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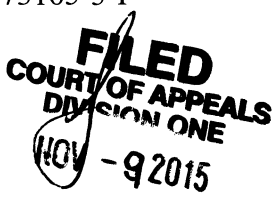

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ERIC HOOD

Appellant

v.

South Whidbey School District,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
ISLAND COUNTY

APPELLANT'S AMENDED OPENING BRIEF

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I. INTRODUCTION

No matter how the South Whidbey School District ("District ") tries to spin the facts, its responses to Eric Hood's ("Hood") public records requests violated the Public Records Act ("PRA"). It improperly and mistakenly withheld thousands of records, then disclosed them only after Hood sued. Its failure to train its employees, unreasonable searches, and unmerited reliance upon flawed counsel resulted in continual violations of the PRA. By overlooking, ignoring or misunderstanding the District's violations, the trial court abused its discretion in grouping violations, granting penalties and awarding attorney fees.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Fact and Conclusions of Law ("FF&CL) on Cross-Motions for summary judgment dated December 15, 2014.

2. The trial court erred in entering its order denying Hood's Motion for Reconsideration dated February 9, 2015.

3. The trial court erred in entering its Findings of Fact, Conclusions of Law ("AFFF&CL") and Order on Plaintiff's Motion for Attorney fees and Costs dated March 4, 2015.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it ruled District's search for responsive records was reasonable? (Assignment of Error Number ("AE") 1; FF&CL ¶¶ 28, 30, 31, 32, 33, 35, and 53.)

2. Did the trial court err when it penalized the District only for untimely disclosures while ignoring other violations based upon statutes and case law which it characterized as merely "technical non-compliance?" (AE 1, FF&CL ¶¶ 43, 44, 46, 47, 66, and 74.)

3. Did the trial court err when it denied Hood's proposed groupings for penalties and subsumed all found violations into Groups 1 and 5? (AE 1; FF&CL ¶¶ 36, 38, 39, 40, 42, 45, and 71.)

4. Did the trial court err in applying mitigating and aggravating factors to its penalty calculations? (AE 1; FF&CL ¶¶ 24, 40, 48, 50, 51, 52, 53, 54, 58, 59, 60, 61, 64, 65, 66, 68, 71 and 72.)

5. Did the trial court err in calculating the lengths of time of violations. (AE 1; FF&CL ¶¶ 67, 68, 69, 70, 71 and 72.)

6. Did the trial court err when it denied the Motion for Reconsideration which showed that the District's searches were unreasonable and the penalty period should have been extended to September 29, 2014? (AE 2.)

7. Did the trial court err when it denied Hood all of his requested attorney fees pursuant to RCW 42.56.550(6)? (AE 3; AFFF&CL ¶¶ 13 and 14.)

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The District's unlawful responses to Hood's records requests are the basis of this lawsuit.[1] Hood provides a chronology of his requests and the District's responses, followed by other relevant facts. 1.

1. Hood's June – July, 2011 Requests. Hood requested records about himself, his family and District programs.[2] On July 5, current Superintendent Josephine Moccia ("Moccia") ignored Hood's first and denied his second July 1 requests. CP 1079, CP 1000-1003. On July 7, Hood made more requests, CP 1006-1008. Moccia acknowledged them. Id. On July 10, Hood reminded Moccia that the District "'may not destroy or erase" records, again requested metadata, responded to all requests for clarification, and made additional requests. CP 1009-1014. On July 12, Moccia promised "all associated metadata." CP 1015-23.

[1] Hood formerly taught with the District. After an arbitrator upheld the District's decision to non-renew him, he requested records related to his employment. He subsequently filed suit in federal court and made additional records requests.

[2] In the interests of brevity, Hood refers this court to a spreadsheet labeled Appendix 1 attached to Plaintiff's summary judgment motion. CP 938-963. It verbatim shows Hood's July-August, 2011 requests (in red) and subsequent District responses (black).

On July 14, Hood requested additional records. CP 1024-1028. On July 20, Moccia provided some responsive records and renumbered Hood's requests. . On July 28, Moccia stated that at least 1000 pages had been printed for review and possible redaction, and that she expected to generate "another 1000 or so pages," promised to disclose records by August 19, and charged fees because it had to "print them in order to determine what may or may not be released...." CP 1036-1037

On August 3, Hood inquired about his June 16, 2011 request (CP 995-999) to which he had been told to expect a July 29th response. CP 1038-1045. Moccia added that request to his others. *Id.* On August 16, Hood received a CD labeled "EH Docs Request CD 1 2011/08/15." CP 873, 878. Moccia promised more records on August 30. CP 1046-1048. Although Hood asked for a withholding log and again for metadata, Moccia's August 22 reply mentioned neither. *Id.*

Hood obtained a CD of responsive records on August 31, labeled "E.Hood - Docs Prepared 2011/08/30." CP 873, 879. On September 5, Hood asked about missing documents listed as email attachments on the CD. CP 1049-1051. He and Moccia significantly disagreed that certain documents were on the CD.[3] Hood stated "for the record" that a document

[3] On September 6, Moccia stated that they were provided as separate documents, not as email links and Hood repeated that one of the documents was not on the CD. The next day, Moccia emailed the missing document to Hood.

was not on the CD. *Id.* Moccia promised a third installment on September 19 but did not provide an estimated date of final disclosure. CP 1046-1048 On September 19, Hood asked Sue Terhar, secretary to both past and current Superintendents ("Terhar"), if records were available for pickup. CP 874. She was not aware of any. CP 1052. On September 20 he picked up a CD of records titled "EH Documents 2011-09-19." CP 874, 880.

On October 14, Moccia provided Hood the purportedly final installment of records responsive to his June-July requests. CP 874, 881, 1053. She attached an exemption log that ostensibly listed all withheld documents. CP 1054-1064.

2. November 1, 2011 Request. On December 14, 2011, Moccia disclosed some records responsive to Hood's request for records and metadata, including records about the Washington State Auditor's Office ("SAO") audit of Bayview School.[4] CP 1080-1083.

On December 16, 2011, Hood picked up a CD labeled "E.H. Docs 2011-12-16." CP 874, 881. On December 21, 2011 Moccia stated there were no records "'regarding this supposed audit."[5] CP 1087-1089. On January 2, 2012, Moccia provided the purportedly final responsive

[4] A spreadsheet labeled Appendix 2 attached to Plaintiff's summary judgment motion tracks the District's responses to Hood's November 1, 2011 requests. CP 964-973.

[5] Her denial came five months after she acknowledged an audit was taking place. CP 1090-1091. It was confirmed the same day by Rick Bonner of the SAO. CP 1092-1095.

records. CP 1096. Some previously undisclosed records provided on December 16, 2011 were responsive to Hood's July 14, 2011 request. CP 1316-1347; Responsive Document Worksheet ("RDW"), lines 5-15.[6]

3. June 19, 2012 Request. On June 21, 2012, Moccia provided what she claimed were the only records responsive to Hood's request for records relevant to statements the SAO made to the District. CP1103-1105. No exemption log was provided. CP 874. Some previously undisclosed emails were responsive to Hood's July and November 2011 requests. CP 1288-1291; RDW 23-24.

4. The District's September 11, 2012 Supplemental Production. The District mailed Hood records to Hood on a CD titled "K&L GATES 9/11/12." CP 874, 882. An accompanying letter stated that records were "already produced" or "not responsive to your July requests." CP 1107. It provided a new exemption log. CP 1108-1118.

[6] The RDW lists descriptions and creation dates of documents that the District withheld or withholds, destroyed, or untimely provided.. By looking at the intersection of the listed document and the date(s) of Hood's request to the District, the reader can determine whether the document was responsive (Y) or not (N) to a particular request. For example, line 4 shows an email disclosed to Hood by the Arlington School District from McCarthy to Johnson. Its creation date of "3/1/11" shows it is responsive to item 8 of Hood's July 10, 2011 request, item 20 of his July 14, 2011 request, and item 1 of his November 1, 2011 request to the District. For another example, line 5 shows an email mentioning "audit" from Pfeiffer to Houck disclosed by the District on December 16, 2011. Since its creation date was "03/18/11," it was responsive to Hood's July 14, 2011 request item # 17 which asks for audit records. The RDW was labeled Appendix 3 and attached to Plaintiff's summary judgment motion. CP 974-993.

The federal court had determined that "all" the documents on the CD "came from eight binders that [former Superintendent Fred McCarthy ("McCarthy")] had created in the process of Hood's arbitration and later proceedings."[7] CP 756. On June 15, 2011, McCarthy, who was replaced by Moccia July 1, 2011, had notified the District School Board, Terhar, District counsel Jennifer Divine and Moccia that he had placed the binders in the District's records storage vault "at the direction of" District counsel. CP 1510; RDW 103. The "supplemental production" included numerous documents responsive to Hood's July and November 2011 requests, CP 1371-1553. It included a revised October 14, 2011 exemption log. CP 1119-1133. It included a new exemption log (CP 1108- 1118) for documents not previously identified or provided of which many were emails responsive to Hood's July and November 2011 requests. CP1108-1118 (log entry dates:12/18/09, 6/22/10 2:21, 6/23/10, 6/30/10, 7/6/10, 11/29/10, 1/5/11 7:51, 1/5/11 9:36, 6/11/11, 6/30/11, 7/19/11.)

The October 14, 2011 revised withholding log states that many records were "previously produced" although it does not state how or when, or "produced on 7/27/11 CD-ROM," though no evidence supports a production around that date. CP 1119-1133. Documents previously withheld and listed on the original October 14, 2011 exemption log per

[7] Hood sued the District in federal court in December of 2011

"deliberative process" were, on September 11, 2012 either disclosed or withheld, this time per "work-product" and/or "attorney-client privilege." (Compare original, CP 1054-1064 with revised log, CP 1119-1133.) Previously undisclosed emails that were responsive to Hood's July and November 2011 requests were disclosed or exempted and withheld. CP 1402, 1421-1423, 1437, 1441-1443, 1461, 1480, 1484, 1488-1491, 1500, 1505-1549; RDW 76-77, 79, 81, 89-94, 97, 101-125 (disclosed emails).

