70212-2

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No. 702122-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HOWARD GALE,

Appellant,

vs.

CITY OF SEATTLE,

Respondents,

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This is a case brought by Appellant Howard Gale ("Gale") against Respondent Seattle Center Department and City of Seattle ("City") brought under the Washington Public Records Act ("PRA"), RCW Chapt. 42.56. The City does not assign error to any of the trial court's rulings and respectfully requests that this Court affirm the trial court's order. The City further asks that this Court not address the multiple new issues raised by Gale on appeal.

Gale has submitted an appellate brief wholly composed of argument and devoid of supporting fact or law. Nothing in his brief should dissuade this Court from affirming the trial court's decision.

II. COUNTERSTATEMENT OF ISSUES

1. Did the trial court correctly find that the Gale's PRA request was for "information concerning AC outlet access in the Armory", where Gale titled the subject of that request "WA State Open Records Request for Information concerning AC outlet access in the Armory," the request stated that Gale sought "objective information with which to assess both the cause and the nature of policies implemented by Seattle Center in regards to restricting access to AC outlets at the Armory," and each category of records listed in the request referred to "AC outlets," "AC power," or "AC outlet covers?"

2. Did the trial court correctly find that despite repeated requests from the City, Gale did not provide clarification regarding documents he believed were responsive to his request that had not been provided or any additional information to assist in locating responsive documents?

3. Did the trial court correctly conclude that upon being put on notice by Gale on November 19, 2012 that he believed additional responsive records existed, the City acted reasonably and conducted a legally adequate expanded search for responsive records and provided the responsive records it reasonably located to him on December 6, 2012?

4. Did the trial court correctly conclude that the City became compliant with the Public Records Act when it conducted an expanded search and produced additional records on December 6, 2012?

5. Did the trial court correctly conclude that City Law Department's voluntary search employing additional search terms provided by Gale in reply briefing on the motion to show cause exceeded the reasonable standard of a legally adequate search where the trial court reviewed the records provided to Gale on December 6, 2012 and the records provided to Gale on February 8, 2013?

6. Did the trial court abuse its discretion in awarding a $10 per day penalty against the City for a period of 22 days where the trial court carefully considered the *Yousoufian* factors relevant to determining the amount of the per diem penalty under the PRA and found multiple mitigating factors including that the City legitimately inquired for clarification or additional information to locate responsive documents after November 19, 2012, the City acted with good faith, due diligence, honesty, and without delay, City personnel have PRA experience, training, and access to resources for complicated requests or legal issues, the City assisted Gale throughout the time it has processed his records request, and the City has electronic and hard files, and a searchable email archiving system, and found only one aggravating factor, the City did not strictly comply with PRA procedures when it inadvertently failed to produce responsive documents in its November 14, 2012 production to Gale?

7. Did the trial court correctly limit Gale's award of costs to the filing fee and to not award Gale's labor costs, which he was not entitled to as a pro se party?

8. Should this Court consider arguments that Gale raises for the first time on appeal?

III. COUNTERSTATEMENT OF CASE

On October 18, 2012, Gale made a PRA request to Seattle Center. The subject line of this request reads: "WA State Open Records Request for Information concerning AC outlet access in the Armory." CP 46. The preface to the request states that Gale is requesting "objective information with which to assess both the cause and the nature of policies implemented by Seattle Center in regards to restricting access to AC outlets at the Armory." CP 46. Within this context, Gale asked for all communications produced or dated between January 1, 2011 through October 18, 2012 addressing four issues:

> (1) providing, restricting, or changing access to AC outlets at Seattle Center (including, but not limited to, turning off AC power at specific times, physically restricting access, etc.);
>
> (2) putting any changes into effect (policies, staff behavior, signage, etc.) that might restrict or control the access of any particular group of people to space or services (including access to AC outlets) at Seattle Center;
>
> (3) the purchase and installation of AC outlets for the new renovation on the west side of the Armory main level;
>
> (4) the purchase and installation of AC outlet covers and/or locking devices for the above."

He asked that Seattle Center prioritize the production of records relating to items 3 and 4. CP 46.

The standard practice at Seattle Center for responding to PRA requests involves the Public Disclosure Officer (PDO) first reviewing the request and determining where responsive records are likely to be located. CP 195. The PDO will contact the Division Director as well as staff who are determined most likely to have responsive records based on the PDO's knowledge of the department's areas of business. *Id.* The PDO often extends contact to the entire Senior Staff, which consist of directors from each division within the department as well as several strategic advisors to ensure that everyone who may have responsive records is notified of the request. *Id.*

Seattle Center PDO Denise Wells (Wells) initiated her search in response to Gale's request by emailing Seattle Center employees most likely to have knowledge or possession of responsive records, or knowledge of the location of responsive records. CP 197 This list of employees included several senior staff, the Chief Operating Officer, supervisors, electricians, and assistants to senior staff. *Id.* Wells made this determination because she was personally familiar with the subject matter of Gale's request, including many of the employees involved in the installation of locks on the electrical outlets. *Id.* Wells also instructed people to check with their staff to verify if they might have responsive documents. CP 197-98. The email to staff included a copy of Gale's

request so that staff knew the scope and subject of the requested records. CP 211.

Wells is Executive Assistant to Seattle Center Director Robert Nellams, so she undertook the search for his records personally. CP 198. She determined that Nellams did not have a hard or electronic files related to the request, so she searched Nellams' email archives. *Id; see also* CP 364. She followed routine department practice of requesting and expecting other employees to perform their own records searches. *Id.* Nonetheless, Wells personally helps staff members who request assistance with search protocols and did so here when she instructed the SC Chief Electrician on how to search her email archives for responsive documents. *Id.*

On multiple occasions, Wells reminded staff to search their archived emails, hard and electronic files, and offered assistance to those who needed help conducting those searches. CP 198, 364-65. Wells then reviewed all gathered documents for responsiveness and exemptions. *Id.* On November 14, 2012, Wells emailed Mr. Gale the responsive records, which were all non-exempt. CP 284-357.

On November 19, 2012, Gale emailed Wells saying that he believed documents were missing "as a result of conversations with workers at the Armory, obvious gaps in the records provided (e.g. talking about considering proposals and then action taken with no records of how

decisions were made), and because I have copies of missing records that were originally sent to Seattle Center staff concerning the issue at hand." CP 52. Gale concluded his email to Wells by stating: "[L]et me know if there is anything I can do to facilitate the search for all relevant documents." *Id.* Gale also inquired when certain previously produced records had been generated. *Id.*

Although Gale's request for the record generation dates was not a valid PRA request, but merely a request for information that does not invoke the obligations of the PRA[1], Wells responded to Gale's inquiry, and in doing so came across records that referenced wi-fi access and expanded her search to include the term "wi-fi." CP 201.

