Supreme Court No. 101450-3

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 55453-4-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

CARRI WILLIAMS,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR REVIEW

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I. INTRODUCTION

This Public Records Act ("PRA") case arises out of Petitioner Carri Williams' effort to stop sexually abusive pat searches by a female corrections officer ("CO") by the only means available to her as an incarcerated woman, filing "PREA Complaints" with prison authorities, and the Supreme Court Writ proceedings that ensued after prison officials infracted Williams for alleged "false reporting" of the sexually abusive searches. Two separate PRA requests arose during the Writ proceeding requesting prior similar complaints or discipline as to the CO. DOC's delayed production of 180, 231 and 434 days for the requests precluded use of those records in the Writ proceeding.

Williams filed a PRA complaint after DOC's delays caused that production to occur only after the Court had finally disposed of the Writ case on March 6, 2020, and the documents could not be used in it. DOC's defense was it was not capable of prioritizing requests or prompt production due to lack of staff and software. The trial court accepted that defense and dismissed

Williams' complaint. Division II accepted DOC's defense in its August 30, 2022, decision ("Decision"), and denied reconsideration. The Decision means prompt production of requested records cannot be required of state agencies that claim lack of staff or resources, excising that statutory requirement.

Petitioner asks the Court to grant review of the Decision holding that DOC's "un-prompt" production of Williams' requests did not violate the PRA. Williams asks the Court to rule that DOC's defense of maintaining a "system" of handling such requests that did not allow it to prioritize requests or otherwise act promptly due to claimed lack of staff or technology is not a valid defense to prompt production under the PRA, consistent with Division III's recent decision, which Division II ignored, *Cantu v. Yakima School Dist. No. 7*,___ Wn.App.2d ___, 514 P.3d 661 (2022). *Cantu* reversed the trial court and held the delayed response of **172 days** after that PRA request was made, which forced the requestor to file the PRA complaint, constituted a "constructive denial" of the request, which was **not** excused by

the agency's claimed insufficient allocation of resources or lack of prioritization. *Id.*, at 678-682, ¶¶ 88-111. The Division II panel was provided with, but ignored, *Cantu.*

The delays in Williams' case were **231 days** and **434 days** for a partial, then final production of the July 24, 2019, request No. 7712; and **180 days** after "acknowledgement" of request No. 8646 created September 11, 2019. *See* Opening Brief ("OB") at pp. 9-11, App. A-41-43, setting out the time frame for the requests and DOC production. The delays triggered Williams' complaint served on August 25, 2020, **400 days** after request No. 7712. *See* OB at 9-10. App. A-41-42. *Compare, Cantu.*

The Court should grant review based on the conflict with *Cantu* where the production delays in Williams' case were far longer than the delays in *Cantu*, yet Division III found PRA violations despite the same "lack of resources" defense while Division II did not. The Court should grant review so the same law applies throughout the State. It should reverse and remand to the trial court for a calculation of penalties and full fees.

II. COURT OF APPEALS DECISION

Following a non-argument consideration date of May 2, 2022, and Williams' August 4 filing of a RAP 10.8 additional authority providing the *Cantu* decision filed on August 2, the Division II panel filed the Decision on August 30, 2022, App. A-1-21, and denied reconsideration October 11, 2022. App. A-22.

The panel decision affirmed on the major issue of whether DOC violated the PRA by its delayed production, App. A-1 & A-14-18, but reversed "with respect to one response letter", App. A-1 & 12-14. Based on the limited reversal, the panel awarded fees solely for the one violation, but not for the remainder of the appeal. App. A-1 & 19-20. Williams timely filed her fee application on September 9, 2022, to which DOC did not object.

Williams filed her reconsideration motion based primarily on *Cantu* on September 19. App. A-23-39, which is incorporated herein in full by reference.

III. ISSUES PRESENTED FOR REVIEW

1. Should review be granted because the Decision directly conflicts with Division III's published decision in *Cantu v. Yakima School Dist. No. 7*, which found a constructive denial of a Public Records Act request by delays of over 172 days, while Division II's Decision herein found ***no*** constructive denial of Williams' requests and no violation of the PRA by the DOC's delays of 180, 231, and 434 days, each production being completed only ***after*** the time it could be used by Williams?

2. The PRA and this Court's decisions require the prompt production of the requested records under the Public Records Act. Should review be granted because the Court of Appeals decision allowing DOC to delay 180, 231, and 434 days in producing records conflicts with the prompt production requirement of the statue and this Court's decisions, including *Yousoufian v. Office of Ron Sims*?

3. Should review be granted to correct Division II's analysis which permits an agency to delay production of records

under the PRA due to lack of personnel or software and a stated inability to prioritize and expedite requests?

4. Should review be granted to correct Division II's mistaken analysis which excises from the PRA any requirement for "prompt" production of documents by state agencies on the basis of lack of personnel or software, contrary to the statute and cases, including *Yousoufian v. Office of Ron Sims,* 168 Wn.2d 444, 229 P.3d 735 (2010) and *Cantu v. Yakima School Dist. No. 7*, ___ Wn.App.2d ___, 514 P.3d 661 (2022)?

5. Should review be granted to address the quantum of penalties that should be imposed on an agency which maintains a system – or rather a non-system – for "responding" to PRA requests which makes it impossible to prioritize requests and responses and effectively precludes prompt production of requested records, in disregard of the clear requirements of the PRA?

IV. STATEMENT OF THE CASE[1]

Appellant Carri Williams is an inmate at the Washington Corrections Center for Women at Purdy. This PRA case arose out of Williams' efforts to stop sexually abusive pat searches by corrections officer Alice Kaleopa ("CO Kaleopa"), by the only means available to her as an incarcerated woman: filing "PREA Complaints" with prison authorities. Those filings resulted in the prison authorities "infracting" her by charging her with the alleged offense of "false reporting" for which she could have been severely disciplined. *See* OB at 12-18. Williams quickly filed a Writ in the Supreme Court and requested an immediate stay of the disciplinary proceedings at the prison pending resolution of the Writ case. *Id.* DOC continued the disciplinary hearing, the matter was briefed and argued to Commissioner Johnston who granted direct review on July 1, 2019. *Id.* The writ

[1] Pages 8-18 of Williams' Opening Brief give the full context of the underlying prison discipline and the Supreme Court Writ case. For convenience, they are in the Appendix at A-40-50.

proceeding then ensued during 2019-2020. *Id.* Immediately after review was granted DOC took steps to moot the legal issues while leaving Williams – and other prisoners – at continued risk of being molested without genuine recourse.[2] *See* OB at 15-16, App. A-47-48.

Three separate PRA requests arose during that Supreme Court proceeding, one related to the disciplinary hearing, and two requesting similar complaints or discipline as to CO Kaleopa. As set out in the Amended Complaint, the Department unreasonably delayed the production of the records for each of Williams' requests when time was of the essence, precluding or compromising use of those documents in the Supreme Court Writ proceeding, among other circumstances making statutory damages appropriate. *See* OB at 14-18, App. A-46-50.

[2] The DOC amended the constitutionally offensive regulation and policy, then dismissed the disciplinary proceeding against Williams. These steps, however, left Williams and other prisoners at risk of future misconduct by CO Kaleopa without the guard being held to account. *See* OB at 15-17, App. A-47-49.

Williams filed her PRA complaint on August 20, 2020. She argued that DOC violated the PRA by delaying its **production** of the requested records beyond the date they would be useful in the then-pending Supreme Court Writ proceedings and, therefore, violated the terms of the PRA as well as relevant case law. *See* OB at 26-44, arguing these delays were not justified and violated the plain terms of the PRA which requires "prompt" **production**. OB at 30-33. This includes penalties per *Yousoufian v. Office of Ron Sims,* 168 Wn.2d 444 (2010), cited throughout the Opening Brief.

The trial court accepted DOC's defense that it could not prioritize requests due to staff and software issues and, thus, that it could not respond promptly to ***any*** request such as Williams' since all were simply placed in line and there was a long line. *See* FOF 7 at CP 2318:

> 7. [The Department] does not have a method of "prioritizing" public record requests; rather, the requests are processed in the order in which they are received.

The trial court ruled that DOC acted reasonably and dismissed Williams' complaint. As noted, Division II erroneously affirmed as to Williams' delay/constructive denial claim.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals decision conflicts with the recent published decision of Division III in *Cantu v. Yakima School Dist. No. 7* which applies the PRA and this Court's decisions to confirm agencies are not excused from the requirement of prompt production; review should be granted per RAP 13.4(b)(1), (2).

1. *Cantu* holds that large agencies are not exempt but have great responsibility to comply with the PRA's prompt production requirement, including giving records requests their "due priority."

