

Hearing date: August 22, 2025  
Hearing time: 9:00 a.m.  
Judge/Calendar: Egeler/Civil

**STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT**

SCOTT SMITH,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT  
OF TRANSPORTATION, an agency of  
the State of Washington,

Defendants.

No. 24-2-00894-34

DEFENDANT WASHINGTON  
STATE DEPARTMENT OF  
TRANSPORTATION'S MOTION  
FOR SANCTIONS

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1                                   **I.           INTRODUCTION AND RELIEF REQUESTED**

2           Defendant Washington State Department of Transportation (WSDOT) seeks two forms of  
3 sanctions against Plaintiff Scott Smith and his counsel: First, WSDOT requests CR 11 sanctions  
4 because the Amended Complaint constitutes a “baseless filing,” as it is not “well-grounded in  
5 fact.” Smith’s counsel failed to conduct a reasonable inquiry into his factual allegations because  
6 documents in their possession when the Amended Complaint was filed on February 18, 2025—  
7 including those received in discovery, through public records requests, or by subpoena—  
8 unequivocally disprove most of Smith’s central allegations of retaliation.

9           Second, WSDOT seeks CR 37 sanctions for spoliation because Smith and his counsel  
10 failed to timely preserve electronically stored information (ESI) on his personal cellular phone. As  
11 a result of that lapse, an unknown number of relevant text messages were—in Smith’s words—  
12 “lost,” the vast majority from a critical, four-month period in the case. That suspicious timing and  
13 other facts make it highly likely these “lost” text messages were deleted by Smith himself, though  
14 only a forensic examination of his phone could ascertain that with certainty. In addition, all Smith’s  
15 WhatsApp messages before January 2024 were destroyed when he disposed of his phone in  
16 February 2025, as the parties were in the midst of discovery. To the extent the Court concludes  
17 that additional information is necessary to determine whether spoliation occurred, WSDOT renews  
18 its request for a forensic examination of Smith’s devices and to conduct other targeted discovery.

19           As a CR 11 sanction, WSDOT requests an award of the reasonable attorney’s fees it has  
20 incurred since February 21, 2025, when its counsel informed Smith’s counsel of its intent to seek  
21 sanctions unless he voluntarily dismissed his suit. As a CR 37 sanction, WSDOT requests the fees  
22 it incurred as a result of Smith’s spoliation. Alternatively, WSDOT requests a nominal, deterrent  
23 award of at least \$100,000, with 90% apportioned to Smith’s counsel and 10% to Smith himself.

## II. STATEMENT OF FACTS

### A. Smith's Initial Complaint

Smith initiated this lawsuit by filing a Complaint on March 5, 2024, naming WSDOT and the State Office of Financial Management (OFM) as Defendants. Compl. ¶¶ 2–3. The gist of his lawsuit was that WSDOT allegedly retaliated against him in violation of the State Employee Whistleblower Protection Act, after he supposedly refused to “jimmy the numbers” in the state transportation forecast to omit fuel-price rises associated with the cap-and-trade program. *Id.* ¶ 18.

Smith alleged that WSDOT “undertook several actions in retaliation”: (1) WSDOT “eliminated [Smith’s] position” by “support[ing] the passage of legislation”—House Bill (HB) 1838—that “transferr[ed] [Smith’s position] to another agency,” the Economic Revenue Forecast Council (ERFC), “effective in 2025,” *id.* ¶ 21; (2) Smith’s “duties changed” because he was required to clear “any surprises regarding the release of any information” with Erik Hansen at OFM, *id.* ¶ 22; (3) Smith “was denied basic software upgrades” required for his role, *id.* ¶ 23; (4) WSDOT “attempted to change and backdate” Smith’s performance evaluations, *id.* ¶ 24; (5) Smith “was denied a promotion as a permanent hire for a supervisory position,” *id.* ¶ 25; (6) Smith was assigned a new supervisor “who scaled down or eliminated the bulk of [Smith’s] preexisting responsibilities,” *id.* ¶ 26; (7) Smith’s supervisor “denied a request for Smith to work out of state virtually,” *id.* ¶ 27; and (8) Smith’s request for vacation leave was denied, *id.* ¶ 28. Smith alleged that he was constructively discharged due to the above “retaliatory acts,” *id.* ¶ 28, and that each of these acts “give[s] rise to statutory and common-law causes of action.” *Id.* at 2.

### B. Independent Investigation Report

After Smith sent a demand letter to WSDOT through counsel on November 30, 2023, WSDOT hired Karen Sutherland of Ogden Murphy Wallace PLLC, a private investigator and



1 attorney, to conduct an independent investigation. Declaration of Zach Pekelis (Pekelis Decl.) ¶ 2  
2 and Ex. A. As part of her investigation, Sutherland interviewed eight witnesses, including Smith’s  
3 former supervisors, and reviewed numerous documents. *Id.*, Ex. A at 2–3. On May 15, 2025,  
4 WSDOT publicly released Sutherland’s investigation report, providing a copy to Smith’s counsel.  
5 *Id.* ¶ 2. The report concluded that there was “not a preponderance of evidence to support findings  
6 that” Smith’s supervisors, Amber Coulson, Nguyen Dang, and Luis Hillon, violated any of  
7 WSDOT’s policies, including those prohibiting discrimination. *Id.*, Ex. A at 2. Sutherland also  
8 determined that there was not “a preponderance of evidence” that any of the “retaliatory acts” that  
9 Smith had alleged WSDOT committed actually occurred.<sup>1</sup>

### 10 C. The Amended Complaint and WSDOT’s CR 11 Sanctions Letter

11 By mid-February 2025, WSDOT had produced over 2,500 documents to Smith in response  
12 to his RFPs. *Id.* ¶ 4. Additionally, Smith’s counsel submitted multiple pre-litigation public records  
13 requests to WSDOT. *Id.* ¶ 3. Those records requests sought, inter alia, the investigation report  
14 prepared by Sutherland, documents related to reduction of Smith’s duties, Smith’s leave requests,  
15 and negative employment actions against Smith, and any emails to or from WSDOT employees  
16 about Smith. *Id.* In total, Smith and his counsel received over 14,000 documents from WSDOT in  
17 response to their public records requests before filing the Amended Complaint. *Id.* In addition,  
18 Smith issued a third-party document subpoena to Sutherland seeking documents she relied on in  
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20 <sup>1</sup> For example, Sutherland found “that the decision to eliminate Smith’s position was because of HB  
21 1838,” a bill that “was the result of discussions that began *in 2022*”—i.e., *before* Smith allegedly refused  
22 to “jimmy the numbers.” *Id.*, Ex. A at 61. Sutherland also found there was “not a preponderance of evidence  
23 that Smith began to be required to ‘clear’ the release of information with Hansen” of OFM or that Smith’s  
24 “duties were dramatically scaled down or eliminated.” *Id.* at 33–34; 47. And Sutherland determined that  
there was not sufficient evidence to support that WSDOT attempted to backdate Smith’s performance  
evaluations. Rather, Smith had failed to acknowledge performance competencies that his prior supervisor,  
Lizbeth Martin-Mahar, had created in 2021 and, as a result, Smith had incomplete evaluations after Martin-  
Mahar left WSDOT. *Id.* at 40–41.

