

67275-4

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NO. 67275-4

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

Resident Action Council,

Plaintiff/Respondent,

v.

Seattle SHA,

Defendant/Appellant.

BRIEF OF RESPONDENT RESIDENT ACTION COUNCIL

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I. Introduction

Defendant-Appellant Seattle Housing Authority (or SHA) is a local government agency that operates about 6,000 units of federally-subsidized “public housing” for low-income people in Seattle. Plaintiff-Respondent Resident Action Council (or RAC) is an organization of tenant leaders who reside in SHA’s public housing facilities. This appeal arises out of a public records request RAC sent to SHA in June 2010.

RAC submitted that records request after receiving information calling into question the fairness of SHA’s public housing “grievance hearings,” administrative tribunals SHA holds to resolve disputes with tenants over such matters as rent increases, apartment sizes, and lease terminations. To investigate the problem, RAC asked for copies of written grievance decisions for the preceding three years, and copies of SHA’s contracts with the external hearing officers who preside at the hearings.

SHA produced substantially all of the documents RAC asked for, but with a considerable amount of information redacted. SHA provided no explanation of the reasons or legal grounds for the redacted material. But from the surrounding context, RAC was able to discern that some of the redacted items were names of SHA tenants, staff, and witnesses who participated in the grievance hearings, other redacted items were addresses and names of streets and buildings, and still other redacted items could not

be meaningfully classified—including things like dates, SHA letterhead, and a newspaper headline.

On many records, SHA carried out the redactions in a manner that rendered the remaining contents practically indecipherable. But in other instances, the redactions were haphazard or incomplete. SHA also provided the records in paper form, rather than electronic (as RAC had requested), and billed RAC for a significant number of duplicates, non-responsive items, and unauthorized fees. And when RAC sent SHA a letter asking SHA to correct these shortcomings, SHA did not respond. RAC therefore brought suit under the Public Records Act, both to compel production of the improperly-withheld materials, and to correct several deficient policies and practices RAC had observed in SHA's handling of their records request.

After an initial hearing, the superior court found SHA had indeed withheld records from RAC unlawfully, and ordered SHA to correct its improper redactions, explain any remaining redactions, and produce the corrected documents electronically. Then, after SHA brought a series of unsuccessful motions for discretionary review, the superior court awarded statutory damages and costs to RAC and ordered SHA to establish appropriate policies and procedures for responding to future public records requests. All of those rulings should be affirmed.

II. Statement of the Case

Seattle Housing Authority (SHA) is a government body that operates about 6,000 units of federally-subsidized “public housing” in Seattle.¹ SHA is a type of entity known as a “housing authority” under state law, and analogously as a “public housing agency” (or “PHA”) under federal law.² Housing authorities are “agencies” subject to the Public Records Act.³ The Resident Action Council (RAC) is an organization of tenant representatives that serves the residents of SHA public housing.⁴

A. RAC’s public records request and SHA’s response.

RAC sent its public records request to SHA on June 17 and 18, 2010.⁵ The request asked SHA for copies of “[a]ll written decisions from grievance hearings conducted in connection with SHA’s public housing program since June 17, 2007,” and copies of the contracts between SHA and hearing officers who presided over grievance hearings during that same period.⁶ RAC asked SHA to produce the records electronically.⁷

¹ CP at 124; see 42 USC 1437 (U.S. Housing Act of 1937, establishing public housing).

² See 24 CFR 5.100 (“Public Housing Agency (PHA) means any State, county, municipality, or other governmental entity or public body, or agency or instrumentality of these entities, that is authorized to engage or assist in the development or operation of low-income housing under [42 USC 1437].”); see RCW 35.82.030 (establishing “housing authorities”).

³ See RCW 42.56.010(1).

⁴ CP at 165.

⁵ CP at 39-41, 94.

⁶ CP at 41 (requesting “[a]ll written decisions from grievance hearings conducted in connection with SHA’s public housing program since June 17, 2007; and [a]ll contracts, agreements, polices, or similar documents between SHA and any person who served as a

SHA's Public Records Officer, Nancy Sundt, provided records in response to RAC's request on July 1, 2010.⁸ Sundt delivered paper copies of the records, rather than electronic.⁹ SHA enclosed a bill for \$123.00, representing 820 pages of copies (at 15¢ per-page) and an additional \$10 "messenger fee."¹⁰ More than 290 pages of the (820-page) response were duplicates or documents irrelevant to RAC's request.¹¹

The records SHA produced included copies of the hearing officer contracts and fifty-seven public housing grievance decisions.¹² Upon reviewing the materials, RAC noticed that SHA had redacted extensive information from the hearing decisions.¹³ SHA provided no explanations for any of the redactions.¹⁴ RAC was able to determine that most of the missing information was names, including names of people (like tenants, SHA staff, attorneys and advocates, police officers and other witnesses), and name of place (like addresses, street and building names, and ZIP Codes).¹⁵ But some redacted information included such things as SHA letterhead, the title of a newspaper article, and the date of an eviction

hearing officer for a grievance hearing conducted in connection with SHA's public housing program since June 17, 2007.").

⁷ CP at 39, 41.

⁸ CP at 29, 95.

⁹ CP at 29, 95-96.

¹⁰ CP at 29, 167.

¹¹ CP at 29, 167.

¹² CP at 30, 166.

¹³ CP at 30. SHA did not redact any information from the hearing officer contracts.

¹⁴ CP at 30, 166.

¹⁵ CP at 31.

notice.¹⁶ SHA did not preserve initials of redacted names, replace any of the redactions with codes or symbols, or use any other method to enable a reader to distinguish references to one redacted item from references to other redacted items—thus making the remaining contents of many decisions extremely difficult or impossible to understand.¹⁷ In other instances, SHA left names and addresses unredacted, or redacted the information so poorly that it could still be easily read.¹⁸

B. RAC’s lawsuit and show-cause motion.

RAC sent SHA a letter on July 6, 2010, objecting to the excess charges and unexplained redactions (among other things), and requesting corrective measures.¹⁹ When SHA did not respond to the letter, RAC brought suit under the Public Records Act (hereafter “PRA” or “the Act”) in King County Superior Court on July 21, 2011.²⁰ The superior court scheduled a hearing on August 17, 2011, for SHA to show cause why it

¹⁶ CP at 50, 52, 56, 61, 67, 166.

¹⁷ CP at 32, 60-65; see also CP at 171; see *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 421; 138 P.3d 1053 (2006) (upholding an order directing the redaction of names from records produced in discovery that directed the use of “identifying numbers or codes” to be substituted for redacted names. “Identifying numbers or codes shall be individual to each alleged perpetrator, so that any alleged multiple offenders can be identified.”).

¹⁸ CP at 32, 73-85.

¹⁹ CP at 48, 167.

²⁰ CP at 3-7; see RCW 42.56.

had redacted the records.²¹ The show cause hearing was continued, at SHA's request, to September 28, 2011.²²

After the show cause hearing, the superior court entered an order finding that SHA had unlawfully withheld information from RAC through improper redactions, and directing SHA to produce copies of the requested grievance decisions with "[o]nly names and identifying information of SHA tenants . . . redacted."²³ The superior court also ordered SHA to provide explanations for any remaining redactions, replace redacted names with distinguishing marks, and produce the records "in electronic format for the same charge as paper copies."²⁴ The order, dated October 7, 2010, gave SHA more than three weeks to fulfill these requirements.²⁵

The October 7, 2010, order additionally declared that RAC was "entitled to costs, fees, and damages pursuant to RCW 42.56.550(4)," but commanded the parties to submit supplemental briefs and documentation

²¹ CP at 88-89; see RCW 42.56.550(1) ("Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records.").

²² RP at 3-9.

²³ CP at 171.

²⁴ CP at 171.

²⁵ CP at 171 ("Production shall occur by October 29, 2011.).

concerning the amount.²⁶ The order also provided RAC a limited time in which to submit additional briefing on its request for injunctive relief.²⁷

C. SHA seeks interlocutory review.

Following the superior court's ruling, SHA filed a notice for discretionary review, seeking to challenge the October 7, 2010, order on an interlocutory basis in this Court.²⁸ At that time, the parties stipulated to an order delaying further proceedings in the superior court until after the Court of Appeals decided on SHA's motion for discretionary review.²⁹

A Court of Appeals Commissioner denied SHA's motion for discretionary review on December 16, 2010.³⁰ SHA filed a motion to modify that order, but the panel affirmed the Commissioner's ruling on March 25, 2011.³¹ SHA then filed a motion for discretionary review in the Supreme Court, under RAP 13.5, seeking review of the Court of Appeals' decision not to review the superior court's ruling.³² The Supreme Court denied that request for review on June 8, 2011.

²⁶ CP at 171 ("RAC is entitled to costs, fees, and damages pursuant to RCW 42.56.550(4). The amount shall be determined upon supplemental briefing of the parties, including supporting documentation.").

