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NO. 959374

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

EDWARD KILDUFF,

Appellant

v.

SAN JUAN COUNTY, a political subdivision of the State of Washington,
and JAMIE STEPHENS, in his capacity as San Juan County Council
Member and Public Records Officer,

Respondents

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The County claims in this appeal that its response to any public record request is not “final” even when it’s Clerk indicates it is, unless and until a requestor utilizes a voluntary County-created internal appeal to the County Prosecutor and the Prosecutor either refuses to alter the response or two days pass after such internal appeal has been submitted. The County then claims that no requestor can sue the County for violating the Public Records Act (“PRA”) unless the requestor utilizes this voluntary internal appeal process because the County’s Ordinance declares any non-appealed requests to not be “final.”

The County’s Ordinance, and the position proposed in this case, would turn the PRA on its head and leave requestors unable to enforce their rights under the PRA, and the County seemingly insulated from its glaring violations of the Act unless a requestor realized the illegal actions, brought them to the Prosecutor’s attention, and the Prosecutor failed to correct the illegal behavior. This position is even more troubling where, as here, the Prosecutor himself is involved in the silent and secret segregation of files and silent withholding of important public records showing illegal behavior by County officials and staff. The position further would seem to leave the County liable for PRA lawsuits years into the future as no request, that was not internally appealed, would ever be deemed “final.” The County’s position also directly contradicts binding case law from this Court, and the clear language of the PRA itself, and so must be rejected. The County’s

efforts should similarly be rejected to have the requestor and his counsel sanctioned for seeking judicial assistance to hold the elected prosecutor and County officials accountable for refusing, for years after committing to the Court it would do so, to replace its Public Records Officer with someone other than the County Commissioner who held conflicting incompatible offices as both the PRO and a Commissioner.

II. ARGUMENT AND AUTHORITY

A. The Lawsuit Was Not Premature.

The PRA requires agencies to give “full” and “prompt” assistance to requesters, and its provisions are to be liberally construed to promote transparency and accountability. *See*, RCW 42.56.520, RCW 42.56.100 and RCW 42.56.030. This Court has observed that “strict enforcement” of the provisions of the statute “should discourage improper denial of access to public records and adherence to the goals and procedures dictated by the statute.” *Hearst Corp. v. Hoppe*, 90 Wn. 2d 124, 139, 580 P.2d 246 (1978). As this Court has stated, “[i]n construing the PRA, we look at the Act in its entirety in order to enforce the law’s overall purpose. *Rental Hous. Ass’n of Puget Sound v. City of Des Moines*, 165 Wash.2d 525, 535, 199 P.3d 393 (2009). San Juan County seeks, by its own Ordinance, to deprive a requestor of the right to sue and to also declare the response to every request to not be “final” and thus still open and not eligible for a PRA lawsuit until a requestor submits a voluntary internal appeal to the Prosecutor and the

Prosecutor either refuses to change the response or two days pass since the appeal was submitted. Neither proposal is authorized by the PRA.

1. “Final Action” is a Prerequisite for Suit.

Here, the County concedes that a PRA lawsuit can be brought “after the agency has engaged in some final action denying access to a record.” *Hobbs v. State*, 183 Wn. App. 925, 935-36, 335 P. 3d 104 (2014). Likewise, all the parties here agree that an agency is free to produce responsive records in installments. Rather, the present dispute hinges on what constitutes that “final action” for the purpose of ripening the matter for judicial review pursuant to RCW 42.56.550.

2. In this Case Final Action Occurred on June 12, 2015.

The County argues that the records clerk’s email of June 12, 2015, clearly telling Mr. Kilduff his request was closed and that no further records would be produced, but in a concluding sentence inviting Mr. Kilduff to inform the County if he believed the response was incomplete, shifted the onus back on Mr. Kilduff and that, “the responsibility was Mr. Kilduff’s to request more.” CP 78, Respondents’ Br. at 15.

