NO. 44498-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST,

Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF LICENSING,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Appellant Arthur West requested Department of Licensing records documenting tribal fuel tax refunds pursuant to the Public Records Act, chapter 42.56 RCW ("PRA"). In response to his request, the Department properly searched for, identified, and timely disclosed over 50,000 pages of records. It also properly withheld or redacted records based on the PRA's personal information exemption, RCW 42.56.230(4)(b), and an exemption within the tribal fuel tax agreement statute, RCW 82.36.450(4), which explicitly exempts from public inspection and copying any information received from the tribes under the terms of such agreement.

While the Department was in the early stages of providing record installments, West sued the Department. He asserted that the Department's claimed exemptions were improper and the Department's search for and production of records were inadequate and untimely. The superior court granted summary judgment in the Department's favor, holding the Department did not violate the PRA, and dismissed West's complaint. The superior court also denied West's motion for reconsideration. Because the Department properly withheld or redacted information pursuant to statutory exemptions, and its search for and disclosure of records was adequate and timely, the Department requests that this Court affirm the superior court's

summary judgment order and its denial of West's motion for reconsideration.

II. COUNTERSTATEMENT OF THE ISSUES

A. Did the Department properly redact tribal tax information under RCW 42.56.230(4)(b), which exempts from disclosure information required of a taxpayer if the disclosure would violate the taxpayer's right to privacy, and under RCW 82.36.450(4), which expressly makes information from a tribe or tribal retailer personal and exempt under RCW 42.56.230(4)(b)?

B. When the Department reasonably required additional time to search for and provide installments of records, and never indicated it would not fully respond to West's public record requests, was West's lawsuit, filed one day after the first installment was produced, unnecessary to compel the Department to disclose records?

C. When the Department gathered, reviewed, and provided West 22 installments of records over nine months, comprising 50,000 pages of records, was the Department's response to West's public records request timely, even though additional installments were not produced until after the summary judgment hearing?

D. Did the superior court properly exercise its discretion in denying West's motion for reconsideration when he improperly characterized check registers as "indexes" and was not entitled to installments in any particular order?

III. STATEMENT OF THE CASE

A. West's Public Records Requests

On January 23, 2012, the Department's Public Records Unit received a public records request (Request #1) from West seeking the following:[1]

1. All records showing the total amounts of gas tax money given monthly to each Indian Tribe, 2008 to present.
2. All audit reports concerning the expenditure of such funds.
3. All communications concerning the disclosure or withholding of such records, or the propriety of disclosing or withholding such records, january of 2011 ro present. [sic]

CP 77-78 (¶13), 90 (Ex. F1). The Department's Public Records Officer, Hannah Fultz, responded to West's request within five business days of the request.[2] CP 78 (¶14), 93 (Ex. F2). Fultz asked West to confirm and clarify his request. *Id.*

West clarified part 3 of Request #1 in a February 2 e-mail:

> [it] should be broadly interpreted to include not only and [sic] PRA requests and responses relating to the above described records, but any record or communications sent or received by the DOL concerning the disclosure or withholding of such records or the propriety of disclosing or withholding them, to include any analysis of the status of such records under the Public Records and official Public Records Statutes.

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[1] West's request was postmarked January 12, 2012, but it was not received by the Department until January 23. CP 77-78 (¶13), 90-91 (Ex. F1). The Public Records Unit was closed on January 19 and 20, because of inclement weather. CP 77-78 (¶13).

[2] RCW 42.56.520 requires an agency to respond within five business days of receiving a public record request. West acknowledges the Department complied. Appellant's Br. at 6. West's request was postmarked January 12, 2012, but it was not received by the Department until January 23. CP 77-78 (¶13), 90-91 (Ex. F1). The Public Records Unit was closed on January 19 and 20, because of inclement weather. CP 77-78 (¶13).

CP 78 (¶15), 98-99 (Ex. F3). Fultz replied to West's e-mail on February 10 and estimated the Department would provide a response to Request #1 on March 9, 2012. CP 78 (¶15), 97-98 (Ex. F3). Fultz advised West that the volume of records was yet unknown but that responsive records might be provided in installments. *Id.*

On February 13, the Department received an e-mail from West with an additional public records request (Request #2):

> I am curious as to what indexes the department maintains of records related to the gas tax refunds to the tribes. Please regard this as a further request for disclosure of any indexes of public records maintained by the department that encompass the gas tax refund amounts, and any applicable retention and destruction schedules.

CP 78 (¶16), 96-97 (Ex. F3). Fultz timely responded to Request #2, informed West he could expect a response to Request #2 by February 24, and asked him to contact her should he have any questions.[3] CP 78 (¶16), 95-96 (Ex. F3). On February 24, Fultz provided West with a status update on Request #2, informed West the Department was working on his request, and revised the date he could expect a response to March 2. CP 78 (¶17), 95 (Ex. F3).

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[3] West acknowledges that the Department timely responded to Request #2. Appellant's Br. at 7.

B. The Department's Search for and Disclosure of Records Responsive to Request #1

Immediately upon receiving Request #1, the Department began to identify what records were responsive to the request and where they were located. CP 79-80 (¶21), 93 (Ex. F2), 95-99 (Ex. F3), 105-07 (Ex. F5). Given that Request #1 was for fuel tax records, the Department identified its Prorate and Fuel Tax Program ("Program") as likely to have responsive records.[4] CP 80 (¶22), 109-12 (Ex. F6).

On February 13, the Public Records Unit sent Request #1 (including the February 2 clarification) to the Program. CP 80 (¶22), 112 (Ex. F6). Fultz, the Program, and other Department staff discussed Request #1, including what and where to search. CP 79-83 (¶¶21-41); 105-27 (Exs. F5-F13). Fultz and the Program continued to discuss West's request and to identify potentially responsive records throughout February to June 2012. CP 80-83 (¶¶23-41), 105-27 (Exs. F5-F13).

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[4] The agency may choose to initially ask only the staff of the department or departments of an agency most likely to have the records to search for records. WAC 44-14-04003(9). Washington Administrative Code Chapter 44-14 contains Model Rules for the Public Records Act. The model rules were promulgated at the request of the legislature to provide guidance to agencies and the public. RCW 42.56.570. The Court of Appeals has found that the model rules "contain persuasive reasoning," *Beal v. City of Seattle*, 150 Wn. App. 865, 874, 209 P.3d 872 (2009), and "offer useful guidance," *Mechling v. City of Monroe*, 152 Wn. App. 830, 849, 222 P.3d 808 (2009).

