No. 55221-3-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RUSSELL MARTIN,
Plaintiff/Appellant,

v.

CITY OF LAKEWOOD,
Respondent.

CITY'S PETITION FOR DISCRETIONARY REVIEW

Eileen M. McKain, WSBA #17792
Assistant City Attorney
City of Lakewood
6000 SW Main Street
Lakewood, WA 98499
253-589-2489

Attorney for Respondent

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1. IDENTITY OF PETITIONER.

On April 22, 2022, the City of Lakewood, Respondent, (City) filed this petition to the Supreme Court for discretionary review of the Court of Appeals Division II decision 55221-3-II.

2. COURT OF APPEALS DECISION.

On March 1, 2022, Division II held that the superior court abused its discretion by imposing costs on Appellant (Martin) for filing and advancing a frivolous case under the Public Records Act (PRA). *Appendix 1*.

On March 28, 2022, Division II denied the City's motion for reconsideration. *Appendix 2*.

3. ISSUES PRESENTED FOR REVIEW /ASSIGNMENT OF ERROR.

A. The Supreme Court holds that "the abuse of discretion standard is extremely deferential." *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 279, 372 P.3d 97 (2016). Courts will reverse a trial court decision under this standard "only if the decision applies

the wrong legal standard, relies on unsupported facts, or adopts a view that no reasonable person would take." *Mayer v. Sto Indus., Inc*., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

Is the appellate decision in conflict with the above Supreme Court decisions when the appellate decision fails to consider the trial court's primary basis for awarding costs pursuant to RCW 4.84.185; that is, the requestor misrepresented facts underlying his sole remaining claim?

B. Is the appellate decision in conflict with established law, including *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 464 P.3d 563 (2020) and *WAC 44-14-04002*, when the appellate decision assumes that an agency should have provided records that had not been used or held in the file requested?

4. STATEMENT OF THE CASE.

A. Undisputed facts.

1. The City conducted two separate investigations with two separate sets of records filed in two separate files.

The City conducted two separate investigations with two separate sets of records filed in two separate files, PSS003 and PSS004. *CP 275.* Any records in common for both files were copied and stored in both files; if a record was not used in a particular file, it was not copied and stored in that particular file. *CP 279.* Both investigations were sensitive internal investigations of police officers accused of misconduct. *CP 275 and 279.*

In the first investigation, the City investigated a single officer accused of dishonesty. *CP 275.* Sgt. Porche supervised the officer accused in this first investigation. *CP 275*. All records used in this first investigation were stored in a file

labeled as 2019-PSS-003 (PSS003). *CP 275*. The PSS003 investigation ended April 10, 2019. *CP 275*.[1]

In the second investigation, the City investigated two different officers, Martin, the Appellant, and Vahle, for failing to properly report the alleged dishonesty of the officer investigated in file PSS003. *CP 275*. All records used in the second investigation were stored in a file labeled 2019-PSS-004 (PSS004). *CP 275.* The PSS004 investigation ended May 16, 2019. *CP 275.*

While the PSS003 and PSS004 investigations were conducted concurrently and held some records in common, Lt. Lawler, who supervised both investigations, attested to the fact that the individual files related to each investigation are considered separate files. *CP 275*. Ms. Pitts, the police

[1] The subject of the first investigation is not named because the allegations were not sustained.

administrative assistant, also attested that any records common to both files were copied and stored in *both* files. *CP 279.*

Martin's attorney, Mr. Harvey, represented Vahle when Vahle was interviewed in the PSS004 investigation and in his subsequent disciplinary hearing. *CP 175.* Mr. Harvey's law partner represented Martin when he was interviewed in the PSS004 investigation. *CP 172.*

2. Martin requested both files; PSS004 first and then PSS003 second before he received PSS004.

On May 14, 2019, Martin submitted the following request for public records through Next Request, the City's on-line portal: "All documents and recordings related to PSS#2019-PSS004." *CP 30.*

The City's records specialist understood that "PSS" referred to the "Professional Standards Section," a division of the Lakewood Police Department so she asked the police department to conduct a search for responsive records. *CP 30.*

The records specialist also knew that the Professional Standards Section conducts internal investigations of officers who are City employees so she also asked the Human Resources Department to search for responsive records. *CP 30.*

Before the City could produce records responsive to Martin's first request for file PSS004, Martin submitted a second request. *CP 31.* The second request mirrored Martin's first except that it sought a second file; file PSS003. *CP 31.*