Mr. Kilduff points to a different portion of that same email which states “in final response to your public records request” that the attached production “fulfills your public records request...” CP 78. That statement constituted “final action”.

This Court has held that the one-year statute of limitations begins upon the “agency’s final, definitive response to a public records request”

with words sufficient to put the requestor on notice that “[r]egardless of whether this answer was truthful or correct ... was sufficient to put him on notice that the County did not intend to disclose [more] records or further address this request.” *Belenski v. Jefferson County*, 186, Wn.2d 452, 460-61, 378 P.3d 176 (2016).; *see also* RCW 42.56.550(6). In *Belenski*, this Court held “If Belenski was unsatisfied with this answer, he could sue to hold the County in compliance with the PRA as soon as it gave this response—there was no need for him to wait an additional 25 months before bringing his cause of action.” *Id.* at 461. Division Two, in *Hobbs*, held that final action is “some agency action, or inaction, ***indicating that the agency will not be providing responsive records.***” *Hobbs v. State*, 183 Wn. App 925, 935-936, 335 P.3d 1004, 1009 (Div. II 2014).

RCW 42.56.520(4) gives agencies a two-day safe harbor after a denial before a denial is deemed “final” and the agency may be sued. RCW 42.56.520(4). The two days begins after the denial, regardless of whether or not a review is actually sought or conducted. *Id.*

Here, Clerk Roger’s email of June 12, 201f that the email was “in final response to your public records request” that the attached production “fulfills your public records request” (CP 78) was the “agency’s final, definitive response to a public records request ... [and] was sufficient to put him on notice that the County did not intend to disclose [more] records or further address this request.” *Belenski*, 186, Wn.2d at 460-61). Like *Belenski*, if Mr. Kilduff “was unsatisfied with this answer he could sue to

hold the County in compliance with the PRA as soon as it gave this response—there was no need for him to wait ... before bringing his cause of action.” *Id.* at 461. The County’s self-serving statement in its Ordinance cannot trump the PRA or overrule this Court’s clear holding in *Belenski*. The County further cannot prevent its request from being “final” by adding in self-serving tag lines to its cover letters like “Let me know if you think we missed something” or “Let me know if you disagree with our production” or “Let me know if you think this production is incomplete.”

Further, the County’s current argument regarding the meaning of its Ordinance—that no response is final no matter its wording unless a requestor appeals—would mean that there would be no beginning event to trigger the one-year statute of limitations against San Juan County unless a requestor internally appealed because a un-appealed denial would not be deemed “final”. Perhaps the County has not thought through that aspect of its current argument, but it would reek havoc for the County, as well as create a different procedure, and different rules, for this County, than that demanded by this Court in *Belenski* for all agencies subject to the PRA. A County can no more demand that a requestor internally appeal before he has the right to sue in court than demand that a requestor internally appeal before a clear manifestation that the agency is done producing records to his request can be deemed “final” starting the statute of limitations clock and also giving him the right to sue.

3. The Contents and Aftermath of the Gaylord/Kilduff Phone Call.

The trial court made no finding as to whether there was a modification, agreement or waiver made during the four-minute long phone call between Prosecutor Gaylord and Mr. Kilduff on May 28, 2015. But even had Mr. Kilduff somehow agreed to modify his request (a fact which he very much disputes), the County thereafter manifested that it was responding to his request as originally made.

On June 2, 2015, Public Records Clerk Rogers emailed Kilduff that he should “expect the *response to your request for copies of all* documents, memos, statements, reports, correspondence and other records associated with the investigation of improper governmental action, related to the above referenced code enforcement file (Hughes wetland issue, Mike Thomas investigation) in another two weeks....” CP at 19. (Emphasis supplied).

At no time was Mr. Kilduff ever informed of the agreement that the County alleges it had entered into with Mr. Gaylord where he supposedly modified his request. While Mr. Gaylord did communicate at least how he himself believed the County should move forward with Mr. Kilduff’s request, he did this with Public Records Clerk Rogers, not Mr. Kilduff. Mr. Kilduff was never told of this alleged agreement and disputes its existence.

