70992-5

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No. 70992-5

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

UNIVERSITY OF WASHINGTON,

Appellant,

v.

ISABELLE BICHINDARITZ,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

State Statutes

Federal Rules

State Rules

State Regulations

Other

I. INTRODUCTION

This is a Public Records Act case where the trial court penalized the University of Washington for delaying production of over 12,000 already assembled documents, for over a year while Plaintiff-Respondent Isabelle Bichindaritz was litigating against it.

On September 9, 2009, Dr. Bichindaritz filed a request under Washington's Public Records Act (PRA), RCW 42.56 *et seq.*, for a copy of all her personnel files and public records from the University. It is undisputed that by the end of October 2009, all documents responsive to Dr. Bichindaritz's 2009 request (No. 09-11792) were assembled by the University. Over the next nine months, the University produced some documents in installments. It also notified Dr. Bichindaritz several times of extensions, based on a false and misleading "need to locate, assemble, and review" documents.

Dr. Bichindaritz requested these records to support an EEOC charge of sex discrimination, retaliation, and national origin discrimination, in connection with her tenure denial, which she filed on March 11, 2010, with a subsequent lawsuit filed on August 25, 2010.

Dr. Bichindaritz contacted OPR in June 2010 and was told there were still about 10,000 records to be produced. It is now undisputed that by end of July 2010 approximately 12,000 records remained for review and production. After July 2010, the University produced very little over the next eight months as the federal case went forward. On February 7,

2011, Dr. Bichindaritz closed her request because she believed she would receive the documents in civil discovery, due to close on June 5, 2011.

On June 6, 2011, Dr. Bichindaritz reactivated Request No. 09-11792. OPR indicated 12,000 pages still remained to be reviewed—roughly the number it allegedly needed to review in July 2010. Based on this uncontested fact, the trial court concluded "the University languished in their document review between October 2009 and February 2011, and again after June 2011 during the pendency of the federal suit." After further delay, OPR produced the remaining 12,000 pages, in installments between August 15, 2011 and November 15, 2011.

Among the documents produced late, one email – recording a University employee's concern that Dr. Bichindaritz was treated differently because of gender – was printed on October 10, 2009 upon transfer from faculty to OPR, but not produced until July 2013. Two other emails, by supervisors involved in Dr. Bichindaritz's tenure review, made mocking reference to her French origin.

The trial court correctly found, *inter alia*, that the University provided unreasonable explanations for its delays during the pendency of the EEOC complaint and federal litigation. The trial court soundly exercised its discretion in penalizing the University $723,290.50, based on findings under *Yousoufian v. Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010), which showed an absence of mitigating factors and a presence of aggravating factors such as delay when time was of the essence; lacking

strict PRA compliance; unreasonable explanation for noncompliance; and negligence, recklessness or bad faith in its PRA noncompliance.

The trial court did not abuse its discretion in calculating the penalty based on a formula of $0.50 per day/page multiplied by the 12,000 pages produced only after unreasonable delay between August 15, and November 15, 2011. The trial court properly exercised its discretion in finding each page constituted a "record" under the PRA. The "per page" calculus, with a daily monetary penalty at near the lowest possible amount in the $0 to $100 range, along with the decision not to group, was certainly not a formula that "no reasonable person" would apply.

II. RESTATEMENT OF THE ISSUES

1. The trial court did not abuse its discretion in granting Plaintiff's Motion To Conduct Trial By Affidavit, By Audio Link, Or Request To Move The Trial Date. (CP 193-94).

2. The trial court did not err in entering Findings of Fact 1.21, 1.24, 1.34, 1.37, 1.39, 1.40, 1.43 and Conclusions of Law 2.7, 2.8, 2.9, 2.10, 2.11, 2.12, 2.16, 2.17, 2.19, 2.20, or 2.21. (*See* CP 1128-49).

3. The trial court did not err in denying Defendant's CR 59 Motion. (CP 2082-83).

4. The trial court did not abuse its discretion in granting Plaintiff's Motion To Strike Declarations Of Andrew Palmer, Lesa Olsen, and Seth Berntsen. (CP 2138-39).

5. Trial court did not abuse its discretion in entering Findings of Fact 7, 9, and 15 about Plaintiff's Attorneys' Fees. (CP 2143-50).

6. The trial court did not err in entering Judgment against the University. (CP 2168-69).

III. RESTATEMENT OF ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the University violate the PRA by delaying two years to produce responsive documents, despite any intervening review process? (FF 1.39, CP 1137; CL 2.8, 2.9, 2.11, 2.12, 2.21, CP 1142-44, 1148-49).

2. Did the trial court abuse its discretion by fashioning a penalty of $723,290.50 that reflected sound application of the mitigating and aggravating factors set forth in *Yousoufian v. Sims,* 168 Wn.2d 444, 229 P.3d 735 (2010), by multiplying the number of pages produced belatedly by a daily penalty of $0.50 at near the lowest possible amount in the $0 to $100 range under RCW 42.56.550(4)? (CP 1141-49).

3. Did the trial court abuse its discretion by finding that the third *Yousoufian* mitigating factor ("agency's good faith, honest, timely, and strict [PRA] compliance"), fifth *Yousoufian* factor ("negligent, reckless, wanton, bad faith, or intentional noncompliance"), and applicable converse aggravating factors worked against the University as to justify the penalty of $723,290.50? (CP 1141-49).

4. Did the trial court err in awarding Plaintiff's lead counsel attorneys' fees at $550 per hour? (CP 2143-50).

5. Did the trial court err in assessing 12% per annum post-judgment interest against the State? (CP 1268-69).

IV. RESTATEMENT OF THE CASE

A. The University Delayed Record Production.

1. The University denied Dr. Bichindaritz tenure on grounds she believed stemmed from discrimination.

Isabelle Bichindaritz, Ph.D., a French citizen, was employed as an assistant professor by the University of Washington at its Institute of Technology in Tacoma ("the University"), from 2002 until June 15, 2010. During this time, Dr. Bichindaritz believed the Institute's then-Director, Orlando Baiocchi, subjected her to differential treatment, in terms of research activities and performance reviews. (*See* CP 4-5).

Dr. Bichindaritz underwent mandatory tenure review during the 2007-2008 and 2008-2009 academic years. (CP 6-8). Despite unanimous recommendations for tenure from her Review Committee and Faculty Council, Dr. Baiocchi recommended against tenure. (*Id.*) After each review, she was denied tenure, last on or about May 14, 2009. (CP 9).

2. Dr. Bichindaritz filed PRA Request No. 09-11792.

On September 9, 2009, Dr. Bichindaritz filed with the University a request under Washington's Public Records Act (PRA), RCW 42.56 *et seq.*, seeking a copy of her personnel files at the University, including email related to her sent by Institute faculty and staff. (CP 393-96). This request was assigned No. 09-11792. (CP 401). On September 15, 2009, the University's Office of Public Records (OPR) sent letters to individuals who could have responsive documents, requesting they be produced by October 8, 2009 or earlier. (*See, e.g.*, CP 398-401, 485-86, 500, 504-12,

550). On September 17, 2009, the OPR estimated that answering Request No. 09-11792 would take approximately 25 days. (FF 1.7, 1130; CP 403).

In late September 2009, BrieAnna Bales at UWT arranged for responsive documents to be taken to OPR in Seattle. (FF 1.8, CP 1130; CP 552, 572, 762). A second batch of documents was sent via intercampus mail in October 2009. (FF 1.8, CP 1130; CP 762). By October 2009 OPR had received responses from every individual required to respond. (*Id.*; *see also* CP 750-52, 780). Emails from Dr. Baiocchi reflect a print date of October 6, 2009. (*See, e.g.*, CP 388, 390; *see also* CP 750-52). The trial court found without challenge "by the end of October 2009, all responsive documents to Dr. Bichindaritz's 2009 request were assembled by the University." (FF 1.9, CP 1130).

Over several months, and amid response date extensions, Dr. Bichindaritz paid for emails responsive to Request No. 09-11792, made available on October, 13 2009, December 23, 2009, and January 26, 2010. (FF 1.12, 1.13, 1.15, CP 1131-32; CP 683; CP 879). Dr. Bichindaritz retrieved these document installments, on November 17, 2009, April 1, 2010, and April 1, 2010, respectively. (FF 1.13, CP 1131; CP 683).

3. Dr. Bichindaritz filed an EEOC Complaint and federal lawsuit when PRA Request No. 09-11792 was still pending.

On March 11, 2010, Dr. Bichindaritz filed an EEOC Complaint alleging sex and national origin discrimination, and retaliation. (CP 579). The trial court found this gave the University notice that Dr. Bichindaritz was likely to sue. (FF 1.15, CP 1132).