In June of 2019, the City provided Martin with the records related to the PSS004 file. *CP 31-32.* The PSS004 file did not use or mention the Porche interview, but it did include a reference to the PSS003 investigation using the file number. *CP 96; 276; 279.*

In July of 2019, the City provided Martin with the records related to the PSS003 file. *CP 32-33.* The PSS003 file included the interview of Sgt. Porche. *P 96; 276; 279.* On July 30, 2019, Martin – or someone with access to his email –

opened the electronic file the City sent him, accessing file PSS003 and the Porche interview. *CP 96.*

There was no attempt to hide the PSS003 file from Martin; it was simply not considered responsive to Martin's first request for PSS004. *CP 96 and CP 279.* By providing a reference to PSS003 in file PSS004, anyone in receipt of PSS 004 could then request PSS003. However, Martin needed no such reference; he requested PSS003 before he received the PSS004 records. *CP 96-97.*

3. Martin filed a complaint and response to summary judgment alleging that the City failed to provide him with the Porche interview in response to his request for file PSS004.

Seven months after the City provided Martin with all records related to both files, Martin filed a complaint. *CP 1-10.* In his complaint, Martin alleged that the City failed to provide records requested in response to his first request for PSS004:

> It is also known that there are documents and a digitally recorded audio and video file that is (sic) in the possession of the city under 2019PSS-004 that have <u>not</u>

> been provided in response to the requester/plaintiff's clear and unambiguous language i.e., "All documents and recordings related to PSS#2019-PSS004."

CP 4.

Later, in response to the City's motion for summary judgment, Martin alleged that the City failed to provide him with an interview; the Sgt. Porche interview, again in response to his request for PSS004:

> Sgt. Charles Porche's interview was not provided by the City of Lakewood responsive to my Public Records request under PSS #2019-PSS004 until after the filing of the lawsuit."

CP 61.

However, Lt. Lawler and his administrative assistant attested to the fact that the Porche interview was never mentioned or used in the PSS004 investigation and file. *CP 275 and CP 279.*

4. Summary judgment hearings – superior court considered all evidence, even untimely declaration.

The superior court prepared for the summary judgment motion at least two times over the course of two months. *CP*

79. The first hearing scheduled for the City's motion for summary judgment was set on May 29, 2020. *CP 79.* On the day before the hearing, however, Martin filed both his response to the City's motion and a motion for continuance. *CP 74-77.* The matter was re-scheduled to July 2, 2020. *CP 79.*

On June 23, 2020, the City filed its reply, noting that earlier references to the two files had been confused and attaching both files for the court's independent review. *CP 82 – 445.* File PSS004 did not include the Porche interview; file PSS003 did. *CP 96; 276; 279.*

On the day before the second summary judgment hearing, Martin filed the Vahle declaration. *CP 280.* In his declaration, Vahle states that prior to his union discipline hearing, he was given a thumb drive; "a file containing a .pdf of the investigation report, video of the interview of Sgt. Charles

Porche under IA 2019 – PSS004" and other videos. *CP 280-285.*[2]

Despite Martin's failure to timely file the Vahle declaration, the superior court considered it; listening to arguments for almost forty minutes. *VRP July 2, 2020, 4-32.*

The court noted that the events described in the Vahle declaration occurred many months before Martin filed his complaint and before he filed a response to summary judgment and that the records described in it were provided as part of a disciplinary proceeding, not a public disclosure request. *VRP July 2, 2020 29-30.*

In addition, when given a chance to independently review the records of each file, the trial court confirmed that the Porche

[2] Officer Vahle was the president of the officer's guild and the guild held a vote to recall him from that position. *CP 275.* Martin claimed to be requesting the records to help Officer Vahle combat the recall vote, but the vote had already been concluded, in Officer Vahle's favor, over a month before Martin submitted any requests for records. The vote was concluded April 8, 2019. *CP 275*.

interview was "not used or mentioned in the PSS 004 investigation so the City correctly determined that they were not responsive to his request for PSS 004." *CP 342-343.*

B. Superior court's orders were based on undisputed evidence, including this: Martin misrepresented the facts about the Porche records.

