

**RECEIVED**  
OCT 16 2023

Washington State  
Supreme Court

NO. 102149-6

---

**SUPREME COURT OF THE STATE OF WASHINGTON**

---

DONALD HERRICK,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES /  
SPECIAL COMMITMENT CENTER

Respondent,

---

**PETITION FOR REVIEW**

---

Donald Herrick – Pro Se  
P.O. Box 88600  
Steilacoom, WA 98388  
253-512-6553  
253-512-6552

**TABLE OF CONTENTS**

A. IDENTITY OF PETITIONER.....1

B. COURT OF APPEALS DECISION.....1

C. ISSUES PRESENTED FOR REVIEW.....1

D. STATEMENT OF THE CASE.....2

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....6

F. CONCLUSION.....20

## TABLE OF AUTHORITIES

### Washington Cases

<u>Herrick v. DSHS / SCC</u> , 55794-II filed February 22, 2023.....	1
<u>Wash. Pub. Emps. Ass'n v. Wash. State Ctr. For Childhood Deafness &amp; Hr'g Loss</u> , 194 Wn.2d 484, 450 P.3d 601 (2019).....	7
<u>Zink v. City of Mesa</u> , 140 Wn.App. 328, 166 P.3d 738 (2007) (Zink I).....	7, 20
<u>Amren v. City of Kalama</u> , 131 Wn.2d 25, 929 P.2d 389 (1997).....	7
<u>West v. City of Tacoma</u> , 12 Wn.App. 2d 45, 81, 456 P.3d 894 (2020).....	7
<u>Cantu v. Yakima Sch. Dist.</u> , 23 Wn.App. 57 (Aug. 2, 2022).....	7
<u>Hearst v. Hoppe</u> , 90 Wn.2 123, 580 P.2d 246 (1978).....	8, 15
<u>Progressive Animal Welfare Soc'y v. Univ. of Wash.</u> , 114 Wn.2d 677, 790 P.2d 604 (1990) (PAWS I).....	8
<u>Neighborhood Alliance of Spokane County v. County of Spokane</u> , 172 Wash.2d 702, 261 P.3d 119 (2011).....	9, 10, 15
<u>Progressive Animal Welfare Soc'y v. Univ. of Wash.</u> , 125 Wn.2d 243, 884 P.25 592 (1994) (PAWS II).....	9
<u>Herrick v. DSHS / SCC</u> , 52744-8-II filed 05-22-19.....	10, 13
<u>Yousoufian v. Office of Ron Sims</u> , 168 Wash.2d 444, 229 P.3d 735 (2010) (Yousoufian II).....	11-16
<u>West v. City of Lakewood</u> , 2022 Wash.App. LEXIS 1425 (cited per GR14.1).....	13
<u>Fisher Broadcasting-Seattle TV LLC v. City of Seattle</u> , 180 Wn.2d 515, 326 P.3d 688 (2013).....	19

*Strand v. Spokane County*, 2021 Wash.App. 1459, (unpublished 37669-9-III, at paragraph 72, cited pursuant to GR 14.1).....19

**Federal Cases**

*Herrick v. Strong*, 2016 U.S. District LEXIS 123429, No. C15-5779 RBL-KLS, U.S. District Court W. Dist. Of Wash. at Tacoma.....2

*U.S. Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 109 S.Ct. 2841, (1989).....9

*Ctr. For Inv. Reporting v. U.S. Dept of Justice*, 982 F.3d 668, 691 (03-06-2020) .....18

*Nat'l Sec. Couns. v. C.I.A.*, 898 F.Supp.2d 233, 270 (D.D.C. 2012).....18

**State Statutes**

RCW 42.56.010(4).....3, 6, 19  
RCW 71.09.....2, 7  
RCW 42.56.030.....10  
RCW 42.56.080.....13, 14  
RCW 42.56.100.....14  
RCW 42.56.520.....14  
RCW 42.56.550.....19

**Federal Statutes**

42 U.S.C § 1983.....2, 4, 17  
5 U.S.C. § 552.....8

**Court Rules**

RAP 13.4(b)(4).....6, 11, 16  
GR 14.1.....13, 19



**A. IDENTITY OF PETITIONER**

Pro se petitioner Donald Herrick asks the Supreme Court to accept review of the Court of Appeals decision designated in Part II.

**B. COURT OF APPEALS DECISION**

Petitioner requests review of the Court of Appeals decision when it issued an unpublished opinion affirming the trial courts order on the Department of Social and Health Services (DSHS) motion to show cause (*Donald Herrick v. DSHS / SCC*, 55794-II filed February 22, 2023) and as well the petitioners motion for reconsideration that the Court of Appeals denied (on June 5, 2023). See Appendix.

**C. ISSUES PRESENTED FOR REVIEW**

**CI. Staff Abuse/Photograph Request**

1. Whether an agency's decision to limit it's response to an obscure black and white copy of a photo, without seeking any clarification and contrary to subsequently offered requestor input, is consistent with the mandate of the PRA when the actual records request was specifically and redundantly for "original color digital photo and without password protection", the existence of which is uncontroverted and has never been challenged or denied by the agency.

2. Whether the PRA's strict mandate for governmental transparency allows for an agency to loosely interpret requests and their duty to provide requested materials.

3. Whether the PRA places the burden on the agency to prove that its search was adequate and that all locations likely to contain responsive materials were in fact searched and ultimately that nondisclosure is justified or can the burden be shifted to the requestor by the Court even though the state agency has never denied the existence and/or availability of the requested (digital)

records that were known to be located elsewhere.

4. Whether the established facts of the case demonstrate the existence of aggravating factors per *Yousoufian* for an appropriate penalty determination.

5. Whether a \$1 penalty is adequate, or consistent with the PRA and clearly established case law, given the established facts and aggravating factors of the case.

## **CII. Mail Log Request**

6. Whether the intent of the PRA is to allow for full public access to public records or A) is the agency able to minimize the scope of its response for its own convenience, or B) is the court able to minimize the scope and/or the source of the responsive materials?

7. DATABASE

8. Does the PRA limit the number of requests an individual can make?

## **D. STATEMENT OF THE CASE**

This case stems from two separate Public Records requests that the petitioner submitted in an attempt to both protect myself from a potential lifetime of confinement under RCW 71.09 by augmenting the lack of any discovery process that existed while my civil commitment proceeding's regular discovery process was under pretrial appellate court "stay" and also defending my rights in Federal court<sup>1</sup>. Records requests were made specifically with regards to:

### **I. Staff Abuse / Photograph Request**

---

<sup>1</sup> - Via a 42 U.S.C. 1983 civil rights complaint in the Federal courts in order to protect myself from constitutional violations against my rights and ability to send and receive mail - see *Herrick v. Strong*, 2016 U.S. District LEXIS 123429, No. C15-5779 RBL-KLS, U.S. District Court Western District Of Washington At Tacoma.

