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COURT OF APPEALS, DIVISION I
FOR THE STATE OF WASHINGTON

CITY OF SEATTLE,

Appellant,

vs.

JAMES C. EGAN,

Respondent,

REPLY BRIEF OF APPELLANT
CITY OF SEATTLE

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ORIGINAL

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I. INTRODUCTION

The brief of respondent James Egan asks this Court to assume that RCW 42.56.540, the provision of the Public Records Act, Chapt. 42.56 RCW (“PRA”), that allows an agency to quickly resolve legal disagreements, was really intended to delay resolution so that a requester could maximize penalties against the agency. He also asks this Court to read language in the Privacy Act, Chapt. 9.73 RCW, that temporarily prohibits a law enforcement agency from making in-car videos available to the public as requiring that those videos be made available to the public immediately.¹ Egan characterizes himself as the victim of a vindictive lawsuit brought by the City against him. This Court should not let Egan’s melodramatic interpretation of events and flawed legal reasoning obscure the actual situation in this case.

The City faced a dilemma. Egan threatened to sue the City for denying his request for in-car videos. The City was involved in the

¹ Egan objects to the City’s reference to 9.73 RCW as the Privacy Act because it is “not supported by any self-reference under that name.” The City reference to the statute as the Privacy Act reflects usage adopted by our Supreme Court and Attorney General. *See, e.g., Lewis v. State Dept. of Licensing*, 157 Wn.2d 446, 139 P.3d 1078 (2006); AGO 1980 No. 20.

KOMO lawsuit² in which access to in-car videos was one of several issues, but the outcome of that lawsuit would have no bearing on whether Egan sued the City or on the outcome if he did. If Egan brought his threatened lawsuit and succeeded on his claims, the City would be liable for significant penalties and fees independent of any result in the KOMO case.

Based on a reasonable belief that Egan would sue the City under the PRA, as he said he would, the City sought properly declaratory judgment and injunctive relief under RCW 42.56.540, the procedure specifically provided to agencies to resolve just such a dilemma.

Nothing in Egan's brief should dissuade this Court from reversing the trial court's judgment on fees. The trial court abused its discretion in imposing CR 11 sanctions against the City theorizing that it was *per se* improper for the City to file a declaratory judgment action. It made no findings as to whether the City's attorneys made a reasonable inquiry into the law and facts prior to filing its declaratory judgment action, and Egan

² *Fisher Broadcasting-Seattle TV dba KOMO 4 v. City of Seattle and the Seattle Police Department*, No. 12-2-00938-4 SEA, now on direct review to the Supreme Court ("KOMO").

presented no evidence that the City's complaint was filed for an improper purpose.

Egan devotes the opening portion of his brief to arguing that the trial court erred by not awarding him enough fees. This Court need not address this issue because the trial court abused its discretion by awarding CR 11 fees in the first place. In any event, Egan failed to support his fee request. Egan appeared pro se in this case, yet he requested fees for law firm associates who had not appeared in the action, and his fee declaration fell far short of minimum standards to support a greater award. It was replete with heavily-redacted, block-billed entries that appeared to have been created after the fact and reflected largely unsupported, unnecessary, unproductive, and duplicative activities. Had Egan been entitled to fees, the trial court was warranted in discounting them as it did.

II. RESPONSE TO ISSUES ON CROSS-REVIEW

Egan failed to make assignments of error and merely provided a list of issues in his brief in violation of RAP 10.3(b). A respondent seeking cross review must state the assignments of error, the issues pertaining to those assignments of error presented for review by respondent, and include argument of those issues. RAP 10.3(b). A properly stated assignment of error is a separate concise statement of each

error a party contends was made by the trial court, together with the issues pertaining to the assignments of error. RAP 10.3(a)(4).

III. CONSOLIDATED REPLY/RESPONSE ON STATEMENT OF THE CASE

Egan provides a counter statement of the case that fails to address much of the City's argument in its opening brief and concedes critical facts. By failing to address factual statements offered in the City's opening brief, Egan *concedes* that the factual statement is true and is the law of the case. *State v. Evans*, 129 Wn. App. 211, 221, n.7, 118 P.3d 419 (2005), *reversed on other grounds*, 159 Wn.2d 402, 150 P.3d 105 (2007); RAP 10.3(a)(5), (b). Those *conceded* facts include:

- Egan threatened to sue the City if it did not provide him the videos within two weeks. Br. of Appellant at 1.
- The KOMO case involved three requests for public records only one of which was for in-car videos. The KOMO complaint included an allegation that the City erroneously applied RCW 9.73.090(1)(c), but KOMO's allegations largely concerned access to database records rather than the in-car videos themselves. *Id.* at 9.
- The City had denied KOMO's requests because it did not have existing and identifiable responsive records rather than because RCW 9.73.090(1)(c) exempted disclosure. *Id.*
- The complaint and answer were the only relevant pleadings that had been filed in the KOMO lawsuit at the time the Egan lawsuit was filed. *Id.* at 8.
- Unlike the KOMO litigation, the only legal issue raised in the Egan litigation was the application of RCW 9.73.090(1)(c). *Id.* at 10.