The superior court granted the City's motion for summary judgment and then imposed costs against Martin for filing and advancing a frivolous suit pursuant to RCW 4.84.185. [3] *CP 416-419.*

In granting summary judgment, the trial court followed *Dotson,* noting that the records Martin claimed the City had denied him were part of *another* file and they were *not* used in the file he had initially requested:

> There is also no issue of fact that the interview and forms are part of another investigation and another file, PSS003. **They were not used or mentioned in the**

[3] Contrary to suggestions in the appellate decision, the superior court declined to impose sanctions pursuant to CR 11. *CP 419.*

> **PSS004 investigation so the City correctly determined that they were not responsive to his request for PSS004 (June 2019). *Dotson v. Pierce County*, Division II June 2020.** Moreover, unrefuted facts demonstrate that the City provided Plaintiff with PSS003, which included the interview and forms, in response to his second request (July 2019) – 7 months before this lawsuit was filed (February 2020). Inexplicably, Plaintiff's pleadings omit any reference to his second request and simply deny, without proof, that he received the records before filing suit.

CP 342-3 (emphasis added).

The superior court issued an order with findings of fact and conclusions of law detailing how the lawsuit in its entirety was frivolous. *CP 416-419.* Among other things, the trial court found that Martin had *misrepresented* facts underlying his claim that the City had denied him the Porche interview:

> Second Hearing - Summary Judgment Granted. The night before the hearing on summary judgment, Plaintiff filed a supplemental declaration based on events alleged to have occurred over a year ago and therefore, known or able to be known to Plaintiff prior to filing his Complaint and his Response in this action. Regardless, the Court found no genuine issues of material fact exist and that the City did not violate the PRA. Of particular note, the only "record" that Plaintiff can identify that he claims he did not - and has not - receive(d) pursuant his PSS-004 public records request (a recorded interview of Sgt.

> Porsche) was provided to plaintiff pursuant to a separate public records request seven months prior to the filing of this lawsuit. In his Complaint, plaintiff claims that "there are documents and a digitally recorded audio and video file that is in the possession of the City under 2019PSS-004 that have not been provided[.]" ***This is a misrepresentation of the facts.*** The undisputed evidence shows that the Porsche interview was filed in the PSS-003 file and not in the PSS-004 file, nor was it even referenced in the 004 file and further, that Plaintiff received it seven months prior to filing this lawsuit. Neither Plaintiff nor counsel were able to identify any documents that existed in the 004 file that were not produced.

CP 418 (emphasis added).

C. Martin filed two appeals; did not consolidate appeals; filed a single brief; and failed to assign error to any of the superior court's findings.

Martin appealed both the summary judgment order and the order imposing costs, but in two separate appeals. Martin did not seek to consolidate the appeals. While the appeals remained separate, Martin filed a single brief for both. Martin's single brief focused on one of the three claims he argued before the superior court, the Porche claim, and provided no argument

or analysis on the issue of costs. Martin failed to assign error to any of the superior court's findings.

The City provided two briefs; a brief in support of summary judgment and a second brief in support of costs. The summary judgment appeal was later transferred to Division III while Division II retained review of the cost appeal.

5. ARGUMENT.

A. The appellate decision fails to consider the basis of trial court's decision: Martin misrepresented facts underlying his remaining claim.

The trial court imposed costs based on unrefuted evidence that Martin misrepresented facts underlying his sole remaining claim against the City. [4] Ignoring Martin's misrepresentation, and therefore the basis of the trial court's decision, the appellate decision holds that the trial court abused its discretion when it imposed costs.

[4] The other two claims are also frivolous and appear to have been abandoned by Martin.

While purporting not to rule on the trial court's summary judgment decision because it had been transferred to another appellate division, the appellate court nonetheless concludes that Martin's claims "cannot be characterized as frivolous."

The appellate decision does not mention the trial court's finding that Martin misrepresented the facts underlying his sole remaining claim; i.e., his claim that the City failed to provide him with the Porche interview. Instead, the appellate decision holds that "there are rational arguments based on both fact and law that the Porsche interview was sufficiently relevant to PSS0004 to have been properly responsive to Martin's PRA request for that file." *Appendix - Martin v. City of Lakewood, No. 55221-3-II, 2022 Wash. App. LEXIS 420 (Ct. App. Mar. 1, 2022, at p. 7).*

1. The appellate decision fails to properly review the trial court's decision under the deferential abuse of discretion standard.

A trial court may award the prevailing party reasonable expenses, including attorney's fees, incurred in opposing a

frivolous action pursuant to RCW 4.84.185. *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 745, 218 P.3d 196 (2009). Such an award is available only when the action as a whole can be deemed frivolous. *McCarthy*, 152 Wn. App. at 746. A lawsuit is frivolous if, when considering the action in its entirety, it cannot be supported by any rational argument based in fact or law. *Curhan v. Chelan County*, 156 Wn. App. 30, 37, 230 P.3d 1083 (2010).