1 her investigation. *Id.*, Ex. B. Sutherland produced to Smith nearly 3,000 documents in response to  
2 the subpoena. *Id.* ¶ 5.

3 Although many of the documents Smith received from WSDOT and Sutherland directly  
4 contradicted his allegations of retaliation, his Amended Complaint differed minimally from his  
5 original Complaint. Filed on February 18, 2025, the Amended Complaint merely corrected the  
6 date of Smith's separation from WSDOT, removed references to OFM following its dismissal as  
7 a party, and added a cause of action under RCW 42.40.030 alleging violation of the Whistleblower  
8 Act's protection prohibiting interference with the right to disclose improper government action,  
9 which does not exist as an independent cause of action under the statute. *Id.* ¶¶ 51–60.

10 On February 21, 2025, WSDOT's counsel sent Smith's counsel a letter notifying them that  
11 WSDOT was considering filing a motion for sanctions pursuant to CR 11 because the Amended  
12 Complaint's allegations were not warranted by fact or law. Pekelis Decl., Ex. C. The letter stated  
13 that WSDOT would agree not to seek sanctions if Smith voluntarily dismissed by March 7, before  
14 the parties engaged in extensive discovery. *Id.* Smith and his counsel refused. *Id.*, Ex. D.

15 **D. Smith's Failure to Meet His Obligations to Preserve Evidence**

16 The relevant facts concerning Smith's numerous discovery deficiencies are summarized  
17 below. WSDOT also refers the Court to the more detailed discussions in its Motion to Compel  
18 Discovery (pages 3–7) and Motion to Compel Forensic Examination (pages 3–8).

19 WSDOT first propounded interrogatories (Rogs) and Requests for Production (RFPs) to  
20 Smith on September 26, 2024. Pekelis Decl. ¶ 8. On October 29, 2024, this Court entered an order  
21 on the parties' ESI Agreement, which specifically stated that "[t]he parties acknowledge they have  
22 an obligation to take reasonable and proportional steps to preserve discoverable information in the  
23 party's possession, custody, or control." ESI Order at 6. On November 4, 2024, Smith responded  
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1 to the initial discovery requests by producing twenty documents that were not in compliance with  
2 the ESI Agreement because they did not contain required metadata. Pekelis Decl. ¶ 8.

3 After Smith failed to produce any additional documents of his own accord, WSDOT moved  
4 to compel discovery on March 13, 2025. *Id.* The briefing on the motion revealed that Smith's  
5 counsel had not even collected Smith's ESI before March 11, 2025, despite having filed his lawsuit  
6 more than a year earlier. *See* Plf.'s Resp. to Mot. to Compel Discovery at 9; Def.'s Reply ISO Mot.  
7 to Compel Discovery at 1. On March 21, the Court entered a stipulated order granting the motion  
8 to compel, which required Smith to "produce all documents responsive to the [RFPs] addressed in  
9 [the motion] no later than April 21, 2025," by conducting "searches of [ESI] collected from  
10 Plaintiff's devices and accounts." Order of Mar. 21, 2025 at 3. On March 28, Smith made just his  
11 second production of documents responsive to WSDOT's discovery requests, which included  
12 various text message threads from Smith's personal devices. Pekelis Decl. ¶ 9.

13 On April 13, 2025, Smith's counsel sent a letter to WSDOT's counsel stating that, in  
14 February 2025, Smith had disposed of the only cellphone he had used during the time period  
15 relevant to this case. Pekelis Decl., Ex. E. With this disposal of his cellphone, Smith lost all  
16 WhatsApp messages before January 1, 2024, because they did not transfer to his new device. *Id.*  
17 In a Rog response, Smith admitted communicating with at least seven individuals through  
18 WhatsApp about his allegations. *Id.*, Ex. F. Neither Smith nor his counsel took any steps to  
19 preserve the ESI on Smith's phone before he disposed of it. *See id.* In a later meet-and-confer,  
20 Smith's counsel committed to seeking to obtain the missing WhatsApp messages directly from the  
21 persons with whom Smith had been communicating (if necessary, by subpoena). *Id.* ¶ 12.  
22 However, Smith never produced to WSDOT any WhatsApp messages obtained from third parties.  
23 *Id.*

1           Additionally, WSDOT identified a four-month gap—from February 8 through June 27,  
2   2023—in the text message chain between Smith and Lizbeth Martin-Mahar, his friend and former  
3   supervisor. *Id.* ¶ 13. In a meet-and-confer, Smith’s counsel stated that they had discussed the issue  
4   with Smith, who indicated it was likely he and Martin-Mahar had not communicated by text  
5   message during that four-month period. *Id.* ¶ 14. In fact, Martin-Mahar’s production of documents  
6   in response to WSDOT’s subpoena showed that she and Smith *had* indeed texted throughout that  
7   period. *Id.* ¶ 15. Martin-Mahar also produced additional (and highly relevant) text messages  
8   between the two from *outside* the four-month gap that had also been omitted from Smith’s  
9   production. *Id.*<sup>2</sup> WSDOT’s counsel emailed Smith’s counsel regarding the omitted messages. *Id.*

10           On May 2, 2025, during a meet-and-confer, Smith’s attorneys stated that they had  
11   discussed the missing messages with Smith and learned he had engaged in conduct that made it  
12   impossible for them to continue representing him without risking a violation of the Rules of  
13   Professional Conduct. *Id.* As a result, Smith’s attorneys informed WSDOT’s counsel of their intent  
14   to withdraw. *Id.* Counsel met and conferred again on May 5, during which WSDOT’s counsel  
15   asked for clarification on the reason for the withdrawal. *Id.* ¶ 13. Smith’s counsel stated that they  
16   were re-evaluating their withdrawal. *Id.* On May 8, Smith filed a motion for voluntary dismissal.

17           After further investigation, WSDOT’s counsel determined that Smith had produced text  
18   message threads with at least ten others individuals that included conspicuous four-month gaps  
19   around the same period as the gap in the thread between Martin-Mahar and Smith. *Id.* ¶ 19, Exs.  
20   L–U. In his deposition, when confronted with these gaps, Smith claimed that “it was likely” that  
21   messages between him and family members during the four-month gap “were lost”, but did not  
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23           <sup>2</sup> For example, Smith’s text message production omitted text messages from Martin-Mahar discussing  
24   the recruitment of Smith’s supervisor, messages about Coulson and Hansen, and messages about his press  
25   interviews about this case. Pekelis Decl., Exs. G–J.