On April 5, 2010, OPR made available more documents, identified as Stage 4, and which were picked up on May 25, 2010. (FF 1.15, CP 1132; CP 683). On May 4, 2010, Dr. Bichindaritz received from OPR Program Coordinator, Madolyne Lawson, a letter extending the response date for Request No. 09-11792. (CP 932). OPR had sent near identical letters before, on December 14, 2009 and March 9, 2010. (*Id.*). These OPR extensions were "based on the need to locate, assemble and review additional information for your request," with respective response dates of January 8, March 23, and May 8, 2010. (CP 929, 931, 932).

OPR failed to abide by each extension, and the record production remained incomplete. In early June 2010, Dr. Bichindaritz spoke to Andrew Palmer at OPR who said, "there were 2-3 boxes remaining and that these would be completed in July." (CP 969). Soon afterward, on June 15, 2010, the University terminated her. (FF 1.17, CP 1132).

The OPR did not complete production by the end of July as promised. Dr. Bichindaritz was informed the "remaining 10,000 records would be released . . . by July 20, 2010." (CP 982; *see also* CP 983). When that didn't occur, Dr. Bichindaritz followed up with OPR, on July 28, 2010, and was told the final emails would be provided in September 2010. (CP 880). The University conceded the record productions through July 2010 comprised about one-half of the documents already assembled by October 2009. (FF 1.19, CP 1132; *see also* CP 667-76; CP 969). The trial court's unchallenged factual finding is that "as of July 30, 2010, about 12,000 pages had still not been produced." (FF 1.19, CP 1132).

On July 30, 2010, OPR responded to Dr. Bichindaritz, but again offered only another installment, identified as Stage 5. (CP 1191). Dr. Bichindaritz picked up these up on or about September 13, 2010. (*Id.*)

4. After Dr. Bichindaritz filed her federal lawsuit, the University failed to produce responsive documents for months even though time was of the essence.

Dr. Bichindaritz was out of the Puget Sound area between mid-June 2010 and February 1, 2011, working in France. (CP 880). On August 25, 2010, she (through former counsel Rick Gautschi) filed a federal discrimination suit, which did not include a national origin claim. (*See* CP 951-60). Request No. 09-11792 meanwhile remained open. With 12,000 documents still unproduced, though assembled by October 2009, months passed without action. (FF 1.21, CP 1132).

On October 8, 2010, Andrew Palmer informed Dr. Bichindaritz that OPR needed yet another extension, this time shifting the justification somewhat—further delay was "needed to locate, review or assemble or to notify third parties affected by your request." (CP 933). As with previous extensions, this explanation still misrepresented the now undisputed fact that OPR **did not need to locate or assemble** any documents—that process was complete by October 2009. (*See* FF 1.9; CP 1130).

In the federal suit, on November 12, 2010, Judge Robert Lasnik set trial for October 3, 2011 and discovery cutoff for June 5, 2011. (CP 582).

On December 9, 2010, OPR offered more responsive documents for production, which Dr. Bichindaritz, still in France, did not pick up at that time. (FF 1.6, CP 1133; CP 684). On January 31, 2011, the

University sent Mr. Gautschi a letter and invoice that referenced Request No. "TR-2010-00156," with a request to remit payment or it would close the request.[1] (CP 421; FF 1.27, CP 1133-34).

On February 7, 2011, Mr. Gautschi called the University and closed the records request. (CP 423; FF 1.27, CP 1134). Ms. Bichindaritz understood that suspending Request No. 09-11792 would not inhibit her suit "because [she] would get . . . more [documents], during the lawsuit discovery process." (CP 880). This prediction was misplaced because the University withheld documents relevant to Dr. Bichindaritz's tenure review process and three emails that bolstered her discrimination claims, as the trial court found. (CP 882; FF 1.37, CP 1137).

5. Dr. Bichindaritz re-opened Request No. 09-11792 on June 6, 2011 to obtain the missing 12,000 documents.

Dr. Bichindaritz contacted OPR by letter on June 6, 2011 asking it to "restart processing my first public records request to you, which is #09-11792." (FF 1.28, CP 1134; CP 425). By this point, the June 5, 2011 discovery cut-off had passed. (FF 1.28, CP 1134; CP 582).

The OPR responded on June 14, 2011, but entered a new request number, PR-2011-00286, noting: "We estimate we will respond to your request by July 20, 2011. As allowed by RCW 42.56.520, if additional time is needed to locate, review or assemble documents or to notify third parties affected by your request, we will contact you." (CP 427; FF 1.29, CP 1134). This explanation was misleading because there were no records

[1] The University claimed at some point in 2010, PRA Request No. 09-11792 was changed to TR-2010-00156. (FF 1.27, CP 1133; *see also* CP 721).

to locate or assemble. OPR Director Eliza Sanders testified, "no communications were sent in 2011 to obtain documents previously requested by Dr. Bichindaritz in 2009 because . . . [t]hey had already been collected." (CP 721).

Dr. Bichindaritz followed-up on June 16, 2011, expressing her frustration and the time-sensitivity of the request:

> I am only requesting the public records already assembled by you in the above request #09-11792 since you have confirmed to me that these documents are available. Therefore I am not requesting a new set of documents, as your letter dated 6/14/2011 seems to indicate. I am not in a situation to be able to wait the years taken by request #09-11792 to assemble the documents.

(CP 429; FF 1.30, CP 1134-35).

OPR Program Coordinator Lawson admitted at deposition she simply could have reopened the request under its old case number. (CP 813-14; FF 1.30, CP 1134). Ms. Lawson conceded it was her "decision to give it a new case number" (CP 813-14), despite Dr. Bichindaritz's clear instruction on June 6, 2011 to reopen the request, "which is #09-11792." (CP 425). OPR later repeatedly used the 2009 case number, "PRA No. 09-11792," in its staggered productions. (CP 641 (8/15/2011); CP 645 (107/2011); CP 648 (11/3/2011); CP 651 (11/15/2011); FF 1.34).

After several emails notifying her of yet further delays, the final documents responsive to Request No. 09-11792 were made available electronically in several batches: 8/15/2011 Stage 1 at cost of $661.18; 10/7/2011 Stage 2 at cost of $273.58; 11/3/2011 Stage 3 at cost of

$468.83; and 11/15/2011 Stage 4 at a cost of $420.98. (CP FF 1.33, CP 1135). With each installment, OPR repeated its purported need for yet additional extensions. (*See* CP 435, 438, 445, 448). The staggered production was also burdened because OPR charged Dr. Bichindaritz $0.15 per page although OPR provided electronic not paper copies. (*See* CP 372-75; FF 1.33, CP 1135-36). OPR made no offer to produce the documents for free as indicated on its website and provided by RCW 42.56.520 and WAC 44-14-04004. (CP 637-38; FF 1.33, CP 1135-36).

While OPR delayed producing responsive records in its possession, the University filed for summary judgment on July 5, 2011. (CP 583). Judge Lasnik denied the motion, but moved the trial to March 19, 2012, and later to April 9, 2012. (CP 588-90).

6. Dr. Bichindaritz discovered emails indicating national origin and gender discrimination amid the last PRA productions.

Dr. Bichindaritz visited the OPR on August 19, 2011 to view all records identified as Stage 1, selected some, and received an electronic copy of them on a CD after paying for them. (CP 882; FF 1.36, CP 1136). On October 7, 2011 and November 3 and 15, 2011, OPR produced additional installments, totaling a cost of $1,163.39. (FF 1.33, CP 1135). Because of events in the federal suit, and her financial situation, the trial court found Dr. Bichindaritz did not request to view or receive the records in Stages 2, 3, and 4 at that time. (CP 882; FF 1.36, CP 1136).

Dr. Bichindaritz was tiring of the confusion and mixed messages. On October 10, 2011, in response to another extension, she wrote:

> I would like to know whether this is the final set of emails and documents. From what I remember you telling me, there were about 5,000 of these remaining. If it is not the final set, please let me know when can expect to receive all the remaining emails. I would prefer to come and go through all the remaining set at once, as I did for the last set than to come several times.

(CP 445). On January 20, 2012, Dr. Bichindaritz informed OPR that she wanted to obtain all of the records, and asked how much this would cost. (CP 454). She added in reference to the staggered productions: "I would like to receive them in separate files or CDs so that I know which ones I have not received yet." (*Id.*) The University responded by email on January 30, 2012, advising: "We are no longer charging for records responsive to public record request." (CP 882; *see also* FF 1.36, CP 1136-37). Dr. Bichindaritz then received a CD in the mail with Stages 2, 3, and 4 on February 1, 2012. (FF 1.36, CP 1136-37).