In response to Gale's statement that he did not believe he had received all responsive records, Wells immediately conducted an expanded search with additional search terms and sources. CP 199, 201. Wells reviewed the responsive emails from the initial documents produced on November 14, 2012 and sent an email on November 20, 2012 to the people cc'd in those emails to perform a search for responsive records, as well as resent the request to the staff who received the first email. CP 199. Wells attached all of the records previously produced to Gale in this email

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[1] *Smith v. Okanogan Co.*, 100 Wn. App. 7, 12, 994 P.2d 857 (2000).

for staff to review and verify whether additional responsive records exist. *Id.*

The day after Gale expressed concern that documents were missing, Wells emailed Gale informing him that she had asked Seattle Center staff to recheck their files and emails for records and that she would follow up with him with any results. CP 279.

Gale did not identify the substance of the conversations he alluded to or the "missing" records he claimed to possess in his November 19, 2012, email or on the three occasions that the City asked him if he would provide additional information to assist the City in locating responsive records. CP 201-203. On November 29, 2012 Wells asked Gale in writing and via telephone if he would provide additional information to assist the City in locating responsive records. She made a similar request again via email on December 6, 2012. CP 284.

Nor did Gale identify the conversations or the purportedly "missing records" in his possession in the trial court leaving only his unsupported allegations regarding the existence of these records. Gale did not suggest any search terms in his communications with the City. In fact, during the November 29, 2012, telephone conversation, Gale responded to Wells' request for additional information by stating that she was insulting his intelligence and that he would not "tip his hand." CP 202. As an

unchallenged finding of fact, Gale concedes that he did not provide the requested clarification or any additional information to assist the City in locating responsive documents. CP 186, 189. Despite Gale's lack of cooperation, the City provided additional responsive documents to him on December 6, 2012, one day earlier than originally estimated. CP 202.

Gale filed this lawsuit on December 3, 2012, three days before receiving the second production of documents. CP 1. The City provided Gale with a single later-found document that had been on December 21, 2012. CP 204.

Gale brought a motion for order to show cause. In his reply briefing on that motion, Gale suggested for the first time search terms that he claimed the City should have used in its records searches. CP 24. All of these terms are related to electrical outlets and power: "AC", "power", "AC power", "house current", "electricity", "electrical power", "electrical outlet", and "120VAC". *Id.*

On December 28, 2012, the Seattle City Attorney's Office PDO Matt Jaeger ran a preliminary search on the City's archived email database for the 28 staff that had previously been designated as most likely possessing responsive materials using the search terms Gale suggested in his reply briefing. There were over 7,000 unduplicated results. CP 121, 359-361. This search was not limited to the Armory or Center House. CP

121, 359-61. As a result, for example, the search results include the use of the word "power" in any context. CP 121.

During the show cause hearing on January 17, 2013, the City asked for a continuance to allow the Seattle City Attorney's Office to complete and process the search using some of Gale's suggested search terms to help the trial court determine whether the City had adequately searched for records. CP 121. As many of Gale's suggested terms appeared too broad to capture Gale's narrow request the City proposed a new search using the terms "outlet", "outlets", "electrical power", "AC power", and "120VAC", as applied to the Armory or Center House. CP 122. The City estimated it would take three weeks to review the search results for responsiveness. CP 361. The trial court granted the motion. CP 362.

The City's email archiving system can conduct forensic searches that run across emails, email attachments, and email threads even when shorter threads are completely duplicated in longer threads.[2] CP 368. The results are then processed into a reviewable format. *Id.* The total number of documents retrieved from the City's third search was 2,362. CP 369. Of these 2,362 documents, only 196 were potentially responsive to Gale's request. *Id.* Of those 196 records, 90 had previously been disclosed to Gale, 3 were redacted

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[2] The Law Department uses this system for e-discovery and other litigation applications.

or exempted, and 104 were previously unproduced. *Id.* Of the 104 previously unproduced documents, only 38 contained any new information that had not been previously disclosed to Gale. *Id.* Some of those records were not responsive to Gale's specific response, such as calendar meeting dates for subject "CH Armory outlets" CP381-85, a request for a copy of the "email sent to Council re outlets" CP 416, and an article regarding a New York Starbucks blocking access to outlets CP 417. The remaining records were either substantially similar to documents previously disclosed to Gale, such as drafts or forwards of emails, or were wholly incorporated into or substantially similar to the 38 new records. One item was mistakenly included in this group CP 376-77, although it had been previously produced to Gale on December 6, 2012. CP 230. One record is wholly incorporated and duplicative, CP 391, of another CP 425. The City provided Gale and the trial court the results of the third search on February 8, 2013. CP 367-587.

The trial court reconvened the show cause hearing on February 12, 2013. During oral argument, Gale suggested for the first time that the City should have used the search terms "homeless" and "transient" in conducting its searches. He made this contention even though he did not provide those search terms in response to the City's repeated requests for additional information to assist it in conducting its search, and even though using those search terms would have produced numerous records

that have nothing to do with what he actually requested – records concerning electrical outlets and/or power at Seattle Center or putting any changes into effect that might restrict or control the access of any particular group of people to space or services at Seattle Center.

All documents produced to Gale in response to his request were submitted to the court for review during the February 8, 2012 show cause hearing. CP 194-357, 367-587. The trial court reviewed the second and third groups of records provided by the City to Gale and twelve days after the February 8, 2013 show cause hearing, the trial court held that the City had violated the PRA by failing to conduct an adequate search in its November 14, 2012 production to Gale but came into compliance with the PRA with its production on December 6, 2012. CP166-170. The trial court further found that the search conducted after the January 17, 2013 hearing exceeded the requirements of the PRA. *Id.* Although the trial court held that the City became compliant with the PRA with its second production of documents on December 6, 2012, it mistakenly imposed a $100 per day penalty against the City for 86 days, from the date of the first production on November 14, 2012 through the last production on February 8, 2013. *Id.*

On February 26, 2013, Gale filed a motion to amend the order, requesting an additional $8,500.00 in penalties and costs and demanding the production of alleged remaining responsive records, and the City filed

a motion for reconsideration on March 4, 2013. CP 171-78, 588-599. Two weeks later on March 18, the trial court corrected is prior ruling, denying Gale's order and granting the City's Order, lowering the per day penalty for the 22 days between November 14, 2012 and December 6, 2012 from $100 to $10, and eliminating all other penalties. CP 180-185. Gale timely appealed the court's March 18, 2013 order on April 9, 2013. CP 186. The City has not appealed the trial court's determination regarding the initial search for records.

IV. ARGUMENT

A. Gale's assignments of error do not warrant appellate review because they lack factual or legal support as required by RAP 10.3

In his assignments of error, Gale lists nineteen errors without citation to the record or legal authority as required under RAP 10.3(a)(6). Gale also fails to refer to the specific finding of fact in his assignment of error as required by RAP 10.3(g). Assignments of error without reference to the record or legal authority are meritless. *Glazer v Adams,* 64 Wn.2d 144, 149, 391 P.2d 195 (1964). Every factual statement made in a brief should be supported by reference to the record. *Estate of Lint,* 135 Wn.2d 518, 531, 957 P.2d 755 (1998). Gale's assignments of error are mere arguments, unsupported by law or fact. As a result the Court should not consider Gale's assignments of error.