In *Cantu v. Yakima Sch. Dist. No. 7, supra*, Division III held that the Yakima School District was liable for delaying PRA production for 172 days, forcing the requestor to file a PRA complaint. Division III held: "[A]dministrative inconvenience or difficulty in producing records does not excuse [the agency's] lack of diligence" nor does "insufficient allocation of resources and lack of priorities." *Cantu*, 514 P.3d at 681-82, ¶108. This

conflicts with Division II's Decision in this case. Here DOC's defense was it did not have enough resources and it was unable to prioritize. Division II's Decision accepted DOC's defense as an excuse from PRA requirements and liability, while Division III in *Cantu* expressly rejected that defense and reversed the trial court for imposing inadequate penalties for the agency's failure to comply with the PRA when constructively denying the request. This conflict requires review under RAP 13.4(b)(2).

2. The conflict and need for review is also shown by comparing Division III's holding that delayed production of 174 days constituted "constructive denial" of the PRA request subjecting the agency to fees, costs, and penalties, with Division II's Decision which found no PRA violation despite delays of 180, 231 and 434 days.

Division III correctly followed this Court's precedents and the PRA itself when determining that the 174 days of delay by the Yakima School District constituted a constructive denial of Ms. Cantu's document request.

> …we hold that an agency's inaction, or lack of diligence in providing a prompt response to a records request can ripen into constructive denial for purposes of fees, costs, and penalties under the PRA.

Cantu, 514 P.3d at 678 & ¶91.

Division III's detailed explanation at pp. 679-682, ¶¶93-111, will not be repeated here, but the Court is directed to it and its reliance on this Court's decisions. The Court also is directed to Williams' reconsideration motion included in the Appendix and incorporated herein for the juxtaposition of the *Cantu* decision and analysis with the Decision herein. App. A-22-39.

For purposes of determining whether review should be granted, suffice to say that the analyses and results of *Cantu* and Division II's Decision herein are not just incompatible, they are conflicting and irreconcilable. *See* App. A-23-24, 26-38. Review should be granted per RAP 13.4(b)(1), (2), so that the same law applies throughout the State.

B. Review should be granted per RAP 13.4(b)(1), (4) because the Court of Appeals decision conflicts with the PRA and this Court's decisions which require prompt *production* of requested documents, not merely prompt responses.

Whether the PRA requires the prompt ***production*** of records by agencies is an issue of substantial public interest that

should be decided by this Court. Division II's Decision doesn't merely call into question whether prompt production is required, given the delays of 180, 231, and 424 days for separate requests; rather, it ***deletes*** the statute's requirement of prompt production of requested documents, contrary to legislative intent and this Court's decisions. Review should be granted to determine if agencies need only give delaying responses, not prompt production. This is a state-wide issue this Court should resolve.

C. Review should be granted per RAP 13.4(b)(4) to confirm that the Department of Corrections is not exempt from the statewide policy of requiring prompt ***production*** of requested documents by government agencies.

Perhaps the most charitable interpretation of Division II's Decision is that it creates a unique exemption from the prompt production requirement for the Department of Corrections. But nowhere in the statute is such an exemption implied or stated, nor does the Decision purport to cite to one. Rather, case law confirms that DOC is subject to the same requirements of the PRA as other public agencies and entities. *See, e.g., Francis v.*

Wa. Dep't of Corrections, 178 Wn.App. 42, 313 P.3d 457 (2013) (applying penalties to DOC for bad faith conduct in failing to timely respond to requests); *Prison Legal News, Inc. v. Department of Corrections*, 154 Wn.2d 628, 115 P.3d 316 (2005) (reversing lower courts to impose sanctions for failure to disclose records related to medical malpractice).

Review should be granted to confirm this issue of state-wide import given the size and scope of the DOC, as documented by Respondents in their pleadings and by Division II in the Decision. *See* pages 9-10, App. A-9-10, figures for DOC. Those figures are similar to those for the Yakima School District recited in *Cantu* which caused Division III to hold: "The District is a large state agency. With great power, comes great responsibility," thus requiring substantial penalties commensurate with the "grave misconduct" in its constructive denial, citing *Yousoufian*. *See Cantu* at ¶144.

VI. CONCLUSION

Petitioner Carri Williams asks the Court to grant review and, after briefing and argument or *per curiam*, reverse and remand for determination of full fees and penalties.

> This document contains 2,411 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 10th day of November, 2022.

CARNEY BADLEY SPELLMAN, P.S.

By */s/Gregory M. Miller*
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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APPENDIX A

Filed
Washington State
Court of Appeals
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CARRI WILLIAMS, Appellant, v. DEPARTMENT OF CORRECTIONS, an agency of Washington State, Respondent.	No. 55453-4-II UPUBLISHED OPINION

VELJACIC, J. — Carri Williams appeals the superior court's order dismissing her Public Records Act (PRA) claims against the Department of Corrections (DOC). Williams argues that the DOC violated the PRA by failing to provide a reasonable estimated response date in two specific communications it had with her. Williams also argues that the DOC violated the PRA because it unreasonably delayed the production of responsive records in each of her three PRA requests. Williams further argues that she is entitled to daily penalties, attorney fees, and costs for the DOC's alleged PRA violations. Williams also requests attorney fees and costs on appeal.

We hold that the DOC violated the PRA with respect to one response letter but not the other. We also hold that, based on the record, the DOC did not unreasonably delay the production of responsive records in each of Williams's three PRA requests. We further hold that Williams is entitled to attorney fees and costs for the violation concerning one of the response letters, but not penalties. However, Williams is not entitled to daily penalties, attorney fees, and costs with respect to her remaining PRA claims because she is not the prevailing party on those claims.

Accordingly, we reverse in part and affirm in part the trial court's order dismissing Williams's PRA claims. We remand the case to the trial court for a calculation of attorney fees and costs with respect to the August 23 letter claim. We also grant Williams's request for attorney fees and costs on appeal with respect to the August 23 letter claim in an amount to be set by our commissioner.

FACTS

I. FACTUAL BACKGROUND

Williams is an inmate housed at the Washington Corrections Center for Women (WCCW). In 2018 and 2019, Williams alleged that a corrections officer inappropriately touched her on several occasions pursuant to a pat down search. The DOC opened a Prison Rape Elimination Act[1] (PREA) investigation to determine whether Williams's claims were substantiated. The DOC determined that they were not.

The WCCW Superintendent, Deborah Wofford, reviewed the DOC's findings and determined that Williams had caused an innocent correctional officer to be investigated for sexual misconduct. Therefore, on May 15, 2019, the DOC informed Williams that she had violated WAC 137-25-030(549) by "providing false or misleading information during any stage of an investigation of sexual misconduct." Clerk's Papers (CP) at 689. Williams was then given a disciplinary hearing notice, setting the infraction hearing for May 31.

On May 21, Williams filed an emergency motion in the Supreme Court requesting to stay the disciplinary hearing. Williams also filed a petition for a writ of prohibition and/or mandamus (writ petition) challenging the legality of the DOC policy at issue, which imposes an infraction on an inmate who falsely accuses a DOC employee of sexual misconduct. Williams withdrew the

[1] 34 U.S.C. § 30301, *et seq*.

emergency motion because the DOC agreed to stay the disciplinary hearing while the writ petition was pending in the Supreme Court. While the writ petition was pending, Williams filed three PRA requests with the DOC. The Supreme Court ultimately dismissed the writ petition on March 6, 2020.[2]

II. THE PRA REQUESTS AT ISSUE AND THE DOC'S RESPONSES

A. Request Number P-6581

On May 31, 2019, the DOC received a PRA request from Williams.[3] That request sought the following:

> 1. The witness statement provided by Inmate Sandra Weller for use at the disciplinary hearing for inmate [] Williams, DOC #370021, that was previously scheduled for May 31, 2019.
>
> 2. Any other witness statement that has been provided to the [DOC] for use at that disciplinary hearing, and any other witness statement that has been obtained in the course of investigating any of [] Williams' PREA complaints.
>
> 3. Any report or memo written by Sgt. Channel regarding the Williams disciplinary hearing or regarding any allegation of misconduct by Corrections [O]fficer Alice Kaleopa.
>
> 4. Any report, memo, or document sent to Sgt. Channel regarding the Williams' disciplinary hearing or regarding any allegation of misconduct by Corrections Officer [] Kaleopa.
>
> Since this is a very discrete request, I am requesting a very fast response.

CP at 798. The request was assigned tracking number P-6581.

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[2] The Supreme Court dismissed the writ petition "[b]ecause [Williams] ha[d] other plain, speedy, and adequate remedies, other than filing a petition for a writ, including such actions as a personal restraint petition, a Section 1983 claim, and a declaratory judgment action." CP at 704.

[3] Denise Vaughn, the DOC Information Governance Director, stated in her declaration that the DOC received this PRA request on May 30. However, e-mail correspondence indicates that the DOC received this PRA request on May 31. Therefore, May 31 appears to be the correct date and is the date we will use in this opinion.

