Court of Appeals No. 851748-I
Supreme Court No. _____

WASHINGTON STATE COURT OF APPEALS
DIVISION I

Snohomish County, *Petitioner*

v.

Lori Shavlik, *Respondent*

ON APPEAL FROM KING COUNTY
SUPERIOR COURT

PETITION FOR REVIEW

Lori Shavlik
POB 73
Woodinville, WA., 98072
425-215-6608

Table of Authorities

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Identity of Petitioner:

The petitioner is Lori Shavlik, who was the respondent when the case was litigated before the court of appeals.

Citation to the Court of Appeals decision:

The petition appeals the unpublished opinion of the Court of Appeals Division I, in Shavlik v. Snohomish County, Case No. 85174-8-I , issued on November 25th, 2024.

Issues Presented for Review:

1. Was the action of the agency "final?"
2. Was the subpoena of the judge relevant to the issues to be decided in Public Records case?

Statement of the case:

A. In 2020, Shavlik Made Two Public Records Requests Concerning Snohomish County Superior Court Judge George Appel

1. Shavlik's First Public Records Request.

On April 13, 2020, Shavlik sought records under the PRA from Snohomish County regarding: 1) Snohomish County Superior Court Judge George F.B. Appel's prior employment as

a Snohomish County deputy prosecuting attorney; and 2) and Dawson Place Child Advocacy Center ("Dawson Place"), a non-profit corporation that houses multiple programs concerning victims of abuse and neglect, including the Snohomish County Prosecutor's Office's Special Assault Unit ("SAU"). CP 107-08, 179. Specifically, the request stated:

> Please search ALL records relating to George F. Apple and Dawson Place from 2005-2008. No court records, but rather Prosecutor records while George F Appel was assigned to the SAU Unit in Snohomish County assigning him to work at 2722 Colby Ave. This will include his employment files.

CP 179, 193.

Because the request (for "Prosecutor records") sought records of the Snohomish County Prosecuting Attorney's Office Criminal Division ("Criminal Division"), the Criminal Division was designated the lead County department for responding to the request. CP 179-80. On April 16, 2020, the Criminal Division responded to Shavlik's records request by informing her that

an installment would be available on or before May 17, 2020. CP 180, 195.

On May 15, 2020, the County e-mailed Shavlik informing her that an installment of records was available. CP 180-81, 199-200. The County also informed Shavlik that, because the County had suspended in-person records inspections pursuant to Washington State Governor Inslee's Proclamation 20-28, they were not available for in-person inspection, but rather in other formats subject to costs, pursuant to RCW 42.56.120(2)(b). Alternatively, Shavlik had the option of leaving her records request open until in-person inspections were allowed. CP 181, 199.

Shavlik objected to the County's suspension of in-person records review and refused to pay the cost associated with the scanning and mailing of records responsive to her request. Since then, the County repeatedly reiterated to Shavlik that records were available to her, including after expiration of the

prohibition on in-person records inspection. CP 181, 208-15.

2. Shavlik's Second Public Records Request.

On June 29, 2020, Shavlik made a second PRA request, which again sought records concerning Judge Appel and Dawson Place. In addition to covering the same temporal scope as the first request, the second request sought records created after 2008 through June 29, 2020:

> Please provide ALL records relating to George F.B. Appel (however file is kept as an employee since many alias are used) AND Dawson Place (Snohomish County Child Advocacy Center) Please keep in mind that I am asking for the records RE: 2005 to 2009 records FIRST, then search the rest of the date up until present date after all of the records from 2005-2009 have been provided. CP 181, 203.

A Criminal Division employee followed up with e-mails to Shavlik noting that the two requests overlapped and confirming that the original installment of records remained available, subject to the scanning and mailing

cost. CP 182, 205-06. Over the next few months and into 2021, a Criminal Division employee repeatedly communicated with Shavlik, reminding her that the records responsive to her requests were available, subject to the scanning and mailing cost. CP 178, 181,184-86, 190-91, 217-229, 252-53. Additionally, through the Criminal Division, the County provided Shavlik an opportunity to review the records online at no charge. CP 188-89, 243-46.

Shavlik declined the opportunity to inspect records online, again refused to pay the cost associated with scanning and mailing records responsive to her request, and repeatedly demanded an in-person inspection of the records which would allow her to copy the records herself. CP 178, 181, 183-86, 190-91, 217-20, 252-53.

Since Shavlik was never afforded an opportunity to view the records and scan or them on her own, she never received and therefore did not examine the records. CP 433.