This request was made after false allegations were made that I was the victim of repeated sexual assaults by a specific SCC female staff member, later identified to me as Carol Olson (Olson). During subsequent investigatory interviews I was shown the personnel photo of said SCC staff member (in both a high resolution color printout and also the same image as a digital image on the computer). On 12-22-2015, I submitted the following redundant request (201512-PRR-889, hereafter "889") (CP33) in pertinent part(s) seeking specifically, in addition to other exculpatory records, the high quality staff photo I'd been shown:

- 1) **Any and all** documents and **writings**<sup>2</sup> that in any way pertain to the investigation abuse towards Donald Herrick by previous SCC staff member Carol Olson, **including but not limited to**, any finding and outcomes, any documents in Carol Olson's **employment file** etc. and **as well any and all documents that from any other source.**
- 2) **Any and all** documents and **writings** that in any way pertain to the investigation or any other allegations of inappropriate behavior regarding Donald Herrick and Carol Olson **including but not limited to**, any findings and outcomes, and **as well any and all documents that are from any other source.**
- 3) **Any and all** documents and **writings** that **in any way pertain** to any investigation and/or reason reason for Carol Olson's discontinuation of employment at the SCC.
- 4) Any and all videos, **photographs etc. that have been used, or viewed, as part of the above requests/investigations in any way.** All videos and **photographs should be in original**

---

2 - Significantly, in regards to this case, and consistent with RCW 42.56.010(4), "writing' means... photographing, and every other means of recording any form of communication or representation including, but not limited to, ...pictures, ...photographic films and prints, motion picture, film and video recordings, ...and other documents including existing data compilations from which information can be obtained..."



**color format and without password protection.** (Emphasis added).

All requested items were provided without issue except for the passport style personnel photograph which was refused to me both verbally and via inappropriately redacted response (CP 50). No clarification was ever sought. DSHS/SCC eventually conceded that they should have provided the personnel photograph and offered as responsive a grainy, obscure black and white copy of a photo (CP239) of an unidentifiable person that was actually previously provided through discovery on November 9, 2017 and never considered as, or identified as, responsive to my request until after more than 3 additional years of litigation in DSHS/SCC's January 15, 2021 Motion For Show Cause (CP8, lines 9-11).

## **II. Personal Mail Log Request**

This request was submitted after I had heard of a "Mail Log" being kept by the SCC so that I could augment closed discovery for a 42 U.S.C § 1983 (supra) civil rights case that I had filed due to ongoing mail violations that began occurring on the first day of my arrival to the SCC on December 7, 2010.

Originally I requested "my (Donald Herrick #490391) SCC mail log" (Personal Mail Log) on 04-06-2016 but after no response later "resent" it on 05-15-2016 (CP28) (201605-PRR-833 hereafter "833"). Between

these two dates, and after not receiving any response to my first Personal Mail Log request I submitted a separate request for “the SCC 'mail log” (CP95) (General Mail Log) (201604-PRR-1274 hereafter “1274”) on 04-27-2016. When DSHS/SCC responded to the General Mail Log they sought clarification on the time period requested (CP96). On 05-05-2016 I offered clarification for a time period of 01-01-2011 for the General Mail Log request and **SIGNIFICANTLY ALSO offered clarification for my Personal Mail Log request** when I specifically emphasized that it was “**INDEPENDENT** of my previous records request (04-06-2016) specifically for a **COMPLETE** copy of my own 'mail log” request (CP97) (emphasis added).

DSHS/SCC did provide an adequate response to the General Mail Log (1274) request. In regards to my chronologically distinct Personal Mail Log (833) request DSHS/SCC never adequately responded instead stating (at CP29):

“We do not have **ANY** responsive **INFORMATION**. The Mailroom doesn't keep individual resident mail logs. SCC must only provide **EXISTING** records and does not have to create records to respond”.

The information from the General Mail Log (1274) request did cover most of the Personal Mail Log (833) request information but importantly it DID NOT cover the most pertinent chronologically distinct time-line of



the specifically requested “complete copy of my own 'mail log” which was the first several weeks of my confinement at the SCC for use in my federal civil rights violations case.

**E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

**I. Staff Abuse Complaint Photograph Request**

This Court should accept review and hold that the PRA demands transparency and access to all public records that are not specifically exempt. Consistent with RAP 13.4(b)(1) & (2) the issues presented regarding the Court of Appeals (COA) decision conflicts with other COA and Washington Supreme Court (WSC) decisions and is at odds with similar Freedom Of Information Act (FOIA) case decisions. The issues presented involve a significant question of law and substantial public interest due to the complete lack of applicable case law and as such this issue is one of first impression and future guidance is needed regarding Public Records image clarity and original digital records as these issues are likely to recur given the ubiquity of cameras and digital images in this digital age and so should be determined by the Supreme Court. RAP 13.4(b)(1)-(4).

(\*\*Petitioner stands by, and would draw attention to, his previous filings regarding my Staff Abuse Photograph request, particularly his Opening Brief at p.10-34.\*\*)

This request was quite specifically for (at each 1-3) “**Any and all** documents and **writings** that in any way pertain to the investigation” (the choice of the term “writing” was deliberately consistent with the expansive definition codified in RCW 42.56.010(4)). Requests 1 & 2 importantly also included the deliberate wording “any documents in Carol Olson's **employment file** etc. and **as well any and all documents**

**that from any other source**". As well the specific wording for the request (at 4) was emphatically deliberate:

**"Any and all videos, photographs etc. that have been used, or viewed, as part of the above requests/investigations in any way. All videos and photographs should be in original color format and without password protection."**

I was specifically wanting to obtain the **quality color** (personnel/employment photograph) that I'd been shown in order to be used for identification and exculpatory purposes in my RCW 71.09 civil commitment proceedings. My request was not qualified or ambiguous and would include the personnel photo that was used in the investigation even if it had to be obtained from outside the investigation file. See *Cantu v. Yakima Sch. Dist.*, 23 Wn.App. 57, 514 P.3d 661, **684** (Aug. 2, 2022) at paragraph 123:

"Given the strong presumption in favor of full disclosure an agency should not unreasonably assume a narrow interpretation of a request. See *Zink v. City of Mesa*, 140 Wn.App. 328, 337, 166 P.3d 738 (2007) (*Zink I*). After applying a broad interpretation, if any ambiguity remains it is incumbent upon the District to clarify that ambiguity. See *West v. City of Tacoma*, 12 Wn.App. 2d 45, 81, 456 P.3d 894 (2020). "

