91105-3

No.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR WEST,
appellant,

Vs.

CHRISTINE GREGOIRE, GOVERNOR OF
THE STATE OF WASHINGTON, et al,
respondents

APPELLANT WEST'S PETITION FOR DISCRETIONARY REVIEW

Arthur West
120 State Ave N.E. #1497
Olympia, Washington, 98501

A. IDENTITY OF PETITIONER

Appellant Arthur West respectfully moves the Court for relief designated in Part B of this petition.

B. RELIEF REQUESTED

West respectfully requests review of the decisions of the Washington State Court of Appeals for Division II in Case No. 45812-8-II filed October 21, November 4, and November 18, 2014. The Washington State Supreme Court should accept review, and reverse the Division II published opinion and remand the case.

A copy of the decisions are appended as Appendix A.

C. SUMMARY & WHY REVIEW SHOULD BE ACCEPTED

This case involves the executive privilege exemption and over 300 pages of records silently withheld by the office of the Governor of the State of Washington that were not disclosed until eight (8) days before a dispositive hearing, after the date in the briefing schedule terminated plaintiff West's ability to file a brief concerning their withholding. This was an undeniable and per se unreasonable act of unlawful silent withholding.

Prior to the published opinion in this case, the very same division of the Court of Appeals, in Gronquist v. Department of Corrections, had

established that a PRA plaintiff preserved issues by including them in a motion for a show cause order.

Yet somehow, in response to a situation where the state failed to produce responsive public records until after the date for plaintiff to briefing had expired, the Court of Appeals decided to establish a new standard at variance with Gronquist, requiring PRA plaintiffs to not only assert claims in a motion for show cause, but ritualistically and formally reassert them in responsive briefing.

Had the Court simply overturned Gronquist, and established a new rule of law, this would have been, in the plaintiff's opinion, a mere error of law. However, the Court went further; it applied this new standard retroactively to deprive plaintiff of his right to assert claims for silent withholding of records based upon his failure to properly assert, in pleadings, a claim for relief for records unlawfully and silently withheld until after his opportunity for filing pleadings had expired, just eight (8) days prior to the hearing. This was inequitable and denied the basic right to a fair hearing in a fair tribunal.

By establishing a new standard of law at variance with that reasonably relied upon by West, and applying it retroactively to deny him a cause of action relating to records disclosed only eight (8) days prior to the hearing, the Court of Appeals abridged not only the remedial intent of

the Public Records Act, but the Due Process and Equal Protection Clauses of the 14th Amendment[1] to the Constitution of the United States.

Despite plaintiff arguing these issues at length in a motion to reconsider and objecting at the presentation of the Order as allowed under CR 37, the Court of Appeals found that West had "abandoned" issues that he had no reasonable opportunity to brief due to the misconduct of the State in silently withholding records until a week before the hearing, and after plaintiff's last brief had been filed.

Similarly, the Court of Appeals found no due process violation in retroactively applying the new "particularized need" standard that it adopted for records withheld under the PRA to bar West's claims, even though the standard was newly adopted and the retroactive application was inequitable and had the effect of barring a citizen from seeking disclosure of public records.

Complicating the matter still further, in West v. Gregoire (I), No. 42776-9-II (an unpublished case), West prevailed against the office of the Governor in a PRA action challenging the assertion of executive privilege, and a per diem penalty of $25 was sustained.

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1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Yet somehow, in West v. Gregoire (II), West was denied the opportunity to argue before the court, his case was sidetracked and another case advanced before it, where the issue was decided against him, and this case was remanded back to the Court of Appeals, which proceeded to stack up additional dubious abridgements of due process of law. The entirety of the circumstances of this case demonstrate how a simple and straightforward process can be transformed into a procedurl morass where technicsl requirements and circumlocuitous procedures entomb due process and the public's right to know just as effectively as censorship in a totalitarian regime such as the former Soviet Union.

RAP 13.4(b) sets forth the following grounds for review of appellate decisions:

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a decision by another division of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This case should be considered under prongs one, two, three and four of this rule. The issue of whether retroactive application of new rules of law in violation of the doctrines of res judicata and collateral estoppel to

unfairly deprive a litigant of a cause of action is consistent with Due Process of law is an issue of substantial public importance that should be decided by the Supreme Court.

The Appeals Court ruling also conflicts with precedent effecting the express intent of the Public Records Act in a manner that should be corrected by the Supreme Court. The Supreme Court should accept review because the Appeals Court ruling below was inequitable and in conflict with all of this court's previous rulings liberally construing the remedial intent of the Public Records Act and narrowly construing exemptions to disclosure to those in statute.

D. ISSUES PRESENTED

1. Is it reasonable and consistent with res judicata, estoppel and due process of law for Division II of the Court of Appeals to rule in defiance of its own ruling in West v. Gregoire (I) where a penalty of $25 per day was upheld for the wrongful withholding of records under claim of executive privilege?
2. Is it reasonable and consistent with due process of law for Division II of the Court of Appeals to overturn its own ruling in Gronquist to establish a new principle of law, and then employ it retroactively to bar assertion of a claim for silent withholding of records; where the records were withheld until just eight (8) days prior to the hearing and after the plaintiff's last brief had been filed?
3. Is it reasonable and consistent with due process of law for the division II of the Court of Appeals to establish a new principle of law as to demonstration of a need for public records withheld under claim of executive privilege and apply it retroactively to bar assertion of a claim for disclosure of records?
4. Does the Court of Appeals decision below conflict with prior U.S. Supreme Court rulings holding that retroactive application of a new rule of law is improper when it has inequitable effects?

5. Does the Appeals Court decision below conflict with prior Washington Supreme Court rulings holding that the Public Disclosure Act must be liberally interpreted and exemptions to disclosure narrowly construed?
6. Does a precedent establishing a new and improper standard of law for PRA actions and recognizing an executive privilege and applying these new standards inequitably in violation of the doctrines of res judicata and collateral estoppel to bar a citizen from seeking public records present a substantial issue of public importance?

E. STATEMENT OF THE CASE

In West v. Gregoire (I), an unpublished case, West prevailed against the office of the Governor in a PRA action challenging the assertion of executive privilege, and a per diem penalty of $25 was sustained.

Yet somehow, in this present case, West v. Gregoire (II), West was denied the opportunity to argue before this court, his case was sidetracked and another case (EFF v, Gregoire) advanced before it, where the issue was decided against him, and this case was then remanded back to the Court of Appeals.

Nearly five years ago, the public records request at issue here was hand-delivered by Mr. West to Governor Gregoire's office on January 19, 2010. CP 569. His request sought, "under RCW 42.56, for disclosure of all of the records currently being withheld from public disclosure by the office of the Governor under color [of] a claim of executive privilege, from 2007 to present, to include all 35 requested described in the [Evergreen Freedom Foundation] policy letter of January 13, [2010], (attached)." CP 569. The EFF policy highlighter that Mr. West attached to his request stated "Since 2007, Governor Gregoire's office has asserted 'executive privilege' 421 times in response to 35 records requests. This privilege has been cited to withhold records concerning

the state's tribal gambling compact, the sale and departure of the Seattle Sonics, the selection and appointment of judges, the state's regulation of marijuana, clemency petitions of death-row inmates, and state employees' public email accounts." CP 560.

On January 25, 2010 (less than five business days after Mr. West's request), Melynda Campbell of the Governor's office responded to Mr. West's request. CP 602. Her letter estimated that it would take her approximately three to four weeks to retrieve the public request files that had been archived and "review, number and provide any documents that may be released." CP 602. After this initial letter, Mr. West heard nothing more from the Governor's office for eight months.