1 explain how that could have occurred. *Id.* Ex. K at 94:8–9; 96:3; 107:5–8. Regarding the messages  
2 with other individuals that included gaps during the same months, Smith testified that it was  
3 possible he had simply stopped texting with them all during that period. *Id.* at 111:6–9. With  
4 respect to his WhatsApp messages, Smith admitted that he had lost an unknown number of  
5 messages when he replaced his phone, including messages exchanged with people with whom he  
6 had discussed his allegations in this case. *Id.* at 41:11–21. Smith further testified that he had  
7 initiated the “disappearing messages” function in WhatsApp, which caused messages to be  
8 automatically deleted from the thread after a certain period of time. *Id.* at 51:18–52:7. A WhatsApp  
9 message exchange between Smith and Martin-Mahar reflects that, in February 2024, Smith caused  
10 all messages between them to automatically delete after just *24 hours*. Pekelis Decl., Ex. V.

11 **E. Smith’s Voluntary Dismissal and WSDOT’s Motion for a Forensic**  
12 **Examination**

13 On the same day that Smith moved to voluntarily dismiss, WSDOT filed a motion to  
14 compel a forensic examination of Smith’s electronic devices. On May 16, 2025, this Court granted  
15 Smith’s CR 41(a)(1) motion. This Court denied WSDOT’s motion without prejudice, noting that  
16 WSDOT could renew the request in connection with a sanctions motion. Smith’s counsel issued a  
17 press release about the dismissal, repeating the Amended Complaint’s false allegations, including  
18 that Smith was “forced out of his position at WSDOT.” Pekelis Decl., Ex. BA.  
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C. Whether a forensic examination of Smith's electronic devices and additional targeted discovery are warranted to discern the nature and extent of Smith's spoliation of evidence.

This motion is based upon the pleadings and records on file and the Pekelis Declaration.

### A. CR 11 Sanctions Should Be Imposed Against Smith and His Counsel

CR 11 permits sanctions for two different types of filings: those lacking a factual or legal basis and those made for improper purposes. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). A court may impose sanctions for either type of filing. *Id.* A filing party or signing attorney may be subject to sanctions under the first category if a pleading, motion, or legal memorandum “is both (1) baseless and (2) signed without reasonable inquiry.” *Hicks v. Edwards*, 75 Wn. App. 156, 163, 876 P.2d 953 (1994) (emphasis omitted) (internal quotation marks omitted). A filing is baseless if it is “(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.” *Id.* A filing is “signed without reasonable inquiry” if the attorney “failed to conduct a reasonable inquiry into the factual and legal basis of the claim.” *Bryant*, 119 Wn.2d at 220 (emphasis omitted). The reasonableness of the attorney’s inquiry is measured objectively and the examination focuses on what “was reasonable

1 to believe at the time” of the filing. *Id.* It “requires attorneys to stop, think, and investigate more  
2 carefully before serving and filing papers.” *Id.* at 218.

3 Under CR 11, a party and their attorneys have a continuing duty to ensure that claims have  
4 a factual and legal basis. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 884–91, 912 P.2d 1052  
5 (1996). Thus, a court may impose sanctions on a party or attorney who becomes aware that a claim  
6 lacks a factual or legal basis as the case progresses, but continues to pursue the claim. *Id.* at 891.

## 7 **2. The Amended Complaint is a baseless filing under CR 11**

8 Like the original Complaint, the Amended Complaint alleges eight retaliatory acts Smith  
9 contends led to his “constructive discharge” from WSDOT. Am. Compl. at 2. The documents  
10 received by Smith before the filing of the Amended Complaint, however, show that these  
11 purported retaliatory acts lack any factual basis.

### 12 ***a.) HB 1838 was not enacted to retaliate against Smith***

13 Of all Smith’s allegations, perhaps the most far-fetched is his contention that WSDOT and  
14 OFM conspired to draft and introduce—and induce the Legislature to pass—HB 1838 for the  
15 purpose of retaliating against Smith for allegedly refusing to “jimmy the numbers” in his fuel price  
16 forecast. Am. Compl. ¶ 20. HB 1838 transferred certain transportation forecasting duties,  
17 including those done by Smith and two of his WSDOT colleagues, from the Transportation  
18 Revenue Forecasting Council (TRFC)—to a separate agency, the Economic and Revenue Forecast  
19 Council (ERFC). Laws of 2023, ch. 390 §§ 1, 2, 6. The bill was introduced in the Legislature on  
20 February 1, 2023—less than two weeks after Smith allegedly told his temporary supervisor he  
21 would not alter his forecast. *Id.* ¶¶ 11–12, 20. Smith alleged that WSDOT somehow engineered  
22 the conceptualization, drafting, introduction, and passage of HB 1838 to target him. *See id.* ¶ 20.

1 For starters, the sheer timing of Smith’s theory is beyond absurd. No reasonable person, let  
2 alone an attorney with even basic knowledge of the legislative process,<sup>3</sup> would believe that  
3 personnel from two state agencies could put together a complex piece of legislation restructuring  
4 governmental forecasting responsibilities, obtain approvals from leaders of both agencies, and find  
5 bipartisan group legislators to introduce and sponsor the bill—all in the span of 13 days.

6 Beyond the farfetched theory, documents in Smith’s and his counsel’s possession when he  
7 filed the Amended Complaint show that the plan to transfer transportation forecasting  
8 responsibilities from the TRFC to the ERFC long *predated* Smith’s conversation with his  
9 supervisor on January 18, 2023. As explained in the investigation report, “the planning for HB  
10 1838 began *in 2022*,” well before the events underpinning Smith’s claims occurred. Pekelis Decl.,  
11 Ex. A at 47, 57 (emphasis added). This is apparent in a 2022 email chain between Amber Coulson  
12 and Doug Vaughn that discussed options for transferring forecasting duties away from TRFC. *Id.*,  
13 Ex. W. Additionally, in her interview with Sutherland for the investigative report, Martin-Mahar—  
14 who left WSDOT in early 2022 and remains a friend and confidante of Smith’s—stated that she  
15 had previously advocated for “moving the [forecasting] work to a different entity.” *Id.* Ex. X at 6.  
16 And another email showed that Steve Lerch, the head of the ERFC, asked that the bill not transfer  
17 WSDOT staff to the ERFC: he explained that this preference was “not . . . to slight DOT staff[,]”  
18 but rather that we would want to be able to do some shifting of forecast assignments among new  
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21 <sup>3</sup> Smith’s counsel has extensive experience in the state legislative process: he “has also been in the  
22 trenches crafting legislation and policy first as a staff attorney with the Florida House of Representatives  
23 then spending almost eight years as senior staff counsel for the Washington State Senate handling  
24 Transportation Committee and playing a key role in staffing investigations into government misconduct led  
25 by the Law and Justice Committee.” Citizen Action Defense Fund, *Citizen Action Defense Fund Announces  
New Executive Director* (Sept. 6, 2022), [https://citizenactiondefense.org/app/uploads/2022/09/220905  
CADFPRESSReleaseFINAL.pdf](https://citizenactiondefense.org/app/uploads/2022/09/220905CADFPRESSReleaseFINAL.pdf).