- The City's declaratory judgment motion indicated that while the relationship between the PRA and the Privacy Act was one of the issues in the KOMO case, the City risked "potentially significant sanctions through a lawsuit from Egan." *Id.* at 10-11.
- The City filed the declaratory judgment action on January 3, 2012, and it notified KOMO's counsel of the declaratory judgment action on January 4, 2012. *Id.* at 7 and 10.
- The City filed its motion for declaratory judgment and preliminary injunction on January 24, 2012. *Id.* at 10.
- On January 25, 2012, KOMO's attorney noted a motion for summary judgment in the KOMO lawsuit for March 23, 2012 but did not file and serve the motion until February 23, 2012. KOMO moved to intervene in the Egan suit on January 26, 2012. *Id.* at 11.
- The KOMO case would not resolve the central issue in the litigation against Egan because Egan could still sue the City for denying his request. *Id.* at 29-30.
- The City named Egan in its declaratory judgment action because the requester is a necessary party. *Id.* at 30-31.
- The City provided evidence in the trial court regarding the three-part test for injunctive relief under RCW 42.56.540 and the trial court found that the City had arguably satisfied the first and third prongs of the test. *Id.* at 31.

Egan further concedes in his own brief that:

- He proceeded pro se in this action and does not dispute that Wilkinson and Bettinger did not file Notices of Appearance. Br. of Resp't. at 43-45.

IV. ARGUMENT IN REPLY TO RESPONDENT EGAN

A. The Trial Court Abused its Discretion When it Failed to Inform Itself and Make Findings Regarding the City's Knowledge, Information and Belief at the Time of Filing

Before finding a CR 11 violation, a trial court must objectively inform itself and make findings regarding the attorney's knowledge, information and belief at the time the pleading was submitted in order to determine whether it was brought for an improper purpose. *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707, *review denied*, 152 Wn.2d 1016, 101 P.3d 108 (2004). (citing multiple cases supporting the proposition that *any* decision to award sanctions must be supported by the record). Here, the trial court ignored evidence that Assistant City Attorney Mary Perry carefully considered the facts and the law in commencing this action and instead simply declared that it "cannot think of any reason to bring this lawsuit other than to obtain litigation advantage and to increase cost to Mr. Egan in violation of CR 11." CP 721- 24, 603. Egan sidesteps the City's briefing on this issue. Br. of Appellant at 20-25.

Egan *concedes* that the City brought the action under RCW 42.56.540 in order to seek judicial guidance based on its perceived liability resulting from Egan's threat to sue over the City's response to his records request. Br. of Resp't at 11. Despite this concession, Egan asserts that providing a way for an agency to seek judicial guidance when faced

with potential liability from a records requester is “not a reasonable reading” of RCW 42.56.540. *Id.* at 15. Contrary to Egan’s assertion, this is the *only* reasonable way to read the statute.

B. The Trial Court Erred in Finding that the City’s RCW 42.56.540 Action Was Unnecessary and Improper

The PRA requires that state and local agencies make all public records available for public inspection and copying upon request, unless a specific exemption applies. RCW 42.56.070(1). Any person whose request was denied may seek judicial review of the agency's denial pursuant to RCW 42.56.550. An agency that withholds a non-exempt record is subject to subject to mandatory attorney fees and penalties, even where the agency’s action is based on a good faith belief that record is exempt. RCW 42.56.550(4); *Amren v. City of Kalama*, 131 Wn.2d 25, 36-37, 929 P.2d 389 (1997).

The PRA imposes a broad mandate for disclosure of public records, but the statute recognizes that it is not appropriate to disclose every public record possessed by an agency. The PRA requires that agencies “make available for public inspection and copying all public records, unless the record falls within the specific exemptions [contained in the PRA]... or other statute which exempts or prohibits disclosure of the specific information or records.” RCW 42.56.070(1). The PRA

contains more than 120 specific exemptions, and at least 200 provisions in “other statutes” exempting or prohibiting disclosure of specific information or records are incorporated into the PRA through RCW 42.56.070(1).³

Courts have not construed every exemption or other statute that an agency must interpret. For example, there are no reported cases construing every section of even the most-frequently cited exemptions applicable to personal information,⁴ records regarding investigative, law enforcement and crime victims,⁵ employment and licensing records,⁶ and financial, commercial, and proprietary information.⁷ Moreover, courts have interpreted only a handful of the numerous “other statutes.”