This was not the first time that Mr. West attempted to challenge Governor Gregoire's assertion of executive privilege in response to a public records request. Mr. West had filed an earlier lawsuits West v. Gregoire (Thurston County Superior Court Cause No. 10-2-00063-9), where he prevailed against the Governor on a claim of executive privilege and this was sustained on appeal. CP 632-36.

In this case, on September 24, 2010, Mr. West filed his complaint, alleging Public Records Act violations. CP 3-6. In his complaint, Mr. West alleged that the Governor "failed to promptly respond or disclose relevant records," and that the Governor "has wrongfully asserted an executive privilege exemption when none exists under the Public Disclosure Act and no colorable claim of any such exemption can be made under existing precedent for the records at issue, and has failed to produce the requested records in a reasonably timely manner." CP 5.

Among other relief, Mr. West sought declaratory rulings that the Governor failed to reasonably disclose public records and that an executive privilege exemption does not apply to the Public Records Act. Mr. West also requested that the Governor be required to disclose the records he sought, and requested an award of costs and per diem penalties under the Public Records Act. CP 6. Mr. West served the Governor's office with his summons and complaint on September 13, 2010, before he filed his lawsuit with the court. CP 566; CP 599.

On the morning of September 27, still not having heard from the Governor's office, Mr. West called the Governor's office to find out the status of his public records request. Over the phone, the Governor's office informed him that public records responsive to his request were available and ready to be picked up. On that same day, September 27, Mr. West visited the office. He paid $71.10 (the copy fee mentioned in the September 27 letter). CP 601. He was given the September 27 letter (CP 13), an exemption log (CP 567; CP 575-95) and 474 pages of responsive records (CP 47-519).

Ms. Campbell also had ready a letter to Mr. West dated September 27 from Ms. Narda Pierce, General Counsel (CP 603-04), which stated "You have requested disclosure of specific pages of documents that were withheld in prior public records requests by other requesters. We have researched our records to determine whether any of these documents have been subsequently released. We determined that documents were released to the original requester subsequent to the initial response in the public records requests numbered 2007-27, 2009-44 and 2009-48. Therefore, those documents are currently available for your review." CP 603. Even though Ms. Campbell had Ms. Pierce's letter ready for

Mr. West, the letter was not given to Mr. West when he visited the office. Instead, Ms. Campbell mailed it to Mr. West on September 29. CP 606; CP 567. On October 19, 2010, the Governor, represented by counsel, filed her answer to Mr. West's complaint, admitting "Defendants admit that Christine Gregoire is the Governor of the State of Washington, that she is named in her official capacity, and that the Public Records Act applies to the Office of the Governor." CP 7-10; CP 8.

The exemption log that the Governor's office produced claimed privileges for 72 records. CP 575-595. Of these records, the Governor's office asserted "Executive Privilege" as the sole exemption claimed for 37 records, of which four are duplicates, for a total of 33 separate records. CP 575-595; CP 610. The other exemptions that the Governor's office asserted included RCW 42.56.250(2) (applications for public employment) (*see* CP 576-78; CP 582; CP 584; CP 589; CP 594-95); deliberative process or RCW 42.56.280 (*see* CP 579; CP 582; CP 590; CP 591-94); RCW 5.60.060(2) (attorney-client privilege) (*see* CP 583; 587-88; CP 590; CP 595); 42 USC 405(c)(2)(vii)(1) and/or 5 USC 552(a) (Social Security Number) (*see* CP 586); RCW 42.56.290 (agency party to controversy; work product) (*see* CP 593); and RCW 42.56.270 (financial, commercial and proprietary information) (*see* CP 594). There were 6 separate records where the Governor *did not assert executive privilege at all*, but claimed one or more exemptions to the Public Records Act (RCW 42.56.250(2), 42 USC 405(c)(2)(vii)(1) and/or 5 USC 552(a), RCW 42.56.270, and RCW 42.56.280). CP 584, 586, and 594. Presumably, the Governor had at one point asserted executive privilege as to these 6 records but had later waived executive privilege

while asserting some other exemption, since otherwise they would not have been responsive to Mr. West's request.

The records disclosed in the exemption log were divided into two categories: "2008 Public Record Request documents" (CP 575) and "2007 Public Record Request documents" (CP 584). Recall that Mr. West's request sought documents which had previously been withheld from Public Record Act requestors under claim of executive privilege, from 2007 on, including those that were mentioned in the EFF policy document dated January 13, 2010. Either (1) there were no public records requests in 2009 or 2010 to the Governor's office from which she withheld records under claim of executive privilege, (2) if there were any such public records requests in 2009 or 2010, the Governor waived the formerly-asserted privilege and produced the previously-withheld documents to Mr. West on September 27; or (3) if there were any such public records requests in 2009 or 2010 *and* the Governor had not waived the formerly-asserted privilege and produced the previously-withheld documents to Mr. West, then the Governor's office did not disclose those still-withheld records in the exemption log.

On March 7, 2011, Mr. West filed a Motion for a Show Cause Order, seeking an order compelling the Governor to appear and show cause why she should not be "found to be in violation of the Public Records act for failing to produce records in a reasonable time, for failing to produce an exemption log citing to an actual exemption to disclosure recognized under RCW 42.56, and for failing to produce public records in response to plaintiff's request." CP 11-12. The Governor filed a Response, CP 1024-1045, and both sides filed declarations. On May 6, a hearing was held in front of the Honorable Gary R. Tabor, where the matter was

continued to June 17, 2011 and the parties were allowed to each file a supplemental brief. CP 637.

In addition to his supplemental brief, Mr. West filed a Declaration on June 6, in which he attempted to "clarify the scope of the issues that will need to be resolved in addition to the central issue of Executive Privilege." CP 661. Mr. West noted: "While the briefing has focused primarily on the primary issue of the existence of an executive privilege, after the issue of this exemption is resolved, and especially in the event that the broad claim of executive privilege is not sustained, secondary issues will remain as to the backup claims asserted by the State as their "fall back" position." CP 661.

After Mr. West had filed his supplemental brief, and the Governor had filed her supplemental brief, Ms. Pierce filed her second declaration. In Ms. Pierce's declaration, she explained that the Governor's office had overlooked hundreds of pages of records that had been withheld by the Governor from public records request responses to Luke Esser, Chairman of the Washington State Republican Party, on the basis of the Governor's assertion of executive privilege, and had neither produced nor disclosed the records to Mr. West. CP 664; *see also* footnote at CP 565. The requests made by Mr. Esser were dated late 2007 and early 2008. CP 663. For roughly three hundred of these pages, the Governor chose to waive her assertion of executive privilege, and the Governor's office produced those records to Mr. West on June 9. CP 64; CP 697; CP 701-997.

For other of the withheld records, the Governor's office chose not to produce them, but disclosed their existence in a second exemption log. CP 667-96. "Exemptions are being asserted as to 93 records, as outlined on the attached

exemption log. Of that total, executive privilege is being asserted as an exemption on 67 records, although only as to 15 records is executive privilege the only basis for an exemption." CP 664. There are 26 records for which the Governor was *not* asserting executive privilege (although presumably executive privilege was asserted for those records sometime in the past; otherwise they would not have been responsive to Mr. West's request).