The trial court's award under RCW 4.84.185 is reviewed under the abuse of discretion standard. *McCarthy*, 152 Wn. App. at 746.

The abuse of discretion standard is "extremely deferential." *Hoffman v. Kittitas Cty.*, 4 Wn. App. 2d 489, 422 P.3d 466 (2018) citing *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 279, 372 P.3d 97 (2016). Courts will reverse a trial court decision under this standard "*only* if the decision applies the wrong legal standard, relies on

unsupported facts, or adopts a view that no reasonable person would take." *Mayer v. Sto Indus., Inc*., 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (emphasis added).

In this case, the appellate decision fails to give proper - or any - deference to the trial court's decision. The appellate decision does not identify how or even if the trial court applied a wrong legal standard, relied on unsupported facts, or adopted a view that no reasonable person would take. Focused on the "PRA's broad mandate for disclosure," the appellate decision misconstrues – or simply ignores – a primary basis of the trial court's decision; Martin's misrepresentation.

2. The trial court awarded costs because Martin's sole remaining claim relies on misrepresented facts.

The trial court imposed less than $3,000.00 in attorney's fees and costs against Martin. The trial court's decision was based on the proper legal standard; RCW 4.84.185. It also relied on supported and unrefuted evidence and adopted a view all reasonable persons would take; Martin misrepresented the

facts underlying his sole remaining claim, filing and advancing what he knew or should have known to be a frivolous PRA action against the City.

Unrefuted evidence demonstrated that Martin knew or should have known that the record he claimed the City denied him – the Porche interview - was not included or even mentioned in the particular file he requested; the PSS004 file.

i. Undisputed facts show the Porche interview is responsive to a request for another file, PSS003, and Martin's second request.

Martin claimed that the City violated the PRA because the Porche interview was "not provided by the City ... responsive to my … request under PSS #2019-PSS004 until after the filing of the lawsuit." *CP 61*.

However, undisputed facts show that the Porche interview was not used or mentioned in PSS004; it was part of *another* investigation and *another* file; PSS003. *CP 96; 276; 279.* Moreover, undisputed facts show that the City provided

Martin with PSS003, which included the Porche interview, in response to his *second* request (July 2019) – **7 months before** this lawsuit was filed (February 2020). *CP 96.*

ii. Martin misleadingly omits reference to his second request for the second investigation PSS003.

Without explanation, Martin's pleadings omit *any* reference to his second request and simply deny, without proof, that he received the records before filing suit – even on appeal.

The appellate decision does not seem to appreciate the significance of Martin's omission. Martin claimed he did not receive certain records in the context of PSS004 when he knew or should have known that those records – the Porche records – were used in the PSS003 investigation, *not* the PSS004 investigation. *CP 96; 276; 279.* Moreover, Martin knew or should have known that he received the records in response to his second, omitted, request.

Martin also disingenuously qualifies his claim by stating that he did not receive the records "until after the filing of the litigation." *CP 61*. Martin's claims are demonstrably false and the trial court understood this when imposing costs. *CP 418.* Undisputed evidence shows that on July 30, 2019, Martin opened the electronic copy of the other investigation file - PSS003 - which included the Porche records. *CP 96.* This undisputed evidence demonstrates that Martin received the PSS003 file seven months *before* he filed this case.

3. The appellate decision did not properly apply *Kilduff* to the facts of this case; unlike *Kilduff*, the trial court found Martin misrepresented facts.

In finding that the trial court abused its discretion, the appellate decision cites to *Kilduff v. San Juan County*, 194 Wn.2d 859, 877, 453 P.3d 719 (2019). However, the facts in this case are significantly different from those in *Kilduff.* In *Kilduff*, it was undisputed that the plaintiff made claims in good faith. In this case, it is undisputed that Martin misrepresented

facts to support his sole remaining claim. Unlike *Kilduff*, Martin cannot be said to have made his claim in good faith.

The superior court found that Martin misrepresented facts and knew or should have known that the Porche records were not responsive to his request for PSS004. *CP 419; CP 342-3.* The entirety of Martin's case lacked merit.