One would expect Prosecutor Gaylord, a very experienced attorney, to have communicated with Mr. Kilduff and informed Mr. Kilduff of his

understanding of the conversation. Indeed, such is the recommended practice articulated in WAC 44-14-04003(4) which provides:

Communicate with requestor. Communication is usually the key to a smooth public records process for both requestors and agencies. Clear requests for a small number of records usually do not require predelivery communication with the requestor. However, when an agency receives a large or unclear request, the agency should communicate with the requestor to clarify the request. If a requestor asks for a summary of applicable charges before any copies are made, an agency must provide it. RCW 42.56.120(2)(f). The requestor may then revise the request to reduce the number of requested copies. **If the request is clarified or modified orally, the public records officer or designee should memorialize the communication in writing.**

(emphasis added). It would be profoundly unfair to determine that, Mr. Gaylord, an experienced attorney need not confirm with Mr. Kilduff his purported oral modification in writing. And Clerk Roger's email several days after the four-minute Gaylord-Kilduff phone call contradicts the County's current claim that any limiting occurred by Mr. Kilduff.

4. Agency's Own Review Does Not Forestall Judicial Review.

a. Methods of Review and Redress Identified in the PRA

There is simply no provision in the RCW or WACs which requires requesters to comply with an agency's administrative review process or allows for such review to be sought before a response from an agency is deemed "final." Counties cannot divest courts of authority to review PRA

denials by County Ordinance.¹ Indeed, the only review process the PRA identifies other than the judicial process of Section 42.56.550 (and other than the self-check review described in Section .520(4), discussed, *infra*) occurs in section RCW 42.56.530 which directs the Attorney General to conduct a review of a state agency's denial when requested to do so by the requester. Section .530 reads in relevant part:

Whenever a state agency concludes that a public record is exempt from disclosure and denies a person opportunity to inspect or copy a public record for that reason, the person may request the attorney general to review the matter. The attorney general shall provide the person with his or her written opinion on whether the record is exempt.

Notably, even if a requester asks for the Attorney General to review a denial by a state agency, the requester is not prevented from bringing suit under Section .550 during the pendency of such a review by the Attorney General. This is because had the Legislature intended the Attorney General to have sole authority to consider the matter – and prevent suit while the matter is under reviewed, such would have been specifically provided for in the statute.²

¹ WAC 44-14-04004(4) provides:

A "denial" of a request can occur when an agency: Fails to respond to a request; Claims an exemption of the entire record or a portion of it; Without justification, fails to provide the record after the reasonable estimate of time to respond expires; or Determines the request is an improper "bot" request.

² The Legislature commonly prevents multiple reviews or enforcement action from occurring, here the Act is silent. *See for e.g.*, RCW 42.52.460 allowing for citizen's action for ethical violation in public service only if attorney general fails to bring an action; RCW 42.17A.775, prevents citizen's action for Public Disclosure violation only after notice is given to Public Disclosure Commission and Commission fails to take enforcement action. RCW 78.56.140 which prevents citizens from bringing actions for enforcement of violation

b. Model Rules Allow for Judicial Review Regardless of Appeal within Agency.

Further, the Model Rules³ promulgated by the Attorney General, expressly supports Mr. Kilduff's position. WAC 44-14-080(1) reads:

Petition for internal administrative review of denial of access. Any person who objects to the initial denial or partial denial of a records request may petition in writing (including email) to the public records officer for a review of that decision. The petition shall include a copy of or reasonably identify the written statement by the public records officer or designee denying the request.