Within five business days of receiving the request, on June 6, the public records specialist responded by acknowledging receipt of Williams's PRA request. The public records specialist also responded by stating that "[DOC] staff are currently identifying and gathering records, if any, responsive to your request. I will respond further as to the status of your request *within* 44 business days, *on or before* August 8, 2019." CP at 800.

On August 8, the public records specialist updated Williams that additional time was needed to process her request, which was based on the need to review the records and to notify affected staff. The public records specialist stated that Williams should expect another update "*within* 26 business days, *on or before* September 16, 2019." CP at 803.

On August 29, the public records specialist produced 52 pages of responsive records. This disclosure occurred the same day, but shortly after, Williams and the DOC had submitted the statement of agreed facts for the writ petition in the Supreme Court. The public records specialist explained that certain records were redacted in part and provided a denial form explaining those redactions. The DOC then closed this request.

B. Request Number P-7712

On July 24, 2019, the DOC received another PRA request from Williams. That request sought the following:

> 1. All letters, emails or other written communications from or to Superintendent Wofford regarding Corrections Officer [] Kaleopa, including any and all complaints about her conduct by prisoners and the documents in any resulting investigations.
>
> 2. All emails or texts to or from Superintendent Wofford which contain Corrections Officer [] Kaleopa's name and any of the following terms: abuse; misconduct; complaint; discipline; and/or transfer, and including both emails or texts on official DOC accounts or devices, and emails and texts on personal accounts or devices.
>
> 3. All letters, emails or other written communications from or to any past or current superintendent of Stafford Creek regarding Corrections Officer [] Kaleopa,

> including any and all complaints about her conduct by prisoners and the documents in any resulting investigations.
>
> 4. All emails to or from any past or current superintendent of Stafford Creek which contain Corrections Officer Kaleopa's name and any of the following terms: abuse; misconduct; complaint; discipline; and/or transfer.
>
> 5. Any reports or memos written for or by WCCW personnel regarding any allegation of misconduct by Corrections Officer [] Kaleopa.
>
> 6. Any reports, memos, or documents written for or by Stafford Creek personnel regarding any allegation of misconduct by Corrections Officer [] Kaleopa.

CP at 26, 1935. The request was assigned tracking number P-7712.

Within five business days of receiving the request, on July 31, the public records specialist acknowledged receipt of Williams's PRA request. Based on the potentially voluminous nature of the request, the public records specialist informed Williams that responsive records would be disclosed on an installment basis. The public records specialist also informed Williams that further clarification was needed in order to move forward with her PRA request. Specifically, they asked Williams to "[p]lease clarify a time frame in which you wish records to be searched for, such as records within the time frame of 1/1/2019-7/24/2019, so that a productive search for records can be conducted." CP at 30, 1934. The specialist further stated that "[i]f clarification regarding your request is not received within 30 days of the date of this letter, your request will be administratively closed." CP at 30, 1934.

On August 12, Williams provided the requested clarification. On August 23, the public records specialist updated Williams that DOC staff were identifying and gathering records and stated that an update would be provided "*within* business days, *on or before*, 2019."

The DOC would eventually split this request, which calved P-7712 (discussed further below), after receipt of an August 29 clarification from Williams. After the August 29 clarification, DOC sent two letters on September 11, one for P-7712 and one for P-8646 (this

request is discussed below). The September 11 letter for P-7712 advised that the date the DOC expected to provide an update would remain the same—on or before November 7. The DOC did provide an update to P-7712 on November 7, as described below.

Due to the language of request number P-7712, it was determined that a staff member from the DOC Headquarters Information Technology unit would have to run a search on "live" e-mails. CP at 753. The search for live e-mails was in addition to the search for responsive records at WCCW, which in turn produced a large amount of data requiring review.

On November 7, the public records specialist updated Williams that they had received over 800 pages of records to review. The public records specialist further stated that she needed additional time to review the records and to notify affected staff. She anticipated that the first installment of records would be produced "within 53 business days, *on or before* January 29, 2020." CP at 46.

On January 29, the public records specialist updated Williams that the first installment had been reviewed for disclosure but was still undergoing the staff notification process. Thus, the public records specialist stated that she needed additional time to respond and anticipated producing the first installment "on or before February 25, 2020." CP at 1919.

On February 25, the public records specialist updated Williams that the first installment of responsive records was still undergoing the staff notification process, and therefore, she needed additional time to respond. Thus, the public records specialist advised that she would produce the first installment "on or before March 10, 2020." CP at 1917.

On March 10, the public records specialist produced the first installment, which contained 403 pages of responsive records. The public records specialist stated that certain redactions were made and provided a denial form explaining those redactions.

On July 8, the public records specialist updated Williams that records for the next installment were identified and gathered, but were still undergoing review for disclosure. The public records specialist also advised that the DOC would have to notify affected staff prior to disclosing the next installment. Thus, the public records specialist advised that additional time was needed to respond and anticipated producing the second installment "on or before September 8, 2020." CP at 1921.

On September 22, after receiving payment, the public records specialist produced the second and final installment, which contained 505 pages of responsive records. The DOC provided a log explaining the redactions. The DOC then closed this request.

C. Request Number P-8646

As noted above, on August 29, 2019, Williams sent a follow up letter to the DOC's August 23 letter. First, Williams clarified that the timeframe for request number P-7712 should include records up to the date of first production, which was beyond July 24, 2019. Second, she clarified that "[item] numbers one and two [for request number P-7712 were] intended to address the records of the WCCW superintendent for the given timeframe, whomever that may be, and not limited to the current Superintendent, [] Wofford." CP at 63.

On September 11, the public records specialist responded to Williams's August 29 letter. The public records specialist stated that Williams did not mention the inclusion of any former WCCW Superintendents for items one and two in request number P-7712. Again, as noted above, the public records specialist advised that a new request would be created to address Williams's request for additional records. She advised that Williams would receive a separate response under a separate tracking number. Again, the public records specialist also advised that the date in which

Williams would receive a status update for request number P-7712 remained the same, "*on or before* November 7, 2019." CP at 38.

That same day, the public records specialist sent Williams another letter advising her that the August 29 letter constituted a new PRA request and assigned it tracking number P-8646. The public records specialist also advised that responsive records would be disclosed on an installment basis due to the potentially voluminous nature of the request and that she would respond further "*within* 54 business days, *on or before* November 26, 2019." CP at 58.

Much like request number P-7712, the DOC determined that a staff member from the DOC Headquarters Information Technology unit would have to run a search on "live" e-mails for this request. CP at 754. This produced a large amount of data requiring review.

On November 26, the public records specialist updated Williams that she needed additional time to review responsive records and to undergo the staff notification process prior to disclosure. The public records specialist stated that she would respond further "*within* 57 business days, *on or before* February 21, 2020." CP at 84.

On February 21, the public records specialist updated Williams that she had completed the review process, but stated that she needed additional time to respond because the records were undergoing the staff notification process. Therefore, the public records specialist stated that she could offer responsive records "within 11 business days, on or before March 9, 2020." CP at 2270.

On March 9, the public records specialist produced 309 pages of responsive records. The public records specialist informed Williams that certain redactions were made and provided a denial form explaining those redactions. The DOC then closed this request.

III. THE DOC'S RESPONSE PROCESS TO PRA REQUESTS

Denise Vaughn is the DOC's Information Governance Director. In this role, she oversees management of agency records and supervises the DOC's public records unit. The public records unit is a centralized unit located at the DOC's headquarters in Tumwater, Washington. The public records unit is comprised of 27 fulltime staff, which includes 4 administrative staff, 16 public records specialists, 2 management analysts, 4 unit supervisors, and the Information Governance Director, Vaughn.

The DOC operates 12 facilities, 86 field offices, and 6 community justice centers across Washington State. The DOC manages approximately 17,000 incarcerated individuals and supervises approximately 15,000 individuals in the community. The DOC also employs approximately 8,500 individuals, making it the second largest agency in the state in terms of employment.

The DOC does not have a centralized records system. This means each facility maintains its own records for those individuals under the management, supervision, and employment of the DOC at that particular facility. The DOC also has a number of different electronic records systems. The level of access can vary depending on the type of electronic storage system and staff security clearance. Relevant here, the public records specialist had to forward each of Williams's PRA requests to the WCCW in order to identify and gather responsive records. Once DOC staff at WCCW identified and gathered responsive records, they were sent to the public records specialist for review.

The DOC receives numerous PRA requests each year. In 2019, the DOC received 13,892 PRA requests. Of these requests, 5,371 were assigned to the public records unit. This meant that each public records specialist managed approximately 120 PRA requests during the time period at issue here.