This second exemption log groups the withheld documents into one category: "2008 Esser Public Record Requests documents." The exemptions asserted by Governor Gregoire include: RCW 42.56.250(2) (applications for public employment) (*see* CP 667-73; CP 691; CP 696); RCW 42.56.250(3) (personal information redacted for state employees) (*see* CP 669; CP 671); RCW 42.56.290 (controversy to which the agency is a party, work product) (*see* CP 672-74; CP 679-89; CP 692-95); RCW 42.56.280 or deliberative process (*see* CP 674-675; CP 677-78; CP 686; CP 688-90; CP 693-96); RCW 5.60.060(2)(a) (attorney-client privilege) (*see* CP 674; CP 679-84; CP 686-89; CP 691-95); and RCW 82.32.330(1)(c) (disclosure of tax information) (*see* CP 676).

As for the 26 records that were disclosed in the exemption log but for which the Governor did not claim executive privilege, the exemptions claimed include RCW 42.56.250(3) (personal information redacted for state employee); RCW 42.56.250(2) (applications for public employment); RCW 42.56.290 (work product); RCW 82.32.330(1)(c) (disclosure of tax information); RCW 5.60.060(2)(a) (attorney-client privilege); and RCW 42.56.280 (deliberative process) (*see* CP 669; CP 670; CP 672-74; CP 676; CP 679-88; and CP 690-92).

On June 17, there was a hearing before Judge Tabor. Mr. West presented argument as to executive privilege and the Public Records Act, and requested an order to show cause. Counsel for the Governor responded in opposition and requested that the motion for order to show cause be denied. The Trial Court stated that it did not find that Mr. West met his burden, and that therefore the State – the Governor – would prevail. The Trial Court dismissed Mr. West's action on the basis that executive privilege exists in Washington and that it is an exemption to the Public Records Act, and adopted the three-part test suggested by the Governor for assessing gubernatorial executive privilege. CP 998; 1007.

In dismissing Mr. West's case, the Trial Court did not reach the issue of whether the Governor had violated the Public Records Act by failing to produce the records for which the Governor was waiving the claim of executive privilege in a reasonable time, nor whether the Governor had violated the Public Records Act by failing to disclose the existence of the records for which the Governor was making a claim of executive privilege by providing Mr. West with an exemption log in a reasonable time, nor yet whether any of the other exemptions applied to the records for which the Governor was *not* asserting a claim of executive privilege.

Mr. West submitted a proposed order. CP 1001-02. The Governor submitted a proposed order, which the Court signed. CP 1003; CP 1004-09. The order signed by the Court contained, among other Conclusions of Law, "The only issue before the Court is whether the Governor may assert a gubernatorial executive privilege, grounded in the separation of powers under the Washington State Constitution, as an exemption under the PRA." Mr. West moved the Court

for reconsideration, which was denied. CP 1022. Mr. West timely appealed to the Supreme Court. CP 999-1002.

The Court denied intervention or consolidation with the EFF matter, stayed West's appeal, ruled in the EFF case that an executive privilege existed, and remanded this case back down to the Court of Appeals.

On November, 2014, Division II of the Court of appeals issued a published opinion overruling the precedent of Gronquist and affirmng the trial court.

On November 18, 2014, an order denying reconsideration was entered. West files this timely Petition for Review to the Washington State Supreme Court.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The retroactive application of new rules of law to deprive a citizen employing what was intended to be a simple show cause procedure to obtain public records a cause of action and the existence of an executive privilege are issues of substantial public importance. As the Supreme Court of the United States has recognized, issues of retroactive application **"are among the most difficult of those which have engaged the attention of courts, state and federal,...**"

"[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the `injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma, supra,* at 706, *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358, 364 (1932). See *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U. S. 371 (1940). Cf. *Linkletter* v. *Walker,* 381 U. S. 618 (1965).

The question of whether the Show Cause procedure in the Public Records Act should be liberally interpreted to effectuate the remedial intent of the law, consistent with Gronquist v. Department of Corrections, or whether new rules of law inconsistent with previous decisions may be adopted to deprive a citizen seeking public records of a substantive right contrary to the decisions above are of substantial public interest.

When construing statutes, the goal is to ascertain and effectuate legislative intent. The People and the legislature both intended to require that the Public Records Act be liberally interpreted to effectuate its purposes. To this end the PRA incorporates a show cause procedure that was intended to be simple enough for an ordinary citizen to employ. Prior to the published decision of the Court of Appeals in this case, Gronquist v. Department of Corrections upheld the principle that issues raised in a motion to show cause under the PRA were preserved.

The ruling of the Court of Appeals in this case is contrary to Gronquist and denies the express remedial language of the Public Records Act that its provisions be liberally applied.

Further, the issue of whether executive privilege exists and whether new rules of law maybe adopted and applied retroactively and in violation of the doctrines of res judicata and collateral estoppel to deny a litigant the opportunity to assert a cause of action is a matter of substantial and statewide public importance.

B. **The decision of the Court is in conflict with the doctrine of separation of powers and previous decisions of the Supreme Court interpreting the 14th Amendment.**

The Appeals Court decision below conflicts with not only the express intent of the PRA and every decision in the last 4 decades interpreting the PRA liberally to effectuate its remedial purpose, it also violates the doctrine of separation of powers by establishing an exemption into statute by judicial fiat. Petrarcha v. Halligan

The Appeals Court's interpretation clearly fails to interpret the statute properly or to give effect to plain meaning of the statute. The plain meaning of the statute requires the Act to be liberally interpreted and the exemptions narrowly drawn to effectuate the remedial intent of the People.

The Court of Appeals removed these protections and created a new

precedent that frustrates and undermines the legislative intent of the Public Records Act and allows for broad withholding without any specific statutory basis.

The Court of Appeals also ignored the rulings of the Supreme Court in PAWS, 114 Wn.2d 677 , 680, 684, 790 P.2d 604 (1990), Hangartner v. City of Seattle, 151 Wn.2d 439 (2004), and Koenig v. City of Des Moines, 158 Wn. 2d. 173, (2006), and every other ruling in the last 40 years liberally interpreting the (PDA and) PRA to effectuate its remedial intent.

In addition, the Court of Appeals denied the estoppel and res judicata effects of its own ruling in West v. Gregoire (I) and thus ruled at variance with the precedent of Kramarevcky v. DSHS, 122 Wn.2d 738, P.2d 535, and Hilltop Terrace Association v. Island County, 126 Wn.2d 22, (1995)

In the Hilltop Case, this Court noted...

The most purely public purpose served by res judicata lies in preserving the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results. . .

The ruling of the Court of Appeals in this case fails to preserve the acceptability of judicial dispute resolution from the corrosive disrespect that will be the result if the same matter of executive privilege is twice litigated (by the same Court of Appeals) with inconsistent results, and, incidentally, failed to afford due process of law.

C. Significant questions of law under the Constitution of the United States and the State of Washington are involved

The issues of separation of powers and executive privilege are significant questions of law under the State Constitution.

This Court's Published Decision of October 21 in this case not only violates the doctrines of the separation of powers, res judicata and estoppel, it establishes a new and burdensome rule for PRA litigants that harkens back to the "sporting theory of justice"denounced a century ago by Rosco Pound, which the revisions to the federal rules were designed to eliminate.

The result of this ruling will be to reduce the due process requirements of the show cause procedure to a formalistic ritual by which PRA litigants are deprived of their right to a hearing by overzealous lawyering, trickery or intimidation.