An agency faces significant uncertainty when a requester threatens to sue over how it applied an exemption or statute in the absence of prior judicial guidance on how to interpret it. The uncertainty is particularly acute when, as in this case, the agency applies a statute that

³ The Washington State Bar Association *Public Records Act Deskbook*, Chapter 12, contains a list of “other statutes” grouped into nineteen categories reflecting more than 200 statutes.

⁴ RCW 42.56.230

⁵ RCW 42.56.240

⁶ RCW 42.56.250

⁷ RCW 42.56.270

prohibits disclosure because there is a substantive difference between an exemption and a prohibition. Exemptions are permissive and an agency has the discretion to provide an exempt record. In contrast, an agency has no discretion to release a record or the confidential portion of a record if a statute classifies information as confidential or otherwise prohibits disclosure. WAC 44-14-06002(1).

The Legislature provided RCW 42.56.540 as a way for an agency to resolve this uncertainty. That statute explicitly provides that “*an agency* or its representative or a person who is named in the record or to whom the record specifically pertains” may initiate court action rather than wait for the requester to seek judicial review of a denied request. Our Supreme Court has recognized that the purpose of RCW 42.56.540 is to spare “the agency the uncertainty and cost of delay, including the per diem penalties for wrongful withholding.” *Soter v. Cowles Pub’g. Co.*, 162 Wn.2d 716, 751, 174 P.3d 60 (2007). The Legislature provided agencies the important option of quickly seeking a judicial determination that the requested records are not subject to disclosure in order to avoid penalties for improperly denying a records request. *Franklin County Sheriff’s Office v. Parmelee*, 175 Wn.2d 476, 480, 285 P.3d 67 (2012).

Egan suggests that the City could have resolved the uncertainty by asking the Attorney General to review the matter pursuant to RCW

42.65.530 or by contacting the subjects of the videos. Br. of Resp't at 20. Neither would have effectively resolved the uncertainty here. While the PRA provides that a state agency may request review under RCW 42.56.530, the City is not a state agency so the provision does not apply. Moreover, a requester may still sue a state agency even if the Attorney General review supports the agency's interpretation of an exemption. *See, Freedom Foundation v. Wash. State Dept. of Transp.*, 168 Wn. App. 278, 284-85, 276 P.3d 241 (2012). Contacting every individual in the videos would not have been effective either. First, because neither the PRA nor the Privacy Act requires an agency to do so, and second, because RCW 9.73.090(1)(c) prohibits disclosure until final disposition of any criminal or civil litigation which arises from an event that has been recorded. Civil litigation may not be filed for at least three years from the date of the event.

Egan's fundamental objection to RCW 42.56.540 is that it can pre-empt a requester's ability to seek relief from a court at a time of his own choosing. A requester can wait 364 days to file the suit and delay an

additional 89 days before serving the agency in order to maximize penalties.⁸

Ensuring that a requester will be able to recover maximum penalties for a perceived violation is not within the intent of the PRA, nor is it sound public policy. The Legislature acknowledged this when it adopted RCW 42.56.540. The statute's legislative history shows that the Legislature specifically adopted language ensuring that "[t]he right of agencies to request judicial review of disputed requests for disclosure is restored." *Soter*, 162 Wn.2d at 753. The statute is intended to resolve uncertainty faced by an agency rather than require it to stand by and simply wait until the requester's lawsuit ultimately arrives. Here, the City

⁸ Egan confirmed this by filing the lawsuit that is the subject of the City's motion requesting this Court take judicial notice that Egan has filed and served the complaint, summons, and amended complaint in *Miguel Oregon v. City of Seattle*, King County Superior Court Cause No. 12-2-38162-3SEA ("Oregon"). The Oregon case is based on the same PRA request that was the subject of the City's declaratory judgment action. Egan confirmed the peril faced by the City at the time of the declaratory judgment action by delaying filing and serving the Oregon lawsuit for the maximum periods allowed by law. He filed the complaint 364 days after the City's response denying the videos and served the City 89 days after filing the complaint. Egan also seeks \$100 per day penalties in the Oregon lawsuit. This is "statutory damages at the maximum level" that Egan originally threatened to seek. CP 50.

The Oregon lawsuit demonstrates that the City had a legitimate rationale for pursuing a declaratory judgment action and confirms that the KOMO case did not resolve the central issue in the City's declaratory judgment action. The Oregon lawsuit demonstrates that the City did not bring its declaratory judgment action to gain unfair "litigation advantage." Most important, it shows that the City did not violate CR 11 when it filed its declaratory judgment action.

brought this action to resolve the very type of uncertainty the statute is designed to address. Thus, the trial court abused its discretion when it found that the City brought its action for an improper purpose.

The trial court also abused its discretion when it found that the City's declaratory judgment action was unnecessary. The trial court found that the KOMO lawsuit "would resolve the central issue in this case." CP 1012. This is wrong because a decision in the KOMO trial court would not protect the City from incurring potentially significant penalties if Egan sued as he said he would. CP 72. The KOMO trial court's decision did nothing to dispel the genuine peril that the City sought to avoid by bringing the present action because Egan could still sue the City and seek to extract maximum penalties. See n.8 *supra*.