1. Introduction

In *Neighborhood Alliance of Spokane County v. Spokane County* 172 Wn.2d 702, the court held that the discovery in public records cases is the same as other civil actions, is governed by the civil rules and what constitutes relevant discovery is broad. "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." CR 26(b)(1). Shavlik contends that the deposition requested easily falls within the *Neighborhood Alliance id*. framework. At the time Dawson Place was conceived, Judge Appel was employed by the defendant as a prosecutor in a special operations group which became a primary occupant when Dawson Place opened. As such, it is entirely plausible that he either possessed or had

knowledge of documents that were responsive to the Respondent public disclosure request and also possessed knowledge how he would locate those documents had he made a diligent search.

The County contends that the deposition request is improper because the judge's conclusory allegation, made under oath, that he possesses no relevant documents, is dispositive over whether such relevant documents are in his possession or control or if he knows of any information that could lead to admissible evidence.

The court of appeals concluded that the deposition was improper because the deposition would only reveal whether new evidence might have been obtained rather than demonstrate whether its search was proper

Both the County and the Court of Appeals argued that Shavlik is not entitled to file suit over the documents because

the agency's was not final because she refused to pay a fee to inspect the documents.

As will be shown in the arguments presented in this petition, none of the County's arguments have any validity, so the Supreme Court should uphold the findings of the trial court and reverse the findings of the Court of Appeals by sustaining the subpoena that ordered the deposition of Judge Appel.

3. Argument

A. The County misrepresents the findings of relevant case law to the court in arguing it had shown Appel possessed no relevant documents.

First, the County appears to focus on the "fact" that Judge Appel does not have responsive records for the time he was a prosecutor. The County refers us to *Nissen v. Pierce Cnty*., 183 Wn.2d 863, 886, 357 P.3d 45 (2015) claiming that holding states that no discovery is allowed as long as the person who holds the records submits a declaration that he holds no records responsive to request.

That was not the holding in *Nissen*. In *Nissen,* the court ruled that the declarations had to be made in good faith. It also stated that the employees' assertion that they did not hold responsive records were not sufficient. In fact, in *Nissen*, remanded the case back, ruling that the County itself had to have a mechanism for reviewing documents alleged to be exempt, to insure there were no public records involved. In *Nissen*, the court cited to two federal cases in support of this principle:

> While "[a]n agency cannot require an employee to produce and submit for review a purely personal document when responding to a FOIA request[,] ... it does control the employee to the extent that the employee works for the agency on agency matters." *Ethyl Corp. v. U.S. Envt'l Prot. Agency*, 25 F.3d 1241, 1247 (4th Cir.1994). Thus, where a federal employee asserts a potentially responsive record is personal, he or she must provide the employer and "the courts with the opportunity to evaluate the facts and reach their own conclusions" about whether the record is subject to FOIA. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 480-81 (2d Cir.1999). We already incorporate FOIA's standard for adequate searches into the

> PRA, *Neigh. All.*, 172 Wash.2d at 720, 261 P.3d 119, and we similarly adopt FOIA's affidavit procedure for an employee's personally held public records

In order to satisfy the agencies burden, *Nissan* permits employees *in good faith* to submit "reasonably detailed, nonconclusory affidavits" attesting to the nature and extent of their search, citing *Neighborhood Alliance*. at 721, 261 P.3d 119

None of that has occurred here. In his declaration, former prosecutor Appel submitted nothing but conclusory allegations that he did not possess such records. He did not delineate what records he possessed from his time as a prosecutor and why they were personal or otherwise not responsive to the appellant's request, or what efforts he made to search those records. In other words, his declaration was not reasonably detailed nor non-conclusory about the nature and extent of his search. If for no other reason, Shavlik should have

an opportunity to cross examine the former prosecutor to determine what kind of records he possesses that could arguably be responsive and how he would look for them so that the court could review them.

The Court of Appeals attempted to avoid this issue by claiming that the purpose of the discovery was to see if an adequate search had been made, not whether more documents could have been located citing *Forbes v. City of Gold Bar,* 171 Wn.App. 857, 866, 288 P.3d 3943 (2012). This objection is easily met; the record only shows Snohomish County requested a conclusory declaration from Judge Appel as part of its search. Since Judge Appel is an employee, they should have requested from him a detailed explanation as to how he conducted his search. The record doesn't show the County ever did this. A deposition might have provided relevant information in this regard.

The Court of Appeals pointed out that in *Neighborhood Alliance supra* there was evidence there was an insufficient search because of contradictions in the government's response which made the motive of their insufficient response open to question

For this reason, Shavlik should be allowed to question Appel, to see if his declaration was made in good faith. The reason for this is that she has submitted declarations indicating that the County is foot dragging in support of a retaliation campaign that was initiated by the judge Appel when he sanctioned her $4000 allegedly for misconduct on another case making his motive suspect. While the county claims that it has offered to give her records, it was accompanied by an admission that the offer was conditional upon several payments and/or other requirements that indicate the prosecutor was treating her differently than other requestors.