Even on appeal, Martin continues to misrepresent facts. *Appellant's Brief at p. 13*. Specifically, Martin asserts that the City failed to provide him with Porche records "until after the filing of this lawsuit." *Id.* Again, this is simply and demonstrably not true. The City provided Martin with the Porche records *before* he filed this lawsuit, in response to his *second* request; a request he made for the file it was actually filed in - PSS003. *CP 96 and 97- 155.*

B. In conflict with established law, the appellate decision holds that the City should have disclosed records that had not yet been requested; the Porche interview.

The appellate decision is in conflict with established law. The appellate decision effectively holds that the City should have disclosed records that Martin had not yet requested; the Porche interview. The decision suggests that the City was supposed to have known that Martin wanted a part of the investigation and file in PSS003 – the Porche interview – even though Martin initially only requested records related to another investigation and file; PSS004. This is an untenable position for the City and any other PRA agency. This is also inconsistent with established law.

1. PRA does not require agencies to be mind readers but to respond to requests as they are made.

The courts have held that the PRA does not require public agencies to be "mind readers." *Bonamy v. City of Seattle*, 92 Wn. App. 403, 960 P.2d 447 (1998) ("a public agency cannot be expected to disclose records that have not yet been requested. To hold otherwise would place public agencies in an untenable position.")

The courts have made it clear that people requesting records under the PRA have the obligation to "identify the documents with sufficient clarity to allow the agency to locate them." *Hobbs v. State*, 183 Wn. App. 925, 944, 335 P.3d 1004 (2014) and see, *RCW 42.56.080; 42.56.550(1).*

Martin's request for PSS004 is an "identifiable" record because it targets a specific file by name, but it is also qualified. The PRA rules note that when requests are qualified with an "inexact phrase" such as all records "relating to" a topic, as in this case, agencies may interpret the request as one for records which directly and fairly address the topic. *WAC 44-14-04002.*

Put simply: when Martin asked for records "related to" a specific and particular file - PSS004 - the PRA permits the City to interpret it as a request for the records in that particular file – not records in other files. *Id and Dotson v. Pierce County*, 13 Wn. App. 2d 455, 464 P.3d 563 (2020).

This is particularly true in this case where the requester has repeatedly confirmed the City's interpretation of his request. Specifically, Martin characterized it as a request related to "*this* internal investigation," as opposed to any other internal investigation. *CP 2 and CP 60 (emphasis added).* Martin continued the reference to the particular investigation and file in his appeal. *Appellant's Opening Brief at p. 12.* As used by Martin, these definite demonstrative articles refer to a specific investigation; a specific file – as opposed to all others.

2. The appellate decision conflicts with *Dotson* which found that records not used or held in a particular file are not responsive for requests for that file.

The appellate decision particularly conflicts with *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 464 P.3d 563 (2020). *Dotson* is a Division II published case in which the court determined that while other records may be "related" to a particular file, if those records were not actually used or held in that file, then they are not responsive to a public records case. Like the *Dotson* court, the trial court in this case found that

because the Porche records were not used or held in the requested file (PSS004), they were not responsive to Martin's request for that specific file. *VRP July 2, 2020 at 21; CP 342-3*.

In *Dotson*, the requester asked for "any and all" records "related" to a code enforcement investigation commenced against her. (The county was investigating Dotson for impermissibly constructing a paddock over a stream.) In the course of researching the code violation, the planner retrieved a single record from an archived file for a parcel adjacent to Dotson's parcel; a stream buffer notice. The planner copied the notice, returned the original to the archive file, and then filed the copy in the code enforcement file.

Dotson claimed that the county violated the PRA when it failed to provide the archived file as well as the current file. Dotson argued that the archived file was "related to" the current file. The court disagreed. The *Dotson* court determined that while other records may be "related" to a particular file, if those

records were not actually used or held in that file, then they are not responsive to a public records case. *Id at p. 16.* "Because the County did not consider any documents from file number 553137 (the archived file), these records are not responsive to Dotson's PRA request." *Dotson v. Pierce Cty.*, 13 Wn. App. 2d 455, 467, 464 P.3d 563, 570 (2020).

Like *Dotson*, the two files at issue here are separate files, created for separate purposes; PSS003, the "other" file, including the Porche records, is not responsive to the request for PSS004. *CP 96 ¶ 4; CP 275 ¶ 5 & 6; and CP 278-279 ¶ 3 - 7.* Like *Dotson*, a few pages - a report of calls - from PSS003, the "other" file, were used in the PSS004 investigation so they were physically copied and the copies were put into PSS004. *CP 135-6 and CP 215-6.* But the Porche records were *not* used in the PSS004 investigation, so they were *not* made a part of the PSS004 file.