On February 17, the Public Records Unit collected from the Program records potentially responsive to parts 1 and 2 of Request #1.[5] CP 81 (¶28), 114 (Ex. F7). Also on February 17, the Program identified a list of 15 individuals as possibly having records responsive to part 3 of Request #1. CP 81 (¶29), 116 (Ex. F8). On March 5, Fultz e-mailed the 15 individuals, asked them to search responsive records by March 9, and directed them to search particular locations using search terms based on the language of the request. CP 81-82 (¶30), 118 (Ex. F9). If a search resulted in responsive records, they were directed to forward the records to Fultz or Kristin Partain (Prorate and Fuel Tax Program Management Analyst), who would then forward the records to Fultz. *Id.* Partain gave Fultz three compact discs of potentially responsive records on April 17.[6] CP 82 (¶31).

Throughout April to June 2012, Fultz regularly communicated with the Program regarding the information within responsive records to determine whether any of the information should be redacted or withheld. CP 82 (¶¶31-34), 105-07 (Ex. F5), 123 (Ex. F11). As investigation showed others within the Program as possibly having responsive records, Fultz widened her request and communicated with Department employees

[5] As addressed further below, these records were disclosed to West but withheld on March 7, and an exemption/redaction log was provided. CP 81 (¶28), 84 (¶42), 129-38 (Ex. F14).

[6] As discussed further below, some of these records were produced to West on October 11 while others were still being reviewed at the time of the December 14 summary judgment hearing. CP 82 (¶31).

regarding searching for responsive records. CP 82-83 (¶¶35-40), 85 (¶48), 105-07 (Ex. F5), 125 (Ex. F12), 127 (Ex. F13). On June 6, she directed Thao Manikoth, the Compliance Manager for the Business and Professions Division, of which the Prorate and Fuel Tax Program is a part, and Karla Laughlin, the Administrator of the Prorate and Fuel Tax Program, to search for records responsive to part 1 of Request #1. CP 83 (¶38), 125 (Ex. F12). On June 7 Fultz e-mailed three more individuals and directed them to search for records responsive to parts 1 and 2 of Request #1 and to forward responsive records to her. CP 83 (¶39), 127 (Ex. F13).

After the ongoing discussions and searches set forth above, as well as further consultation with executive management and the Attorney General's Office, the Program and the Public Records Unit determined there were additional records potentially responsive to Request #1. CP 84-85 (¶¶47-49). The Unit collected approximately 50,000 pages of additional records in 30 boxes of various sizes from the Program on or about June 15. CP 84-85 (¶47), 203 (¶6). Either Fultz or Crosby then reviewed the records to determine (1) whether they were responsive to Request #1 and, if so, (2) whether they should be produced or withheld. CP 83 (¶41).

On March 7, in response to parts 1 and 2 of Request #1, Fultz e-mailed West, as an attachment, an exemption log that set forth the reasons why certain records were being withheld. CP 84 (¶42), 129-37 (Ex. F14).

On June 4, the Department e-mailed West a corrected exemption log to remove RCW 82.32.330 as a cited exemption. CP 84 (¶42), 140-45 (Ex. F15).

Fultz also informed West on March 7 that pages #000001–000020 responsive to parts 1 and 2 of Request #1 were still being reviewed and he could expect a status update as to these records on March 16.[7] CP 84 (¶43), 129 (Ex. F14). The Department did not update West on these pages on March 16, but did provide him an update on June 4 advising it hoped to have an installment to him by June 11. CP 140 (Ex. F15). The Department disclosed, with redactions, pages #000001–000020 to West on July 26. CP 205 (¶9), 324-48 (Ex. C4).

Fultz also e-mailed to West on March 7 page #000021 which was responsive to parts 1 and 2 of Request #1. CP 84 (¶44), 138 (Ex. F14). The Department continued to search for and review records responsive to part 3 of Request #1 and expected to provide an installment by March 23. CP 84 (¶45), 129 (Ex. F14). At her May 21 deposition, Fultz informed

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[7] West's assertion that the Department told him on March 7 that it was "withholding" pages 000001–000020 is misleading. Appellant's Br. at 8. Rather, the Department told West, "[t]he Department is currently working with our attorneys to determine whether or not these pages are exempt, either in whole or in part." CP 84 (¶43), 129 (Ex. F14). As addressed further below, the PRA expressly allows an agency additional time to respond to a request 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." RCW 42.56.520.

West's counsel that the Department was reviewing records potentially responsive to part 3. CP 1089, 1100.

Fultz e-mailed West on June 28 an installment responsive to part 3 of Request #1. CP 84 (¶46), 147-52 (Ex. F16). All further installments to Request #1 were provided to West from Sara Crosby, Manager of the Vehicle/Vessel Public Disclosure Unit. CP 79-80 (¶21), CP 203 (¶5). As of October 31, 2012, Crosby had provided West with installments on the following dates: July 6, 10, 23, 26, 27; August 3, 17, 20, 21, 23, 24, 31; September 18; October 4, 11, 18, 19, 23, 24, and 29.[8] CP 205 (¶9).

As of October 31, 2012, a total of 47,363 pages in 22 installments had been produced to West or accounted for in an exemption log. CP 207 (¶11), 208-1066 (Exs. 1-20). With each installment, the Department provided West with exemption logs setting forth the applicable exemptions for any records withheld or redacted. CP 84 (¶42-46), 87 (¶58-60), CP 205 (¶9).

C. The Department's Search for and Disclosure of Records Responsive to Request #2

Immediately upon receiving Request #2 on February 13, the Department began to identify responsive records to the request and where

[8] The Department filed its Motion for Summary Judgment on November 16, 2012. CP 176-201. The Declarations in support of its motion described the Department's search for and production of records through October 31, 2012. CP 75-87, 202-07. Additional installments were provided after October 31 with the last installment being produced on December 27, 2012. CP 1270-71, 1273, 1349-1834.

they may be located. CP 78 (¶16); 95-99, 105-07 (Exs. F3, F5). Given that Request #2 was for records related to fuel tax, the Department's Prorate and Fuel Tax Program was identified as likely to have responsive records. CP 86 (¶51), 154 (Ex. F17). On February 14, the Public Records Unit sent Request #2 to the Program. *Id.* The Program and Fultz discussed the Request including what and where to search. CP 86-87 (¶¶52-55), 154, 156-63 (Exs. F17, F18).

Between February 13 and March 9 Fultz conferred with the Public Records Unit and the Prorate and the Program, including Karla Laughlin and Kristin Partain, to determine the meaning of "index" contained within Request #2 and to determine whether there were any identifiable public records regarding an "index." CP 86-87 (¶¶53, 55), 154 (Ex. F17), 156-63 (Ex. F18). In addition, Fultz communicated with staff from the Department's Information Services Division regarding the meaning of "index" and whether "index" was an identifiable public record. CP 86-87 (¶55), 156-63 (Ex. F18). The Department concluded there were no responsive records. CP 87 (¶56), 156-63 (Ex. F18).

On February 24, Fultz reviewed records supplied by the Program that were responsive to the "retention and destruction schedule" portion of Request #2. CP 87 (¶57), 105-07 (Ex. F5). Fultz verified with Bruce Clark

(Forms and Records Analyst 3, Public Records Unit) that the schedules Partain provided were correct. CP 87 (¶57).