1 and existing staff.” Pekelis Decl., Ex. Y. Smith admitted Lerch would have had no reason to  
2 retaliate against him. *Id.*, Ex. K at 182:3–5.

3 Despite this clear evidence disproving Smith’s allegations, he and his counsel persisted in  
4 falsely alleging that WSDOT and OFM drafted, supported, and drove HB 1838 through the  
5 legislative process to retaliate against Smith. Am. Compl. ¶¶ 20, 41(d). In his deposition, Smith  
6 claimed WSDOT and OFM “testif[ied] in favor” of HB 1838. Pekelis Decl., Ex. K at 178:23–  
7 179:4. He then admitted, however, that he had no direct knowledge of this, but “was told that” and  
8 “there’s a video.” *Id.* Indeed, there is a video of the hearing on HB 1838—as all legislative hearings  
9 are recorded and publicly available—but it shows that no one from WSDOT testified.<sup>4</sup>

10 ***b.) Smith was not required to “clear” his work with OFM***

11 Next, Smith claims he was retaliated against because, in a March 27, 2023, conversation  
12 with Coulson, she “required [him] to have his work reviewed” by OFM’s Hansen. Am. Compl. ¶¶  
13 18, 41(b). Even if Smith’s account of his conversation with Coulson were plausible—and  
14 significant evidence shows it is not<sup>5</sup>—this allegation is *legally* baseless for two reasons. First,

15 <sup>4</sup> See TVW, *House Transp.*, Feb. 20, 2023 – 1:30pm (4:23:30 mark), <https://tvw.org/video/house-transportation-2023021406/?eventID=2023021406>. On December 2, 2023, Smith’s counsel emailed a  
16 reporter claiming that OFM’s Hansen “took the trouble of testifying personally on” the “house bill that  
17 eliminated my clients [sic] position,” and that it “might be worth it to watch his testimony on the hearing  
18 on this bill.” Pekelis Decl., Ex. Z. Had counsel bothered to watch the hearing video, he would have seen  
that, though Hansen was present at the hearing, he did not speak.

19 <sup>5</sup> The impetus for that discussion was a meeting a few days earlier between Smith, Hansen, and others,  
which is summarized in a contemporaneous email from WSDOT employee Chelsea Buchanan to Coulson.  
20 Pekelis Decl., Ex. AA. According to Buchanan, Smith had speculated (inaccurately) that the ferries forecast  
was wrong, which “panicked” legislative staff and caused a “whole lot of unnecessary kerfuffle” because  
21 of Smith’s “confusing and non-timely communication.” *Id.* Smith also suggested that legislative staff and  
WSDOT “meet after session to discuss improving fuel price forecasting (without him having talked to OFM  
22 first).” *Id.* Hansen emailed Buchanan after that meeting, stating: “I have no idea what Scott is talking about  
around a meeting after session. I would appreciate having a discussion with OFM before people start  
23 committing to conversations with legislative staff and changing process.” Pekelis Decl., Ex. AB. Hansen  
was plainly not asking to review or pre-approve Smith’s work, but simply objected to Smith’s attempts to  
24 circumvent usual processes. Sutherland thus found insufficient evidence that Smith was required to “clear  
the release of information with Hansen.” *Id.*, Ex. A at 33–34. Rather, Coulson conveyed Hansen’s concerns  
to Smith and offered to “coach him” to “be more aware how his messages are received.” *Id.*

1 Smith admits Hansen's supposed "animosity" began long before Smith purportedly refused to  
2 change his forecast, and was also directed at others on Smith's team. He testified: "[T]here's no  
3 doubt that Erik -- Erik's hostility to me began prior to that and that also stems [sic] with this  
4 hostility to other people in my unit . . . . I just rubbed the man the wrong way apparently. But yeah,  
5 I stipulate . . . there was bad blood between us before it even started." Pekelis Decl., Ex. K at  
6 185:21–185:2. Thus, no causal link exists between Smith's protected activity and this alleged  
7 retaliation. *See Boespflug v. Dep't of Labor & Indus.*, No. 83301-4-I, 2022 WL 594288, at \*9  
8 (Wash. Ct. App. Feb. 28, 2022) (unpublished) (no causal link where "longstanding dispute"  
9 predated alleged whistleblower retaliation).

10 Second, Smith admitted in the Amended Complaint that he *never complied* with Coulson's  
11 purported directive to have Hansen review his work. Am. Compl. ¶ 41(b) ("Plaintiff did not  
12 ultimately comply with this requirement."). He can therefore not establish that the directive  
13 constitutes a "reprisal or retaliatory action" under the Whistleblower Act, RCW 42.40.050,  
14 because it does not constitute an "adverse employment action." *See, e.g., Budsberg v. Trause*, No.  
15 46653-8-II, 2015 WL 7259958, at \*4 (Wash. Ct. App. Nov. 17, 2015) (unpublished) (plaintiff's  
16 "alternative work assignment, pending an investigation, that does not subject the employee to any  
17 loss in pay or benefits does not constitute an actionable adverse employment [action]" under  
18 Whistleblower Act).

19 ***c.) Smith was not "denied basic software upgrades"***

20 In the Amended Complaint, Smith claims that he was retaliated against because WSDOT  
21 "denied basic software upgrades." Am. Compl. ¶ 22. In his discovery responses, Smith clarified  
22 that this allegation related to the EViews program he used. Pekelis Decl., Ex. AC. Yet again,  
23 documents available to Smith's counsel showed that this allegation is baseless and that Smith was  
24

1 aware that he was not denied upgraded EViews access in retaliation. Rather, in an email that Smith  
2 sent to his supervisor, Luis Hillon, regarding upgrading the current version of EViews he notes  
3 that WSDOT *as an entity* was using a dated version of the software, not that Smith was specifically  
4 singled out for refusal. *Id.*, Ex. AD. In his deposition, Smith admitted that Hillon “committed to  
5 get [the upgrade] for [him]” and “was very supportive of [him] getting the software.” *Id.* Ex. K at  
6 210:14–18; 211:20–23. Moreover, Smith repeatedly told WSDOT management and IT that he did  
7 *not* need an upgrade of EViews to do his work. *See* Pekelis Decl., Ex. AH. Additionally, even  
8 though Smith surmised that Coulson denied his request, no documentation supports his  
9 assumption. Indeed, numerous emails show that Coulson regularly *approved* Smith’s requests for  
10 subscriptions he said were necessary for his work. *Id.*, Exs. AE–AG. It is nonsensical—and entirely  
11 unsupported—that Coulson would deny Smith a software upgrade in retaliation, while consistently  
12 approving the purchase of other (and more expensive) subscriptions he requested. Smith’s counsel  
13 should have understood that this allegation was baseless through reasonable inquiry.