²⁷ CP at 171-172 ("The issue of injunctive/remedial relief against SHA is reserved, pending the provision of further authority . . . Should RAC wish to continue to pursue this issue, a motion and supplemental briefing shall be provided to the court.").

²⁸ CP at 173. Though incorrectly titled "Notice of Appeal," the notice was later treated as one for discretionary review per RAP 5.1(c). CP at 184.

²⁹ CP at 183-188.

³⁰ CP at 228-233.

³¹ CP at 234.

³² CP at 280; see RAP 13.5.

D. The superior court grants injunctive relief and awards damages, costs, and attorney fees.

On April 8, 2011, RAC proceeded in the superior court with a motion for injunctive relief and to establish the amount of damages.³³ This motion was filed after the Court of Appeals had denied SHA's motions for discretionary review and for modification of the order denying discretionary review, but before the Supreme Court had ruled on SHA's motion for review (of the Court of Appeals' denial of review). SHA asked the superior court to suspend proceedings on RAC's motion for damages and injunctive relief pending the outcome of the Supreme Court motion, but the superior court declined.³⁴

The superior court decided RAC's motion on May 13, 2011. The ruling set RAC's damages at \$25 per day, beginning July 1, 2010, and granted the motion for injunctive relief.³⁵ The injunction commands SHA to publish procedures for requesting public records from SHA and a list of exemptions applicable to SHA, to establish procedures for redacting grievance decisions properly and for providing written explanations whenever SHA withholds records, and to provide "reasonably locatable or translatable" records in electronic format when requested in that format.³⁶

³³ CP at 189-212.

³⁴ CP at 235, 285.

³⁵ CP at 305-311.

³⁶ CP at 310.

The superior court later awarded RAC costs and attorney fees following a separate motion, which SHA did not contest.³⁷

III. Statement of Issues

1. The Public Records Act entitles any person to inspect or copy a public record, unless the record is exempt under some law. A federal regulation, codified at 24 CFR 966.57(a), requires public housing agencies to make the written decisions from administrative hearings on public housing tenant grievances available to prospective complainants, their representatives, hearing panels and hearing officers. Does this regulation limit access to grievance hearing decisions to prospective complainants, representatives, hearing panels and hearing officers *only*, thus preempting the Public Records Act?

2. The same regulation, 24 CFR 966.57(a), requires public housing agencies to redact “names and identifying information” from grievance decisions before making those records available to people other than housing authority staff or the tenant involved in the grievance. The superior court interpreted this provision to require redaction of only the names and identifying information of public housing residents. Did the superior court interpret this regulation accurately?

³⁷ CP at 312-326, 329-330.

3. When the superior court found that SHA had redacted the public records RAC requested more heavily than permitted by law, the superior court ordered SHA to fix the improper redactions and produce corrected copies of the documents to RAC. Did this order impermissibly require SHA to create non-existent records?

4. SHA has the equipment and technical expertise to scan and e-mail public records, and can do so at no greater cost than to photocopy and deliver paper records. However, SHA denies owing any duty to provide records in electronic format. Did the superior court correctly find that, in SHA's case, the duty to provide fullest assistance to requesters includes providing reasonably locatable and reasonably translatable records in electronic format when requested in that format?

5. The Public Records Act requires an agency that withholds or redacts public records to provide written justifications for withholding information with the agency's response to the records request. SHA withheld the unredacted grievance decisions it keeps in tenant folders but did not explain why these records were withheld; SHA did produce redacted copies of grievance decisions from a separate file, but did not provide written explanations of what it had redacted and why. Did SHA's lack of written justifications violate the Public Records Act?

6. When a person is wrongly denied access to a public record, or other response required by the PRA, the superior court must award damages. Did the superior court properly award damages to RAC?

7. The Public Records Act requires all agencies to have “published rules” for making their records available to the public for inspection and copying. The Act also requires agencies to prepare an informational list of laws believed to exempt agency records from public access. SHA never published rules for public disclosure or a list of exemptions. Did the superior court abuse its discretion by ordering SHA to publish rules for public disclosure and a list of exemptions?

8. When RAC filed its motion to establish the amount of its damages and for injunctive relief, SHA moved for a continuance pending the outcome of its petition for discretionary review in the Supreme Court. Did the superior court err in denying the continuance?

9. After that continuance was denied, SHA filed and served a brief in response to RAC’s motion (for damages and injunctive relief). The brief was seven days late, and also beyond the deadline for RAC to submit rebuttal materials. The superior court struck SHA’s untimely brief. Did the superior court err in striking the brief?

IV. Argument

The first set of issues SHA raises concerns public access to grievance decisions and the superior court's determination that SHA improperly redacted information from those records. Review of an order concerning an agency's withholding of public records is de novo.³⁸

A. Under the Public Records Act, Seattle Housing Authority should have provided copies of the public housing grievance decisions to the Resident Action Council with only names and identifying references of SHA public housing tenants redacted.

Public housing grievance hearings are quasi-judicial administrative tribunals that are held to resolve “any dispute which a tenant may have with respect to [housing authority] action or failure to act in accordance with the individual tenant's lease or PHA regulations which adversely affect the individual tenant's rights, duties, welfare or status.”³⁹ The hearings are governed by a series of U.S. Department of Housing & Urban Development regulations codified at 24 CFR part 966(B).⁴⁰ One regulation, 24 CFR 966.57, directs the hearing officer (or hearing panel) who hears a grievance to “prepare a written decision, together with the reasons therefor, within a reasonable time after the hearing.”⁴¹ SHA held

³⁸ *Mechling v. City of Monroe*, 152 Wn. App. 830, 841; 222 P.3d 808 (2009).

³⁹ See generally 24 CFR 966.56-57; see also *King County Housing Authority v. Saylor*, 19 Wn. App. 871, 873-874; 578 P.2d 76 (1978); see also *Shepherd v. Weldon Mediation Services, Inc.*, 794 F.Supp.2d 1173, 1183-84 (W.D.Wash. 2011).

⁴⁰ See 24 CFR 966.50-57; see also 42 USC 1437d(k).

⁴¹ 24 CFR 966.57(a).

about fifty-seven grievance hearings within the time period of RAC's records request.⁴²

1. Public housing grievance decisions are public records and presumptively subject to public disclosure under the PRA.

Grievance decisions easily meet the definition of "public records" under the Public Records Act, which "includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."⁴³ At SHA, the grievance decisions are prepared by SHA hearing officers and retained in SHA files.⁴⁴ And in most instances, the grievance decisions relate to the conduct and performance of SHA functions because they are "binding on the PHA which shall take all actions, or refrain from any actions, necessary to carry out the decision."⁴⁵

The PRA makes all public records presumptively open to any person for inspection and copying.⁴⁶ Since they are public records, this presumption applies to public housing grievance decisions as well. SHA could lawfully withhold the grievance decisions, or portions thereof, from

⁴² CP at 166.

⁴³ RCW 42.56.010(2).

⁴⁴ CP at 95, 147-148.

⁴⁵ 24 CFR 966.57(b).

⁴⁶ See RCW 42.56.080 ("Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person..."); see also RCW 42.56.070 (Agency must make all public records available for inspection and copying, except records specifically exempt by law).

public examination only if the records fell “within the specific exemptions of [the PRA] or other statute which exempts or prohibits disclosure of specific information or records.”⁴⁷

2. 24 CFR 966.57(a) does not preempt the Public Records Act.

SHA argues, for the first time on appeal, that the Public Records Act does not apply to public housing grievance decisions.⁴⁸ SHA does not deny that grievance decisions are public records, but asserts instead that 24 CFR 966.57, the same federal regulation as mentioned above, exclusively controls access to grievance decisions—effectively preempting the PRA. If the Court considers this new argument, it should reject it.

The regulation instructs housing authorities to keep two copies of each grievance decision: one for the “tenant’s folder,” and another copy, “with all names and identifying references deleted,” in a separate file.⁴⁹ A housing authority must make its file of redacted decisions “available for inspection by a prospective complainant, his representative, or the hearing panel or hearing officer.”⁵⁰ SHA argues that HUD, by including this list of people entitled to access grievance decisions, has implicitly *denied*

⁴⁷ RCW 42.56.070(1).

⁴⁸ See Br. of Appellant at 14, 18-19.

⁴⁹ 24 CFR 966.57(a). (“The PHA shall retain a copy of the decision in the tenant's folder. A copy of such decision, with all names and identifying references deleted, shall also be maintained on file by the PHA and made available for inspection by a prospective complainant, his representative, or the hearing panel or hearing officer.”).