As well *Cantu v. Yakima Sch. Dist.*, 23 Wn.App. 57, 514 P.3d 661, **663** (Aug. 2, 2022) elaborates on point at paragraph 60:

"The PRA mandates full disclosure of public records except for limited exemptions provided by the act. *Wash. Pub. Emps. Ass'n v. Wash. State Ctr. For Childhood Deafness & Hr'g Loss*, 194 Wn.2d

484, 491, 450 P.3d 601 (2019). The PRA requires all state and local agencies to disclose any requested public record unless the record falls within a specific exemption. Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 250, 884 P.2d 592 (1994) (PAWS II) (plurality opinion). There is a strong presumption in favor of full disclosure. Zink v. City of Mesa, 140 Wn.App. 328, 337, 166 P.3d 738 (2007) (Zink I) (citing Amren v. City of Kalama, 131 Wn.2d 25, 31, 929 P.2d 389 (1997)). Washington courts have long held that the PRA must be liberally construed to promote full access to public records. Progressive Animal Welfare Soc'y v. Univ. of Wash., 114 Wn.2d 677, 682, 790 P.2d 604 (1990) (PAWS I) (citing former 42.17.010(11) (1975)).”

At p. 8-9 (and at footnote 3) of the Div. 2 COA decision<sup>3</sup> the COA shifted the burden to me<sup>4</sup> when it stated that “*Herrick has provided no evidence that a photo of the quality he requests exists*”, which is contrary to the PRA, to prove that the color picture exists when<sup>5</sup> it is uncontroverted by the SCC that the color photo does exist in the personnel database and the burden is on them to disprove its existence. “The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with statute..” RCW 42.56.550(1). “The PRA closely parallels the federal Freedom Of Information Act (FOIA) (5 U.S.C. § 552), thus where appropriate,

---

3 - Also in the Division Two Court of Appeals decision, p. 3, in response to a picture of myself that was offered as responsive the COA states “Herrick's photograph is a grainy, poor-quality, black and white photograph”. COA is correct, and though that may be a violation of the PRA as well petitioner is not in need of a picture of himself for witness identification or anything else. Of legal significance was Olson's photograph.

4 - Untrained pro se petitioner elaborated on his citation to the color photo in his Motion For Reconsideration at p. 3-8. Specifically he cited, from his Counter Motion To Show Cause, his reference and subsequent declaration to being “shown a full color high quality image on a computer” (CP123).

5 - The SCC does claim that the color photo is not in the investigative file.



Washington courts look to judicial interpretations of FOIA in construing the PRA. *Hearst Corp.*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978). See *Ctr. For Inv. Reporting v. U.S. Dept of Justice*, 982 F.3d 668, 690, (03-06-2020): **“the burden is on the agency to demonstrate, not the requestor to disprove, that the materials sought are not [currently existing] agency records”** citing *U.S. Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 109 S.Ct. 2841, (at [FN3]) (1989). **“Placing the burden of proof upon the agency puts the task of justifying the withholding on the only party able to explain it”**. “Like under FOIA, under the PRA the burden of showing compliance with the act is on the agency. RCW 42.56.550(1).” *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wash.2d 702, 739, 261 P.3d 119 (2011). **“The agency has the burden of providing sufficient detail to make the prima facie case that it conducted an adequate search”**. See *Neighborhood* at 744.

“The PRA unequivocally places on the agency the burden to establish that nondisclosure is justified”. See *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 251-52, 884 P.2d 592 (1994) (PAWS II) and RCW 42.56.550(1). For purposes of the PRA, the adequacy of the agency's search for requested records :

**“is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents... 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 ore more places if there are additional source for the information requested...** Indeed the agency cannot limit it's 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...The PRA treats a failure to properly respond as a denial... Thus, an inadequate search is comparable to a denial because the result is the same, and should be treated similarly in penalty determinations...the agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. **These should include the... type of search performed, and they should establish that all places likely to contain responsive materials were searched.**" (emphasis added).

see *Neighborhood* at 720-721.

The PRA unequivocally places the burden on DSHS/SCC to have 1) established and articulated that other locations likely to contain the photo (personnel database<sup>6</sup>) were also searched, AND ALSO 2) that the photo was no longer available from any other sources. DSHS/SCC never did either and has failed to present prima facie evidence to shift the burden to petitioner. This burden can not be shifted to the requestor by the COA. Importantly DSHS/SCC has never denied the existence of the high quality color photograph (located in the personnel database etc.) outside of the investigative file at the time of the request<sup>7</sup>. DSHS/SCC at best did an inadequate search. "This chapter shall be liberally construed and its

6 - In a secure facility for the potential lifetime of total confinement requiring a federal background check.

7 - See petitioner's Mot. For Reconsideration at p.11.



exemptions narrowly construed” RCW 42.56.030.

Petitioner refuses to concede to any determination that the photo is responsive as DSHS/SCC themselves cast doubt upon the responsiveness in their 05-22-19 “Respondent/ Cross Appellant's Brief” (First COA 52744-8).<sup>8</sup>

Finally, in petitioner's Mot. For Reconsideration he articulated his actual citations to the color photo (p.3-8, & 12) and reasons that an untrained pro se litigant's filings should not be judged as harshly as an attorneys (p. 17-19). In the interests of equity this Court should agree.

**a. Amount of Penalties**

This Court should accept review and hold that the PRA demands accountability and adequate deterrence when determining penalties and that under the facts of this case there was an abuse of discretion. The Court of Appeals decision conflicts with a decision of the Supreme Court and because these issues are both likely to recur and are of substantial public interest these issues need to be reiterated by the Supreme Court. RAP 13.4(b)(1) & (4). (\*\*Petitioner stands by, and would draw attention to, his previous filings regarding any Penalty determination, particularly his Opening Brief at p.22-31\*\*\*).

On p. 9-10 of the COA Opinion it addresses the penalty determination found by the superior court utilizing the *Yousoufian*<sup>9</sup> factors stating that

---

<sup>8</sup> - DSHS/SCC stated “The SCC does not, however, concede that it has violated the PRA. On Remand, the SCC reserves the right to advance alternative legal arguments. One potential argument is that the photograph was not in fact responsive to Mr. Herrick's PRA request”.

<sup>9</sup> - *Yousoufian v. Office of Ron Sims*, 168 Wash.2d 444, 466-68, 229 P.3d 735 (2010) (*Yousoufian II*). **Mitigating factors are:** 1) the lack of clarity in the PRA request, 2) the

*“the superior court considered the relevant Yousoufian factors when determining the per day penalty for improper redaction of the employee photograph”* but then states that *“the superior court's findings do not indicate the existence of any of the aggravating factors”*. As noted by petitioner in his appellate filings the record is replete with aggravating factors and as such an obvious abuse of discretion.