5. September 11, 2012 Request. On October 16, 2012, the District closed its search for records responsive to Hood's request for records and metadata relevant to the South Whidbey Education Association Collective Bargaining Agreement ("CBA"). CP 1134-1135. He picked up a CD labeled "CBA REQUEST EH." CP 874, 883. On November 13, 2012, it disclosed additional responsive records. CP 1136. Some of them were previously undisclosed records responsive to Hood's prior requests. CP 1714-1720; RDW 266-68. Not all associated metadata was provided. *Id.*

6. October 4, 2012 Request. Records provided to Hood on September 11, 2012 indicated to him that the District had recovered the deleted personal records from the hard drive of his work computer.[8] CP 874. Hood requested the recovered records on October 4, 2012. CP 1148.

[8] Not one recovered record has ever been used against Hood as evidence of misconduct.

He was provided a thumb drive containing them accompanied by a letter dated October 9, 2012. CP 1149. Records on the thumb drive were responsive to Hood's July 10, 2011 request.

7. October 10, 2012 Request. Moccia promised, by October 30, 2012, all records responsive to Hood's follow-up request regarding the District's record destruction policies. CP 1150-1154. On November 29, 2012 after Hood reminded Moccia of the promised disclosure date, she admitted that the District inadvertently failed to respond to his October 10, 2012 request and disclosed responsive documents. *Id.*, CP 1754-1974; RDW 286-291.

8. October 16, 2012 Request. Moccia acknowledged Hood's request for records pertaining to an email, its attachment, and its associated metadata on October 23, 2012. CP 875, 1155-1160. On October 31, 2012, Moccia closed the request without providing any responsive records. *Id.* Her response confused Hood because a previously disclosed District record indicated the email had been sent to numerous persons or entities. CP 1437; RDW 79.

On November 3, 2012, Hood helped the District locate the relevant records. CP 1155-1160. That same day, Moccia asked Hood's further assistance. *Id.* On November 8, 2012, Hood provided a .pdf snapshot of the reference documents and pointed out that though he had already

referenced them, the District had not performed an adequate search. *Id.* Hood picked up some responsive records around November 28, 2012. CP 875. The District supplied final responsive documents on December 12, 2012. CP 1164-1165.One previously undisclosed records was responsive to Hood's July and November 2011 requests. CP 1976; RDW 292.

9. October 18, 2012 Request. On October 22, 2012, Moccia acknowledged Hood's request for records related to his arbitration hearing. CP 1171-1172. On November 27, 2012 Moccia directed Hood to come to the office and pay for copies of responsive records, though Hood had requested that the District "make records available, whenever possible, in electronic form via email." CP 1173. Moccia's December 12, 2012 closing email attached seven responsive .pdf files and again demanded payment for copies of 408 paper records. CP 1176-1177. Hood picked them up on or about December 18, 2012 along with an exemption log. CP 1178-1179. Many emails from these productions were responsive to Hood's July and November 2011 requests. CP 1994, 1996, 2102-2103; RDW 305, 309, 356-361. Previously undisclosed documents responsive to Hood's prior requests were listed on a December 13, 2012 exemption log. CP 1178-1179.

10. November 15, 2012 Request. On November 19, 2012 Moccia confirmed Hood's request for audit and attendance records, and

the next day provided a response date of December 21, 2012. CP 1180-1184. On December 19, 2012 Moccia disclosed records which Hood picked up around January 22, 2013. *Id.*; CP 875. Many records were responsive to Hood's July 14, and November 1, 2011 and June 19, 2012 requests. CP 874, 883, 2143-2198; RDW 384-409.

Hood proposed a compilation of record data in lieu of approximately 5,000 pages of attendance records. CP 1180-1192. After almost three months of no response, Hood re-contacted the District. Its counsel responded, "[t]he District is not amenable at this time to your proposal. If you wish to obtain copies of redacted attendance records, you will need to pay for them." *Id.* On March 22, 2013 Hood asked Moccia for the documents, and Terhar demanded payment for copies of each of the 656 responsive records that needed redaction. *Id.* The District disagreed with Hood's assertion that an agency may not charge to redact records for viewing, and instead directed Hood to pay to view an exemplar of the redacted records.[9] *Id.* Although he believed he was entitled to view the exemplar without payment, Hood felt compelled to pay it. *Id.*; CP 875. He viewed remaining attendance records on April 5, 2013. CP 1185-1192.[10]

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[9] The trial court referred to the installment as a "redacted exemplar." FF&CL,¶ 47.

[10] Their existence contradicts statements made by the District's former counsel who provided only a fraction of them: "You have been given all the student attendance records that they have. There are no other attendance records they have found." CP 1181.

11. January 24, 2013 Request. Hood requested documents prepared by UC eXpress that referenced him.[11] CP 1193-1194. The next day, Moccia provided him previously undisclosed records responsive to Hood's prior requests. CP 2200-2218; RDW 410-413.

12. January 28, 2013 Request. Hood found that some District documents referenced its insurer, the Washington Schools Risk Management Pool ("WSRMP"). CP 875. He requested "Any communications with this organization" that concerned him. CP 1195-1199. Three days later, Moccia stated it would search for records. *Id.* On February 14, 2013, Moccia stated:

> Please note that the District has not and does not consider your October 18, 2012 request to encompass records prepared in response to any of your pending litigation against the District[...] that reference your non-renewal and/or arbitration proceeding.

Id. She produced no exemption log or further records of communication with the WSRMP. CP 875.

13. The District's May 2, 2013 Production. On March 13, 2013, Hood made a Request for Productions to the District in federal court. CP 875. He viewed them around May 2, 2013 CP 876. A previously undisclosed record was responsive to Hood's prior requests. CP 2222; RDW 416.

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[11] UC eXpress provides unemployment services.

14. January 30, 2014 Request. Based on issues raised during discovery during this action, Hood requested records related to his prior requests and Moccia provided an expected response date. CP 1203-1209. Hood followed up by requesting the "7/27/11" CD referenced in the September 11, 2012 revised withholding log and any related correspondence. Moccia replied that the District would provide Hood "another" purported copy of the CD that she identified as the "7 /27 /11 CD." *Id.* Around February 28, 2014 Hood picked up a CD titled "E.H. - Emails Set: 2011/07/27." CP 876, 884. It contained approximately 2000 separate records. CP 876. When Hood challenged the District about the records on the CD, its current counsel stated that prior counsel had purportedly provided him those records on August 16, 2011. *Id.* The District later admitted it had not previously provided the contents of that CD "in its entirety" to Hood. CP 2868. Many previously undisclosed records were responsive to Hood's July and November 2011 requests.[12] CP 2227-2438; RDW 419-456.

On March 14, 2014, Moccia confirmed that the final installment of records were available. CP 1202. It contains previously undisclosed, redacted attorney-District emails dated between July 1 and October 26,

[12] Unredacted attorney- client emails with print dates of July 2011 make it clear that the District's prior attorneys collected these documents for review and then failed to timely provide them to Hood. CP 2435-2438; RDW 453-56.

2011 not shown on any exemption log. CP 2440-2596. One email shows that OSPI FedExed to the District a CD containing records of correspondence involving Hood. CP 2529. The District has not disclosed it to Hood.

15. June 25, 2014 Request. Hood clarified his request for records about his family on July 14, 2014. CP 65-66, 78-78. The District informed Hood the final installment was ready for pickup on September 24, 2014. CP 203. On September 29th Hood picked up records, some of which were responsive to either or both of Hood's July and November 2011 requests. CP 205-211. They were not previously disclosed to Hood or listed on any exemption log. Some documents were emails printed from the District's Google email system on August 29, 2014, but created during the summer of 2011, a time during which the District claims its Google email system systematically destroyed emails. *Id.*, (*see* footers).

16. Hood's Public Records Requests to Other Agencies. Other agencies disclosed records to Hood. The following table summarizes Hood's requests, agency responses, and responsive records they disclosed to Hood that the District has never disclosed to him.

Table 1

Agency name	**Request date, CP # Agency disclosure date, CP#**	**Disclosed records**	**RDW #**
Arlington School Dist.	07/14/2011, CP 1065-1066 08/18/2011, CP 1067	1305-131	1-4
OSPI[13]	10/16/2011, 1072-1074 01/13/2012, 1077-1078	1279-1286	16-22
AGO[14]	03/23/2012, 1097-1100 06/21/2012 , 1101-1102	1348-1363	35-36
SAO	03/23/12, 1106 07/11/12, CP 1348-1363	1364-1371	37-41
SAO	09/18/2012, 1137-1138 10/04/2012, 1139-1140	1154-1562	166-168
Coupeville School Dist.	09/19/2012 CP1143 10/25/12 CP 1144	1614-1616	220
WSRMP	10/04/2012, 1145 11/01/2012, 1146-1147	1617-1652	221-249
SAO	10/16/2012, 1166-1168 11/07/2012, 1169-1170	1654-1712	249-265
WSRMP	02/20/2013, 1200-1201 03/15/2013, 1200-1201	2220	414

17. The District's File and Email Archival System. The District stored hardcopy and electronic files in its central administrative office, school administrative offices, and individual employees' offices and computers. The District did not search its offsite data storage system known as WSIPC, though it holds employee records. CP 1216, 1228.

The District's Facilities and Operations Director, Brian Miller ("Miller") primarily searched for emails in a District-wide email system

[13] Washington State Office of the Superintendent of Public Instruction.