When PRA requests are received, they are logged, assigned a tracking number, and assigned to a public records specialist, correctional facility, field office public records coordinator, or records staff for processing. Response time frames are based on many factors, such as the staff member's current workload, complexity and scope of the records requested, the number of sources for potentially responsive records, scheduling issues, and any other factor which may affect production of the records. The DOC does not have a method to prioritize PRA requests, even if they are deemed urgent by the requestor.

Additional time is often needed for the DOC to fully respond to a request. This is caused by factors such as the need to clarify the request, the time it takes to locate and assemble the requested documents, the requirement to notify persons affected by the request, and the need to determine whether any of the information contained in the responsive records are exempt from disclosure and require redaction. Relevant here, Vaughn declared that the "[public records unit] was not involved in Williams' [writ] petition nor would its staff be aware of any deadlines associated with the case." CP at 755. Instead, the time frames for each of Williams's requests were determined by the public records specialist based on the criteria stated above.

IV. PROCEDURAL HISTORY

On November 10, 2020, Williams filed an amended complaint in Thurston County Superior Court alleging that the DOC violated the PRA. In her opening brief, Williams argued that the DOC violated the PRA by: failing to state an estimated production date in its August 23

letter with respect to request number P-7712; failing to provide the requested records within a reasonable time with respect to each request number; and denying certain requested records. Williams also requested penalties, attorney fees, and costs.

In response, the DOC argued that Williams's PRA claims should be dismissed. First, the DOC argued that Williams's PRA claims under RCW 42.56.520 were moot because she had already received the requested records. Second, the DOC argued that its failure to provide an estimated response time in its August 23 letter did not violate the PRA. Third, the DOC argued that even if Williams's claims were not moot, it did not unreasonably delay the production of responsive records. Finally, the DOC argued that Williams's denial claim was meritless because its search was adequate and because it had no duty to produce a record that was non-existent.

In her reply brief, Williams appeared to raise a new issue. More specifically, Williams argued that, in addition to the DOC's alleged inadequate response in its August 23 letter, the DOC also violated the PRA by failing to provide an estimated production date in its September 11 letter, which concerned request number P-7712.

The superior court agreed with the DOC. Accordingly, the court dismissed Williams's PRA claims. Williams appeals.

ANALYSIS

I. STANDARD OF REVIEW

"The PRA is a 'strongly worded mandate for broad disclosure of public records.'" *O'Dea v. City of Tacoma*, 19 Wn. App. 2d 67, 78, 493 P.3d 1245 (2021) (internal quotation marks omitted) (quoting *Serv. Emps. Int'l Union Local 925 v. Univ. of Wash.*, 193 Wn.2d 860, 866-67, 447 P.3d 534 (2019) (*SEIU*)). The purpose of the PRA is to increase governmental transparency and accountability by making public records accessible to Washington residents. *John Doe A v. Wash.*

State Patrol, 185 Wn.2d 363, 371, 374 P.3d 63 (2016). Accordingly, the PRA must be "liberally construed and its exemptions narrowly construed." RCW 42.56.030.

We review de novo an agency's action in responding to a PRA request. *Freedom Found. v. Dep't of Soc. & Health Servs.*, 9 Wn. App. 2d 654, 663, 445 P.3d 971 (2019); *see also* RCW 42.56.550(3). "Where, as here, the record on appeal consists solely of declarations or other documentary evidence, we stand in the same position as the trial court." *SEIU*, 193 Wn.2d at 866. Accordingly, we may affirm the trial court's order on any basis supported by the record.[4] *O'Dea*, 19 Wn. App. 2d at 79.

II. REASONABLE ESTIMATE

Williams argues that the DOC violated RCW 42.56.520 because it did not provide her with a reasonable estimated response date in its August 23 and September 11 letters, which concerned request number P-7712. Williams relies on *Hikel v. City of Lynnwood*, 197 Wn. App. 366, 389 P.3d 677 (2016), to support her argument. We agree that the August 23 letter violated the PRA but disagree that the September 11 letter violated the PRA.

A. Legal Principles

The PRA provides a cause of action for when "an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request." RCW 42.56.550(2).

[4] Williams contends that trial court's order dismissing her PRA claims should be reversed because its findings of fact do not support its conclusions of law. Because Williams's PRA claims are subject to de novo review, we do not address whether the trial court's findings of fact are support by substantial evidence and whether those findings support its conclusions of law. RCW 42.56.550(3).

An agency must respond promptly to a public records request. RCW 42.56.520(1); *Rufin v. City of Seattle*, 199 Wn. App. 348, 359, 398 P.3d 1237 (2017). "RCW 42.56.520 governs an agency's initial response to a PRA request." *Hobbs v. State*, 183 Wn. App. 925, 941, 335 P.3d 1004 (2014). In relevant part, the PRA provides that, "[w]ithin five business days of receiving a public record request," the agency must respond by "[a]cknowledging . . . the request and asking the requestor to provide clarification for a request that is unclear, and providing, to the greatest extent possible, a reasonable estimate of the time the agency . . . will require to respond to the request if it is not clarified." RCW 42.56.520(1)(d).

In *Hikel*, five business days after a public records request was made, the agency acknowledged receipt of the request and asked for clarification. 197 Wn. App. at 370. Hikel argued that the agency violated the PRA because it did not provide him with a reasonable estimate of the time it would take to respond to his request. *Id*. at 372. The *Hikel* court concluded that "[an initial] response that does not either include access to the records or deny the request must contain the agency's estimate of the time it will take to respond." *Id*. at 373. Accordingly, the court held that the request for clarification was deficient because it did not contain a time estimate of when the agency would respond to Hikel's request. *Id*. at 373-75.

B. The DOC's August 23 Letter Violated the PRA

Here, the DOC responded to request number P-7712 within five business by requesting a clarification. Williams responded with the requested clarification on August 12. In reply, the DOC stated in its August 23 letter that it would provide a status update "*within* business days, *on or before*, 2019." CP at 36. While the omission of the estimated response date appears inadvertent, this letter nevertheless violates RCW 42.56.520 because, as in *Hikel*, it wholly fails to provide a

reasonable, estimated response date that the DOC expected to begin producing responsive records. Therefore, we hold that the DOC's August 23 letter violated RCW 42.56.520.

C. The DOC's September 11 Letter Did Not Violate the PRA

Here, as explained above, on August 29, 2019, Williams sent a follow up letter to the DOC's August 23 letter by providing further clarification for request number P-7712. On September 11, the public records specialist advised that the date in which Williams would receive a status update for request number P-7712 remained the same, "*on or before* November 7, 2019." CP at 38. However, this letter does not violate RCW 42.56.520 because it was not the initial response letter to request number P-7712. Williams provides no citation to authority requiring an agency to provide estimated production dates in letters subsequent to the initial response letter. *See Cook v. Brateng*, 158 Wn. App. 777, 794, 262 P.3d 1228 (2010) ("Appellate courts need not consider arguments that are unsupported by pertinent authority, references to the record, or meaningful analysis."). Therefore, we hold that the September 11 letter that Williams takes issue with did not violate the PRA.[5]

III. TIMING OF PRODUCTION[6]

Williams argues that the DOC violated the PRA by using its estimated response times to unreasonably delay its response to each of her three requests. Specifically, Williams contends that the DOC unreasonably delayed the production of responsive records for each of her PRA requests based on: (1) the amount of time it took the DOC to produce the records and (2) the fact that the

[5] As noted above, there were two letters sent on September 11. Here, Williams does not take issue with the letter pertaining to request number P-8646, but only that pertaining to P-7712.

[6] Williams also addresses the DOC's mootness argument while discussing unreasonable delay. Because the DOC does not appear to advance this argument on appeal, we do not address the issue.

requested records were disclosed after key deadlines had passed while her writ petition was pending in the Supreme Court. We disagree.

A. Legal Principles

The PRA requires agencies to provide the "'fullest assistance'" and the "'most timely possible action on requests for information.'" *Freedom Found.*, 9 Wn. App. 2d at 673 (internal quotation marks omitted) (quoting *Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 651, 334 P.3d 94 (2014)); RCW 42.56.100. "In determining whether an agency acted promptly in producing responsive records we examine whether the agency's response was thorough and diligent. Whether the agency responded with reasonable thoroughness and diligence is a fact-specific inquiry." *Freedom Found*., 9 Wn. App. 2d at 673 (internal citations omitted).

RCW 42.56.080(2) permits agencies to produce responsive records on a partial or installment basis. *Hobbs*, 183 Wn. App. at 942. The PRA also permits an agency to extend the amount of time it needs to respond to a PRA request based on changing circumstances:

> Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.