C. Egan Misreads the "Other Statute" Provision and Cases Applying It

Egan contends that the "other statute" provision of the PRA applies only when the particular statute exempts or prohibits the disclosure of specific public records "in their entirety." He further contends that the temporary prohibition on making in-car videos in RCW 9.73.090 fails the purported "entirety" requirement because "[a] 'prohibition' is by definition permanent and not temporary." Br. of Resp't at 23.

Egan's first contention misconstrues language in *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) (*PAWS II*). That case does not require that an "other statute" prohibit the disclosure of specific public records in their entirety as Egan contends. Contrary to Egan's claim, *PAWS II* specifically held that the "other statutes" exemption incorporates into the PRA other statutes which exempt or prohibit disclosure of either *specific information* contained in records or entire records. *Id.* See also, *Ameriquest Mortg. Co. v. Wash. State Office of Atty. Gen.*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010) (holding that the PRA's "other statute" exemption allows for a separate statute to preclude disclosure of "specific information" or entire "records.")

While RCW 42.56.210 requires that agencies redact partially-exempt records rather than withhold them in their entirety, *PAWS II* holds that this provision applies only to the exemptions specifically listed in the PRA (currently RCW 42.56.230- .440), but the redaction requirement does not apply to an "other statute" incorporated into the PRA under RCW 42.56.070(1). *PAWS II*, 125 Wn.2d at 262. Thus, if the "other statute" exempts or prohibits disclosure of certain public records in their entirety, then the agency can withhold them in their entirety rather than redacting them. *Id.*

Egan provides no support for his second contention; i.e., that because RCW 9.73.090(1)(c) is a temporary prohibition it fails his mistaken “entirety” requirement. As a result, it does not warrant attention.⁹ Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Palmer v. Jensen*, 81 Wn.App. 148, 153, 913 P.2d 413 (1996), *remanded on other grounds*, 132 Wn.2d 193, 937 P.2d 597 (1997).

It bears saying, nevertheless, that a number of PRA exemptions contain time limitations similar to RCW 9.73.090(1)(c). Some provisions contain specific time periods. For example, the contents of real estate appraisals, made for or by any agency relative to the acquisition or sale of property, are exempt until the project or prospective sale is abandoned or until such time as all of the property has been acquired or the property to which the sale appraisal relates is sold, but disclosure may not be denied for more than three years after the appraisal. RCW 42.56.260. Valuable formulae, designs, drawings, computer source code or object code, and research data obtained by any agency within five years of the request for

⁹ Egan raises an additional issue not addressed in the trial court regarding what he purports to be the City’s retention policy for in-car videos. The Court should disregard this argument. RAP 2.5(a); *see also, Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991) (an appellate court will not consider theories not presented below).

disclosure are exempt when disclosure would produce private gain and public loss. RCW 42.56.270(1).

Others, like RCW 9.73.090(1)(c), exempt disclosure until a certain event has occurred as opposed to the passage of a specific time period. The investigative exemption in RCW 42.56.240(1) categorically exempts the contents of an open, active law enforcement investigation until closed or referred to a prosecuting agency. *Newman v. King County*, 133 Wn.2d 565, 574-75, 947 P.2d 712 (1997); *Cowles Pub. v. Spokane Police Dept.*, 139 Wn.2d 472, 479, 987 P.2d 620 (1999). Records within the deliberative process exemption of RCW 42.56.280 are exempt only until the policies or recommendations contained in such records are implemented. *ACLU v City of Seattle*, 121 Wn.App. 544, 554, 89 P.3d 295 (2004).

D. Making a Record Available to a PRA Requester Is Making It Available to the Public

Egan introduces a new argument in his brief. He maintains that the prohibition in RCW 9.73.090(1)(c) that no sound or video recording made by a dash-cam shall be “made available to the public by a law enforcement agency” does not apply when the agency gives a recording to a public records requester. He argues that a recording is only made “available to the public” when the requester posts the video on the internet or gives it to

the media, who then post it on the internet. Br. of Resp't at 30. The Court should disregard this argument. RAP 2.5(a); *Puget Sound Blood Center*, 117 Wn.2d at 780.

If the Court considers it, the fundamental flaw in Egan's argument is that the PRA language mirrors the Privacy Act language. RCW 42.56.070(1) states that agencies "shall make available for public inspection and copying" all non-public records. It also states that agencies may not distinguish among persons requesting records, so agencies may have to disseminate the same records widely if they are requested by a large number of requesters. RCW 42.56.080. It is nonsensical to assert that providing a record to a public records requester is not making it available to the public.