⁵⁰ 24 CFR 966.57(a).

access to anyone *not* listed (i.e., other than prospective complainants, representatives, hearing panels or hearing officers).⁵¹ But it is unlikely HUD intended any such limitation—and even if HUD did so intend, the Court should not find preemption because there is no conflict between the regulation and the PRA.

a. No express or field preemption has occurred.

Federal preemption of state law may occur in three basic ways:

“express preemption, field preemption, and conflict preemption.”⁵²

Express preemption has not occurred because the federal regulation SHA has identified does not contain any language expressly preempting the PRA, either broadly or with specific respect to grievance decisions, and no such language is believed to exist in any other law.⁵³ Field preemption, which occurs when a federal law occupies an entire field of regulation so pervasively as to leave no room for states to supplement it,⁵⁴ has not occurred because Congress has expressly anticipated that individual public

⁵¹ Br. of Appellant at 14.

⁵² See *P.A.W.S. v. University of Washington*, 125 Wn.2d 243, 265; 884 P.2d 592 (1995) (burden of proving preemption is on party asserting it).

⁵³ See *P.A.W.S.* at 265.

⁵⁴ See *Inlandboatmen's Union v. Dep. of Transp.*, 119 Wn.2d 697, 705; 836 P.2d 823 (1992) (Field preemption requires “an unambiguous congressional mandate” to preempt state regulation in a particular field, and courts are reluctant to find such preemption even when a comprehensive federal regulatory scheme exists).

housing agencies *would* establish and implement local procedures to supplement the federal grievance hearing scheme.⁵⁵

b. No conflict preemption as 24 CFR 966.57(a) is easily reconciled with the Public Records Act and the PRA does not undermine its purpose.

Conflict preemption, the one remaining form of preemption, arises when “state law conflicts with federal law due to impossibility of compliance with [both] or when state law acts as an obstacle to the accomplishment of the federal purpose.”⁵⁶

SHA cannot demonstrate conflict preemption through impossibility of compliance with both state and federal laws. Both 24 CFR 966.57(a) and the Public Records Act are permissive. The PRA allows “any person” to access public records, which includes grievance decisions.⁵⁷ The HUD regulation allows certain people (i.e., prospective complainants, their representatives, hearing officers, and hearing panels) to access grievance decisions. But neither provision authorizes access to a person the other excludes, nor vice-versa. A housing authority that allows prospective complainants, representatives, hearing officers, or hearing panels to access grievance decisions complies with both the HUD regulation and the PRA;

⁵⁵ See 42 USC 1437d(k) (directing Secretary of HUD to “by regulation require each public housing agency receiving assistance under this chapter to establish and implement an administrative grievance procedure under which tenants will ... (6) be entitled to receive a written decision by the public housing agency on the proposed action.”).

⁵⁶ See *P.A.W.S.* at 265.

⁵⁷ See RCW 42.56.080(1); see also RCW 42.56.010(2).

a housing authority that allows *any* person to access grievance decisions also complies with PRA, and does not violate the HUD regulation.⁵⁸

Finally, the Public Records Act is not an obstacle to accomplishing the purposes of 24 CFR 966.57(a). HUD, in promulgating that regulation, had two distinct purposes in mind. One goal was to protect tenant privacy. The other was to ensure that tenants, advocates, and hearing officers could review past grievance decisions in preparing for or adjudicating later cases.⁵⁹ Allowing the general public to access grievance decisions, as the PRA does, would not undermine either of these objectives.

Full public openness would actually promote, not frustrate, HUD's goal of ensuring future hearing participants and hearing officers access to the decisions. And HUD adequately protected tenant privacy by directing public housing agencies to redact names and identifying references from prior decisions before releasing them, and to keep the unredacted copies in (presumably private) tenant files.⁶⁰ No honest reading of the regulation could lead to a conclusion that HUD intended to protect tenant privacy

⁵⁸ See, accord, *P.A.W.S.* at 267 (agency could comply with both PRA and a federal statute authorizing the withholding of certain records by releasing the records, because the federal statute “merely authorize[d], rather than mandate nondisclosure[.]”).

⁵⁹ See 24 CFR 966.57(a).

⁶⁰ See 24 CFR 966.57(a). The regulation does not specify who may access the contents of tenant files, but the regulation does strongly imply that access to the tenant folders is much more limited than to the separate file of redacted decisions. SHA claims that “SHA policies and HUD regulations require SHA to keep the grievance-hearing decisions strictly confidential,” but does not cite any specific regulations or policies to that effect. See Br. of Appellant at 6.

even further by allowing *only* prospective complainants, representatives, hearing panels or hearing officers to access the redacted copies.

Indeed, at SHA the pool of just “prospective complainants” alone includes any person living in one of 6,000 public housing dwelling units—and almost anyone could potentially serve as a tenant’s “representative.”⁶¹ It is inconceivable that HUD would have authorized the release of redacted grievance decisions to such a broad and numerous group unless HUD believed redaction alone would sufficiently protect tenant privacy.

As the Supreme Court has repeatedly emphasized, “there is a strong presumption against finding preemption in an ambiguous case and the burden of proof is on the party claiming preemption.”⁶² SHA has not demonstrated a basis for preemption here. The Court should conclude that the public—including RAC—was entitled by the PRA to access some version of the grievance hearing decisions.⁶³ Which versions, and in what form, are the questions to which we turn next.

3. SHA failed to justify withholding public records from RAC.

⁶¹ CP at 124; see 24 CFR 966.56(b) (“The complainant shall be afforded a fair hearing, which shall include: ... (2) the right to be represented by counsel or other person chosen as the tenant’s representative...”).

⁶² *P.A.W.S.*, 125 Wn.2d at 265, quoting *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 327; 858 P.2d 1054 (1993).

⁶³ Even if the Court does accept SHA’s contention that RAC’s right of access arises under 24 CFR 966.57(a) only (i.e., as prospective complainants or as representatives thereof), RAC fails to see why the Public Records Act and cases interpreting it should not guide the application of that regulation in Washington. SHA has proposed no alternative standards governing the interpretation of 24 CFR 966.57(a).

An agency that receives a request to inspect or copy a public record must produce it unless the record is subject to an exemption.⁶⁴ An agency that withholds a record, including any part of a record (e.g., by redaction), must justify the withholding.⁶⁵ SHA did not produce the grievance decisions stored in the tenant folders, and later claimed that the entire contents of those folders are exempt under RCW 42.56.230(1).⁶⁶ SHA produced the redacted copies from the separate file, and ultimately justified the redactions on the basis of 24 CFR 966.57(a).⁶⁷

The superior court agreed with SHA that the copies of decisions kept in tenant files are exempt under RCW 42.56.230(1), a provision that applies to “personal information” in files on students, hospital patients, welfare recipients, and other “clients of public institutions.”⁶⁸ This ruling limited RAC’s access to just the separate file of decisions.

Though SHA did produce the redacted copies from the separate file, not all of the redactions SHA made to those records were allowed by

⁶⁴ See RCW 42.56.070(1).

⁶⁵ See RCW 42.56.210(3) (“Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.”); see also RCW 42.56.070(1) (“[I]n each case, the justification for the deletion shall be explained fully in writing.”).see also *Sanders v. State*, 169 Wn.2d 827, 848; 240 P.3d 120 (2010).

⁶⁶ CP at 127-141, 168-170.

⁶⁷ CP at 94-97.

⁶⁸ RCW 42.56.230 states, in relevant part: “The following personal information is exempt from public inspection and copying under this chapter: (1) Personal information in any files maintained for students in public schools, patients or clients of public institutions or public health agencies, or welfare recipients[.]”.

24 CFR 966.57(a), and no other law permitted those excess redactions.⁶⁹ The superior court therefore ordered SHA to provide RAC copies of the decisions with the improperly-redacted contents restored.⁷⁰ The superior court had ample authority to make this order under RCW 42.56.550.⁷¹

4. 24 CFR 966.57(a) allows SHA to withhold the names and identifying references of SHA public housing tenants only.

As mentioned above, HUD directs public housing agencies to delete “all names and identifying references” from the grievance decisions in the separate file.⁷² As SHA points out, this text is somewhat ambiguous and, being nowhere further explained either by HUD or any interpreting court decision, its meaning appears to be an issue of first impression for this Court.⁷³ But RAC believes the superior court reached the correct interpretation when it construed the regulation’s parameters narrowly, to encompass only “names and identifying information of SHA tenants.”⁷⁴ The removal of other information, such as “names of SHA employees, witnesses to the proceedings, Seattle Police Officers, and a newspaper

⁶⁹ CP at 166, 169-170.

⁷⁰ CP at 171.

⁷¹ See RCW 42.56.550(1) (“[T]he superior court . . . may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute . . .”).

⁷² 24 CFR 966.57(a).

⁷³ See 24 CFR 966.57(a); see Br. of Appellant at 15.