RCW 42.56.520(2). The PRA does not limit the number of extensions an agency may require to respond to a request. *Andrews*, 183 Wn. App. at 652; *see also* WAC 44-14-04003(7) ("[e]xtended estimates are appropriate when the circumstances have changed"). However,"[w]hile agencies may provide a reasonable estimate of when they can produce the requested records . . . they cannot use that estimated date as an excuse to withhold records that are no longer exempt from disclosure." *Wade's Eastside Gun Shop, Inc. v. Dep't of Lab. & Indus*., 185 Wn.2d 270, 289, 372 P.3d 97 (2016).

B. The DOC Did Not Unreasonably Delay Its Responses to Each PRA Request

Here, the DOC acted with reasonable thoroughness and diligence with respect to all three of Williams's PRA requests. Based on the record before us, the estimated response times were determined by the size and scope of the request, workload of the public records specialist, and time consuming nature of the response process.

The record shows that the response process was time consuming especially when viewed in light of the public records unit's high workload. When each PRA request was received, the public records specialist had to reach out to WCCW staff to obtain the requested records because the DOC does not have a centralized records system. After DOC staff identified and gathered responsive records, the public records specialist had to review each record to analyze whether the requested information would be exempt, redacted, or required notifying third persons affected by the request. This process is necessarily time consuming. Additionally, the record shows that the DOC received numerous PRA requests in 2019: 13,892 requests were made in total, 5,371 of which were assigned to the DOC's public records unit, which handled the requests at issue here. This meant that the assigned public records specialist managed approximately 120 PRA requests at the time of Williams's requests. Since the DOC does not prioritize PRA requests, this implies that requests were processed in the order received. Therefore, the response process and existing workload of the public records specialist necessarily impacted the timing for each of the disclosures.

For request number P-6581, the record shows the public records specialist responded within five business days of receiving the request, attended to the request, provided timely updates, and even produced the requested records two weeks before the estimated production date of September 16. Williams takes issue with the fact that it took the DOC 97 days to produce 52 pages

of records and that key deadlines in the writ petition had passed. But given the time consuming nature of the response process and existing workload of the public records specialist, we conclude that the DOC acted with reasonable thoroughness and diligence, and therefore, promptly responded to request number P-6581. There was no unreasonable delay based on the record before us.

For request number P-7712, the record shows that the public records specialist provided timely updates, attended to her request, and generally kept in line with the estimated response dates.[7] To the extent those dates could not be honored, the record demonstrates that the public records specialist timely notified Williams and provided the records as quickly as practicable. Again, Williams takes issue with DOC's response time in disclosing responsive records for this request (434 days) and the fact that those records were disclosed after the writ petition was denied. However, the record shows that DOC staff had a large amount of data to review for this request. Furthermore, numerous redactions had to be made for both installments and affected staff had to be notified, which impacted timing. Given the scope of the request, workload of the public records specialist, and time consuming nature of the response process, we conclude that the DOC acted with reasonable thoroughness and diligence, and therefore, promptly responded to request number P-7712. There was no unreasonable delay.

For request number P-8646, the record shows that the public records specialist attended to Williams's request, provided timely updates, and produced responsive records within its estimated time frame. Williams again expresses dissatisfaction with the amount of time it took for the DOC to produce responsive records for this request (180 days) and the fact that the records were

[7] Though, as explained above, we do hold that the August 23 letter violated RCW 42.56.520. This is a separate and distinct claim from whether the DOC unreasonably delayed the production of responsive records.

disclosed after the writ petition was denied. However, much like request number P-7712, this request required the DOC staff to review a large amount of data. Additionally, redactions had to be made and affected staff had to be notified given the nature of the requested records. These factors necessarily impacted to the timing of the disclosure. Based on the scope of the request, workload of the public records specialist, and time consuming nature of the response process, we conclude that the DOC acted with reasonable thoroughness and diligence, and therefore, promptly responded to request number P-8646. There was no unreasonable delay.

C. Williams's Remaining Arguments Fail

Williams appears to argue in passing that the DOC failed to provide an explanation for the time extensions with respect to each of her records requests, which supports her unreasonable delay claims. However, "[RCW 42.56.520] does not require the agency to provide an explanation for its time estimate." *Freedom Found.*, 9 Wn. App. 2d at 665. And the PRA does not limit the number of extensions an agency may require to respond to a request. *Andrews*, 183 Wn. App. at 652; WAC 44-14-04003(7). Regardless, the DOC did provide explanations for their extensions for all three PRA requests, which were based on the need to locate and assemble records, review whether those records were exempt from disclosure, and notify affected staff. Such extensions are proper under the PRA. RCW 42.56.520(2). Accordingly, this argument fails.

Williams also appears to argue, without any citation to authority, that the DOC unreasonably delayed the production of her requested records because it had failed to prioritize her PRA requests over others. As stated above, "[a]ppellate courts need not consider arguments that are unsupported by pertinent authority, references to the record, or meaningful analysis." *Cook*, 158 Wn. App. at 794; RAP 10.3(a)(6). Because Williams fails to support her argument with any citation to authority, we do not address her claim.

IV. DAILY PENALTIES, ATTORNEY FEES, AND COSTS

Williams argues that she is entitled to daily penalties, attorney fees, and costs as a result of the DOC's alleged PRA violations. We agree that Williams is entitled to attorney fees and costs for the August 23 violation, but decline to award penalties for the error. We decline to award penalties, attorney fees, and costs for the other alleged PRA violations because Williams is not the prevailing party with respect to those claims.

The PRA provision authorizing awards of penalties, fees, and costs reads:

> *Any person who prevails* against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

RCW 42.56.550(4) (emphasis added). Because Williams was serving a criminal sentence in a state operated correctional facility on the date she made her PRA requests, she may not recover daily penalties unless the court finds that the DOC acted in bad faith:

> A court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made, unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record.

RCW 42.56.565(1).

Here, Williams is the prevailing party with respect to her August 23 letter claim. Because she is the prevailing party on the August 23 letter claim, we hold that Williams is entitled to recover attorney fees and costs with respect to that claim. However, she is not entitled to penalties for this error. *See Rufin*, 199 Wn. App. at 360 ("RCW 42.56.550(4) authorizes a penalty for the denial of the right to inspect or copy a public record, but does not authorize a freestanding penalty for lack

of a five-day letter."). Accordingly, we remand the case to the trial court to calculate fees and costs with respect to the August 23 letter claim.

On the other hand, Williams is not the prevailing party with respect to her other PRA claims. Because she is not the prevailing party on those claims, we hold that Williams is not entitled to recover daily penalties, attorney fees, or costs. RCW 42.56.550(4).

V. ATTORNEY FEES ON APPEAL

Williams also requests attorney fees and costs on appeal under RAP 18.1 and RCW 42.56.550(4). We grant her request in part and deny her request in part.

We may grant an award of reasonable attorney fees and costs on appeal to a party that requests it in its opening brief, and as long as applicable law provides for such an award. RAP 18.1(a), (b). As discussed above, the PRA grants the right to recover attorney fees and costs to "[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time." RCW 42.56.550(4).

Here, Williams is the prevailing party with respect to her August 23 letter claim. But she is not the prevailing party with respect to her remaining PRA claims. Accordingly, we grant Williams's request for attorney fees and costs with respect to the August 23 letter claim in an amount to be set by our commissioner, but deny her request for the remaining claims. RCW 42.56.550(4).

CONCLUSION

We reverse in part and affirm in part the trial court's order dismissing Williams's PRA claims. We remand the case to the trial court for a calculation of attorney fees and costs with

respect to the August 23 letter claim. We also grant Williams's request for attorney fees and costs on appeal with respect to the August 23 letter claim in an amount to be set by our commissioner.

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

Veljacic, J.

We concur:

Worswick, J.

Cruser, A.C.J.

Filed
Washington State
Court of Appeals
Division Two

October 11, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CARRI WILLIAMS, Appellant, v. DEPARTMENT OF CORRECTIONS, an agency of Washington State, Respondent.	No. 55453-4-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Carri Williams, moves this court to reconsider its August 30, 2022 opinion. After consideration, we deny the motion. It is

SO ORDERED.

Panel: Jj. Worswick, Cruser, Veljacic

FOR THE COURT:

Veljacic, J.

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

CARRI WILLIAMS, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	No. 55453-4-II MOTION FOR RECONSIDERATION

1. Identity of Moving Party.

Appellant Carri Williams seeks the relief in Section 2.

2. Statement of Relief Requested.

Williams asks the panel to reconsider its August 30, 2022, decision terminating review ("Decision") per RAP 12.4(c), RAP 1.2(a), and CR 1, and grant Williams full relief and penalties.