[14] Washington State Attorney General's Office.

called FirstClass, replaced by a Google system around March of 2011. CP CP 2794. During "the search process" in response to Hood's July 2011 requests, Miller purportedly discovered that "the new Google program was only saving emails for a period of 45 days after their creation." CP 2796. The "search/archiving function" of the Google program, however, was "not activated until August of 2012." CP 726. Emails created prior to August of 2012 "would not have been found" because they "predated the August 2012 activation...." CP 727-728.

B. PROCEDURAL POSTURE

Hood filed this lawsuit June 8th, 2012. He filed a second Amended Complaint August 5, 2013. CP 2729-66. Simultaneous summary judgment motions were filed March 28, 2014.[15] CP 898-2728. Responses were filed April 18, 2014. CP763-872. Replies were filed April 23, 2014. CP 384-417. Corrections were filed to Plaintiff's summary judgment motion and the Second Declaration of Michael C. Kahrs. CP 244-339, 340-342. A hearing was held June 27, 2014. On September 15, 2014, the trial court issued a memorandum decision. On December 15, 2014, the trial court signed its FF&CL. CP 218-242. Hood filed a motion for reconsideration on December 22, 2014. CP 160-215. A response and reply were filed. CP 147-159, 97-109. The trial court denied the motion for reconsideration. CP

[15] Apparently, the exhibits to the Second Declaration of Michael C. Kahrs were attached to the motion in the clerk's papers. The exhibits are appropriately referenced herein.

47-48. Meanwhile, a motion for attorney fees, the response and reply with supporting documents were filed and the parties stipulated to a date limiting fees. CP 115-36, 157-159. The trial court signed its AF FF&CL on March 5, 2015. CP 40-46. Hood filed a timely notice of appeal March 9, 2015. CP 1-39.

IV. SUMMARY OF THE ARGUMENT

Hood will show, request by request, how the District committed multiple violations of the PRA. He then shows how the trial court abused its discretion in both grouping the violations and assigning penalties. He finally shows that the trial court abused its discretion when awarding attorney fees.

V. ARGUMENT

A. STANDARD OF REVIEW

Appellate Courts review agency actions under the PRA *de novo* when the sole evidence is documentary. *Lindeman v. Kelso School Dist. No. 458*, 162 Wn.2d 196, 201, 172 P.3d 329 (2007). Appellate courts "stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence." *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1995) ("*PAWS*"). Appellate courts are not bound by a trial court's factual findings regarding an agency's PRA violations.

A trial court's penalty determination based on grouping is reviewed for an abuse of discretion. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 439, 98 P.3d 463 (2004). The trial court's determination of an appropriate per-day penalty is also reviewed under an abuse of discretion. *Id.*, at 431. A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *ACLU v. Blain School Dist. No. 503*, 95 Wn. App. 106, 111, 975 P.2d 536 (1999).

B. JUDICIAL REVIEW OF AN AGENCY'S RESPONSE TO A PUBLIC RECORDS ACT REQUEST IS REVIEWED WITH ALL INFERENCES TO BE CONSTRUED IN FAVOR OF THE PARTY SEEKING THE RECORDS.

The Public Records Act is set forth in RCW 42.56 et seq. "The purpose of the PRA is to preserve 'the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.'" *O'Connor v. Dept. of Soc. & Health Servs.*, 143 Wn.2d 895, 25 P.3d 426 (2001) (*quoting PAWS*, 125 Wn.2d at 251).

> 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.

RCW 42.56.030.

It is "a strongly worded mandate for broad disclosure of public records." *Prison Legal News, Inc. v. Dept. of Corrections*, 154 Wn.2d 628, 635, 115 P.3d 316 (2005). The PRA provides that "'[j]udicial review of all agency actions taken or challenged under [RCW 42.56.030 through 42.56.520] shall be *de novo*." *O'Connor*, 143 Wn.2d at 904 (*quoting PAWS*, 125 Wn.2d at 252; RCW 42.56.550(3)).

The Supreme Court in *PAWS* emphasized that "[a]gencies have a duty to provide 'the fullest assistance to inquirers and the timeliest possible action on requests for information.'" *PAWS*, 125 Wn.2d at 252 (*quoting* RCW 42.17.290 (*now* RCW 42.56.100)). It is abundantly clear that "[L]eaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 131, 580 P.2d 246 (1978).

> Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.

RCW 42.56.550(1); *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 794, 791 P.2d 426 (1990); RCW 42.56.550(3). Finally, an agency "shall not distinguish among" requesters. RCW 42.56.080.

C. THE DISTRICT VIOLATED THE PUBLIC RECORDS ACT MULTIPLE TIMES IN MULTIPLE WAYS.

Washington's Supreme Court defines a "person who prevails" as a person who must seek judicial review to determine that documents were wrongly withheld. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005). The filing of a lawsuit need not be the direct cause of an agency's disclosure, if a court determines that the disclosure was wrongfully denied at the time of filing. *Id.* Good faith is not a defense. *Amren v. City of Kalama*, 131 Wn.2d 25, 35, 929 P.2d 389 (1997).

An agency must produce every requested, non-exempt public record. *Neighborhood Alliance of Spokane County v. Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). Each exemption must be "narrowly construed." RCW 42.56.030. A document must be redacted, not exempted if redaction makes the document releasable. *City of Lakewood v. Koenig*, 182 Wn.2d 87, 94, 343 P.3d 335 (2014). The burden is on the agency to justify any exemption or redaction. *Gendler v. Batiste*. 174 Wn.2d 244, 252-53, 274 P.3d 346 (2012). The District's many violations are discussed in association with Hood's requests.

1. Violations in Response to Hood's June-July Requests. On October 14, 2011, the District falsely claimed that it had completed its

disclosure of responsive records. Not only did Hood timely receive District records from other agencies, the District untimely provided responsive emails *15 separate times* after closing its response, some as late as September 24, 2014. Appendix 1 (Emphasis added). These untimely disclosures resulted from the following:

a) *Unreasonable Searches*. Evidence of the District's unreasonable searches starts with its false promise to search all possible "repositories" including Terhar's files. CP 2812. Her stated failure to perform a global search of her computer contradicts Moccia's declaration that she directed Terhar to search her computer. CP Id.; 3044. The trial court relied upon Terhar's incredible testimony that she knew every document on her computer.[16] Likewise, the unreliable testimony of key District employees Moccia, Miller and Poolman and counsel Chavez (discussed below) led the trial court to mistakenly conclude that the District conducted a reasonable search.

Hood provided names and job titles of District employees, including Sue Raley ("Raley"), who the District characterized as "records

[16] "But Terhar testified in her deposition that if a request pertained to anything that she might have on her computer, she would search for it." FF&CL ¶31. She also stated she wasn't "real savvy" on searches. CP 3042.

custodians."[17] The District did not search, until the summer of 2014, their electronic files. CP 140, 142-143. The District's sweeping July 12, 2011 reply obligated it to do so. CP 1015-1023, items 8, 10 (promise to search for "any" records from "district administrators" "any records about you from listed staff members."). Moccia declared to the trial court that their files had been searched. CP 2812-2813 ("potential custodians included administrative staff [and] counselors," "individual staff members also searched their computer files"). She does not limit the term "electronic files." CP 2812. Her declaration misled both Hood and the trial court.

The District's failure to fix its defective email system for over a year, which deprived Hood of unknown numbers of auto-deleted documents, is unreasonable.[18] Overlooking paper records in a mislabeled file may be excusable, but untimely disclosing *emails* three years after multiple electronic searches of the same databases is unreasonable. Section a., above, applies to all District responses to Hood's requests.

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[17] Hood cited Raley, colleagues, board members, counselors and administrators. CP 1009-1014. The District agreed to search their files. CP 1015-1023, item 9: ("We will search for records about you made by the listed staff members.") It failed to search for records made or kept by Raley, as opposed to records that may have been located on its email system. It certainly knew she made records about Hood, including a letter. CP 1131 ("1/7/11, 11:21 AM"), CP 1486. She was not asked to search her files. CP 3053-3054.

[18] District Superintendent Moccia, frequent advisee of experienced counsel, had notice of the District's duty to preserve records that were potentially relevant to litigation. Even before starting her duties as District superintendent/ records officer on July 1, 2011, she requested legal advice about Hood. CP 1118 ("6/30/11"). He sued the District in federal court in December 2011, and in this court in June 2012.

b) *Improper Exemptions.*

The District improperly withheld documents pursuant to "deliberative process." CP 1054-1064. After Hood filed this lawsuit, District's present counsel determined that prior counsel's exemption claims were improper and provided the records to Hood. CP 1119-1133. Untimely disclosing wrongfully withheld records clearly violates the PRA.

Documents originally withheld and listed on the October 14, 2011 exemption log and subsequently produced with the September 11, 2012 supplemental production were ignored by the trial court. FF&CL 65. Once an agency implements the policies discussed in records withheld per the deliberative process exemption, they are no longer exempt. *West v. Port of Olympia*, 146 Wn. App. 108, 117, 192 P.3d 926 (2008) *(citing PAWS,* 125 Wn.2d at 257).The trial court abused its discretion because the "process," Hood's arbitration, had been completed before he made his request.

All documents in the supplemental production came from eight binders that the former Superintendent McCarthy, whose duties ended prior to July 1, 2011, had placed in the District's record storage vault. *See* section III.A.4., *supra*. Many documents formerly withheld per "deliberative process" have a header showing "printed by: Brian Miller"

with a print date of either July or August, 2011. CP 2677-2728. How these documents came to be included in this production has not been explained. Miller searched only email databases and was unaware of the binders. CP 1220-1221. He clearly could not have printed electronic records from "hardcopy" records within the eight binders. The District hasn't explained how electronic documents printed by Miller in July and August of 2011 were part of the binders that McCarthy placed in the vault before he left employment at the end of June, 2011.