OPR's Stage 3 production on November 3, 2011 included emails where her supervisors (Orlando Baiocchi and Larry Wear) exchanged comments that refer mockingly to her French national origin. (FF 1.37, CP 1137; CP 388, 390; CP 719, 734-35). The University did not produce these during the federal litigation and they were thus unavailable for use when deposing Professors Baiocchi and Wear. (CP 882; FF 1.37, CP 1137). Among the documents produced in August 2011, Dr. Bichindaritz noticed other records with new and important evidence about her tenure candidacy, which the University had not produced in discovery. (*Id.*)

Much later, on July 24, 2013, the trial court here conducted *in camera* review of the redacted documents and determined that several should have been produced unredacted. (CP 611-31). The trial court determined: "Important to the federal litigation, one of the documents was an email between Wear and Baiocchi revealing that a 'nursing person who was on Isabelle's committee hinted that we might be picking on Isabelle's teaching because she is a woman.'" (FF 1.40, CP 1137-38).

The trial court found this email was written on November 14, 2007, during the time frame that Dr. Bichindaritz's first tenure application was considered. (FF 1.40, CP 1137-38). The document was printed on "10/6/09" but not produced unredacted until July 2013, pursuant to court order. (*Id.*; *see also* CP 620). As a consequence, the trial court found that "it permitted [the University] to argue in the federal litigation that no one had complained that she was a victim of gender discrimination." (FF 1.40, CP 1138).

B. Procedural History

A bench trial was held on Dr. Bichindaritz's federal claims from April 9, 2012 to April 16, 2012, with judgment entered for the University. (CP 593). Dr. Bichindaritz filed state discrimination and retaliation claims against the University under in King County Superior Court on February 12, 2012, under the Washington Law Against Discrimination, RCW 49.60 *et seq.*, as a "placeholder." (CP 6-11; FF 1.41, CP 1138). On February 14, 2014, Dr. Bichindaritz filed an amended complaint asserting these PRA claims. (CP 12-31). On June 4, 2012, Dr. Bichindaritz moved to stay

discovery or proceedings as to those "placeholder" claims pending favorable outcome of her future federal appeal. (FF 1.41, CP 1138).

On June 8, 2012, the University moved for partial summary judgment and sanctions. (FF 1.42, CP 1138). The University argued the statute of limitations had run on PRA claims before June 2011 because Plaintiff's former counsel closed the 2009 PRA claim in February 2011. (*Id.*) The University did not reveal to the trial court that all 12,000 documents were assembled in 2009 but not produced until 2011. (*Id.*).

In an interlocutory order, the trial court granted partial summary judgment, holding the WLAD claims were barred by res judicata and collateral estoppel, and awarded costs and fees totaling $20,266.16, at 12% interest. (CP 69-70). In the same interlocutory order, the trial court dismissed PRA claims "arising from the University's response to Plaintiff's September 9, 2009 public records act request" as "untimely because she failed to commence her Public Records Act claim within one year of receiving the last production of records in response thereto or within one year of closing that request." (CP 70).

On September 6, 2013, after a trial by affidavit and deposition testimony, Judge Monica Benton entered Findings of Fact and Conclusions of Law in favor of Dr. Bichindaritz on her PRA claim for days of delay between June 7, and November 15, 2011. (CP 1128-41).

As its first conclusion of law, the trial court cited *American Canoe Association v. Murphy Farms, Inc.*, 326 F.3d 505 (4th Cir. 2003), for the principles that "'interlocutory orders that resolve fewer than all claims are

subject to revision at any time before the entry of [final] judgment," "[s]aid power is committed to the discretion of the district court[,]" and "every order short of a final decree is subject to reopening at the discretion of the district judge.'" (CL 2.1, CP 1139).

The trial court concluded that "the University violated the PRA in failing to produce 12,000 documents assembled in 2009 until the end of 2011." (CL 2.12, CP 1143). It awarded statutory penalties "from June 7, 2011 until November 15, 2011," noting "Stage 1-4 documents were assembled by the University by October or November 2009; yet from June 6, 2011, the date of Plaintiff's request to resume her initial PDA request, the next day, June 7, 2011, the documents should have been produced." (CL 2.21, CL 1148-49). The trial court found, "[a]t fifty cents per day, per record, the total penalty will be $723,290.50," with the breakdown as follows: Stage 1: 70 days (after June 7, 2011) x 4,379 pages = $153,265; Stage 2: 123 days x 1,795 = $110,392.50; Stage 3: 150 days 3,112 = $233, 400; Stage 4: 162 days x 2,793 = $226,233. (CL 2.21, CL 1148-49).

The trial court entered judgment against the University for $826,248.53, including $102,958.03 in attorneys' fees (at the rate of $550 per hour) and costs, and imposed post-judgment interest at 12% per annum. (CP 2143-50, 2168-69).

V. SUMMARY OF ARGUMENT

On *de novo* review, with factual findings reviewed for substantial evidence (Arg. A), the University violated the PRA by failing to promptly produce 12,000 emails and other documents assembled as of October

2009, until as late as November 15, 2011, after Dr. Bichindaritz reactivated Request No. 09-11792 on June 6, 2011. (Arg. B).

It is undisputed that by October 2009, OPR had already contacted faculty, and located and assembled the body of responsive records, which numbered approximately 24,000. Yet in the nine months after the request—on December 14, 2009, March 9, 2010, and May 4, 2010—OPR notified Dr. Bichindaritz to extend its response time "based on the need to *locate, assemble and* review additional information." Thereafter, OPR continued to misrepresent the basis for its serial extensions, effectively denying access to public records, contrary to the PRA and the Attorney General's model regulations for PRA compliance, WAC-14-04003.

When Dr. Bichindaritz contacted OPR in June and July of 2010, OPR claimed there were still about 10,000 records, which was roughly consistent with the University's discovery responses indicating that by end of July 2010 approximately 12,000 pages remained for review and production. When Dr. Bichindaritz reactivated her request on June 6, 2011, OPR indicated that 12,000 ***still*** remained, an undisputed fact that supports the conclusion that OPR had done little or nothing from late summer 2010 to February 7, 2011 when Dr. Bichindaritz closed her request. Based on this unchallenged finding, the trial court correctly concluded "the University languished in their document review between October 2009 and February 2011, and again after June 2011 during the pendency of the federal suit."

OPR finally completed its response, on November 15, 2011, after another series of extensions, missed deadlines, misleading justifications, and partial productions. Even considering the four-month period when Dr. Bichindaritz's PRA Request No. 09-11792 was closed, it took OPR over a year and a half to complete production. The trial court correctly found this was unreasonable delay in violation of the PRA.

The trial court did not abuse its discretion in imposing a $0.50 per page/document penalty for the delayed four-part production from August 15, 2011 to November 15, 2011. (Arg. C). The trial court properly assessed this penalty by considering the mitigating and aggravating factors set forth in *Yousoufian v. Sims,* 168 Wn.2d 444, 229 P.3d 735 (2010). The trial court's findings supported the absence of mitigating factors and presence of aggravating factors such as delay when time was of the essence; unreasonable explanation for noncompliance; and negligence, recklessness and/or bad faith. The trial court did not abuse its discretion in calculating the penalty based on a formula that multiplied the 12,000 pages by $0.50 per day with respect to documents produced with unreasonable delay. The trial court also acted within its discretion by declining to "group" these documents. This Court should affirm, under the wide latitude trial judges have when meting out PRA penalties.

The award of attorneys' fees at $550 per hour too was no abuse of discretion. (Arg. D). Finally, the trial court did not err in imposing 12% per annum post-judgment interest. (Arg. E). The Legislature impliedly waived sovereign immunity by enacting the PRA. Washington courts

routinely find such statutory regimes effect an implied waiver, and the University cites no apt authority to the contrary.

VI. ARGUMENT

A. This Court Should Defer to the Trial Court's Findings of Fact and Review Conclusions of Law *De Novo*.

This Court reviews the trial court's interpretation and construction of the PRA *de novo* as an issue of law. *See Ockerman v. King Cnty. Dept. of Developmental and Environmental Servs.*, 102 Wn.App. 212, 216, 6 P.3d 1214 (2000). This Court "reviews the trial court's findings of fact for substantial evidence in the record." *West v. Washington State Dept. of Natural Resources*, 163 Wash.App. 235, 245, 258 P.3d 78 (2011) (applying standard in PRA case). "Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted." *Id.* (omitting internal quotation marks).

The University argues *de novo* factual review should apply because there was no evidentiary hearing. App. Br. at 23. It claims that "where the record in a PRA case 'consists entirely of written materials and the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of a witness, weigh evidence, nor reconcile conflicting evidence, then an appellate court stands in the same position as the trial court in looking at the facts of the case and should review the record de novo.'" App. Br. at 22-23 (quoting *Gronquist v. Department of Corrections*, 159 Wn.App. 576, 590, 247 P.3d 436 (2011) (citing

Progressive Animal Welfare Society v. Univ. of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994) (*PAWS*))).

The Washington Supreme Court expressly rejected the University's position "where [as here] the proceeding at the trial court turned on credibility determinations and a factual finding of bad faith," making it "entirely appropriate for a reviewing court to apply a substantial evidence standard of review." *In re Marriage of Rideout*, 150 Wn.2d 337, 350–51, 77 P.3d 1174 (2003).

