73165-3

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Court of Appeals
Division I
State of Washington

No. 73165-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

Eric Hood,

Appellant,

v.

South Whidbey School District,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR ISLAND COUNTY

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES AND RULES

I. INTRODUCTION

After he was fired for poor teaching performance, Appellant Eric Hood made dozens of overlapping public record requests of his former employer, the South Whidbey School District. Before the trial court, Hood acknowledged that the District largely complied with the Washington Public Records Act's (PRA's) procedures and that there was no evidence of intentional District malfeasance. He conceded that the District's attorney-client communications and work product (which were the only records the District withheld from him) were exempt. Hood further admitted that the vast majority of his requests had no public importance and were made simply to further his personal agenda against his former employer. For those stray responsive records that the District produced subsequent to closing his requests, Hood himself proposed grouping the documents and imposing a penalty of $5 a day, a proposal to which the District agreed and that the trial court adopted.

Despite all of these concessions, Hood claimed, largely on the basis of his own self-serving allegations, that the District's searches were unreasonable and that its conduct amounted to bad faith. He asserted that *other* public records produced by *other* agencies in response to *different* requests proved that the District must have withheld or destroyed records,

while ignoring that all of his comparison records were innocuous and the District actually produced many of them directly to him. Hood even accused the District of causing him economic loss when the federal court sanctioned him for his own misconduct, an argument that the trial court explicitly found frivolous.

Hood asked the trial court to impose one of the largest recorded penalties in the history of the Public Records Act -- almost $400,000.00. The trial court undertook an extensive and thorough deliberative process, carefully reviewed all of the evidence, and awarded Hood penalties proportional to the District's violations, along with reasonable fees. The trial court correctly identified and applied the law; Hood doesn't challenge a single conclusion of law on appeal. There is no basis in the record to overturn the court's findings and thoughtful exercise of its discretion and this appeal should be dismissed.

II. COUNTERSTATEMENT OF ASSIGNMENTS OF ERROR

1. Where the trial court reviews all evidence related to an agency's responses to records requests and finds the agency's searches reasonable, can the requestor show that this finding is not supported by substantial evidence merely by rearguing the weight to be given the evidence presented and considered by the trial court?

2. Can a requestor show that the trial court abused its discretion where the trial court grouped records at the invitation of both parties, explicitly considered all relevant aggravating and mitigating factors, and awarded daily penalties at an amount originally proposed by the requestor and well within the range of awards in other cases?

3. Can a requestor show that the trial court abused its discretion in denying reconsideration where he fails to support his assignment of error with any argument in his brief, and where the court explicitly found that the handful of documents he proffered in support of reconsideration would not have changed the court's ruling?

4. Did the trial court abuse its discretion in awarding a requestor half of his incurred attorney fees where the requestor *explicitly asked for a 50% fee award*, and where the trial court independently found that a 50% award was appropriate, given the legal issues, the facts of the case, and the results obtained?

III. COUNTERSTATEMENT OF THE CASE

A. Background

Hood has been challenging the non-renewal of his District teaching contract since he was dismissed in 2010. CP 219 (FF 5).[1] Initially Hood

[1] The trial court's December 15, 2014 Order contains over seventy findings of fact and conclusions of law. CP 218-42. Hood has not

arbitrated the District's decision to fire him. FF 5. In connection with that February 2011 proceeding, the District provided Hood's union with the contents of his personnel file and another 2,404 pages of Bates-numbered documents. FF 21. The arbitrator, the Honorable Judge Alsdorf, upheld the District's decision. FF 5; CP 2846-2958. Hood then began filing lawsuits against the District.[2] FF 6.

Following the arbitration and beginning in June 2011, Hood made a series of public records requests of the District. FF 8, 22. In response to Hood's requests, the District produced thousands of records to him. FF 9. Hood alleges that the District's searches for records were inadequate and that some responsive records were not timely produced. FF 9. The

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challenged the majority of the trial court's findings, making them verities on appeal. *Courchaine v. Commonwealth Land Title Ins. Co.*, 174 Wn. App. 27, 34, 296 P.3d 913 (2012); *Buck Mountain*, 174 Wn. App. at 713-14 (citing *Inland Foundry v. Labor & Indus., 106 Wn. App. 333, 24 P.3d 424 (2001)*). Unless otherwise noted, the District's counterstatement of facts are drawn from the trial court's findings, which are cited as "FF".

[2] Hood's first suit alleged that the District and Hood's Union conspired to select the arbitrator in violation of the collective bargaining agreement. The United States District Court for the Western District of Washington dismissed that case with prejudice. FF 6.

Hood's second federal lawsuit alleged, among other things, that the District's conduct in pre-arbitration discovery denied his constitutional right to access the courts in violation of 42 U.S.C. § 1983. This case was also dismissed. FF 7. Hood appealed the district court's summary judgment ruling to the Ninth Circuit Court of Appeals, which affirmed. *See Hood v. South Whidbey School District*, No. 14-35256, 605 Fed. Appx. 665; 2015 U.S. App. LEXIS 8563 (9th Cir., May 22, 2015).

reasonableness of the District's searches and related issues are the subject of this lawsuit. FF 8.

B. Hood's Records Requests

The record in this case contains dozens of Hood's record requests. FF 22, 23. These were cataloged by the trial court, along with the District's initial responses and dates of its record productions. *See* FF 22, 23, 25, and 26. As of August 5, 2011, two months after he started, Hood had already made 25 different requests of the District. FF 22.

Hood's requests were not only numerous, but also extremely broad. FF 23. He essentially requested any District record of any kind having anything to do with him from 1999 to the present, as well as numerous other District records. For example, his central request in July 2011 asked for "[a]ny records about [Hood] made by any current or former district administrators and/or board members dating from September 1999 to the present." *Id.* Likewise, on November 1, 2011, Hood requested "all District records about, mentioning, referring to, or regarding Eric Hood or any member of his family from July 5, 2011 to the present and, if any exist, any previously undisclosed records about, mentioning, referring to, associated with or regarding either Eric Hood or his non-renewal or both dating from September 1999 to the present." *Id.*

C. The Lawsuit

Hood filed this action on June 8, 2012 in Island County Superior Court. Op. Br. at 16. Throughout the course of the lawsuit, he continued to make records requests, including seven in 2012 (June 19, September 11, October 4, October 10, October 16, October 18, and November 15); two more in 2013 (January 24 and January 28); and another in 2014 (January 30). FF 22. A year after filing, Hood amended his complaint to add allegations regarding his subsequent requests. CP 2729-66. Hood had contact with the District throughout this period, and requested records from a variety of other public agencies. FF 22. With the assistance of counsel, before trial Hood narrowed the claims in his final amended complaint to those sounding under the PRA. CP __ (Sub 67).

For some exempt documents, the District originally asserted the deliberative process exemption, but later revised its logs to assert the work product and attorney-client privilege exemptions for the withholdings. FF 39. Hood requested *in camera* review of some of the records the District withheld from him as exempt. FF 39; *see also* CP __ (Sub 123/124). As to those records the court reviewed *in camera* at Hood's request, it determined that they had *all* been appropriately treated. FF 39; CP __ (Sub 124). Hood did not appeal that ruling. CP 1-39.

The parties prepared cross motions for judgment on Hood's

remaining claims, and the trial court heard the matter on June 27, 2014. FF 2. The court reviewed the District's actions in responding to Hood's requests *de novo* under RCW 2.56.550(3). FF 1. At hearing, the parties specifically agreed that the case was appropriately decided on the basis of affidavits pursuant to RCW 42.56.550(3). FF 2. Thus, with the parties' consent, the court conducted the trial on the basis of the submitted papers, balanced and weighed the evidence, and resolved all material factual issues and issues of credibility, as it would if it had heard oral testimony. FF 2, 73.