The intent of the PRA was to establish a simple and forthright procedure simple enough for the actual citizens (who would be the ones required to enforce it) to employ. The restricitve and novel rule set forth by the Court is not only inequitable, it is at variance with the clear intent of the PRA itself that it be liberally interpreted to effectuate its remedial intent.

The ruling also misrepresents the plain language of the plaintiff's Complaint and Show Cause Motion. Contrary to the Court's determination, both of these pleadings reference the PRA claims ignored by the Trial Court.

The Court also overrules the holding in Gronquist v. Department of Corrections, 159 Wn. App. 576, (2011) that

> The DOC argues that Gronquist never raised these arguments below and, thus, we should not consider them. This is incorrect. Gronquist raised these arguments in his show cause motion,...See Gronquist, supra, at note 9

The 14th Amendment to the Constitution of the United States provides...

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

When a state court overrules established precedent like Gronquist with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend [his] substantive right." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678

The ruling in this Court admittedly established a new principle of law, and applied it retroactively to unfairly deny the appellant West his day in court, despite his reasonable reliance upon the ruling of the very same Court in Gronquist, and West v. Gregoire I.

The new principle of law set forth by the Court harkens back to an era of sporting justice best left in the past. The retroactive application of this new rule goes beyond mere sporting into the realm of the unconstitutional.

Similarly, the application of a new rule under the PRA to change the clear terms of statute to create a heretofore unknown executive privilege exemption violates the separation of powers identified in Petracha v. Halligan. To require

the appellant to have previously complied with procedures not established at the filing of the suit to establish a specific need also violates the rule of Bouie v. City of Columbia and Brinkerhoff as an ex post facto retroactive application of a new rule to bar a litigant's due process rights.

G. CONCLUSION

The Courts have broad latitude in fashioning prospective rules of procedure, but judicial creation of substantive law and the retroactive application of such newly established rules is inequitable and unjust when it deprives a plaintiff of the protections of the separation of powers, due process, equal protection, and a right to a fair hearing, particularly when a citizen seeking public records from his government has reasonably relied upon prior decisions, practice and precedent.

Based on the forgoing arguments, West respectfully requests the Supreme Court accept review of this case because it meets the four criteria under RAP 13.4.

Respectfully submitted this 17th day of November 2014.

BY s/ Arthur West

ARTHUR WEST

Declaration of Service

I declare that on the date and time indicated below, I caused to be served via email and personally, a copy of the documents and pleadings listed below upon the attorney of record for the defendants herein listed and indicated below.

1 APPELLANT WEST'S PETITION FOR DISCRETIONARY REVIEW

BRUCE TURCOTT OFFICE OF THE ATTORNEY GENERAL

I declare under penalty of perjury under the laws of the United States that the foregoing is True and correct.

Executed on this 17th day of ~~October~~, December 2014.

S/ Arthur West

ARTHUR WEST

ARTHUR WEST, Appellant.
v.
CHRISTINE GREGOIRE, GOVERNER OF THE STATE OF WASHINGTON, STATE OF WASHINGTON, Respondents.

No. 45812-8-II.

Court of Appeals of Washington, Division Two.

Filed October 21, 2014.

November 4, 2014.

Arthur West (Appearing Pro Se), 120 State Avenue Ne #1497, Olympia, WA, 98501, Counsel for Appellant(s).

Elizabeth Christina Beusch, Atty Generals Office, Po Box 40100, Olympia, WA, 98504-0100, Alan D. Copsey, Office of the Attorney General, Po Box 40100, Olympia, WA, 98504-0100, Counsel for Respondent(s).

OPINION

MAXA, J.

Arthur West appeals the trial court's dismissal, following show cause proceedings under former RCW 42.56.550 (2005),[1] of his complaint alleging that then Governor Christine Gregoire violated the Public Records Act (PRA), chapter 42 RCW, by refusing to produce numerous records under a claim of executive privilege. West initially argued that the trial court erred in recognizing an executive privilege as a PRA exemption. However, our Supreme Court resolved this issue in *Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 310 P.3d 1252 (2013), holding that a qualified executive communications privilege operates as a PRA exemption. West now asserts that the trial court erred in dismissing his lawsuit based on the executive privilege because he also asserted additional PRA claims relating to Gregoire's alleged unreasonable delay in producing records and other grounds, and because the trial court should have deferred ruling on whether West could show a particularized need for the records requested under the second part of the *Freedom Foundation* test.

We hold that (1) the trial court did not err in dismissing all West's claims following the former RCW 42.56.550 show cause proceedings because West abandoned all claims other than those based on his argument that the executive privilege was not a valid PRA exemption, and (2) the trial court properly ruled that the executive privilege precluded disclosure because West failed to submit any evidence that

he had a particularized need for the records requested. Accordingly, we affirm.

FACTS

In January 2010, West made a PRA request to Gregoire for all records for which she had asserted executive privilege since 2007. The governor's office responded within five business days, as required by RCW 42.56.520, explaining that it would take three to four weeks to process the request and provide the responsive records and an exemption log listing records covered by any exemptions. However, the governor's office did not communicate further with West for over eight months.

On September 3, the governor's office prepared a letter notifying West that the records and exemption log were available for inspection and copying. West claims he never received this letter. On September 24, West filed suit against Gregoire to compel production of all records for which Gregoire had "wrongfully asserted an executive privilege exemption where none exists under the [PRA]," Clerk's Papers (CP) at 5. West also sought penalties under the PRA and a declaratory ruling that the privilege itself was not a valid PRA exemption. On September 27, West appeared at the governor's office to inspect the records, and he received copies of numerous records and the exemption log.

More than five months later, West moved for a show cause order. He requested that Gregoire appear and show cause why she should not be found in violation of the PRA for failing to (1) produce records in a reasonable time, (2) produce an exemption log citing to a recognized exemption, and (3) produce public records in response to his request. In a supporting declaration West alleged that the governor's office "failed to produce the records in a reasonable time (over 8 months)." CP at 46. Gregoire did not file a separate motion to dismiss West's PRA lawsuit. However, in her response brief Gregoire requested that the trial court dismiss the lawsuit because "the only claim Mr. West has made in this matter is that executive privilege is not recognized in this state as a basis for exemption from disclosure under the [PRA]." CP at 1044.

In support of his show cause motion, West filed an initial brief and a supplemental memorandum — both obviously copied from briefs in other cases — which focused only on whether the executive privilege was an exemption to the PRA and provided no reference to the facts of West's claim against Gregoire. West did not argue in either of his briefs or in his supporting declarations that he had additional PRA claims based on Gregoire's delay in responding to the PRA request or any other grounds.

In June 2011, after the parties had filed their briefs but before the court heard oral argument, the governor's office disclosed another batch of records not previously identified that were responsive to

West's request. The governor's office also produced an additional exemption log asserting executive privilege for some of these newly disclosed documents. West moved to supplement the record with copies of the new log and the "silently withheld" documents the governor's office had just produced, "[f]or the court to rule in an informed manner on the propriety of the executive privilege exemption." CP at 697. But he did not move to amend his complaint to assert new PRA claims related to the disclosure or request a continuance of the show cause hearing.

On June 17, the trial court held a hearing on West's show cause motion. West argued only that Gregoire unlawfully withheld certain records because the executive privilege was not a PRA exemption. He did not argue that he had PRA claims based on Gregoire's delay in responding to his request or any other grounds. After oral argument the trial court ruled in Gregoire's favor on the executive privilege issue and dismissed West's lawsuit. West objected to the dismissal on the grounds that because Gregoire had produced some records after he filed suit, he had prevailed and was entitled to relief under his complaint. West did not argue that the trial court could not dismiss his complaint because he had raised additional PRA claims resulting from Gregoire's delay in responding to his request or any other grounds.