Fultz e-mailed West on March 9 informing him there were no responsive records to the "index" portion of Request #2. CP 87 (¶58), 165-66 (Ex. F19). This e-mail included what the Department understood "index" to mean as provided by its Information Services division. *Id.* Fultz asked West to contact her if his understanding of "index" differed from the Department's. *Id.* West never contacted Fultz regarding the term "index" and the Department closed Request #2 on March 23. CP 87 (¶¶58, 60).

In the same March 9 e-mail, Fultz also e-mailed West records responsive to the "retention and destruction schedule" portion of Request #2. CP 87 (¶59), 165-66, 170-75 (Ex. F19).

D. Procedural History

On March 8, 2012, less than seven weeks after the Department received Request #1, and less than four weeks after receiving Request #2, West sued the Department in Thurston County Superior Court. CP 4-7. He asserted the Department failed to timely respond to Request #1, failed to adequately search for and/or produce responsive records, asserted improper exemptions, and failed to provide exemption logs. CP 6.

The Department moved for summary judgment arguing (1) West's suit was unnecessary, (2) the Department's search for records was adequate, (3) installments of records were properly provided, and (4) the Department's asserted exemptions were proper. CP 176-201.

West filed a response to the Department's motion as well as a cross-motion for summary judgment, and a CR 56(f) continuance. CP 1275-1287. In his cross-motion, West argued (1) he was forced to file suit and conduct discovery in order to compel the Department's disclosure of records and (2) the Department's exemptions were improper. *Id.*

Prior to the summary judgment hearing, the Department requested the court review exempt records *in camera*. CP at 1288-90. West did not oppose this motion except as to the installment dates of the records to be reviewed. CP 1324-26.

The trial court denied the request for *in camera* review, granted the Department's summary judgment motion, and denied West's motions. CP 1336-37. West's subsequent motion for reconsideration was denied. CP 1836, 1842.

IV. STANDARD OF REVIEW

"Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo...The court may conduct a hearing based solely on affidavits." RCW 42.56.550(3).

Summary judgment is appropriate to resolve legal issues related to the PRA. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 106, 117 P.3d 1117 (2005). A grant of summary judgment is reviewed de novo. *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). However, in reviewing an order granting a motion for summary judgment, the appellate court considers only evidence and issues called to the attention of the trial court. RAP 9.12.

V. ARGUMENT

While the Public Records Act requires state and local agencies to disclose public records upon request, there are specific statutory exemptions from disclosure that allow agencies to withhold records or redact portions of them. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 258, 884 P.2d 592 (1994) (*PAWS*); *see* RCW 42.56.070(1).

In the present case, the Department produced tens of thousands of records in response to West's public records requests and properly withheld or redacted information pursuant to specific statutory exemptions. West's lawsuit was unnecessary as the Department was in the process of identifying, collecting, and disclosing records when the

lawsuit was filed, and it never indicated that it would not produce the requested, non-exempt records.

Along with challenging the Department's asserted exemptions, the gravamen of West's appeal is that the Department did not provide him with the records he wanted, when he wanted them, and in the order he wanted them. Appellant's Br. at 203 (Assignments of Error 2-4). But, this is not the standard for compliance under the PRA. Rather, the Department's efforts to search for records must only be reasonable, and the Department can produce or disclose records in installments while taking the time necessary to locate and assemble information and seek legal advice. RCW 42.56.080; .210(3), .520; *Neighborhood Alliance*, 172 Wn.2d at 721. In responding to West's requests, the Department reasonably estimated the time necessary to identify, collect, and provide installments of records responsive to West's requests and timely began either producing records or withholding them pursuant to exemptions. The Court should affirm the superior court's order granting the Department's motion for summary judgment and dismissing West's complaint.

A. The Department Properly Withheld or Redacted Tribal Tax Information Under RCW 42.56.230(4) and RCW 82.36.450(4)

An agency's records are open to the public, but there are specific statutory exemptions that allow agencies to withhold records or portions of

records from disclosure. *See* RCW 42.56.070(1). If a record contains both exempt and nonexempt information, the agency may redact the exempt information. RCW 42.56.210; *Zink v. City of Mesa*, 162 Wn. App. 688, 725, 256 P.3d 384 (2011). When an agency withholds or redacts a record, it must specify the exemption and give a brief explanation of how the exemption applies to the document. RCW 42.56.210(3); *Sanders v. State*, 169 Wn.2d 827, 834, 240 P.3d 120 (2010). The burden is on the agency to establish the exemption. RCW 42.56.550(1).

Here, the Department properly withheld and redacted records pursuant to specific statutory exemptions that protect tribal fuel tax information and identified those exemptions in logs provided to West. The State of Washington has agreements with federally recognized Indian Tribes governing the taxation of motor vehicle fuel on tribal land. The Department of Licensing's Prorate and Fuel Tax Program is responsible for administering these agreements. CP 80 (¶6); RCW 82.36.450.

RCW 42.56.230(4) exempts from disclosure information that would violate a taxpayer's right to privacy:

> The following personal information is exempt from public inspection and copying under this chapter:
>
> (4) Information required of any taxpayer in connection with the assessment or collection of any tax if the disclosure of the information to other persons would: (a) Be prohibited to such persons by RCW 84.08.210, 82.32.330, 84.40.020, 84.40.340,

> or any ordinance authorized under RCW 35.102.145; or (b) *violate the taxpayer's right to privacy* or result in unfair competitive disadvantage to the taxpayer;

(emphasis added). RCW 82.36.450 governs motor vehicle fuel tax agreements between the State and any federally recognized Indian tribe located on a reservation within Washington State. Subsection 4 of this statute provides:

> *Information* from the tribe or tribal retailers received by the state or open to state review under the terms of an agreement *shall be deemed to be personal information under RCW 42.56.230(3)(b) and exempt* from public inspection and copying.[9]

(emphasis added). This tribal exemption is broader than, but also expressly incorporates, the privacy exemption of RCW 42.56.230(4)(b). The tribal exemption requires no analysis of whether records concern private matters; by legislative directive, the information is private.

RCW 42.56.230(4) and RCW 82.36.450(4) thus exempt from inspection information the Department receives from a tribe or tribal retailers—a taxpayer—under the terms of a fuel tax agreement. Pursuant to these exemptions, the Department, for example, withheld tribal fuel tax refund audits, CP 141-45, and redacted the dollar amount of refunds given to a tribe. CP 277-306, 1247-66. The Department properly redacted or

[9] RCW 42.56.230 was amended by 2011 c 173 § 1, changing subsection (3)(b) to subsection (4)(b).

withheld records pursuant to these statutory provisions, and West's claim to the contrary were properly dismissed.