In addition, the County has a history of stalling with respect to Shavlik. The County was sanctioned for similar foot-dragging in *Shavlik v. Snohomish County*, King County Case #17-2-0396-9 and Shavlik should be allowed to conduct discovery to see if the same motive is present here.

B. Shavlik's requests were reasonable and not for the purposes of harassment.

In its opening brief, the County argued that Shavlik's deposition of Appel constituted harassment because she admitted she sought to question Appel about a previous case. In that case, Shavlik was sanctioned $4000 by Appel, when Shavlik sought his recusal.

Under Washington's CR 26(b)(1), "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." This rule is designed to permit a broad scope of discovery. *Bushman v. New Holland* Div., 83 Wn.2d 429, 434, 518 P.2d

1078 (1974). See *Lurus v. Bristol Laboratories, Inc.*, 89 Wn.2d 632, 574 P.2d 391 (1978); The Washington State Supreme Court has previously said that the decision not to disclose records and the reasons behind that decision "are precisely the subject matter of a suit brought under the Public Records Act." *PAWS v. UW*, 125 Wash.2d 243, 270, 884 P.2d 592 n. 17. And the court expanded this in its recent *Yousoufian* opinion, which made agency culpability the focus in determining daily penalties, thus making discovery regarding motivation relevant. *Yousoufian v. Office of Ron Sims*, 168 Wash.2d 444, 460, 229 P.3d 735 (2010). Of course, it may be within the trial court's discretion to narrow discovery, but it must not do so in a way that prevents discovery of information relevant to the issues that may arise in a PRA lawsuit.

Motivation was one of the reasons Shavlik sought to depose Judge Appel. Since Appel was a prosecutor for the unit that eventually occupied Dawson Place and both the agency and

Appel had been adversarial with Shavlik in the past, as argued earlier she was entitled to depose Appel do determine if his declaration was submitted in good faith.

The trial court dealt with the complaint by the County that she intended to go beyond the scope of discovery by issuing an order that limited the scope of the deposition as follows:(CP 700).

> c. Examination of the deponent shall be limited to the following: 1) Judge Appel's possession or knowledge of records responsive to Plaintiff's Records Requests, if any (but not including the contents of such records, if any); 2) matters explicitly raised by Judge Appel in his declaration.
>
> d. Plaintiff shall not inquire into orders issued, or cases heard, by Judge Appel in which Ms. Shavlik or a member of Ms. Shavlik's family was a party. Plaintiff shall not inquire into matters unrelated to or post-dating Judge Appel's former employment with the Snohomish County Prosecutor's Office. Judge Appel is permitted to decline to answer questions based on a belief that answering he may violate the Rules of Professional Conduct, the Code of Judicial Conduct, or would otherwise reveal his thought processes or mental impressions attendant to his judicial decision-making. *To the*

> *extent Plaintiff believes that Judge Appel's refusal to answer questions is not well-grounded or in good faith, she may bring a written motion to compel in accordance with the Civil Rules.*

Chief Justice Warren, in a foreword to W. Glaser, Pretrial Discovery and the Adversary System (1968) said:

> The pretrial discovery rules have attempted to remove secrecy and surprise from the trial, thus presenting the fact-finder with a less dramatic, but more accurate, presentation of information. Proponents assert that the rules have proved successful in this regard. Yet there has been widespread debate and disagreement about whether the discovery rules, on balance, have improved the adversary system. Critics have doubted whether the benefits have been achieved, and have charged that discovery is unduly expensive and promotes delay and harassment.

It is toward the amelioration of these problems, among others, that CR 26(c), providing for protective orders, was directed. Under this rule the trial court exercises a broad discretion to manage the discovery process in a fashion that will implement the goal of full disclosure of relevant information and at the same time afford the participants protection against

harmful side effects. 4 J. Moore, Federal Practice ¶ 26.67, at 26-487 (2d ed. 1982).

If the person shows good cause, the trial court may make any protective order which justice requires to protect the person from annoyance, embarrassment, oppression, or undue burden or expense, including that the discovery not be had. CR 26(c)

The County cites to *Barfield v. City of Seattle*, 100 Wn.2d 878, 885, 676 P.2d 438 (1984); CR 26(c) for the general proposition that CR 26 allows for a protective order to be issued that protects against annoyance, harassment, undue burden or expense and also references *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 232, 654 P.2d 673 (1982) that states a party establishes good cause by showing that a protective order would avoid the threat of a harm listed in CR 26(c) without impeding the discovery process.