In the trial court's Order (specifically at CP248-49 at 7-14) the mitigating factors mentioned are absurd as outlined: 1) *the lack of clarity in the PRA request – my request was actually clear straightforward and was fulfilled without issue except for the photo that they deliberately refused to provide*; 2) *the agency's prompt response or legitimate follow-up inquiry for clarification - DSHS/SCC response was not prompt<sup>10</sup> nor was clarification EVER sought*; 3) *the agency's good faith, honest, timely*

*agency's prompt response or legitimate follow-up inquiry for clarification, 3) the agency's good faith, honest, timely and strict compliance with all PRA procedural requirements and exceptions, 4) proper training and supervision of the agency's personnel, 5) the reasonableness of any explanation for noncompliance by the agency, 6) the helpfulness of the agency to the requestor, and 7) the existence of agency systems to track and retrieve public records. **Aggravating factors are:** 1) delayed responses by the agency, especially in circumstances making time of the essence, 2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions, 3) lack of proper training and supervision of the agency's personnel, 4) unreasonableness of any explanation for noncompliance by the agency, 5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency, 6) agency dishonesty, 7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency, 8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency, and 9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.*

10 - 12-22-15 Date of my request; 11-09-17 date discovery of obscure grainy black & white photo was actually provided (without notice of being “responsive”); 01-15-21 date DSHS/SCC finally stated that they had provided responsive materials.

*and strict compliance with all PRA procedural requirements and exceptions, DSHS/SCC response was not timely nor was it in strict compliance with PRA procedural (see FN 9) – nor was it honest and in good faith (see FN 12); 4) proper training and supervision of the agency's personnel, demonstrably the training was substandard and certainly there was no supervision of SCC Record personnel;<sup>11</sup> 5) the reasonableness of any explanation for noncompliance by the agency, no explanation was offered for the delay and the noncompliance was a PRA violation<sup>12</sup> ; 6) the helpfulness of the agency to the requestor, DSHS/SCC was adversarial and not helpful in the slightest regarding the photo; and 7) the existence of agency systems to track and retrieve public records, any systems that were in place were not effective and consistent with recent case law.<sup>13</sup>*

---

11 - DSHS/SCC threw there Records staff member under the bus when asking for penalty leniency “Finally, a penalty is not necessary to deter similar mistakes in the future. The public disclosure coordinator who conducted the original search for the records is no longer the public disclosure coordinator at the SCC” (CP 14, lines 21-23)

12 - From the date of request 12-22-15 I was originally denied the photo and a non-existing exemption was cited (42.56.23) in the redaction (CP50). This erroneous explanation was the only one offered until 05-22-19 when in DSHS/SCC “Respondent/Cross Appellant's Brief” (First COA 52744-8), at page 14-15, they concede to not deserving their Summary Judgment and state that the SCC Records staff were concerned with SCC staff safety and that they were distinguishing the requestor contrary to the PRA (42.56.080) and they also float the possibility that the photo is not responsive to my request anyways before then, on 01-15-21, unceremoniously claiming that the photo was provided in discovery over three years earlier without any prior notice.

13- See *West v. City of Lakewood*, 2022 Wash.App. LEXIS 1425 (cited per GR14.1) where it states at paragraph 34, “The city also argues that it invested heavily in electronic systems to respond to PRA requests...But the existence of modern system is irrelevant if it is not used properly”.



Of more significance is the complete abuse of discretion and the finding of NO aggravating factors contrary to examples now outlined: **Aggravating factors are:** 1) *delayed responses by the agency, especially in circumstances making time of the essence, the time between initial request (12-22-15) until the purported day of receipt (11-09-17) and then the date of notice of providing the responsive photo 01-15-21 was absolutely a delay;*<sup>14 15</sup> 2) *lack of strict compliance by the agency with all the PRA procedural requirements and exceptions, as outlined above (see FN 10 & 12) there was no compliance, strict or otherwise, and no valid exception ever given;* 3) *lack of proper training and supervision of the agency's personnel, as outlined above (see FN 11) there was no proper training or supervision;* 4) *unreasonableness of any explanation for noncompliance by the agency, no explanation has ever been given other than years late an acknowledgment that SCC violated the PRA;* 5) *negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency, as argued at length in prior filings (Opening Brief at p.22-31) negligent and bad faith thoroughly apply;* 6) *agency dishonesty, as outlined above (see FN 8) and throughout filings*

---

14 - The PRA itself demands timeliness no less than three separate times. See 42.56.080 "agencies shall, upon request for identifiable public records, make them promptly available" and RCW 42.56.100 "most timely possible action on requests" and 42.56.520 Prompt Responses Required: "Responses to requests for public records shall be made promptly"

15 - Petitioner maintains that there has been no responsive photo provided to date.

DSHS/SCC have been continuously dishonest; 7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency, circumstances regarding Sexually Violent Predators and sexual abuse by state employees against those in their care are of public importance; 8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency, the underlying allegation and subsequent denial of access to these public records helped to prolong my confinement and limit employment opportunities at the SCC; 9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case, DSHS/SCC being by far the largest agency in the state, having a history with several other PRA violations (including non-frivolous with petitioner), and the fact that petitioner is pro se and there is no significant attorney fees<sup>16</sup> portion of the penalty deterrent all demand a significant penalty.

Also of significance is the overall theme of DSHS/SCC's approach:

“An agency that sought clarification of a confusing request and in all respects timely complied but mistakenly overlooked a responsive document should be sanctioned less severely than an agency that intentionally withheld known records and then lied in its response to avoid embarrassment.”

---

<sup>16</sup> - *Hearst v. Hoppe*, 90 Wn.2d 123, 139-140, 580 P.2d 246 (1978) “This court characterized the award as a fine which, along with the costs and attorney fees comprised the public disclosure acts 'penalty provisions'.”



See *Neighborhood* at 718.

This request for the investigative photo stands in the company of few others when scrutinizing the PRA. DSHS/SCC has continued to blatantly violate the PRA and, for one reason or another, have found shelter from the courts in determining an adequate penalty. All factors and circumstances of this case demand a significant penalty.