In *Rideout*, the parties submitted at trial documentary evidence consisting of "numerous declarations filed separately by" the two parents, the weight and credibility of which were at issue in a contempt motion arising out of non-compliance with a parenting plan. 150 Wn.2d at 345. On appeal, the losing parent relied on *PAWS* and the principle argued here that this Court should review factual findings *de novo*. *Id.* at 350. *Rideout* rejected this standard, holding "cases [like *PAWS*] differ from the instant in that they did not require a determination of the credibility of a party." *Id.* at 350. "[T]he substantial evidence standard of review should be applied here where competing documentary evidence had to be weighed and conflicts resolved," *id.* at 352, because "trial courts are better equipped than multijudge appellate courts to resolve conflicts and draw inferences from the evidence." *Id.* at 353.

In *Dolan v. King County*, the court similarly rejected *de novo* review in favor of the "substantial evidence" standard where "the trial court was required to weigh over 6,000 pages of testimony and exhibits,

resolve conflicts, and issue formal findings of fact." 172 Wn.2d 299, 310, 258 P.3d 20 (2011). "We apply the substantial evidence standard in this case because of the size and complexity of the record and the need to resolve conflicting assertions." *Id.* at 311

Here, as in *Rideout* and *Dolan*, the trial court weighed affidavits and deposition testimony, along with a voluminous documentary record, and resolved conflicts in competing evidence to decide the University had unreasonably delayed production of the 12,000 documents and acted in bad faith.[2] *See Rideout*, *supra* (considering bad faith of parent in contempt proceeding); *Francis v. Washington State Dept. of Corrections*, 178 Wn.App. 42, 64, 313 P.3d 457 (2013) (in PRA case involving agency bad faith, "trial court's unchallenged findings of fact are verities on appeal and, alternatively, are based on substantial evidence in the record").

The University doubtless will point to the trial court's denial of its Motion for Trial by Live Testimony in favor of Plaintiff's Motion for Trial By Affidavit (CP 193-94) as a basis to distinguish *Rideout*. There, the parent who was found in contempt had the option of calling live witnesses, but didn't. *Rideout*, 150 Wn.2d at 352.

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[2] For instance, the trial court weighed evidence in deciding a pivotal issue of whether the June 11, 2011 request "to restart processing the documents from my first public records request, which is #09-11792" constituted a new and separate request (as the University claims), or whether it reactivated the request from September 9, 2009. The trial court rejected the University's characterization because: (1) Dr. Bichindaritz explicitly reiterated on June 16, 2011 that she was "requesting the public records already assembled by you in the above request #09-11792," and was "not requesting a new set of documents, as your letter dated 6/14/2011 seems to indicate." (FF 1.30, CP 1134-35). Thereafter, the University itself referred to Request No. 09-11792 when making 2011 production installments, which the trial court deemed "strong evidence that the University considered this to be a reactivation of the 2009 request." (FF 1.30, CP 1135).

Plaintiff here moved for trial by affidavit because Dr. Bichindaritz was caring for her elderly mother in France and was then set to start a new job in New York State, which conflicted with the trial, and because the University had an opportunity to cross-examine her at deposition shortly before trial started. (*See* CP 2176, 2179). The result in *Rideout* did not depend on the waiver of the right to put on live witnesses; rather it was the trial court's better position "to resolve conflicts and draw inferences from the evidence." 150 Wn.2d at 353. And *Dolan* did not even discuss waiver; like *Rideout*, it focused on "the need to resolve conflicting assertions" in a factually complex case as the rationale for a "substantial evidence" standard. *See* 172 Wn.2d at 311.

B. The PRA Provides Canons of Construction In Favor of Liberal Interpretation and Broad Public Disclosure.

The PRA "'is a strongly worded mandate for broad disclosure of public records.'" *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). "The PRA's purpose is to increase access to government records." *Sanders v. State of Washington*, 169 Wn.2d 827, 849, 240 P.3d 120 (2010). To that end, the Legislature has declared:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. *This chapter shall be liberally construed and its exemptions narrowly construed*

> *to promote this public policy and to assure that the public interest will be fully protected.*

RCW 42.56.030 (emphasis added).

C. The University Violated the PRA By Unreasonably Delaying Production of Requested Records Assembled in October 2009 for Two to Five Months After Dr. Bichindaritz Reactivated PRA Request No. 09-11792 on June 6, 2011.

1. Disclosed records must be produced promptly; agencies are ordinarily bound by their estimated response time.

"Responses to requests for public records shall be made promptly by agencies." RCW 42.56.520. Under this section, an agency has five days to respond to a PRA request by: "(1) providing the requested records, (2) providing a reasonable time in which the requested records will be provided, or (3) denying the request." *Smith v. Okanogan County,* 100 Wn. App. 7, 994 P.2d 857 (2000). If an agency provides a time estimate for responding to a request, that estimate must be "reasonable." WAC-14-04003(6). "The burden of proof shall be on the agency to show that the estimate it provided is reasonable." RCW 42.56.550(2); *see also* WAC-14-04003(6).

The Attorney General's regulations for PRA compliance provide:

> An agency should either fulfill the request within the estimated time or, if warranted, communicate with the requestor about clarifications or the need for a revised estimate. An agency should not ignore a request and then continuously send extended estimates. *Routine extensions with little or no action to fulfill the request would show that the previous estimates probably were not 'reasonable.'* Extended estimates are appropriate when the circumstances have changed (such as an increase in other requests or discovering that the request will require extensive

redaction). *An estimate can be revised when appropriate, but unwarranted serial extensions have the effect of denying a requestor access to public records.*

WAC-14-04003(6) (emphasis added). These regulations also provide "agencies should provide a record within the time provided in its reasonable estimate or communicate with the requestor that additional time is required to fulfill the request based on specified criteria. Unjustified failure to provide the record by the expiration of the estimate is a denial of access to the record." WAC-14-04003(10).

A delayed response, when time is of the essence, is an aggravating factor justifying an increased penalty. *Yousoufian*, 168 Wn.2d at 467.

2. The University assembled all responsive records by October 2009, then unreasonably delayed production based on unjustified extensions.

The trial court correctly and properly concluded that "[t]aking over two years to produce documents is bitterly, indeed, grievously unreasonable as a matter of law," (CL 2.11, CP 1143); and "the University violated the PRA in failing to produce 12,000 documents assembled in 2009 until the end of 2011." (CL 2.12, CP 1143).

This Court should affirm the trial court because the University's response to Request No. 09-11792 was unreasonably delayed both *before* Plaintiff's former counsel closed the request on February 11, 2011 and *after* Dr. Bichindariz explicitly reopened the request on June 6, 2011. During both time frames, OPR gave itself serial extensions, based in part on the claimed need that it had to "locate and assemble" responsive documents—when, in fact, OPR *had already assembled* the documents for

processing. The crux of the trial court's findings, and Dr. Bichindaritz's PRA claim, is that OPR took nearly two years to process the September 9, 2009 request and that by June 6, 2011 (when it was reopened) the documents should have been promptly produced, but were not.

a. Trial court properly considered pre-February 7, 2011 dilatory conduct.

The University raises the non-sequitur that the trial court, in an interlocutory order, dismissed her 2009 PRA claims as time-barred and "Bichindaritz has not appealed the . . . dismissal." App. Br. 15-16. First, an interlocutory order, like the trial court's partial summary judgment ruling here, is not appealable. *See Zimmerman v. W8LESS Products, LLC*, 160 Wn.App. 678, 690, 248 P.3d 601, 607 (2011) ("a grant of partial summary judgment is not a final, appealable order"). Dr. Bichindaritz needn't cross-appeal the partial summary judgment ruling because she later prevailed. *See State v. Kindsvogel*, 149 Wn.2d 477, 481, 69 P.3d 870 (2003) ("The prevailing party need not . . . cross-appeal a trial court ruling if it seeks no further affirmative relief. It may argue any ground to support a court's order which is supported by record.").

The trial court modified its interlocutory ruling to the extent it considered the University's conduct before February 7, 2011 as material to the University's dilatory conduct after Request No. 09-11792 was reactivated on June 6, 2011. (CL 2.1, CP 1139) (citing Federal Rule of Civil Procedure 54(b) and quoting *American Canoe Association v. Murphy Farms, Inc.*, 326 F.3d 505, 514-15 (4th Cir. 2003), for the principle that

"interlocutory orders that resolve fewer than all claims are subject to revision at any time before the entry of [final] judgment"); *see also Nelbro Packing Co. v. Baypack Fisheries, L.L.C.*, 101 Wn.App. 517, 522, 6 P.3d 22, 25 (2000) (CR 54 and federal rule "essentially the same")).

Here, the only effect of the statute of limitations ruling was to limit the University's exposure to penalties to the period after June 6, 2011. (*See* CL 2.21, CP 1148-49). The ruling did not limit the trial court, or this Court, from considering conduct before Dr. Bichindaritz closed her request on February 7, 2011 to the extent that was relevant to the issue of unreasonable delay. *Cf. Loeffelholz v. Univ. of Washington*, 175 Wn.2d 264, 278, 285 P.3d 854, 860 (2012).

b. The University unreasonably delayed producing responsive documents over two-year period with litigation pending.