Just like *Dotson*, records from another file used in relation to the requested file were physically copied, filed and also provided, but the whole of the "other" file was not; it was referred to only by number.

The appellate court seems to suggest that labels of "003" and "004" on some of the overlapping records may have confused Martin. However, the labels could not have reasonably influenced Martin before he submitted his requests because he could not have seen them before he requested either record.

Nor could the labels have confused Martin before he filed his complaint because at that point, he possessed both files and knew or should have known that the Porche records were not included in PSS004.

One distinction from *Dotson* is that Martin, unlike Dotson, asked for a specific investigation file, identifying it using the naming convention of the division maintaining it.

Martin's reference to the specific file name makes it even more reasonable for the City to believe Martin wanted *that particular* file. Consistent with the PRA and PRA rules, the City reasonably focused its search on the police department and the personnel department for "records and recordings related to" that particular file. *CP 96, paragraph 5; CP 279, paragraph 4*.

C. The appellate decision ignored Martin's failure to assign error or otherwise brief his appeal.

On appeal, Martin failed to assign error to any of the superior court's findings. Accordingly, any assumed assignment of error should be considered waived. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986). See also, *Dotson v. Pierce Cty*., 13 Wn. App. 2d 455, 470 n.5, 464 P.3d 563, 571 (2020) citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) and RAP 10.3(a)(6).

6. Conclusion.

In a recent decision, Division III expresses sympathy for a county working with a "disingenuous PRA litigator" noting that "if the law is to change, the legislature, not the judiciary, must change it." *Hood v. Columbia County,* No 38187-1-III, March 8, 2022, at p. 13*, published in part.*

The City does not disagree with the court. The City is not asking the courts to change the PRA. The City seeks consistent guidance and application of the law. If, as the appellate decision seems to suggest, the City should have provided Martin with a portion of file PSS003 – the Porche interview - in response to his request for records "related to" PSS004, then the decision is in conflict with established law and agencies' obligations are significantly altered.

More importantly, such a change will negatively impact the public's access to both records and the courts. Ultimately, the public bears the cost of disingenuous PRA actions in the

form of delayed responses to other record requests and courts bogged down with frivolous claims. In this action alone, the trial court had to hold five separate hearings.

The judiciary is not powerless in discouraging those who want to monetize or otherwise misuse the PRA. It is within the sound discretion of the judiciary to "discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases." *Kilduff v. San Juan Cty.*, 194 Wn.2d 859, 876, 453 P.3d 719, 728 (2019) interpreting *RCW 4.84.185*.

The trial court exercised sound discretion in imposing costs on Martin when undisputed evidence showed that none of Martin's claims could be supported by any rational argument based in fact or law. The City requests the Supreme Court to reverse the appellate decision and reinstate the trial court's award of costs.

DATED this 22nd day of April 2022.

Respectfully submitted,

CITY OF LAKEWOOD
HEIDI ANN WACHTER, CITY ATTORNEY

Eileen M. McKain

Digitally signed by Eileen M. McKain
DN: cn=Eileen M. McKain, email=emckain@cityoflakewood.us, c=US
Date: 2022.04.22 15:27:38 -07'00'

Eileen McKain, WSBA #17792
Assistant City Attorney
Attorney for Respondent, City of Lakewood

CERTIFICATE OF COMPLIANCE

I certify that this document is set in 14-point font, that it contains 4,835 words and is within the size limitations of RAP 18.17

CITY OF LAKEWOOD
HEIDI ANN WACHTER, CITY ATTORNEY

Eileen M. McKain

Digitally signed by Eileen M. McKain
DN: cn=Eileen M. McKain, email=emckain@cityoflakewood.us, c=US
Date: 2022.04.22 15:28:02 -07'00'

Eileen McKain, WSBA #17792
Assistant City Attorney
Attorney for Respondent, City of Lakewood

CERTIFICATE OF SERVICE

I certify that on the 22nd day of April, 2022 I caused a true and correct copy of the City's Motion for Reconsideration to be served on the following in the manner indicated below:

Counsel for Plaintiff Alan Harvey 1104 Main St Suite 214 Vancouver, WA 98660 Alan.Harvey@NWLAdvocates.com	Electronic Service via Court of Appeals Portal
Court of Appeals Derek Byrne, Clerk Court of appeals Division Il 909 A Street Tacoma, WA 98402	Electronic Service via Court of Appeals Portal

Dated this 22nd day of April 2022.