Egan then implausibly argues that the Legislature intended to incorporate without reference Rules of Professional Conduct (RPC) 3.6 and 3.8 which govern prejudicial extrajudicial statements by lawyers or law enforcement officers regarding litigation into the Privacy Act. It is bewildering why the Legislature would implicitly incorporate court rules that are beyond the scope of its responsibility into legislation. It is even more baffling why they would do so without comment. Egan offers no legal support for his novel theory, but examination of the rules he cites demonstrates that his argument must fail.

Egan cites RPC 3.6 and 3.8 which govern what lawyers may say while litigation is active or anticipated. These rules restrict attorneys, and, by extension investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case, from making extrajudicial statements that may prejudice a case. RPC 3.8(f). Egan does not explain how an extrajudicial statement is similar to an in-car video except to concede that both have the potential to “inflare an imminent jury pool.” Br. of Resp’t at 34. He, thus, appears to concede that premature disclosure of in-car videos could detrimentally affect litigation.

Egan’s strained argument also fails because of the language of RPC 3.6(a). That rule states that a lawyer “shall not make an extrajudicial statement that the lawyer knows or reasonably should know *will be disseminated by means of public communication* and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” RPC 3.6(a) (emphasis added). Egan argues that the Legislature was considering the principles regarding proscribed extrajudicial statements and intended RCW 9.73.090(1)(c) to be read so that providing an in-car video to the media is not making it available to the public. How he discerns that the Legislature so intended is a mystery as nothing in the statute’s language or legislative history indicates this is true.

RPC 3.6(a) prohibits extrajudicial statements that a lawyer knows or reasonably should know will be disseminated by means of public communication. An agency reasonably should know that any record it provides could be disseminated by means of public communication. As Egan concedes, an agency should anticipate that an in-car video would be posted on the internet. Br. of Resp't at 30. The intent of RPC 3.6(a) is to prevent the dissemination of extrajudicial statements by means of public communication. If one accepts Egan's strained argument that the Legislature silently associated the Privacy Act and the RPC's, one must also accept that the Legislature's intent in temporarily prohibiting disclosure of in-car video similarly must have been to prevent their dissemination by means of public communication. As a result, making a recording available to the public includes providing it to a public records requester.

The Legislature prohibited disclosure of in-car video before final disposition of related criminal and civil litigation, and provided criminal penalties for wrongfully disclosing them. RCW 9.73.080 (2).¹⁰ Egan concedes that the Legislature recognized the public interest in due process

¹⁰ Egan argues that this provision does not apply to a law enforcement agency. The Court need not resolve that issue here, but the imposition of criminal penalties for wrongful disclosure, no matter to whom they apply, evidences the Legislature's intent to prevent the irreparable harm to persons and vital government interests resulting from disclosure.

and affording individuals the right to defend criminal charges or pursue civil claims in an impartial atmosphere. Br. of Resp't at 35. The logical conclusion is that the Legislature intended to delay disclosure of in-car videos because of the same concerns that we read about daily rather than an improbable relationship to the court rules. Public concerns about the pervasiveness of the internet, surveillance and other cameras, and concerns about privacy and personal exposure have only grown since the Legislature enacted RCW 9.73.090(1)(c), making its prohibition even more significant. Moreover, that the Legislature chose to prohibit disclosure rather than to exempt it meets the second and third prongs of RCW 42.56.540; i.e., that disclosure would not be in the public interest, and disclosure would substantially and irreparably damage a person or a vital government interest. *Soter*, 162 Wn.2d at 757.

V. ARGUMENT IN RESPONSE TO CROSS-APPELLANT EGAN

A. Even If Egan Had Been Entitled to Fees, He Failed to Support His Claimed Fees

Egan argues that the trial court should have awarded him more than twice the fees it did, and misrepresents the City's position by contending that the City "essentially conceded" that he was entitled to recover for a minimum number of hours. Br. of Resp't at 40. In fact, the City maintained that it did not violate CR 11 and, therefore, opposed the

award of any fees to Egan. CP 964. The City merely argued that in the event that trial court awarded fees, Egan's fee petition did not support his claimed fees. *Id.* This remains the City's position on appeal.

The trial court abused its discretion by imposing CR 11 sanctions against the City and awarding fees to Egan. Thus, this Court need not address Egan's arguments regarding the amount of fees. Should the Court reach those issues, nothing in Egan's brief should persuade it that he was entitled to more fees than the trial court awarded.

Egan appeared pro se in this action, yet sought fees incurred by associates who failed to appear in the case. He offered *no evidence* supporting his purported hourly rate. Most egregiously, he submitted heavily-redacted, block-billed entries that appeared to have been created after the fact and reflected largely unsupported, unnecessary, unproductive, and duplicative activities. *See, e.g., Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998) ("Counsel must provide contemporaneous records documenting the hours worked"); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983) (A court should "discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time"). Even if he had been entitled to an award of fees, Egan's fee petition did not meet the minimum standards to support an award.