All responsive documents (including those 12,000+ remaining unproduced on June 6, 2011) were assembled by October 2009. (FF 1.9, CP 1130). But OPR did not inform Dr. Bichindaritz of this until the August 29, 2013 deposition of OPR Director Sanders. (CP 721). From the beginning, OPR repeatedly misrepresented it was extending the response time, purportedly "based on *the need to locate, assemble and* review additional information for your request"—on December 14, 2009 and March 9, and May 4, 2010. (CP 929; CP 931; CP 932) (emphasis added).

Thereafter, OPR again gave Dr. Bichindaritz false estimates about when she could expect production. At the time of her June 2010 inquiry, Andrew Palmer assured Dr. Bichindaritz that "there were 2-3 boxes

remaining and that these would be completed in July." (CP 969; *see also* CP 879). As with earlier extensions, OPR did not complete production within the estimated time. When the June extension was set to expire, on July 28, 2010, Dr. Bichindaritz inquired about the progress on her request—this time Mr. Palmer told her the final emails would be provided in September 2010. (CP 880). Production still did happen.

The University's dilatory response is evident in the lack of any meaningful progress between July 2010 and June 2011. When Dr. Bichindaritz contacted OPR in June and July of 2010, Mr. Palmer said there were still approximately 10,000 records (CP 982-83), roughly consistent with the University's discovery responses indicating by end of July 2010 approximately half the original 24,000 documents (12,000) remained for review and production. (CP 667-76, 969; FF 1.19, CP 1132).

When Dr. Bichindaritz reactivated her request on June 6, 2011, OPR indicated that 12,000 ***still*** remained. This undisputed fact indicates OPR had done little or nothing from late summer 2010 to February 7, 2011 when Dr. Bichindaritz closed her request. Based on this, the trial court correctly concluded "the University languished in their document review between October 2009 and February 2011, and again after June 2011 during the pendency of the federal suit." (CL 2.8, CL 1142).

This demonstrable lack of progress belies the sincerity of OPR's rationale for continually extending its response times in late 2010 and 2011. On October 8, 2010, Mr. Palmer again informed Dr. Bichindaritz OPR needed another extension, this time shifting the justification

slightly—further delay was "needed to locate, review or assemble or to notify third parties affected by your request." (CP 933). It is irrelevant whether there were records yet to review as the University argues on appeal. Mr. Palmer's explanation was still misleading in light of the now undisputed fact that OPR **did not** need to locate or assemble any documents—that process was completed by October 2009. (*See* FF 1.9; CP 1130).

After Dr. Bichindaritz renewed her request on June 6, 2011, OPR continued its pattern of delay based on disingenuous grounds and time estimates it did not meet. On June 14, 2011, Mr. Palmer said "we estimate we will respond to your request by July 20, 2011," adding "if additional time is needed to locate, review or assemble documents or to notify third parties affected by your request, we will contact you."[3] (CP 427).

True to pattern, OPR didn't meet the projected July 20, 2011 deadline, without even seeking another extension beforehand. Mr. Palmer announced on August 17, 2012 it was "necessary," because of the same misleading rationale that more time was "needed to locate, review or assemble documents or to notify third parties affected by your request."

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[3] The University will likely argue this articulated need for extension is couched in the disjunctive, *i.e*, that OPR reserved itself additional time in case of the "need to locate, review *or* assemble" documents. (CP 427) (emphasis added). However, that post hoc explanation doesn't negate the fact Mr. Palmer implied that by June 14, 2011 there was still a potential need to "locate" and "assemble" documents when there demonstrably wasn't. Moreover, if the University takes that position, it must concede that in earlier letters of extension—on December 14, 2009, March 9, 2010, and May 4, 2010—OPR was consciously misleading Dr. Bichindaritz in using the conjunctive construction, *i.e.*, that the extension was "based on the need to locate, assemble *and* review additional information for your request." (CP 929; CP 931; CP 932) (emphasis added).

(CP 435). This time he "extend[ed] the response date . . . to September 15, 2011." (*Id.*). On September 15, 2011, Mr. Palmer informed Dr. Bichindaritz more time was needed, until September 29, 2011. (CP 438). OPR missed this deadline, too, and did not complete production until November 15, 2011.

The University stresses the PRA allows agencies "'additional time to locate and assemble the information . . . [or] to determine whether any of the information requested is exempt.'" App. Br. at 25 (quoting RCW 42.56.520 and citing the Public Records Act Deskbook, Washington State Bar Association, 5.3(3), § 5-21 (2006 Ed. & 2010 Supp.)). Yet this general latitude does not mean that routine and serial extensions without justification are proper or reasonable. In fact, the Attorney General's regulations instruct the opposite principle should guide agency conduct, and this Court's analysis: "Routine extensions with little or no action to fulfill the request would show that the previous estimates *probably were not 'reasonable.'* . . . An estimate can be revised when appropriate, but *unwarranted serial extensions have the effect of denying a requestor access to public records*." WAC-14-04003(6) (emphasis added).

The University's response was unreasonable because it repeatedly missed production deadlines. *See Violante v. King County Fire Dist. No. 20*, 114 Wn.App. 565, 570–71, 59 P.3d 109 (2002) (failure to respond to request 14 days after estimated response time expired violated PRA). Even the Public Records Deskbook, relied on by the University, states "the agency should consider itself bound by its estimate." 5.3(3), § 5-21.

Here, the University announced on at least ten occasions—from its initial response on September 17, 2009 to September 15, 2011 (discussed above)—that it would complete its production/response by a specific date, yet each time it failed to do so. (*See* CP 403, 429, 435, 438, 879, 880, 929, 931, 932, 933). This regular practice evinces a disregard for the agency's duty to "provide reasonable estimates," which reinforces the trial court's conclusion that the two-year response time here "is bitterly, indeed, grievously unreasonable as a matter of law." (CL 2.11, CP 1143).

Despite the extensive evidence of unwarranted delay, the University argues it "promptly" responded to Dr. Bichindaritz's PRA Request No. 09-11792, reactivated on June 6, 2011, by producing the remaining 12,000 records, in four installments between August 15, 2011 and November 15, 2011. *See* App. Br. at 26.

This position ignores the uncontroverted fact that by the time Dr. Bichindaritz inquired with OPR on June 9, 2010 about the status of her request, there were still 3.5 boxes of documents to review. (FF 1.16, CP 1132; CP 356). More important, it ignores that the University concededly had approximately 12,000 documents to review by end of July 2010; yet by the June 6, 2011 request reactivation that number was essentially unchanged. (*See* FF 1.21, CP 1132). The inescapable inference, reached by the trial court, is that "the University languished in their document

review between October 2009 and February 2011, and again after June 2011 during the pendency of the federal suit." [4] (CL 2.8, CP 1142).

The University attempts to find fault with the trial court's decision, by mischaracterizing it as a "failure to recognize that the University could not *produce* the remaining 12,000 pages the same day Bichindaritz reopened her request simply because it had *assembled* those documents." (App. Br. at 20) (emphasis in original). Framing the issue that way elides the chronic delays before February 7, 2011 and serial misrepresentations about extensions, which both support agency culpability.

The University's citation to the 5-day rule under RCW 42.56.520 is irrelevant. First, it ignores that the University made its initial response under RCW 42.56.520 and the 5-day rule when on September 17, 2009 it estimated it would take only 25 days to complete the response. (CP 403). Though the University assigned the reopened June 6, 2011 request a new 2011 case number (CP 427), it did so despite Dr. Bichindaritz's explicit instruction she was reopening Request No. 09-11792. (CP 425). Moreover, Dr. Bichindaritz quickly corrected any misconception: "I am not requesting a new set of documents, as your letter dated 6/14/2011 seems to indicate. I am not in a situation to be able to wait the years taken by request #09-11792 to assemble the documents." (CP 429).

The trial court rightly found that OPR recognized the June 6, 2011 request was not new. In four subsequent communications with Dr.

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[4] For this reason, any error by the trial court in finding circumstantially that the withholding index was created before July 2011 (*see* App. Br. at 30-31), is harmless.

Bichindaritz—on August 15, October 7, November 3, and November 15, 2011—OPR stated: "This letter is provided in response to your public records request for documents prepared, but not yet provided to you in response to your previous public records request #09-11792." (CP 641, 645, 648, 651; FF 1.34, CP 1136). The trial found these communications were "strong evidence that the University considered this to be a reactivation of the 2009 request." (FF 1.34, CP 1136). This finding vitiates the claim the University was entitled to RCW 42.56.520's 5-day grace period.