The Decision erred by ruling Williams did not establish a violation of the Public Records Act ("PRA") by the Department of Corrections' ("DOC") delays in producing requested records when it overlooked Williams' additional authority filed August 4, 2022, *Cantu v. Yakima School Dist. No. 7*, __ Wn.App.2d __, 514 P.3d 661 (Aug. 2, 2022) (holding a delayed agency response can "ripen into a constructive denial" of a public records request

in violation of the PRA, including where delay is due to the agency's "insufficient allocation of resources and lack of priorities"), as well as the statutory bases for her claim in her briefing. A copy of the additional authority with the *Cantu* decision is in the appendix to this motion, along with the Decision. No petition for review has been filed in *Cantu*.

3. Facts Relevant to Motion.

The panel is familiar with the facts. The facts relevant to the motion are stated in the Decision itself and will be set out in the argument.

4. Grounds for Relief and Argument.

(a) Reconsideration should be granted per RAP 12.4(c) where an appellate decision overlooks or misapprehends applicable law or operative facts. Here the Decision does both and reconsideration should be granted to comport with the law. RAP 1.2(a); CR 1.

RAP 12.4(c) instructs that motions for reconsideration should focus on the "points of law or fact which the moving party contends the court has overlooked or misapprehended," and thus

states the standard for modifying or changing the initial decision. Our appellate courts grant reconsideration where warranted. Both the Court of Appeals[1] and the Supreme Court[2] recognize the underlying goal of the appellate courts as stated in RAP 1.2 and the underlying civil rules, is to reach the legally correct and just decision on the merits. *See Keck v. Collins,* 184 Wn.2d 358, 369, 357 P.3d 1080 (2015) (referencing CR 1). Reconsideration is a key mechanism to ensure that a just decision is made on the applicable law and the facts. These principles apply here.

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[1] *See, e.g., Behnke v. Ahrens,* 172 Wn.App. 281, 294 ¶¶30-31, 294 P.3d 729 (2012) (discussing grant of reconsideration to consider facts brought to the panel's attention on reconsideration); *Copper Creek Homeowners Ass'n. v. Kurtz et al,* 21 Wn. App.2d 605, 508 P.3d 179 (2022) (granting reconsideration), *review granted,* 2022 WL 4093082 (2022).

[2] *See, e.g., Washington Water Jet Workers Ass'n v. Yarbrough,* 151 Wn.2d 470, 474, 90 P.3d 42 (2004) (*reversing* prior decision at 148 Wn.2d 403, 61 P.3d 309 (2003), after granting reconsideration and re-argument).

(b) Reconsideration should be granted because the Decision overlooked the new decision of *Cantu v. Yakima School Dist.* submitted as an additional authority on a central issue for which relief was denied by the trial court and by the Decision, the DOC's delays in <u>producing</u> records which ripened into a constructive denial of Williams' PRA request.

The most basic argument Williams raised was that the DOC violated the PRA by delaying its **<u>production</u>** of the requested records beyond the date they would be useful in the then-pending Supreme Court Writ proceedings and, therefore, violated the terms of the PRA as well as relevant case law. *See* Opening Brief ("OB") at 26-44, arguing these delays were not justified and violated the plain terms of the PRA which requires "prompt" **<u>production</u>**. OB at 30-33. This includes penalties per *Yousoufian v. Office of Ron Sims,* 168 Wn.2d 444 (2010), cited throughout the brief.

The Decision dismissed these arguments, stating Williams failed to cite authority, while at the same time specifically noting that the DOC was structured in a manner that prevented prompt

production, since the "DOC does not have a centralized records system", but "each facility maintains its own records," and that "DOC has a number of different electronic systems." Decision, Slip Op. at 9.[3] The Decision also erred by focusing on DOC's **responses** while overlooking DOC's delayed **production.** A prompt response is meaningless when, as here, the delayed **production** is so late as to constitute a denial, as *Cantu* holds.

The recitation of DOC's cumbersome non-system, Slip Op. at 9-10, makes plain that DOC and its public records response office are structured in such a way that DOC literally is incapable of making prompt **production** of requested documents. That incapacity is DOC's norm. Also pertinent here,

[3] *Accord*, Slip Op. at 16: "When each PRA request was received, the public records specialist had to reach out to WCCW staff to obtain the requested records because the DOC does not have a centralized records system. After DOC staff identified and gathered responsive records, the public records specialist had to review each record to analyze whether the requested information would be exempt, redacted, or required notifying third persons affected by the request. This process is necessarily time consuming."

the Decision states that "DOC does not have a method to prioritize PRA requests, even if they are deemed urgent by the requestor." *Id.* at 10 (emphasis added); *id at* 16 ("DOC does not prioritize PRA requests"). This too violates the PRA.

In sum, per the facts stated in the Decision, the only response DOC is capable of making "promptly" is an initial estimate of the time required to **produce** requested documents particularly because DOC does not prioritize requests. Per the Decision, that is all DOC has to do under the PRA. This is wrong as a matter of law, as *Cantu* demonstrates.

The Decision dismisses Williams' arguments that the lack of prompt **production** of records violated the PRA by asserting, incorrectly, that Williams cited no authority for the argument DOC unreasonably delayed production of her records because it failed to prioritize hers. Slip Op., p. 18. She argued the statute requires prompt **production and disclosure** for ***all*** requests.

See, e.g., OB at 30-33.[4] The governing statute setting policy is a pertinent legal authority. Moreover, two days after it was filed, Williams submitted *Cantu,* which indisputably is the kind of "purple cow" authority the Decision seemed to require.

Parenthetically, since the PRA is to be liberally construed and applied to meet its intended purposes of **producing** agency documents ***promptly***, those purposes and principles are undermined by an approach of requiring a prior "purple cow" case in order to find a violation or basis for a penalty. As a matter of PRA policy, the benefit of the analysis and interpretation flows in the requestor's favor, here Williams. *See Canatu* at ¶¶88-104, *esp.*¶91 ("whether a constructive denial has occurred

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[4] Williams argued at pages 30-31 (bold italics added):

"The PRA 'is a strongly worded mandate for broad disclosure of public records' ***that requires state agencies to disclose any public record*** **upon request**, unless the record falls within certain specific exemptions….A reviewing court must construe the PRA broadly and its exemptions narrowly." *Hines-Marchel v. Dep't of Corrections,* 183 Wn.App. 655, 663, 334 P.3d 99 (2014), quoting *Prison Legal News, Inc. v. Dep't of Corr.*, 154 Wn.2d 628, 635, 115 P.3d 316 (2005) (emphasis added).

is based on an objective standard from the requesters' perspective"); *Morgan v. City of Federal Way*, 166 Wn.2d 747, 753, 213 P.3d 596 (2009) (PRA must be "liberally construed and its exemptions narrowly construed" to ensure that the public's interest is protected. RCW 42.56.030; *Livingston v. Cedeno*, 164 Wn.2d 46, 50, 186 P.3d 1055 (2008).").

This standard under the PRA thus is ***not*** the same as is required for imposing 42 U.S.C. § 1983 liability, which ***does*** require a purple cow case to put public officers on notice of conduct that violates a person's constitutional rights. That kind of notice provision to Agencies is contrary to the PRA – the statute itself is the notice to agencies of their duty to **produce** and disclose promptly. A prompt response without prompt production violates the statute.

Cantu must be examined and addressed by the panel because, based on the facts as set out in the Decision, the principles of *Cantu* require reversing the trial court and finding

violations by DOC, minimally by a constructive denial of Williams' requests sufficient to require penalties.

By the Decision's recitation of facts, this large state agency is structurally incapable of being nimble or quick, much less prompt in the actual **production** of documents, despite – or perhaps because of – its large size and resources. On these facts set out in the Decision DOC literally cannot meet the requirements of the PRA of prompt production of documents. Its size is not an excuse for DOC to violate the PRA's promptness requirement. Rather, as Division III's *Cantu* decision notes, if anything greater size creates enhanced duty: "With great power comes great responsibility." *Cantu, supra,* 514 P.3d at ¶114.

In *Cantu* parents sued the Yakima School District under the PRA for its delays in producing documents requested under the PRA to address concerns related to alleged bullying of their daughter. This is similar to the claims of abuse raised by Williams in her Writ action: in both cases records were being requested to address an immediate and continuing safety concern

of a person in the custody and control of the agency, the student for whom the School District was *in loco parentis*, and Williams, over whom DOC has absolute and total control. While the trial judge found some violations of the PRA in *Cantu*, its dismissal of delay claims was reversed because the agency's failure to respond and produce "for an extended period of time" constituted "the constructive denial or records….wrongfully denying her the records [the parent] had requested. *Cantu, supra*, ¶4. Division III also reversed the trial court's *per diem* penalty of $10/day as "inadequate and … an abuse of discretion." *Id.*, ¶6.

The analysis used by Division III is equally applicable to this case. If there was any question about "pertinent authority" to support Williams' claims of unreasonable delay in **production** that frustrated the fundamental purposes of the PRA, *Cantu* indisputably provides it. Since the time-frame for filing a petition for review in *Cantu* has passed and none was filed, that published decision is final. It should not only be addressed in

this case, but it should be followed to provide relief for Williams similar to the relief for the Cantu family.