⁷⁴ CP at 166, 171.

article,” was not authorized under this interpretation.⁷⁵

The superior court’s interpretation of the exemption was consistent with HUD’s objective of protecting tenant privacy, which deleting names of SHA personnel, third-party witnesses, building names, and ZIP codes would not advance. The interpretation was also consistent with the PRA, under which exemptions from disclosure are narrowly-construed.⁷⁶ And the interpretation also had the advantage of clarity, leaving no doubt as to whose names and identifiers should be redacted and whose should remain.

SHA did not argue for a different interpretation of “all names and identifying references” in the superior court proceedings. Indeed, SHA offered substantial evidence in support of that interpretation—such as the declaration of SHA’s public records officer that “public housing grievance hearing decisions are redacted to delete the names and other identifying information of the residents who are involved in the grievance hearing.”⁷⁷ But in another shift, SHA now argues that the superior court was wrong

⁷⁵ CP at 166.

⁷⁶ See RCW 42.56.030; see also *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 408; 259 P.3d 190 (2011), (“PRA is a strongly worded mandate for broad disclosure of public records;” its disclosure provisions are “liberally construed and its exemptions narrowly construed to promote this public policy[.]”), quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127; 580 P.2d 246 (1978); see also *P.A.W.S. v. Univ. of Washington*, 125 Wn.2d 243, 261-62; 884 P.2d 592 (1994) (“if such other statutes mesh with the Act, they operate to supplement it. However, in the event of a conflict between the Act and other statutes, the provisions of the Act govern.”).

⁷⁷ CP at 95.

even to interpret the exemption at all.⁷⁸ Rather, SHA now claims public housing agencies have the “discretion” to decide for themselves what names and identifying references to redact under 24 CFR 966.57(a).⁷⁹

Because housing authorities, like most administrative agencies, are generally presumed to have expertise in their areas of operations that courts may not possess, a housing authority’s interpretation of a HUD regulation is ordinarily entitled to deference so long as it is “not inconsistent with federal housing provisions [and] not arbitrary and capricious.”⁸⁰ By contrast, agency interpretations of the PRA are entitled to no deference at all.⁸¹ Under the PRA, courts, rather than agencies, “are charged with determining when a duty to disclose exists and whether a statutory exemption applies.”⁸² And as the Supreme Court recognized in *Hearst Corp. v. Hoppe*, open access to government records, though in the public interest, “may cause inconvenience or embarrassment to public

⁷⁸ Br. of Appellant at 15.

⁷⁹ Br. of Appellant at 15 (“HUD leaves it up to each Housing Authority to interpret the C.F.R. and to remove all names and identifying references as it sees fit.”).

⁸⁰ See *Clark v. Alexander*, 85 F.3d 146, 152 (4th Cir. 1996) (upholding PHA’s interpretation of federal rules governing when a PHA may terminate a housing subsidy based on tenant’s criminal drug activity entitled to deference).

⁸¹ *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 149; 243 P.3d 1149 (2010) (“[T]he courts are charged with carrying out the PRA. We are here to declare the law and effect of the statute; we need provide no deference to an agency’s interpretation of the PRA.”); see *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 130; 580 P.2d 246 (1978).

⁸² *Zink v. City of Mesa*, 140 Wn. App. 328, 335; 166 P.3d 738 (2007).

officials”—a dynamic that makes agency personnel ill-suited to determine what records they may lawfully withhold from public view.⁸³

Of course, 24 CFR 966.57(a) is a HUD regulation, not a section of the Public Records Act. But as the question here concerns what records a housing authority may withhold from the public, SHA’s opinion of 24 CFR 966.57(a) should command no more deference than would SHA’s interpretation of a PRA provision. SHA’s core competency is subsidized housing; it surely possesses no more expertise than courts in the field of public disclosure. And when records tending to cause “inconvenience or embarrassment” are requested, government officials—including SHA—may have no less temptation to read illusory exemptions into federal law as state law.

Even if its view would be entitled to deference, SHA has yet to advance a coherent interpretation of 24 CFR 966.57(a) that would not be arbitrary and capricious or contrary to HUD’s objectives. In its brief, SHA first suggests “all names” should be taken literally, to result in the deletion of all names whatsoever.⁸⁴ Such a broad reading would go far beyond protecting tenant privacy, and could render the written decisions so unintelligible as to undermine HUD’s other policy objective of assuring access for potential complainants, advocates, and hearing officers.

⁸³ *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 130; 580 P.2d 246 (1978).

⁸⁴ Br. of Appellant at 16.

Moreover, SHA immediately concedes that it does not actually adhere to the literal interpretation, only “occasionally removing the names of witnesses, police officers, and SHA employees.”⁸⁵ But then SHA offers no methodology for deciding what names to remove or when, rendering the “policy” inscrutable at best and capricious at worst.⁸⁶ The one deletion SHA does explain, a newspaper headline, SHA finally⁸⁷ claims was made because “the article included the client’s name and other identifying references.”⁸⁸ But a redaction on that basis would probably be permitted under the superior court’s formulation, especially if the tenant’s name appeared in the headline itself (rather than the body of the article).⁸⁹

Not only does SHA’s brief fail to make clear what information SHA believes should be redacted (and not redacted) from publicly-available grievance decisions, but the record confirms that SHA did not follow any clear or consistent interpretation of 24 CFR 966.57(a) when it actually redacted and produced the records. No consistent pattern or policy was evident from a review of the redacted decisions.⁹⁰ And when

⁸⁵ Br. of Appellant at 16.

⁸⁶ Br. of Appellant at 16.

⁸⁷ This explanation of SHA’s purpose for redacting the newspaper headline, which appeared for the first time in SHA’s brief, was never disclosed to RAC or to the superior court. Though RAC has no reason to doubt its veracity, there is no evidence in the record to support it, and the superior court did not have the benefit of this fact when undertaking its own analysis.

⁸⁸ Br. of Appellant at 16.

⁸⁹ CP at 171.

⁹⁰ CP at 50-85, 166.

asked about the inconsistencies at oral argument, SHA's counsel explained that "the redactions are done basically by clerical people, different people, over different periods of time, and so they are done differently."⁹¹ A more capricious approach to public disclosure would be difficult to imagine.

In the end, SHA even redacted some information, such as dates and SHA letterhead, which could not plausibly have constituted "names and identifying references" under any interpretation.⁹² These outlying deletions would warrant an order to correct and re-produce the records even if SHA's unorthodox construction of 24 CFR 966.57(a) was valid. But this Court should affirm the superior court's reading, and hold that SHA must redact (from publicly-available grievance decisions) the names and identifying information of SHA residents only.

5. The superior court properly ordered SHA to correct its unauthorized redactions.

The superior court's order directing SHA to fix its redactions and produce the appropriate records represented precisely the type of relief contemplated by the PRA's show cause procedure, by which a requester may have a speedy hearing to determine whether he or she is entitled to inspect a particular set of records.⁹³ Yet SHA argues, on two different grounds, that the superior court had no authority to order the production of

⁹¹ RP at 18.

⁹² CP at 61, 166.

⁹³ See RCW 42.56.550; see also WAC 44-14-08004(1).

corrected records even if SHA did redact more information than allowed by 24 CFR 966.57(a). These arguments also fail.

a. Restoring improperly-redacted contents to an existing public record does not amount to creating a “nonexistent document” under PRA jurisprudence.

SHA first contends that the superior court’s order to correct its improper redactions impermissibly requires the creation of new records. It is undeniable that an agency has “no duty to create or produce a record that is nonexistent.”⁹⁴ But this rule does not prohibit the superior court from ordering SHA to correct redactions it improperly made to an existing document. Redacting documents is a commonplace activity agencies must perform under the PRA, and the Act provides a remedy where agencies perform redactions incorrectly.⁹⁵

The seminal case establishing that agencies do not have to create otherwise nonexistent documents in response to public records requests is *Smith v. Okanogan County*.⁹⁶ In *Smith*, a man submitted a series of letters to various government offices in Okanogan County requesting documents that had never been created, or asking for information without identifying or requesting any specific records at all. For instance, a letter to a county

⁹⁴ *Building Industry Assn. v. McCarthy*, 152 Wn. App. 720, 734; 218 P.3d 196 (2009).

⁹⁵ See, e.g., RCW 42.56.070(1) (“To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record[.]”).

⁹⁶ *Smith v. Okanogan County*, 100 Wn. App. 7; 994 P.2d 857 (2000).

clerk sought “a complete index of all persons employed [by] Okanogan County District Court, Superior Court, Sheriff’s Department, County Clerk’s Office, and Auditor’s Office;” the clerk kept no such index.⁹⁷ Another letter “asked the Okanogan County Commissioners’ Office to advise him when, how, and why Okanogan County became a municipal corporation,” but specified no record believed to have that information.⁹⁸ Some letters did seek specific records, and in those instances the county generally provided them—for example, one official provided a county map in response to a request for “a map of the county defining the exact location of the municipal corporation.”⁹⁹ But on those occasions when it had no responsive materials, the county informed the requester it would not create new records to satisfy his requests.¹⁰⁰

The *Smith* court upheld the county’s responses, holding that the Public Disclosure Act (former RCW 42.17, forerunner of the Public Records Act¹⁰¹) did not require an agency “to create an otherwise nonexistent document.”¹⁰² Several subsequent cases have followed *Smith*

⁹⁷ *Smith*, 100 Wn. App. at 17.