However, WAC 44-14-080(4) specifies:

Judicial review. Any person *may obtain court review* of denials of public records requests pursuant to RCW 42.56.550 at the conclusion of two business days after the initial denial *regardless of any internal administrative appeal.*

So clearly the drafters of the Model Rules contemplated a broad and expansive role for judicial review of denials.

c. Section 42.56.520(4), .520(4) and .100

The County misreads RCW 42.56.520(4). That statute mandates what an agency *may* do, not what the requester is *required* to do. It reads:

Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, **and such review shall be deemed completed at the end of the second business day**

of various mining and milling law unless prosecution is declined.

³ The model rules are published with comments. The comments have five-digit WAC numbers such as WAC 44-14-04001. The model rules themselves have three-digit WAC numbers such as WAC 44-14-040. *See*, WAC 44-14-00002.

following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives **for the purposes of judicial review.**

In order for RCW 42.56.520(4) to operate as the County proposes, a requester would have to receive a response, appreciate that the response was somehow defective, communicate this to the agency, have the claimed error assessed and potentially rectified by the agency all within two business days. This is an absurd rendering of the statute. Requesters do not continuously hover over their emails waiting for responses, fully versed in the statutory and case law pertaining to the disclosure of public records, ready to object with cat-like reflexes to a defective tender. Requestors further do not know what they do not know, meaning they may not know if an agency, like San Juan County, has deliberately pulled responsive records from a file the same day it was requested, and hidden the records away in some newly-created “personal” file so they would not be produced. Clearly this statute was designed to give agencies a bit of breathing room to correct obvious errors and prevent “gotcha-style” suits from tenders that they can quickly identify as deficient, but it was never meant to put the onus on a requestor to make a mandatory internal appeal before the response to his request could be deemed “final” and before he could sue.

Likewise, the County’s reliance on RCW 42.56.040 does not provide agencies with authority to enact substantive rules that abrogate the

rights of requesters under the PRA. Rather that statute merely requires agencies to publish a copy of the WACs and the general rules for requesting records. It does not delegate authority to agencies to furnish their own procedures that conflict with State Law.

The same is true for RCW 42.56.100 which allows agencies to adopt and enforce “reasonable rules and regulations” but does not delegate to agencies the authority to abrogate the usual rules regarding judicial reviews of denials. In fact, Section .100 requires that “[s]uch rules and regulations shall provide for the fullest assistance to inquirers and the most-timely possible action on requests for information.” Such a sentiment is echoed in the PRA’s mandated liberal construction which provides that “in the event of a *conflict between the provisions of this chapter and any other act the provisions of this chapter shall govern.*” RCW 42.56.030 (emphasis supplied.)

B. Facts in Opening Brief are Relevant.

Respondents request that the Court “disregard the argument and unsupported assertions in Mr. Kilduff’s Statement”. Respondents’ Br. at 3. However, it is entirely unclear as to which facts and what arguments the Respondents object since according to Respondents, “responding to [Appellant’s] allegations point-by-point only suggests that they are somehow relevant”. *Id.* at 11.

While it is important to reiterate that the Court did not make a factual finding with respect to who said what or what was agreed to during the four-

minute phone call between Prosecutor Gaylord and Mr. Kilduff, the underlying factual events *are* relevant to expose the motivation for the denial, the pointlessness of any administrative appeal, and the reasons why Mr. Kilduff's claim for ouster was made in good faith.

Respondents identify with particularity two facts that they claim are superfluous and not worthy of consideration: 1) That County Prosecutor Gaylord ordered the code enforcement officer to remove the IGA documents from the enforcement file; and, 2) that Manager Mike Thomas is indisputably unqualified to make determinations as to whether a classified wetlands exists or how such can be rated. *Id.* at 10 and 11.

Both of these facts are undisputed and highly relevant. The first is relevant because it is evidence that Prosecutor Gaylord had an interest in preventing the public from obtaining the responsive documents and calls into doubt the legitimacy of the County's proposed review process. In other words, the Court should consider that the proposed administrative appeal pursuant SJCC 2.108.130 is supposed to be made to the official who has a demonstrated interest in the outcome of the request and (as discussed more fully below) still maintains that the records Mr. Kilduff sought are not properly disclosable.⁴

⁴ It bears noting, the duties of a prosecutor enumerated in RCW 36.27.020 do not include as acting in a review capacity envisaged by SJCC 2.108.130, and as such are an *ultra vires* delegation of the Council's authority.