When a court awards sanction, it must bear in mind that “[t]he basic principal governing the choice of sanctions is that the least severe sanctions adequate to serve the purpose should be imposed.” *McDonald v Korum Ford*, 80 Wn.App. 877, 891, 912 P.2d 1052 (1996) (citations omitted). Fees awards under CR 11 are limited to the amounts reasonably expended in responding to sanctionable filings because the rule is not meant to act as a fee shifting mechanism. *McDonald*, 80 Wn.App. at 891, citing *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994) (*Biggs II*); see also, *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993) (“[S]anctions rules are not ‘fee shifting’ rules” and “requests for sanctions should not turn into satellite litigation or become a ‘cottage industry’ for lawyers”).

In determining fees, a court should look to what a competent practitioner would need to do to obtain the successful result. *Scott Fetzer v. Weeks*, 122 Wn.2d 141, 151 859 P.2d 1210 (1993). Generally, a court must show its work in determining how a fee as a sanction is calculated. *Highland School Dist. No. 203 v. Racy*, 149 Wn. App. 307, 316, 202 P.3d 1024 (2009). The lodestar method is a good basis for doing so. *Id.*, *Progressive Animal Welfare Society v. University of Washington*, 114 Wn.2d 677, 689-90, 790 P.2d 604 (1990) (*PAWS*).

The lodestar approach involves two steps. First, the trial court multiplies “a reasonable hourly rate by the number of hours reasonably worked.” *West v. Port of Olympia*, 146 Wn. App. 108,122, 192 P. 3d 926 (2008), *review denied*, 165 Wn. 2d 1050 (2009). Next, the court determines the reasonable number of hours expended by counsel. The party seeking attorney’s fees bears the burden of proving the reasonableness of the fees. *Mahler*, 135 Wn.2d at 433-34. In calculating fees, a court should consider the type of work performed by the attorney. *ACLU v. Blaine School District*, 95 Wn. App. 106, 118, 975 P.2d 536 (1999). And a court should reduce the requested fees for amounts that “are deemed excessive, unreasonable or based on work unnecessarily done.” *PAWS*, 114 Wn.2d at 689-90. In making this determination, the court is not required to accept unquestioningly fee affidavits from counsel. *West*, 146 Wn. App. at 123.

The party seeking fees bears the burden of proving the reasonableness of the fees requested. *Scott Fetzer*, 122 Wn.2d at 151. A court “should impose *the least severe sanction necessary* to carry out the purpose of the rule.” *Biggs II*, 124 Wn.2d at 197 (emphasis added). A party may not recover excessive expenditures. *McDonald*, 80 Wn. App. at 891. Where a court awards substantial sanctions, those sanctions must be

quantifiable with some precision and are subject to rigorous appellate review. *Id.*

A court must determine which hours were reasonable and eliminate billing for work that was unsuccessful, duplicative, or unproductive. *Bowers*, 100 Wn.2d at 597.

B. Egan Offered No Evidence Supporting His Purported Hourly Rate

Egan merely stated that his value as a lawyer was reasonably set at \$295 per hour, and the trial court awarded him that amount without question. CP 1013. Egan provided no evidence to support his rate. He offered no representative client invoices or billing agreements to support this conclusion, and he failed to provide support why he would be entitled to this rate for work in this particular case. A court can award a higher fee to reflect an attorney's "special expertise." *West*, 146 Wn. App. at 123. But Egan has no "special expertise" in PRA matters. Even if he had demonstrated that \$295 is his standard hourly fee for criminal defense work, he did not address why he would be entitled to recover his full rate in a PRA case.

C. As a Pro Se Litigant, Egan Could Not Recover Fees for Associates Who Had Not Appeared in the Case

Egan appeared *pro se* in this action. His law firm was not a party to the suit. Egan nonetheless argues that the trial court abused its

discretion by failing to award fees for work done by Jay Wilkinson and Dawn Bettinger, associates in Egan's law firm. He offers no legal authority supporting this position, and, in fact, all authority is to the contrary. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Palmer v. Jensen*, 81 Wn. App. 148, 153, 913 P.2d 413 (1996), *remanded on other grounds*, 132 Wn.2d 193, 937 P.2d 597 (1997).

