No. 95429-1

SUPREME COURT
OF THE STATE OF WASHINGTON

RICHARD EGGLESTON,

Petitioner,

v.

ASOTIN COUNTY, a public agency,
ASOTIN COUNTY PUBLIC WORKS
DEPARTMENT, a public agency,

Respondents.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

This is a Public Records Act, RCW 42.56, ("PRA") case relating to three discrete documents representing but a small number of documents out of the hundreds of pages Asotin County ("County") produced pursuant to multiple requests by petitioner Richard Eggleston ("Eggleston"), an experienced construction manager and consultant. A portion of Eggleston's property was acquired for a critical bridge/highway project (the "Project") in the County.

In its unpublished opinion, Division III affirmed the trial court's decision on whether the documents were public records and the trial court's decision on fees, costs, and penalties.[1] Despite Division III's careful opinion, Eggleston essentially hopes to recover further penalties and fees by arguing that a single email was a public record after the trial court and Division III both ruled it was not. That January 11, 2002 email, the subject of 9 of his 13 claimed requests, was between two private parties and *was never received by the County*. If such an email ever existed, it was no longer available to the County from Thomas, Dean, &

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[1] While the County disagrees with Division III's analysis of whether the April and July 2012 preliminary Project plans were subject to the PRA, op. at 13-15, and the trial court's penalty/fee decision, op. at 15-21, the County is not seeking review of those decisions, unless the Court were to grant review. *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 721, 714, 845 P.2d 987 (1993) (recognizing that party may raise issues conditionally). *See also*, WSBA, 2 *Wash. Appellate Practice Deskbook* at § 18.2(b).

Hoskins, Inc. ("TD&H"), the engineering firm with which the County contracted to provide engineering services on the Project *after* the date of the email. Division III was correct that the January 11, 2002 email was not a public record subject to the PRA. Eggleston fails to document how review of Division III's unpublished opinion meets the criteria of RAP 13.4(b). Review should be denied.

B. STATEMENT OF THE CASE

Division III correctly recited the facts and procedure in this case. Op. at 2-9. However, certain facts bear emphasis.

Asotin County is a small rural county located in the Southeastern corner of Washington. It has approximately 21,000 people and its county seat is Asotin. As a small county, the County has limited resources and staff.

Eggleston is a sophisticated construction manager. He received a degree in construction management from the University of Washington and has been involved with construction for over twenty years. He works with construction drawings on a daily basis. RP II:243.[2] Because of his expertise, he was familiar with construction claims and how to protect his personal interest.

[2] The report of proceedings is referenced by volume number.

Eggleston had a personal interest in the Project because it impacted his property and he sold some property in a right-of-way agreement to the Washington State Department of Transportation for well in excess of $100,000. RP IV:549, 594.[3] The area where the Project was located was known to be culturally significant and it was believed there were pre-historic graves of Indians in the area. RP II:281. Knowing that, and being sophisticated in construction, Eggleston obtained consulting party status from the federal government which allowed him to comment on the Project and possible antiquities. RP II:244. Although he had consulting status, that did not mean that Eggleston's agreement was necessary when the Project needed to be redesigned. RP IV:536, 537.

The Project took a decade to come to fruition. The County had to replace an existing one-lane bridge on the Snake River Road with a two-lane bridge; this impacted the road alignment. RP III:460-61. It was a very important project for the County and its residents as it was the biggest County project in about ten years; it involved in excess of $4 million (the County budget was only $6.9 million in 2014). RP III:489, 490, 529.

The County entered into a design contract with TD&H on March 4,

[3] While Eggleston attempts to claim his interest was to promote "the protection of these archeologic resources" (Br. of Appellant at 4), in making the PRA requests at issue here, his interest was personal to determine if any changes in the Project were going to affect rockery walls on his property. RP II:254.

2002. Ex. 23.[4] In addition to the County, four other entities were formally involved in the project whose agreement was necessary: the Federal Highway Administration, WSDOT, the Nez Perce Tribe, and the Washington State Department of Archeology and Historic Preservation. RP I:52-54.