D. The District's Searches

The process of responding to Hood's dozens of requests for records is set out in testimony from District witnesses, including Superintendent Jo Moccia; Brian Miller, District Director of Facilities and Operations; District attorneys Laura Clinton and Carlos Chavez; Technology Operations Manager Thomas Atkins; and Dan Poolman, the Assistant Superintendent of Business, among other record evidence. FF 29. Before the court, the District acknowledged that, despite its efforts, its searches did not immediately uncover every document responsive to Hood's July and November 2011 requests and that multiple productions occurred before those requests were completely fulfilled. FF 62.

District witnesses testified, and the trial court found, that the

District is relatively small, serving approximately 1,400 students in its school programs at the time of trial. FF 24.[3] The District's student enrollment has steadily declined in the last 13 years. This decreased enrollment, together with state budget cuts, resulted in a 15% drop in the District's budget during the last six years. The District has approximately 150 employees, seven of whom work in the District's main administrative offices. The District does not have a dedicated full-time public records officer; the Superintendent is designated as the records officer. FF 24.

District witnesses also testified in detail about the process of receiving, reviewing, and responding to Hood's requests. Superintendent Moccia testified about the dozens of requests Hood made of the District and how she directed District staff to search for responsive records. CP 2811-2820 at ¶¶ 15-57; CP 420-28. Moccia specifically refuted Hood's speculation that she failed to supervise the review and production process, and addressed his various allegations about other records requests. CP 418-20 at ¶¶ 3-6; *compare* Op. Br. at 30 (mischaracterizing testimony).

Likewise, the District's technology director testified about the many searches he conducted for electronic records. CP 2794-99 at ¶¶ 4-

[3] Hood challenges FF 24, but only as part of his claim that the court should not have considered the District's size as a mitigating factor. *See* Op. Br. at 60-61. Hood does not assert that FF 24 is not supported by the record, nor could he credibly do so. *See* CP 2808-10 at ¶¶ 6-10.

19. District counsel testified in detail about aspects of the collection and review of records, and the creation of exemption logs to track those that were withheld. *See* CP 2864-67 at ¶¶ 3-11; CP 3051. Individual staff confirmed that they searched their files as appropriate in response to Hood's requests. *See., e.g.*, CP 718-20 at ¶¶ 6-16 (Poolman); CP 3046 at 35:5-15; CP 3044 at 29:8-18; CP 3042 at 18:10-21:12 (Terhar).

District witnesses repeatedly confirmed under oath that they fully intended to provide Hood with all responsive records, that they conducted searches with diligence and in good faith, that none of them had any personal motivation to withhold materials from him, and that any minor errors in locating and producing records were a result of inadvertence and not an intent to interfere with Hood's access to public records. *See* CP 2799 at ¶ 10 (Miller) ("I have conducted all searches to the best of my ability, I have pulled and reviewed all responsive documents located by my searches, and I have worked with the District Superintendent and its counsel to provide all records located."); CP 2820 at ¶ 47 (Moccia); CP 728 at ¶ 13 (Atkins); CP 722 at ¶ 16 (Poolman).

The trial court found the District's witnesses credible, and its searches reasonable. *See e.g.,* FF 28 ("After due consideration of all of the evidence in this case, the Court concludes that the District's searches for records in response to Hood's requests were reasonable. The District's

searches were reasonably calculated to uncover all relevant documents"); FF 35 ("The District engaged in earnest, good faith, efforts to respond to Hood's requests. Its searches for records were reasonable and calculated to uncover all relevant documents. … The testimony of the District witnesses on these issues is credible, and Hood's contrary allegations lack record support."); *see also* FF 31. Hood takes issue with the trial court's findings that the District's searches were reasonable and its related credibility determinations. *See* Op. Br. at 2 (issue 1, challenging FF 28, 30-33, 35 & 53).

E. Grouping

Before the trial court, both parties recognized that it was appropriate for the court to group various alleged violations together where more than one document has not been produced. FF 36; FF 19. Hood suggested nine separate groups of records, and the District agreed that two of them were appropriate. FF 36.[4]

Hood's proposed Group 1 consisted of the District's untimely productions related to his requests of June and July 2011. The court found that this grouping was appropriate. FF 37. Hood's proposed Group 5 addressed documents that were untimely produced in response to his

[4] Hood challenges the trial court's FF 36, but presumably just the portion concluding that only two of his nine groups were appropriate. *Compare* FF 37 and 41 (unchallenged findings accepting Groups 1 & 5).

November 1, 2011 requests, and the court agreed that this grouping was also appropriate. FF 41.

The court rejected Hood's proposed Group 2 (records produced after Hood filed the lawsuit), as encompassed by Group 1. FF 38. In rejecting Group 2, the court found no legitimate basis for increased or duplicative penalties based on the fact that records were produced after litigation was initiated. FF 38. Likewise, the court rejected Hood's proposed Group 3 (exempt documents that the District initially withheld under the deliberative process exemption), finding no legal basis to subject these exempt documents to penalties. FF 39.

Hood proposed Group 4 to address documents that he alleged the District was silently withholding from him. The court found no evidence supporting Hood's speculation that such documents even existed. FF 40. As the court found, to the extent they existed and were untimely produced, any such documents were included in Groups 1 and 5 and fully addressed by the treatment of those groups. FF 40.

Likewise, the trial court rejected Hood's argument that certain documents he requested were of public importance, and merited increased penalties in his proposed Group 6. FF 42. In addressing this grouping, the court explicitly found that Hood's assertions were largely without merit, and that any such records were subsumed in Groups 1 and 5 and were

fully addressed by those groups. FF 42.

Hood's proposed Group 7 sought penalties for the alleged failure to produce metadata. FF 43. The trial court found that the District included the metadata reasonably available to it and of the type explicitly requested by Hood, such that the District complied with Hood's requests for metadata. FF 44. Further, Hood did not contest, and the court found, that the server routing information Hood identified as the metadata "missing" from District email was immaterial to the actual substantive content of the records. FF 43.

Hood's proposed Group 8 related to the alleged late production of a CD-ROM labeled with the date 7/27/11, which Hood undisputedly received on February 28, 2014. FF 45. District witnesses testified that they believed that the CD had already been produced to Hood on August 16, 2011. FF 45; *see also* CP 2865-67 at ¶¶ 8-10. The court found that, regardless of whether Hood received the CD itself for the first time in August 2011 or February 2014, its contents were either produced to him as part of previous productions or were exempt. FF 45. Furthermore, the court found that any of the responsive records on the 7/27/11 CD were appropriately accounted for within Groups 1 and 5, and declined to treat the CD as a separate group. FF 45.

Finally, Hood's proposed Group 9 encompassed his remaining

allegations that the District violated the PRA, primarily his claim that the District charged him to view records. FF 46. Hood requested a large set of student attendance records, which the District located and was prepared to make available to him. FF 47. However, the records consisted of approximately 5,000 hard copy originals and required redaction of identifying student information from every page before they could be produced under RCW 42.56.230(1). FF 47. In an attempt to accommodate Hood, the District made an exemplar of the redacted student records. *E.g.*, CP 872. After reviewing the exemplar, Hood narrowed the scope of his request and the District prepared an installment of redacted attendance records for his review. FF 47. The District did not charge Hood to review that installment, but did take the position that if Hood did not wish to pay for copies of the installment after he had the chance to review it, the District would close the request. FF 47.

Hood paid $11.10 for copies of the first installment of 74 redacted attendance records. FF 48. Hood acknowledged to the court that he came to an agreement with the District avoiding further copying, and he did not request further installments. FF 48; *see also* CP 1190 (correspondence from Hood's prior counsel seeking compromise to avoid the "problematic" scope of work necessary to redact 5000 student records); CP 1189 (Hood narrowing request to 720 records for 2009-10 only); and

CP 1187 (Hood further narrowing request to 656 weekly attendance sheets); CP 1185 (District makes first installment of 66 pages of redacted records available for inspection; copy of installment estimated to cost $9.90); *see also* CP 426-28 (Moccia). Given these facts, the court found that "It would be an exaltation of form over substance to impose a penalty against the District where the records were prepared at Hood's request, where he voluntarily paid the $11.10, and where he reached an agreement with the District obviating the need for additional installments." FF 48.