Non-attorney *pro se* litigants cannot recover fees in Washington courts. *West v. Thurston Co.*, 168 Wn. App. 162, 195, 275 P.3d 1200 (2012). Many jurisdictions deny fees to *pro se* litigants who happen to be attorneys as well. For example, a *pro se* attorney may not recover fees in FOIA actions. *Pietrangelo v. U.S. Army*, 568 F.3d 341 (2d Cir., 2009).¹¹ Washington courts have in some cases allowed an award of fees to a *pro se* litigant who is an attorney. *West v. Thurston Co.*, 168 Wn. App. at 195; *Leen v. Demopolis*, 62 Wn. App. 473, 486-87, 815 P.2d 269 (1991); *review denied*, 118 Wash.2d 1022, 827 P.2d 1393 (1992). Regardless, in Washington an attorney-litigant's right to recover fees is limited to

¹¹ Two cases containing extensive discussions of how different jurisdictions have resolved this issue are *Calhoun v. Calhoun*, 339 S.C. 96, 529 S.E.2d 14 (2000) and *Robbins v. Krock*, 73 Mass. App. Ct. 134, 896 N.E. 2d 633 (2008).

compensation for “*his own time.*” *Tradewell Group , Inc. v. Mavis*, 71 Wn. App. 120, 131, 857 P.2d 1053 (1993), *citing*, *Leen*, 62 Wn. App. at 487. (emphasis added).

To support his claim for associates’ fees, Egan offers only a case from Montana that does not even address associates’ fees. *Winer v. Jonal Corp.*, 169 Mont. 247, 545 P.2d 1095 (1975). The *Winer* case says that an attorney-litigant may recover for his own time, as opposed to the time of others. This is no more than Washington courts have held. The *Leen* case even cites *Winer* for the proposition that lawyers *who represent themselves* may recover fees. *Leen*, 62 Wn. App. at 487. Nothing in *Winer* supports extending fee recovery to associates who do not represent themselves.

Egan’s fees declaration showed that he chose to represent himself after weighing the “advantages and disadvantages for self-representation or hiring outside counsel.” CP 1016. Egan’s firm was not a party to this action; thus, any time spent by Wilkinson and Bettinger was attributable to a non-party rather than to Egan in this case. *See, Spokane Research & Defense Fund v. City of Spokane*, 99 Wn. App. 452, 457-58, 994 P.2d 267 (2000). Wilkinson and Bettinger could seek recovery for their time only if they acted as Egan’s attorneys, but they did not because Egan chose not to engage counsel when he appeared *pro se*.

Most important, Egan seeks fees for Wilkinson and Bettinger when they did not enter appearances in the case. Egan concedes that Wilkinson and Bettinger did not file notices of appearance as required by RCW 4.28.210 but argues they should be compensated anyway because their efforts on the case were “obvious” to the City and trial court. Br. of Resp’t at 45-46. Egan again offers the inapplicable *Winer* case to support this contention.

In Washington, a court may find in some instances that a defendant has appeared informally so as to be entitled to notice of a hearing on default. *Morin v. Burris*, 160 Wn.2d 745, 756, 161 P.3d 956 (2007). Because “litigation is inherently formal,” however, the informal notice doctrine is limited even in the context of a default hearing. *Id.* at 757. No Washington court has extended the concept of informal appearance to allow recovery of fees by associates who have not appeared on behalf of a pro-se attorney litigant. Egan urges the Court to take this extraordinary step because the “City never articulated surprise” that he may have had Wilkinson and Bettinger help him. Br. of Resp’t at 46. “Mere intent to defend,” however, is not enough to avoid a default judgment. *Morin*, 160 Wn.2d at 756. Nor is failing to articulate surprise enough to warrant awarding fees to Wilkinson and Bettinger in this case. There simply is no authority to support Egan’s claim for associates’ fees.

D. Egan's Heavily-Redacted, Block-Billed Fees Request Reflected Unproductive, Wasteful, and Other Non-Compensable Activities

Egan appears to concede that his initial fee request was deficient and now requests a lowered fee amount of \$29,500 for himself, as well the amounts previously requested for his associates' fees. Br. of Resp't at 47. Had Egan been entitled to fees, the trial court correctly reduced the amount.

Case law lays out standards that courts should apply in analyzing billing records. First, records should be kept contemporaneously. *Mahler*, 135 Wn.2d at 434. Second, the Court must exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims. *Scott Fetzer*, 122 Wn.2d at 141. Egan submitted block-billed hours making it impossible to determine how he apportioned his time. Billing records must do more than merely lump the work into various categories because the trial court must also be looking for wasted hours. *Id.* The practice of "block billing" is so frowned upon that federal courts summarily reduce hours for block-billed hours. *See, eg., Welch v. Metropolitan Life Ins. Co.* 480 F.3d 942, 948 (9th Cir. 2007) (Allowing a twenty-percent-reduction for all blocked-billed entries). Egan's imprecise records also frustrated determining the proportion of time he spent on his unsuccessful anti-SLAPP motion.

Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now, 119 Wn. App. 665, 690, 82 P.3d 1199, *review denied*, 152 Wn.2d 1023, 101 P.3d 107 (2004).

Where a party submits billing records that do not support the fees sought, a trial court should make an independent decision as to what represents a reasonable amount of attorney fees and need not rely on the requesting party's billing records. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.3d 208 (1987). A court may award substantially less than the amount requested by indicating how it arrived at the final numbers and explaining why discounts were applied. *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 847-48, 917 P.2d 1086 (1995).