B. Gale has not challenged significant findings of fact and conclusions of law in this case

In his notice of appeal, Gale assigns error to only a few of the trial court's findings of fact. CP 186. Most significantly, he has not assigned error to the following facts:

1. Upon being put on notice of Gale's concerns, the City immediately expanded the scope and search terms used, conducted a follow-up search, and provided the records it located at that time to Gale on December 6, 2012.

2. The City asked Gale in emails on November 29, 2012 and December 6, 2012, and in a telephone conversation on November 29 to clarify what documents he believed were responsive to his request that may not have been produced by the City.

3. Gale did not provide the requested clarification or any additional information to assist in locating responsive documents.[3]

4. Gale filed this lawsuit on December 3, 2012. This was three days before he received the additional records provided by the City after its expanded search.

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[3] This finding is a verity notwithstanding the fact that Gale assigns error to "the corollary finding of fact that "Gale refused to provide clarification" found in finding of fact fifteen. (CP 191)

These unchallenged findings of fact are verities on appeal. *Robel v Roundup Corp.,* 148 Wn.2d 35, 42, 59 p.3d 611 (2002); citing *State v. Hill,* 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

Similarly, Gale assigns error to only some of the trial court's conclusions of law. CP 186. The most significant of these are:

1. Gale has provided no evidence that he has suffered actual personal loss from any alleged misconduct by the City.

2. As a pro se litigant, Gale is not entitled to attorneys' fees. CP 192

These unchallenged conclusions of law have become the law of the case. *State v Moore,* 73 Wn. App. 805, 811, 871 P.2d 1086 (Div. 2, 1994); citing *State v. Slanaker,* 58 Wn.App. 161, 165, 791 P.2d 575, review denied, 115 Wn.2d 1031 (1990).

C. Standards of review

This Court reviews challenges to agency action under the PRA de novo. RCW 42.56.550(3); *City of Federal Way v. Koenig,* 167 Wn.2d 341, 344, 217 P.3d 1172 (2009); citing *Soter v Cowles Publ'g Co.,* 162 Wn.2d 716, 731, 174 P.3d 60 (2007). In reviewing a PRA request, "the appellate court stands in the same position as the trial court where the record

consists only of affidavits, memoranda of law, and other documentary evidence." *PAWS v. UW*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994).

A trial court's award of per day penalties is reviewed for abuse of discretion. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 725 (2010). A trial court abuses its discretion when a decision is arbitrary, manifestly unreasonable, or based upon untenable grounds. *City of Bellingham v. Chin,* 98 Wn. App. 60, 66, 988 P.2d 479 (1999); citing *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court's decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that "no reasonable person would take." *Yousoufian v. Office of Ron Sims,* 168 Wn.2d 444, 458, 229 P.3d 735 (2010); citing *Mayer v. Sto Indust., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2010). In *King County v. Sheehan,* 114 Wn.App. 325, 350–51, 57 P.3d 307 (2002), the Court of Appeals held that under RCW 42.17.340(4)[4] an appellate courts "function is to review claims of abuse of trial court discretion with respect to the imposition or lack of imposition of a penalty, not to exercise such discretion ourselves."

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[4] Recodified in 2006 as RCW 42.56.550(4)

1. The trial court correctly found that Gale's PRA request was for "information concerning AC outlet access in the Armory."

The subject line of Gale's request is: "WA State Open Records Request for information concerning AC outlet access in the Armory." CP 46. Gale uses the word "outlet" or "outlets" six times in his request, in addition to "AC power," and includes no reference to "homeless" or "transient." *Id.* The preface to the request states that Gale was in contact with Seattle Center staff regarding "restricting access to AC power at the Armory" and that he was requesting "objective information with which to assess both the cause and the nature of policies implemented by Seattle Center in regards to restricting access to AC outlets at the Armory." *Id.* Within this context, Gale requested: "all communications produced or dated between January 1, 2011 through October 18, 2012 addressing the following issues:

(1) providing, restricting, or changing access to AC outlets at Seattle Center (including, but not limited to, turning off AC power at specific times, physically restricting access, etc.);

(2) putting any changes into effect (policies, staff behavior, signage, etc.) that might restrict or control the access of any particular group of people to space or services (including access to AC outlets) at Seattle Center;
(3) the purchase and installation of AC outlets for the new renovation on the west side of the Armory main level;

(4) the purchase and installation of AC outlet covers and/or locking devices for the above." *Id.*

Gale asserts that the City has falsely represented his request by

using the subject line of his email "information concerning outlet access in the Armory" to interpret the request, relying heavily on the fact that this phrase is not contained within the "actual request." Br. of appellant at 23. Setting aside this irrational assertion, even eliminating the subject line and reviewing the plain language of the request, the City properly and reasonably determined the scope of Gale's request as relating to outlet access at the Armory.

Even accepting Gale's argument to excise the subject line, the remainder of his request supports the City's interpretation, because Gale explained that the explicit reason for the request was "to assess both the cause and the nature of policies implemented by Seattle Center in regards to restricting access to AC outlets at the Armory," and he referred to AC outlets in each of the four categories listed in the request. Contrary to Gale's claim, the only reasonable way to interpret the request was that it sought "information concerning outlet access in the Armory." The City's interpretation of Gale's request was neither arbitrary nor restrictive.

More importantly, the City did not limit even its first search only to records containing the terms "outlet" or "outlets" in order to provide records responsive to his entire request, including item 2 of the request, i.e., "putting any changes into effect (policies, staff behavior, signage, etc.) that might restrict or control the access of any particular group of

people to space or services... at Seattle Center." Gale essentially conceded this point when he cited to records responsive to item 2 in his Complaint. The Complaint refers to records that were among the *first* production of records provided to Gale on November 14, 2012: email stating that weekly meetings would occur to discuss..."how to manage our resident transient population" CP 4, referencing CP 232; meeting notes regarding "managing the potential displacement of transient population due to new CH space use and amenities." and working to "develop new language to strengthen exclusion rules" CP 6, referencing CP 242. The City provided other documents to Gale on November 14, 2012, related to the restricting or controlling of access of space or services as well.[5] The City provided additional documents responsive to section 2 of Gale's request in the second group of records produced on December 6, 2012. *See* CP 287, 289-303, 307, 346.

Rather than showing noncompliance on the City's part, these documents actually demonstrate that Gale conflated his request for records with a request demanding explanation of an operational decision he does

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[5] See CP 218 (meeting minutes "access of electric outlets"); CP 220 ("We should install some [receptacle covers] on 3rd floor where a lot of kids hang out and see if they work."); CP 224 ("the guidelines for providing Electricity will be developed soon"); CP 226 (email regarding guidelines for use of outlets); CP 272 (messaging point regarding locking electric outlets); and CP 273 (Armory rules of conduct).

not agree with. Gale confirms this in by saying that he sought "to understand the reasons" for removing AC outlet access at the Armory, and it became "apparent" to Gale that removing outlet access was part of what he believed was "a broader attempt to displace the homeless from the Armory," and wanted to know the "rationale" for the actions. Br. of appellant at 1.