## **II. Personal Mail Log Request**

This Court should accept review and hold that the PRA demands transparency and access to all public records, including digital databases, that are not specifically exempt. Consistent with RAP 13.4(b)(1) & (2) the issues presented regarding the Court of Appeals (COA) decision conflicts with other COA and Washington Supreme Court (WSC) decisions and is at odds with similar federal Freedom Of Information Act (FOIA) case decisions. The issues presented involve a significant question of law and substantial public interest due to the lack of applicable case law and as such this issue is potentially one of first impression and future guidance is needed regarding Public Records original digital/database records as these issues are likely to recur given the digital age in which we live and so should be determined by the Supreme Court. RAP 13.4(b)(1)-(4).

(\*\*Petitioner stands by, and would draw attention to, his previous filings regarding my Mail Log request, particularly his Opening Brief at p.35-44.\*\*)

Immediately upon my arrival to the SCC on December 7, 2010 I began having my rights violated regarding my mail. I subsequently filed a federal 42 U.S.C § 1983 (supra) civil rights complaint ("1983") in the U.S. District Court in Tacoma. While navigating my 1983 I heard that

SCC keeps a Mail Log of residents incoming and outgoing mail. I submitted a public records request specifically to receive a copy of my complete mail log in order to augment my 1983 discovery process that had ended. This request was made specifically for my entire mail record (including, deliberately and even primarily for, my first few weeks at the SCC) as that was when the mail violations began.

Originally I requested “my (Donald Herrick #490391) SCC mail log” (Personal Mail Log) (201605-PRR-833 hereafter “833”) on 04-06-2016 but after receiving no response I later “resent” it on 05-15-2016 (CP28). Between these two dates, and after not receiving any response to my first Personal Mail Log request I submitted a separate request for “**THE** SCC ‘mail log’” (CP95) (General Mail Log) (201604-PRR-1274 hereafter “1274”) on 04-27-2016. When DSHS/SCC responded to the General Mail Log they sought clarification on the time period requested (CP96). On 05-05-2016 (CP97) I emphasized that “***Originally** there was no date/timeline parameters for the request*” (thus no parameters were expected of my personal mail log request) but I did offer clarification for a time period of 01-01-2011 (to the present time) for the **General Mail Log request only** and **SIGNIFICANTLY ALSO offered clarification for my Personal Mail Log request** when I specifically emphasized that it was “**INDEPENDENT** of my previous records request (04-06-2016)

specifically for a **COMPLETE** copy of my own 'mail log'" request (emphasis added). DSHS/SCC did provide an adequate response to the General Mail Log (1274) request. Unfortunately in regards to my chronologically distinct Personal Mail Log (833) request DSHS/SCC never adequately provided a response instead stating (at CP29):

“We do not have **ANY** responsive **INFORMATION**. The Mailroom doesn't keep individual resident mail logs. SCC must only provide **EXISTING** records and does not have to create records to respond”. (emphasis added).

This response to my Personal Mail Log is contrary to established case law (as outlined in my Opening Brief at p.35-44) and specifically utilizes wording (emphasized) that is specifically addressed in the case law<sup>17</sup>. The information from the General Mail Log (1274) request did cover portions of the Personal Mail Log's (833) requested information but importantly it DID NOT cover the most pertinent chronologically distinct time-line of the specifically requested “complete copy of my own 'mail log” which began immediately upon my arrival to the SCC and specifically covered the first several weeks of my confinement at the SCC for use in my

---

17 - *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 524, 326 P.3d 688 (2013). “But 'public record' is broadly defined and includes 'existing data compilations from which information may be obtained' 'regardless of physical form or characteristics' RCW 42.56.010(4),(3). This broad definition includes electronic information in a database”. Reiterated at length by *Strand v. Spokane County*, 2021 Wash.App. 1459, (unpublished 37669-9-III, at paragraph 72, cited pursuant to GR 14.1) and federal case law such as *Center for Investigative Reporting v. D.O.J.*, 982 F.3d 668, 691, No.18-17356 (9<sup>th</sup> Cir. 2020) citing *Nat'l Sec. Couns. v. C.I.A.*, 898 F.Supp.2d 233, 270 (D.D.C. 2012) “[S]orting a pre-existing database of information to make information intelligible does not involve the creation of a new record.”



federal civil rights violations case. Nor did the General Mail Log cover a period after the General Mail Logs request was submitted (04-27-16) but before the Personal Mail Log was itself submitted (05-15-16).

On p.8 of the COA Opinion it states that “the general mail log was the only record containing information about Herrick’s individual mail log”. The general mail log was retrieved from the SCC mail log database. It is nonsensical to think that the SCC must provide information that is responsive to my request from the “general mail log” but not the original source of the underlying data. This rationale is contrary to established state and federal case law (see FN 17 and argument in Opening Brief at specifically p.38-44). The “general mail log” IS NOT the only record to contain responsive materials to my request, the entire mail log database contained the sought information and **the full chronological response should have been provided including the pertinent first several weeks from petitioners arrival at the SCC on December 07, 2010 that was specifically sought and never provided.**

To the extent that the COA rationale is that my subsequent request is inconvenient “Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience” RCW 42.56.550(3) or that petitioners request is exceeding the limit the PRA

“does not place a limit on the number of request an individual can make” but the PRA does “require strict compliance”. *Zink v. City of Mesa*, 140 Wn.App. 328, 340, 166 P.3d 738 (2007) (Zink I).

**F. CONCLUSION**

Untrained petitioner has never filed in the Supreme Court before and is uncertain of the degree to which his initial filings will be reviewed and at what point. Petitioners PRA requests were always in good faith, pertinent, non-frivolous and for his own records and were to be sent directly to his RCW 71.09 counsel. Petitioner is simply looking to have his PRA requests taken seriously going forward as he is still navigating the SCC and RCW 71.09 proceedings and a significant deterrent (as demanded by the PRA and case law) is the only possibility as I continue to have problems with any requests from the SCC only.

Petitioner understands that the Supreme Court is not inclined to award penalties in PRA cases but given the prolonged nature of this case and the perceived prejudice directed against himself due to his circumstances petitioner humbly asks this Court to determine an appropriate penalty consistent with the facts of the case and correct *Yousoufian* factorization.

//

//

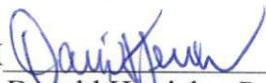
//



I, Donald Herrick, state and declare that I am over 18 years of age and that I am competent to testify to the matters set forth herein. I declare, under penalty of perjury under the laws of the State of Washington that the foregoing is both true and correct to the best of my own personal knowledge.

Dated this 10 of October 2023 at McNeil  
Island, Pierce County Washington.

Sincerely,

X   
Donald Herrick – Pro Se  
P.O. Box 88600  
Steilacoom, WA 98388  
253-512-6553  
253-512-6552

**APPENDIX**

**ATTACHMENT A**

(Division 2 - Court Of Appeals February 22, 2023 Decision)

February 22, 2023

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

**DIVISION II**

DONALD HERRICK,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES and SPECIAL COMMITMENT  
CENTER,

Respondent.