Hood asserts that the trial court's refusal to adopt his Groups 2, 3, 4, 6, 7, 8, and 9 was an abuse of discretion. *See* Op. Br. at 2 (issue 3, challenging FF 36, 38-40, 42, & 45), and *id.* at 44-61.

F. Yousoufian Factors

Before the trial court, both parties asserted that various mitigating and aggravating factors applied to this case. FF 49. The trial court examined each in turn. FF 50-61.

First, Hood asserted that the lack of proper training and supervision of District personnel was an aggravating factor. FF 50. Before the trial court, the District conceded that Superintendent Moccia, the District's designated records officer, and Brian Miller, the District's Technology Manager, had received no formal training in PRA matters. FF 50. Moccia largely relied on other District personnel and outside counsel

to respond appropriately to Hood's numerous requests. FF 50.[5]

On the other hand, Moccia began her position with the District on July 1, 2011, at the same time that Hood's numerous requests began. FF 51. She had previously served as a superintendent and educator in the New York state public school system for over 25 years, and had experience in dealing with public records requests under New York's public records statutes. Because of her lack of experience with Washington's specific PRA, however, she requested assistance from the District's attorneys in responding to Hood's requests. FF 51.

The trial court found that the District's size and modest resources, as well as its use of legal counsel, were "proper mitigating factors for the District's own lack of training." FF 51 (*see also* FF 50, "Because of budget cuts, the District's professional development and training budget has been significantly reduced, and available resources have been directed toward meeting the educational needs of District students."). Accordingly, the trial court concluded, after explicitly considering of all the evidence on the issue, to increase the penalty that would otherwise have been imposed but for the lack of training of District personnel. FF 52. The court

[5] Here again, Hood assigns error to FF 50 and FF 51, but does not argue that the findings are not supported by substantial evidence; rather, he challenges the weight given to these facts by the trial court in determining penalties. *See, e.g.*, Op. Br. at 60.

incorporated this increase in the per-day penalty amount it ultimately assessed against the District. FF 52.

Second, Hood asserted that the District's explanations for instances of noncompliance were unreasonable, and that this is an aggravating factor that should increase the penalty awarded. FF 53. The court, however, found the District's explanations for particular oversights in its searches and productions reasonable indeed fully understandable in light of the numerous broad and overlapping requests with which it was faced. FF 53. Though the District acknowledged that it inadvertently failed to provide certain records, the court did not find such instances of noncompliance to constitute an aggravating factor under the facts of this case. FF 53.

Third, Hood asserted to the trial court that the District's conduct was negligent, reckless, wanton, taken in bad faith, or represented intentional noncompliance with the PRA, so as to increase the penalty, relying on *Francis v. Dept. of Corrections*, 178 Wn. App. 42, 313 P.3d 457 (2013). FF 54. Hood *conceded* that there was no evidence of willful agency dishonesty, CP 912, and the trial court found no record support for the contention that the District acted with gross negligence. FF 54. To the contrary, the trial court found that the record as a whole showed that the District did, in fact, act in good faith at all times, was not negligent, and provided reasonable explanations for its actions in response to Hood's

requests. FF 54.[6]

Fourth, Hood alleged that that he suffered actual personal economic loss resulting from the District's alleged misconduct and that this should be considered an aggravating factor. FF 55. The trial court found this argument, which was based on a $1,500.00 sanction the federal court imposed on Hood for his baseless motion practice, "frivolous." FF 55-56.[7] The federal court orders in the record show that "United States District Court Judge Richard A. Jones, in a nine-page decision and order entered July 31, 2013, sanctioned Hood for filing 'two motions with baseless accusations of fraud and perjury.'" FF 56. The court carefully reviewed Hood's remaining allegations about economic loss and the federal court action and found them meritless, specifically noting that Hood's admission that District documents show no pretextual intent to fire him was in fact a tacit admission that his federal court motions were not well grounded in fact. FF 57; *see also* CP 345 (Hood). Hood does not

[6] Hood specifically challenges the evidentiary support for the trial court's finding that the District "devoted thousands of hours of staff time in responding to Hood's record requests." FF 54; Op. Br. at 43. The District acknowledges that the record reflects that the District spent *hundreds* of hours of staff time and *thousands* of dollars in response to his repeated requests. CP 2814 at ¶ 27 and CP 2820 at ¶ 45 (Moccia).

[7] Hood does not assign error to this finding, or any of the other findings related to his assertions that the federal court sanctioned him as a result of District conduct. *See* Op. Br. at 2. Nor would such a challenge have any merit. *See* CP 750-58 (federal order).

challenge any of those findings on appeal. *See* Op. Br. at 2 (no error assigned to FF 55-57).

Fifth, Hood claimed that his requests concerned matters of public importance such that an aggravating factor should apply. The trial court found that this assertion was not supported by the record. FF 58. To the contrary, the trial court found that the overwhelming majority of Hood's requests were directly related to his personal challenge to his termination. Those few requests that involved ostensibly public matters were tied to the work of his former supervisors and his attempts to discredit them. FF 58.

The trial court found nothing in the record to indicate that the interests of the public were advanced by Hood's requests. FF 59. Rather, the court found it "patently obvious from the record as a whole that Hood was seeking information that would help him in his challenges to his nonrenewal and his lawsuits and/or that would discredit the District and its employees in some manner." FF 59. Thus, the court concluded that this aggravating factor either did not apply, or applied only minimally, in the present case, and that it had fully accounted for such issues in assessing an appropriate penalty against the District. FF 59.

The trial court found that several mitigating factors applied to the case, including a lack of clarity in the PRA requests. FF 60. Hood made multiple, broad, overlapping, and occasionally duplicative requests.

Because of this, it was virtually inevitable that the District would miss some of the records in its initial searches. FF 60. Similarly, the court found that the District's reasonably prompt responses to the majority of Hood's requests and its good faith efforts to comply with the PRA, including the retention of counsel to assist in responding, were mitigating considerations. FF 61.

With the exception of his frivolous arguments on economic loss, Hood challenges the trial court's consideration of mitigating and aggravating factors as an abuse of discretion. *See* Op. Br. at 2 (issue 4, challenging FF 24, 40, 48, 50-54, 58-61, 64-66, 68, & 71-72), *id.* at 37-44.

G. The Penalty Calculation

Hood sought over $390,000 in penalties for the District's failure to immediately locate and produce every record responsive to his requests. FF 62. The District acknowledged that some penalties were appropriate for the delayed production of the records included in Hood's proposed Groups 1 and 5. *Id.* As to Group 1, Hood proposed a penalty of $5 per day, but suggested a multiplier of 12, for a total of $60 per day. Hood subsequently revised his request to compound the $5 per day penalty by a multiplier of 15, representing each production of documents allegedly responsive to his July 2011 requests, for a total of $73,350.00. FF 63.

The court declined to adopt Hood's proposed multipliers of either

12 or 15. FF 64. Rather, based upon its review of the entire record, the court found that a $5 per day penalty was appropriate and provided adequate incentive to induce future District compliance with the Public Records Act. FF 66. Further, the trial court explicitly found that this per-day penalty was sufficient to address any and all issues related to the District's belated production of this material, as well as any other non-compliance with any provision of the Act that related to these documents and any relevant aggravating factor. Id., FF 68. The court accepted Hood's argument as to the relevant time period for the calculation of the penalty. FF 67.