The parties submitted proposed orders memorializing the trial court's oral ruling. West's proposed order included language expressly denying claims for failure to produce records and exemption logs in a reasonable time. But the trial court signed the State's proposed order, which did not include this language. The trial court noted that it had ruled only on the executive privilege issue and that West had not presented any other issues to the court. The trial court's final order included a conclusion of law that the only issue before the court was Gregoire's ability to assert the executive privilege. West moved for reconsideration, arguing that the court erred in dismissing his additional claims sua sponte. The trial court denied the motion.

West filed a notice of appeal in the Supreme Court, which included a reference to a PRA claim related to Gregoire's delay in responding to the PRA request and "silent withholding" of the documents produced in June 2011.[2] CP at 999. At the time West filed his appeal, Washington law still was unsettled as to whether executive privilege could be claimed as an exemption to the PRA. West sought to consolidate his case on appeal with *Freedom Foundation,* which was then before the Supreme Court and involved the same underlying challenge to the executive privilege exemption. The Supreme Court denied consolidation and stayed West's case.

The Supreme Court ultimately held in *Freedom Foundation* that the executive privilege operated as a constitutional exemption to the PRA disclosure requirements and laid out the applicable test for deciding whether the exemption applies. 178 Wn.2d at 699-705. The court then remanded West's case

to this court for a decision in light of its holding in *Freedom Foundation.*

ANALYSIS

We review challenges to an agency action under the PRA de novo. Former RCW 42.56.550(3); *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 428, 300 P.3d 376 (2013). The PRA requires disclosure of public records upon request, unless an exemption applies. RCW 42.56.070(1). The burden is on the agency to show that such an exemption applies, former RCW 42.56.550, and we narrowly construe exemptions. RCW 42.56.030.

A. WEST'S ADDITIONAL CLAIMS FOR PRA VIOLATIONS

West argues that even if executive privilege constitutes an exemption to the PRA, the trial court erred in dismissing his lawsuit because he had asserted additional claims that Gregoire violated the PRA by failing to promptly respond to his requests, failing to produce or identify in exemption logs some documents responsive to his requests, improperly claiming other PRA exemptions for records not subject to an assertion of executive privilege, and silently withholding a second set of records until June 2011. We hold that even assuming West raised these claims in his initial pleadings, he abandoned the claims by failing to argue them in the show cause proceedings.

West consistently characterized his lawsuit as one challenging the assertion of executive privilege. For instance, he began his complaint by stating that "[t]his is an action . . . resulting from (1) an improper assertion of an executive privilege exemption." CP at 3. But West did assert at least an unlawful delay claim in his initial pleadings. West's complaint alleges that Gregoire failed to reasonably disclose records in a timely manner and failed to promptly respond or disclose relevant records. And in his motion for a show cause order, West requested an order compelling Gregoire to appear and show cause why she should not be found in violation of the PRA for, among other things, failing to produce records in a reasonable time. In a supporting declaration, West stated that the governor's office had "failed to produce the records in a reasonable time (over 8 months)" and had improperly asserted an executive privilege.[3] CP at 46.

However, during the show cause process West did not argue any claims other than those involving the executive privilege. His two briefs focused solely on whether executive privilege was a valid PRA exemption. West did not address additional claims in oral argument. On this basis, the trial court expressly concluded that West did not present any other issues to the court besides whether Gregoire

could assert an executive privilege as an exemption to the PRA. West did not assign error to this conclusion.

Whether a requestor in a PRA action abandons claims by failing to argue them at the show cause hearing is a matter of first impression. But had West failed to present his claims in a formal trial or in response to a summary judgment motion, there is no question that those claims would be deemed abandoned. When a party asserts a claim in pleadings but at trial does not "press" the claim in any way or present evidence to support it, the party abandons that claim. *See* Rainer Nat'l Bank v. McCracken, 26 Wn. App. 498, 508, 615 P.2d 469 (1980) (affirming dismissal of counterclaim). Similarly, a plaintiff abandons a claim asserted in a complaint by failing to address the claim in opposition pleadings, present evidence to support the claim, or argue the claim in response to a summary judgment motion seeking dismissal of the entire complaint. *Cano-Garcia v. King County*, 168 Wn. App. 223, 248, 277 P.3d 34, *review denied*, 175 Wn.2d 1010 (2012).[14] The question here is whether we should treat a show cause proceeding under former RCW 42.56.550(1) like a trial or summary judgment motion when determining whether a claimant has abandoned PRA claims.

Under the PRA, a requester may seek judicial review of an agency's refusal to produce the requested records via "any kind of civil action." *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 104, 117 P.3d 1117 (2005). Former RCW 42.56.550(1) also provides that a requestor denied the opportunity to inspect or copy a public record may move for an order requiring the agency to show cause why it has refused to allow inspection or copying. In this show cause proceeding the agency bears the burden of establishing that its refusal to produce the records did not violate the PRA. Former RCW 42.56.550(1). The show cause hearing may be held on affidavits, former RCW 42.56.550(3), or as a trial-type hearing involving oral argument and live testimony. *Wood v. Thurston County*, 117 Wn. App. 22, 28, 68 P.3d 1084 (2003). The court may completely resolve PRA claims in the show cause proceeding. *See* *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 154, 240 P.3d 1149 (2010); *Zink v. City of Mesa*, 140 Wn. App. 328, 335, 166 P.3d 738 (2007).

Given this procedure, a former RCW 42.56.550(1) show cause proceeding is, in effect, the PRA claimant's trial. At the very least, it operates like a motion for summary judgment on the claimant's PRA claims. Therefore, as in a trial or summary judgment motion, West was required to address all the claims that he wanted to pursue against Gregoire in the show cause proceedings that he initiated. Because he did not even mention any claims not involving the executive privilege in his briefs or in oral argument, he is deemed to have abandoned those claims.

Requiring a PRA claimant to address all PRA claims during show cause proceedings in order to avoid abandonment promotes the orderly administration of PRA requests and is consistent with the purposes

of the PRA. To hold otherwise would allow PRA claimants to assert their claims in a piecemeal fashion, which would delay the ultimate resolution of disputes involving PRA requests and result in judicial inefficiency. *See* Brown v. Gen. Motors Corp., 67 Wn.2d 278, 282, 407 P.2d 461 (1965) ("[p]iecemeal litigation is not to be encouraged."); *State ex rel. Lemon v. Coffin,* 52 Wn.2d 894, 898, 332 P.2d 1096 (1958).

We hold that unless the parties agree or the trial court rules otherwise, a PRA claimant abandons all PRA claims if the claimant does not address those claims in briefing or argument in a former RCW 42.56.550(1) show cause proceeding.[5] Because West argued only his executive privilege claim in the show cause proceedings, we hold that he abandoned any other PRA claims.

B. APPLICATION OF EXECUTIVE PRIVILEGE TEST

West argues that the trial court erred in dismissing his PRA claim based on executive privilege without first giving him the opportunity to show a "particularized need" for the privileged records under the second part of what became the *Freedom Foundation* test. We disagree. West had the opportunity to show that he had a particularized need for the documents protected by the executive privilege, but failed to submit any such evidence or argument.