No. 55794-1-II

UNPUBLISHED OPINION

LEE, J. — Donald Herrick appeals the superior court’s order on the Department of Social and Health Services’ (Department’s) motion for show cause under the Public Records Act (PRA), chapter 42.56 RCW.<sup>1</sup> Herrick argues that the superior court erred in its findings regarding the Department’s compliance with the PRA and in determining the amount of penalties imposed against the Department. Herrick also argues that the superior court erred by failing to award costs to him as the prevailing party. We affirm the superior court’s order on the Department’s motion to show cause but remand to the superior court to consider Herrick’s request for costs consistent with this opinion.

---

<sup>1</sup> Herrick filed a countermotion to show cause, but the order on appeal is titled, “Order on Motion for Show Cause and Findings under the Public Records Act (PRA),” and that order states, “Defendant’s Motion for show cause is **GRANTED**.” Clerk’s Papers (CP) at 247, 251.



FACTS

A. PRA REQUESTS

Between December 2015 and May 2016, while detained at the Special Commitment Center (SCC), Herrick filed three public records requests with the SCC. *Herrick v. Dep't of Soc. and Health Servs.*, No. 37362-2-III, slip op. at 1-2 (Wash. Ct. App. May 19, 2020) (unpublished).<sup>2</sup> The first request related to the investigation of an SCC employee. *Id.* at 2. The SCC produced various documents in response to this request, but redacted a photograph of the employee in the documents produced. *Id.*

Herrick's second request was for a copy of the SCC mail log. *Id.* Herrick narrowed the request to a time frame beginning January 1, 2011. *Id.* There is no dispute that the SCC adequately responded to this request. *Id.*

Herrick's third request was for a copy of his individual SCC mail log. *Id.* The SCC public disclosure unit informed Herrick that it did not keep individual mail logs for residents and, therefore, did not produce any documents in response to this request. *Id.*

B. PRA LITIGATION

Herrick filed an action seeking penalties for the Department's failure to comply with the PRA. *Id.* The superior court determined that the Department properly redacted the employee photo but should have produced an individual mail log for Herrick. *Id.* at 3-4. The trial court imposed a penalty of \$12,090 for the failure to produce the individual mail log. *Id.* at 4. Herrick appealed and the Department cross appealed. *Id.*

On appeal, the Department conceded that the employee photo was improperly redacted. *Id.* at 5. Division Three of this court held that there is no duty to produce or create records that do

---

<sup>2</sup> [https://www.courts.wa.gov/opinions/pdf/373622\\_unp.pdf](https://www.courts.wa.gov/opinions/pdf/373622_unp.pdf)

not exist, and because the SCC did not keep individual mail logs, the Department was not required to produce an individual mail log in response to Herrick's request. *Id.* at 6-7. The court left the question of whether the general mail log that the SCC produced fulfilled the Department's obligations under the PRA for the superior court to resolve on remand. *Id.* at 7.

C. PROCEEDINGS ON REMAND

On remand, the Department made a motion for show cause, seeking findings that the Department did not violate the PRA by failing to provide Herrick's individual mail log and that a minimal daily fine for the improper redaction of the photograph was appropriate. In support of its show cause motion, the Department included its initial response to Herrick's request for records regarding the investigation into the SCC employee, including the redacted photograph of the employee, which is shown as a black and white photograph with a solid gray box in the middle of the document. Also included in the response to Herrick's PRA request relating to the SCC employee investigation was an unredacted photograph of Herrick. Herrick's photograph is a grainy, poor-quality, black and white photograph. The Department later produced an unredacted copy of the employee photograph as part of a discovery response on November 9, 2017.

With regard to the mail logs, the Department explained that Herrick was detained at the SCC from December 7, 2010 until February 11, 2019. On April 27, 2016, Herrick submitted his request for "THE SCC 'mail log.'" Clark's Papers (CP) at 95. On April 28, the SCC sent Herrick a letter asking that he clarify the specific scope of his request by May 12. On May 5, Herrick limited his request to a time period from January 1, 2011 to present. Herrick also referenced a separate request for his individual mail log that he had made on April 6, 2016, that he was still waiting for a response. On May 9, the SCC responded that it had not received the April 6 records request.

On May 15, Herrick resubmitted his request for his individual mail log. On May 18, the SCC informed Herrick that it did not have any responsive records because the SCC did not maintain individual mail logs. On May 23, the SCC sent the records responsive to Herrick's April 27 request for the SCC mail log to Herrick's attorney, as Herrick requested, and closed the request.

Nicole Brees, the legal coordinator and records manager at the SCC, signed a declaration relating to the SCC's public records unit in support of the Department's motion to show cause. Brees explained that she oversees the designated public disclosure coordinator who is responsible for responding to public records requests. The SCC uses a specific software system to track all public records requests. The public disclosure coordinator also receives extensive training on responding to public records request and is required to engage in continuing education. The SCC public disclosure coordinator also regularly attends trainings and meetings with other department public disclosure employees and leads.

On March 3, 2021, Herrick filed a countermotion to show cause, arguing that the Department violated the PRA by failing to provide his personal mail log and continued to violate the PRA in regard to the employee photograph. Herrick asserted that significant daily fines were warranted for the Department's violations. Herrick also requested a total of \$799 in costs and fees related to the costs of clerk's papers and filing fee in the appeal.

On March 9, the Department filed a "Reply to Plaintiff's Response to Motion for Show Cause and Findings under the PRA." CP at 228. And, on March 29, Herrick filed "Plaintiff's Reply to Defendant's Response to Countermotion for Show Cause." CP at 240.

On March 29, the superior court entered its order on the Department's motion for show cause, which included written findings of fact and conclusions of law. The superior court decided the motion on the filings and pleadings without a hearing. The superior court found that by



fulfilling Herrick's request for the complete SCC mail log, the Department provided the documents Herrick had requested in his request for his personal mail log. The superior court also found that the Department complied with the PRA when it provided the unredacted photograph in its discovery request, and therefore, a total of 636 days elapsed from the disclosure of the improperly redacted photograph until the unredacted photograph was produced. The superior court imposed a per day fine of \$1 for the improper redaction of the photograph for a total fine of \$636. The superior court based the amount of the per day fine on the following findings of fact:

7. The SCC provides significant training to its public records coordinator. The training includes onboarding and ongoing training adequate to support the role of public records coordinator.

8. The SCC provides software to ensure the tracking and retrieval of public records request, and allows for notes, correspondence and calendaring of tasks related to a particular request.