The trial court also ignored the District's production of silently withheld attorney-District communications responsive to Hood's prior request. *See* section III.A.14, *supra*. Bad faith untimely disclosures of records (or defenses thereof) are an aggravated violation of the PRA.

c) *Silent Withholding of Records.*

Documents, including SAO documents, disclosed to Hood by other agencies, showed that the District had not reasonably searched for and was silently withholding or destroying many documents. *See* Table 1, *supra*. The District not only withheld many records related to the audit but claimed on December 21, 2011 that it had no records "regarding this supposed audit." CP 1087-1089. The District's own records show the SAO started auditing Bayview School in March 4, 2011, over 4 months prior to his July 14, 2011 request. CP 1291 (email header states "Audit;" cc to

Business Manager Dan Poolman ("Poolman")). It withheld audit-related records until December 19, 2012. CP 2144-2145, 2147-2198; RDW 384-85 and 387-409.

Hood's July 14 request also involved the District's Highly Capable Learner's ("HCL") program. The dates of documents provided to Hood by OSPI shows the District possessed them both before and after Hood's requests. CP 1279-1286; RDW 16-22. A July 13, 2011 email of obvious public interest notifies the District that its "Highly Capable End-of-Year Report (250)11-12) Needs More Work Before Final Approval Can Be Issued." CP1285. Hood received neither the website address nor a draft of the non-approved report. This violation, silent withholding, also applies to District responses to Hood's requests of November 1, 2011, June 19, September 11, and November 15, 2012, and June 25, 2014 requests for audit and/or HCL and/or CBA records.

d) *Withholding Requested Metadata.*

On July 7, 2010, Hood, citing case law, requested all metadata:

> Note that all requests below include an explicit request for metadata (Fields for the "To", From", and "cc" are all recipients and are considered "metadata. *See O'Neill v. City of Shoreline*, 170 Wn.2d 138, 151-152, [240 P. 3d 1149] (2010).

CP 1006-1008. On July 10, 2011 Hood made the following request:

> Prior to the arbitration hearing the WEA had requested "the contents of any working file maintained by you, your agents, or

> any District administrator regarding Eric Hood." However, as the WEA did not specifically request meta-data with regard to the above, please disclose any previously undisclosed meta-data records about me.

CP 1011. In response, Moccia stated:

> The working files produced to you in response to the WEA request were maintained in paper form, and no meta-data is available for those files. To the extent that any records included in those working files are also still maintained in electronic form, they will be located in searches conducted in response to your other requests, and will be disclosed to you together with all associated metadata.

Id. It did not provide, as stated, "all associated metadata." CP 1024-1028.

The District's agreement to search for metadata in "any records" that were "still maintained in electronic form" shows it clearly understood Hood's request included metadata for non-email records. FF&CL ¶¶ 43-44. The District ignored Hood's requests for metadata and its own obligations by providing only minimal header metadata for emails and absolutely none for non-email documents. Whether or not all metadata provided any "substantive content," as interpreted by an agency, is irrelevant to whether or not it must be produced. *See Hearst Corp.*, 90 Wn.2d at 131.

By converting emails to .pdfs before producing them to Hood, the District intentionally limited the metadata to what is "commonly shown in the header of an email transmission." CP 2796. Miller testified that

"yes, it's possible" to retrieve comprehensive metadata from the District's Google email archive, but didn't attempt to do so.[19] CP 1218. His testimony regarding the District's former email system does not state what properties of metadata information it "limits." CP 2795. But such limits would apply only to emails created prior to March of 2011, at which time it was replaced by the Google system. *Id.* Hundreds of email documents do not contain the email metadata that the Google system is capable of providing, including dozens of District documents identified as emails that were responsive to Hood's requests. Identified as ("em"), dated after March 2011 on the RDW. In short, the District could have, but did not provide "all associated metadata" for emails, as promised.

The trial court erred by examining only emails and ignoring the metadata associated with other electronically created documents that Hood was entitled to. The District was lawfully obligated to request clarification if it considered Hood's requests for metadata unclear or erroneous. RCW 42.56.100 ("fullest assistance"). Instead, the District promised "all associated metadata" without limitation. CP 1015-1023. It did not exempt metadata on a withholding log. Agencies must disclose metadata when specifically requested. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 141, 240 P. 3d 1149 (2010).

[19] It did not search for metadata even on pre-arbitration-dated emails. CP 1516-1518.

Requested but undisclosed metadata for especially non-email, electronic documents could have revealed material information like time and dates of creation and modification, and authors' names. For example, the District's failure to provide metadata associated with Hood's October 16, 2012 request prevented him from learning the names of the recipients of a defamatory letter written by McCarthy. CP 1437-1438. Metadata withheld from a non-email electronic document could reveal the precise date that an administrator discussed, with regard to Hood, "two ways a certificated employee can be terminated." CP 1504. It withheld metadata for the non-email electronic CBA documents that mostly comprise the District's October 16, 2012 production. CP 1566-1613; RDW 170-219.

The District was advised by experienced attorneys who certainly knew about metadata, even if District employees now claim to be ignorant of it. CP 2812-2814, 2819. That is, District counsel knew that 1) all metadata should have been either provided or exempted, but wasn't, and 2) Hood was not provided an explanation for the metadata the District exempted from disclosure. "[T]he agency's failure to provide a brief explanation should be considered when awarding costs, fees, and penalties." *Sanders*, 169 Wn.2d at 848. The trial court erred by finding that undisclosed but requested metadata was "immaterial to the actual substantive content of the records he requested" and that the District

complied with Hood's request for metadata. FF&CL ¶43. The above-mentioned metadata violations also apply to the District's responses to Hood's August 31 and November 1, 2011, September 11, and October 16, 2012 requests.

e) Lack of Oversight. The District's failure to train and oversee its employees and supervise counsel is replete throughout this caseas shown in the following excerpts from Moccia's deposition:

Table 2

1. Moccia had no training regarding public records and does not regard responding to records requests as "a primary duty of mine." CP 1236.

2. She had not "provided training to employees of the South Whidbey school district regarding their obligations to retain records per the schedule," even though school Board policy specifies "what we would follow." CP 1237.

3. Despite Hood's records requests during the past 3 years, no one in the District, including Moccia, has been provided "training" regarding "records retention." CP 1237.

4. She didn't "review the final set of documents that were slated to be disclosed to Mr. Hood." CP 1238.

5. She didn't herself document the "search performed of non-electronic files." CP 1239.

6. She doesn't recall whether the District made "available a document informing employees of their obligations under" the PRA, *Id.*

7. She didn't know, until an employee's deposition a few days before hers "that it is *still* possible for individual employees of the [...]

district to individually delete their e-mails [...] so as to non-archive them," *Id.* (Emphasis added.)

8. She didn't know if it is "possible that e-mails responsive to Mr. Hood's request could have been destroyed after he made a request, but before a search was taken of the archive." CP 1240.

9. Despite her declared expectation of litigation, she purportedly didn't review the "legal" binders related to Hood, had "no idea" what was in them, or whether "anybody added documents to the binders after [she] started employment." CP 1241.

10. She didn't "tell any employee who searched for records what database or databases they should look in." CP 1241.

11. She didn't review the 10/14/11 exemption log and was unaware of "what [it] said or what was withheld." CP 1242/

12. She admitted taking advice about, but not responsibility for records productions: "I chose to accept that responsibility of taking the advice from counsel in this matter." The "matter" referred to was, "what documents were provided Mr. Hood in response to his [...] July 2011 request." *Id.*

13. She wasn't "concerned that documents were being withheld rather than redacted." CP 1243.

14. She wasn't able to determine ("I would have to look") whether board policy "sets forth the requirements of the Superintendent to retain records." CP 1300.

15. She didn't know if there is "someone in the district who is known as a records custodian or some similar title." *Id.*

Moccia stated without contradiction that she failed to supervise her employees and counsel. The trial court ignored the Superintendent's failure to provide necessary oversight.

2. Violations in Response to November 1, 2011 Request. The District failed to provide responsive emails 18 times. Appendix B. It failed to disclose all metadata, and audit records. All violations discussed in Section V.C.1.a), c), d), e), *supra,* apply to the District's response to this request.

All later untimely productions of audit records, and CBA records disclosed on October 16, 2012 in response to Hood's September 11, 2012 request were records of public importance responsive to both Hood's July 14 and November 1, 2011 requests. CP 1566-1613; RDW 170-219.

A letter accompanying the District's disclosure of a thumb drive in response to Hood's October 4, 2012 request confirms that it contained the recovered contents of Hood's work computer. CP 874, 1148-1149. Those contents were thus untimely disclosed and necessarily responsive to Hood's July 10 and November 1, 2011 requests for records about himself.

3. Violations in Response to June 19, 2012 Request. The District again failed to timely provide all responsive documents to this third request for audit-related records. CP 1365-1370, 1554-1562, 1653-1712 (other agency's responsive records). After closing its response, the District untimely provided additional responsive documents on November

27, 2012 and December 19, 2012. CP1722-1731, 2143-2198; RDW 269, 270, 384-409.

4. Violations in Response to September 11, 2012 Request. The District withheld requested metadata for the non-email electronic documents that mostly comprise this production. CP 1566-1613; RDW 170-219. After its closure, the District untimely disclosed more documents on November 13, 2012. CP 1714-1720; RDW 266-268.

5. Violations in Response to October 10, 2012 Request. The District untimely provided responsive records on November 29, 2012. CP 1755-1974. The District's admitted failure to timely respond violated the PRA. CP 1150.

6. Violations in Response to October 16, 2012 Request. By prematurely denying the existence of responsive records and closing its response, and by feigning ignorance of the location of its own records, the District obviously failed to provide "fullest assistance" to Hood. It then untimely disclosed responsive records, again without all associated metadata. CP 1976; RDW 292.