Finally, the University is wrong that the trial court "ignored that the PRA required the University to balance competing obligations in responding to Bichindaritz's public record request." App. Br. at 26. Judge Benton did consider competing obligations and the University's proffered justifications for the two-year delay, including: (1) the "broad scope of the requests"; (2) "the records were in the possession of at least 96 different record holders in at least 11 different departments across 2 different campuses" (3) "the massive volume of records"; (4) "the nature of the records . . . [that] contained statutorily exempt information requiring extensive time to review"; (5) "the volume of work at the OPR during this period and the limited staff available at the OPR'"; and (6) and "further delay[]" because Dr. Bichindaritz the "closed her 2009 PRA Request on February 7, 2011 and did not purport to reopen it . . . for another four months." (CL 2.16, CP 1145) (citing Sanders and Lawson Declarations)).

The trial court weighed these justifications, rejecting them as "insufficient." (CL 2.16, CP 1145). The trial court specifically found "the University's devotion of resources to PDA requests is solely within its discretion," and "having fewer personnel is not recognized as a justification because of the strict time statutory constraints." (CL 2.17, CP 1145-46). As to the reason for delay, the trial court found, "because these records were assembled within several weeks of the request despite of their numerosity, that they were not produced . . . in a timely way required by law, only points to ongoing litigation as motive for delay." (*Id.*)

The trial court also considered the effect of the "abandoned . . . request amid litigation, which ordinarily would have vitiated plaintiff's 2009 claim," but for the "completed assembled documents" on June 6, 2011. (CL 2.17, CP 1146). Finally, consistent with the arguments above, the trial court considered the unreasonableness of the University's serial extensions: "the agency's actions of ongoing communications in the context of litigation were meaningless by continually extending distribution without giving 'good' cause, punctuated by an inventory list which was not accurate." (CL 2.17, CP 1147).

The trial court balanced all the factors the University stresses here and concluded correctly the University did not meet its burden. It should not take nearly two years (counting the closed period of the request from February 7 to June 6, 2011) to review even the large volume of documents here. The delay was unreasonable based on substantial evidence, or even with any factual findings reviewed *de novo*.

D. The Trial Court Did Not Abuse Its Discretion In Imposing a $723,290.50 Penalty Where the University Took Nearly Two Years To Produce 12,000+ Records With Lawsuit Pending.

1. This Court has a deferential standard of review under the "*Yousoufian*" factors for imposing PRA penalties.

"[T]he trial court's determination of appropriate daily penalties is properly reviewed for an abuse of discretion." *Yousoufian*, 168 Wn.2d at 449 (alteration in original) (internal quotation marks omitted). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons." *Id.* "A trial court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" *Id.* at 458-59 (quoting *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003)).

The Washington Supreme Court left in the hands of trial judges the decision of how large or small a PRA penalty should be, and provided a nonexclusive list of mitigating and aggravating factors the court may consider. *See Sanders*, 169 Wn.2d at 862 (citing *Yousoufian* factors). The mitigating factors include in pertinent part:

> (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; . . . [and] (5) the reasonableness of any explanation for noncompliance by the agency[.]

The aggravating factors include in pertinent part:

> (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; . . . (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; . . . (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, 168 Wn.2d at 467.

Yousoufian "emphasize[d] that the 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." 168 Wn.2d at 468.

"Where the PRA is violated, trial courts *must* award penalties." *Yousoufian*, 168 Wn.2d at 465. "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."[5] *Id.* at 459.

2. Judge Benton's penalty was a sound exercise of discretion.

The trial court determined that "a penalty should be awarded from June 7, 2011 until November 15, 2011," "[a]t fifty cents per day, per

[5] As of 2011 amendments to the PRA, the trial court may now impose less than $5.00 per day, or even no penalty. *See* RCW 42.56.550(4) (it is "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").

record, the total penalty will be $723,290.50" (CL 2.21, CP 1148-49), expressly "declin[ing]" Plaintiff's calculation of "two dollar per day per record, resulting in sums of $2,893,162.00 in penalties." (*Id.*).

The University does not challenge the number of days the trial court determined to fall within the penalty period, or the daily penalty of $0.50 per record. The University argues three points against the trial court's basis for imposing the penalty:

> (1) RCW 42.56.550(4) only "authorizes the court to penalize an agency 'for each day that [the requestor was denied the right to inspect or copy said public record' – not each 'page' or other component of a record." App. Br. at 32.
>
> (2) "Bichindaritz submitted a single public records request to a single agency for documents relating to herself." *Id.* at 33.
>
> (3) "Even if . . . Bichindaritz requested more than one 'public record,' Bichindaritz did not seek 12,000 'records' as the trial court held." *Id.* at 33-34.

The University's statutory interpretation is unavailing in this context where the Washington Supreme Court interprets RCW 42.56.550(4) to afford "[t]rial courts . . . considerable discretion under the PRA's penalty provisions in deciding where to begin a penalty determination." *Yousoufian*, 168 Wn.2d at 466-67; *see also Sanders*, 169 Wn.2d at 862 ("There is no presumptive starting point . . . the trial court should use its discretion in determining where to begin.").

The University assumes the 12,000 "pages" belatedly produced cannot be "records," despite no definition in the PRA. The University also assumes the "pages" in question do not encompass more than 12,000

"records." *See* App. Br. at 34-35. The trial court properly exercised its discretion in finding each page constituted a "record" under the PRA. Most pages of emails in the record contain more than one communication. (*See*, *e.g.*, CP 388, 390-91, 459-483 (more than 20), 611-31 (more than 30)). Thus each page was, literally, a "record"—of a particular communication, at a specific time, between one person and another.

The University argues second that Dr. Bichindaritz's submission of one request should be mirrored with a response of over 12,000 pages that is only one "public record." App. Br. 33. In other words, the University insists the trial court needed to "group" all the responsive documents no matter the date, author, or subject matter, into a single record.

"The PRA does not require records be divided into separate groups based on production date." *Double H, L.P. v. Washington Dep't of Ecology*, 166 Wn.App. 707, 714, 271 P.3d 322, 325, rev. denied, 174 Wn.2d 1014, 281 P.3d 687 (2012). Grouping is not an abuse of discretion. Neither is the trial court's decision not to group documents. The 2009 PRA request specifically asked for emails from 96 individuals who referred to Dr. Bichindaritz. Responsive documents can be divided into "groups" only arbitrarily. For this reason, the decision not to impose some topic-based grouping structure was no abuse of discretion. The University cites *Sanders* for the proposition that a "'trial court interpreted the PRA request as seeking two records, as group broadly by subject matter.'" App. Br. at 34 (quoting *Sanders*, 169 Wn. 2d at 864). But by case authority or logic there is *no requirement* that the trial court group by subject matter.

The University raises the specter that a "per-page penalty encourages plaintiffs to submit broad 'fishing expedition' requests in the hope of obtaining a large award and contravenes the PRA's policy of encouraging clear and focused requests." App. Br. at 34. First, the University does not argue that Dr. Bichindaritz's request was unclear, which is a mitigating factor under *Yousoufian*, and the trial court found no lack of clarity. (CL 2.15, 1145). Second, there is no reason to believe fishing expeditions will abound because *this* trial court in *this* case exercised its discretion to calculate a per page penalty of $0.50 per day.

Here, the trial court found the University was "a government entity with vast financial resources . . . [that] heightened the need for a prompt and thorough records review." (CL 2.17, CP 1146). It soundly devised "a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case." *Yousoufian*, 168 W. 2d at 468; *see also Yousoufian II*, 152 Wn.2d at 435, 98 P.3d 463 (PRA purpose to "promote access to public records . . . better served by increasing the penalty based an agency's culpability").

3. The trial court did not abuse discretion in applying *Yousoufian* mitigating and aggravating factors, including that there were unreasonable explanations for delay and/or bad faith.

In assessing the penalty, the trial court properly considered both the mitigating and aggravating factors as required. (CL 2.14, CP 1144).

"Whether an agency acted in bad faith under the PRA presents a mixed question of law and fact, in that it requires the application of legal precepts (the definition of 'bad faith') to factual circumstances (the details

of the PRA violation)." *Francis*, 178 Wn. App. 42, 51-52, 313 P.3d 457, 462 (2013), as amended on denial of reconsideration (Jan. 22, 2014).

The trial court considered and rejected the factors the University claimed mitigated in its favor. As canvassed above, there was no lack of clarity in the request under the first factor. (CL 2.15, 1145). As to the second, the trial court rejected the University's purported promptness in responding to Dr. Bichindaritz's records request, both before it was closed on February 7, 2011 and after it was reopened on June 6, 2011.

Under the third mitigating factor ("the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements") and fifth mitigating factor ("negligent, reckless, wanton, bad faith, or intentional noncompliance"), *see Yousoufian*, 168 Wn.2d at 467, the trial court found several facts cut against the University, evincing "self-interest as an overarching motive" or "bad faith." (CL 2.17, CP 1146):

- "All documented communications concerning . . . tenure process were pertinent to the PDA request as well as the federal suit. These issues were not narrow, as only gender or national origin discrimination, but broad because of the ambit of other available claims, as alleged retaliation. The University's liability exposure as a government entity with vast financial resources only heightened the need for a prompt and thorough records review." (CL 2.17, CP 1146).