Likewise, Hood proposed a multiplier of 5, which he later revised to 12, for materials in Group 5 (consisting of all records belatedly produced in response to his November 1, 2011 requests). FF 69. The court rejected Hood's proposed multiplier and imposed a penalty of $5 per day for records in this group. *Id.* Again, the court found that the penalty chosen provided adequate incentive to induce future District compliance and that it was sufficient to address any and all issues related to the District's belated production of this material, as well as any other PRA compliance issue or aggravating factor related to these documents. FF 72.

Accordingly, the court awarded Hood a total of $7,150.00 in penalties, comprising $4,890.00 for records responsive to Hood's requests

of June and July 2011 and $2,260.00 for records responsive to the November 1, 2011 requests. FF 72. The court explicitly found that this total penalty award addressed all issues related to the District's conduct and all of Hood's arguments that had any merit whatsoever, including all of his assertions about noncompliance, belated record productions, lack of training, and any other relevant factor. FF 68, 72.

Hood challenges the trial court's calculation of penalties as an abuse of discretion. *See* Op. Br. at 2 (issue 3, challenging FF 67-72).

H. The Trial Court's Orders

On September 15, 2014, the court issued a Memorandum decision summarizing its rulings. FF 3; CP__ (Sub 126). Consistent with that Memorandum, the District proposed findings of fact and conclusions of law. Hood raised specific objections to several proposed findings and conclusions, which written objections were presented to the Court on November 21, 2014. FF 3; *see also* CP __ (Sub 136). At that hearing, the trial court heard from counsel, reviewed in detail every objection raised to the proposed findings and conclusions, and sustained or overruled each objection as appropriate. FF 3. Thereafter, on December 15, 2014, the court entered its Findings and Conclusions. CP 218. In so doing, the court explicitly noted that it had carefully reviewed the voluminous record, and considered the submitted declarations, documentary evidence,

briefing, and all arguments of counsel. FF 2, 74.

Regarding its findings, the trial court noted, "These Findings and Conclusions are the product of the Court's extensive review of the record, including the testimony and evidence and the arguments and admissions made at hearing. Although the evidence related to some factual issues is conflicting, the Court has carefully weighed all of the evidence in reaching its Findings. Each of the Court's Findings is based on a review of all the evidence and is supported by the preponderance of the evidence. No one finding is essential to the Court's conclusion as to the appropriate penalty in this case." FF 73.

The court denied Hood's subsequent motion for reconsideration in a detailed memorandum and order. CP 49-61; CP47-48.

Hood filed a request for attorney fees after the trial court's judgment was entered. CP 132-36. The parties stipulated that the trial court should only consider fees and costs incurred prior to January 7, 2014. CP 2791-92; CP 42 at ¶ 5; *see also* Op. Br. at 17. Hood's total fee request for that period was $10,320.00. CP 42 at ¶ 6. In his motion, Hood asserted that he had "prevailed on approximately 50% of his claims although he did not get the penalties he sought." CP 132. The trial court, after reviewing all the relevant factors, reduced the total invoiced fees by 50% and awarded Hood $5100.00. CP 40-46. Hood filed a satisfaction of

the judgment (for both the judgment and the fee award), on 5/8/2015. CP __ (Sub 177).

Hood appealed the trial court's rulings in spring 2015. CP 1.

IV. ARGUMENT

In this case, the trial court correctly interpreted and applied the relevant law. It undertook an extensive and thorough deliberative process, explicitly considering all the materials and argument presented, weighing the evidence and making credibility determinations with the parties' consent. Finding that the District had conducted reasonable, appropriate searches in response to Hood's dozens of requests, the trial court explicitly considered all relevant *Yousoufian* factors and articulated its reasoning with respect to each one, grouped similar records at the invitation of both parties, and imposed a daily penalty that Hood himself suggested. The trial court issued a detailed memorandum decision and -- following additional hearings and argument -- entered comprehensive findings and conclusions that awarded Hood thousands of dollars in penalties. The trial court acted well within its discretion under the statute and its award is within the range of penalties awarded in other cases.

Hood accepted the benefit of the trial court's ruling and this appeal is procedurally barred. If the Court does reach the merits, most of the trial court's factual findings are verities on appeal because of Hood's failure to

properly challenge them; those findings that he did challenge are subject to deferential review. In light of the detailed and credible testimony in the record, Hood cannot show that the trial court's finding that the District's searches were reasonable is not supported by substantial evidence. Instead, he does little more than ask this Court to reweigh the evidence presented below; this is woefully insufficient. Likewise, Hood's disagreement with the court's exercise of its discretion in grouping violations, considering alleged aggravating factors, and awarding a penalty amount do not present adequate grounds for overturning the trial court's thoughtful determinations. This appeal should be dismissed.

A. The Acceptance of Benefits Rule Bars This Appeal.

As a threshold matter, Hood's acceptance of payment in satisfaction of the judgment below mooted this appeal. Under RAP 2.5(b), a party cannot "accept the benefits of a trial court decision" and simultaneously appeal unless one of four conditions applies:

> A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision **only** (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal

> separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.

RAP 2.5(b)(1) (emphasis added). Where none of these conditions apply, acceptance of payment in satisfaction of the judgment moots the appeal. *Buckley v. Snapper Power Equip. Co.*, 61 Wn. App. 932, 940-42, 813 P.2d 125 (1991). The intent to waive is generally irrelevant. *Id.* at 942.

Hood accepted all the benefits of the trial court's award and none of the above conditions are met. CP __ (Sub 177). Of the four exceptions listed in RAP 2.5(b), only the third (that the appealing party will be entitled to the accepted benefits regardless of the appeal) is relevant. That exception does not apply because the penalties in a PRA case are a matter of trial court discretion; there is no guarantee that Hood will be entitled to at least the same amount of money he has already accepted.

For example, in *Buckley*, a minor child accepted payment of a trial court judgment but simultaneously attempted to appeal. The court of appeals rejected her argument that RAP 2.5(b)'s third condition applied, since "a trial on remand could result in a defense verdict." 61 Wn. App. at 940-41. Here, if this Court were to reverse, the most likely remedy would be remand and a new hearing, which could result in a lower award (or no award at all).[8] This level of uncertainty precludes the application of RAP

[8] While Hood asks this Court to recalculate penalties, remand would be a

2.5(b),[9] and the appeal may be dismissed on these grounds alone. *Buckley*, 61 Wn. App. at 940-42.

B. The Trial Court's Findings That The District's Searches Were Reasonable Are Amply Supported by the Record and Hood Cannot Simply Reargue the Evidence to this Court.

Hood assigns error to the trial court's factual findings that the District's searches were reasonable and its witnesses credible. *See* Op. Br. at 2. As a threshold matter, he seriously misapprehends his burden in making such a challenge, apparently believing that he is free to relitigate factual issues before this Court. *See* Op Br. at 17-18 (asserting that appellate courts stand in the same position as the trial court, and that "[a]ppellate courts are not bound by a trial court's factual findings regarding an agency's PRA violations."). He is mistaken.

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more appropriate remedy. *Compare* Op. Br. at 61 with *PAWS*, 125 Wn.2d at 247 (remanding to trial court for further proceedings); *see also* Op. Br. at 64 (seeking remand for fee calculation).

[9] This uncertainty contrasts sharply with matters in which RAP 2.5(b)'s exception applied. *Compare Sherry v. Financial Indem. Co.*, 132 Wn. App. 355, 362, 131 P.3d 922 (2006) (no waiver because both parties agreed that appellant was entitled to the full amount of the judgment regardless of the outcome, and the only issue on appeal was whether appellant was entitled to more); *Hamilton v. Huggins*, 70 Wn. App. 842, 848, 855 P.2d 1216 (1993) (appellant was entitled to the full amount of the judgment regardless of appellate outcome; only appeal issue was amount of attorneys' fees); *Scott v. Cascade Structures*, 100 Wn.2d 537, 540-41, 673 P.2d 179 (1983) (appellant was entitled to the full amount of the judgment regardless of appeal result; only issue was whether appellant was entitled to more).