7. Violations in Response to November 15, 2012 Request. Over 600 attendance records were untimely disclosed due to the District's delayed response to Hood's proposal to view them, and its insistence that

he pay to view redacted copies of them. The record shows the following crucial exchange in chronological order:

> Hood: When may I come in to view the records? After I view them I will decide whether I want the copies."
>
> District: The records may not be viewed until we take copies and redact all of the student names. *This will require you to pay for the copies that need redacting at .15 cents per copy. Sorry....no other way around this.*
>
> Hood: Under the Public Records Act, an agency may not charge fees to redact public records. Fees are governed by RCW 42.56.070(7),(8) and RCW 42.56.120.
>
> District counsel: The District respectfully disagrees with you regarding the proper interpretation of the Public Records Act. Nonetheless, given the narrowed scope of your request and to avoid further dispute on this request, *upon completion of your review of this first installment of redacted records, the District will require your payment of $9.90 for the redacted installment. If you do not pay for this first installment, the District will not fulfill the balance of your request for these attendance records, per RCW42.56.120.*

CP 1185-1186. (Emphasis added.) The District violated the PRA by requiring payment for an exemplar/installment of records before permitting Hood to view a second installment. It definitely required payment before Hood could view a second installment, even if he did not want any of the records he viewed in the first exemplar/installment. Contrary to the trial court's findings, Hood obviously narrowed the scope of his request to avoid paying to view records. *See* FF&CL¶ 33.

RCW 42.56.130 states that "[n]o fee shall be charged for the inspection of public records." When a statute's plain language is subject to only one interpretation, the inquiry into its meaning stops because no explanation is necessary. *State v. Armendariz,* 160 Wn.2d 106, 110, 156 P.3d 20 (2007). A statutory construction that renders meaningless or superfluous any part of a statute must be avoided. *Burlington N., Inc.* v. *Johnson,* 89 Wn.2d 321, 326, 572 P.2d 1085 (1997). The basic tenets of statutory construction imply that RCW 42.56.130 can only be interpreted one way -- an agency cannot charge to make copies for the purposes of redaction if the individual has requested to view, not obtain copies of the records. Because the District forced Hood to narrow the scope of his request by threatening to charge copy costs, it violated the PRA. Because the District forced Hood to pay for an exemplar and prevented him from viewing a second installment without paying for the exemplar, it violated the PRA.

8. Violations in Response to January 30, 2014 Request. On February 26, 2014, the District disclosed thousands of previously undisclosed records to Hood. It claimed that they had been disclosed to Hood in the summer of 2011 on a "July 27, 2011 CD," as referenced in the District's September 11, 2012 revised exemption log. CP 1119-1133. The trial court overlooked evidence that non-exempt records were disclosed to

Hood for the first time on February 26, 2014. CP 876. Most of them are not exempt and have "content" that is entirely different from any previously disclosed records. CP 2227-2438. Some of them are communications between attorney and client that were not previously disclosed or shown on an exemption log, yet another example of the District's negligence in tracking its records productions. CP 2435-2438.

Possibly in relation to the "7/27/11 CD," Moccia stated on July 28, 2011 that there were at least 1000 pages printed for review for possible redaction and that she expected to generate "another 1000 or so pages." CP 1036-1037. Since counsel did not review several thousands of documents the day before Moccia sent Hood the email, the CD clearly was not disclosed to Hood.[20] The CD contained responsive documents Hood's July and November 2011 requests.[21] CP 2227-2438. When presented with this evidence, the District initially flatly denied any of the records were responsive to prior requests. It finally admitted what Hood suspected – the District failed to timely produce them. CP 2866-2867.

The trial court overlooked the District's later admission and instead relied upon Chavez's earlier misleading declaration that "it is

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[20] Hood alerted the District that its August 2011 production, which purportedly contained the contents of the "7/27/11 CD," was incomplete. See Facts, June-July Request, *supra* and CP 1049-1051.

[21] Eight documents mentioning the words "Highly Capable Learners" or "HCL," were inadvertently, and brought to the attention of the trial court.

undisputed that Hood received the non-exempt contents of that 7/27/11 CD [in the summer of 2011]." CP 2866-2867. When its attempt to conceal the untimeliness of this production failed, the District then claimed that certain of its records were not "material" because they are "draft versions of documents." CP 775. One such draft is an important "separation agreement" that offered Hood a lump sum of $20,000 in severance pay. CP 2245-2248. The final draft was never disclosed to Hood. Other such documents are undated, unsigned letters also related to Hood's non-renewal. CP 2420-2423. The PRA does not differentiate between draft and final documents except for the deliberate process exemption and then, only until the process is complete. Furthermore, the District withheld metadata for these non-email draft Microsoft Word documents which would have revealed, among other material information, their authors' names and dates of creation and modification. A draft document can clearly be as important as the final. The District violated the PRA by arbitrarily filtering its disclosures according to an indefinite, fabricated, and ultimately bogus "substantive content" standard. The trial court abused its discretion by adopting that standard. FF&CL ¶¶34, 43.

9. Violations in Response to June 25, 2014 Request. The District's September 24, 2014 disclosure of previously undisclosed records about Hood's family shows it did not search, until the summer of

2014, the electronic or other files of many of its records custodians. CP 140, 142-143. The District's July 12, 2011 reply to Hood's July 10 request obligated it to do so. (*See section* C.1.A., *supra*) The District knew its email system auto-deleted emails from March 2011 until August of 2012. CP 726. This knowledge obligated it to search the individual computer files of any persons who might have stored records responsive to Hood's request on their computers, including a search for emails that may have been auto-deleted in the central email system. CP 725 (admitting productive "test" search for responsive records of the computer files of employee Pfeiffer and Terhar, both of whom were either specified by Hood's requests or likely to have records about him). The conclusion this Court must draw is that the District, despite knowing that its central email system destroyed emails, failed to recover them or timely, reasonably search other obvious records locations where emails were stored.

D. THE TRIAL COURT ABUSED ITS DISCRETION WHEN DETERMINING GROUPING AND PENALTIES.

The trial court has the discretion to base penalties per record or group of records, per request or group of requests. Such a determination can and should include consideration of culpability as a major factor. *Yousoufian v. King County*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004) (*Yousoufian* II). But it is not the only factor. Penalties can be based upon

the date of the request. In *Yousoufian II*, there were only two requests and 18 records identified. *Id.* at 425-26. The records were put into ten groups based on the date of production and the type of records. *Id.* at 427. There can also be a per request penalty. *See West*, 146 Wn. App. at 115, 121-22.

While degree of culpability is an important factor when determining penalties, our courts have determined that a showing of bad faith does not require an intentional bad act.[22] *See Francis v. Dept. of Corrections*, 178 Wn. App. 42, 313 P.3d 457 (2013). In discussing bad faith, Division II focused on the Restatement (Second) of Contracts § 205 cmt. d (1981), quoted in Black's Law Dictionary 159 (9th ed. 2009) and looked to the federal Freedom of Information Act ("FOIA") for possible persuasive authority. After careful consideration, the *Francis* Court rejected following FOIA case law. *Francis*, 178 Wn. App. at 465. It looked to statutory interpretation of RCW 42.56.565.

In rejecting the intentional bad act requirement, the *Francis* Court examined the purpose of the PRA, especially people's sovereignty, and took into account how the PRA is interpreted in favor of the requestor in order to protect the public interest. *Francis*, 178 Wn. App. at 466. It concluded that an agency establishes bad faith when it does not conduct a

[22] This is in a prison context where the inmate requester must show the agency acted in bad faith before being eligible for penalties. RCW 42.56.565. Because there is no case law on what defines bad faith, this definition is relevant to a bad faith analysis in the PRA context.

reasonable search while excusing simple mistakes or complying with pre-existing law. *Id.* at 467.

In further defining bad faith, the Division III *Faulkner* court held that "[b]ad faith is associated with the most culpable acts by an agency." *Faulkner v. Wash. Dept. of Corrections*, 183 Wn. App. 93, 332 P.3d 1136 (2014), at 105. It seconded *Francis's* bad faith finding that a cursory search and delayed disclosure fell "well short of even a generous reading of what is reasonable under the PRA." *Id.* (*citing Francis*, 178 Wn. App. at 63). The *Faulkner* court requires a higher level of culpability than negligence – it requires a finding of wanton or willful act or omission by the agency. *Id.* Using Black's Law Dictionary, *Faulkner* defined "wanton" as "[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences." [...] One acting wantonly may be creating no greater risk of harm, but he is not trying to avoid it and is indifferent to whether harm results or not." *Id.* at 103-04 (citations and quotations omitted). In other words, "[p]enalties are owed when an agency acts unreasonably with utter indifference to the purpose of the PRA." *Id.* at 105. The *Faulkner* Court fully endorsed the decision in *Francis*:

> "*Francis* is an example of a wanton act made in bad faith—the agency knew it had a duty to conduct an adequate search for the requested records but instead performed a "cursory search and delayed disclosure well short of even a generous reading of what is reasonable under the PRA."

Id. (*citing Francis*, 178 Wn. App. at 63).

When evaluating penalties, courts use the non-exclusive list of mitigating and aggravating factors promulgated by the Supreme Court in *Yousoufian IV* with the following caveat.

> We emphasize 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.

Yousoufian v. King County, 168 Wn.2d 444, 467-68, 229 P.3d 735 (2010).

The *Yousoufian IV* mitigating factors are as follows:

> (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.

The *Yousoufian* aggravating factors are as follows:

> (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. King County, 168 Wn.2d 444, 467-68, 229 P.3d 735 (2010).

Hood addressed many of these factors in his proposed nine groupings to the trial court. The trial court accepted two of them and awarded de minimus penalties. Hood first shows how the trial court abused its discretion in considering possible penalties. He will then show how it abused its discretion when it ignored his proposed groupings.