⁹⁸ *Smith*, 100 Wn. App. at 19.

⁹⁹ *Smith*, 100 Wn. App. at 19.

¹⁰⁰ *Smith*, 100 Wn. App. at 14-23.

¹⁰¹ See RCW 42.56.001 (“The legislature finds that chapter 42.17 RCW contains laws relating to several discrete subjects. Therefore, the purpose of [RCW 42.56] is to recodify some of those laws and create a new chapter in the Revised Code of Washington that contains laws pertaining to public records.”).

¹⁰² *Smith*, 100 Wn. App. at 14. The only explicit rationale the *Smith* court provided for this conclusion was that the federal Freedom of Information Act, which is instructive in

in ruling agencies had no duty to produce a nonexistent “police file,”¹⁰³ a long-deleted e-mail,¹⁰⁴ or minutes of a public meeting that had not yet taken place.¹⁰⁵

In *Smith* and the cases that followed, the records requested either never existed at all, or existed at one time but were destroyed before the request. But the grievance decisions at issue in this case did exist at the time of the records request.¹⁰⁶ SHA’s reliance on the *Smith* line of cases is misplaced, because the superior court did not order SHA to create new records from scratch—only to restore improperly-redacted material from records that can scarcely be called “nonexistent.”

b. SHA can correct the improper redactions without violating tenant privacy rights.

SHA also argues it cannot comply with the order to correct its improper redactions without making use of the unredacted copies of the grievance decisions it maintains in tenant files, and contends that such use would be unlawful (because documents in the tenant files are exempt from disclosure under RCW 42.56.230(1)). This is a spurious contention.

construing Washington’s public records statutes, does not require agencies to create otherwise non-existent documents (to fulfill records requests). However, implicit in the *Smith* court’s reasoning was a need to ensure public disclosure responsibilities did not become too onerous on agencies.

¹⁰³ See *Sperr v. City of Spokane*, 123 Wn. App. 132, 136; 96 P.3d 1012 (2004).

¹⁰⁴ See *Building Industry Assn. v. McCarthy*, 152 Wn. App. 720, 739; 218 P.3d 196 (2009).

¹⁰⁵ See *Zink v. City of Mesa*, 162 Wn. App. 688, 718; 256 P.3d 384 (2011).

¹⁰⁶ CP at 94-97, 147-148.

Nothing in the PRA prevents SHA from using contents of tenant folders to correct its improper redactions. Personal information in SHA tenant folders may be exempt from “public inspection and copying,” under RCW 42.56.230(1), but that does not prevent SHA from accessing and using the materials internally.¹⁰⁷ So long as the unredacted copies are not released to the public, and they need not be, SHA can both protect tenant privacy and fulfill its duty to produce public records.¹⁰⁸

6. The superior court could alternatively have ordered SHA to produce copies of the grievance decisions from tenant folders with tenants’ personal information redacted.

SHA justified withholding the grievance decisions from tenant folders under RCW 42.56.230(1), which exempts “personal information” in files on clients of public institutions.¹⁰⁹ SHA argued that exemption (hereafter “230(1)”) makes the entire contents of its tenant folders—including the full text of grievance decisions—exempt from disclosure, and the superior court agreed.¹¹⁰ However, in RAC’s view the exemption at 230(1) only authorizes SHA to delete tenant names and identifiers from the records in essentially the same way as 24 CFR 966.57(a) requires.

¹⁰⁷ See RCW 42.56.230 (certain personal information “exempt from public inspection and copying”); see also RCW 42.56.030 (PRA exemptions are narrowly-construed).

¹⁰⁸ See RCW 42.56.230 (making certain personal information “exempt from public inspection and copying”).

¹⁰⁹ RCW 42.56.230 states, in relevant part: “The following personal information is exempt from public inspection and copying under this chapter: (1) Personal information in any files maintained for students in public schools, patients or clients of public institutions or public health agencies, or welfare recipients[.]”.

¹¹⁰ CP at 168-169.

RAC has always conceded that public housing tenants are “clients of public institutions ... or welfare recipients,” to whom the exemption at 230(1) applies.¹¹¹ But 230(1) exempts only “personal information” within SHA tenant files, meaning “information peculiar or proper to private concerns.”¹¹² The exemption is not applicable to the extent that personal information can be deleted from specific records sought.¹¹³

The superior court concluded that a grievance hearing decision is comparable to a school disciplinary record, which the Supreme Court found constituted “personal information” in *Lindeman v. Kelso School District*.¹¹⁴ RAC would have to agree. But what led the *Lindeman* court to find that a disciplinary record equated to personal information was its tendency to reveal discipline that was imposed on a specific student.¹¹⁵

A grievance decision could similarly reveal information relating to a specific public housing tenant.¹¹⁶ But once the tenant’s name and other identifiers are removed, the document can no longer be associated with that person. A record that cannot be attributed to a specific tenant may reveal that some sanction (or “discipline”) was imposed on *a* person, but

¹¹¹ RCW 42.56.230(1).

¹¹² *Lindeman v. Kelso School Dist.*, 172 Wn.2d 196, 202; 172 P.3d 329 (2007).

¹¹³ RCW 42.56.210(1) (“[T]he exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought.”).

¹¹⁴ CP at 169; see *Lindeman v. Kelso School Dist.*, 172 Wn.2d at 203.

¹¹⁵ See *Lindeman v. Kelso School Dist.*, 172 Wn.2d at 203.

¹¹⁶ See 24 CFR 966.57.

the information is no longer “peculiar or proper to private concerns.” In RAC’s view, this should make the record subject to production—but in a form substantially identical to the redacted records SHA is required to keep separately under 24 CFR 966.57(a).

It is ultimately immaterial to RAC which route of analysis is taken, as both end in the same place—with SHA owing a duty to produce copies of grievance decisions with names and identifying references to SHA tenants redacted, and all other contents left in. But as a policy matter, the public has a momentous interest in accessing records of core governmental functions like grievance hearings and other administrative tribunals.¹¹⁷ The removal of personal identifiers protects privacy well enough to allow that access even where no federal regulation fortuitously requires the agency to keep a second set of records.

B. The superior court did not abuse its discretion by ordering SHA to produce records in electronic format.

The Public Records Act does not specifically direct agencies to produce public records in electronic form.¹¹⁸ However, the PRA does

¹¹⁷ See *Bellevue John Does 1-11 v. Bellevue School Dist.*, 164 Wn.2d 199, 221;189 P.3d 139 (2008) (public had interest overseeing and evaluating school district’s responses to alleged sexual misconduct by teachers, but not in the names of accused teachers).

¹¹⁸ See *Mitchell v. Dept. of Corrections*, ___ Wn. App. ___; 260 P.3d 249, 253 (2011).

require agencies to provide “fullest assistance” to requestors.¹¹⁹ In some instances, the duty to provide fullest assistance can entail the production of records in electronic form.¹²⁰ Whether an agency must produce electronic records in a particular case appears to be a matter within the superior court’s discretion, depending on a case-specific inquiry of “whether it is reasonable and feasible for the [agency] to do so.”¹²¹

In this case, the superior court ordered SHA to produce records in electronic form only after finding that SHA has the technical feasibility to provide electronic records, that SHA could provide electronic records at no greater cost than paper copies, and that SHA presented “no reason” for not providing electronic records.¹²² That ruling should also be affirmed.

1. The superior court correctly followed the AG’s rules in determining that SHA should provide reasonably translatable documents, such as the grievance decisions, in electronic format when requested in electronic format.

The superior court’s decision relied heavily on the Attorney General’s model rules interpreting the Public Records Act, which advise agencies to, if requested, produce records in electronic format when the

¹¹⁹ See RCW 42.56.100 (“Agencies shall adopt and enforce reasonable rules and regulations [that] shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information.”).

¹²⁰ See *Mechling v. City of Monroe*, 152 Wn. App. 830, 850; 222 P.3d 808 (2009).

¹²¹ *Mechling*, 152 Wn. App. at 850.