Based on his unsupported suspicion regarding the City's motive for the decision to cover outlets, Gale presumes there must be more records explaining that decision and syllogistically interprets the absence of records as evidence the City is withholding them. Whether or not a record should exist, however, is a different question than whether it does exist. The fact that there is no record of how a decision is made does not indicate a missing record, but rather that such a decision was not reduced to writing.

Here, the City is placed in the impossible position of having to prove a negative; to demonstrate that a document does not exist. An agency has no duty to create or produce a record that is nonexistent. *Sperr v. City of Spokane,* 123 Wn.App. 132, 136–37, 96 P.3d 1012 (2004). Further, the PRA does not require agencies to research or explain public records. *Smith v. Okanagan County, Smith v. Okanogan County,* 100 Wn.App. 7, 12, 994 P.2d 857 (2000). The PRA requires only that agencies

provide existing records, not nonexistent records the requester believes should exist. *Sperr*, 123 Wn.App at 136-37. Mere conjecture that a record should exist does not constitute evidence that it does exist. *White v U.S. Dept. of Justice,* 840 F. Supp.2d 83, 92 (D.D.C, 2012).

Gale disagrees with Seattle Center's decision to restrict electrical outlet access and wants to know how that decision was reached. In his complaint, Gale identified several categories of records he believed the City had not provided. Close inspection of these categories shows that Gale was primarily requesting information to explain the produced records. He sought information on how the meeting with the homeless came about and who was invited CP 5; deliberations on why AC access was restricted *Id.*; how the policy to turn off the AC outlets was decided and implemented *Id.*; how details were worked out to decide which outlets would be restricted CP 6; and how Seattle Center concluded there was table availability issue *Id.* "An important distinction must be drawn between a request for information about public records and a request for the records themselves. The act does not require agencies to research or explain public records, but only to make those records accessible to the public." *Bonamy v City of Seattle,* 92 Wn.App. 403, 409, 960 P.2d 447 (1998).

"A request for information about public records or for the information contained in a public record is not a PRA request." *Beal v City of Seattle,* 150 Wn.App. 865, 876, 209 P.3d 872 (2009); citing *Wood v Lowe,* 102 Wn.App. 872, 879, 10 P.3d 494 (2000). The City provided records responsive to Gale's request as the PRA requires. Gale may believe that there "should" be more documents reflecting the underlying reasons for the Seattle Center's decision-making process, but this is not a claim subject to this PRA case.

While the PRA places certain duties on agencies, it also imposes obligations on a requester, including stating a request in a form sufficiently clear so that an agency has reasonable notice that it has received a public records request, and that the request must be for an identifiable public record. RCW 42.56.080, *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004); *Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000). An agency has no duty to respond until it has received a valid public records request. *Bonamy v. City of Seattle*, 92 Wn.App. 403, 412, 960 P.2d 447 (1998) review denied, 137 Wn.2d 1012, 978 P.2d 1099 (1999). "A public agency cannot be expected to disclose records that have not yet been requested." *Beal v. City of Seattle*, 150 Wn. App. 865, 875, 209 P.3d 872 (2009) (citations omitted). The PRA does not "require public agencies to be mind readers." *Bonamy*, 92 Wn.App. at 409.

The City does not dispute that Gale's request was clear on its face, and the City searched for records within the four corners of that request including records responsive to request item 2. In the context of a Freedom of Information Act ("FOIA") request, an agency "is not required to look beyond the four corners of a request for leads to the location of responsive documents." *Kowalczyk v. U.S. Dep't of Justice,* 73 F.3d 386, 389 (D.C. Cir. 1996). Because the PRA closely parallels FOIA, interpretations of that act can be helpful in construing the PRA. *Hearst v. Hoppe,* 90 Wn.2d 123, 128, 580 P.2d 246 (1978); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677.687, 790 P.2d 604 (1990).

Gale now says the city should have known he was making an expansive request for records regarding the homeless and transients. He, nonetheless, fails to explain why he did not tell the City this on the three occasions it asked him for additional information to assist in locating responsive documents, or why he did not suggest "homeless" or "transient" as search terms until the second show cause hearing, 117 days after his request, and 48 days after suggesting electricity-related terms in his show cause reply briefing. The record shows that Gale asked for "information concerning AC outlet access in the Armory," but he now insists that the City should have been aware he really wanted information

specifically about the homeless and transient population. *Citizens for Fair Share v State Dept. of Corrections,* is directly on point. 117 Wn.App. 411, 434, 72 P.3d. 206 (Div. 2, 2003). There the requester asked for "policies" related to the topic of "political opposition" to correctional facilities and then argued that the Department of Corrections (DOC) failed to respond adequately when it did not produce a "booklet prepared to assist DOC staff in hosting a community meeting." The court held that if the requester wanted the community meetings booklet, he could have requested more than just "policies related to....political opposition to...correctional facilities." *Id.* That court also noted the requester failed to provide clarification when the DOC specifically asked for clarification of the records sought. *Id, at n. 26.*

Gale argues that his November 19, 2012, email saying that he was aware of alleged missing documents "gave a clear indication as to the types of records missing." Br. of appellant at 17. Close reading of the email shows otherwise. In pertinent part, the email stated: "Unfortunately there are many documents missing. I know this as a result of conversations with workers at the Armory, obvious gaps in the records provided (e.g., talking about considering proposals and then action taken with no records of how decisions were made), and because I have copies of missing records that were originally sent to Seattle Center staff concerning the

issue at hand." CP 52. Gale did not say nor does the City know with whom Gale allegedly spoke at the Armory, nor what documents he alleges he had copies of.

Although arguing that he had no obligation to clarify, Gale asserted: "If the Defendants had asked me to clarify a word or phrase, elaborate a particular section of my PRA request, asked me for suggestions on search terms, or asked me about alternate methods to search for emails, I would have been forthcoming."CP135 Again, Gale is asking the City to be mind readers. If only the City had known just the right questions to ask, Gale claims he would have provided clarifying information. This is disingenuous at best and deceptive at worst. Gale withheld the search terms he claims he really wanted until oral argument at the show cause hearing when the City could not respond. Gale's actions appear more concerned with penalizing the City than for inspecting public records.

2. The trial court correctly found that despite repeated requests from the City, Gale did not provide clarification regarding documents he believed were responsive to his request that had not been provided or any additional information to assist in locating responsive documents.