West attacks the application of the Department's asserted exemptions because the Department redacted tribal information even though this information may not, in some of the redacted or withheld records, be in the same format as it was when received from the tribe.[10] Appellant's Br. at 19-27. However, when interpreting a statute, a court's primary objective is to ascertain and give effect to the intent of the legislature, beginning with the statute's plain language and ordinary meaning. *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). Here, the plain language of the exemption statutes make clear that it is not just a particular *record* that is exempt but the *information* itself that is exempt.

The Department's redactions were necessary to protect information it received from tribes as required by RCW 82.36.450 and RCW 42.56.230(4)(b). For example, from a tribal refund worksheet, the Department redacted the total gallons of fuel, the refundable gallons, and

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[10] West acknowledges the Department correctly applied RCW 82.36.450(4) and RCW 42.56.230(4)(b) and to information that was provided by the tribe to the Department—for example, the number of gallons of fuel a tribe reports to the Department. Appellant's Br. at 22.

the net refund amount. CP 1245, 1268.[11] The Department did not redact the refundable percentage, or the tax rate. *Id.* As West acknowledges, the information received from the tribe, like the total gallons of fuel sold, is exempt under RCW 82.36.450(4) and 42.56.230(4)(b). Appellant's Br. at 20. But so too must the Department redact the refund amount because failure to do so would have allowed West, or any other requestor, to determine the amount of gallons of fuel a tribe sold, which is personal information and exempt.

West complains the Department's claimed exemptions are improper because the refund amount is not information *received* from the tribe, but is rather information *derived* from information received from the tribe. Appellant's Br. at 20-22. But, since the tax rate applied to tribal fuel purchases is known, if the refund amount is not redacted, West could easily calculate the tribe's personal information.

West's reliance on *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011), is misplaced. There, an equally divided court held that the name of a police officer accused of

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[11] In support of its motion for summary judgment, the Department submitted the exemption logs, CP 133-37, 141-45, 211-1066, but not examples of redacted records and the superior court denied the parties' motions for in camera review. CP 1336-38. West submitted a small sample of redacted records with his cross-motion for summary judgment. CP 1247-68. The redacted records in question, in large part, are therefore not included in the Clerk's Papers. However, West does not dispute this description of the redacted information and, in fact, describes them in the same way in his opening brief. Appellant's Br. at 13-14, 16-17, 20-21.

misconduct was exempt from production, but the remainder of the investigative reports were not exempt despite the fact that production could reveal the officer's identity by implication, if third parties were aware of additional information not contained in the records. *Bainbridge Island Police Guild*, 172 Wn.2d at 417-18, 423-24. West cites this case for the proposition that the Department cannot redact the amounts actually refunded to the tribes just because a requestor could work backwards and figure out the information the tribes provided that was then used to calculate the refund amount. Appellant's Br. at 22-27. However, the sections of the PRA and information at issue in West's request are distinguishable from those in *Bainbridge Island.*

The claimed exemption in *Bainbridge Island* necessitated analysis of whether production of personal information violates an employee's right to privacy under former RCW 42.56.230(2) and RCW 42.56.050. A person's right to privacy is violated only if disclosure of information about the person would be highly offensive *and* is not of legitimate public concern. RCW 42.56.050. The court concluded that while disclosure of the officer's name would be highly offensive to a reasonable person and was not of legitimate public concern, other contents of the investigative reports were of legitimate public concern. *Bainbridge Island*, 172 Wn.2d

at 415-18. The investigative reports, therefore, were not exempt because they did not meet the statutory definition of exempt personal information.

Here, RCW 82.36.450(4) explicitly deems tribal information to be private and, therefore, exempt. No right to privacy analysis is required to determine whether records that reveal the private taxpayer information would be offensive or are of a legitimate public concern.

RCW 82.36.450(4) exempts from inspection the withheld information because the state obtained it from tribes or tribal retailers under the terms of fuel tax agreements. This information is deemed to be personal information under RCW 42.56.230(4) and exempt from public inspection and copying. The Department properly redacted or withheld the information pursuant to these statutory provisions and complied with the PRA. The order granting summary judgment was therefore proper and should be affirmed.

B. West's Lawsuit Was Unnecessary to Compel Disclosure of the Requested Records

Under the PRA, a requesting party may file an action when it believes a government agency has not complied with the Act. *See* RCW 42.56.550. Generally, a party does not prevail in such an action unless an affirmative judgment is rendered in his favor at the conclusion of the case. *Wood v. Lowe*, 102 Wn. App. 872, 877, 10 P.2d 494 (2000)

(citation omitted). A party can also prevail without a judgment in his favor if the action could reasonably be regarded as necessary to obtain the information and the lawsuit caused the release of the information. *Id.* Here, West's lawsuit was not necessary to obtain the information sought because the Department was in the process of identifying, collecting, and producing records when the lawsuit was filed, and it never indicated that it would not produce the requested records. The court should affirm.

A PRA lawsuit may be necessary when an agency, by resisting disclosure of requested records, forces a requester to file an action. *Spokane Research,* 155 Wn.2d at 103-104. However, a lawsuit is unnecessary when, despite uncertainty about the time it may take to produce the requested records, an agency never indicates that the requested records will not be forthcoming and the agency never fights to prevent disclosure or is otherwise obstinate in responding to the request. *Limstrom v. Ladenberg*, 98 Wn. App. 612, 617, 989 P.2d 1257 (1999). Moreover, in instances where an agency provides the requester with a timeframe for providing the requested records, the agency should be allotted that amount of time to perform and provide those records before a lawsuit becomes necessary to compel production. *See Limstrom*, 98 Wn. App. at 617.

Here, it was unnecessary for West to file an action to obtain the requested records. While there was initial uncertainty about the time it would take to fully respond to West's requests and the number of responsive records, the Department never indicated before or after West filed suit that the requested records would not be forthcoming once the Department had compiled them and determined which records should be withheld. CP 84-86 (¶¶43, 45, 47-49), 95-99 (Ex. F3), 129-38 (F14), 165-75 (F19). Nor did the Department ever fight to prevent disclosure or otherwise act obstinate or resistant towards West's requests. *Id.* Rather, as specifically authorized by the Act, the Department produced requested records in installments or withheld records under an exemption. *See* RCW 42.56.080; 42.56.210(3).

Further evidence showing that the Department was neither obstinate nor resistant is that the Department informed West of its progress in retrieving and preparing the requested records. Beginning with its timely acknowledgement letter to Request #1, the Department sought to clarify what records West was seeking so as to ensure a timely response. CP 78 (¶14), 93 (Ex. F2).[12] Once West clarified Request #1 on

[12] West cites *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 750, 174 P.3d 60 (2007), for the proposition that a failure to properly respond to a records request is a denial. Appellant's Br. at 28. But the Supreme Court is clearly referring to an agency's failure to respond to a request within five business days, as required by RCW 42.56.520, by providing the records, denying the request, or providing a reasonable estimate of the

February 2, 2012, the Department advised West that the volume of records was yet unknown, but that responsive records may be provided in installments. CP 78 (¶15), 98-99 (Ex. F3). Fultz estimated the Department would have an installment to West by March 9, and the Department in fact provided the first installment and exemption log on March 7. CP 78 (¶15), 84 (¶¶42-44), 97-98 (Ex. F3), 129-38 (Ex. F14). West's suggestion that the no records were produced on March 7 is incorrect. Appellant's Br. at 8.