To the contrary, the appellant carries a heavy burden when challenging a trial court's factual findings, as they are presumed correct, and the party claiming error must show that a specific finding of fact is not supported by substantial evidence. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990). The trial court's factual findings are given deference even where a case was decided entirely on documentary evidence. *State v. Kipp*, 179 Wn.2d 718, 727, 317 P.3d 1029 (2014); *In re Yakima River Drainage Basin*, 177 Wn.2d 299, 340, 296 P.3d 835 (2013), as corrected (May 22, 2013); *Dolan v. King County*, 172 Wn.2d 299, 310, 258 P.3d 20 (2011) (citing *In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003)). In Washington, the general rule is that "where competing documentary evidence must be weighed and issues of credibility resolved, the substantial evidence standard is appropriate." *Kipp*, 179 Wn.2d at 727.

The cases on which Hood relies are not to the contrary, as they do not address trial court findings made after weighing disputed facts and testimony. *See Lindeman v. Kelso School Dist. No. 548*, 162 Wn.2d 196, 201, 172 P.3d 329 (2007) (show cause ruling on undisputed facts reviewed *de novo*); *Progressive Animal Welfare Soc'y (PAWS) v. University of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1995) (reviewing summary judgment ruling made on undisputed facts) (appellate court may

review record *de novo* if "the trial court has not seen or heard testimony requiring it to assess the credibility… of witnesses, and to weigh the evidence, nor reconcile conflicting evidence").

Here, the trial court made credibility findings, weighed evidence and resolved conflicting testimony, all with the express consent of the parties.[10] FF 2, 73. As such, substantial evidence is the correct standard of review for any factual finding that Hood challenges, primarily the reasonableness of the District's searches.[11] *Dolan, 172 Wn.2d at 310;*

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[10] Thus, while the cross motions were originally styled as motions for summary judgment, by the time of hearing the parties explicitly agreed that the court could try the case – including weighing evidence and determining credibility – on the papers, and that an evidentiary hearing was not necessary. This agreement is reflected in the Report of Proceedings, which Hood has not provided to the Court. *See* RAP 9.2(b) ("A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review. . . ."). For this reason, any suggestion that the trial court acted improperly in conducting the proceedings should be rejected. *Nelson v. Schubert*, 98 Wn. App. 754, 764, 994 P.2d 225 (2000) ("[Appellant] has the burden of presenting an adequate record, and bears the consequences of our inability to conduct a full review, which is rejection of his challenge."); *State v. Wade*, 138 Wn.2d 460, 464-66, 979 P.2d 850 (1999) (appellant's burden to provide an adequate record for review of each issue raised on appeal); *Dash Point Village Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 612, 937 P.2d 1148 (1997).

[11] The appellate court may review only the findings of fact to which the appellant properly assigns error. *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 940, 845 P.2d 1331 (1993). Any finding not specifically challenged is a verity on appeal. *Courchaine v. Commonwealth Land Title Ins. Co.*, 174 Wn. App. 27, 34, 296 P.3d 913 (2012); *see also* RAP 10.3(g); *Fuller v. Emp't Sec. Dept. of State of Wash.*, 52 Wn. App. 603, 605-06, 762 P.2d 367 (1988) (treating findings

Kipp, 179 Wn.2d at 727. Hood must show that there is no substantial evidence to support each challenged finding, *i.e.*, that no rational, fair-minded person could conclude that the fact is true. *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 720, 281 P.3d 693 (2012); *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012).

1. The Trial Court's Findings that Credible Witness Testimony Established Reasonable Searches Are Supported By Substantial Evidence.

Washington public agencies must conduct reasonably adequate searches in response to records requests. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011); *Bartz v. Department of Corrections Disclosure Unit*, 173 Wn. App. 522, 533, 540 (2013) (affirming dismissal of action under CR 12(b)(6) where DOC conducted reasonable records search, despite lack of assistance from requestor); *compare Francis v. Washington Department of Corrections*, 178 Wn. App. 42, 63, 313 P.3d 457 (2014) (inadequate search where DOC spent no more than 15 minutes on request, failed to check any usual record storage locations, and offered no explanation justifying perfunctory search).

The touchstone for evaluating the adequacy of an agency's search for public records is reasonableness. *Neighborhood Alliance*, 172 Wn.2d

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of fact as verities because they were not set forth in appellant's brief).

at 720 ("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."). This is inherently a fact-specific inquiry: "What will be considered reasonable will depend on the facts of each case." *Id.* Agency testimony describing searches that were reasonably expected to produce the material requested is sufficient to demonstrate reasonableness. *Lazaridis v. U.S. Dep't of State*, 934 F. Supp. 2d 21, 31 (D.D.C. 2013) (agency demonstrated reasonable search where declarant described searches that located 212 responsive documents); *Brown v. U.S. Dep't of Justice*, 734 F.Supp. 2d 99, 107-08 (D.D.C. 2010) (FBI used search methods that could be reasonably expected to produce the information requested, and were therefore adequate, where it searched and produced or withheld as exempt all responsive documents it located); *see also McKinley v. Bd. Of Govs of the Fed. Reserve System*, 849 F. Supp. 2d 47, 56 (D.D.C. 2012) (process of conducting adequate search requires case-specific exercises of discretion and administrative judgment that courts should not micromanage).

Here, the record details the huge outlays of staff and attorney time expended to identify, locate, and produce records to Hood. *See, e.g.*, CP 418-28; CP 718-20; CP 722; CP 728; CP 2794-99; CP 2811-2820; CP 2864-67; CP 3042 at 18:10-21:12; CP 3044 at 29:8-18; CP 3046 at 35:5-

15; CP 3051. The District's searches were reasonably calculated to collect all responsive public records. *Id.* With very few exceptions, the District's searches did in fact locate responsive documents, and it disclosed (either by exemption log or production) the responsive records it found. *See, e.g.*, CP 2811-14 (Moccia, describing searches and productions). The trial court found credible the testimony of District witnesses about the scope and extent of the searches. *See* FF 35 (the District's "searches for records were reasonable … The testimony of the District witnesses on these issues is credible, and Hood's contrary allegations lack record support."); *see also* FF 31 (finding District witnesses credible).

Hood takes issue with these findings. Op Br. at 2 (assigning error); at 21 (referring to "incredible testimony", "unreliable testimony", and the "false promise" of District witnesses); *see also id.* at 45, 49, 49 n.26, 58 (disparaging District testimony and asserting own credibility). But merely asserting that District witnesses were not credible and arguing that the trial court should have given his own testimony more weight does not begin to address Hood's burden here. A reviewing court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. *See Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002); *Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wn. App. 702, 713-14, 308

P.3d 644 (2013). "When the determination of the particular issue rests upon the credibility of the witnesses or the weight of the evidence, the trial court has vast discretion and the appellate courts properly show considerable deference." *State v. Graciano*, 176 Wn.2d 531, 551, 295 P.3d 219, 229 (2013) (Chambers, J., concurring in dissent).