14 Additionally, even if this allegation were true, it is legally baseless because the mere denial  
15 of a software upgrade does not constitute actionable retaliation. At most, this represents a minor  
16 “inconvenience,” not a material “change in employment conditions” rising to the level of an  
17 “adverse employment action.” *See Marin v. King Cnty.*, 194 Wn. App. 795, 811, 378 P.3d 203  
18 (2016); *Budsberg*, 2015 WL 7259958 at \*3. This is particularly true given the fact that everyone  
19 else at WSDOT was using the same, older version and Smith was admittedly able to do his job  
20 without the newer version.

21 ***d.) WSDOT did not “change” or “backdate” Smith’s “performance***  
22 ***evaluations”***

23 The Amended Complaint alleges that Smith was retaliated against because WSDOT  
24 “attempted to change and backdate [Smith’s] performance evaluations.” Am. Compl. ¶ 23. The

1 documents produced *by Smith himself* to support this allegation show it is entirely baseless. In his  
2 response to WSDOT's discovery requests seeking evidence about his "backdated performance  
3 appraisal," Smith referred to a document he produced that appears to be a screenshot of WSDOT's  
4 performance management system showing two required tasks to "acknowledge [his]  
5 competencies"—one with a start date of December 28, 2021, and the other with a start date of  
6 October 31, 2023. *Id.*, Ex. AI. In his deposition, Smith conceded this was not asking him to agree  
7 on a backdated performance "evaluation," but to agree on "performance *standards*" for his role.  
8 *Id.* Ex. K at 266:11–19 (emphasis added).<sup>6</sup> This alone demonstrates that the allegations in the  
9 Amended Complaint are false as Smith was not asked to sign any backdated evaluation.

10 Additionally, an email from Hillon to Smith blatantly contradicts Smith's contention that  
11 his supervisors utilized evaluations to retaliate against him. *See* Pekelis Decl., Ex. AJ. A cursory  
12 investigation into the available documents should have indicated to Smith's counsel that the  
13 allegation of backdated performance evaluations was baseless.

14 ***e.) Denying Smith a promotion he did not actually want was not***  
15 ***retaliation***

16 Smith alleges in the Amended Complaint that he was retaliated against when he was  
17 "denied a promotion as a permanent hire for a supervisory position that he applied for since the  
18 position was unfilled." Am. Compl. ¶ 24. But interviewer evaluations showed that Smith was  
19 denied the promotion in 2023 because the interviewers all scored him lower than the eventual hire,

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20 <sup>6</sup> Likewise, in her investigative report, Sutherland concluded, after interviewing numerous WSDOT  
21 personnel and reviewing documents, that there was "not a preponderance of evidence that WSDOT  
22 attempted to backdate Smith's evaluation." *Id.*, Ex. A at 41. Rather, she explained that Smith never  
23 acknowledged the "competencies" (i.e., performance standards) Martin-Mahar created for Smith in 2022  
24 before she left WSDOT, so this task was left incomplete. *Id.* at 40. Shortly after he became Smith's  
supervisor, Hillon created new competencies for Smith to acknowledge. *Id.* And, in an August 2023 email,  
Hillon explains to Smith that completing his performance evaluation was mandated by Human Resources  
at WSDOT. *Id.* According to Hillon, Smith refused to participate in the process. *See id.*, Ex. K at 259:20–  
23.

1 Luis Hillon. *See* Pekelis Decl., Ex. AK. These interviewers were not Smith’s supervisors, but were  
2 representatives from various departments who would have no reason to submit dishonest interview  
3 assessments or to retaliate against Smith. *Id.* ¶ 37. Following the interview process, Coulson  
4 emailed Vaughn asking for approval to hire Hillon because “[h]e impressed all the interview  
5 panelists” and his prior experience leading a team through reorganization would be useful as the  
6 TRFC duties transitioned from WSDOT to the ERFC. Pekelis Decl., Ex. AN. Smith’s allegation  
7 that WSDOT’s failure to promote him in 2023 was retaliatory is further contradicted by the fact  
8 that he was not hired for the same position after interviewing in 2022, well before Smith’s  
9 purported protected activity occurred in January 2023. *Id.* ¶ 22.

10 More importantly, Smith did not even apply for the position because he wanted the job—  
11 but to bolster his legal claims against WSDOT. In a text message, Martin-Mahar advised Smith  
12 that applying could help “make [his] case” if he was not hired. *Id.*, Ex. AL. Smith responded to  
13 Martin-Mahar’s suggestion with: “Guess I’ll apply. Better safe than sorry.” *Id.* Immediately  
14 thereafter, Smith wrote a text message to his then-coworker: “Hey do I need to reapply for the  
15 chief job to show interest? . . . Our gambit is to make sure they don’t put a goober in here. If they  
16 do, we can sue.” *Id.* Ex. AM. All of these documents were available to Smith and his counsel prior  
17 to their filing of the Amended Complaint.

18 ***f.) Smith’s responsibilities were not scaled down or eliminated***

19 Smith alleges that he was retaliated against because his “new supervisor... scaled down or  
20 eliminated the bulk of [Smith’s] preexisting responsibilities.” Am Compl. ¶ 25. In his response to  
21 an interrogatory asking Smith to clarify which of his duties were “scaled down,” Smith identified  
22 only one: utilizing REMI software. Pekelis Decl., Ex. AO at 8. But in his Rog response he admitted  
23 that he had only previously *trained* on using REMI software, but had never actually *worked* on  
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1 REMI assignments, either before or after the supposed incidents leading to this alleged retaliation.  
2 *See id.* And in his deposition, Smith confirmed that he had “trained for REMI,” to “help Amber,”  
3 but that he “never did any work” with REMI. *Id.*, Ex. K at 75:3–13. From this alone, it is clear that  
4 this duty was never “scaled down,” as Smith had never performed any REMI work, but only trained  
5 to be able to do this work in the future. And it is manifestly false that the “*bulk* of [Smith]’s  
6 preexisting responsibilities” were “scaled down or eliminated.” Am. Compl. ¶ 25 (emphasis  
7 added); *see Webster’s Third New Int’l Dictionary* 293 (2002) (defining “bulk” as “the main or  
8 greater part” or “MAJORITY”).