Without citation to authority, Gale argues that his obligation to clarify his request ended with the City's November 14, 2012, production

of documents. CP 135. Yet Gale ignores the fact that he created the need for clarification when he believed were missing. Until then, the City reasonably believed that it had interpreted his request properly. It was only after Gale announced that documents might be missing that the City had reason to request clarification or additional information to assist in locating responsive documents. Where a requester creates uncertainty, an agency has not objective method for determining what to search for. At a minimum, a person seeking documents under the PRA must identify or describe the documents with sufficient clarity to allow an agency to locate them. *See, Bonamy*, 92 Wn.App. at 409. ("If Bonamy truly wanted the City to provide him with certain policies, he could easily have said so.") Gale failed to provide additional information to the City, but despite Gale's lack of cooperation, the City produced additional responsive documents without delay. As Gale concedes in his brief, the City's response "was prompt". Br. of appellant at 15.

The facts here are similar to those in the recently-decided case of *Bartz v. Dep't of Corrections*, affirming the trial court's dismissal of requester Bartz's complaint. 173 Wn.App. 522, 297 P.3d 737 (Div. 2, 2013). There, Bartz informed DOC that its response to his request was incomplete because he possessed emails between two DOC employees that should have been included in the responsive documents, but failed to

identify the allegedly missing records to DOC or to provide them to the trial court. The court held that DOC had not violated the PRA where "the record shows that (1) "DOC made multiple attempts to produce the requested records, even asking Bartz to provide specific names and dates for the emails he was seeking and performing another futile search when he refused to supply this information," and (2) DOC responded promptly to every letter Bartz sent involving this PRA request. *Id.,* 173 Wn.App at 539.

The PRA is not the game of "gotcha" that Gale tries to make it. Gale has recharacterized his request, asking the Court to disregard the plain language, context and subject of his request, thereby creating a moving target. Gale insists that the City remains liable for an ever-evolving and expanding request. It is neither reasonable nor in the spirit of the PRA for Gale to insist that documents are missing, suggest search terms that the City relies upon to address his concerns, fail to specify what he really wants, and then allege that the City is willfully withholding records.

3. The trial court correctly concluded that upon being put on notice by Gale on November 19, 2012 that he believed additional responsive records existed, the City acted reasonably and conducted a legally adequate expanded search for responsive records and provided the responsive records it reasonably located to him on December 6, 2012.

The PRA requires an agency to perform an adequate search for responsive records. *Neighborhood Alliance of Spokane Co. v. County of Spokane,* 172 Wn.2d 702, 261 P.3d 119 (2011). The State Supreme Court adopted the FOIA standard of reasonableness regarding what constitutes an adequate search, holding that "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." *Id.,* 172 Wn.2d at 719-720.

In determining the adequacy of a search, the "focus is not on whether responsive documents do in fact exist, but whether the search itself was adequate." *Id.,* at 720. "The agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. These should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched." *Id.,* at 721. The standard of reasonableness "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir., 1986). An agency's search is not inadequate because it "did not do all that it could." *Id.* at 1385. Here the City did all that it could. An agency that conducts a reasonable search is not liable under the PRA. *Forbes v. City of Gold Bar,* 171 Wn.App. 857, 288 P.3d 384, 388 (2012).

Without citation to authority, Gale argues that adoption of this well-established precedent that liability does not attach to an agency that conducts a reasonable search is "absurd" and "would make the PRA meaningless." Br. of appellant at 34. On the contrary, an agency's obligation under the PRA would be endless if a reasonable search imposed liability. This is especially true here, where Gale has recharacterized and expanded his request, asking this Court to disregard the language, context, and subject line of his request. Br. of appellant at 23. This argument is unreasonable and is beyond the City's obligation to conduct an adequate search under the PRA.

Neighborbood Alliance involved two requests relating to a seating chart and its electronic information log (date created, modified, etc.) to determine if persons identified therein as employees occurred *prior* to posting the jobs. The *Neighborhood Alliance* Court found that the search was inadequate because the County failed to follow up after it was put on notice that additional records might exist. Instead, without explanation, the County simply replied that there were no other responsive documents. *Neighborhood Alliance, Id.* at 722. This is in stark contrast to how the City responded when it received notice that additional records might exist in this case. The City immediately conducted a second expanded search with additional search terms and sources.

The record demonstrates that the trial court correctly determined that the City's second search for records was adequate.[6] Upon being informed of Gale's concerns, the City immediately conducted an expanded search with additional search terms and sources. CP 199, 201. The Seattle Center PDO reviewed the responsive emails from the initial documents produced on November 14, 2012 and sent an email on November 20, 2012 to the people cc'd in those emails to perform a search for responsive records, as well as resent the request to the staff who received the first email. CP 199. She attached all of the records previously produced to Gale in this email for staff to review and verify whether additional responsive records exist. *Id.*

Gale belatedly contends that the City should have conducted broad searches for records regarding "homeless" or "transient." This argument is flawed because it ignores what Gale actually requested and his failure to communicate this information earlier, as explained in detail above. Moreover, a search of either term would result in scores of unresponsive documents; e.g., any record in which an individual is identified as homeless or transient even if it has nothing to do with the issue of AC outlets or "restricting or controlling the access of any particular group of

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[6] The City has conceded that its first search for records was not adequate and has not appealed the trial court's ruling so.

people to space or services" as Gale requested. Focusing on the knowledge of records custodians regarding the records they have and using reasonable search terms, the City conducted a search that was reasonable and likely to locate all relevant documents. The trial court correctly found that the City's second search was adequate and the City came into compliance with the PRA when it provided records found during that search to Gale on December 6, 2012.

4. The trial court correctly concluded that City Law Department's voluntary search employing additional search terms provided by Gale in reply briefing on the motion to show cause exceeded the reasonable standard of a legally adequate search.

Despite considerable effort and expanding the search terms to include those suggested by Gale and expanding the scope of the search beyond records related to the Armory, and using the Law Department's more sophisticated system, the results of the third search produced essentially similar results as the second search including records unresponsive to Gale's specific request or records substantially similar to documents previously disclosed. After having the records for a period of twelve days to review and to compare to the records produced as a result of the City's second search, the trial court concluded that the City exceeded its obligation under the PRA when it conducted the third search.

The trial court had additional time to review the records and revise its determination on reconsideration but did not change its conclusion.

Gale remains unconvinced that the City has produced records responsive to his request and now argues that the City should have known to employ the broad search terms of "homeless" and "transient". Gale ignores that "It is the requestor's responsibility to frame requests with sufficient particularity... to enable the searching agency to determine precisely what records are being requested." *Assassination Archives and Research Center, Inc. v. CIA,* 720 F.Supp. 217, 219 (D.D.C.1989). Gale may want the City to keep searching for the nonexistent records that he believes must exist, but as the *Assassination Archives* court explained, "the rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors." *Id.*

5. The trial court did not abuse its discretion in awarding a $10 per day penalty against the City for a period of 22 days.