Hood's invitations to this Court to reweigh the evidence[12] misconstrue the role of the appellate court and his burden. *See, e.g., Green v. Normandy Park Comm'ty Club*, 137 Wn. App. 665, 689, 151 P.3d 1038 (2007) (reviewing court may not substitute its judgment for that of the trial court even if it might have resolved disputed facts differently). Likewise, Hood's repeated attempts to treat his summaries of his own allegations (in the form of appendices, tables, and worksheets) as evidence should be rejected. *E.g.*, Op. Br. at 3 n.2; 5 n.4; 6 n.6; 15. Before the trial court, the District repeatedly demonstrated that these compilations contained serious inaccuracies. *E.g.*, CP 771-72; CP 810; CP 3051; *see also* CP 385 (Hood reply, acknowledging "inadvertent" "irrelevant" inclusions in exhibit); CP 387 (admitting that HCL records submitted as evidence in support of claims were not actually responsive to requests); CP 387 n. 5 (inadvertent duplicates); CP 340-42 (multiple "corrections" to

[12] Hood virtually ignores the trial court's findings, presenting instead selective portions of the record most favorable to him. This does not meet his burden on any point.

prior submissions); *see also* Op. Br. at 25, 28, 31, 32, 52 (referring Court to Hood's "RDW", a document Hood created and which he acknowledged contained multiple errors); CP 877; CP 343 (errors). Indeed, Hood failed to include in the record his corrected version of the RWD, the accuracy of which is not conceded here. *See* CP ___(Sub 113); *see also* CP ___ (Sub 112) (additional errata to Hood's trial court submissions).

2. The Trial Court Considered Hood's Other Allegations About the District's Searches and Properly Found That They Did Not Establish Unreasonable Agency Conduct.

Hood offers the same arguments he presented below regarding the reasonableness of the District's searches. His request that this Court substitute its judgment for that of the trial court is inappropriate. *Green v. Normandy Park Comm'ty Club*, 137 Wn. App. at 689.

For example, Hood continues to argue that the mere fact of later productions demonstrate that the District's original searches were *per se* unreasonable. Op. Br. at 21, 42. But this position is flatly contrary to Washington law: "the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found." *Neighborhood Alliance,* 172 Wn.2d at 720; *see also Bartz*, 173 Wn. App. at 533, 540 (affirming dismissal of action where DOC conducted reasonable search in response to requests, but requestor asserted that relevant emails were not located);

see also Zemansky v. U.S. E.P.A., 767 F.2d 569, 571 (9th Cir. 1985); *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (issue is not whether there might exist any other documents responsive to the request, but rather whether the search for records was reasonable).

As the trial court found, "Given the comprehensive scope of Hood's requests and the relative lack of resources with which to respond to them, it is not surprising that the District did not produce some of the records in a timely manner. The fact that some documents were not produced within the time periods for responses does mean that the District's searches were unreasonable." FF 30; *see also, e.g., Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2nd Cir. 1994) (requestor speculation does not overcome agency evidence of adequate and reasonable search). Hood's related suggestions that the District should be faulted for producing records after he filed suit, Op. Br. at 1, 20, are particularly meritless in light of his many post-filing requests. FF 22.

Likewise, Hood alleges that the District failed to search Secretary Terhar's email account for relevant records. *See* Op. Br. at 21. But, as the trial court found, this unsupported allegation is contrary to Ms. Terhar's deposition testimony that if a request pertained to material that she might have on her computer, she searched for it. CP 3046 at 35:5-15 (Terhar); *see also* CP 3044 at 29:8-18; CP 3042 at 18:10-21:12 (Terhar describing

her searches of her work computer). The District conceded that some documents that were originally sent to or from Terhar were not located by the District. But as Brian Miller testified, this was because the emails were either not responsive to search terms or not archived and retained on the District's new email system. CP 713-14.[13] The court found the testimony of the District witnesses on this issue credible, and that Hood's contrary allegations lacked record support. FF 31.

As he did to the trial court, Hood also argues that the District should have directed Sue Raley to search for records, merely because he listed her name in one of his many requests. Op. Br. at 22, n. 17. But a requestor is not entitled to dictate to an agency the potential record custodians from whom it must collect records, and Raley never claimed to have any responsive records.[14] CP 3053. This is hardly surprising; Raley

[13] Hood's implication that the District knowingly allowed its email system to destroy responsive records rather than produce them to him is not supported by any evidence. *Compare* Op. Br. at 22, 37 with CP 2796-97; CP 711-12 (Miller). His related claims that the District did not comply with retention schedules are irrelevant. *Compare* Op. Br. at 41 *with e.g., West v. Washington State Dep't of Natural Resources*, 163 Wn. App. 235, 245 (2011) (rejecting argument that failure to retain emails violated records retention act and thus the PRA) (citing *BIAW v. McCarthy*, 152 Wn App. 720 (2009)).

[14] Again asking this Court to reweigh the evidence, Hood suggests that Raley's 2 paragraph declaration was "credible, evidence-based testimony" that should have caused the trial court to ignore the detailed testimony of multiple District witnesses with personal knowledge of the District's searches for records. Op. Br. at 45.

is a teacher -- she would presumably maintain some District records regarding her own duties (e.g., grade book and lesson plans). There is no evidence, in Raley's declaration or otherwise, to support a finding that she would reasonably be expected to be a custodian of District records *regarding another teacher*.[15]

In the absence of a reasonable expectation that an individual actually may have relevant records, Hood's demand that the District interrupt individual staff members with search requests for public records that have no apparent connection to their District duties is baseless. *See Neighborhood Alliance*, 172 Wn.2d at 720 ("This is not to say, of course, that an agency must search *every* possible place a record may conceivably be stored, but only those places where it is *reasonably likely* to be found."). Further, while it did not ask Raley to search her computer, the District did review her email files for responsive documents. *See, e.g.*, CP 2812 at ¶ 19 (directing search of electronic files of staff identified by Hood); CP 2802 (documenting Miller's search of Raley's email account). The trial court's findings have ample record support. *See* FF 32.

[15] Hood's arguments here are similar to his contention that the District did not originally search his hard drive for material he deleted prior to leaving; they conflate all documents with District records. *See* Op. Br at 8, 31 (suggesting that Hood's deleted "personal records" on a District computer were subject to the PRA); RCW 42.56.010(3) (act only applies to records of government operations).

C. The Trial Court Properly Exercised its Discretion in Grouping Documents, Considering All Relevant Yousoufian Factors, and Calculating Penalties.

As Hood acknowledges, grouping records, the impact of aggravating factors, and the level of penalty are all matters completely entrusted to the discretion of the trial court. Op. Br. at 18, 37; *see Yousoufian v. Office of Ron Sims, King County Executive*, 168 Wn.2d 444, 458, 229 P.3d 735, 743 (2010) ("[T]he trial court's determination of appropriate daily penalties is properly reviewed for an abuse of discretion."). Hood cannot possibly show an abuse of discretion: "'An abuse of discretion exists only when ***no reasonable person would take the position adopted by the trial court***.'" *Pub. Util. Dist. No. 1 of Okanogan Cnty. v. State*, 182 Wn.2d 519, 531, 342 P.3d 308, 314 (2015) (quoting *Westerman v. Cary*, 125 Wn.2d 277, 304, 892 P.2d 1067 (1994)) (emphasis supplied). A trial court only abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362, 1366 (1997).

In a fact-intensive case like this one, the trial court's discretionary decisions should be afforded maximum deference. *Cf. In re Parentage of Jannot*, 149 Wn.2d 123, 126, 65 P.3d 664, 666 (2003) (finding that for fact-sensitive inquiries, added deference is appropriate because "a trial judge does stand in a better position than an appellate judge" even if

submissions are entirely documentary). It is abundantly clear that the trial court did not abuse its discretion in determining record groupings, evaluating aggravating and mitigating factors, and assessing penalties.

1. The trial court did not abuse its discretion in refusing to adopt Hood's various overlapping groupings.

Hood proposed nine groupings of records to the trial court. His first group included all records responsive to his broad July 2011 requests that were not timely produced. FF 37. He proposed another reasonably distinct penalty group based upon his November 2011 requests (Group 5). FF 41. Both of these groups were accepted by the District and adopted by the court.[16] FF 36. This was an appropriate exercise of discretion. *See, e.g., Sanders*, 169 Wn.2d at 863-65 (upholding daily penalty based upon grouping of records); *Yousoufian*, 152 Wn.3d at 427 (approving grouping by time of production and subject matter).