Although our Supreme Court had not yet decided *Freedom Foundation* when the trial court ruled, Gregoire argued in the show cause proceedings that the trial court should apply the three-part test for analyzing the privilege that the Supreme Court ultimately adopted. Gregoire specifically argued that if the privilege applied, West could obtain the protected records only if he could show a particularized need for them. As a result, West knew that if the trial court accepted the three-part test, he had to come forward with some evidence on his need for the records. But he made no effort to show that he had a particularized need for the records he had requested.

As noted above, the trial court ruled that Gregoire could assert executive privilege as an exemption to the PRA and adopted the three-part test for analyzing the privilege. The trial court indicated that the withheld documents appeared to fall within the privilege. This required the trial court to address the second part of the test — whether West could overcome the presumption of privilege. The trial court then concluded that "Mr. West offered no basis to find that . . . the presumption of privilege should be overcome." CP at 1008. Because he presented no evidence or argument on the issue, the trial court necessarily ruled that West did not satisfy the second part of the test eventually adopted in *Freedom Foundation.*

West argues that the trial court unfairly applied a new test to his PRA claim without providing adequate

notice, which violated his right to due process. However, West had adequate notice of the requirements of the three-part test. The test has been used in federal courts since the U.S. Supreme Court decision in *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). And in her response to the show cause motion, Gregoire specifically argued that the trial court should apply the three-part test and that West had made no attempt to show a particularized need. West responded to this argument in his supplemental brief and argued against adoption of the three-part test, but he did not advance any claim at that time that he had a particularized need for the records requested.

West cites no authority for the proposition that a trial court cannot adopt and apply a legal analysis as a matter of first impression when the parties have fully briefed the issue. West had every opportunity to present an argument that he did have a particularized need for the records requested, and he should not be allowed to benefit from his failure to do so. We hold that under these circumstances the trial court did not err in applying the three-part test to West's claims and did not infringe on his right to due process.[6]

C. ATTORNEY FEES

West requests attorney fees for his appeal. *See* RAP 18.1. A prevailing plaintiff in a PRA action is entitled to reasonable attorney fees and all costs associated with the litigation, in addition to any penalties assessed against the agency. Former RCW 42.56.550(4). Because West does not prevail, we deny West's request for attorney fees.

We affirm the trial court's dismissal of West's complaint.

WORSWICK, P.J. and LEE, J., concurs.

[1] RCW 42.56.550 was amended in 2011, but the provisions at issue here were unchanged. LAWS OF 2011, ch. 273, § 1.

[2] West actually filed the notice of appeal before the trial court entered written findings and conclusions on his show cause ruling.

[3] Later, West referenced "secondary issues" related to the governor's assertion of exemptions other than executive privilege. CP at 661. However, he did not plead this issue in his complaint or reference it in his motion for a show cause order.

[4] And as a general rule, we will not address abandoned issues on appeal. *Green v. Normandy Park Riviera Section Cmty. Club, Inc.*, 137 Wn. App. 665, 688, 151 P.3d 1038 (2007).

[5] Our holding should not be interpreted as preventing a PRA claimant or an agency from requesting that the trial court address multiple claims in separate show cause proceedings, or preventing a trial court from conducting separate proceedings for different claims.

[6] West also challenges the evidentiary sufficiency for findings of fact 2, 3, and 8 in the trial court's final order. These findings indicate that West received the September 3, 2010 letter from the governor's office. Because of our holding above, these findings are immaterial and

we need not address West's challenges.

WEST v. GREGOIRE

NO. 42779-6-II.

ARTHUR WEST, Appellant, v. CHRISTINE GREGOIRE, GOVERNOR OF THE STATE OF WASHINGTON; STATE OF WASHINGTON, Respondents.

Court of Appeals of Washington, Division Two.

Filed: September 11, 2012.

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UNPUBLISHED OPINION

PENOYAR, J.

Arthur West and the Governor's Office both challenge the trial court's award of penalties against the Governor's Office under the Public Records Act (PRA).[1] West contends that the trial court erred in the award calculation because it incorrectly determined (1) the number of penalty days and (2) the penalty amount. On cross appeal, the Governor's Office contends that the trial court erred when it determined that $25 was the appropriate daily penalty. Because the trial court properly excluded a reasonable period to respond to West's request from the penalty days and did not act unreasonably in determining the appropriate daily penalty to be $25, we affirm.

FACTS

I. FACTS

On November 16, 2009, West submitted to the Governor's Office a memorandum addressed to "WASHINGTON STATE GOVERNOR CHRISTINE GREGOIRE AND [Washington Association of Counties (WSAC)] DIRECTOR ERIC JOHNSON." Clerk's Papers (CP) at 45. The memorandum began with the line, "RE: ATTENDANCE AT

SECRET SHADOW GOVERNMENT EVENT, AKA (WSAC 2009 ANNUAL CONFERENCE)." CP at 45. West made a request for "all records of communications between the Office of the Governor and WSAC from 2007 to the present" in the last paragraph of his memorandum. CP at 45. The memorandum was routed to the Governor's Constituent Services Unit (CSU).

On December 1, West emailed the Communications Director for the Office of Financial Management and the Director of External Affairs and Senior Counsel to Governor Gregoire. West wrote that he had submitted a public records request to the Governor's Office but had not received a response. He also asked for additional public records, including an August 2, 2006 proclamation of the Governor relating to WSAC and speeches by the Governor to WSAC from 2005 to present. The directors forwarded West's email to the Public Records Officer for the Governor's Office, Melynda Campbell.

That same day, Campbell contacted the CSU and asked whether it had received West's request. CSU responded within an hour, sent a copy of West's memorandum, and explained that it had not seen the public records request on the memorandum. Campbell notified the Governor's Office's staff of West's public records request and directed the staff to advise her of documents responsive to his request. Campbell then emailed West to inform him that his memorandum had not initially been identified as a public records request. She also told West that she would provide an estimate of the time required to respond to his public records request within two days.

On December 2, West responded and stated that he had a deadline of December 7 in a case concerning the status of WSAC; he hoped to receive the requested proclamation and other available information by that date. Campbell then emailed the office staff to inform them of West's deadline.

On December 3, Campbell emailed 57 pages of responsive documents to West, including the proclamation. Campbell informed West that the search was still ongoing and that she would let him know if additional documents were located.

On December 17, Campbell provided West with an additional 299 pages of documents and an exemption log. One 3-page document was withheld. The exemption log

identified the document, "PRR 71-73;" its date, "April 8, 2009;" the author, "Kathleen Drew;" the recipient, "Governor Gregoire;" the type of document, "Briefing Document;" and exemption, "Executive Privilege." CP at 12. Kathleen Drew is one of the Governor's Executive Policy Advisors.

II. PROCEDURAL HISTORY

On January 11, 2010, West brought a lawsuit under the PRA, claiming that the assertion of executive privilege violated the PRA. The trial court issued an order to show cause to the Governor's Office, directing the Governor's Office to show cause why it should not be found in violation of the PRA. The show cause hearing was scheduled for January 22. West requested a continuance to February 5, which the trial court granted. West then requested a continuance to February 12, waiving any PRA penalties during this period.

On March 12, the trial court entered findings of fact, conclusions of law, and an order compelling disclosure. The trial court concluded, after reviewing, in camera, the document that the document at issue[2] did not contain advice to the Governor and thus would not be subject to a claim of executive privilege even if such a privilege existed. The trial court concluded that it need not address the issue of whether an executive privilege exists in the State of Washington. That day, the Governor's Office provided a copy of the memorandum to West.