Likewise the second fact to which the County objects (Manager Thomas's lack of qualification) is validly considered by this Court since not only does it establish a motive and an explanation for the County's unwillingness to tender the records as doing so would show the concerted effort by Council Members and its executive staff to coordinate a "favor" for a specific member of the public, but it *also* demonstrates that Mr. Kilduff's claim for ouster was made in good faith since it was this contorted supervisor/supervisee relationship between Manager Thomas and Council Member Stephens which prevented the extra-judicial resolution of Stephen's holding of his two incompatible offices. Appellant addresses each in turn.

1. Prosecutor Gaylord's Order to Sanitize the Code Enforcement File Because it was "Personal".

According to Maycock's memorialization of the events of May 12, 2015, "The PA [Prosecuting Attorney Gaylord] then stated again he thought Chris [Code Enforcement Officer Laws] was being 'difficult' and that file maintenance was part of his job and refusal to do [remove the files] appeared to be insubordination." CP 260. Maycock goes on and reports "The PA stated that he had told Chris at the beginning to keep separate files and repeated that *all documents relating [sic] the IGA were 'personal'*".
Id.

Prosecutor Gaylord has continued to take this position – that the IGA documents were the “personal” records of the Code Enforcement Officer even after the suit was filed.

Q: In that context did you become familiar with the code enforcement file that was requested by Mr. Kilduff?

Pros. Gaylord: Yes, I did become familiar with that code enforcement file.

Q: Can you tell us what the status of the code enforcement file was on the day it was requested May 2, 2015?

Pros. Gaylord: Yes, earlier that day that the code enforcement file was in my office, and my legal assistant reorganized the file because the Code Enforcement Officer declined instruction from his superior to reorganize the file, and so the file was reorganized by my office. A copy was made and the file was returned to the Department of Community Development.

Q: Can you explain why it needed to be reorganized?

Pros. Gaylord: It needed to be reorganized because it contained personal items in the file. Personal items needed to be removed from the file.

Q: Why was your office involved in the reorganization of the file?

Pros. Gaylord: Those personal items dealt with confidential records that my office was familiar with. So my office could reorganize that file rather than anybody else because they already knew about those documents. Those were documents concerning an Improper Governmental Action report that was made but somehow was related to this code enforcement file.

RP 2/17/17 47-48.

What this indicates is that contrary to San Juan County's assertion that these documents would have been provided to Mr. Kilduff had he simply asked for them⁵ from Prosecutor Gaylord, is not true because Prosecutor Gaylord has taken the position – even post suit being filed – that they were personal and therefore not subject to inspection. As the examination continued, Prosecutor Gaylord again took the position that the records were the personal property of the Code enforcement officer.

Q: So the Code Enforcement Officer would only be the custodian officer of the code enforcement file; is that your testimony?

Pros. Gaylord: Correct.

Q: But you gave Mr. Laws back – is it Law or Laws?

Pros. Gaylord: Laws.

Q: You gave Mr. Laws back the part that you pulled out of this file?

Pros. Gaylord: Those were *his records*.

Q: What personal information was in the file?

Prosecution Gaylord: I would like to speak with counsel before answering that question.

RP 2/17/17 at 65 (emphasis supplied).