But then Hood asked the trial court to compound the penalty calculations by adopting multiple overlapping groups of records that were already addressed by these two groups. For example, Hood argued that he was entitled to an enhanced daily penalty for records that that were

[16] Hood's argument that the trial court "abused it discretion when it refused to acknowledge that Hood's [Group 1] … accounted for the District's" failure to provide all records responsive to the July requests, is peculiar, as the court accepted it. *Compare* FF 37 *with* Op. Br. 44-47; *see also* Op. Br. at 53-54 (arguing about Group 5, which was also accepted).

responsive to his July 2011 requests, but not produced until September 2012. Op. Br. at 47 (discussing Group 2). But Group 2 records were included in Group 1. *See* FF 38. Likewise, Hood's purported Groups 4, 6, and 7 consisted entirely of records for which Hood separately sought penalties under Group 1 (July 2011 requests) and Group 5 (November 2011 requests). Hood dedicates an inordinate amount of space to his allegations that some of the records produced in response to his later requests were *also* responsive to his earlier requests. Op. Br. at 20-36. But the District acknowledged from the beginning that some responsive records were not located by its searches in response to Hood's requests. FF 62**.** The trial court found Hood's arguments for separate -- and punitive -- treatment of these records unpersuasive, and that decision was not manifestly unreasonable or based on untenable grounds. *See Littlefield,* 133 Wn.2d at 46-47.

Likewise, the trial court did not abuse its discretion in rejecting Hood's request for more than $21,000.00 for some attorney-client privileged and work product protected documents that were initially identified as exempt under the deliberative process exemption and later produced to him without waiver of their exemptions. *See Sanders*, 169 Wn.2d at 847-48 (production of exempt documents to a requestor does not waive exemptions). Hood claimed that either the production, or the

revision of the exemption claim warranted sanctions, but this is not the law: "the appropriate inquiry is whether the records are exempt from disclosure. ***If they are exempt, the agency's withholding of them was lawful and its subsequent production of them irrelevant***." *Id.* at 849-50 (emphasis supplied); *Cowles Publishing Co. v. City of Spokane*, 69 Wn.App. 678, 683 (1993); *PAWS*, 125 Wn.2d at 252 (university could argue any exemption supported by record regardless of whether previously asserted); *Sanders*, 169 Wn.2d at 847-48 (same).

Before this Court,[17] Hood now asserts that the trial court misunderstood his arguments and looked at the wrong records. Op. Br. 50-51. To the contrary, it is Hood who misstates the record. *Compare* CP 2865-66; CP 3051 at ¶¶ 3-5 (explaining that "deliberative process" documents were exempt under the attorney client and work product doctrines but were released to Hood when exemption logs were updated because counsel believed that they had already been produced), *with* Op. Br. at 23, 50-1 (misstating testimony). Further, these materials were cataloged by the District in an appendix to its response papers (CP 811-

[17] Hood did not object to FF 46 & 47, concerning the student attendance records, as they were proposed to the trial court. *See* CP __ (Sub 136). A party who objects to some, but not all, of a trial court's proposed findings may be found to have conceded or acquiesced to the findings to which he did not object. *State v. Vaughn*, 83 Wn. App. 669, 676-77, 924 P.2d 27 (1996) (finding that a criminal defendant had conceded certain facts due, at least in part, to the fact that he did not object to proposed findings).

66). Of the 26 records at issue, 21 were on their face exempt work product materials and attorney-client communications, and the remaining 5 were undisputedly ***not responsive to Hood's requests***. CP 3051; *compare* Op. Br. at 51 (selectively quoting District's prior briefing to suggest that it admitted withholding violations with regard to these 5 documents). Hood now faults the court for not further examining the District's work product claims as to ten of these documents, Op. Br. at 50, while simultaneously acknowledging that the court found them exempt, *id.* at 51 (the court "erroneously found that they were properly exempted …") and confirming that the District had every reason to anticipate litigation from Hood, *id.* at 22, n.18. None of this suggests an abuse of discretion.

In his Group 4, Hood sought the statutory maximum for documents that were released to him by other agencies, which he speculated the District must be silently withholding from him. Op. Br. at 24. The court did not "fail to understand" that Hood believed these records from other agencies were responsive to his requests of the District, nor did the court abuse its discretion in failing to credit Hood's accusations that the District actually had such records in its possession and was refusing to produce them. *See also* CP 3051; 810; *accord, Neighborhood Alliance*, 172 Wn.2d at 737-38 (requester does not raise a material factual issue about the reasonableness of a search by identifying other documents that are

internally referenced in the documents released) (Madsen, C.J., concurring). Likewise, Hood's arguments that his requests concerned matters of public importance (Group 6) were refuted by the record. *See* CP 421 at ¶ 11; CP 425 at ¶¶ 21-22; CP 719 at ¶ 7 (Hood initiated SAO "audit"). To the extent they had any merit, they were addressed in the penalties awarded on Groups 1 and 5. *See* FF 42.

Regarding Group 7, Hood claimed the court abused its discretion in failing to "provide any penalties" for metadata. Op. Br. 57. To the contrary, the court declined to accept a separate grouping for metadata, as it found that the District had largely complied with the request and that the awarded penalties were sufficient to address any violation. FF 44, 66, 68. In Group 8, Hood sought heightened penalties for records that were inadvertently not disclosed until February 26, 2014 on a 7/27/2011 CD-ROM. The record was clear that the District did not intentionally deny Hood access to these records and that most of them had already been produced to him in other forms. CP 2865-67; CP 2797.

Finally, in Group 9, Hood sought penalties for a host of miscellaneous alleged violations. Chief among them was Hood's agreement to pay $11 for an installment of 74 pages of redacted student records. *See supra* at 13-14 (detailing evidence on this issue). Hood's insistence that he was forced to pay to inspect the records (Op. Br. 11 , 32-

33) misstates the evidence, and the court did not abuse its discretion in refusing to grant penalties for this group of records.[18]

2. The trial court did not abuse its discretion by considering all relevant aggravating and mitigating factors.

Relying on *Yousoufian*, Hood claimed that several aggravating factors were present. The trial court, after considering all the evidence, found the District's searches reasonable, that Hood's requests did not concern matters of public importance, and that his arguments about economic loss were frivolous. FF 28, 35, 55-59. The trial court appropriately reviewed the other asserted factors.

Training: The District acknowledged that at the time of hearing it did not have a formal PRA training program. FF 50. Hood began his request campaign just as Dr. Moccia, the new Superintendent with no prior experience in Washington or with its PRA, assumed her responsibilities. CP 2811-12 ¶¶ 15-17. Confronted with a requestor with a history of litigation against the District, and with no personal experience with either him or the PRA, Moccia requested the assistance of outside legal counsel. CP 2812 ¶ 17. As the trial court found, this was not an abdication of her responsibilities. *See Lindberg v. Kitsap County*, 133

[18] A review of CP 872, an example of one such redacted attendance record, suggests that Hood had good reason for not requesting further installments – after proper redaction, the record's content is virtually nil.

Wn.2d 729, 746-47 (1997) (total PRA penalty of $507, based in part upon agency's good faith reliance on erroneous legal advice); *West v. Thurston County*, 168 Wn. App. 162, 190 (2012) (agency's reliance on attorney is mitigating factor). Hood's allegation that Moccia did not oversee the process is contrary to her testimony and has no apparent basis. CP 2812-13; CP 418-420. In any event, the trial court found that lack of training was an aggravating factor and increased penalties accordingly. FF 52.