Also on March 7, Fultz informed West that the Department continued to search for and review records responsive to Request #1 and expected to provide another installment by March 23. CP 84 (¶45), 129 (Ex. F14). But rather than await further installments, West filed suit on March 8.[13] CP 5-7.

The same is true for Request #2—the Department provided West with a realistic estimate for responding. CP 78 (¶¶16-17), 95-96 (Ex. F3). The Department hoped to have an installment to West by February 24, which was then revised to March 2. *Id.* The Department contacted West when its timeframe had to be revised due to various issues that arose with

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time the agency will take to respond. *Soter*, 162 Wn.2d at 750. Additional time may be required to respond upon the need to clarify the request. The Department properly responded within five business days by requesting clarification and then providing an estimate of time it would take to provide the records once the clarification was received.

[13] West filed an amended complaint on June 21, 2012. CP 65-67.

responding to such a broad public records requests. CP 78 (¶¶16-17), 95 (Ex. F3). Due to the Department's uncertainty over the meaning of "index" in Request #2, the Department missed its self-imposed deadline and did not produce records until March 9. CP 86-87 (¶¶53, 55-56), 165-75 (Ex. F19). But West never responded to the Department's March 9, e-mail asking him to clarify the meaning of "index" if it did not match the Department's. CP 87 (¶58), 165-66 (Ex. F19). If a requestor fails to clarify the request, the agency need not respond to it. RCW 42.56.520.

West claims his lawsuit was necessary because at the time he filed it, "he knew that the Department possessed records #00001 through #000020 [responsive to Request #1], but that the Department was refusing to disclose the records to him, either through production . . . or inclusion in a proper exemption log."[14] Appellant's Br. at 28. West has produced no evidence to support his accusation. The Department on the other hand provided evidence demonstrating compliance with the PRA. The Department did not refuse to disclose these records but rather advised West it needed to review them with its attorneys to determine whether an exemption applied, an action the PRA expressly authorizes.

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[14] Records #00001 through #000020 were produced to West with redactions on July 26. CP 205 (¶9), 324-48 (Ex. C4), 1247-66. As is addressed below, the Department not producing these records immediately is not a PRA violation since it acted reasonably and timely.

RCW 42.56.520[15]; CP 84 (¶43), 129 (Ex. F14). That the Department voluntarily informed West it needed time to review these specific records does not render its initial withholding of these records a violation of the PRA. Production of documents after requester files suit is not an admission that initial withholding was wrongful. *Sanders v. State*, 169 Wn.2d 827, 846-50, 240 P.3d 120 (2010). If documents are exempt, the agency's withholding of them was lawful and its subsequent production of them irrelevant. *Id.* To hold otherwise would improperly penalize the Department for keeping West apprised of the status of his request with respect to these specific documents.

West urges this Court to conclude that in providing the March 7 and March 9 installments, in advising him the search for records was ongoing and more records would be forthcoming for Request #1, and in closing Request #2 after informing him it did not have responsive records, the Department was silently withholding records, and it was therefore necessary for him to file the present lawsuit. Appellant's Br. at 16, 32. Such a conclusion is contradicted by the undisputed facts before this Court and would be contrary to the PRA. While West may be disappointed the

[15] Pursuant to RCW 42.56.520, an agency is allowed additional time "to respond to a request [which] 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."

Department could not search for, review, and disclose tens of thousands of pages by March 8, his disappointment does not support a PRA violation.

West claims that after its March 7 response to Request #1, the Department effectively abandoned its response. Appellant's Br. at 10. He makes this assertion despite the undisputed facts in Fultz's declaration that demonstrate the Department continued to search for and review records throughout February to June 2012. CP 79-83 (¶21-41), 86-87 (¶50-57), 129-38 (Ex. F14); 1089. Fultz's declaration demonstrates that rather than abandoning its response, the Department was diligently searching for and gathering responsive records and taking additional time to ensure an adequate and complete response as specifically authorized by RCW 42.56.520. *Id.* Given the broad scope of West's requests and the number of responsive records, the Department was justified in taking more time to respond and it fulfilled its duty to continue to search as information became available. *See Neighborhood Alliance*, 172 Wn.2d at 720 (holding that a proper search includes following up on leads as they are uncovered).

By contrast, in *Violante v. King Cnty. Fire District*, 114 Wn. App. 565, 59 P.3d 109 (2002), the court held the PRA lawsuit was necessary because there had been multiple attempts to get the requested information, the likelihood of a timely response was impossible, and there was nothing

to indicate the request would ever be honored. But here, the exact opposite is true—the Department timely acknowledged West's request and, consistent with the statutory provisions set forth above, informed West it needed additional time to respond and then began providing records in installments.

Simply put, the Department never refused to provide West with the records he requested in his January and February 2012 requests. Nor did the Department resist disclosing those records to West. To the contrary, the Department timely responded to both requests, sought clarification, and specifically informed West, on multiple occasions, that the volume of records was unknown, the Department was working to identify records, and that installments would be provided as they became available. The Department was entitled to provide West the requested records in installments and should be allowed the time necessary to provide those installments before a lawsuit to compel production is proper. *See Ladenburg*, 98 Wn. App. at 617.

The superior court properly granted the Department's summary judgment motion because the documentary evidence permitted only one conclusion: West's lawsuit was unnecessary to compel disclosure, and the Department did not deny West the opportunity to inspect or copy a specific public record or class of records.

C. The Department's Response to West's Public Records Requests Was Adequate and Timely

West concedes that the Department's search for records was adequate. Appellant's Br. at 31 ("The search that the Department launched does seem to have been adequate."). But, he asserts the search was untimely, conducted only in response to his lawsuit, and the Department improperly delayed providing some records.[16] Appellant's Br. at 2-3 (Assignments of Error 2-3), 32. West is incorrect. The Department's response to his public record requests was both adequate and timely. The Department also reasonably estimated the time required to respond to the request, and West was not entitled to receive installments of records in any particular order. The Court should affirm.