After a short recess, where Prosecutor Gaylord was permitted to consult with his team of attorneys, Prosecutor Gaylord continued to

⁵ Indeed, to this day the County has never provided to Mr. Kilduff all the records that were responsive to his request. For example, the Maycock email of May 25 was never provided. Moreover, at least some of the records that were supplied Mr. Kilduff – post suit – were not the records in the IGA, but records produced from a later litigation file. See for e.g., CP 113-114.

maintain that he could not describe what had been removed since to do so would reveal the “identity of who the whistleblower is”.⁶ RP 2/17/17 at 70. This claim is belied by the May 25, 2015 Maycock email where it is specifically described that Mr. Laws – the whistleblower himself – was adamant that the records were not his personal files and that they properly belonged in the file.⁷ CP 260. In other words, Prosecutor Gaylord’s explanation that disclosure was prohibited by the whistleblower protection statute RCW 42.41 is simply a pretext for non-disclosure.

Finally, Prosecutor Gaylord suggested to the trial court that the “personal records” be submitted to the trial court for *in camera* review. RP 2/17/17 at 73. But for reasons unknown to the Appellant, these records have never been submitted to *any* court for review and have – to this day – escaped review entirely. Accordingly, the record clearly demonstrates the patent falsity of the notion that had Mr. Kilduff simply asked Prosecutor Gaylord to review the records that all would have been disclosed. This Court has repeatedly held that if resort to the administrative procedures would be futile, exhaustion is not required. *Hollywood Hills Citizens v.*

⁶ This notion should be summarily rejected. First, during the examination of Prosecutor Gaylord, Code enforcement Officer Laws’ role had already been identified – it was no secret who had made the IGA claim. Moreover, Prosecutor Gaylord had already identified Officer Laws to the subjects of Officer Laws’ allegations within one week of the report of IGA being made. See CP 148, 69-75.

⁷ See also, the job description for the Code Enforcement Officer which provides that the position “[p]repares and maintains case logs documentation and computerized records of all actions taken in every case.” CP 295-296

King County, 101 Wn.2d 68, 74, 677 P.2d 114 (1994), citing *Zylstra v. Piva*, 85 Wn.2d 743, 539 P.2d 823 (1975).

2. Manager Thomas's Lack of Qualification is Relevant to PRA Claim and Shows Good Faith Basis for Ouster Claim.

It is not in dispute that Manager Thomas was not qualified to conduct the wetland evaluation of the Hughes' parcel. CP 74. It is also not in dispute that he was directed by County Council Member Jarman to conduct this evaluation. CP 71-75. Like the facts pertaining to Prosecutor Gaylord's direction to sanitize the file discussed above, these facts further establish that the County had an interest in not disclosing the records to Mr. Kilduff.

The more nuanced implication of Manager Thomas' lack of qualification, however, is that it is a key fact in a circumstances that unquestionably establish that Mr. Kilduff's claim for ouster was made in good faith since all avenues to redress Mr. Stephen's illegal simultaneous occupation of incompatible offices had been compromised by conflict and Mr. Kilduff therefore reasonably sought judicial redress.

San Juan County is governed by a three-member County Council. Council Member Jarman was clearly conflicted from ensuring Stephen's removal since he was the one that had directed Manager Thomas (Stephen's Supervisor as PRO) to go and evaluate Jarman's neighbor's wetland. Likewise, Council Member Stephens was conflicted because he was the one holding the two incompatible offices. So there remained only one

potentially non-conflicted Council Member. Given that this solitary member would not have authority to direct his fellow member to abandon his office or direct Manager Thomas to fire Stephens (as PRO), and given that Prosecutor Gaylord was similarly conflicted as described above there was simply no uncompromised path to resolution available. Neither the Prosecutor, or the Council, nor the County Manager would have sought to rectify the incompatibility because each and every one of these actors was conflicted.

In evident recognition of the correctness of the substance of Mr. Kilduff's argument that Mr. Stephens could not serve in both offices the prosecutor's office represented to the trial court that Mr. Stephens would cease being the PRO at the end of the 2015 fiscal year. Deputy Prosecuting Attorney Jon Cain represented to the court:

You know, as -- as an aside, Mr. Stephens is the interim public records officer. As you're likely aware, it's budget season at counties around this state now, and we expect a new one will be appointed by the end of the year.

RP 9/15/16 at 14.

