ 40-42; *Resident Action Council v. Seattle Housing Authority,* 177 Wash.2d 417, ¶ 25, 327 P.3d 600 (2013).

The County released some of the records that Mr. Allphin was able to identify for the County, CP 1471-73, ¶ 8, but claimed that others no longer existed. CP 1472, 1605-06, 1610-12. For example, on April 25, 2014, Mr. Allphin sent the County a list of 11 emails known to be missing. CP 1472, 1603. The County responded by letter of May 14, 2014, disclaiming possession of some of the records and producing others. CP 1605. The County's explanation on non-possession is not credible, as the County retained copies of many similar records, authored by the same individuals, relating to the same subject matter, and during the same time period. CP 1472. These five specific records were sent or received by County employee, Mr. Rivard, who release many similar records on this subject and in this timeframe. *Id.* There is no justification for the County

to have destroyed selectively certain records in its possession, which further violated its public records retention policy. CP 1774, 1824, 1830.

Then, on July 25, 2014, the County "discovered" one of the five records declared not in its possession after its earlier "extensive search." CP 1605, CP 1610. The long-delayed release of the March 23, 2011 email, was not an unintentional or inconsequential oversight, as it demonstrates the County's knowledge that Mr. Allphin was properly operating under a state-issued permit. CP 1472-73, CP 1610, CP 1712. The County intentionally withheld and delayed release of this record due to its exculpatory contents, and would have never released the record, had Mr. Allphin not known of its existence. CP 1472-73. Further, there is no justification for the County's failure to release the March 23, 2011 email, which existed as part of an email string, and which involves the same date, authors, recipients, and subject line. See CP 1472, 1714-20.

Further, the County claimed by its letter of July 25, 2014 that at least three records were not in its possession. CP 1473. In other correspondence, Mr. Allphin had identified 16 additional emails, which the County refused to produce. CP 2732-33. The County's response as to these missing records was an admission that it "failed to uncover a small number of email records (about 20)". CP 2881. But rather than admit the

wrongfulness of the silent withholding, the County excused itself under the auspices of its own "reasonable search". CP 2881.

The extent of the County's "silent withholding" again came to light after the December 23, 2014 summary judgment hearing, when Mr. Allphin discovered an additional 16 responsive emails that the County had never identified or released. CP 2732-2795. The records were readily within the County's possession as evidenced by the County production of the records just one week after Mr. Allphin's notice. CP 2738-2742.

The County violated the PRA by silently withholding records until Mr. Allphin specifically notified the County of Mr. Allphin's knowledge of the records. The County also violated the PRA as to for those records known and acknowledged to exist, but claimed missing or deleted from the County's records. Summary judgment as to these records should be reversed as to the County and granted for Mr. Allphin, pursuant to *Soter*, ¶ 54 (stating, that the PRA "treats a failure to properly respond as a denial", citing RCW 42.56.550(2)); see also *Neighborhood Alliance,* ¶ 30.

As stated in *Haines-Marchel v. State, Dept. of Corrections*, 183 Wash.App. 655, ¶ 35, 334 P.3d 99 (Div. 2 2014), "our Supreme Court has made clear that '[t]he fact that the requesting party possesses the documents does not relieve an agency of its statutory duties, nor diminish the statutory remedies allowed if the agency fails to fulfill those duties.'"

(citing *Neighborhood Alliance,* ¶ 40). The PRA "clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request." *PAWS,* 125 Wash.2d at 270, 884 P.2d 592.

Mr. Allphin was not "playing gotcha" with the County. See CP 2882. Rather, Mr. Allphin was dutifully clarifying his request, providing actual examples of missing County records, and communicating his concern that employees were withholding responsive records. The County was able to produce some of the records without any demonstrated difficulty or explanation as to why the records were initially withheld.

The "about 20" that the County withheld, destroyed, or lost should be the subject of a per diem statutory penalty from the date of the request until the date of judgment. CP 1471-73.These are specifically identified emails, known to exist and known to have been in the County's possession. These cannot be excused pursuant to a unilaterally-claimed reasonable search. The County cannot shoehorn this lawsuit into a "reasonable search" on this factual record.

Finally, the County's primary affiant on the "reasonableness" of its records response has directly and repeatedly contradicted herself in sworn declarations and is not credible. The County's former lead attorney, Zera Lowe, has told lies that begot lies, namely by trying to justify her wrongful obstruction of the records on April 2, 2013 under claims that she

did not know that Mr. Allphin had made a similar request for records to the DOE or that the DOE was releasing records. CP 1413, ¶¶ 15, 17. That the DOE had released the records was known by the County before it filed the lawsuit in February 2013, before it filed the exemption log of April 2, 2013, and before it sought the restraining orders in April-May 2013. CP 2207, citing sworn representations at CP 62:5-10; CP 105; see also CP 1476-77.