- "[B]ecause these records were assembled within several weeks of the request despite of their numerosity, that they were not produced to the plaintiff in a timely way required by law, only points to ongoing litigation as motive for delay." (CL 2.17, CP 1146).

- The University's claimed need for extensions "in the context of litigation were meaningless by continually extending distribution without giving 'good' cause, punctuated by an inventory list which was not accurate." (CL 2.17, CP 1147).

- [I]n view of what was ultimately discovered in the second to the last distribution, the two emails of substance, the delayed distributions strongly suggest the interposition of self-interested litigation motives." (CL 2.17, CP 1147).

Bad faith under Washington PRA jurisprudence encompasses a different, broader set of factors beyond customary characteristics as "recklessness or intentional noncompliance," "intentional hiding or misrepresentation," or "deceit." *Francis*, 178 Wn. App. at 53. Bad faith may attach to agency conduct for various reasons, including "(1) delayed response by the agency; (2) lack of strict compliance with PRA procedural requirements; (3) lack of proper training and supervision; (4) "negligence or gross negligence." *Id.*

a. University acted negligently, recklessly or in bad faith in not producing email that showed discrimination.

In the federal litigation, the University failed to produce unredacted email between Professors Wear and Baiocchi, who were assessing Dr. Bichindaritz's tenure application, that referenced a "nursing person who was on [plaintiff's 2007-2008 tenure] committee hinted that we might be picking on Isabelle's teaching because she is a woman." (CP 237). The University also failed to produce, until November 2011, two emails that mocked Dr. Bichindaritz's national origin. (CP 388, 390).

The University knew as of March 11, 2010, when she filed her EEOC Complaint, that Dr. Bichindaritz had gender discrimination, retaliation, and national origin discrimination claims. (CP 579). Any reasonable person would have known that the two emails between Professors Wear and Baiocchi could support a national origin claim, and the nurse-related email could bolster the claim of gender discrimination. Yet the University failed to produce all three unredacted. As a result, when Dr. Bichindaritz filed her federal lawsuit without the national origin claim, she did not have benefit of the two emails between her supervisors.

As for the email referencing "the department's picking on Isabelle's teaching because she is a woman," (CP 237), this directly supported Dr. Bichindaritz's gender discrimination claim. Yet it was actively withheld for reasons the trial court rejected after *in camera* review on July 25, 2013. (CP 611-13). This was well after Ms. Bichindartiz had her bench trial before Judge Lasnik in April 2012 and filed her Ninth Circuit appeal on March 20, 2013. (CP 994-1060).

The University's delayed production and/or wrongful withholding of these documents until after the discovery cut-off in the federal suit amounts to at least gross negligence, which alone is basis for bad faith. *See Yousoufian*, 168 Wn.2d at 457; *see also Francis*, 178 Wn.App. at 57 (noting "over a century ago, our Supreme Court . . . recognized that gross negligence could rise to the level of bad faith").

The University's defense to the bad faith finding is that "mere existence of related litigation cannot establish bad faith." App. Br. at 37.

This position disregards that the University was *obligated* to produce the emails, but didn't until it was too late. The documents withheld here were sought to investigate discrimination claims and for active litigation. The University does not dispute it was required to divulge them. Production was required both in the PRA case and federal litigation, but the University failed to timely do so, indicating a lack of good faith. *See Yousoufian v. King County Exec. (Yousoufian I)*, 114 Wn.App. 836, 853, 60 P.3d 667 (2003) (no "good faith effort" where agency "knew it had responsive records that should have been disclosed"), rev'd on other grounds, 152 Wn.2d 421, 98 P.3d 463 (2004) (*Yousoufian II*).

The records' absence cannot be said with certainty to have changed the federal case outcome, but that misses the point. Bad faith is not gauged retrospectively, based on consequences of the misdeed. Rather, the analysis considers the mental state when the agency was required to act. *See Francis*, 178 Wn. App. at 55 ("bad faith involves actual or constructive fraud" or "neglect or refusal to fulfill some duty . . . not prompted by an honest mistake . . . , but by some interested or sinister motive") (internal quotation marks omitted).

Instead of considering its conduct here under the applicable bad faith standards in *Yousoufian* and *Francis*, the University asks this Court to defer to Judge Lasnik's ruling on a different issue. App. Br. at 37. Judge Lasnik found, in the context of Dr. Bichindaritz's motion to set aside the judgment under Federal Rule of Civil Procedure 60(d)(3) ("Rule 60"), that withholding of the nurse-related email "does not give rise to an

inference of corrupt motive . . . [i]n light of the University's production of significant evidence going to the same issue." App. Br., Appx. D at 3-4.

This argument fails for the obvious reason that the PRA bad faith standard under *Yousoufian* and *Francis* differs markedly from the much higher fraud standard under Rule 60(d)(3) applied by Judge Lasnik: "Relief under Rule 60(d)(3) is available only if the fraud 'defiles the court or is perpetrated by officers of the court.' *United States v. Chapman*, 642 F.3d 1236, 1240 (9th Cir. 2011). The fraud must rise 'to a level of an unconscionable plan or scheme which is designed improperly influence the court in its decision.'" App. Br., Appx. D at 2. It is also irrelevant to the PRA bad faith inquiry that the University may have produced "significant evidence going to the same issue," as Judge Lasnik found. The PRA does not impose penalties only when a requester is prejudiced.[6]

b. The trial court did not abuse its discretion in finding that time was of the essence.

The trial court correctly found that the federal court's own civil discovery rules "underscored that time was of the essence in the production of the PRA documents." (FF 2.7, CP 1142). Dr. Bichindaritz made the pressing need for the remaining document production clear. On June 14, 2011, when she wrote to OPR, she corrected the decision by Ms. Lawson to start processing the documents as a new PRA request in order to avoid any attendant delay: "*I am not in a situation to be able to wait*

[6] For these reasons, the Court should deny the University's Motion for Additional Evidence on Review, and its invitation to take judicial notice of Judge Lasnik's decision under RAP 9.11. *See* App. Br. at 38 n.9.

the years taken by request #09-11792 to assemble the documents." (CP 429). That federal discovery had ended on June 5, 2011 only dramatized that she needed remaining records through the PRA process.

The University congratulates itself for producing by November 3, 2011 the two emails that mocked Dr. Bichindaritz's French origin, asserting she had them in time to use as exhibits at her federal trial. *See* App. Br. at 38. Yet this ignores that they were no longer as useful to Dr. Bichindaritz then as before when she alleged national origin claims in her EEOC Complaint, claims she decided not to pursue in federal court.

The material fact here is that Professors Baiocchi and Wear forwarded these emails to OPR within the October 2009 deadline set for faculty to submit responsive documents—*over two years before OPR ultimately made them available on November 3, 2011.* (CP 388, 390, 750, 792-93). After receiving these important documents, OPR sat on them as the EEOC Complaint and then the federal lawsuit were filed, and as federal discovery ended. All these deadlines made time of the essence.

The finding was not "manifestly unreasonable," despite any intermittent delays by Dr. Bichindaritz in retrieving records produced in staggered fashion, particularly when she was out of the country.

4. Declining to hold evidentiary hearing was no abuse of discretion.

A court's denial of a request for an evidentiary hearing is reviewed for abuse of discretion. *State v. McLaughlin*, 74 Wn.2d 301, 303, 444 P.2d 699 (1968). "A court may abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact whose

resolution requires a determination of witness credibility." *Woodruff v. Spence*, 76 Wn.App. 207, 210, 883 P.2d 936 (1994). This Court reviews any failure to hold an evidentiary hearing for prejudice. *See State v. Kilgore*, 147 Wn.2d 288, 294, 53 P.3d 974 (2002) (internal quotation marks and citations omitted). "[F]ailure to hold an evidentiary hearing [is] harmless error when substantial evidence is admitted at trial to support a finding by a preponderance[.]" *Id.*

The University argues the trial court should have held an evidentiary hearing. App. Br. 43-45. First, the University claims an evidentiary hearing was necessary to resolve whether OPR withheld documents for "tactical or strategic reasons." *Id.* at 43. Such a hearing was unnecessary because presumably the OPR staff would have testified they didn't, consistent with their declarations. (CP 319, 1706).