1. The Trial Court Abused Its Discretion When Considering the Mitigating and Aggravating Penalty Factors.

The trial court abused its discretion when applying various mitigating and aggravating factors to its penalty calculation including imposing only minor and unspecified increases in penalties, though it found that District personnel lacked training. FF&CL 52, 65. For example, District did not adhere to state records retention requirements, timely repair its auto-deleting email system or track its productions to Hood. It "inadvertently" forgot to disclose records, improperly denied some of Hood's requests, failed to search for or disclose all requested metadata, ignored his request that it provide records in electronic form and instead repeatedly charged Hood fees, failed to timely search its own records storage vault, and denied the existence of an audit based upon a bogus

claim that it was a "review." It failed to timely respond to Hood's proposal to view attendance records, and then charged him to view them. It failed to track its productions, mistakenly believed it had disclosed records containing attorney–client communications, and then disclosed those records, apparently without reviewing them. It faulted Hood for making additional or follow-up records requests, though it continually withheld records responsive to his initial requests. Its Superintendent admitted she failed to provide any oversight over the productions. *See* Table 3, *supra.*

The District's productions clearly show, at a minimum, a grossly negligent failure to oversee and train its employees, or oversee flawed counsel. The trial court abused its discretion by failing to give due weight to the negligent degree to which District employees lacked training and oversight. The above paragraph responds to FF&CL ¶35.

The trial court instead excused the District's failure to train by lauding its use of counsel. FF&CL ¶51. It also argued that given its size, the District's use of counsel should mitigate penalties. FF&CL ¶¶52, 65. Its reasoning should hold only if counsel is properly supervised and directed, and does not make significant errors. Here, counsel was not supervised at all and made serious errors. For example, former counsel claimed that the deliberative process exemption applied to certain withheld records cited in the October 14, 2011 exemption log, though the

"process" had been completed. *See* section V.C.1.b., *supra*. Current counsel mistakenly believed that records apparently intended for counsel's review had been disclosed to Hood on the mythical "7/27/11 CD" mentioned in the September 11, 2012 revised exemption log. *See* section V.C.8. *supra.* Also, counsel was acting under the "control" of the District. *Rho Co., Inc.* v. *Department of Revenue,* 113 Wn.2d 561, 570, 782 P.2d 985 (1989). Ignoring District liability for counsel's failures is an abuse of discretion.[23]

The trial court's unsupported finding that the District "devoted thousands of hours of staff time" exaggerated District efforts. FF&CL ¶54. The District stated only that it spent "significant" staff time. CP 1236. Miller, the District employee most involved in the searches testified only that he spent "over 60 hours... in the summer and fall of 2011." CP 2795. By extrapolating quantifiable evidence of good faith search efforts from contrary or indefinite statements, the trial court abused its discretion. FF&CL¶35.

The trial court erred by overlooking, ignoring or misunderstanding many violations and minimally penalized them by lumping them together as "technical non-compliance." FF&CL ¶¶66, 68, 71, 74. There is no such term in the PRA. An agency won't recognize or be deterred from future

[23] CR 19 permitted the District to name counsel as a third party defendant on these issues.

violations that the trial court vaguely labels as "technical non-compliance" and does not appropriately penalize.

2. The Trial Court Abused Its Discretion When It Refused to Accept Hood's Proposed Penalty Groups.

a) *Group 1.* Hood proposed Group 1 for untimely disclosed documents responsive to the June-July 2011 requests. The District failed to provide responsive records 15 times. Appendix 1. The last responsive record was disclosed September 24, 2014.

The trial court erred by not considering "all the evidence" or "the entire record" of the District's responses to Hood's June-July requests.[24] It abused its discretion when it refused to acknowledge that Hood's grouping accounted for the District's continual, chronic failure to provide responsive records, especially emails, for over three years. FF&CL ¶¶27-28, 66, 72, 74. The trial court also mistakenly concluded that the District's searches were "reasonably prompt" though the District provides no reasonable explanation for its multiple untimely productions after multiple searches of the same files. FF&CL ¶ 61. It is impossible for an agency to be reasonably prompt when it takes over two years after the filing of a lawsuit to produce all responsive records.

[24] The trial court inaccurately stated: Hood "does not challenge the District's responses" to his requests of October 4, 2012, or January 30, 2014, not listed in FF&CL ¶27

The trial court ignored the District's bad-faith promise to Hood to search all possible "repositories" including employee's computers like Terhar's and Raley's. CP 1241; *see* section V.C.1.a. *supra.* Moccia's declaration that she directed Terhar to search her computer and directed other "custodians" to search their files was irrelevant because it obviously was not carried out. *Id.* The trial court's reliance upon the unreliable testimony of key District employees Moccia, Chavez, Miller, and Poolman or counsel Chavez, while dismissing or misinterpreting the credible, evidence-based testimony of Raley and Hood led to its erroneous conclusion that the District reasonably searched, in good faith, all files where records could reasonably be found. FF&Cl ¶¶ 28, 29, 31, 32, 35.

The trial court also erred by attributing the District's flawed, untimely responses to what it characterized as Hood's "numerous, broad, and overlapping requests." FF&CL ¶¶53, 60. Hood's clearly articulated requests, some broad, some specific, were met with very few requests for clarification, to which Hood promptly responded.[25] The District's replies did not complain that requests were overbroad or harassing, or that Hood did not adequately or timely reply to its few requests for clarification, or that it lacked sufficient resources to respond its own chosen time.

[25] The trial court does not cite a single unclear request

If anything, Hood's "multiple, broad, overlapping, and occasionally duplicative requests" combined with the District's broad search parameters and purportedly thorough searches should have ensured that it did not overlook records. District replies to Hood's requests unambiguously included staff, computers, and files. CP 1015-1023, 1081-1082. In addition to its email system and central administration files, the District falsely promised or claimed to have searched, numerous times, the files of over 20 individual employees or agents. CP 1015-1023, 1081-1082, 2812-2813. FF&CL ¶35. Only after Hood sued did the District limit its search and complain about Hood's requests. The trial court abused its discretion by speculating, without evidence, that Hood's requests made it "inevitable" that the District "missed" records. FF&CL ¶60.

Because the District withheld documents responsive to Hood's July 2011 requests until September 24, 2014, the trial court abused its discretion by not extending the Group 1 penalty period to 1172 calendar days. FF&CL ¶67.

The trial court misstated Hood's logical proposal to successively multiply a minimal $5/ day penalty in order to appropriately address the District's continued violations. He originally listed 12 violations but the evidence shows 15. Appendix 1. The trial court abused its discretion by ignoring the severity of violation arising from multiple untimely

disclosures after searching the same databases. FF&CL ¶ 64. The trial court's claim that Hood did not find a "smoking gun" is a straw man. The District's continued failure to provide responsive documents is the "smoking gun" that supports an inference of "District misconduct." *Id.* The type of record withheld is only important in a *Yousoufian IV* penalty calculation when considering economic loss or public importance.

Finally, whether or not the District's violations were intentional, they were most certainly made in bad faith. *Francis* and *Faulkner* only require that actions be wanton or reckless to show bad faith. The District's actions were either one or both.

b) *Group 2.* The District's September 11, 2012 "supplemental production" is the basis for Group 2. It includes all documents silently withheld for 429 days that were subsequently either provided or listed on the District's revised exemption log. The trial court's unsupported finding that "these records were produced in response to [Hood's] July 2011 requests, and are thus encompassed by Group 1" (FF&CL ¶38) contradicts the District's statement that Group 2 records or their "substantive content" were either "already produced" or "not responsive to your July request." CP 1107. The trial court abused its discretion when it minimized the Group 2 violations and subsumed them with Group 1. FF&CL ¶ 33, 38.

Its finding that the "Supplemental Production" contained records from sources other than the binders was based upon District counsel Chavez's declaration that contradicts a federal court order:

> Based upon my review of the binders *and the District's prior production sets to Mr. Hood,* I provided Mr. Hood a supplemental production ... on September 11, 2012.

CP 2864 (emphasis added); FF&CL ¶ 33, 38. The District did not explain how attorney-reviewed "hardcopies" locked in a vault by the previous Superintendent could be "printed by Brian Miller" in July and August of 2011 (*see* section V.C.1.b., *supra*). The only reasonable conclusions to draw are that the District and prior counsel located, printed and reviewed documents in July, 2011 but withheld them from Hood -- whether accidentally (like the "07/27/11 CD") or intentionally. After change of counsel in 2012, the District searched its records storage vault and not surprisingly found records. To obscure its withholding of records that prior counsel should have disclosed in 2011, the District misleadingly claimed they were not discovered until 2012.

The trial court reasoned without legal precedent that "substantive content" satisfies a records request. In doing so, it ignored 134 records that were responsive and related to Hood "in some manner." FF&CL ¶ 34. An agency has no right to determine whether records have "substantive content" and must be disclosed. The District violated the PRA by

withholding records according to its own discriminatory interpretation of their significant. *See Hearst Corp.*, 90 Wn.2d at 131, *supra*. Records listed on the September 11, 2012 "supplemental production's" revised and new exemption logs were either silently withheld or improperly exempted and untimely. Such evidence alone "challenges" District testimony. FF&CL ¶ 34.[26]

Records in the supplemental production merit a distinct, maximal penalty because the District failed to timely locate them after key employees were told they were in the records vault, attempted to avoid penalties by filing unreliable declarations regarding their source, and submitted vague and confusing withholding logs with faulty exemption claims. Contrary to the trial court's reasoning, *Sanders* does not apply to this violation because the District's exemptions were improper. *Sanders*, 169 Wn.2d at 849-50 ("Rather, the appropriate inquiry is whether the records are exempt from disclosure."). The trial court abused its discretion by failing to distinguish documents in the supplemental production from

[26] Examples of credible evidence rejected by the trial court: An email with threatening marginalia, though "strictly responsive" to Hood's July and November requests was not previously disclosed, purportedly because of its "substantive content." CP 1443. Many Items on the "revised" exemption log (CP 1119-1133) shown as "produced on 7/27/11 CD-ROM" were withheld until September 11, 2012. CP 2677-2728. Even if the trial court accepted the District's "substantive content" argument, it overlooked an item that even the District admits was "produced on 9/11/12 CD-ROM," i.e., it was produced for the first time on September 11, 2012. CP 1128, "8/2/10, 6:18 PM."

previously disclosed documents and then subsuming them into Group 1. FF&CL 38.

c) *Group 3.* This group included previously exempted documents initially listed on an October 14, 2011 exemption log and then produced, without exemption, in the "supplemental production." CP 1054-1064, 1119-1133. The improperly exempted documents were thus withheld for 429 days.