9. The photograph at issue was an improper redaction, but was only one page of a complicated 8-part record request.

10. The SCC promptly responded to Mr. Herrick's request and promptly searched for responsive records. The request was forwarded to another department for those records that were maintained by the other department.

11. The SCC provided a reasonable explanation of the error and the error was not intentional or made in bad faith.

12. There is no public importance of the staff photograph. The photograph was a face shot of the staff member and had not [sic] evidentiary value to the investigation.

13. Mr. Herrick has not suffered an economic loss as a result of the failure to receive the photograph unredacted.

14. A penalty has minimal deterrent value because the mistake involves a one-time mistake of law by the Agency.

CP at 248-49. The order did not address Herrick's request for costs and fees.

Herrick appeals.

#### ANALYSIS

Herrick argues that it was improper for the Department to file a motion to show cause and the superior court erred by failing to consider his reply brief. Herrick also argues that the Department failed to comply with the PRA in responding to his request for the individual mail log

because that request was distinct from his request for the general SCC mail log. Herrick further argues that the SCC has continued to fail to comply with his request for the photograph because the unredacted photograph is a poor quality, black and white photograph. Finally, Herrick argues that the relevant factors warrant a higher per day penalty and the superior court erred by failing to award him costs. We affirm the superior court's order on the Department's motion to show cause but remand to the superior court to determine the amount of costs Herrick should have been awarded.

A. DEPARTMENT'S SHOW CAUSE MOTION

Herrick argues that it was improper for the Department to file a motion to show cause and the superior court erred by failing to consider his reply brief. We are not persuaded by Herrick's argument.

Show cause motions are the usual mechanism for resolving PRA litigation. *Wood v. Thurston County*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003). And there is at least one published case in which the agency was the party that brought the show cause motion. *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 862, 288 P.3d 384 (2012), *review denied*, 177 Wn.2d 1002 (2013). Therefore, it was not improper for the Department to file the motion to show cause after this case was remanded to the superior court.

As to Herrick's reply brief, there is no indication in the record that the superior court failed to consider Herrick's March 29, 2021 reply brief. The Department did not move to strike Herrick's reply brief, and the superior court's order expressly stated that it considered all the pleadings filed. Herrick's argument fails.

B. COMPLIANCE WITH THE PRA

We review a challenge to an agency action under the PRA de novo. RCW 42.56.550(3). Because our “‘record consists only of affidavits, memoranda of law, and other documentary evidence,’ we stand in the same position as the trial court.” *John Doe G v. Dep’t of Corr.*, 190 Wn.2d 185, 191, 410 P.3d 1156 (2018) (quoting *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) (plurality opinion)).

The PRA requires that “[e]ach agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within specific exemptions of . . . this chapter, or other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). We construe the PRA’s disclosure provisions liberally and exemptions narrowly. *John Doe G*, 190 Wn.2d at 191-92. “The legislature enacted the PRA to ensure ‘broad disclosure of public records.’” *Id.* at 192 (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)).

Under the PRA, an agency has no duty to produce records that do not exist. *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 522-23, 326 P.3d 688 (2014). However, a public record includes “‘existing data compilations from which information may be obtained’ ‘regardless of physical form or characteristics.’” *Id.* at 524 (quoting RCW 42.56.010(4), (3)). Therefore, an agency must disclose information that is responsive to a request even if it is not in the specific form that was requested. *See Id.* at 523-24.

I. Production of the Mail Log

Herrick argues that disclosure of the general mail log is insufficient to respond to his request because the timeframe of the general mail log was limited while the timeline for his individual mail log was not. We disagree.



Here, the Department was under no obligation to create an individual mail log when it is undisputed that the SCC does not keep individual mail logs. Therefore, the Department was not required to produce an individual mail log in response to Herrick's request.

However, the general SCC mail log contains information that is responsive to Herrick's request and, therefore, production of the general mail log is responsive to Herrick's request. Herrick explicitly chose to narrow his request for the general mail log and it is undisputed that the SCC fully complied with that request. Because the general mail log was the only record containing information about Herrick's individual mail log, and Herrick has received that record in accordance with his clarification as to how he wanted the general mail log produced, the superior court properly determined that the SCC has complied with the PRA in regards to Herrick's request for his personal mail log.

## 2. Employee Photograph

Herrick argues that the Department has failed to comply with the PRA in regards to the employee photograph because the unredacted photograph is a poor-quality, black and white photograph. We disagree.

Here, the record shows that the originally redacted photograph was a poor-quality, black and white photograph with a solid gray box on it. The unredacted photograph is a poor-quality, black and white photograph with an image of the employee where the solid gray box had been. It is clear from the record that the Department had produced an unredacted copy of the previously redacted employee photograph. Further, Herrick has provided no evidence that a photo of the quality he requests exists.<sup>3</sup> The Department is not required to create a new photograph because

---

<sup>3</sup> In his brief, Herrick includes multiple references to having seen a high-quality, color photograph during the course of the SCC's investigation into the employee and references an affidavit

Herrick is unhappy with the quality of the records that exist. *See Id.* at 523-24. Therefore, disclosure of the unredacted photograph in its discovery response fulfills the Department's obligations under the PRA.

C. AMOUNT OF PENALTIES

Herrick argues that the superior court erred in determining the amount of penalties for the improper redaction of the employee photograph because the *Yousoufian*<sup>4</sup> factors warrant higher penalties. We disagree.

We review a superior court's decision on the amount of penalties for an abuse of discretion. *Yousoufian*, 168 Wn.2d at 458. Our Supreme Court has provided the mitigating and aggravating factors that must be considered when determining the amount of a per diem penalty for violations of the PRA. *Id.* at 466-68. The mitigating factors are:

- (1) a lack of clarity in the PRA request,
- (2) the agency's prompt response or legitimate follow-up inquiry for clarification,
- (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions,
- (4) proper training and supervision of the agency's personnel,
- (5) the reasonableness of any explanation for noncompliance by the agency,
- (6) the

---

allegedly attesting to that fact. But Herrick provides no citation for the affidavit and the record on appeal does not contain any affidavit attesting to these facts.

Herrick has attempted to incorporate the record from the original trial court proceedings by reference, while urging this court to apply a liberal, less stringent standard to his pleadings on account of his proceeding as a self-represented litigant. *See Br. of Appellant* at 9 ("Plaintiff, in an effort to be more judicious with the court's time and resources, would place emphasis on, and draw the Court's attention to, arguments made in original trial court filings offered in Clerk's Papers and will make reference to such throughout the current filings instead of lengthy duplicative verbatim quotes.").