1. The Department diligently searched for and gathered voluminous records responsive to West's requests

An agency's search for records must be reasonably calculated to uncover all relevant records, and what is reasonable depends on the facts of each case. *Neighborhood Alliance*, 172 Wn.2d at 720. Important here is that agencies are required to follow obvious leads as they are uncovered and to make more than a perfunctory search. *Id.* The Department fully observed

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[16] If West desired to challenge the reasonableness of the Department's estimate of time required for it to his respond to his request, he could have pursued a show cause motion under RCW 42.56.550(2). He did not exercise this option. He also did not specifically challenge the Department's estimate of time in his cross-motion for summary judgment. CP 1275-87.

this principle. Fultz initially met with the Program and Department staff to discuss where to search and identify potentially responsive records and continued to do so even as it produced records. CP 79-83 (¶¶21-41); 105-27 (Exs. F5-F13). When individuals with potentially responsive documents were identified, Fultz contacted them and directed them to conduct searches. *Id.*

As the Department searched for responsive records, it discovered further obvious leads and followed them. CP 82-83 (¶¶31-40), 84-85 (¶¶47-49), 105-07 (Ex. F5), 123 (Ex. F11), 125 (Ex. F12), 127 (Ex. F13). West cannot now claim the PRA was violated when the Department continued to discover records as it conducted its search into his broad and multipart requests.

2. The Department provided reasonable estimates and timely disclosed records

West argues the Department should be penalized for not strictly adhering to its estimates of the time to produce records. Appellant's Br. at 30. His argument ignores the plain language of the Public Records Act, which merely requires an agency to provide an *estimate* of the time required to respond to a request, not an absolute deadline beyond which records are untimely. RCW 42.56.520. The agency does not need to provide an explanation for its estimate of time. *Ockerman v. King Cnty Dep't of Dev. &*

Envtl. Servs., 102 Wn. App. 212, 217, 6 P.3d 1214 (2001). Given the extent of the search involved, the volume of records collected, reviewed, and disclosed, the number of records requests the Department processes at any given time, and West's intervening lawsuit which further drew upon Department resources, the Department provided reasonable estimates consistent with the PRA.

RCW 42.56.520 provides that upon receiving a request for public records, the Department must respond within five business days either by "(1) providing the record; (2) providing [a web] link . . . to the specific records; (3) acknowledging that the agency . . . has received the request and providing a *reasonable estimate* of the time the agency . . . will require to respond to the request; or (4) denying the public record request."

The comments to the model rules for processing public record requests provide guidance on what factors the court should consider in determining whether an agency's estimate of time was reasonable. First, the comments caution that an agency should not use the same estimate of time for every request. WAC 44-14-04003(6). Next, the comments suggest that an agency should calculate the time it will take to respond to the request, acknowledging that "some very large requests can legitimately take *months or longer* to fully provide." *Id.* (emphasis added). The comments also make clear that "[e]xtended estimates are appropriate when the circumstances have

changed (such as an increase in other requests or discovering that the request will require extensive redaction.)" *Id.* Lastly, the comments acknowledge that there is "no standard amount of time for fulfilling a request so reasonable estimates should vary." *Id.*

A requestor's right to inspect or copy a public record arises then once the agency has had a reasonable period under the Act to complete its response to the request. A record cannot be "wrongfully withheld" during the reasonable period the PRA affords the agency to respond to the request.

a. Request #1

Here, the Department needed additional time to respond to West's Request #1 in order to locate and assemble a huge volume of records and determine whether any exemption applied. CP 85-86 (¶¶48-49). Request #1 was broad and included "all records showing total amounts of gas tax money given monthly to each Indian Tribe, 2008 to present," "all audit reports concerning the expenditure of such funds," and "all communications concerning the disclosure or withholding of such records, or the propriety of disclosing or withholding such records, january of 2011 ro [sic] present."[17] CP 85-86 (¶¶48-49), 90 (Ex. F1).

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[17] West chastises the Department for producing records for which he claims he did not ask. But it was West who drafted the language of the request and who chose not to narrow his request or otherwise indicate to the Department that the thousands of pages it was disclosing in installments were not responsive. Even if the Department disclosed records not

The Department initially estimated it would provide an installment by March 9, and it did in fact provide an installment on March 7. CP 98, 129-38. At that time the Department informed West it was continuing to review records responsive to parts 1 and 2 of Request #1 and expected report the outcome of its review by March 16. CP 129. The Department also informed West it continued to search for and review records responsive to part 3 and would provide installments as they became available, with the first installment expected March 23. CP 129.

As the Department reviewed responsive records, its search expanded, which required additional time to review additional records. CP 85 (¶48). Further, West filed suit on March 8 and shortly thereafter began conducting discovery. CP 5-6; Appellant's Br. at 11. The Department did not disclose any records on March 16 or March 23 but it continued to work on West's request through the spring of 2012. CP 79-83 (¶¶21-41). Further, it did update West on June 4, CP 140, and began providing regular installments on June 28. CP 202-1072. More than 30 boxes and over 50,000 pages of records needed to be searched, gathered, reviewed, scanned, then produced or withheld. CP 203 (¶6). And, as addressed above, the records contained private tribal fuel tax information; therefore the Department had to analyze each record to determine whether it was required to be withheld or redacted.

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strictly responsive to West's request, disclosing too many records is not a PRA violation, and West does not allege a PRA violation on this basis.

CP 85-86 (¶¶48, 49); *see* Washington State Bar Ass'n, Public Records Act Deskbook, § 5.3 at 5-13 (2006) ("Certain types of records may require extensive review before disclosure because of the exemptions that potentially apply to them. Such records may require review by the assigned assistant attorney general....").

RCW 42.56.100 allows agencies to adopt rules that accommodate the agencies' time, resource, and personnel constraints to prevent excessive interference with other essential functions of the agency. Employees within the Department's Public Records Unit are responsible for more than responding to West's requests—they also have competing job duties. CP 75-76 (¶¶3-7), CP 202 (¶2). The Act recognizes that an agency's obligation to respond to public records requests is but one of the many obligations imposed on agencies. RCW 42.56.080, 42.56.100, 42.56.210(1). "In general, an agency should devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an "excessive interference" with the agency's "other essential functions." WAC 44-14-04003(2). That the Act requires the most timely "possible" action on requests is a recognition that an agency is not always capable of fulfilling a request as quickly as the requestor would like. RCW 42.56.100; WAC 44-14-04003(2).

In *Levy v. Snohomish County*, 167 Wn. App. 94, 272 P.3d 874 (2012), the court held that a 59-day response time from Snohomish County to produce one, two-page record was acceptable. *Id.* at 876. Some of the time was spent seeking clarification and some due to mailing delays. *Id.* However, the court noted that the County "timely disclosed, identified, and made available all relevant documents." *Id.* Moreover, the County responded without delay to every request or communication from the requester. *Id.* Likewise, here, the Department responded without delay to every request or communication from West. But in contrast to the one, two-page document produced in *Levy*, the Department produced more than 50,000 pages of records.