The County misrepresents the holding of *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn. App. 412, 423, 204

P.3d 944, review denied, 166 Wn.2d 1037 (2009) by omitting the finding that in order "To establish good cause, the party should show specific prejudice or harm will result if no protective order is issued." The party should use affidavits and concrete examples to demonstrate the specific harm that will be suffered; "broad or conclusory allegations of potential harm may not be enough." *Id.*

The county did none of that here. Not only did Judge Appel's declaration not give any concrete specific examples of the harm he might suffer, he did not even say he would be harmed at all.

The Court of Appeals apparently sought to avoid this issue by claiming the agencies order was not final citing *Hobbs v. State*, 183 Wn. App. 925, 935-936, 335 P.3d 1004. However, Hobbs was not decided in the midst of a pandemic where the agency was using the pandemic as an excuse to either charge

her for the copying or making it impossible for her to scan or copy with her own equipment at no cost.

According to RCW 49.56.120:

> (1) No fee shall be charged for the inspection of public records or locating public documents and making them available for copying, except as provided in RCW 42.56.240(14) and subsection (3) of this section.
>
> …
>
> (3)(a)(i) In addition to the charge imposed for providing copies of public records and for the use by any person of agency equipment copying costs, an agency may include a customized service charge. A customized service charge may only be imposed if the agency estimates that the request would require the use of information technology expertise to prepare data compilations or provide customized electronic access services when such compilations and customized access services are not used by the agency for other agency purposes.
>
> (ii) The customized service charge may reimburse the agency up to the actual cost of providing the services in this subsection.
>
> (b) An agency may not assess a customized service charge unless the agency has notified the requestor of the customized service charge to be applied to the request, including an explanation of why the customized service charge applies, a description of the specific expertise, and a reasonable estimate cost of the charge. The notice

> also must provide the requestor with the opportunity to amend his or her request in order to avoid or reduce the cost of a customized service charge.

Neither the county nor the Court of Appeals cite to any authority which allows the County to charge for inspecting documents. Neither agency cites to any authority stating the appellant must wait to the end of the pandemic before the order should be considered final.

"Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). In Washington, courts may assume that where no authority is cited, counsel has found none after search. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978).

If it were possible for the County to make an argument that this is a case of first impression, then it should have done so. By not doing so, the court should therefore give no credence to this argument In Washington, passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Holland v. City of Tacoma* 90 Wa. App. 533, 538, 954 P.2d 2d290(1998)

4. Conclusion

According to RAP the following considerations govern whether the Supreme Court will accept review.

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue

of substantial public interest that should be determined by the Supreme Court.

Shavlik contents that 1, 2, and 4 are met. The Court of Appeals decision conflicts with *Neighborhood Alliance supra* and other authority cited in this brief. The issue of whether a government agency can use the pandemic as an excuse to comply with a statute is of substantial public interest that should be determined by the Supreme Court.

The trial court crafted a carefully written order which allowed Shavlik to conduct the discovery while limiting it so the deponent could not be harassed or unnecessarily burdened. For this reason, the court should uphold the order that subjected Judge Apple to a deposition by Shavlik.

I certify that this motion is in 14-point Times New Roman font and contains 3,486 words, in compliance with the Rules of Appellate Procedure. RAP 18.27(b)

DATED December 26th, 2024.

/S/ *Lori Shavlik*
Lori Shavlik
Pro Se

I hereby certify that on December 26th, 2024, I caused to be served a copy of this document, Respondent's Opening Brief, by the method indicated below to the following:

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Lori Shavlik,
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LORI SHAVLIK, Respondent, v. SNOHOMISH COUNTY, Petitioner.	No. 85174-8-I DIVISION ONE UNPUBLISHED OPINION

CHUNG, J. — In this Public Records Act[1] (PRA) case in which plaintiff Lori Shavlik seeks records from Snohomish County, the trial court denied Snohomish County's motion to quash a subpoena directing a superior court judge to appear for a deposition. The court also denied the County's motion for a protective order prohibiting Shavlik from deposing the judge pursuant to another subpoena. Because Shavlik made no showing that the judge's testimony was relevant to her PRA claims, the trial court abused its discretion by denying the County's motions. Therefore, we reverse and remand for further proceedings consistent with this opinion.

FACTS

On April 10, 2020, Lori Shavlik made the following public records request to Snohomish County for records related to former deputy prosecutor George

[1] Chapter 42.56 RCW.