When called out on the misrepresentation about her knowledge of the DOE request, CP 1476-77, the County filed another reply declaration again misrepresenting that it "was not until early 2013" that she learned of the similar request to the DOE. CP 2674. The falsity of this repeated sworn statement lies in the records. First, she was copied on a DOE email dated October 18, 2012 (one day after Mr. Allphin's requests) that discusses the DOE's collection of records for responding to Mr. Allphin's request. CP 1476, 1845-46. Second, her time records state on November 14, 2012: "Review and call to Roger Johnson, DOE PRO, to confirm they will give us time to seek injunction; uncertain as to release date but he will give notice." CP 2695-96, CP 2555-56, CP 2654. The entry demonstrates that she knew the DOE "PRO" (public record officer) was gathering records for release to Mr. Allphin. CP 2654.

The County now attempts to explain away its wrongful withholding and injunction of many records in 2013 on the former

attorney's false statement. However, the record belies the explanation, and the County's attempted "cover-up" is certainly "worse than the crime." The explanation is not credible, compounds the bad faith attributable to the County, and fully discredits the County's "reasonable search" defense.

(4) The County wrongfully withheld the "Smoking Gun Memorandum" due to its exculpatory nature and only released it after Mr. Allphin demanded its release following the County's filing of and reliance on the record in related federal litigation.

The "smoking gun memorandum" demonstrates the County's bad faith in its prosecution of Mr. Allphin's businesses. CP 1988-89. Mr. Allphin set out a lengthy, document-supported declaration showing the County's wrongful withholding and use of this key record against him in related federal litigation. CP 1878-2163.[3] For present purposes, the relevant facts are this: (1) the County possessed and silently withheld the record from Mr. Allphin despite its clear responsiveness to his records request, (2) the County filed the record in related federal litigation and relied on it in support of its case against Mr. Allphin, (3) Mr. Allphin demanded the County produce the record, and (4) the County finally

[3] The numbering by the trial clerk for the Clerk's Papers for this declaration is out of order. The declaration appears at CP 1988-2000, but the exhibits to the declaration are located variously at 1878-2163. This brief will provide pinpoint citations to alleviate any confusion from the clerical error.

produced the record 646 days later on July 25, 2014. CP 1983, 1985-87. The trial court incorrectly denied Mr. Allphin summary judgment as to this record. RCW 42.56.550; *Soter,* ¶ 54 (stating that the PRA "treats a failure to properly respond as a denial").

The County has raised an absurd argument that it did not possess the record at the time of Mr. Allphin's 2012 public records request, despite the fact that the record was transmitted from the County's copier to a County employee and then forwarded from the County employee to a DOE employee in 2011. CP 1993-94, 2050-53. The County's explanation in this lawsuit is further impeached by its sworn statements in the federal lawsuit, where the County and its employees testified to reviewing the record and using it to guide their enforcement actions. CP 1996-97, 1954-80. The County should be judicially estopped from disclaiming possession of the record. *Rushlight v. McLain*, 28 Wash.2d 189, 182 P.2d 62 (1947); *Johnson v. Si-Cor Inc.*, 107 Wash.App. 902, 28 P.3d 832 (Div. 3 2001); *King v. Clodfelter*, 10 Wash.App. 514, 518 P.2d 206 (Div. 1 1974). The County's explanation is not credible or consistent with the record.

If the abundant circumstantial evidence and principles of judicial estoppel are insufficient to reach the conclusion that reasonable minds could not differ on the County's actual possession of the "smoking gun

memorandum," then a genuine issue of material fact exists precluding summary judgment and requiring remand. CP 2211-12.

IV. CONCLUSION

The trial court's grant of summary judgment for the County should be reversed and summary judgment for Mr. Allphin should be granted for the following record-based violations, with remand for a penalties hearing:

1) Wrongful withholding of the records submitted for *in camera* review and sealed at the County's request;
2) Wrongful withholding of six records under the County's March 27-28, 2013 exemption log and 50 records under the County's April 2, 2013 exemption log, including for those records subsequently released;
3) Violations for wrongful delay and the County's failure of its PRA duties for all records delayed and denied beyond February 22, 203, the date the County sued Mr. Allphin;
4) Wrongful denial of the "smoking gun memorandum", which the County refused to provide to Mr. Allphin despite its opportunistic use of the record against Mr. Allphin in related litigation;
5) Wrongful withholding of those records finally released on April 25, 2014, July 25, 2014, and January 13, 2015 only after Mr. Allphin notified the County that the records were known to exist and be in the

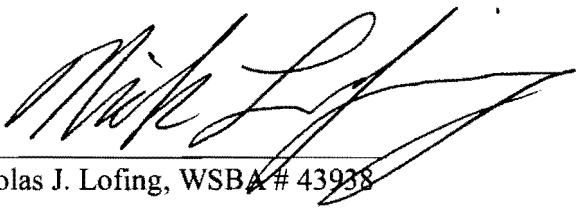
County's possession, and also including those "about 20" records the County acknowledged but disclaimed current possession.

VI. REQUEST FOR ATTORNEY FEES UNDER RAP 18.1

Mr. Allphin requests attorney fees and expenses pursuant to RAP 18.1 for this appeal. The right to recover reasonable attorney fees or expenses on review is granted to Mr. Allphin by RCW 42.56.550.

Respectfully submitted this 31st day of September, 2015.

DAVIS, ARNEIL LAW FIRM, LLP
Attorneys for Appellants



By:_____
Nicholas J. Lofing, WSBA # 43938