¹²² CP at 170.

records are either “reasonably locatable” or “reasonably translatable.”¹²³ A “reasonably locatable” record is information stored electronically “which can be located with typical search features and organizing methods contained in the agency’s current software.”¹²⁴ A “reasonably translatable” record is information the agency can convert into the requester’s desired electronic format through a process analogous to photocopying—a paper record that can be scanned to create a PDF file being probably the clearest example.¹²⁵ The AG’s rules also recognize that “[t]echnical feasibility is the touchstone for providing an electronic record.”¹²⁶ An agency that lacks the necessary equipment or technical expertise is not required to provide electronic records.¹²⁷

As the superior court found, the grievance decisions RAC had requested were “reasonably translatable” because they could be scanned just as easily as photocopied.¹²⁸ SHA conceded having the ability to scan records and provide them in PDF form at no greater cost than paper

¹²³ See WAC 44-14-05001; see also WAC 44-14-05002 (discussing “reasonably locatable” and “reasonably translatable” records).

¹²⁴ WAC 44-14-05002(1).

¹²⁵ See WAC 44-14-05002(2) (“When an agency only has a paper copy of a record, an example of a ‘reasonably translatable’ copy would be scanning the record into an Adobe Acrobat PDF file and providing it to the requester.”).

¹²⁶ WAC 44-14-05001.

¹²⁷ See WAC 44-14-05001 (“What is technically feasible in one situation may not be in another. Not all agencies, especially smaller units of local government, have the electronic resources of larger agencies and some of the generalizations in these model rules may not apply every time.”); see also *Mitchell*, 260 P.3d at 254.

¹²⁸ CP at 170. The superior court did not reach the question of whether the grievance decisions, which SHA hearing officers prepared using word-processing software, were also reasonably locatable.

copies.¹²⁹ Under the AG’s rules, this meant SHA should have provided the records in electronic form, since RAC requested them in electronic form.¹³⁰ Asked why it had not, SHA’s counsel stated:

“[W]e could have provided PDF copies because they wanted PDF copies, but the issue here is the charge. And the charge for a PDF copy would be ... essentially the same as a charge for a hard copy because the process for making a PDF copy is exactly the same as the process for making a hard copy.”¹³¹

In fact, SHA did bill more for the paper records than it could have charged for electronic, because SHA incurred a messenger fee that would not have arisen had SHA sent the records by e-mail.¹³² The superior court properly disallowed the charge as not authorized by the PRA, so SHA had to absorb that unnecessary expense.¹³³ But even if electronic records would truly have cost the same as paper, SHA acted arbitrarily when—confronted by two supposedly equal options—SHA chose to produce the records in the opposite form as RAC had requested.

2. The AG’s model rules were properly applied to SHA.

The superior court’s reliance on the AG’s rules in determining the extent to which SHA must produce documents electronically was fully appropriate. The AG’s rules may not be binding on agencies, but they are

¹²⁹ CP at 170; RP at 19-21.

¹³⁰ See WAC 44-14-05001.

¹³¹ RP at 19. In fairness, RAC’s initial records request had given a “wish to minimize reproduction costs” as a reason for requesting electronic records. See CP at 41.

¹³² CP at 167.

¹³³ CP at 171; see RCW 42.56.120.

persuasive authority; this Court has specifically recognized that the rules supply “useful guidance” in determining whether and when an agency’s duty to afford fullest assistance to requesters includes providing electronic documents.¹³⁴

The AG’s rules do caution that the specific circumstances and resources of particular agencies may make some (or all) of those rules unsuitable in some situations.¹³⁵ But SHA has never offered any reason or argument as to why the AG’s rules regarding electronic records would be burdensome or otherwise inappropriate to SHA. It is also unlikely SHA could ever tenably advance any such argument, since SHA is the largest public housing agency in the Pacific Northwest, with assets of over \$384 million, an annual budget over \$201 million, and—most importantly—the equipment to scan and e-mail documents and staff who know how to use that equipment.¹³⁶ SHA also failed to offer any alternative approach for determining when its duty to provide fullest assistance would involve the production of electronic records.

3. The order directing SHA to produce reasonably translatable records in electronic format does not conflict with the *Mechling* or *Mitchell* cases because the superior court’s order does not require needless duplication.

¹³⁴ CP at 170; see *Mechling v. City of Monroe*, 152 Wn. App. at 849.

¹³⁵ WAC 44-14-00001 (“Agencies vary enormously in size, resources, and complexity of requests received. Any ‘one-size-fits-all’ approach in the model rules, therefore, may not be best for requestors and agencies.”).

¹³⁶ CP at 34-36, 167, 224-227.

Two reported cases have held that agencies did not have to scan paper documents simply to create electronic records for production to a PRA requestor.¹³⁷ Both cases are distinguishable from the present action, however, because in each of those prior cases the creation of electronic records would have entailed unnecessary duplication.

In *Mechling v. City of Monroe*, a requestor sought copies of certain e-mails related to municipal business.¹³⁸ Some of the e-mails had to be redacted before being produced—meaning the city would have to print them and delete the exempt contents.¹³⁹ Although the requester had asked for electronic records, the *Mechling* court ruled that the city could simply turn over the redacted paper documents, rather than take the duplicative step of scanning the redacted documents into PDF or TIFF files (in effect, creating a second set of electronic copies in addition to the paper copies that had already been created).¹⁴⁰ As for the e-mails that did not need to be redacted, however, the *Mechling* court remanded with instructions to “determine whether it is reasonable and feasible” to produce the e-mails electronically.¹⁴¹

¹³⁷ See *Mechling v. City of Monroe*, 152 Wn. App. 830, 850; 222 P.3d 808 (2009); see *Mitchell v. Dept. of Corrections*, ___ Wn. App. ___; 206 P.3d 249, 254 (2011).

¹³⁸ See *Mechling*, 152 Wn. App. at 835.

¹³⁹ See *Mechling*, 152 Wn. App. at 850.

¹⁴⁰ See *Mechling*, 152 Wn. App. at 850.

¹⁴¹ *Mechling*, 152 Wn. App. at 850.

In a similar case, *Mitchell v. Dept. of Corrections*, Division Two followed *Mechling* in holding that the Department of Corrections did not have to “print the records, redact them, and then scan them back into electronic format” to satisfy an inmate’s PRA request.¹⁴² Again, that procedure would have entailed making two copies—one paper, and one electronic—of each requested record. The *Mitchell* court held the duty of providing fullest assistance does not include such duplicative measures.¹⁴³

Unlike the agencies involved in *Mechling* and *Mitchell*, SHA does not need to print or photocopy original documents to first create a copy that may be redacted, and then make a subsequent copy of the redacted copy. Rather, SHA redacts the grievance decisions automatically, and keeps the redacted copies in a separate file specifically for public access. SHA is required to do this by 24 CFR 966.57(a). SHA can scan those documents (once only) for public disclosure just as efficiently as SHA can photocopy them.¹⁴⁴

C. Damages were appropriate because SHA wrongfully withheld records, failed to explain redactions, and violated other statutory public disclosure duties.

A person whose request for public records is wrongly denied by an agency is entitled to damages of between \$5 and \$100 “for each day that

¹⁴² *Mitchell*, 206 P.3d at 254

¹⁴³ *Mitchell*, 206 P.3d at 254.

¹⁴⁴ RP at 19; CP at 170.

he or she was denied the right to inspect or copy said public record."¹⁴⁵ A damage award is mandatory whenever an agency improperly withholds a record.¹⁴⁶ An award is also required if any agency fails to make some other required response to a PRA request, such as providing written explanations for redacting records.¹⁴⁷ The imposition of a PRA damage award is reviewed for abuse of discretion.¹⁴⁸

SHA argues it did not withhold any records and thus should not have been ordered to pay any damages. But for the reasons discussed above, the superior court correctly found that SHA wrongfully withheld information by redacting the grievance decisions more heavily than permitted by 24 CFR 966.57(a). This entitled RAC to recover damages.¹⁴⁹

SHA does not appear to dispute the method by which the superior court calculated RAC's damages, but there is no question that the superior court followed the correct method. Consistent with the procedure set forth in *Yousoufian v. Office of Ron Sims*, the superior court set the base amount of RAC's damages at \$10 per day, then adjusted that amount to \$25 per day based on a series of aggravating factors (like SHA's failure to explain redacted references in writing) and mitigating factors (like assistance that

¹⁴⁵ RCW 42.56.550(4).

¹⁴⁶ See *Amren v. City of Kalama*, 131 Wn.2d 25, 37; 929 P.2d 389 (1997).

¹⁴⁷ See *Sanders v. State*, 169 Wn.2d 827, 848; 240 P.3d 120 (2010).

¹⁴⁸ *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458; 229 P.3d 735 (2010).

¹⁴⁹ See *Amren*, 131 Wn.2d at 37.

SHA's public records officer provided in correcting a typographical error on RAC's initial request letter).¹⁵⁰

D. The superior court properly issued an injunction directing SHA to adopt policies and procedures to facilitate future compliance with the Public Records Act.