Appel, who subsequently became a Snohomish County Superior Court judge:

> Please searc[h] ALL records relating to George F. App[el] and Dawson Place from 2005-2008.
>
> No court records, but rather Prosecutor records while George F[.] Appel was assigned to the SAU Unit in Snohomish County assigning him to work at 2722 Colby Ave. This will include his employment files.

Shavlik had previously sued the Child Advocacy Center of Snohomish County at Dawson Place (Dawson Place), which houses the Snohomish County Prosecuting Attorney's Office's Special Assault Unit, or "SAU" (2017 lawsuit).[2] See Shavlik v. Dawson Place, 11 Wn. App. 2d 250, 253, 452 P.3d 1241 (2019); Judge Appel presided over a hearing in the 2017 lawsuit and made the following disclosure:

> Before we get under way, lest there be any curiosity, this disclosure. I used to work for the prosecutor's office. I worked there until the end of 2008 and was, in fact, assigned to the Special Assault Unit in the prosecutor's office between 2003 and 2005, leaving there to go to a different unit at the end of 2005.
>
> So I was never actually assigned to Dawson Place. However, I was assigned to the unit that eventually wound up going to Dawson Place. And there may possibly have been some people in the Special Assault Unit when I was there who then went to Dawson Place, although I'm not sure about that.

On April 13, 2020, the County acknowledged receipt of Shavlik's public records request, to which it assigned tracking number K040880 (first request), and indicated that "public records (if any) responsive to this request, as we currently understand it, will be available on or before May 17, 2020."

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[2] In its opening brief, the County asserts that Shavlik made frivolous filings in this and other litigation. Shavlik moves to strike these assertions, arguing that her litigation history is not relevant, was not before the trial court, and constitutes inadmissible character evidence. We deny Shavlik's request to strike; however, we need not and do not consider the County's allegations about Shavlik's litigation tactics.

On May 15, 2020, the County notified Shavlik by e-mail that records responsive to her first request were ready but were too large to send through e-mail. The County thus invoiced Shavlik for scanning the documents and making them available to her on a compact disc.

On June 28, 2020, Shavlik made another public records request (second request) to the County:

> Please provide ALL records relating to
>
> George F. B. Appel (how ever file is kept as an employee since many alias are used)
>
> AND
>
> Dawson Place
> (Snohomish County Child Advocacy Center)
>
> Please keep in mind that I am asking for the records RE: 2005- to 2009 records FIRST, then search the rest of the date up until present date after all of the records from 2005-2009 have been provided.

On July 7, 2020, the County acknowledged by e-mail that it had received the second request, to which it assigned tracking number K042784, and indicated that "we anticipate that an installment will be available on or before August 7, 2020." The County also noted that Shavlik "previously made a similar request—K040880—that is still pending payment," that the second request "appears to partially encompass the same records as" the first request, and that Shavlik "may receive the same records in response to both requests."

On July 9, 2020, Shavlik responded to the County's e-mail, asking, "Can you please provide me with an inspection / Copy Date?" The County responded that "in-person PRA services" were suspended until August 1, 2020, pursuant to

the governor's Proclamation 20-28 related to the COVID-19 pandemic. Accordingly, it tentatively scheduled an inspection date of August 11, 2020 for its responses to both the first and second requests. The County rescheduled the inspection date multiple times as the governor extended Proclamation 20-28.

In March 2021, the County notified Shavlik that it could offer her an online inspection of responsive records, and asked her to "let us know at your earliest convenience if you would like to avail yourself [of] online records inspection." Shavlik asked the County why it could not provide the responsive records "by drop box [for] free," and the County responded, "The fee is for scanning. The age of the records means that they are all paper records and the County charges per sheet for scanning."

On April 7, 2021, the County notified Shavlik that an online records inspection had been set up for her, and Shavlik responded, "I can not creat[e] an account to view the files, so in the alternative provide the records or set an appointment for me to copy and inspect." The County responded that it would contact her to schedule an in-person inspection "once the emergency declarations prohibiting in-person County business are lifted."

On September 20, 2021, the County e-mailed Shavlik in response to a voicemail she left regarding her requests. It wrote, "By way of your email dated April 7, 2021, you have let us know that you do not want to avail yourself [of] the online inspection process." It also notified Shavlik that although its public records policy "normally provides that if a requestor fails to claim, review or pick-up an installment [of] records within a 30 day period after initial notification, the County

may close the request," but in light of the COVID-19 state of emergency, it would "continue to adhere to its policy of not closing requests because of nonpayment" until Proclamation 20-28 was rescinded or the COVID-19 state of emergency terminated, "whichever occurs first."