In rejecting this proposed group, the trial court reviewed the wrong documents. FF&CL ¶ 39. The trial court reviewed attorney invoices in camera (CP 2597-2674). In ruling on Group 3 records, it should have examined the documents originally withheld October 14, 2011, and then produced in the District's September 11, 2012 supplemental production. (CP 2677-2728).

The trial court failed to properly compare the October 14, 2011 and September 11, 2012 exemption logs. Such a comparison proves that certain previously withheld records were later disclosed. Comparing the supplemental records (CP 2677-2728) with both exemption logs (CP 1054-1064, 1119- 1134) proves that previously withheld records were later disclosed. Certain records withheld per "deliberative process" on the

October14, 2011 log were disclosed on September 11, 2012.[27] Their disclosure tacitly admits improper withholding.[28]

The trial court erroneously found that they were properly exempted, even though the District admitted that 5 of the 26 records were not exempt. CP 795 ("vast majority of them (21 of 26) . . . are clearly exempt)." In summary, the trial court abused its discretion by finding the District was "entitled" to exempt documents, even though it reached its conclusion after examining the wrong records, misunderstanding evidence, and incorrectly applying case law.

d) *Group 4.* This group includes documents that Hood obtained from other agencies (Table 1, *supra*) showing that the District silently withheld them for a period of 604 days and/or destroyed them, and documents referenced by the District that it still withholds or destroyed. This group includes violations associated with District responses to Hood's July and November 2011, June 19, 2012, and January 30, 2014 requests and its September 11, 2012 supplemental production.

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[27] See, e.g., the May 14, 2010, 6:23:52AM email disclosed on September 11, 2012. (CP 2678) . It is exempted on the October 14, 2012 withholding log (CP 1054) but shown as "produced" on the September 11, 2012 revised withholding log (CP 1119).

[28] Hood has never asserted that an agency cannot change exemption claims between the exemption log and the lawsuit. Because Hood and the trial court were talking apples and oranges, this argument was not relevant to the violation or penalty determination.

The trial court failed to understand that the documents produced by other agencies, including non-email documents like letters, were responsive to requests made by Hood. FF&CL ¶ 40. The District only provided a rationale for its non-production of certain emails. Some District non-emails – i.e., letters disclosed to Hood by other agencies, but not disclosed by the District, include a June 17, 2011letter to the Arlington School District, a March 9, 2011 letter to the Attorney General's Office, and a June 21, 2011 letter to the Auditor. CP 1313, 1349, 1367. Records produced by the WSRMP show and/or reference dozens of District-WSRMP correspondences that the District refused to disclose or list on an exemption log. CP 1617-1652, 2219-2220. A reasonable search should have turned up these electronically generated letters, even if the District auto-deleted its emails. Since the District has neither claimed an exemption nor disclosed these and similar documents, they were either destroyed or are being silently withheld.[29]

The trial court failed to understand that Hood's Group 4 argument is also based upon documents *provided by the District* that reference undisclosed records. (Emphasis added.) District attorney invoices reference 16 distinct email communications between District employees and counsel that have never been disclosed or listed on any exemption

[29] The RDW lists many other non-email District records disclosed by other agencies or untimely disclosed by the District.

log.[30] CP 2598-2674; RDW 537-553. Another withheld District record references a CD containing records of correspondence involving Hood that was "overnight FedExed" to the District. CP 2529; RDW 570. Another record references a scanned document sent to the Superintendent from her secretary. CP 2544; RDW 571.

The District must but cannot explain why certain records were not produced. The onus is on the agency to explain why it was unable to locate certain records. *Neighborhood Alliance*, 172 Wn.2d at 719-20. It has not done so. The trial court abused its discretion by finding the District didn't silently withhold records, though its own and other agency's documents reference undisclosed records that wouldn't have been affected by the District's defective email system. Its search was inadequate.

e) *Group 5.* This group involved 18 untimely disclosures of responsive records after the District closed its response to Hood's November 1, 2011 request, similar to Group 1. Appendix 2. The last responsive record was disclosed September 24, 2014. Hood requested $5/day per violation. The trial court abused its discretion when it ignored that 18 subsequent untimely productions of responsive documents constitute an aggravating factor. This Court must reject the trial court's

[30] See for example, the following dated items from invoice pages: CP 2615, "10/08/10;" CP 2621 "12/03/10;" CP 2652, "06/20/11 PREPARE EMAIL;" CP2654, "07/05/11;" CP 2657 "07/10/11 DRAFT EMAIL...."

flawed reasoning. FF&CL ¶¶64, 69. It abused its discretion by ignoring that documents produced September 24, 2014 were responsive to Hood's November 1, 2011 requests and should thus extend the violation period to 1058 days. FF&CL ¶71.

f) *Group 6*. This group encompassed documents of public importance involving a state audit of the District, the District's Highly Capable Learner Program, and the CBA. Hood requested a penalty based upon the final date of disclosure of one such record, a period of 524 days.[31] This group involves violations associated with District responses to Hood's June-July, November 1, 2011, June 19, September 11, 2012 and June 25, 2014 requests

The trial court abused its discretion by failing to "heighten" penalties and by overlooking evidence showing that the District not only repeatedly denied the existence of numerous audit records but disclosed them only after Hood filed suit. FF&CL ¶42. It destroyed or withholds records that it should have retained, and attempted to justify its untimely disclosures and denials by mischaracterizing the audit to the court as a

[31] Including the publicly important HCL documents disclosed on September 24, 2014 would extend the group 6 penalty period to 1172 days.

"review," though its own business manager's correspondence with the auditor refers to the "audit."[32]

The trial court did not recognize the importance of audit records though the State Auditor's Office, a public agency, does. CP 1319, 1555-1562, 1654-1712. The former District Superintendent's decision to discuss what he refers to as the "audit" with numerous persons, including elected officials, shows both its importance and its foreseeable significance. CP 1510-1513 ("The preliminary results of that audit have been shared ....When a formal report of findings is presented to me I *intend* to review it thoroughly....we *will acknowledge* this and correct the practice."). Efforts in "damage control" involved sending a letter explaining the audit to "all who were distributed Mr. Hood's letter to Senator Mary Margaret Haugen," approximately 40 persons, and stating "*we will continue to work with OSPI* to ensure that state requirements are satisfied." CP 1437-1438 (emphasis indicates forseeability of issues related to audit).

Although a penalty "should reflect the [foreseeable] significance of the project to which the PRA request relates," assessing a penalty "should not be contingent on uncovering the proverbial 'smoking gun'" or "actual

[32] Poolman declared, "To my knowledge, [State Auditor] Ms. Christiansen's work in reviewing Bayview's enrollment practices in spring 2011 was [not] an 'audit' of Bayview." CP 723-24. His declaration grounds the District's argument that it denied the existence of the audit in good faith and that Hood's request lacked clarity. CP 772-773. Poolman was sent or copied on emails from Christiansen that repeatedly refer to the Spring 2011 "audit." CP 1291-1296.

public harm." *Yousoufian IV*, Wn.2d at 462. An auditor's letter stating "the District over-claimed students by 24 percent" more than justifies the *Yousoufian* "public importance" factor. CP 1290.

The record also shows that the District's Highly Capable Learner's (HCL) program was of foreseeable importance to persons other than Hood. CP 204-211; *see* section V.C.1.c. *supra*. These emails, disclosed on September 24, 2014 in response to Hood's June 25, 2014 request involve numerous employees and parents, and discuss costs, mentors, favoritism and lack of effectiveness associated with the HCL program. They were untimely responsive to Hood's July 14 and November 1, 2011 requests.

The District's October 16, 2012 disclosure in response to Hood's September 11, 2012 CBA request, included records of public importance showing discussions between the District and the teacher's union. They were responsive to Hood's November 1, 2011 request. CP 1566-1613; RDW 170-219.

The trial court abused its discretion by failing to recognize the severity and aggravation associated with the District's withholding of publicly important records and by failing to accord a separate group to this violation. FF&CL ¶¶ 42, 58-59. It irrelevantly and without support speculated about Hood's motives requested records in order to "discredit the District" rather than address the foreseeable public importance of

issues and records related to his requests. Id., ¶59. In so doing it distinguished the requester, in violation of RCW 42.56.080, an abuse of discretion.

g) *Group 7.* The trial court abused its discretion when it refused to acknowledge this group or provide any penalties for the District's 992-day withholding of any email metadata and metadata associated with non-email electronic documents.[33] *See* section V.C.1.d., *supra.*

h) *Group 8.* These thousands of previously undisclosed records were produced to Hood for the first time on February 26, 2014 and withheld for 962 days. *See* section V.C.8., *supra*. The District claimed that they had been disclosed to Hood in the summer of 2011 on a mythical "July 27, 2011 CD," referenced in the District's September 11, 2012 exemption log. CP 1119. After denying that any of the records were responsive to prior requests the District eventually admitted the truth – it had failed to produce these responsive documents. *Id.*, CP 2867.