West then moved for an award of penalties and costs. The trial court found that the Governor's Office did not respond within the initial 5 business day period set forth in former RCW 42.56.520 (1995), that this was not excusable, but that the form of West's request was unclear and foreseeably contributed to the error. The trial court found that the public records officer for the Governor's Office was "properly-trained and systems were in place to track and respond to requests for records." CP at 168. The trial court also found that after December 1, 2009, "when the Governor's Office first recognized that Mr. West had made a public records request, it acted expeditiously to respond to this request and completed its response in a reasonably timely manner." CP at 168. The trial court concluded that the Governor's Office had acted in good faith throughout the case and in asserting executive privilege. The trial court considered the

aggravating and mitigating factors as set forth in *Yousoufian v. Office of Ron Sims* (*Yousoufian V*), 168 Wn.2d 444, 229 P.3d 735 (2010), and concluded that none of the aggravating factors and all of the mitigating factors applied. The trial court determined the appropriate daily penalty to be $25, "a penalty at the lower end of the statutory range." CP at 169.

The trial court calculated the appropriate penalty period to be 87 days. In determining the penalty period, the trial court calculated the period between West's request on November 16, 2009 and March 12, 2010. The trial court then subtracted the 7 days West waived when he sought a second continuance of the show cause proceeding. The trial court also subtracted 22 days, which the trial court determined to be a reasonable period for the Governor's Office to respond to West's public records request.[3] West moved for reconsideration, and the trial court denied his motion.

West petitioned for direct review at the Supreme Court, primarily seeking review of the trial court's decision to decline considering the issue of whether executive privilege existed in the State of Washington. The Governor's Office filed a notice of cross appeal.

In its answer to West's statement of grounds for direct review, the Governor's Office argued that, under RAP 3.1, West was not aggrieved of the trial court's decision compelling disclosure of the requested document and could not challenge that decision on appeal. Accordingly, the Governor's Office moved to strike the portions of West's brief challenging the trial court's decision not to decide the executive privilege issue.

A Supreme Court Commissioner granted the Governor's Office's motion to strike, reasoning that West was not aggrieved of the trial court's decision compelling disclosure of the requested document. The commissioner then concluded, "And because the governor does not challenge that decision on appeal, Mr. West cannot raise the executive privilege issue as an alternative basis for upholding the superior court's decision." Ruling Granting Motion to Strike & Establishing Briefing Schedule (Supreme Court No. 84629-4) at 2. West then moved to modify the commissioner's ruling; the Supreme Court denied West's motion. The Supreme Court transferred this

case to us.

ANALYSIS

I. PENALTY DAYS

First, West contends that the trial court erred in calculating the penalty period. West contends that the "correct number of penalty days in this case [is] from the date the original request for records in this case was filed by West until the record was produced." Appellant's Br. at 50. In response, the Governor's Office asserts that the trial court properly included in its calculation a reasonable period for the Governor's Office to respond to West's request. The Governor's Office contends that "West's argument depends on the premise that a requester has the right to inspect or copy a record immediately upon request." Resp't's Br. at 21. Because the right to inspect or copy a public record, under the PRA, does not arise until after the agency has had a reasonable period to complete its response to the request, we agree with the Governor's Office.

We review questions of statutory meaning de novo. *City of Federal Way v. Koenig,* 167 Wn.2d 341, 344, 217 P.3d 1172 (2009). The fundamental objective of statutory construction is to ascertain and carry out the legislature's intent. *Rozner v. City of Bellevue,* 116 Wn.2d 342, 347, 804 P.2d 24 (1991). If the statute's language is plain and unambiguous, then the statute's meaning must be derived from the wording of the statute itself. *Rozner,* 116 Wn.2d at 347.

Former RCW 42.56.550(4) (2005) states:

> 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 less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

Under the PRA, responses to requests for public records shall be made within five business days of receiving a public record request. Former RCW 42.56.520. The

agency may respond in one of several ways; one option allows the agency to acknowledge that it has received the request and provide a reasonable estimate of the time the agency will require to respond to the request. Former RCW 42.56.520. "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." Former RCW 42.56.520.

Under the PRA's statutory language, the penalty period is "each day that [the requester] was denied the right to inspect or copy" the requested public record. Former RCW 42.56.550(4). The Governor's Office persuasively argues that the right arises "*after* the agency has been afforded a reasonable period to complete its response to the request." Resp't's Br. at 17-18. Indeed, under the PRA, an agency is allowed five business days to respond to the request, may respond by providing a reasonable estimate of the time required to respond to the request, and may require additional time to respond to a request based on the need to locate and assemble the requested information. *See* former RCW 42.56.520. These statutes support the trial court's conclusion that the PRA allows an agency a reasonable time to respond to a public record request and a requester is not denied his or her right under the PRA to inspect or copy the requested record during this time period. Accordingly, we hold that the trial court did not err by (1) concluding that an agency is afforded a reasonable time to respond to a public records request under the PRA and (2) excluding a reasonable period of 22 days from the penalty period.

II. DAILY PENALTY

Both parties challenge the trial court's conclusion that $25 was an appropriate daily penalty. West contends that the amount was too low and that the trial court erred by failing to decide the executive privilege issue, "in finding all of the mitigating factors to be present when such a finding was not supported in the record, and in failing to find that any of the aggravating factors were present." Appellant's Br. at 43. Conversely, the Governor's Office asserts that the $25 award was too high. Because the trial court's

award was not manifestly unreasonable, we disagree with both parties and affirm the trial court.

A. STANDARD OF REVIEW

We review a trial court's determination of appropriate daily penalties to determine whether the decision is manifestly unreasonable or based on untenable grounds or reasons. *Yousoufian V,* 168 Wn.2d at 458-59. A trial court's decision is manifestly unreasonable if it adopts a view that no reasonable person would take despite applying the correct legal standard to the supported facts. *Yousoufian V,* 168 Wn.2d at 458-59 (quoting *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

"Determining a PRA penalty involves two steps: `(1) determine the amount of days the party was denied access and (2) determine the appropriate per day penalty between $5 and $100 depending on the agency's actions.'" *Yousoufian V,* 168 Wn.2d at 459 (quoting *Yousoufian v. Office of King County Executive* (*Yousoufian II*), 152 Wn.2d 421, 438, 98 P.3d 463 (2004)). "Trial courts may exercise their considerable discretion under the PRA's penalty provisions in deciding where to begin a penalty determination." *Yousoufian V,* 168 Wn.2d at 466-67 (citing former RCW 42.56.550(4)). "There is no presumptive starting point, not even the midpoint of this range; the trial court should use its discretion in determining where to begin." *Sanders v. State,* 169 Wn.2d 827, 862, 240 P.3d 120 (2010).

In *Yousoufian V,* the Supreme Court set forth a number of mitigating and aggravating factors a trial court may consider in determining the appropriate per day penalty. 168 Wn.2d 467-68. Mitigating factors that may decrease the penalty are

> (1) a lack of clarity in the PRA request; (2) the agency's prompt response or legitimate follow-up inquiry for clarification; (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions; (4) proper training and supervision of the agency's personnel; (5) the reasonableness of any explanation for noncompliance by the agency; (6) the helpfulness of the agency to the requestor; and (7) the existence of agency systems to track and retrieve public records.