(c) The analysis in *Cantu* and the facts herein require the trial court to be reversed and Williams granted full relief and penalties.

First, as in Williams' case, the delay of over 174 days between request and filing of the complaint in *Cantu* constituted constructive denial of the requests, as the Additional Authority noted at pp. 1-2:

- *See Cantu*, ¶¶ 88-104 (holding that the agency's delayed response for more than 174 days after the request made in April, 2018, until the PRA complaint was filed constituted "constructive denial" of the records request even though the records were produced later), *esp*. ¶91:

> As more fully explained below, we hold that an agency's inaction, or lack of diligence in *providing* a prompt response to a records request can ripen into constructive denial for purposes of fees, costs, and penalties under the PRA. We also hold that **whether a constructive denial has occurred is based on an objective standard <u>from the requesters' perspective</u>** and will depend on the circumstances of each case.

Cantu, at ¶91 (emphasis added).

- *See Cantu's* Heading (1) ("Agency's inaction can

ripen into the constructive denial of records") and *Cantu* at ¶¶ 92-104 (describing same);

- "Whether an agency's lack of diligence amounts to a constructive denial is a question of fact" which the appellate court can review from the affidavits since it is 'in the same position as the trial court.' " (internal quotations omitted); the *Cantu* appellate court determined that "the District's lack of diligence amounted to a denial of Ms. Cantu's April 2018 request." *Cantu* at ¶107.

Williams' additional authority at pages 1-2 summarized how *Cantu's* circumstances related to this case, and by the juxtaposition with Issue #4 in the Opening Brief, show the circumstances herein were more egregious than those in *Cantu* and require relief for Williams, including penalties:

> **Issue #4:** Whether the trial court erred by concluding that Respondent Department of Corrections ("DOC") did not violate the PRA by its failure to promptly **produce** requested records until after completion of the Supreme Court Writ proceedings when the documents were most relevant, OB at 6, and arguments at 20-25 (DOC's delays frustrated purpose of the requests); 26-27 (delayed responses of 231 days and 434 days violated the PRA); 28-30 ("magic software" defense not reasonable basis for delay); and Reply Brief at 3-7 (general reply addressing defenses of inability to **produce** documents until Supreme Court litigation concluded, for alleged lack of "magic software" and resources).

Williams' Additional Authority at pp. 1-2 (emphasis added).

Similarly, the Additional Authority at pp. 3-6 pointed the Court to how Williams' issues 5 and 6 claiming violations for DOC's admitted lack of resource or ability to prioritize requests are contrary to and refuted by the *Cantu* decision:

> **Issue #5** at OB 6: Whether DOC's excuse for delayed production – because it lacked resources or the "magic software" which meant it could not prioritize requests – violated the PRA; and **Issue #6** at OB 6: Whether DOC's lack of response and of resources, its foot-dragging, and its delayed production until after Supreme Court proceedings concluded constituted bad faith. *See* arguments at OB 28-44 (DOC's defense of no magic software to prioritize requests, and DOC's admitted failure to promptly produce documents are not reasonable and merit significant penalties); and Reply Brief at 8-12 (egregious failures constituted denial of requests, showed bad faith, and call for significant penalties, *e.g.*, p. 8: DOC "very effectively denied Williams the right to inspect or copy the pertinent records during the pendency of the Supreme Court writ proceedings, the time when they should have been produced under the PRA, and the time when they mattered because time was of the essence," violating the PRA).

- *See Cantu*, ¶¶ 105-111 (emphasis added):

> ¶ 108 The District argues that it was simultaneously responding to "numerous large public records requests," even if it was not "making significant progress" on Ms.

Cantu's request. Br. of Resp't at 43. This argument fails for two reasons. First, administrative inconvenience or difficulty in producing records does not excuse lack of diligence. [citations omitted]. Second, the District's own evidence suggests that the delay in responding to Ms. Cantu's request was not due to overwhelming requests, but rather **insufficient allocation of resources and lack of priorities**.

¶111 …. We conclude that as of July 16, 2018, it **reasonably appeared from Ms. Cantu's perspective** that the District would not provide responsive records. *Hobbs*, 183 Wn.App. at 936, 335 P.3d 1004.

- *See Cantu*, ¶¶139-144, *esp*. ¶¶139, 142, 144 (emphasis added):

¶139 We hold that the penalty in this case was inadequate in light of the circumstances and constitutes a manifest abuse of discretion. The District's failure to produce records for 631 days was based on conduct that amounts to gross negligence.

# # #

¶142 The District's culpability for failing to comply with the PRA is clear. The PRA officer's failure to follow proper procedure **and give the records request its due priority** was most likely caused by lack of experience, training, and support.

# # #

¶144 … the trial court determined that there was no need for deterrence because the District had recently changed its PRA procedures. We disagree that deterrence is no longer an issue. While the District assured the trial court that its policies had changed, the policies could just as

> easily revert if there is little incentive to comply. Moreover, the District acknowledged that its policies changed to comply with the law, **which it should have been doing from the beginning. <u>The District is a large state agency. With great power, comes great responsibility.</u>** Yet, instead of setting the standard for PRA requests, **the District's failure to allocate sufficient resources suggests that it considered PRA requests a low priority. Given the totality of these circumstances, the penalty imposed was disproportionately low to the <u>grave misconduct</u> and was manifestly unreasonable**. *See Yousoufian II*, 168 Wn.2d at 463, 229 P.3d 735; *O'Dea*, 19 Wn.App.2d at 84, 493 P.3d 1245.

Additional Authority at 3-6 (emphasis added in the pleading).

Under *Cantu*, the Decision's recitation at Slip Op. 9-10 of DOC's size and cumbersome internal organization is no excuse for failing to **<u>produce and disclose</u>** documents promptly. Because its unresponsiveness is ***structural*** it means that DOC knew, institutionally, it could not and would not comply with the PRA's prompt **<u>production and disclosure</u>** of documents requirement. As in *Cantu*, this structural failure of DOC should subject it to significant penalties for its "grave misconduct."

5. Conclusion.

Appellant Carri Williams asks the panel to reconsider its August 30 Decision and, consistent with *Cantu* and the directives in the PRA's text, issue a New Decision which holds the DOC's delays in producing requested records until a time beyond when they could do the most good constituted, as in *Cantu*, delays that ripened into a functional denial of Williams' requests in violation of the PRA, regardless of any intent or lack of intent to delay by individual DOC personnel. It should hold these circumstances merit an award of fees and penalties in the trial court and a full measure of Williams' attorney fees on appeal.

> This document contains 2911 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 19th day of September, 2022.

CARNEY BADLEY SPELLMAN, P.S.

By */s Gregory M. Miller*
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ ESERVICE, to the following:

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DATED this 19th day of September, 2022.

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Deborah A. Groth, Legal Assistant

[redacted]

Three separate PRA requests arose during that Supreme Court proceeding, one related to the disciplinary hearing, and two requesting prior similar complaints or discipline as to CO Kaleopa. As set out in the Amended Complaint, the Department unreasonably delayed the production of the records for each of Williams' requests when time was of the essence, precluding or compromising the use of those documents in the Supreme Court Writ proceeding, among other circumstances making statutory damages appropriate.

Documents for the first request, No. 6581 made on May 24, 2019, were not produced for 97 days, until after the close of the courts on August 29, 2019, and after the deadline for submitting agreed documents and facts to the Supreme Court in the pending Writ case. CP 488-489 (Amended Complaint, ¶¶ 15-19), and referenced exhibits. The requested documents were

witness statements and reports related to the pending disciplinary hearing initially scheduled for May 31, 2019, to which Williams was entitled under Department policies and the infraction notice, which should have been produced quickly – in 30-days or less. *See* CP 486-489 (Amended Complaint ¶¶ 8-13; 15-19). The 97-day delay was unreasonable given the nature of the records and the pending litigation, and "just happened" to be provided 15 minutes after the deadline for submitting the agreed appellate record in the pending proceeding in the Supreme Court. Time was of the essence.

Documents for the second request, No. 7712, received July 24, 2019, were not fully produced until a "final production" on September 28, 2020, 434 days after the request, and 34 days after the Department was served with the Complaint in this action on August 25, 2020. CP 490-493 (Amended Complaint, ¶¶ 20-33). The record thus does not support FOF 20 which states that the records for that request were provided on March 9, 2020, and that

the Department then "closed the request."[2] No such thing occurred on March 9, 2020. In fact, the Department's first notice of the availability of a *partial* production for No. 7712 was not given until March 10, 2020, 231 days after receipt of the original request and four days after the Supreme Court Justices denied Williams' motion to modify the commissioner's order of dismissal. CP 493 (Amended Complaint, ¶32). And that notice was a notice of availability – there was no actual production on March 9 or March 10. The requested documents were of prior similar complaints or discipline as to CO Kaleopa. Time was of the essence for these records when requested in July, 2019.