The trial court abused its discretion by ignoring both the severity of this violation and Hood's justification for making it a separate group. FF&Cl ¶45. By overlooking both the District's later admission and the

[33] Including email metadata withheld from documents disclosed on September 24, 2014 would extend the group 7 penalty period to 1172 days.

records themselves, and instead relying on Chavez's initial misleading declaration that the District had previously disclosed the non-exempt records to Hood (CP 2866-2867), the trial court abused its discretion.

The February 28, 2014 disclosure represents an egregious violation that deserves the requested maximum penalties because it reveals the District's a) gross negligence in responding to Hood's requests, b) failure to track responses, c) withholding of material records, d) withholding of records of public importance, e) continued withholding of requested material metadata, and f) bad faith defense through the use of its attorney's unreliable affidavit. FF&CL ¶¶35, 54, 61.

i) *Group 9*. This group involved several explicit statutory violations of the PRA. The District failed to provide the "fullest assistance" required by RCW 42.56.100 by not searching all reasonable places. It violated RCW 42.56.130 by requiring Hood to pay before he could view records. *See* section V.C.7., *supra*. Because the trial court did not find the District's evident lack of full assistance and charging of fees to be violations of the PRA, it abused its discretion. FF&CL ¶¶46-47.

Knowledge that its email system auto-deleted emails before and during Hood's requests obligated the District to timely repair it, and search individual computer files attempt to undelete emails from individual computers that may have been deleted on the District-wide email system.

See section V.C.1.a. *supra*. The violations associated with this obvious neglect impacts Hood's Groups 1, 4, 5, 6, 7, and 9.The trial court abuses its discretion by failing to penalize or even acknowledge the outright destruction of potentially responsive records.

The District's refusal to disclose or list exempted records related to its insurer, the WSRMP, without a reasonable or even comprehensible explanation clearly violates the PRA. *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009) (when an agency withholds a document without claiming an exemption to disclosure this is called silent withholding and is a violation of the PRA). CP 1195-1199. The WSRMP but not the District disclosed dozens of District-WSRMP correspondences. CP 1617-1652, 2219-2220. The trial court's failure to penalize or even consider these circumstances is an abuse of discretion. Hood focused on culpability, aggravating or mitigating factors, type of violation, length of violation, and other types of liability. Because the trial court ignored the District's many violations and total liability represented by Hood's groupings, the trial court abused its discretion.

Hood waited over three years for the District to unreasonably search for and produce, possibly, the last set of documents -- some of public importance and lacking all metadata, that are responsive to his prior

requests. [34] Yet the trial court recognized only two groups and penalized the District a paltry $5/day. Hood proposed, for those groups, a $5/day day penalty for each subsequent violation after the District formally closed its responses. His proposal reasonably penalizes the District $75/day for 15 violations of his July 2011 requests, and $90/day for 18 violations of his November 1, 2011 request.

Failing to impose a reasonable alternative to Hood's reasonable proposal for those two groups is a clear abuse of discretion. Compounding that abuse, the trial court denied evidence of continuing violations shown in Hood's motion for reconsideration and subsumed all other violations, "technical" or otherwise, into those two unreasonably penalized groups. Its actions not merely minimize but ignore substantial and numerous violations of law, and consequent liability, represented by Hood's seven other groups.

The trial court seemed only to consider the District's size rather than its available economic resources in determining what penalty would be necessary to deter future misconduct. FF&CL ¶¶ 30, 50. Moccia declared that the "economic climate" compelled the District to lay off employees, rise to "the challenge of doing more with less" and

[34] Every time Hood thinks he has all the records, the District provides more. Yet the District attempts to paint Hood's requests as abusive.

"significantly reduce" its budget for training and professional development. CP 2809. In short, it insinuated that it lacked resources to timely repair its email system or train employees in even the most basic requirements of the PRA. FF&CL ¶¶50, 52. Invoices show the District had more than sufficient resources to pay experienced counsel to perform simple secretarial tasks.[35] CP 2598-2674. No agency, not even a purportedly distressed school district, when given so many chances to get it right, should be merely slapped on the wrist. The Court must remedy the trial court's abuse of discretion and appropriately penalize the District.

E. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT HALVED THE ATTORNEY FEE AWARD FOR TIME SPENT SOLELY ON DISCOVERY.

1. The Trial Court Abused Its Discretion When It Gave Hood Half of His Fees for Work Performed During Discovery.

A trial court's determination on attorney fees is reviewed on an abuse of discretion standard. *Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn. App. 110, 120, 231 P.3d 219 (2010). The trial court abused its discretion because Hood's attorney asked for reasonable fees through January 7, 2014. CP 157-159. This was time spent doing the beginnings of discovery. CP 128. The trial court halved Hood's attorney fee request because Hood prevailed on only 2% of his requested penalties.

[35] *See, e.g.*, "7/19/11" billing for "4.30" hours to "CMK" at $210/hr to "draft 5-day response," – i.e., acknowledge Hood's records request, and "create table" of requests and responses, CP 2657. The table has not been disclosed to Hood.

The trial court abused its discretion. Not one published case awards attorney fees based on a comparison of amounts awarded to amounts requested. The focus must instead be on the actual documents wrongfully withheld per *Sanders v. State*, 169 Wn.2d 827. The *Sanders* trial court assigned percentages to four issues and denied fees for three. *Id.* at 866. It then ruled that *Sanders* only prevailed on the first issue and then only on about five percent of the related documents. *Id.* Because of economy of scale issues, it awarded Sanders 37.5% of the fees requested. *Sanders* is relevant because the trial court should only consider the violations argued and the documents produced, not the penalties requested.

The trial court relied on irrelevant case law. CP 222, ¶ 5; *See Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745, 756 (2013) *review denied sub nom. Berryman v. Farmers Ins. Co.*, 179 Wn. 2d 1026, 320 P.3d 718 (2014). In *Berryman*, one of the measurements used by the Court of Appeals was to compare the award to the fees asked for. *Id.*, at 661. It did not compare a party's request for damages (or penalties) to the court's award. It instead focused on counsel's excessive request for fees related to obscure "block billing." Because the fee request was four times the damage award, it was rejected by the *Berryman* Court. Here, the amount requested is approximately 1.3 times the amount awarded, billing is not

suspect, and the complexity of this case required substantial work. *Berryman* does not apply but *Sanders* does.

Even if Hood was not awarded most of the penalties he asked for, he did prevail on every claim, even though the trial court concluded that some of the claims were "technical" in nature. Therefore, Hood is entitled to all fees up to January 7, 2014.

Hood also asked for attorney fees for time billed on general discovery and not for time billed on particularized claims. As in *Sanders*, the amount requested is appropriate for the work performed. Because fees only encompassed discovery work that would benefit the case in general and because Hood prevailed in his lawsuit, he is entitled to requested fees.

2. Hood Is Entitled to Reasonable Attorney Fees and Costs If He Prevails on Part or All of His Appeal.

If Hood prevails on all or part of his appeal, he is entitled to reasonable attorneys fees and costs. RAP 18.1 permits attorneys fees and costs on appeal if the applicable law grants this right for an appeal. The Washington Supreme Court determined that under the PRA, an individual who prevails against the agency is entitled to all costs, including reasonable attorney fees. RCW 42.56.550(4); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990). Hood would ask this Court to determine reasonable attorney fees and costs for

the appeal. Any determination for trial court fees and costs should be remanded to the trial court.

VI. CONCLUSION

For the reasons stated above, this Court must find that the District violated the PRA many times and that the trial court abused its discretion when awarding penalties, fees and costs to Hood for the District's violation of the PRA. Hood asks this Court to award appropriate penalties and reasonable attorney fees and costs.

Respectfully submitted this 9th day of November, 2015.

MICHAEL C. KAHRS, WSBA #27085
Attorney for Appellant Eric Hood

CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on November 9, 2015, in Seattle, County of King, State of Washington, I emailed and deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. APPELLANT'S OPENING BRIEF

TO:

Laura K. Clinton
Baker & McKenzie LLP
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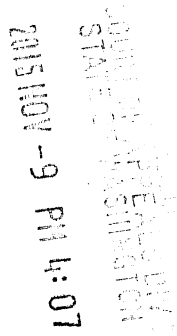

By: _____ Date: 11/9/15
MICHAEL C. KAHRS

APPENDIX 1

Date of Request	Clerk's Papers	RDW Document Number
06/21/12	1388-1397	23-34
09/11/12	1108-1118	The RDW refers to itemized documents listed on an exemption log.
09/11/12	1371-1553	42-127
10/04/12	873-884, 1145	No RDW number
10/16/12	1722-1731	269-270
10/18/12	1733-1753	271-285
10/18/12	1978-1982	293-299
12/12/12	1976	292
12/12/12	1984-2143	300-369
12/13/12	1178	The RDW refers to itemized documents listed on an exemption log.
12/19/12	2164-2174	Various
01/24/13	2200-2218	410-413
02/26/14	2226-2438	419-456 except HCL documents.
03/14/14	2529-2530, 2962-2963	509, 526
06/25/14	204-211	Section III, Supra

APPENDIX 2

Date of Disclosure	Clerk's Papers	Document RDW Number
6/21/12	1388-1397	25-34
9/11/12	1108-1118	The RDW refers to itemized documents listed on an exemption log.
9/11/12	1371-1553	42-127
10/04/12	873-884	No RDW number
10/16/12		170-219
11/13/12		266-268
11/27/12	1722-1731	269-270
11/27/12	1733-1753	271-285
12/12/12	1976	292
12/12/12	1978-1982	293-299
12/12/12	1984-2143	300-369
12/13/12	1178-1179	The RDW refers to itemized documents listed on an exemption log.
12/19/12	2164-2174	Various.
01/25/13	2200-2218	410-413
02/15/14	2224-2225	417-418
02/26/14	2267-2268, 2434-2438	Various, 452-456.
03/14/14	2440-2596	457-536
06/25/14	204-211	Section III, Supra