A trial court's award of per day penalties is reviewed for abuse of discretion. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 725 (2010). The City did not challenge the trial court's ruling that the City violated the PRA when it failed to conduct an adequate search in its November 14, 2012 production to Gale's request. The trial court found

that the City came into compliance with the PRA on December 6, 2012, so penalties were assessed for the 22 days between the November 14, 2012 and December 6, 2012 productions. The PRA authorizes the trial court to award any person who prevails against a public agency "an amount not to exceed one hundred dollars for each day" when that the person is denied the opportunity to inspect public records. RCW 42.56.550(4).

In determining the proper amount of per day penalties, the existence or absence of an agency's bad faith is the principal factor that the trial court must consider. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 460, 229 P.3d 725 (2010), citing *Amren v. City of Kalama,* 131 Wn.2d 25, 37–38, 929 P.2d 389 (1997). There is not a presumptive "starting point" and the trial court must consider the full range of potential daily penalties, from zero to one hundred dollars. *Yousoufian* 168 Wn.2d at 466.

Appellate court guidance on the assessment of per day penalties culminated in the *Yousoufian* case, which established seven mitigating factors and nine aggravating factors to provide guidance to trial courts, more predictability to parties, and a framework for meaningful appellate review. *Yousoufian*, 168 Wn.2d at 467-468.

The seven mitigating factors are as follows: (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 helpfulness of the agency to the requestor; and (7) the existence of agency systems to track and retrieve public records. *Id.* at 467.

The nine aggravating factors are as follows: (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 467-468.

In *Yousoufian*, the Supreme Court held that the trial court's assessment of a $15 per day penalty was manifestly unreasonable in light of the county's "gross negligence" in responding to a PRA request. *Yousoufian*, 168 Wn.2d at 463. In that case, the requested records dealt with a $300 million publicly financed project that was subject to an upcoming referendum. *Id.* at 462. The facts demonstrated that over a period of four years the county repeatedly failed to meet its responsibilities under the PRA. *Id.* at 455-456. Specifically, the agency falsely asserted that it was conducting searches for records; falsely asserted that it had produced all responsive records; and falsely asserted that records were located in other places. *Id.* at 456. After "years of delay and misrepresentation," the requester filed suit, yet it would still take another year, and long after the public vote at issue, for the county to completely and accurately respond to the request. *Id.* In that case, the Supreme Court itself set the per day penalty amount at $45 per day.

Other recent cases involving PRA penalties are also instructive. In *Sanders v. State*, 169 Wn.2d 827, 862-63, 240 P.3d 120, (2010), the Washington Supreme Court upheld a penalty of $8 dollars per day in a case where an agency intentionally and wrongfully withheld records as attorney-client privileged communication, but found nothing to indicate that the agency had acted in bad faith. *Id.* at 862-63 In *West v Thurston*

County, 168 Wn.App. 162, 275 P.3d 1200 (2012), the Court affirmed the trial court's $30 per day penalty for records that were produced 534 days following the request. There, the trial court applied the *Yousoufian* factors, finding delay as an aggravating factor, and no bad faith. In *Lindell v. City of Mercer Island*, 833 F. Supp. 2d 1276 (W.D.Wash. 2011), the agency delayed two-and-a-half-years in responding to a request for email contacts and calendar entries. Even though the agency provided no explanation for non-disclosure and the court could discern no applicable exemption, the court assessed only a $25 per day penalty. *Id.* at 1287.

a) The trial court correctly analyzed the *Yousoufian* mitigating factors.

The record reflects that the City has acted in good faith and with due diligence in responding to Gale's request: upon notice that documents were missing, the City immediately conducted a new, expanded search; the City offered and conducted a forensic search using terms suggested by Gale; the City produced documents to Gale in a timely fashion; and from the outset the City has produced documents that may be considered embarrassing. All of these factors eviscerate Gale's assertions that this case involves repeated misconduct by the City, lack of good faith, gross negligence, and dishonesty. Further, in his notice of appeal, Gale did not challenge mitigating factors (4) (proper training and supervision of the

agency's personnel) or (7) (existence of agency systems to track and retrieve public records), so they are verities on appeal. CP 186. *Robel v Roundup Corp.,* 148 Wn.2d 35, 42, 59 p.3d 611 (2002); citing *State v. Hill,* 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). Nonetheless, Gale improperly includes argument in his brief on these two mitigating factors Br. of appellant at 25, 27. The City asks that the court disregard these arguments as they were not challenged in Gale's notice of appeal.

The City's good faith is supported through the analysis of each of the *Yousoufian* mitigating factors.

i. **lack of clarity in the PRA request.** Gale claimed that documents were missing, and offered to facilitate the search for relevant records. CP 52. This notice triggered the City to ask Gale for additional information to assist in locating responsive documents. Gale refused to provide any guidance on three occasions, only providing suggested search terms after filing the lawsuit. CP 24. The PRA does not "require public agencies to be mind readers." *Bonamy v. City of Seattle,* 92 Wn.App. 403, 409, 960 P.2d 447 (1998).

ii. **the agency's prompt response or legitimate follow-up inquiry for clarification.** The City acknowledged Gale's request within the statutory 5-day period, RCW 42.56.520. CP 49. Following

notice that documents may be missing, the City repeatedly asked for clarification/additional information, but Gale refused to provide guidance, a fact that Gale has not challenged. CP 181, finding of fact number six.

iii. the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions. The City acted with good faith, due diligence, and without delay. It promptly responded to each inquiry made by Gale, even providing information regarding produced records that it did not have an obligation to provide under the PRA. CP 282. The City provided a later-discovered misfiled document to Gale. CP 204.

iv. proper training and supervision of the agency's personnel. Gale did not challenge this finding of fact. CP 183, finding of fact thirteen. Nonetheless, the Seattle Center PDO has extensive PRA experience, training, and access to resources for complicated requests or legal issues. CP 195-96.

v. the reasonableness of any explanation for noncompliance by the agency. The Seattle Center PDO Denise Wells properly determined the scope of the request, the likely location of records, and the likely custodians of records, given her personal knowledge of the subject matter of Gale's request and per Seattle Center standards. CP

194-204. She conducted a search and instructed other record custodians to search for relevant records. *Id.* The City admits that the first search was inadequate because some responsive documents were inadvertently not produced in the initial production. CP 191.

vi. the helpfulness of the agency to the requestor. The City immediately conducted a renewed search when told that documents might be missing, even though Gale refused to provide guidance. The City Law Department then offered to run another search using terms provided by Gale. The City provided information regarding produced records that it did not have an obligation to do under the PRA. CP 282. The City provided a later-discovered misfiled document to Gale. CP 204.

At every turn, the City has attempted to work with Gale.

vii. the existence of agency systems to track and retrieve public records. Gale did not challenge this finding of fact. CP 183, finding of fact sixteen. The City has electronic and hard files, and a searchable email archiving system. CP 194-204.