More important, the trial court did not ground its "bad faith" reasoning in a finding that there was necessarily some concerted effort to withhold documents relevant to the federal litigation. Rather, Judge Benton held the "University's liability exposure as a government entity with vast financial resources only heightened the need for a prompt and thorough records review." (FF 2.17, CP 1146). As argued above, the "bad faith" ruling was on the third and fifth *Yousoufian* mitigating factors—(3) "the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions"; and (5) the "reasonableness of any explanation for noncompliance by the agency." (FF 2.14, 2.17, CP 1144). Moreover, the aggravating factor included other

bases such as "negligent" or "reckless" acts or "unreasonableness of any explanation for noncompliance." (FF 2.17, CP 1146). Therefore, the trial court's conclusion was more nuanced and not based on a finding of intentional concealment. Testimony from OPR staff that they were not instructed to withhold relevant records was not necessary to the analysis.

The same rationale neutralizes the import of any trial court consideration of Dr. Bichindaritz's "hearsay allegation 'that the responsive documents were in the possession of the Attorney General's Office' when she reopened her request in 2011." App. Br. at 43-44. Chronic untimeliness and unreasonable explanations by the University for those delays supported the trial court's finding that *Yousoufian* mitigating factors three and five did not assist the University. (FF 2.17, CP 1145-46).

Dr. Bichindaritz contacted OPR and was told her documents were with the Attorney General's Office. (CP 880). In the Palmer Declaration, which the trial court struck as untimely and the University nevertheless filed with this Court (CP 1703-07),[7] he said: "*I do not recall ever telling* Dr. Bichindaritz that records responsive to her public records requests were in the possession of the Attorney General's Office and I would have had no reason to make such a statement." (CP 1706) (emphasis added).

Judge Benton noted Dr. Bichindaritz's statements in regard to what she heard from an OPR staffer that her records were with the Attorney General's Office. (FF 1.24, CP 1133). That view is not inconsistent with

[7] The Palmer Declaration was dated October 2, 2013, nearly a month after entry of the Findings of Fact and Conclusions of Law on September 6, 2013. (CP 1707).

Mr. Palmer's inability to remember what he told Dr. Bichinardaritz. In any event, the finding wasn't linked to her finding that the University acted in "bad faith." Even if wrong, the finding was harmless error.

Finally, it is similarly irrelevant whether Mr. Palmer had testified live about the effect of any delay by Bichindaritz in occasionally retrieving records after they were produced. Again, he surely would have testified consistent with his declaration the trial court struck as untimely. (*See* CP 1703-07). Regardless, the trial court knew of any and all delays by Dr. Bichindaritz, and the circumstances for those delays.

E. The Trial Court Did Not Abuse Its Discretion In Setting Lodestar Attorneys' Fee Award at $550 Per Hour.

The University claims it was error to award an hourly rate of $550 for Dr. Bichindaritz's lead counsel, Jack Sheridan. App. Br. at 45. "In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion." *Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). Because "it is the trial judge who has watched the case unfold," this Court "defer[s] to the trial court's judgment on these issues." *Id.* at 540.

The University has not shown the trial court abused its discretion. "Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598, 675 P.2d 193 (1983). Without disputing that Mr. Sheridan's current rate for his hourly clients is $550, the University complains that this hourly rate was unreasonable because a fee

agreement from 2011 listed Mr. Sheridan's rate at the time as $450 per hour. The fee agreement recognized that Mr. Sheridan's rates are subject to change. (CP 1848–61). *See Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989) (court may compensate for the time value of money by using present-day rates). It was no abuse of discretion to award Mr. Sheridan his current hourly rate for work that was done in 2013. (CP 1831–43).

The University also argues that Mr. Sheridan's rate was unreasonable because it was "based on counsel's experience litigating employment discrimination, not PRA cases." App. Br. at 46. The University offers no authority for why Mr. Sheridan's decades of litigation experience, primarily in civil rights and public interest work and often in cases against government agencies, are less relevant to PRA litigation, or why it was "untenable" for the trial court to consider that experience. *See Pham*, 159 Wn.2d at 540. The University's citation to two PRA cases where different attorneys happened to be awarded lower hourly rates has no bearing on whether the trial court abused its discretion in this case.

Finally, the University argues the trial court should have reduced the fee because it found only 16 out of 101 documents were improperly redacted, in reliance on *Sanders*. App. Br. at 47. *Sanders* is inapposite. There, the requester prevailed on only one of four issues. *Sanders*, 169 Wn. 2d at 865–66. Here, Plaintiff prevailed on numerous claims, including the "most important" issue of delayed production. (CP 1143). She also prevailed on other theories deriving from a common core of facts. *See Steele v. Lundgren*, 96 Wn. App. 773, 783, 982 P.2d 619 (1999) (with

"common core of facts and related legal theories, a plaintiff who has won substantial relief should not have his attorney's fee reduced").

F. The Trial Court Properly Awarded Post-Judgment Interest.

Sovereign immunity does not preclude award of post-judgment interest. The State implicitly waived immunity when it enacted the PRA.

The University correctly cites the general rule that the "state cannot, without its consent, be held to interest on its debts." *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 455–56, 842 P.2d 956 (1993); *Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 524, 598 P.2d 1372 (1979). But the University wrongly claims sovereign immunity can only be waived by implication "in situations where State agencies were authorized to enter into contracts." App. Br. at 48. That is not the case—the Washington Supreme Court has held "nothing . . . in *Architectural Woods* can be construed as exclusively limiting a finding of an implied waiver of sovereign immunity to contractual situations." *Union Elevator & Warehouse Co. v. State*, 171 Wn.2d 54, 63, 248 P.3d 83 (2011).

An implied waiver of sovereign immunity can occur when the State enacts "a statutorily-created cause of action" intended "to provide comprehensive relief to aggrieved claimants." *Union Elevator*, 171 Wn.2d at 64–65 (discussing *Smoke v. City of Seattle*, 132 Wn.2d 214, 937 P.2d 186 (1997)). *Smoke* held the State had impliedly waived sovereign immunity from post-judgment interest by creating a statutory cause of action for damages for property owners aggrieved by unlawful agency action. *See* 132 Wn.2d at 228. *Union Elevator* explained a statutorily-

created cause of action, with "an attorney fee provision," suggested "the legislature intended not only to establish a claim but to provide comprehensive relief to aggrieved claimants." 171 Wn.2d at 64–65. Post-judgment interest was part of that "comprehensive relief." *See id.*

As in *Smoke*, the PRA is a statutorily-created cause of action that allows citizens to seek monetary penalties from state agencies that act unlawfully (under the PRA, by failing to properly disclose and produce public records). It also provides for award of "all costs, including reasonable attorney fees, incurred in connection with such legal action," RCW 42.56.550(4), suggesting it intends "to provide comprehensive relief to aggrieved claimants." *Union Elevator*, 171 Wn.2d at 64–65.

The University also wrongly argues post-judgment interest is inappropriate because PRA penalties are akin to punitive damages. App. Br. at 49. The University's authority concerns availability of pre-judgment interest, which serves a separate purpose of compensating plaintiffs denied the use of funds; they say nothing about post-judgment interest. *See Ventoza v. Anderson*, 14 Wn. App. 882, 897, 545 P.2d 1219 (1976); *Blake v. Grant*, 65 Wn.2d 410, 413, 397 P.2d 843 (1964). Post-judgment interest, unlike pre-judgment interest, is mandatory under RCW 4.56.110, because its purpose is to compensate plaintiffs for the lost value after judgment has been rightfully awarded. *See Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 552, 114 P.3d 1182 (2005).

The University cites no PRA authority for the proposition that the State has not, through its enactment, waived sovereign immunity. In fact,

the only published Washington opinion discussing imposition of post-judgment interest in a PRA case upheld that interest. *See Zink v. City of Mesa*, 162 Wn. App. 688, 695, 256 P.3d 384 (2011) (directing post-judgment interest would run from the date of new judgment).

The trial court correctly applied a 12% rate to the award of post-judgment interest, which is the default rate under RCW 4.56.110(4) and RCW 19.52.020 and applies unless the judgment is covered by RCW 4.56.110(1), (2), or (3). The University claims the appropriate rate is determined by the rate under RCW 4.56.110(3)(a) for "[j]udgments founded on the tortious conduct of a public agency." App. Br. at 49.

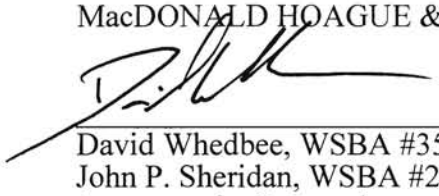
The University cites no authority for its claim that a violation of the PRA sounds in tort. And its analogy of PRA liability to insurance bad faith, *see* App. Br. at 50, misses the mark. The judgment here was not merely "based on a finding that the University acted in bad faith." Rather, it stemmed from violation of a unique statutory obligation under several judicially created factors interpreting the PRA's penalty provision.

VII. CONCLUSION

This Court should affirm the trial court.

RESPECTFULLY SUBMITTED this 21st day of July, 2014.

MacDONALD HOAGUE & BAYLESS



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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 21, 2014, I arranged for filing an original and one copy of the foregoing Respondent's Brief with the Court of Appeals, Division I; and arranged for service of a copy of the same on the parties to this action as follows:

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