Within a month of the Public Records Unit receipt of West's Request #1, the Prorate and Fuel Tax Program sent records to the Public Records Unit. CP 81 (¶28); 114 (Ex. F7). The Department began disclosing these records to West on March 7 and provided additional installments, including records unearthed as it continued to search, on June 28; July 6, 10, 23, 26, 27; August 3, 17, 20, 21, 23, 24, 31; September 18; October 4, 11, 18, 19, 23, 24, and 29.[18] CP 84 (¶46), 147-52 (Ex. F16), 205-07 (¶9). Within five

[18] The Department filed its Motion for Summary Judgment on November 16, 2012. CP 176-201. The Declarations in support of its motion described the Department's search for and production of records through October 31, 2012. CP 75-87, 202-07. Additional installments were provided after October 31 with the last installment being produced on December 27, 2012. CP 1270-71, 1273, 1349-1834.

months of receiving West's Request #1, the Prorate and Fuel Tax Program sent approximately 30 boxes containing approximately 50,000 pages of records to the Public Records Unit. CP 203-04 (¶6). As of October 31, West had received 22 installments of records for a total of 47,363 pages that have been produced to West or accounted for in an exemption log. CP 207 (¶11). Given the sheer volume of records and "tremendous effort" involved, the Department's estimate of time was reasonable, and, as more and more records were discovered, it was reasonable to go beyond that original estimate.

West's reliance on *Violante v. King*, 114 Wn. App. 565, 570-71, 59 P.3d 109 (2002), is misplaced. In that case, an agency failed to produce records within its estimated time and did not produce *any* records until after the requestor filed suit. The only issue was whether the requester's lawsuit was necessary to obtain the requested information. *Id.* at 569. The court did not address whether an agency's failure to meet its own estimated date of production is automatically a PRA violation. The PRA plainly grants additional time when needed to locate and assemble requested records. West has not cited any Washington decision holding that an agency's failure to meet its own initial estimated date of production is, by itself, a PRA violation.

The Department informed West pages #000001-000020 existed on March 7. CP 129 (Ex. F14). The Department advised West it would provide him an update on March 16 as to pages #000001-000020, but it did not provide an update until June 4 and ultimately did disclose the records with redactions on July 26. CP 84 (¶43), 129 (Ex. F14), 140 (Ex. F15), 147-52 (Ex. F16). West claims, without citation to any authority, that in telling him about the records on March 7, but not citing an exemption or providing an exemption log, the Department violated the PRA. Appellant's Br. at 28. What West overlooks is that this is often the case in responding to record requests: an agency identifies responsive records but needs time to evaluate whether the records are exempt. Taking such additional time to clarify the request, locate and assemble the information, and seek legal advice is expressly authorized by the PRA. *See* RCW 42.56.520. That the Department voluntarily informed West pages #000001-000020 existed, but that it was continuing to evaluate the records, is not a PRA violation. To conclude otherwise would undermine the Department's ability to keep requestors apprised of the status of his or her request for fear of giving the requestor too much information. It would also undermine the statutory authority the Department has to take additional time and consult with counsel to properly respond to a request.

The Department also advised West it expected to provide an installment to part 3 of Request #1 by March 23 but did not do so until June 28. CP 84 (¶¶45, 46), 129 (Ex. F14), 147-52 (Ex. F16).

While the Department may have missed its initial estimates of providing additional records to West by March 16 and March 23, it was not because it was ignoring his request. *See* WAC 44-14-04003(6) ("An agency should either fulfill the request within the estimate time or, if warranted communicate with the requestor about clarifications or the need for a revised estimate. An agency should not ignore a request and then continuously send extended estimates."). Rather, Fultz's declaration makes it clear that the Department continued to search for and review responsive records throughout spring 2012. CP 79-83 (¶¶21-41). The Department's delay in providing installments was warranted because of the broad scope of West's request, the discovery of additional records, and the time required to analyze and apply exemptions.

b. Request #2

The Department also timely acknowledged Request #2 and began searching for records. The Department informed West there were no records responsive to the "index" portion of his request on March 9—25 days after receiving the request. The Department's public records officer informed West of her interpretation of "index" and specifically requested

West contact her if he meant something different.[19] CP 87 (¶58), 165-66 (Ex. F19). West did not contact the public records officer, did not indicate he had a different understanding of "index", and made no effort to clarify the meaning of "index." On March 9, the Department produced records responsive to the "retention and destruction" portion of Request #2. CP 87 (¶59); 165-66, 170-75 (Ex. F19).

The Department closed Request #2 on March 23, since no responsive records regarding "index" were discovered, West had not clarified the meaning of "index," and all other responsive records were produced. CP 87 (¶60). There is no agency action to review under the PRA where the agency did not deny the requestor an opportunity to inspect or copy a public record, because the record sought does not exist. *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004); *see also Kleven v. City of Des Moines*, 111 Wn. App. 284, 294, 44 P.3d 887 (2002) (no violation of the PRA because the agency had "made available all that it could find"). The Department acted in accordance with the PRA since it was not required to create or produce a record that is non-existent and it was entitled to summary judgment. *Smith v. Okanogan County*, 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000).

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[19] The Department defined indexes in the fuel tax refund system, in part, as "system generated and used by the system to located records in a quick manner. It is controlled and created by the system and not a file that is produced by the application." CP 165.

West now claims check registers provided on December 27, after the summary judgment hearing, were indexes and that the Department therefore improperly withheld records responsive to his request for any indexes of public records maintained by the department that encompass the gas tax refund amounts. Appellant's Br. at 17, 33. West is incorrect on two grounds.

First, these records were not at issue before the trial court as they were not disclosed until after the summary judgment hearing. While West submitted the records as part of his motion for reconsideration, a motion to which the Department did not have an opportunity to respond, that motion was denied by the trial court.

Second, while West labels the check registers disclosed on December 27 as indexes, Appellant's Br. at 17, CP 17-14-15, on March 9, the Department had informed West of its understanding of index and that it had no responsive records. CP 87 (¶58), 165-66 (Ex. F19). The Department engaged in more than a perfunctory search for the requested "index".[20] It made a good faith and reasonable effort to understand the term "index" and determine if the Department had responsive records. After discussing

[20] The only reference to an "index" in the PRA is in RCW 42.56.070 which requires state and local agencies to have a system of indexing for particular classes of records. The Department of Licensing has implemented this requirement in WAC 308-10-065 and 308-10-067. Neither the statute nor the rules require the Department maintain an index of gas tax refund amounts.

the issue over a two week period, Fultz determined the Department did not have a responsive "index." CP 86-87 (¶¶55-56), 105-07, 156-63, 165-66 (Exs. F5, F18, F19).

Here, in informing West it did not have responsive records, the Department told West how it was interpreting "index," that it searched its fuel tax refund system and the imaging refund invoice packet system, but found no identifiable public records. CP 165-66 (Ex. F19). The Department then invited West to correct or clarify the meaning of "index". West never informed the Department he had a different understanding of "index" or clarified to the Department what he meant by index. CP 87 (¶58), 165-66 (Ex. F19). Ultimately, the Department determined it did not have any responsive records. The Department considered the records that were disclosed on December 27 to be responsive only to Request #1. West cites no reason why the Department's evaluation of its own records is incorrect and any claim to the contrary should be disregarded.