Amanda Collins
Public Records / Legal Specialist

APPENDIX 1

Filed
Washington State
Court of Appeals
Division Two

March 1, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RUSSELL MARTIN, Appellant, v. CITY OF LAKEWOOD, a Washington Governmental Entity, Respondent.	No. 55221-3-II UNPUBLISHED OPINION

PRICE, J. — Lakewood Police Officer Russell Martin brought a lawsuit under the Public Records Act (PRA)[1] against the City of Lakewood. Martin's lawsuit related to his PRA request for records from the Lakewood Police Department's investigation into him as an officer. In response, the City brought a motion for summary judgment that was granted by the superior court. The superior court dismissed Martin's case and awarded sanctions to the City. Martin appeals the superior court's award of sanctions.[2] We hold that the superior court erred in awarding sanctions and reverse.

[1] Ch. 42.56 RCW.

[2] In a separate appeal, Martin argues that the superior court erred by granting the City's underlying motion for summary judgment. The appeal of the underlying summary judgment motion is not before this court, so we limit our consideration to the superior court's order on sanctions.

FACTS

In 2019, the Lakewood Police Department conducted two separate but related investigations into officers following allegations of dishonesty and misconduct. The first investigation involved a single officer being investigated for dishonesty and was labeled 2019-PSS-003 (PSS003).[3] The second investigation involved officers Jeremy Vahle and Martin and was labeled 2019-PSS-004 (PSS004). Vahle and Martin were being investigated for failure to report the alleged dishonesty of the first officer.

In the PSS004 investigation, allegations against Vahle were sustained. Prior to his union discipline hearing, Vahle was provided with a thumb drive containing documents related to the investigation into his conduct. Included on the thumb drive was an interview with Sgt. Charles Porsche, the supervisor of the officer who was the subject of the PSS003 investigation.

PUBLIC RECORDS REQUESTS AND LAWSUIT

After the conclusion of the investigations, Martin made two public records requests to the City of Lakewood. First, Martin requested records related to the second investigation, specifically, "[a]ll documents and recordings related to [PSS004]." Clerk's Papers (CP) at 58. Then, about a month later, Martin made the following request related to the first investigation: "All documents and recordings related to [PSS003]." *Id.* at 31.

The City responded to both of Martin's requests, providing him with documents and redacting information determined to be exempt from disclosure. In response to his request for documents and recordings related to PSS004, Martin received the following files:

[3] PSS stands for "Professional Standards Section," which is a division of the Lakewood Police Department. CP at 30.

Jeremy-Vahle-2019PSS-004.mp4
Russ-Martin-2019PSS-004.mp4
Suver-2019PSS-003---004.mp4
Suver-re-interview-2019PSS-004.mp4
Vahle determination.pdf
2019PSS-004-redacted.pdf

Id. at 14. The provided documents contained references to the PSS003 investigation, including two employee statements that were labeled as being related to both PSS003 and PSS004. The Porsche interview was not provided. Upon providing Martin with the documents, the City informed him that it considered his first request relating to PSS004 closed.

In response to Martin's subsequent request for files related to PSS003, Martin received, among other records, the Porsche interview that was labeled, "Porsche-witness-interview-2019PSS003---004.mp4." *Id.* The employee statement signed by Porsche stated that he was being interviewed "as part of an internal investigation under PSS Control # 003 & 004." *Id.* at 130. Although there was a certain amount of overlap between records provided in response to the PSS003 and the PSS004 requests,[4] and notwithstanding that Porsche's employee statement and the label on the interview carrying references to both investigations, the Porsche interview was provided only in response to Martin's PSS003 request and *not* in response to Martin's PSS004 request. There was no further communication between Martin and the City following the City's responses.

[4] Certain documents provided were not labeled but provided in response to both requests. Other documents were labeled as belonging to both investigations but only provided in response to one of the requests. One document was labeled in its file name as belonging to both investigations and was provided in response to both requests.

About seven months after the City's response, Martin filed a complaint for disclosure of public records. Martin alleged that the City had wrongfully withheld documents in response to his public records request for documents related to PSS004. He seemed to argue that the interview of Porsche was sufficiently related to the PSS004 file such that it should have been provided in in response to his request for that file, not just in response to his request for the PSS003 file.