The Public Records Act does not expressly authorize remedies other than damages for agency violations.¹⁵¹ But a “superior court’s inherent authority to enforce orders and fashion judgments is not dependent on the statutory grant.”¹⁵² Once it “acquires jurisdiction of the main purpose of an action, [a superior court] has the right to grant such ancillary or incidental relief as will be necessary to make the relief sought complete.”¹⁵³ This includes entering injunctions or other remedies within its inherent equitable powers.¹⁵⁴ An order granting an injunctive relief is reviewed for abuse of discretion.¹⁵⁵

1. RAC met all prerequisites for injunctive relief.

A party seeking an injunction “must demonstrate that (1) he has a

¹⁵⁰ *Yousoufian v. Office of Ron Sims*, 168 Wn.2d at 466-68.

¹⁵¹ The PRA does authorize agencies and individuals to seek injunctions prohibiting the disclosure of records that “would substantially and irreparably damage any person, or ... vital governmental functions.” See RCW 42.56.540.

¹⁵² *Allen v. American Land Research*, 95 Wn.2d 841, 852; 631 P.2d 930 (1981) (upholding injunction issued to enforce Consumer Protection Act, even though statute did not authorize injunctive relief).

¹⁵³ *Dare v. Mt. Vernon Inv. Co.*, 121 Wash. 117, 120; 208 P. 609 (1922).

¹⁵⁴ See Wash. St. Const., Art. IV, Sec. 6; see RCW 2.08.010; see *Bowcutt v. Delta North Star Corp.*, 95 Wn. App. 311, 319; 976 P.2d 643 (1999) (superior court’s “inherent powers encompass all the powers of the English chancery court [including] writ of injunction”); see *State v. Chehalis County Superior Court*, 43 Wash. 225, 228; 86 P. 632 (1906) (superior court does not need statutory authority to issue injunction).

¹⁵⁵ *City of Bellingham v. Chin*, 98 Wn. App. 60, 66; 988 P.2d 479 (1999).

clear legal or equitable right, (2) he has a well-grounded fear of immediate invasion of that right, and (3) that the acts he is complaining of have or will result in actual and substantial injury.”¹⁵⁶ RAC demonstrated a clear legal right, an immediate invasion, and an actual and substantial injury on each item the superior court enjoined.

First, RAC had a clear legal right to receive written explanations for the records SHA withheld and redacted.¹⁵⁷ The Act requires agencies to provide those justifications at the time it responds to the request, so that the requester can assess the validity of the claimed exemptions.¹⁵⁸ SHA never provided the required explanations, and their omission impaired RAC’s ability to determine what information SHA had withheld and basis for it.¹⁵⁹ SHA argues the Court should not recognize this as an “adverse effect” to RAC, but it certainly was; SHA’s argument to the contrary relies on a misapplication of statutory language (precluding a person from being charged, especially in proceedings unrelated to the PRA, with constructive knowledge of an agency’s procedures).¹⁶⁰

¹⁵⁶ *DeLong v. Parmalee*, 157 Wn. App. 119, 150; 236 P.3d 936 (2010).

¹⁵⁷ CP at 166.

¹⁵⁸ See *Sanders v. State*, 169 Wn.2d 827, 846; 240 P.3d 120 (2010) (“Claimed exemptions cannot be vetted for validity if they are unexplained); see *Mitchell v. Dept. of Corrections*, 260 P.3d at 252.

¹⁵⁹ See *Sanders*, 169 Wn.2d at 846.

¹⁶⁰ RCW 42.56.040(2) (“Except to the extent that he has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published or displayed and not so published or displayed.”).

SHA exacerbated RAC's difficulty in ascertaining the grounds for the redacted information by not publishing a list of exemptions applicable to SHA.¹⁶¹ This invaded a clear right because the Act explicitly requires agencies to "publish and maintain a current list containing every law, other than those listed in [the PRA], that the agency believes exempts or prohibits disclosure of specific information or records of the agency."¹⁶² Paradoxically, SHA denies knowing of any exemptions other than those contained in the PRA, yet admits withholding names (and identifying references) under 24 CFR 966.57(a). Surely the HUD regulation is the type of authority SHA ought to include on such a list of exemptions.

The PRA also requires all agencies to adopt "published rules" for the public examination of records.¹⁶³ SHA has not, and as an apparent consequence SHA staff had no clear or consistent guidance to follow in redacting the grievance decisions SHA requested.¹⁶⁴ As SHA's counsel told the superior court:

[T]here's no redaction requirement of the [Public Records] Act and there's no HUD standard, there's no legal standard of how redaction is supposed to be done. And they mention that these redactions are done sloppily. These redactions are done basically by clerical people, different people, over periods of time, so they are done differently.¹⁶⁵

¹⁶¹ CP at 304.

¹⁶² RCW 42.56.070(2).

¹⁶³ RCW 42.56.070(1); see also RCW 42.56.040.

¹⁶⁴ CP at 307, 309.

¹⁶⁵ RP at 18.

RAC, as discussed above, was adversely affected both by SHA's wrongful redaction of information, and by the manner of redaction (which made remaining contents often unintelligible). SHA also denied RAC electronic copies of reasonably translatable records, as discussed at length above.

2. Equitable factors weighed in favor of the injunction, and a purely legal remedy would not have been adequate.

In deciding whether to grant an injunction, a court should weigh

“(a) the character of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction in comparison with other remedies, (c) the delay, if any, in bringing suit, (d) the misconduct of the plaintiff if any, (e) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, (f) the interest of third persons and of the public, and (g) the practicability of framing and enforcing the order[.]”¹⁶⁶

Also, injunctive relief “will not be granted where there is a plain, complete, speedy and adequate remedy at law.”¹⁶⁷ In this case, the superior court weighed these factors and found in favor of an injunction; SHA's failure to establish policies and procedures for meeting its PRA obligations was detrimental to the public and relevant third parties, and an injunction was superior to other remedies.¹⁶⁸

¹⁶⁶ *DeLong*, 157 Wn. App. at 150, quoting *Holmes Harbor Water Co., Inc. v. Page*, 8 Wn. App. 600, 603; 508 P.2d 628 (1973).

¹⁶⁷ *Kucera v. State*, 140 Wn.2d 200, 209; 955 P.2d 63 (2000); but see *Crafts v. Pitts*, 161 Wn.2d 16, 27; 162 P.3d 382 (2007) (availability of some monetary relief does not preclude the entry of an injunction).

¹⁶⁸ CP at 309-310.

RAC had requested copies of the grievance decisions to investigate and evaluate the quality of those tribunals—a benign public purpose at the heart of the Act.¹⁶⁹ SHA’s lack of policies and procedures for properly redacting and producing public records contributed to (or fully caused) its failure to provide timely and proper records, which delayed and hindered RAC’s investigation.¹⁷⁰ This was injurious to the public, especially public housing residents, and not conducive to any clear or naturally-calculable monetary remedy.¹⁷¹ And SHA’s ongoing failure to establish published rules for public records threatened to delay or frustrate RAC and other potential requesters in the future.¹⁷² Damages are not an adequate remedy for continuing violations.¹⁷³

Several factors also supported the superior court’s determination that injunctive relief would be a superior remedy. Preliminarily, the court recognized that RAC has well-founded expectations of requesting records from SHA again in the future, and that an injunction would best ensure that RAC will not have to endure ongoing PRA violations or repeat this

¹⁶⁹ CP at 213-214, 308; RP at 6; see also RCW 42.56.030 (“The people insist on remaining informed so that they may maintain control over the instruments that they have created.”).

¹⁷⁰ CP at 166, 309-310.

¹⁷¹ See *Kucera v. State*, 140 Wn.2d at 210 (Remedy at law is not “adequate” unless the injury is of a kind for which monetary damages can satisfactorily compensate).

¹⁷² CP at 309-310; see RCW 42.56.070(1).

¹⁷³ *Kucera v. State*, 140 Wn.2d at 210.

litigation again should SHA not make reforms voluntarily.¹⁷⁴ And while the Act ordinarily incentivizes both agency compliance and private enforcement through mandatory damage awards when requesters are wrongly denied access to records,¹⁷⁵ RAC's special connection to SHA makes the injunction a more precise and efficient remedy than a monetary award alone (which could, but would not necessarily, prompt SHA to improve its public disclosure practices).¹⁷⁶

Another factor supporting the injunction was that some of SHA's violations were not necessarily independently actionable under the PRA. For instance, the Act provides no specific remedy for an agency's failure to publish rules for requesting records.¹⁷⁷ Thus, when the superior court found that SHA had not published the required rules, the court ordered SHA to correct that violation by publishing the required rules.¹⁷⁸ This order was appropriate because "[c]ourts have consistently held that when a statute gives a new right and no specific remedy, the common law will provide a remedy."¹⁷⁹

The superior court did not overlook any countervailing factors in

¹⁷⁴ CP at 309-310.