3. West was not entitled to records in any particular order

To support his argument that the Department's production of records was untimely, West further complains that the records provided in the December 27 installment had not been provided earlier. Appellant's Br. at 2-3 (Assignments of Error 2-3). But this does not demonstrate that the overall production of records was untimely. Rather, he complains that

he did not receive the records he happened to have a greater interest in sooner than records he was less interested in.

For example, West claims the Department had responsive records as early as February 17 but did not disclose those records immediately; rather, the Department disclosed some on March 7 and others beginning June 28. Appellant's Br. at 7-8, 13; CP 81 (¶28), 114, 129-138 (Ex. F14). West also claims the Department had records of its prior public record requests responses at the time he made his request but that those records were not produced until after the summary judgment hearing.[21] Appellant's Br. at 28, 32-33.

But there is nothing in the PRA that entitles a requestor to installments in any particular order. The "right to inspect or copy" a record is not a right to instantaneous inspection or copying. *See* RCW 42.56.550(4) (referring to "right to inspect copy" and "right to receive a response."). Contrary to West's unsupported allegation, the Department was not obligated to instantly disclose records; neither was it obligated to disclose records in any specific order, especially since West never requested that the

[21] West raised this issue in his motion for reconsideration. CP 1342-48. In his brief to this court, he again baldy asserts, without any citation to the record or other support, that providing installments after the summary judgment hearing demonstrates the Department was acting in bad faith. Appellant's Br. at 32-35. The Department did not have the opportunity to respond to West's motion for reconsideration. In any event, the records produced or disclosed after the summary judgment hearing were not before the trial court and are not before this Court.

Department give certain records priority over others. As discussed above, the Department provided 22 installments between March and October 2012. That the Department did not provide certain records in a particular order or at a particular time does not give rise to a cause of action. Summary judgment was proper.

D. The Superior Court Properly Exercised its Discretion in Denying West's Motion for Reconsideration

Although West claims the Court should review the superior court's denial of his motion for reconsideration de novo, he cites no authority for this assertion. Appellant's Br. at 36. Contrary to his unsupported assertion, the superior court's denial of West's motion for reconsideration is reviewed for abuse of discretion, that is, discretion that is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *River House Development Inc., v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 231, 272 P.3d 289 (2012).

Following the summary judgment hearing, the Department produced its final installment of records on December 27. CP 1353-1834. Included in these installments were the Department's check registers itemizing payments to tribes. CP 1714-15. The installments also included prior public records responses provided to other requesters. CP 1719, 1721-28, 1730-85.

West filed a motion for reconsideration based on what he deemed to be newly discovered evidence and arguing that the summary judgment order was contrary to law. CR 59(a)(4), (7). He asserted that the check registers were "indexes" responsive to Request #2. Appellant's Br. at 17; CP 1345-47. He further argued that the Department's prior public responses that were responsive to part 3 of Request #1 were untimely produced. Appellant's Br. at 16-17; CP 1346-47. The court denied the motion one day after it was filed.[22] CP 1835.

A motion for reconsideration based on newly discovered evidence can only be granted if the evidence is such that it will probably change the result of the trial, was discovered since the trial, could not have been discovered before trial by the exercise of due diligence, is material, and is not merely cumulative or impeaching. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003); *see also Wick v. Irwin*, 66 Wn.2d 9, 400 P.2d 786 (1965) (new trial will not be granted on ground of newly discovered evidence where such evidence would be merely cumulative, with no effect on result of trial). Failure to satisfy any of these facts is a ground for denial of the motion. *Go2Net*, 115 Wn. App. at 88 (citations omitted).

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[22] West filed the motion on January 22, 2013, and noted it for hearing February 8, 2013. CP 1342. The order denying the motion was filed January 23, 2012. CP 1835. Thurston County Superior Court Local Rule 59 allows the judge to strike the hearing and decide the motion without oral argument.

West failed to establish that the installments produced after the filing of the Department's summary judgment were material or would have changed the trial court's decision granting summary judgment in the Department's favor. The December 27 installment was not material to the issues that were before the court on summary judgment: whether (1) West's suit was necessary, (2) the Department's search for records was adequate, (3) the installments addressed in the Department's summary judgment has been properly provided, and (4) the Department's asserted exemptions were proper. CP 176-201.

First, the Department had previously informed West how it was interpreting his request for "indexes," and West never responded that such interpretation was incorrect. CP 165-66. Moreover, check registers are not indexes. They are records of the checks the Department paid to various tribes. Therefore, West's factual assertion that the Department had improperly informed him there were not "indexes" responsive to Request #2 is simply incorrect.

Second, regarding the production of the records provided to previous requestors, West was not entitled to receive records installments in any particular order. The fact that the Department produced these records as the final installment rather than a prior installment does not show "bad faith" but rather that the Department was busy reviewing the

more than 50,000 pages of records it had gathered to determine whether they were responsive and, if so, to what extent they needed to be redacted. More importantly, the fact that a particular installment was provided later than other installments is not an articulable cause of action.

West produces no evidence that the Department acted in bad-faith by disclosing records after the summary judgment hearing. Appellant's Br. at 32. His allegations are conclusory and speculative. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash.2d 355, 360, 359, 753 P.2d 517 (1988) (Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment). Accordingly, the additional installment was not material to the issues decided on summary judgment, and the court did not abuse its discretion in denying West's motion. *See Parmelee v. Clarke*, 148 Wn. App. 748, 201 P.2d 1022 (2008) (where additional evidence in public records case was not material and similar evidence was in the record considered by the trial court; additional submissions did not materially strengthen the argument).

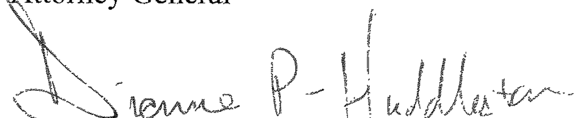
VI. CONCLUSION

The Department has met its burden to establish that its search for records was adequate and timely and that any withheld records were exempt from disclosure under RCW 42.56.230(4) and RCW

82.36.450(4). For the reasons set forth above, the Department respectfully requests that the Court affirm the superior court's summary judgment order dismissing West's action with prejudice, with no penalties or attorney's fees awarded to West.

RESPECTFULLY SUBMITTED this 23rd day of September, 2013.

ROBERT W. FERGUSON
Attorney General



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PROOF OF SERVICE

I, Judy St. John, certify that I served a copy of this **Respondent's Brief** on all parties or their counsel of record on the date below as follows:

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

DATED this 23rd day of September 2013, at Seattle, WA.

Judy St. John, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

September 23, 2013 - 11:06 AM

Transmittal Letter

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Court of Appeals Case Number: 44498-4

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