Three days later, Shavlik filed the instant lawsuit against the County, alleging that the County violated the PRA in processing the first and second requests.[3] Shavlik also alleged that Judge Appel had not been honest about his relationship to Dawson Place. Then, in April 2022, Shavlik obtained a subpoena directing Judge Appel to appear for a deposition and produce the following documents listed in an "Exhibit A" to the subpoena:

1. Emails, and telephonic communications that fit in the parameters of this lawsuit.

2. Documents that fit in the parameters of this lawsuit.

3. All records relating in any way to the 2) public records # K040880 and K042784.

4. [M]eetings, subject matter of meetings that fit in the parameters of this lawsuit.

5. All documents relating to Dawson Place. AKA Snohomish County Child Advocacy Center AKA Dawson Place.

6. [A]ll records relating to Three address:
   2722 Colby Ave Everett WA 98201
   1509 California Ave Everett WA 98201
   3000 Rockefeller Everett WA 98201

7. All records relating to the employment of George Appel and his wife that mentions Dawson Place.

The County moved to quash the subpoena, arguing that it exceeded the

[3] Shavlik's complaint also alleged PRA violations related to four other PRA requests, which are not at issue on review.

scope of allowable discovery. The trial court concluded that although Shavlik "is entitled to ask this particular witness whether he's got any records in his own possession that might be relevant to this particular case," Exhibit A to the subpoena was overly broad and "somewhat looks like a fishing expedition." Accordingly, the court quashed the subpoena "as it's issued right now, . . . with Exhibit[ ] A attached to it," and it indicated that Shavlik could propose a subpoena without an exhibit attached.

Shavlik followed through with that proposal, and on June 24, 2022, the trial court issued a second subpoena that directed Judge Appel to appear for a deposition but did not direct him to produce any documents. The County moved to quash the second subpoena, and the trial court denied the motion, reasoning that Judge Appel might have relevant information about the records Shavlik was requesting. That said, the court indicated that "if a deposition happens, . . . it should be limited only to any knowledge [Judge Appel] has of County records that aren't privileged . . . or are not chamber[s] records . . . and whether . . . he has any possession of those County records that would be responsive to [Shavlik's] request." The court asked the parties to prepare an order and, if they were unable to come to an agreement, to set a presentment hearing. It also stayed Judge Appel's deposition pending entry of an order.

On September 20, 2022, before the court had entered an order on the County's second motion to quash, Shavlik sought and obtained a third subpoena to depose Judge Appel. The County responded by moving for a protective order prohibiting Shavlik from deposing Judge Appel pursuant to that subpoena. In

support of its motion, the County provided a declaration from Judge Appel in which he attested that "to the best of [his] knowledge, Dawson Place did not yet exist until after [he] had been rotated from the . . . SAU" and that he "did not have an office at Dawson Place . . . (when it was located . . . at 2722 Colby Ave. or otherwise). Judge Appel also attested, among other things:

> 10. I am aware that the litigation under this Superior Court cause number concerns, among other things, two requests made by the plaintiff to Snohomish County under the [PRA] for records concerning: 1) myself and/or my employment as a DPA in the Criminal Division of the Snohomish County Prosecuting Attorney; and 2) Dawson Place CAC.
>
> 11. As a Superior Court judge, my duties do not include collecting records in response to requests made to Snohomish County under the [PRA]. Nor am I involved in the establishment or implementation of County policies regarding responses to requests made to the County under the [PRA]. Accordingly, I was not involved in the response to plaintiff's public records requests at issue, either in terms of searching for and collecting records or in terms of making decisions regarding their production and availability to the plaintiff.

On October 13, 2022, Shavlik obtained a fourth subpoena directing Judge Appel to appear for a deposition on October 21, 2022. The County moved to quash because no order had yet been entered on the County's motion to quash Shavlik's second subpoena and because the County's motion for a protective order in response to the third subpoena remained pending. The trial court granted the motion to quash the fourth subpoena and set a hearing for (1) presentment of an order on the County's motion to quash the second subpoena and (2) consideration of the County's motion for a protective order in relation to the third subpoena.