Yousoufian V, 168 Wn.2d at 467 (footnotes omitted). Aggravating factors that may increase the penalty are

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

Yousoufian V, 168 Wn.2d at 467-68 (footnotes omitted). "[These] factors may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate considerations. Additionally, no one factor should control. These factors should not infringe upon the considerable discretion of trial courts to determine PRA penalties." *Yousoufian V,* 168 Wn.2d at 468.

B. WEST'S ARGUMENT

First, West contends that the trial court's penalty was too low and that the trial court erred by finding all of the mitigating factors to be present and by failing to find that any of the aggravating factors were present when the information withheld concerning the operations of the governor's office, as well as those of the [Office of Financial Management] OFM and the WSAC were of foreseeable public importance, when the agency misrepresented the content of the record in an attempt to evade an in camera review completely."[4] Appellant's Br. at 43-44. West does not cite the record or legal authority, contrary to the requirements of RAP 10.3(a)(6); accordingly, we decline to consider this argument. *See Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (declining to consider arguments not supported by any reference to the record nor by any citation of authority). West fails to prove aggravating factor 7, that the request was related to an issue of public importance and that the importance was foreseeable to the agency. Furthermore, aside from his bare assertion that the "agency misrepresented the content of the record," West fails to offer proof of aggravating factors 5 and 6, that the agency acted in bad faith or acted dishonestly.

Appellant's Br. at 44.

West also contends that the trial court failed to consider the "lack of strict compliance with the 5 day response period requirement." Appellant's Br. at 45. But the trial court did consider this fact. In finding of fact 19, the trial court specifically found:

The Governor's Office did not respond to Plaintiff's November 16, 2010 public records request within the initial 5 day period set forth in RCW 42.56.520. While [the delayed response was] not excusable, the form of Mr. West's request was unclear and foreseeably would contribute to this error. The public records officer for the Governor's office was properly trained and systems were in place to track and respond to requests for records.

CP at 168.

Finally, West repeatedly asserts that the trial court erred by declining to determine whether an executive privilege exists in this state. He contends that the privilege is "improper" and the trial court's ruling "encouraged the continuing use of the phantom exemption by the Governor." Appellant's Br. at 46. Again, West fails to support his argument with citations to the record or legal authority; thus, we decline to address this issue. *See* RAP 10.3(a)(6); *See Cowiche Canyon Conservancy,* 118 Wn.2d at 809. To the extent that West is arguing that the Governor's Office's claim of the constitutionally-based executive privilege is inconsistent with good faith, we disagree. The Governor's Office provides extensive argument that the "privilege is firmly grounded in the law and recognized by courts throughout the country." Resp't's Br. at 24. The Governor's Office cites to case law recognizing this privilege in Alaska, Vermont, Delaware, and Ohio. The Governor's Office's claim that an executive privilege exists in this state can hardly be characterized as frivolous or made in bad faith.[5] In sum, we reject West's assertion that the trial court's penalty was unreasonably low.

C. GOVERNOR'S OFFICE'S ARGUMENT

On cross appeal, the Governor's Office argues that the trial court erred by awarding a daily penalty of $25 per day. The Governor's Office contends that "a daily penalty five times the then-statutory minimum was `manifestly unreasonable'" and a reasonably daily penalty would be $5 per day.[6] Resp't's Br. at 36. Because the trial court properly

exercised its considerable discretion, we disagree.

In support of its argument, the Governor's Office cites three cases in which an appellate court set or affirmed a penalty of less than $25 per day. These cases are not instructive. In *American Civil Liberties Union of Washington v. Blaine School District No. 503* (*ACLU*), 95 Wn.App. 106, 109, 115, 975 P.2d 536 (1999), Division One vacated the trial court's award and set the penalty at $10 per day on the basis that it was clear that the District did not act in good faith when it made requested records available for review and copying but refused to copy and mail the requested 13 pages of documents.[7] In *Sanders,* the Supreme Court affirmed the trial court's selection of an $8 per day penalty when the trial court did not presume any starting point, considered the full statutory range, determined that the agency had acted in good faith, and noted that the agency had not strictly complied with the PRA's brief explanation requirement.[8] 169 Wn.2d 827, 863, 240 P.2d 120 (2010). In *Yousoufian V,* the Supreme Court set a penalty of $45 per day when "over a period of several years the county repeatedly failed to meet its responsibilities under the PRA with regard to [the plaintiff's] request"; the county was negligent; and the negligence amounted to bad faith. 168 Wn.2d at 456, 469. Certainly, each case has similarities and differences from the present case. All of these cases, however, demonstrate the court's considerable discretion in determining a PRA daily penalty amount.

Here, the trial court properly considered a number of factors before determining the PRA penalty. The trial court considered the mitigating and aggravating factors, concluding that all of the mitigating factors and none of the aggravating factors applied. The trial court also concluded that the Governor's Office exercised good faith in responding to West's requests and in asserting executive privilege. But the Governor's Office failed to recognize West's request for records for several weeks. The trial court found that the Governor's Office did not respond to West's public records request within the initial 5-day period set forth in former RCW 42.56.520 and that this was "not excusable" but the "form of Mr. West's request was unclear and foreseeably would contribute to this error." CP at 168.

Yousoufian V provides guidance for trial courts in setting PRA penalties. *Yousoufian V*

does not hold, however, as the Governor's Office appears to argue, that in the absence of all aggravating factors and the presence of all mitigating factors, the trial court must award the statutory minimum penalty. Trial courts have considerable discretion to determine PRA penalties and the trial court did not adopt a view that no reasonable person would take despite applying the correct legal standard to the supported facts. Accordingly, we reject the Governor's Office's argument and affirm the trial court's award.

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.

ARMSTRONG, and HUNT, JJ., concurs.

FOOTNOTES

1. Chapter 42.56 RCW.

2. The document was a "Governor's Meeting Memorandum." CP at 305. "The document was prepared to outline for the Governor the considerations and recommendations by policy staff on the issues anticipated to be raised in a meeting of the Governor and her advisors and the Chair, executive director, and deputy director of the Washington Association of Counties . . . . The heading of the document states the purpose of the meeting as follows; `Purpose: Discuss legislative bills and budget issues.'" CP at 305.

3. The trial court calculated 22 days to be reasonable by adding the 5 business days an agency is allowed to respond to a records request under former RCW 42.56.520 to the 17 days the Governor's Office took to locate and assemble the records once it responded to West's request.

4. West also "takes exemption [sic] to each and every one of the mixed findings of fact and law entered by the Court." Appellant's Br. at 44. West does not, however, provide argument to support his assertion.

5. The issue of whether an executive privilege exists in this state is not before this court and does not need to be addressed in order to determine whether the Governor's Office acted in good faith.

6. Former RCW 42.56.550(4) states, "[I]t shall be within the discretion of the court to award such person an amount and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record." (Emphasis

added). The statute has since been amended to not include a statutory minimum. RCW 42.56.550(4).

7. In the Supreme Court concluded that the strict and singular emphasis on good faith or bad faith, seen in is inadequate to consider fully a PRA penalty determination. 168 Wn.2d at 461.

8. The Supreme Court noted that the trial court did not expressly examine all of the factors, as the factors had not yet been announced. 169 Wn.2d at 863.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ARTHUR WEST,

Appellant,

v.

CHRISTINE GREGOIRE,
STATE OF WASHINGTON,

Respondents.

No. 45812-8-II

ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **October 21, 2014** opinion.

Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Worswick, Lee

DATED this 18th day of November, 2014.

FOR THE COURT:

PRESIDING JUDGE

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