9 This allegation is also legally baseless. Again, actionable retaliation “must involve a  
10 change in employment conditions that is more than ‘an inconvenience or alteration of job  
11 responsibilities.’” *Marin*, 194 Wn. App. at 811 (quoting *Kirby v. City of Tacoma*, 124 Wn. App.  
12 454, 465, 98 P.3d 827 (2004)). The non-assignment of one particular type of work that Smith had  
13 never previously done does not come close to meeting this standard.

14 ***g.) Smith’s request to telework was never denied***

15 Smith alleges that he was retaliated against when his “supervisor denied a request for  
16 Plaintiff to work out of state virtually” Am. Compl. ¶ 26. This allegation is blatantly false based  
17 on a review of the documents available to Smith and his counsel at the time they filed the Amended  
18 Complaint. Rather than deny Smith’s request, Hillon responded by telling Smith it would require  
19 “approval from [Coulson] and [the] HR Director,” explaining: “if you want to request approval to  
20 telework outside of Washington state, you will need to submit a signed telework agreement form  
21 and send it to [Coulson] for her approval.” Pekelis Decl., Ex. AP. Smith admitted that he never  
22 even took the first step required to formally request to telework by submitting a telework  
23  
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1 agreement form. *Id.*, Ex. BB at 4. It is clear that Smith’s request was not denied, rather, he failed  
2 to follow through with the required procedures to request telework.

3 ***h.) Smith’s request for vacation leave was never denied***

4 Smith further alleges that WSDOT “refused” his vacation request despite his offer to attend  
5 necessary meetings while on leave. Am. Compl. ¶ 27. But, again, documents available to Smith  
6 and his counsel at the time he filed the Amended Complaint disprove this allegation. In an email  
7 from Hillon to Smith responding to his leave request for November 17 to 27, 2023, Hillon states:  
8 “before I approve a vacation leave, it is important to know what your detailed plan is to make sure  
9 [certain] deliverables are done on time,” as the quarterly forecast adoption meeting was scheduled  
10 for November 20. Pekelis Decl., Ex. AQ. Rather than respond with a plan as Hillon requested, or  
11 any offer to complete work while on leave, Smith immediately responded with an announcement  
12 that he was “retiring/resigning” from WSDOT effective November 6, 2023. *Id.* As Smith admitted  
13 in his deposition, “there is no explicit denial.” *Id.*, Ex. K at 249:6–9. Rather, Smith objected to his  
14 supervisor’s request for a “detailed plan” to cover his “deliverables” for the November forecast  
15 and chose to leave WSDOT rather than provide one. *See id.*

16 Additionally, in Smith’s initial request for leave, he inadvertently identified dates in  
17 *October*, not November—and Hillon immediately *approved* that request. *Id.*, Ex. AR. It defies  
18 credulity to claim Hillon’s request for a detailed plan was retaliatory—rather than a legitimate  
19 effort to ensure the November forecast adoption work would be covered—when he had promptly  
20 approved Smith’s request for leave the previous month.<sup>7</sup> This allegation is also factually baseless.

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<sup>7</sup> Numerous other produced documents show that Coulson regularly approved requests for leave during  
24 the time that Smith alleges he was being retaliated against. *See id.*, Exs. AS–AT.

1 *i.) Smith was not constructively discharged*

2 Smith alleges that, due to these alleged retaliatory acts, he “was constructively discharged  
3 on November 6, 2023. But, as discussed, each of these purported “retaliatory acts” is disproved by  
4 documents that were available to Smith and his counsel before the Amended Complaint was filed.  
5 And, as shown by the communication discussed above regarding Smith’s leave request, Smith was  
6 not constructively discharged. Numerous documents confirm that Smith was considering leaving  
7 WSDOT either for another role or to retire as early as June 2022, when he submitted an application  
8 to the Senate Ways and Means Committee. *See* Pekelis Decl., Ex. AU. And in July 2023, Smith  
9 emailed Coulson and Hillon stating that he was “unable to [give] a date certain” for his retirement  
10 because DRS had not confirmed his vested date, but that it was his intention to “complete the  
11 November revenue cycle and separate from the agency on the first pay period of January 2024.”  
12 *Id.*, Ex. AV; *see also*, Ex. AW (July 2023 Smith email to DRS stating he is retiring “prior to my  
13 retirement age” and asking for the date when he would be fully vested).

14 Additionally, in a September 2023 email to Hillon, Smith stated that “the success of [their]  
15 working relationship . . . [had] caused [him] to reconsider” his contemplated retirement date. *Id.*,  
16 Ex. AX. Smith wrote that he would “commit to staying until the transition to ERFC and continue  
17 forecasting duties, and all my other duties.” *Id.* This email contains no indication Smith was  
18 unhappy or experiencing retaliation. Rather, it shows the opposite: he enjoyed working with Hillon  
19 as his supervisor so much that he was “reconsider[ing]” retirement to stay through July 2024, when  
20 WSDOT’s transportation forecasting responsibilities would be transferred to the ERFC. *Id.*

21 Smith and his counsel knew or should have known from a reasonable inquiry that his  
22 allegations of retaliation in the Amended Complaint were not grounded in fact or law.  
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1           **B.      CR 37 Sanctions for Spoliation Should Be Imposed Against Smith and His**  
2           **Counsel**

3           The trial court has broad discretion to impose discovery sanctions under CR 37, including  
4           for spoliation. *J.K. ex rel. Wolf v. Bellevue Sch. Dist. No. 405*, 20 Wn. App. 2d 291, 315, 500 P.3d  
5           138 (2021). To decide “whether sanctionable spoliation occurred, courts weigh (1) the potential  
6           importance or relevance of the missing evidence and (2) the culpability or fault of the adverse and  
7           spoliating party.” *Id.* at 304 (cleaned up). “Spoliation may encompass a ‘broad range of acts  
8           beyond those that are purely intentional or done in bad faith,’ so ‘a party may be responsible for  
9           spoliation without a finding of bad faith.’” *Id.* at 308 (quoting *Homeworks Constr., Inc. v. Wells*,  
10          133 Wash. App. 892, 900, 138 P.3d 654 (2006)).

11          Monetary sanctions should be imposed against Smith and his counsel pursuant to CR 37  
12          for their failure to take steps to preserve ESI, Smith’s intentional disposal of his personal cellphone,  
13          and his apparent deletion of text messages between himself and individuals with whom he  
14          discussed the allegations in his Amended Complaint.