Good Faith: When determining a penalty, "the existence or absence of [an] agency's bad faith is the principal factor" that a trial court should consider. *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38 (1997) (quoting *Yacobellis v. City of Bellingham*, 64 Wn.App. 295, 303 (1992)) (alteration in original). Hood admitted there was no evidence of District dishonesty, CP 912, and the trial court found that there was no evidence of District negligence, recklessness, wanton conduct, bad faith, or intentional noncompliance. FF 54; *compare* CP 2799 at ¶ 10, 19 (Miller); CP 2820 at ¶ 47 (Moccia); CP 728 at ¶ 13 (Atkins); CP 722 at ¶ 16 (Poolman), *with, e.g., Francis*, 313 P.3d at 468 (DOC spent no more than 15 minutes on request and did not check any usual record storage locations).

Despite this, and without a scintilla of evidence in support, Hood repeatedly implied that the District had destroyed or was silently withholding records in bad faith. But the District had no motive to hide

records from Hood, and even he admitted that the documents he thought would contain evidence of nefarious intent were completely innocuous. FF 57. *Compare Neighborhood Alliance*, 172 Wn.2d at 721-22 (agency search was limited to single new computer: "the only place a complete electronic record could not be found"); *PAWS*, 125 Wn.2d at 268-69 (stated refusal to comply with PRA requests suggested that documents may have been silently withheld); *ACLU v. Blaine Sch. Dist.*, 95 Wn. App. 106, 112-13, 975 P.2d 536 (1999) (defendant refused to copy and mail requested records for "improper reasons"). Hood offered his own self-serving speculation that the District was negligent, but this was woefully inadequate. *Frederick S. Wyle Prof. Corp.*, 764 F.2d at 612 ("[B]ald assertions, absent any evidentiary base, are insufficient …"). The court found that the "record as a whole shows that the District did, in fact, act in good faith at all times, [and] was not negligent." FF 54.

Clarity of requests: The trial court found that a lack of clarity in the PRA requests and their sheer volume was a mitigating factor in the District's favor. FF 60. Incredibly, Hood now faults the District for failing to complain that his requests were harassing. Op. Br. at 45. Similarly, the court found that the District's reasonably prompt responses to the majority of Hood's requests and its good faith efforts to comply with the PRA, were mitigating considerations. FF 61.

3. The trial court did not abuse its discretion in adopting a daily penalty and calculating the award.

Hood claims that the trial court abused its discretion in refusing to award him the $75-$100 a day he requested for the belated production of various records. Op. Br. at 60. The PRA, which was amended after *Yousoufian* to eliminate mandatory penalties, grants complete discretion to trial courts to award any amount up to $100 a day (or less than $1 a day, or nothing) for violations. RCW 42.56.550(4). The trial court's decision to apply a $5 per day penalty was well within this statutory grant.

Further, the trial court's $5 a day penalty is also within the range of awards approved in other cases, even under the prior mandatory penalty provision. For example, in *Lindberg,* the Supreme Court found that a total PRA penalty of $507 for more than 200 days that multiple records were *intentionally* withheld was well within the trial court's discretion, even under the mandatory minimums. 133 Wn.2d at 747 (court of appeals erred in remanding to trial court for recalculation of penalty where there was no evidence that trial court abused discretion in setting original penalty; total award of $1100, which included costs, reasonable attorney fees, and "some" penalties was "reasonable under the circumstances"). In *Sanders*, the Supreme Court approved the application of the *statutory minimum* $5 per day with a $3 enhancement against the Attorney General's Office

where the agency acted in good faith but wrongfully withheld various documents that were not exempt.[19] 169 Wn.2d at 860-61. As "the penalty needed to deter a small school district and that necessary to deter a large county many not be the same," the trial court's exercise of discretion here was not arbitrary. *Yousoufian*, 168 Wn. 2d at 467-68 and 463.

In *ACLU v. Blaine Sch. Dist.*, the Court of Appeals found "startling evidence of the District's improper motives" in responding to the ACLU's requests. 95 Wn.App. 106, 113 (1999). Finding that the district did not act in good faith, the court imposed a PRA penalty of $10 per day -- only $5 more than the minimum penalty then required. *See also Francis*, 313 P.3d at 469 (affirming penalty award of less than $5,000 against DOC where agency acted in *bad faith* and spent less than 15 minutes on request). The penalty amount the trial court awarded should be affirmed.

D. Hood Fails to Address the Denial of His Motion for Reconsideration and Thus Has Waived Review of That Order.

Hood assigns error to the trial court's denial of reconsideration, but fails to present any argument in his brief as to that ruling. He has thus waived review by this Court. "This court generally does 'not engage in conjectural resolution of issues presented, but not briefed.'" *In re F.D.*

[19] Notably, the AGO is a much larger public agency than the District and charged with the interpretation and enforcement of the Act itself. *See, e.g.*, RCW 42.56.530 (agency denials of public record requests reviewable by the attorney general).

Processing, Inc., 119 Wn.2d 452, 456, 832 P.2d 1303 (1992) (quoting *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772 , 785, 819 P.2d 370 (1991)) ("sweeping assignments of error" not considered by court of appeals where not supported by argument in brief); *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (court will not ordinary review issues not briefed by parties). In any event, the trial court's denial of reconsideration was clearly supported by the record before it, as detailed in the court's memorandum decision. CP 49-61; *see also* CP 137-158.

E. The Trial Court's Fee Award Was Appropriate.

Hood challenges, as an abuse of discretion, the trial court's award of half his invoiced attorneys fees for the relevant time period. Op Br. 61. In so doing, Hood completely ignores the fact that a 50% award was exactly what he requested:

> This was a complex case involving many requests and documents. According to this Court's judgment, ***Mr. Hood prevailed on approximately 50% of his claims*** although he did not get the penalties he sought.
>
> …
>
> Reviewing the relevant factors one by one in the case requires this Court find ***the percentage of the fees*** and costs requested reasonable.

CP 132, 135; *see also* CP 133 n. 2 (inviting comparison with award of 37.5% of invoiced fees in *Sanders*).

Before this Court, Hood now asserts that he prevailed on every

claim, and is thus entitled to 100% of his requested fees. Op. Br. at 63. This is simply wrong. *Compare* CP 45 at ¶ 14 (Hood only prevailed on limited claims); *see also* CP __ (Sub 124) (no basis for claims that documents were improperly redacted). This change in position alone should preclude his argument here. *See, e.g, Garrett v. Morgan*, 127 Wn. App. 375, 112 P.3d 531 (2005) (judicial estoppel prevents party from asserting different position from one offered and accepted by court); *In re Pers. Restraint of Tortorelli,* 149 Wn.2d 82, 94, 66 P.3d 606, *cert. denied,* 540 U.S. 875 (2003) (invited error doctrine "prohibits a party from setting up an error in the trial court then complaining of it on appeal.").

The trial court, which had exhaustive experience with the record, the claims, and the advocacy in this case, found that a 50% fee award was appropriate. CP 45 ¶ 15. Contrary to Hood's assertions, the trial court considered many factors, including as the legal issues presented, which were "not particularly novel or difficult" and required "no particular special skills" to litigate, the number of issues on which Hood lost (including arguments that the court found frivolous), and the fact that Hood received only 2% of the penalties he requested where the District "essentially conceded that a similar amount should be awarded." CP 42 at ¶¶ 12, 11. These factors are appropriate considerations under Washington law. *See* CP 43 at ¶ 6 (citing RPC 1.5, which specifically identifies

"results obtained" as relevant factor for evaluating reasonableness of fee). That ruling was an appropriate exercise of discretion, and Hood should not be awarded fees on appeal.

CONCLUSION

The trial court's rulings should be affirmed in their entirety.

RESPECTFULLY SUBMITTED this 2nd day of October 2015.

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CERTIFICATE OF SERVICE

Laura K. Clinton declares under penalty of perjury as follows:

I am and at all times herein after mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and competent to be a witness in the above action, and not a party thereto; that I effected service by emailing a true copy of this document to:

Michael C. Kahrs
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Seattle, WA 98107
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DATED this 7th day of October, 2015.

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