These mitigating factors, and the fact that the City acted in good faith, support the trial court's ruling of a $10 per day penalty. Gale's assertions otherwise have not shown that the trial court abused its discretion in analyzing and applying the *Yousoufian* mitigating factors.

b) Trial court correctly analyzed the *Yousoufian* aggravating factors

The City's absence of bad faith is supported through analysis of the *Yousoufian* aggravating factors.

i. delayed response by the agency, especially in circumstances making time of the essence. The City promptly responded to both Gale's initial request and follow-up request. CP 49, 91.

ii. lack of strict compliance by the agency with all the PRA procedural requirements and exceptions. Although the City did not strictly comply in conducting the first search by inadvertently not producing responsive documents, it renewed and expanded its second search to come into compliance with the PRA. CP 183.

iii. lack of proper training and supervision of the agency's personnel. Gale does not challenge the City's training and supervision. The Seattle Center PDO has extensive PRA experience, training, and access to resources for complicated requests or legal issues. CP 195-96.

iv. unreasonableness of any explanation for noncompliance by the agency. This does not apply because the City admits that the first search was inadequate. CP 148.

v. negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency. Gale's conclusory assertions of misconduct and bad faith by the City are not supported by the record. Gale has recharacterized and expanded his original request and refused until the second show cause hearing to provide search terms to locate documents he alleges he wanted the entire time. Gale conflates his records request with a desire to know the underlying reason for the City's decision to restrict outlet access. The City has provided Gale with relevant documents, including those that may be deemed embarrassing. While the City's prompt response, ongoing effort to assist Gale, and disclosure of relevant records show that the City acted in good faith and with due diligence to comply with the PRA, Gale's actions appear focused on penalizing the City with a game of gotcha'.

vi. agency dishonesty. The City was honest. It admits that the first search was inadequate. The City then renewed and expanded its search to locate relevant documents for Gale. Gale is displeased with the Seattle Center's decision to restrict the outlets; however this displeasure does not support his assertion that the City acted dishonestly.

vii. the public importance of the issue to which the request is

related, where the importance was foreseeable to the agency. The City does not question the importance of Mr. Gale's issue, but the City's actions here stand in sharp contrast to *Yousoufian* where the requester waited years for a response to a request regarding a $300 million, publicly-financed project that was subject to an upcoming referendum at the time of the request. *Yousoufian,* 168 Wn.2d at 462.

viii. any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency. Gale does not challenge this finding. CP 184, conclusion of law number eight. Gale has provided no evidence that he has suffered any personal economic loss as a result of any alleged misconduct.

ix. a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case . The City committed no misconduct, and a penalty will not deter future misconduct. The City renewed its search when notified of missing documents and thus came into compliance with the PRA. It then exceeded PRA standards by conducting a third, expanded search. Penalizing the City could disincentivize agencies from making similar efforts in the future.

The City's absence of bad faith is supported by the record and is the

principal factor for the trial court to consider in determining per day penalties. *Yousoufian,* 168 Wn.2d at 444. The trial court's imposition of $10 per day penalties against the City was reasonable and not an abuse of discretion. The trial court did not err in awarding this penalty against the City.

6. The trial court correctly limited Gale's award of costs to the filing fee and by not award Gale's labor costs, to which he was not entitled a pro se party.

Gale argues that he is entitled to compensation for his "costs,' including his labor in connection with the litigation. The trial court correctly determined that as a pro se non-attorney litigant, Gale was not entitled to compensation for attorney fees. CP 180, *see, West v. Thurston Co.,* 168 Wn.App. 162, 195, 275 P. 3d 1200 (Div.2, 2012). Gale's attempt to recover for labor as "costs" is simply a back-door effort to recover attorney-fees as a pro se. Moreover, Gale failed to submit a detailed affidavit of costs in the trial court. His offer to "submit a detailed cost analysis at a latter (sic) time" is not appropriately before this Court.

7. The Court should not consider issues raised for the first time on appeal.

"The general rule is that appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman,* 159 Wn.2d 918, 926, 155 P.3d 125 (2007); citing RAP 2.5(a). However, there are three errors that may be raised for the first time in appellate court: lack of trial court

jurisdiction, failure to establish facts upon which relief can be granted, and manifest error affecting a constitutional right. RAP 2.5(a) Gale has not asserted any of these errors and none of them apply to this case.

An appellate court may review matters of "fundamental justice" for the first time on appeal. *See Greer v. State v. Northwestern Nat'l. Ins. Co.,* 36 Wn.App. 330, 339, 674 P.2d 65 (Div. 3, 1987) (holding that it was in the interest of fundamental justice to determine whether exclusionary insurance clause violates public policy)*; State v Card,* 48 Wn. App 781, 784, 741 P.2d 65 (1987). (Public policy and fundamental justice required review to determine whether returning unclaimed property to defendant convicted of possession of stolen property in the second degree would allow her to profit from her crime.) The issues Gale asserts for the first time on appeal do not involve issues of fundamental justice and Gale has not asserted such: 1) imposition of CR 11 sanctions against the City; 2) request in camera review of documents; and 3) request to provide allegedly missing attachments from emails that Gale has failed to identify. Thus, the Court should disregard any and all references to the aforementioned issues. However, should the Court choose to review these issues for the first time on appeal, the City argues that Gale is not entitled to the relief he seeks.

Gale argues that the trial court should have awarded CR 11 sanctions against the City. Before sanctions may be imposed under CR 11 in favor of a private party, it is *compulsory* that the court or a party seeking sanctions must notify the offending party of the objectionable conduct and provide that person or party with an opportunity to mitigate the sanction by amending or withdrawing the pleading at issue. Without such notice, CR 11 sanctions are not warranted because due process principles are offended. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 224, 829 P.2d 1099 (1992); *Biggs v. Vail*, 124 Wn.2d 193, 198, 876 P.2d 448 (1994). At no point in this litigation did Gale notify the City that he would be seeking CR 11 sanctions. He is, therefore, not entitled to CR 11 sanctions against the City.

Even if Gale had properly notified the City that he intended to seek CR 11 sanctions, his claim would fail on the merits. A party seeking CR 11 sanctions bears a heavy burden in making a request for CR 11 sanctions. *Biggs*, 124 Wn.2d at 202. In order to justify a request for sanctions, Gale had to demonstrate (1) that the City's counsel failed to conduct a reasonable inquiry into the facts supporting the pleading; (2) the City's counsel failed to conduct a reasonable inquiry into the law to ensure that the pleading filed as warranted by existing law or a good faith argument for the extension, modification or reversal of the existing law;

and (3) the City's counsel filed the pleading for an improper purpose such as delay, harassment, or to increase the costs of litigation. *Miller v. Badgley*, 51 Wn. App. 285, 753 P.2d 530, *review denied,* 111 Wn.2d 1007 (1998). Gale may be unhappy that the trial court ruled as it did, but the fact that the trial court ruled in the City's favor regarding the second and third searches is sufficient to demonstrate that City's counsel acted properly. See, *Doe v. Spokane and Inland Empire Blood Bank,* 55 Wn.App. 106, 111, 780 P.2d 853 (1989) (CR 11) sanctions are not warranted "merely because an action's factual basis proves deficient or a party's view of the law proves incorrect").