15               **1.      Smith’s text and WhatsApp messages were likely relevant**

16          As explained above, during discovery WSDOT discovered two separate deficiencies in  
17          Smith’s production of communications from his personal devices: First, every text message thread  
18          he produced contains a gap of approximately four to five months during a critical time period in  
19          the case—from mid-February to late June 2023. *See supra* at section II.D. Second, Smith’s  
20          disposal of his cellular phone in February 2025 resulted in the loss of all his WhatsApp messages  
21          before January 1, 2024. *Id.*

22          For several reasons, these communications were potentially important or relevant to  
23          Smith’s claims or WSDOT’s defenses. First, Smith admitted in discovery responses that he  
24          communicated via text or WhatsApp with at least seven individuals, including friends and family

1 members, about his allegations in this case. *See* Pekelis Decl., Ex. F at 5. It is likely that at least  
2 some of these lost communications undercut or contradict Smith’s allegations, many of which  
3 concern his oral conversations with WSDOT management of which there is no definitive  
4 documentary evidence. For example, Smith alleges that, on March 27, 2023, Coulson called him  
5 and told him that Smith “should be clearing ‘any surprises’ with Mr. Hansen prior to issuing his  
6 [forecast] estimate.” Am. Compl. ¶ 18. Smith’s text or WhatsApp messages from that time period  
7 might shed light (or cast doubt) on the veracity of that allegation, but all his text messages from  
8 March 2023 are inexplicably missing.

9         Second, the text messages WSDOT subpoenaed from Martin-Mahar contain numerous  
10 relevant communications that were not included in the text message threads produced by Smith,  
11 including messages *outside* the four-month gap period. For example, the text messages produced  
12 by Martin-Mahar reveal that (1) when Smith learned about HB 1838, he wrote, “I like this deal”  
13 because it gave him “a whole year to p[i]ss off [f] Amber” Coulson, but did not suggest that the bill  
14 had been introduced to retaliate against him; (2) Smith was updating his resume and applying for  
15 other jobs as early as April 2023—long before he claims he was “constructively discharged” in  
16 November 2023 (“I’ve decided I’m not doing another winter in WA”); and (3) Smith believes  
17 Hansen “dreamed up this [retaliation] scheme himself” because only he had “the technical  
18 knowledge.” Pekelis Decl., Ex. AY.

19         Third, WSDOT obviously had no opportunity to review Smith’s text and WhatsApp  
20 messages before they were lost. This weighs in favor of spoliation sanctions. *See, e.g., J.K.*, 20  
21 Wn. App. 2d at 307 (“That J.K. had no chance to examine the destroyed footage supports the trial  
22 court’s order [imposing spoliation sanctions].”); *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122,

1 135, 307 P.3d 811 (2013) (“In weighing the importance of the evidence, we consider whether the  
2 adverse party was given an adequate opportunity to examine it.”).

3 **2. Smith and his counsel have the requisite culpability to justify**  
4 **sanctions**

5 In “determining the adverse party’s culpability” for spoliation, “the trial court can consider  
6 the party’s bad faith, whether that party had a duty to preserve the evidence, and whether the party  
7 knew that the evidence was important to the pending litigation.” *J.K.*, 20 Wn. 2d at 308 (cleaned  
8 up). Here, all three considerations apply.

9 First, Smith and his counsel obviously had a duty to preserve his text and WhatsApp  
10 messages. That duty arose certainly no later than March 5, 2024, when Smith filed this lawsuit.  
11 *Cf. Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 901, 138 P.3d 654 (2006) (expressing  
12 support for proposition “that a party has a general duty to preserve evidence on the eve of  
13 litigation”). In October 2024, the parties memorialized their reciprocal duty to preserve ESI when  
14 they entered into—and the Court approved—the ESI Agreement, which states: “The parties  
15 acknowledge they have an obligation to take reasonable and proportional steps to preserve  
16 discoverable information in the party’s possession, custody, or control.” ESI Order at 6. Smith’s  
17 counsel unquestionably failed to discharge this duty, having not taken steps to collect and preserve  
18 his ESI before March 11, 2025—nearly a year after Smith filed his lawsuit. *Supra* Section II.D.

19 Second, Smith and his counsel clearly knew that his ESI was “important to the pending  
20 litigation.” *J.K.*, 20 Wn.2d at 308; *see also Seattle Tunnel Partners v. Great Lakes Reinsurance*  
21 *(UK) PLC*, 26 Wn. App. 2d 319, 347, 527 P.3d 134 (2023) (“[T]he party seeking sanctions must  
22 show that the duty extends to the specific evidence at issue by demonstrating that a reasonable  
23 person in the opposing party’s position should have foreseen that the evidence was material to a  
24 potential civil action.”). WSDOT specifically requested ESI—including text messages and

1 WhatsApp messages—in discovery requests propounded in September 2024. Yet Smith’s counsel  
2 waited nearly six months before bothering to collect the data from Smith’s devices.

3 This lapse is particularly galling in light of Smith’s November 2023 demand letter to  
4 WSDOT, which instructed the agency to take detailed “steps to preserve all hard copy documents  
5 *and ESI* relevant to this Action,” warning: “Your failure to preserve relevant data may constitute  
6 spoliation of evidence, which may subject you to sanctions.” Pekelis Decl., Ex. AZ. Discovery, of  
7 course, is a “two-way street.” *State v. Boehme*, 71 Wn.2d 621, 632, 430 P.2d 527 (1967); *see also*  
8 *Nurmagomedov v. Legionfarm, Inc.*, No. 23 CIV. 6683 (NRB), 2024 WL 4979235, at \*3, fn 3  
9 (S.D.N.Y. Dec. 4, 2024) (“[S]ending a demand letter is sufficient to trigger a party’s obligation to  
10 preserve.”). And by itself, this lapse is sufficient to support an award of sanctions for spoliation.  
11 *J.K.*, 20 Wn. App. 2d at 313 (determining that a school district “acted with sufficient culpability  
12 to justify sanctions” where it “had a duty to preserve []camera footage, knew the potential  
13 importance of the footage, and failed to take action to preserve the footage for about six months”);  
14 *Morisky v. MMAS Rsch. LLC*, No. 2:21-CV-1301-RSM-DWC, 2024 WL 4136492, at \*10 (W.D.  
15 Wash. Aug. 20, 2024), *R&R adopted*, 2024 WL 4134046 (Sept. 10, 2024), *reconsideration denied*,  
16 2024 WL 4709564 (Oct. 17, 2024) (spoliation sanctions warranted where, “at the time the laptop  
17 was destroyed, [Defendant] knew about this lawsuit and knew that the information on the laptop  
18 was relevant to this case and would be discoverable”); *see generally Henderson v. Tyrrell*, 80 Wn.  
19 App. 592, 605–06, 910 P.2d 522 (1996) (examining federal spoliation cases under Federal Rule of  
20 Civil Procedure 37 in determining whether to impose sanctions under CR 37).