After a hearing on March 15, 2023, the trial court entered written orders

(1) denying the County's motion to quash the second subpoena and (2) denying the County's motion for a protective order in relation to the third subpoena. The court authorized Shavlik to depose Judge Appel subject to the following conditions:

> a. Such deposition shall take place on a mutually agreed date and time, subject to Judge Appel's and counsel for the County's availability.
>
> b. In accordance with the Washington Supreme Court's Order Regarding Court Operations After October 31, 2022, No. 25700-B-697, the deposition shall take place remotely and shall not be recorded other than by a certified stenographer/court reporter . . . .
>
> c. Examination of the deponent shall be limited to the following: 1) Judge Appel's possession or knowledge of records responsive to Plaintiff's Records Requests, if any (but not including the contents of such records, if any); 2) matters explicitly raised by Judge Appel in his declaration.
>
> d. Plaintiff shall not inquire into orders issued, or cases heard, by Judge Appel in which Ms. Shavlik or a member of Ms. Shavlik's family was a party. Plaintiff shall not inquire into matters unrelated to or post-dating Judge Appel's former employment with the Snohomish County Prosecutor's Office. Judge Appel is permitted to decline to answer questions based on a belief that answering the question may violate the Rules of Professional Conduct, the Code of Judicial Conduct, or would otherwise reveal his thought processes or mental impressions attendant to his judicial decision-making. *To the extent Plaintiff believes that Judge Appel's refusal to answer questions is not well-grounded or in good faith, she may bring a written motion to compel in accordance with the Civil Rules.*

The court also ordered that if the County sought discretionary review, no deposition could take place until this court issued a mandate or certificate of finality. The County moved for discretionary review, which this court granted.

ANALYSIS

The County argues that the trial court erred by denying its motion to quash and its motion for a protective order. We agree.

We review a trial court's discovery orders for an abuse of discretion. McCallum v. Allstate Prop. & Cas. Ins. Co., 149 Wn. App. 412, 419, 204 P.3d 944 (2009). "[T]he civil rules control discovery in a PRA action." Neigh. All. of Spokane County v. Spokane County, 172 Wn.2d 702, 716, 261 P.3d 119 (2011). Under those rules, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." CR 26(b)(1). Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Here, Shavlik's complaint alleged that the County violated the PRA by "withholding" records and "not provid[ing] [them] when they said they would," not providing further responses or updates when the county " 're-opened,' " not providing any records, "[d]en[ying] [i]nspection and demanding fees," "delet[ing] the records from govqa and combin[ing] this request behind another request," failing to conduct an adequate search, and failing to provide an adequate response. As the County points out, each of these claims is focused on whether the County complied with its obligations under the PRA in processing Shavlik's records requests. Those obligations consisted of providing reasonable estimates of the time required to respond and the charges for copies, and adequately searching for—and producing—responsive records. See RCW 42.56.550(1)-(2)

(establishing causes of action based on an agency's denial of "an opportunity to inspect or copy a public record" and for an agency's failure to make a "reasonable estimate" of the time required to respond or of the charges to produce copies); WASH. STATE BAR ASS'N, PUBLIC RECORDS ACT DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS § 16.2 (2d ed. 2014) ("denial of access" claims include claims that an agency failed to produce records or failed to adequately search for records). To that end, the trial court found that "Judge Appel was not involved in responding to [Shavlik]'s Public Records Requests or in establishing or implementing Snohomish County's policies and procedures concerning the production of public records—including in response to [Shavlik]'s Public Records Requests."

Yet the court *also* concluded that records Judge Appel "may have created or possessed (or have knowledge concerning), if any," were relevant to Shavlik's PRA claims. This was error. Whether Judge Appel had knowledge of or possessed documents responsive to Shavlik's requests does not make any more or less probable whether the County adequately searched for and produced responsive records.[4] This is so because " '[t]he focal point of the judicial inquiry *is the agency's search process, not the outcome of its search*. The issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate.' " Forbes v. City of Gold Bar, 171 Wn. App. 857, 866, 288 P.3d 394 (2012) (internal quotation marks omitted; some emphasis added) (quoting Trentadue v. Fed. Bureau of

[4] Nor does it make it any more or less probable whether the County provided reasonable estimates of the time required to respond to Shavlik's requests and the cost to produce copies.

Investigation, 572 F.3d 794, 797-98 (10th Cir. 2009)); see also Neigh. All., 172 Wn.2d at 720 ("[T]he issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found."); Kozol v. Wash. State Dep't of Corr., 192 Wn. App. 1, 8, 366 P.3d 933 (2015) ("When an agency does not find a record that should exist, the question for review is whether or not *the search* was adequate." (emphasis added)). Accordingly, the trial court abused its discretion by not quashing Shavlik's second subpoena and not entering a protective order prohibiting her from deposing Judge Appel pursuant to the third subpoena.

Shavlik disagrees and argues that "the deposition requested easily falls within the Neighborhood Alliance framework.". In Neighborhood Alliance, as noted above, our supreme court held that the civil rules control discovery in a PRA case and that discovery was thus "governed only by relevancy considerations." 172 Wn.2d at 708. Further, the court observed that what is relevant in a PRA case "includes *why* documents were withheld, destroyed, or even lost" and what the agency did to locate those documents. Id. at 718.