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[2] Documents for the "clarified" request, No. 8646, were produced on March 9 and that request was closed. *See* CP 493-494, ¶¶ 34-37. But FOF 20 does not specify which record request was produced and closed on March 9.

More troubling is that nowhere in the FOF does the trial court acknowledge the undisputed facts that the documents responsive to No. 7712 were not fully produced until September 28, 2020, over 434 days after the initial request and 34 days after the Complaint was served in this matter, and that the first notice of the availability of a *partial* production was made on March 10, 2020. *See* CP 490-93, ¶¶20-33 (Amended Complaint and referenced documents).

The Department created Williams' third request, No. 8646, by claiming it needed a "clarification" of the earlier request in July, and thus only acknowledged that "new request" on September 11, 2019. Those documents, a clarification of No. 7712, were produced on March 9, 2020, 180 days after the acknowledgement, and four days after the Supreme Court denied modification of the commissioner's order of dismissal, ending the Writ case. CP 493-494 (Amended Complaint, ¶¶ 34-37). The requested documents were of prior similar complaints or discipline as to CO Kaleopa at other Department facilities and involving other superintendents. *Id.* Time was also of the essence in this request. The facts are undisputed, as the Department admitted them in its Answer or stated in its Answer that it had no information upon which to admit or deny the fact in question (CP 558-562, Amended Answer), agreed to them in the "Statement of Agreed Facts" in the Supreme Court Writ proceeding (CP 578 ¶¶ 8-9 (Miller Dec.) and CP 575-700 (App. G to Milled Dec., listing 108 "agreed facts" filed in Supreme Court Writ

proceeding), or the facts are of record in the Writ proceeding and documented in the Miller Declaration.

B. Context: The Supreme Court Writ Case.

The nature and progression of Williams's underlying Supreme Court Writ case is important to understand the context for all the PRA requests at issue. The pleadings and rulings from that case are included in the record at CP 581-727 as appendices A – J to the Miller Dec.[3]

In sum, Williams made PREA Complaints against CO Kaleopa in 2018 and early 2019. After the required internal investigation of the complaints in May, 2019, instead of relief for Williams the victim she was retaliated against. The WCCW

[3] The Emergency Motion For Stay in the Writ proceeding gives a narrative of the pending discipline and Williams' central legal claims and requests for relief. CP 619-638 and appendices thereto. It is a good preface to Commissioner Johnson's July 1, 2019 Ruling (CP 645-654, App. C), which retained the case for consideration of the merits. As part of the Supreme Court Writ proceeding, the parties submitted agreed documents and agreed facts to form the appellate record. The complete Agreed Statement of Facts is at CP 676-700 (App. G). It includes facts and circumstances up to its filing on August 29, 2019.

superintendent charged Williams with a "549 Offense", a charge of false reporting, with a disciplinary hearing to be held on May 30, 2019, 15 days from delivery of the infraction. *See* CP 577 (Miller Dec.) and CP 581-655 (App. A, B & C).

Williams filed her Petition for a Writ of Prohibition and/or Mandamus in the Supreme Court on May 21, 2019 ("Writ Petition"). CP 583. The Writ Petition was filed to challenge the alleged "549" violation per DOC Policy 490.860, which provided for infracting an inmate for allegedly lying if the Superintendent found, by a preponderance of the evidence without notice or a hearing, that the PREA report was a false report, after which the inmate would be subject to a disciplinary hearing before a hearing officer subordinate of the Superintendent, at which the burden of proof for the Department to establish the infraction was merely "some evidence." *See* CP 577 (Miller Dec., ¶ 4). *See, e.g.*, CP 581-593 (App. A, Writ Petition); CP 619-638 (App. B, Emergency Motion); CP 646-654

(Commissioner's Ruling retaining the Writ for direct review on the merits); CP 691-694 (Agreed Facts, ¶¶ 82-89).

Williams filed an emergency motion to stay the discipline hearing scheduled for May 30, 2019, for the alleged 549 violation. CP 619-638. The Department did not respond to the emergency motion. Instead, on May 24, 2019, it advised that it would postpone the disciplinary hearing until after the parties briefed and argued to Commissioner Johnson whether the Court should retain the Petition. CP 577 (Miller Dec., ¶ 5).

On May 24, 2019, Williams's counsel sought documents relevant to the disciplinary hearing and to the Writ Petition by a PRA request, designated No. 6581 by the Department, and which it did not provide until after close of business on Friday, August 29, 2019, after the extended deadline for filing agreed facts and documents in the Writ Case. CP 694-695, ¶¶ 93-97.

On July 1, 2019, after briefing by the parties and several amici supporting the Petition and oral argument on June 26, Commissioner Johnson filed a ruling retaining the Writ Petition

for a decision on the merits by the Supreme Court. CP 645-654. It provided for the parties to create an agreed set of documents and facts to constitute the appellate record. CP 577-578, ¶ 7. The Department reacted to the Ruling by dismissing the infraction in July, 2019, then on August 6, 2019, amending the part of Policy 490.860 requiring the Superintendent to initiate the charging of a 549 infraction by finding the inmate made a false report in an unspoken effort to moot the case. The Department did not notify Williams's counsel of the policy change until August 28, 2019. CP 578 (Miller Dec. ¶ 8); CP 696-697 (App. G at ¶¶ 103 & 106).

Throughout August, 2019, the Department nominally participated in the Writ Case, including by engaging in the process to sign off on the agreed facts and documents. *Id.*; *see* CP 698 (Agreed facts, signature block). The Agreed Facts were filed at 4:38 p.m. on August 29, CP 676; then, at 5:15 p.m. after the agreed facts were filed, Department staff Rivera sent an email to Williams' counsel providing the documents for PRA Request No. 6581 via the Department's portal. CP 578 (Miller Dec. ¶ 9)

and CP 502-510 (Amended Complaint, Ex. 2-3). Those documents were requested on May 24 and were all documents to which Williams was entitled under the Department's rules related to hearings, among other bases. *Id*.

The Department's purpose in dismissing the infraction and changing the policy was to try and moot the case, as became apparent when it moved to dismiss the Writ Case on October 14, 2019, waiting until the day before the opening brief was due to file. CP 578 (Miller Dec., ¶ 10). Apparently, the thought was either that, if the case went away the record requests would be irrelevant and need not be produced, and/or that if the records were withheld, it would help the case go away. After substantial briefing, Commissioner Johnson granted the motion to dismiss on the basis of mootness on November 13, 2019. *Id.*

Williams moved to modify the Commissioner's dismissal and the motion was set for the Justices' January 30, 2020, Departmental calendar. Her arguments against mootness included that: 1) the change the Department made to its policy

did not eliminate all the problems with DOC Policy No. 490.860 because it still allowed the threat of retaliation by writing up inmates for a 549 infraction and thus constituted an existing and ongoing prior restraint on speech and petitioning; 2) that the Department's voluntary cessation of the infraction proceeding and the policy change did not render a case moot because it can later restore the policy and/or re-infract Williams – plus the fact of the continuing policy leaves prison officials and guards free to charge Williams (and other inmates) under 549 if they make an accusation of sexual assault against a guard, keeping Williams at risk for retaliation for future reports; and 3) the public interest exception should be applied, even if Williams' individual disciplinary case was considered moot, due to the danger to her and other inmates of repeated improper behavior. CP 578-79 (Miller Dec., ¶ 11).

Following briefing, on January 30, 2020, Department 2 of the Supreme Court, in an unusual step, continued consideration of the matter to the *en banc* calendar of March 5, 2020. CP 579

(Miller Dec., ¶ 12); CP 702 (App. H., order). On March 6, 2020, "a majority" of the Justices denied Williams' motion to modify the Commissioner's ruling. CP 579 (Miller Dec., ¶ 13), CP 704 (App. I, order). *Id.*

As noted in the Amended Complaint, and as is undisputed, the Department did not produce any of the records for the second two PRA requests, No. 7712 and No. 8646, until after the case was substantively complete at the Supreme Court and the Department had safely escaped potential scrutiny by the Justices. Those documents could not be used to help convince a majority of the Justices the case should be retained, even if moot, because of the continuing danger to Williams and other women inmates.

C. Trial Court Ruling.

The PRA case was heard on December 18, 2020 and taken under advisement. *See* VRP. The trial court issued its own order on January 5, 2021 with an ultimate holding that there was no violation of the PRA, dismissing the case. CP 2317-2320.

CARNEY BADLEY SPELLMAN

November 10, 2022 - 11:30 AM

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