Gale argues that the trial court erred by not reviewing records *in camera* that the City claimed were exempt, but Gale failed to request *in camera* review below. RCW 42.56.550(3) provides, in relevant part, "Courts ***may*** examine any record *in camera* in any proceeding brought under this section." Alternatively "The court ***may*** conduct a hearing based solely on affidavits." (emphasis added). *Id.* The standard on review of a trial court's decision whether to conduct an in camera review of records is abuse of discretion. *Harris v. Pierce County,* 84 Wn.App. 222, 235, 928 P.2d 1111 (1996). Where, as here, the requester failed to request *in camera* review by the trial court, there is no exercise of discretion for this Court to review. Moreover, Gale failed in the trial court to challenge the

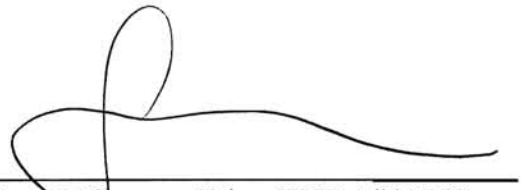
limited exemptions applied below. As a result, any challenge is now waived. *Kirkman,* 159 Wn.2d at 926.

This Court should also ignore Gale's contention that the City should be required to release allegedly missing attachments from emails. Br. of appellant at 37. Gale has failed to identify which emails he believes are missing attachments. He states only that he "would like to specify the full list of such emails at a later date." *Id.*

V. CONCLUSION

Gale's brief is composed of argument based on unsupported assumptions devoid of supporting fact or law. He disagrees with Seattle Center's decision to restrict electrical outlet access in the Armory. He presumes that the City must have violated the PRA when it did not produce records reflecting his presumed reason for the decision to limit outlet access. Presenting no evidence to support his contentions, he seeks to expand his initial request and the City's obligations under the PRA until the City provides these nonexistent records. Nothing in Gale's appellate brief should dissuade this Court from affirming the trial court's decision, and the City respectfully requests that this Court affirm that decision.

DATED this 22nd day of July, 2013



Sara O'Connor-Kriss, WSBA#41569
Mary F. Perry, WSBA #15376
Assistant City Attorneys

Attorneys for Respondents

DECLARATION OF SERVICE

Marisa Johnson states and declares as follows:

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

2. On July 22, 2013, I caused to be delivered by ABC Legal Messengers, addressed to:

Howard J. Gale
702 2nd Avenue W., Apt. 304
Seattle, WA 98119

a copy of Brief of Respondents.

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

DATED this 22 day of July, 2013, at Seattle, King County, Washington.

Marisa Johnson

APPENDICES

Gmail by Google

Howard Gale <hjgale@gmail.com>

WA State Open Records Request for information concerning AC outlet access in the Armory

Howard Gale <hjgale@post.harvard.edu> Thu, Oct 18, 2012 at 2:16 PM
To: "Mary E. Wideman-Williams" <mary.wideman-williams@seattle.gov>
Cc: "Robert L. Nellams" <Robert.Nellams@seattle.gov>

Dear Ms. Wideman-Williams,

More than 13 days have passed, without a reply, since I last wrote you in regards to the Seattle Center policy of restricting access to AC power at the Armory. Additionally, I have been informed that Robert Nellams has e-mailed incorrect information to at least one individual (Joe Martin) following up on my concerns.

Given this lack of response and misinformation I feel it would be beneficial to all parties involved to have objective information with which to assess both the cause and the nature of policies implemented by Seattle Center in regards to restricting access to AC outlets at the Armory. I am therefore requesting the following information, under the provisions of the Washington Public Records Act (RCW 42.56), involving all communications (e-mails, written memorandum, meeting notes, letters, equipment requisitions, plans, proposals, etc.) produced or dated between January 1, 2011 and today (October 18, 2012) addressing the following issues:

(1) ***providing, restricting, or changing access to AC outlets at Seattle Center (including, but not limted to, turning off AC power at specific times, physically restricting access, etc.);***

(2) ***putting any changes into effect (policies, staff behavior, signage, etc.) that might restrict or control the access of any particular group of people to space or services (including access to AC outlets) at Seattle Center;***

(3) ***the purchase and installation of AC outlets for the new renovation on the west side of the Armory main level;***

(4) ***the purchase and installation of AC outlet covers and/or locking devices for the above.***

I would appreciate Seattle Center prioritizing the production or access of records relating to (3) and (4), a far smaller set of records. More specifically, if locking covers were provided for in the original work orders for the renovation of the west side of the main level then that is the only information I need to see in regards to (3) and (4). However, if work orders and/or equipment requisitions for locking covers were issued at alater date, than I would need access to those documents as well. This restricted first set of information should be easily provided in a matter of days.

I trust you will forward this request, with a CC to me, to the appropriate person in charge of Public Records Act compliance for Seattle Center. Failing that, if you could e-mail me the contact information for the appropriate person I will insure that this request gets to them.

Thanks in advance.

Sincerely,

Howard J. Gale
206-999-2454

RCW 42.56.080
Facilities for copying — Availability of public records.

Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure. Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad. Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons. Agency facilities shall be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency. Agencies shall honor requests received by mail for identifiable public records unless exempted by provisions of this chapter.

[2005 c 483 § 1; 2005 c 274 § 285; 1987 c 403 § 4; 1975 1st ex.s. c 294 § 15; 1973 c 1 § 27 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.270.]

Notes:

Reviser's note: This section was amended by 2005 c 274 § 285 and by 2005 c 483 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Intent -- Severability -- 1987 c 403: See notes following RCW 42.56.050.

RCW 42.56.520
Prompt responses required.

Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives. Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer; (3) acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request; or (4) denying the public record request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. In acknowledging receipt of a public record request that is unclear, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives need not respond to it. Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

[2010 c 69 § 2; 1995 c 397 § 15; 1992 c 139 § 6; 1975 1st ex.s. c 294 § 18; 1973 c 1 § 32 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.320.]

Notes:

Finding -- 2010 c 69: "The internet provides for instant access to public records at a significantly reduced cost to the agency and the public. Agencies are encouraged to make commonly requested records available on agency web sites. When an agency has made records available on its web site, members of the public with computer access should be encouraged to preserve taxpayer resources by accessing those records online." [2010 c 69 § 1.]

RCW 42.56.550
Judicial review of agency actions.

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. 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 or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) Any 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. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(5) For actions under this section against counties, the venue provisions of RCW 36.01.050 apply.

(6) Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

[2011 c 273 § 1. Prior: 2005 c 483 § 5; 2005 c 274 § 288; 1992 c 139 § 8; 1987 c 403 § 5; 1975 1st ex.s. c 294 § 20; 1973 c 1 § 34 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.340.]

Notes:

Intent -- Severability -- 1987 c 403: See notes following RCW 42.56.050.

Application of chapter 300, Laws of 2011: See note following RCW 42.56.565.