¹⁷⁵ See RCW 42.56.550(4); see also WAC 44-14-08004(7).

¹⁷⁶ See *Yousoufian*, 168 Wn.2d at 463 (PRA damage awards are intended to deter agency violations, not to compensate economic losses to requesters).

¹⁷⁷ See RCW 42.56.070.

¹⁷⁸ CP at 307-310.

¹⁷⁹ *State ex rel. Phillips v. Liquor Control Bd.*, 59 Wn.2d 565, 570; 369 P.2d 844 (1962).

granting the injunction. The injunction does not present any difficult problems of enforcement and does not impose any material hardship on SHA. RAC did not engage in any delay or other misconduct. And every provision of the injunction is tailored to correct a specific statutory violation SHA was proven to have committed.¹⁸⁰

3. The superior court did not abuse its discretion by declining SHA's request for a continuance on RAC's motion for damages & injunctive relief, or by striking SHA's untimely brief in opposition to that motion.

This Court should also reject SHA's challenges to both the denial of its motion to continue RAC's motion for damages and injunctive relief, and the striking of SHA's untimely brief opposing that motion.

a. The continuance SHA requested would have been harmful to RAC and contrary to public policy, but was not supported by good cause.

The superior court had full authority to hear and rule on the motion RAC filed for damages and injunctive relief on April 8, 2011.¹⁸¹ No review was accepted in this case until June 27, 2011, when SHA filed its current Notice of Appeal, as neither the Court of Appeals nor Supreme Court ever granted discretionary review or otherwise limited the superior

¹⁸⁰ *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 143; 720 P.2d 181 (1986) ("Injunctions must be tailored to remedy the specific harms shown rather than to enjoin all possible breaches of the law.").

¹⁸¹ CP at 189-216.

court's power to rule before then.¹⁸² Since the superior court had full authority to rule on the motion for damages and injunctive relief, its denial of SHA's continuance request is reviewed for an abuse of discretion.¹⁸³

Several factors weighed against granting the continuance SHA requested. For one, the PRA show cause procedure is designed to provide "a speedy remedy" for requestors wrongfully denied access to records.¹⁸⁴ But at the time of SHA's continuance motion, over ten months had passed since RAC submitted its records request, and over six months since the superior court found SHA wrongly withheld records.¹⁸⁵ SHA was the party responsible for substantially all of this delay—having first sought and obtained a continuance of the initial show cause hearing, then an additional suspension of the superior court proceedings for its attempt to secure interlocutory review.¹⁸⁶ Additional delay would have come directly at RAC's expense, and would have run counter to the statutory intent.

Another reason not to grant the continuance was that a ruling on damages and injunctive relief would not have affected the order SHA was seeking to have reviewed, which concerned SHA's duties to redact records

¹⁸² CP at 228-234, 333-334; see RAP 6.1.

¹⁸³ See *City of Seattle v. Clewis*, 159 Wn. App. 842, 846; 247 P.3d 449 (2011).

¹⁸⁴ See WAC 44-14-08004(2) ("The act provides a speedy remedy for a requestor to obtain a court hearing on whether the agency has violated the act. The purpose of the quick judicial procedure is to allow requestors to expeditiously find out if they are entitled to obtain public records.").

¹⁸⁵ CP at 38-41, 165-172, 235.

¹⁸⁶ RP at 3-9; CP at 173, 183-188; see also CP 310.

only as authorized by 24 CFR 966.57(a) and to produce corrected records in electronic form.¹⁸⁷ In fact, adjudicating the lingering issues of damages and injunctive relief more likely quickened SHA's access to review by creating a final order appealable as of right.¹⁸⁸

The only basis SHA asserted in favor of the continuance was a claim that RAC had supposedly violated an agreed order requiring the parties to delay further superior court proceedings "pending the outcome of SHA's anticipated motion for discretionary review[.]"¹⁸⁹ But that stipulation (and associated agreed order) pertained to SHA's motion for discretionary review *in the Court of Appeals*, not SHA's later motion for discretionary review in the Supreme Court.¹⁹⁰ RAC did not file its motion for damages and injunctive relief until the Court of Appeals had fully denied discretionary review.¹⁹¹ The stipulation and agreed order also made clear that the superior court could dissolve the order.¹⁹²

Since SHA's only argument in favor of the continuance request was specious, and since valid reasons existed for denying it, the superior court did not abuse its discretion by denying SHA's continuance motion.

¹⁸⁷ CP at 173-182.

¹⁸⁸ CP at 305-311; see RAP 2.2(a).

¹⁸⁹ CP at 183-188, 285.

¹⁹⁰ CP at 183-188.

¹⁹¹ CP at 189.

¹⁹² CP at 184 (superior court proceedings "are hereby suspended pending the outcome of SHA's anticipated motion for discretionary review, unless such suspension is earlier dissolved by this Court.").

b. SHA's brief opposing damages and injunctive relief was unreasonably late and unfair to RAC.

RAC's motion for damages and injunctive relief was noted for a hearing on May 6, 2011, and timely filed and served to SHA.¹⁹³ Under CR 56(c), this gave SHA until April 26, 2011, to file a response.¹⁹⁴ SHA did not file or serve a response until May 3, 2011—seven days after the deadline.¹⁹⁵ SHA denies that its late response prejudiced RAC, but in fact SHA's response was so late that RAC's deadline for filing a reply (to the response) had already expired by the time the response was filed.¹⁹⁶

SHA's insistence that the superior court should have allowed its late response is particularly audacious considering that SHA had formally moved for, and been denied, a continuance of the motion to which that response related.¹⁹⁷ In filing its brief a week late, SHA essentially forced the superior court either to strike the brief or allow SHA the essential benefit of a continuance the court had already denied.¹⁹⁸ The superior

¹⁹³ CP at 189, 237.

¹⁹⁴ See CR 56(c) ("The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing.").

¹⁹⁵ CP at 286.

¹⁹⁶ See CR 56(c) ("The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing."); see CP at 301-302.

¹⁹⁷ CP at 285.

¹⁹⁸ SHA's late brief was particularly remarkable considering that RAC had stated, in opposing the continuance, that while RAC opposed an open-ended continuance lasting until the Supreme Court adjudicated SHA's petition under RAP 13.5, RAC was "not averse to a modest continuance of the PRA Damages & Injunction motion if SHA requires additional time to prepare its [response] brief or for some other such reason." CP at 255. SHA did not pursue this lesser alternative.

court did not abuse its discretion in striking that brief.¹⁹⁹

c. SHA did not suffer actual prejudice from the denial of its continuance request or striking of its brief.

Even though SHA's brief was stricken, that ruling does not appear to have caused SHA any actual prejudice in the end. The superior court's Order for PRA Damages & Injunctive Relief reflects careful consideration of the law and facts.²⁰⁰ The court did not enter all of the factual findings RAC requested, nor set the per-day PRA penalty as high as RAC asked.²⁰¹ The superior court also made findings and conclusions favorable to SHA, such as starting the per-day penalty calculation at a lower amount than RAC suggested because "a substantial portion of the records were initially provided" by SHA.²⁰² In any event, SHA does not offer any explanation as to how the case might have been decided differently had its brief not been stricken.

F. RAC is entitled to reasonable attorney fees on appeal.

The Court should award RAC its reasonable attorney fees on appeal, per RAP 18.1. The fees are authorized by RCW 42.56.550(4).

V. Conclusion

For all of the foregoing reasons, this Court should AFFIRM the

¹⁹⁹ CP at 310.

²⁰⁰ CP at 205-311.

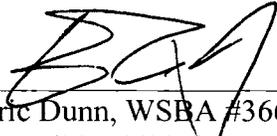
²⁰¹ CP at 305-311.

²⁰² CP at 307.

decisions of the superior court.

RESPECTFULLY SUBMITTED this 19 day of December, 2011.

NORTHWEST JUSTICE PROJECT

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NO. 67275-4

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

Resident Action Council,

Plaintiff/Respondent,

v.

Seattle SHA,

Defendant/Petitioner.

DECLARATION OF SERVICE

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 **ORIGINAL**

I, Marie Nguyen, certify under penalty of perjury under the laws of the State of Washington that on the 19th day of December, 2011, I caused a copy of the following documents:

1. Brief of Respondent Resident Action Council; and
2. This Declaration of Service.

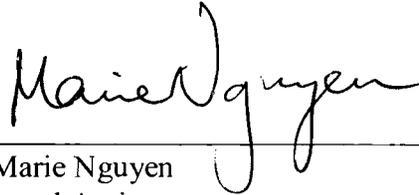
to be delivered via electronic mailing in .pdf format and U.S. First Class mail, directed to the attention of the following:

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Signed at Seattle, Washington, this 19th day of December, 2011.

NORTHWEST JUSTICE PROJECT



Marie Nguyen
Legal Assistant