After Martin brought his lawsuit, the City filed a motion for summary judgment. The City argued that the Porsche interview was never used for the PSS0004 file and, therefore, was not responsive to his request for that file. The City further argued that in any event, Martin eventually received all of the requested documents. The superior court granted the City's motion for summary judgment.

Shortly thereafter, the City brought a motion for sanctions asserting that Martin's action was frivolous and advanced without reasonable cause. The City argued that costs and sanctions should be awarded because Martin's action had neither a factual nor a legal basis. The superior court agreed with the City and awarded sanctions because Martin brought the lawsuit without reasonable cause.

Martin appeals the award of sanctions.

ANALYSIS

"The PRA is a strongly worded mandate for broad disclosure of public records." *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 468, 464 P.3d 563, *review denied*, 196 Wn.2d 1018 (2020). The PRA is "liberally construed and its exemptions narrowly construed." RCW 42.56.030. When responding to a request under the PRA, an agency must conduct an adequate search.

Neighborhood All. of Spokane County v. Spokane County, 172 Wn.2d 702, 721, 261 P.3d 119 (2011). There is not a set definition for what constitutes an adequate search:

> [T]he focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate. *The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. What will be considered reasonable will depend on the facts of each case*. . . .
>
> Additionally, agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. The search should not be limited to one or more places if there are additional sources for the information requested. Indeed, "the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." This is not to say, of course, that an agency must search every possible place a record may conceivably be stored, but only those places where it is reasonably likely to be found.

Id. at 719-20 (emphasis added and omitted) (internal citations omitted) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)).

Furthermore, where an agency violates the PRA in failing to provide a public record, subsequent provision of the record previously wrongfully withheld does not protect the agency from liability. *Id.* at 726-27. The harm occurs at the time the record is withheld. *Id.* "[T]he remedial provisions of the PRA are triggered when an agency fails to properly disclose and produce records, and any intervening disclosure serves only to stop the clock on daily penalties, rather than to eviscerate the remedial provisions altogether." *Id.* at 727.

A superior court may award a prevailing party its costs where it determines that "the position of the nonprevailing party was frivolous and advanced without reasonable cause." RCW 4.84.185. An action is frivolous if, "considering the action in its entirety, it cannot be supported by any rational argument based in fact or law." *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App.

758, 785, 275 P.3d 339 (2012). This court reviews an award of sanctions under this provision for an abuse of discretion. *Kilduff v. San Juan County*, 194 Wn.2d 859, 877, 453 P.3d 719 (2019).

Here, Martin argues that the superior court erred in granting the City's request for sanctions because his lawsuit was not frivolous. We make no decision on the ultimate merits of Martin's claims or whether the superior court erred in granting the underlying motion for summary judgment to the City. However, given the PRA's broad mandate for disclosure and resulting obligation of agencies to make an adequate search for responsive records, Martin's claims cannot be characterized as frivolous. On this record, there are rational arguments based on both fact and law that the Porsche interview was sufficiently relevant to PSS0004 to have been properly responsive to Martin's PRA request for that file. The fact that Martin ultimately received the Porsche interview in response to a separate request may be relevant to potential damages, but it does not necessarily shield the City from liability. Accordingly, we conclude the superior court abused its discretion in its awarding sanctions to the City.

CONCLUSION

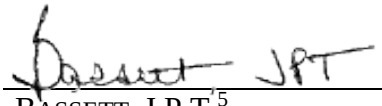
In conclusion, because Martin's PRA claims cannot fairly be characterized as frivolous, we reverse the superior court's award of sanctions to the City.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

PRICE, J.

We concur:

MAXA, P.J.



BASSETT, J.P.T.[5]

[5] Judge Jeffrey Bassett is serving as a judge pro tempore of the court pursuant to RCW 2.06.150.

APPENDIX 2

Filed
Washington State
Court of Appeals
Division Two

March 28, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RUSSELL MARTIN, Appellant, v. CITY OF LAKEWOOD, a Washington Governmental Entity,, Respondent.	No. 55221-3-II ORDER DENYING MOTION FOR RECONSIDERATION

Respondent moves for reconsideration of the opinion filed March 1, 2022, in the above entitled matter. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj: MAXA, PRICE, BASSETT

FOR THE COURT:

PRICE, J.

CITY OF LAKEWOOD

April 22, 2022 - 4:12 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	55221-3
Appellate Court Case Title:	Russell Martin, Appellant v. City of Lakewood, Respondent
Superior Court Case Number:	20-2-04645-6

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