But in Neighborhood Alliance, the documents the agency disclosed to the requester had discrepancies indicating the agency's search was inadequate, see 172 Wn.2d at 711, 713 n.3, thus making discovery into the agency's search and its motives relevant. Furthermore, the requester filed suit only after efforts to resolve the discrepancies failed. Id. at 712. Here, by contrast, the record establishes that at the time Shavlik sought to depose Judge Appel, she had not even viewed the documents the County produced in response to her requests,

and her requests remained open pending inspection, which the County had postponed but not denied. While Neighborhood Alliance may stand for the proposition that relevant discovery in a PRA lawsuit is no less broad than in any other civil case, we are not persuaded that it is broad enough to allow a requester to file a PRA lawsuit *before* an agency has taken a final action on their request and, by doing so, depose a witness based on denial-of-access claims that are necessarily speculative because the requester has not even reviewed the responsive records.[5] Cf. Hobbs v. State, 183 Wn. App. 925, 935-36, 335 P.3d 1004 (2014) ("Under the PRA, a requester may only initiate a lawsuit to compel compliance with the PRA *after* the agency has engaged in some final action denying access to a record."). Neighborhood Alliance is distinguishable and does not control.

Shavlik also argues that the trial court did not abuse its discretion because it placed limitations on the scope of Judge Appel's deposition and the County failed to show "specific harm" justifying entry of a protective order. But even with limitations, the trial court still allowed Shavlik to depose Judge Appel about his possession or knowledge of records responsive to Shavlik's records requests. Because Judge Appel's testimony about these matters was not relevant to

[5] Shavlik claims that the County violated the PRA by charging her a fee to inspect the responsive documents. But the record reflects that the County specifically advised that contrary to regular policy, because of COVID-19, it would not close her requests based on nonpayment "until the Proclamation is rescinded by gubernatorial or legislative action or termination of the COVID-19 State of Emergency, whichever occurs first." Further, the County offered to schedule an inspection once in-person business resumed and, in the meantime, gave Shavlik the option to pay to obtain copies or view scanned documents in an "online inspection." That Shavlik declined the latter alternatives neither establishes that the County charged Shavlik for an inspection nor alters the fact that at the time the trial court authorized Judge Appel's deposition, Shavlik still had not inspected any of the responsive records the County had produced.

Shavlik's PRA claims against the County, his deposition was not justified regardless of the limitations placed thereon and without any further showing of harm. See Rhinehart v. Seattle Times Co., 98 Wn.2d 226, 232, 654 P.2d 673 (1982) (scope of discovery extends only to "relevant and not privileged" matters).

Finally, Shavlik contends that she should have been allowed to question Judge Appel about whether his declaration in support of the County's motion to quash "was made in good faith." Shavlik relies on Nissen v. Pierce County, where our supreme court stated that an agency can satisfy its burden to show it conducted an adequate search for records by presenting employees' "good faith [and] 'reasonably detailed, nonconclusory affidavits' attesting to the nature and extent of their search." 183 Wn.2d 863, 885, 357 P.3d 45 (2015) (quoting Neigh. All., 172 Wn.2d at 721). She also asserts that Judge Appel initiated a "retaliation campaign" against her by sanctioning her in the 2017 lawsuit and that the County "has a history of stalling with respect to Shavlik," as evidenced by a sanction imposed in a King County lawsuit. But Shavlik provides no details about the other lawsuit, and in any case, her assertions are not supported by any references to the record. Thus, we do not consider them. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments unsupported by references to the record or citation to authority need not be considered). Moreover, Nissen is inapposite because Judge Appel's declaration was not submitted to demonstrate the adequacy of the County's search, but to support the County's motions to protect him from being subpoenaed for deposition. Cf. Nissen, 183 Wn.2d at 886 (purpose of Nissen affidavit is to give requester and

trial court a basis to determine whether withheld material was indeed nonresponsive). Shavlik argues that she "should have an opportunity to cross examine the former prosecutor to determine what kind of records he possesses that could arguably be responsive so that the court could review them," but she cites no authority to support that proposition. And again, Shavlik did not even review the records the County provided in response to her requests. Thus, the relevance of any records Judge Appel might possess to her claims against the County about its compliance with the PRA, when he last worked at the SAU unit in 2009, is entirely speculative. Cf. Forbes, 171 Wn. App. at 867, 869 (trial court appropriately declined to review documents in camera where requester "did not have any clear articulation as to why such a review would be appropriate; thus, the request amounted to nothing more than a fishing expedition").

We reverse and remand to the trial court for further proceedings consistent with this opinion.

Chung, J.

WE CONCUR:

Feldman, J.

Smith, C.J.