However, in Washington, self-represented litigants are held to the same standards as attorneys. *Winter v. Dep't of Soc. & Health Services*, 12 Wn. App. 2d 815, 844, 460 P.3d 667, review denied, 196 Wn.2d 1025 (2020). Our court rules require that factual statements in briefs be supported by citation to the record. RAP 10.3(a)(5). And the record on review must be composed in compliance with Title 9 RAP. Because Herrick has failed to comply with these rules, there is no support for his assertion that a high-quality, color photograph exists.

<sup>4</sup> *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010).

helpfulness of the agency to the requestor, and (7) the existence of agency systems to track and retrieve public records.

*Id.* at 467 (footnotes omitted). The aggravating factors are:

(1) a delayed response by the agency, especially in circumstances making time of the essence, (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions, (3) lack of proper training and supervision of the agency's personnel, (4) unreasonableness of any explanation for noncompliance by the agency, (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency, (6) agency dishonesty, (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency, (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency, and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

*Id.* at 467-68 (footnotes omitted).

Here, the superior court considered the relevant *Yousoufian* factors when determining the per day penalty for improper redaction of the employee photograph. Specifically, the superior court considered the mitigating factors and the superior court's findings do not indicate the existence of any of the aggravating factors. On this record, the superior court did not abuse its discretion in setting a \$1 per day penalty for the improper redaction of the employee photograph.

#### D. REQUEST FOR COSTS

Herrick argues that the superior court erred by refusing to grant his request for costs under RCW 42.56.550(4). Herrick also requests costs on appeal under RAP 14.1 and RAP 18.1. We agree that the superior court erred in failing to address Herrick's request for costs. We deny Herrick's request for costs on appeal.

##### 1. Costs Requested in the Superior Court

The PRA provides that "[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including



reasonable attorney fees, incurred in connection with such legal action.” RCW 42.56.550(4). “Whether to award costs and attorney fees [under RCW 42.56.550(4)] is a legal issue reviewed de novo.” *Sanders v. State*, 169 Wn.2d 827, 866, 240 P.3d 120 (2010). However, the amount of the award is reviewed for an abuse of discretion. *Id.* at 867. The failure to exercise discretion is itself an abuse of discretion. *In re Adoption of A.W.A.*, 198 Wn. App. 918, 922, 397 P.3d 150 (2017).

A requester does not need to prevail on all his or her claims in order to be awarded costs and attorney fees. *See Sanders*, 169 Wn.2d at 867-68. However, “[i]t is clear that a court has the discretion to apportion an award of costs and fees so that it does not relate to any exempt documents.” *Id.* at 867. Further, the superior court may reduce the amount of costs and attorney fees in order to account for claims on which the requester did not prevail. *See Id.* at 868 (“Around 95 percent of the claimed exemptions proved valid, suggesting that Justice Sanders’s fees and costs should be deeply discounted.”). While self-represented PRA litigants may be entitled to costs, they are not entitled to recover attorney fees. *See West v. Thurston County*, 168 Wn. App. 162, 195, 275 P.3d 1200 (2012).

Here, Herrick prevailed on the issue of whether the employee photograph should have been provided. Therefore, Herrick may have been entitled to an award of some costs. Thus, the superior court should have exercised its discretion to determine Herrick’s request for costs. The superior court abused its discretion by completely failing to consider Herrick’s request for costs. Accordingly, we remand to the superior court to consider Herrick’s request for costs.

2. Costs on Appeal

Herrick requested costs on appeal under RAP 14.1. However, RAP 14.2 governs who is entitled to costs on appeal. RAP 14.1(d). Under RAP 14.2, costs are awarded to the party that substantially prevails on appeal.<sup>5</sup>

Here, Herrick is not the substantially prevailing party on appeal. Although we remand to the superior court to exercise its discretion regarding an award of costs because Herrick prevailed on one of his claims at the superior court, we have affirmed the merits of the superior court's order in its entirety. Herrick did not prevail on the substantial majority of his arguments on appeal. Accordingly, we deny Herrick's request for costs on appeal.


We affirm the superior court's order on the Department's motion to show cause but remand to the superior court to consider Herrick's requests for costs consistent with this opinion.

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.

We concur:

  
\_\_\_\_\_  
J. J.

  
\_\_\_\_\_  
Glasgow, C.J.

  
\_\_\_\_\_  
Veljacic, J.

<sup>5</sup> Herrick's entire argument for costs on appeal merely states that he is entitled to costs "consistent with RAP 14.1(a) and (b), and RAP 18.1(a) and (b)." Br. of Appellant at 50. Herrick does not cite nor argue RCW 42.56.550(4).

**APPENDIX**

**ATTACHMENT B**

(Division 2 - Court Of Appeals June 5, 2023 Order Denying Motion For  
Reconsideration)



17-2-08077-8

FILED  
\* 6/5/2023 \*  
Court of Appeals  
Division II  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DONALD HERRICK,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES and SPECIAL COMMITMENT  
CENTER,

Respondent.

No. 55794-1-II

ORDER DENYING MOTION  
FOR RECONSIDERATION

Appellant, Donald Herrick, filed a motion for reconsideration of this court's unpublished opinion filed on February 2, 2023. After consideration, it is hereby

**ORDERED** that the motion for reconsideration is denied.

FOR THE COURT: Jj. Lee, Glasgow, Veljacic

  
\_\_\_\_\_  
LEE, JUDGE

RECEIVED  
OCT 16 2023

Washington State  
Supreme Court

**CERTIFICATE OF SERVICE BY MAIL  
VIA MAIL BOX RULE – GR3.1**

I, Donald Herrick, declare that on the 10 of October, 2023, I deposited the following documents into the Special Commitment Center's legal mail system, via prepaid mail and the **MAIL BOX RULE (GR3.1)**, under Supreme Court Cause No. 102149-6:


1. Petition For Review and Appendixes

addressed to the following:

Washington State Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	Office of the Attorney General Craig Mingay - AAG P.O. Box 40124 7141 Cleanwater Dr. S.W. Olympia, WA 98504-0124
---	--

I, Donald Herrick, state and declare that I am over 18 years of age and that I am competent to testify to the matters set forth herein. I declare, under penalty of perjury, under the laws of the State of Washington, that the foregoing is both true and correct to the best of my own personal knowledge.

Dated this 10 of October 2023 at McNeil Island,  
Pierce County Washington.

X   
Donald Herrick – Pro Se  
P.O. Box 88600  
Steilacoom, WA 98388  
253-512-6553  
253-512-6552



Donald Herrick  
P.O. Box 88600  
Bellevue, WA 98008



\*Mailed via Mail Box Rule GR3.1

LEGAL  
MAIL

Washington State Supreme Court  
- Temple of Justice -  
P.O. Box 40929  
Olympia, WA 98504-0929