The trial court found substantial deficiencies in Egan's fees declaration and reduced amounts accordingly. As an initial matter, Egan's heavily-redacted, block-billed entries made it difficult to "discern the reasonableness of the bills at all." CP 995. The trial court found that a substantial amount of claimed work unreasonable and unproductive. It specifically highlighted nine hours Egan claimed for preparing and rehearsing a Power Point for a twenty-minute hearing. *Id.* The trial court also noted the lead role that KOMO's attorney had taken in arguing the case. KOMO's attorney billing amounted to a fraction of Egan's. *Id.*

Reviewing Egan's fees declaration reflects the accuracy of the trial court's fees reduction. First, his fees declaration demonstrated that Egan spent the majority of his time in less than productive activity. In addition to the Power Point noted by the trial court, Egan submitted a myriad of time entries in which he "discusses", "confers", "emails", or "contacts" attorneys and perhaps others regarding the case. CP 998-1010. It is not legally justified, and it does not further the public purpose of the PRA or any other provision to award City taxpayer funds in order to subsidize an attorney's talking about the case rather than actively responding to it.

Egan sought a windfall at the taxpayers' expense, while his records failed to meet minimum requirements to support any fees award. To the extent he proved anything, it was that he spent most of his time on activities that were unnecessary, duplicative, and unproductive. The trial court abused its discretion by awarding any fees to Egan, but if he was entitled to fees, the trial court did not abuse its discretion in reducing his requested fees in the manner it did.

E. Egan Is Not Entitled to Attorney Fees on Appeal

Egan asks for fees on appeal but fails to comply with RAP 18.1(b), which requires a party seeking attorney fees on appeal to devote a section of the opening brief to a request for such fees. A party requesting

appellate attorney fees must include a separate section in its brief devoted to the request. RAP 18.1(b). This requirement is mandatory. *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996). The rule requires more than a bald request for attorney fees on appeal. The party must provide argument and citation to authority under the rule to advise the court of the appropriate grounds for an award of attorney fees as costs. *Wilson Court Ltd., P'ship v. Tony Maroni's Inc.*, 134 Wn.2d 692, 710, n.4, 952 P.2d 590 (1998); *see also*, *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9, *review denied*, 175 Wn.2d 1016 (2012). A party who fails to comply with this procedure is not entitled to an award of attorney fees. *Id.*; *see also*, *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 772 n.17, 162 P.3d 1153 (2007).

Egan's opening brief contains a single sentence containing no supporting authority that this Court should award him fees on appeal.¹² Br. of Resp't at 48. A single sentence requesting attorney fees without

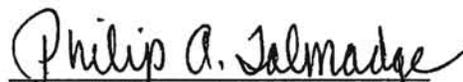
¹² The paragraph of Egan's opening brief containing this sentence mentions CR 11, but CR 11 does not apply in appellate proceedings. Instead, RAP 18.9(a) authorizes imposing attorney fees as a sanction for defending against a frivolous appeal. *See Eugster v. City of Spokane*, 139 Wn. App. 21, 34, 156 P.3d 912 (2007). Even if Egan correctly requested attorney fees on appeal under RAP 18.9(a), which he did not, he should not recover those fees because the City's appeal is not frivolous. An appeal is frivolous only when the appeal presents no debatable issues on which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal. *Stiles*, 168 Wn. App. at 267; *see also*, RAP 18.7.

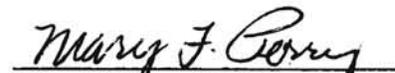
citing authority does not comply with RAP 18.1(b). *Stiles*, 168 Wn. App. at 267. Thus, where he failed to request them in his opening brief, Egan is not entitled to an award of attorney fees and costs on appeal even if applicable law were to grant him the right to recover such fees.

VI. CONCLUSION

Nothing in Egan's brief should dissuade this Court from reversing the trial court's order awarding CR 11 fees to Egan and vacating the judgment imposed against the City.

DATED this 25th day of March, 2013


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DECLARATION OF SERVICE

Marisa Johnson states and declares as follows:

1. I am over the age of 18, am competent to testify in this matter, am a Legal Assistant in the Law Department, Civil Division, Seattle City Attorney's Office, and make this declaration based on my personal knowledge and belief.

2. On March 25, 2013, I caused to be delivered by ABC Legal Messengers, addressed to:

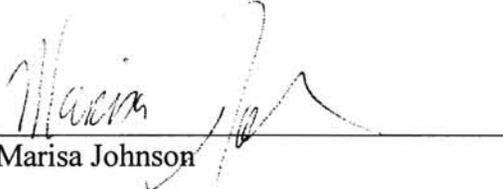
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a copy of Reply Brief of Appellant City of Seattle.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of March, 2013, at Seattle, King County, Washington.



Marisa Johnson