Despite this representation to the trial court—now more than three and a half years ago—Mr. Stephens **still** occupies his two incompatible offices **to this day**. The County Prosecutor has never sought to remove him. While this Court may agree that Mr. Kilduff's claim for ouster is ultimately unsuccessful, it was clearly based in fact and not interposed for an improper purpose and is, therefore, not sanctionable pursuant to CR 11.

Appellant's second claim of error is that the trial court imposed sanctions pursuant to CR 11 and RCW 4.84.185⁸ on Mr. Kilduff and his attorneys for bringing a frivolous claim for ouster. Here, Mr. Kilduff made a good faith argument that was well grounded in both fact and law why the usual rule that only a prosecuting attorney or a person with a claim to the target office may seek ouster should be relaxed under the present circumstances.

Appellant hopes that the Court after reviewing the record can appreciate the coziness of San Juan County's government and hopes it can understand the unfairness and frustration of citizens like Mr. Kilduff of having no ability to address the problem of their public officials occupying two incompatible offices, and thus ultimately adequately serving the public in neither.

"Complaints which are "grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" are not "baseless" claims and are therefore not the proper subject of CR 11 sanctions." *Bryant v. Joseph Tree, Inc.* 119 Wn. 2d 210, 220-21 (1992).

⁸ From its responsive briefing, it appears that the County concedes that RCW 4.84.185, is not a basis for sanctions. As explained in the Appellant's opening brief fees pursuant to RCW 4.84.185 require an entire case to be frivolous. Its citation by the trial court where clearly inappropriate is indicative of an abuse of discretion with respect to the CR 11 basis for sanctions.

Appellant's claim for ouster may not ultimately carry the day. Appellant however, did not interpose the claim in bad faith. It was not intended to cause Mr. Stephens distress, embarrassment or cost. Rather, it was brought in a good faith attempt to remedy what is contrary to the public policy of Washington—a public official holding a dominant and subordinate office at the same time. Appellant submits that the factual circumstances present in this case makes Appellant's request for judicial enlargement of Washington's ouster laws was reasonable and well within the bounds of acceptable practice. The facts of this case demonstrate that Mr. Kilduff had nowhere else to turn, and that absent the judicial intervention he sought, San Juan County residents still, three and a half years after the County committed in Court to replace Stephens as the PRO, Stephens still serves as the PRO and a County Commissioner, and thus his boss's boss, as well as his boss's subordinate.

Appellant is fearful that should this Court uphold the trial court's determination of sanctions that action will have exactly the chilling effect that *Bryant* cautions against. This is not a commercial case where a claimant is trying to exhaust the resources of an adversary by bringing marginal or otherwise frivolous claims. Rather, this is a case about the transparency, accountability and structure of the people's government, brought by a litigant through contingent fee counsel investing their time and resources to help the litigant remedy a significant public wrong. The County can point to nothing in the record that demonstrates that Appellant

brought the ouster claim for an improper purpose, or that the County, which could have resolved the issue by appointing a PRO who was not a County Commissioner, was truly harmed. And Appellant rightfully looked to the courts for assistance when he had no other avenue for help. Sanctioning attorneys who take on accountable government cases on a contingency fee basis will necessarily have a further chilling effect on the willingness of lawyers to take such cases, and sanctioning litigants willing to step up and take on such governmental abuses will frighten away the future heroes such as Mr. Kilduff willing to challenge such actions. Accordingly, this Court should reverse the award of sanctions.

III. CONCLUSION

For the foregoing reasons, the Court should reverse the trial court, award Mr. Kilduff his fees and costs on appeal and remand for further proceedings on his PRA claim, including an appropriate award of fees, costs and penalties at the trial court level and an order compelling the County to produce records which still have not been produced.

Respectfully submitted this 6th day of June 2019.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that today I e-filed and delivered a copy of the foregoing **Reply Brief of Appellant** by email pursuant to an electronic service agreement among the parties to the following:

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