21 Third, although “bad faith” is not required, *see J.K.*, 20 Wn. App. 2d at 308, here there is  
22 strong evidence of it—at least on the part of Smith himself. First, with respect to his text messages,  
23 nine of the threads he produced in discovery contain approximately four-month gaps during a  
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1 critical time period in the case. Although WSDOT's counsel repeatedly asked Smith's counsel for  
2 explanations for these gaps, none was ever provided. Pekelis Decl. ¶ 20. Nor could Smith himself  
3 provide a coherent explanation for them in his deposition. Although he acknowledged that many  
4 of the messages with family members were likely "lost," he suggested that other gaps might exist  
5 because he coincidentally stopped texting with all those individuals for the same four-month  
6 period. *See id.* Ex. A at 88:6–13; 90:1–10; 96:3–6; 100:6–14.<sup>8</sup> That fanciful theory is  
7 unquestionably false as to Martin-Mahar, who produced text messages within the four-month gap  
8 in Smith's production, as well as text messages outside the gap period that were also missing from  
9 Smith's production.<sup>9</sup> In the absence of any plausible alternative explanation (which neither Smith  
10 nor his counsel has provided), the only logical inference to draw from the above—combined with  
11 the fact that only Smith had access to his cellphone, *id.*, Ex. K at 52:2–3, and Smith's counsel  
12 informed WSDOT's counsel of their obligation to withdraw after they asked him about the text  
13 message gaps—is that Smith deleted text messages he knew were relevant to the litigation. If true,  
14 that constitutes bad faith. *See, e.g., Richards v. Healthcare Res. Grp., Inc.*, No. 2:15-CV-134-RMP,  
15 2016 WL 7494292, at \*5 (E.D. Wash. Sept. 29, 2016) (imposing sanctions where plaintiff "acted  
16 in bad faith in deleting text messages" and "failing to preserve text messages").

17 Second, with respect to Smith's lost WhatsApp messages, his disposal of his cellphone  
18 without taking *any* action to preserve the data is textbook spoliation. As Smith's discovery  
19 responses indicate, he had communicated about his allegations via WhatsApp message with seven  
20 individuals. Pekelis Decl., Ex. F at 5. At the time Smith disposed of his cellphone, he and his

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21 <sup>8</sup> Notably, this was the same explanation Smith and his counsel had given when confronted with the gap  
22 in messages between him and his former supervisor, Martin-Mahar, before Martin-Mahar's production  
23 proved that this was not true. Pekelis Decl. ¶¶ 14–15.

24 <sup>9</sup> These included messages in which Martin-Mahar was advising Smith on the potential grounds for a  
25 lawsuit against WSDOT, Smith discussed interactions with Coulson, Smith sought advice on how to move  
forward against the agency, and Smith discussed his reaction to HB 1838. *See id.* Ex. AY.

1 counsel were aware of (1) their duty to preserve ESI, (2) that there were likely messages on Smith's  
2 cellphone that were relevant to the litigation, and (3) that no action had yet been taken to collect  
3 these messages for review and production. This, too, is independently sufficient to support  
4 spoliation and impose sanctions.

5 **3. If necessary, the Court may authorize additional discovery**

6 Should this Court determine that it lacks sufficient information regarding Smith's  
7 spoliation of evidence, WSDOT respectfully asks that the Court order limited discovery to conduct  
8 an independent forensic examination of Smith's electronic devices pursuant to a protocol agreed  
9 to by the parties. This would provide insight into why messages were missing from Smith's  
10 production, when and how they were "lost" from his phone, and whether they are recoverable, all  
11 directly in furtherance of WSDOT's sanctions motion. *See Clare v. Telquist McMillen Clare*  
12 *PLLC*, 20 Wn. App. 2d 671, 680, 501 P.3d 167, 172 (2021) (following voluntary dismissal the  
13 court may retain jurisdiction to consider collateral issue of sanctions motion); *Beckman v. Wilcox*,  
14 96 Wn. App. 355, 359, 979 P.2d 890, 892 (1999) (same and noting that, "[b]ecause CR 41(a)  
15 follows the federal rule, Fed. R. Civ. P. 41(a), we look to decisions and analysis of the federal rule  
16 for guidance"); *Lundahl v. Halabi*, 600 F. App'x 596, 609 (10th Cir. 2014) (holding that district  
17 court was authorized to hold hearings on sanctions after Rule 41(a)(1) voluntary dismissal  
18 because[ed] "it retains the inherent authority to issue orders on matters collateral to the merits and  
19 to conduct sanction proceedings") (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395–  
20 96 (1990); *Willy v. Coastal Corp.*, 503 U.S. 131, 136–37 (1992)); *Szabo Food Serv., Inc. v.*  
21 *Canteen Corp.*, 823 F.2d 1073, 1085 (7th Cir. 1987) (reversing denial of Rule 11 sanctions motion  
22 after Rule 41(a)(1) voluntary dismissal, remanding for district court "to take such evidence and  
23 make such findings as are appropriate"); *Markey v. Lapolla Indus., Inc.*, No. CV 12-4622 JS AKT,

1 2015 WL 5027522, at \*1 (E.D.N.Y. Aug. 25, 2015), *R&R adopted*, 2016 WL 324968 (Jan. 26,  
2 2016) (after granting dismissal, the Court retained jurisdiction to hear discovery sanctions motion  
3 and held an evidentiary hearing on that motion in which numerous witnesses were examined).

4 **C. An Award of WSDOT's Attorney's Fees and Costs Is Warranted**

5 Both CR 11(a) and CR 37(b) authorize an award of a party's reasonable attorney's fees and  
6 litigation costs as a sanction for a violation of the rules. As of February 18, 2025, the date  
7 WSDOT's counsel informed Smith's counsel of its intent to seek CR 11 sanctions for the baseless  
8 Amended Complaint, WSDOT has incurred \$327,183 in fees and costs. Pekelis Decl. ¶ 55. And  
9 WSDOT has incurred at least \$42,000 in fees just to address Smith's spoliation of evidence. *Id.*  
10 WSDOT therefore requests an award of its reasonable attorney's fees—to be conclusively  
11 determined in a separate fee petition—as well as its attorney's fees for bringing this motion.

12 Alternatively, WSDOT respectfully asks this Court to impose a nominal sanction of at least  
13 \$100,000, with 90% apportioned to Smith's counsel and 10% apportioned to Smith.

14 **VI. CONCLUSION**

15 For the reasons above, WSDOT respectfully requests that the Court order Smith and his  
16 counsel to pay sanctions pursuant to CR 11 for filing the Amended Complaint without factual or  
17 legal bases. WSDOT also respectfully requests that the Court order sanctions against Smith and  
18 his counsel pursuant to CR 37 for discovery violations.

19 DATED this 11th day of June, 2025.

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**CERTIFICATE OF SERVICE**

I certify that I filed with the Court and electronically served a copy of this document on  
all parties on the date below as follows:

Jackson Maynard, WSBA No. 43481  
Sam Spiegelman, WSBA No. 58212  
Citizen Action Defense Fund  
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Olympia, WA 98501

Attorneys for Plaintiff

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

DATED this 11th day of June, 2025, at Seattle, Washington.

Erica Knerr, Legal Asst.

Signature on file