After years of design, public meetings, and obtaining financing, the final design for the project was completed in the spring of 2010; Eggleston received a copy of those plans from the County and he reviewed them. RP II:244-45. Construction began in June 2010. *Id.* After construction started, the public had a use a temporary one-lane bridge on a much less safe road route. RP III:461.

Construction proceeded for a few months until Project managers encountered a Native American grave site in October 2010. As a result, the Project was shut down. RP III:460. This had huge financial and safety considerations for the County. The public still had to use the dangerous temporary one-lane bridge. The contractor was paid "stand-by fees;" the

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[4] Contrary to Eggleston's apparent belief, the County had no agreement with TD&H until this formal agreement was signed. "In the procurement context, the awarding of a government contract is the last in a sequence of events beginning with the invitation for bids. Acceptance of the bid is not the same thing as the award." *Speakman v. Weinberger*, 837 F.2d 1171, 1173 (1988). A formal meeting of the minds is necessary. "Frequently, the government advises the contractor ... by forwarding a document reducing all agreements to writing. When the contractor executes this document, and returns it to the government, it submits its final proposal or "offer." Execution by the government then constitutes the government's "acceptance" of the proposal." *Sterling-Kates v. United States*, 12 Cl. Ct. 290, 304 (1987).

County essentially paid the contractor $34,000 per month to be ready to re-start the Project, even though no work was being performed in the meanwhile. *Id.*[5] When Jim Bridges became the County Engineer in early 2012, the contractor had been paid $300,000 to $400,000 to do nothing. *Id.* More ominous was that if an agreement could not be reached among the affected parties about how to proceed, the entire Project might be lost, as had occurred with a project on the lower Elwa River in Western Washington. CP 419-21; RP II:380-81. The trial court found the financial and potential loss of the Project concerns "legitimate." CP 563.

Of necessity, all of the parties had to agree about a redesign and revised construction techniques to avoid or minimize any impacts to Native American antiquities. RP I:132. Negotiations among the parties took place from March 2002 until a final design and agreement was reached in October 2012. Ex. 102; CP 1076-82. Thereafter, construction recommenced with the Project being completed in 2013.[6]

The first nine Eggleston PRA requests relating to the January 11,

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[5] The trial court found the amount to be $25,000 per month. CP 563.

[6] Thus, vital government interests were involved here. The Project had been shut down for months. The travelling public was forced onto a temporary one lane bridge on the Snake River on a dangerous route. A contractor was being paid to do nothing and hundreds of thousands of dollars had been spent that way. The entire Project could be lost if an agreement among five separate entities could not be reached and the process had gone on for over a year and a half with no resolution. The Tribe did not "trust" the County. Eggleston, with his personal agenda to benefit his own property, wanted disclosure so he could start raising issues while, as he described them, "sensitive" or "sticky wicket," negotiations were going on. It was a recipe for disaster.

2002 email, an email that predated those negotiations and did not relate to antiquities. TD&H is a private company with offices throughout the Northwest that performs engineering services for all sorts of entities. CP 416-18. It was a fee-for-service contractor. CP 1028. While this was a big project for the County, it was not a big project for a major engineering firm like TD&H. The Project's Phase 1 preliminary work and route study was only $25,000. CP 1028. In order to perform its work, TD&H, like any private sector business, had to get its personnel and resources ready. The contract required a cultural and historical preservation study. CP 1056. That study needed to be performed by a sub-consultant selected and hired by TD&H, although technically the County had final approval authority; TD&H contacted Kevin Cannell, the Tribe's Cultural Resources Archeologist, to perform the study. CP 38. He formulated a scope of work that stated what work would be done and the charges for that work. CP 1017-18. It was a "proposal" to TD&H.

Eggleston apparently believed there was a written request for proposals from TD&H when it was preparing its statement of qualifications so that it could be qualified to provide engineering services for the Project. CP 1068. This is evidenced by his repeated references in his various PRA requests seeking the "solicitation to Cannell to perform Archeological services" or "original RFP for Archeological services." CP

28, 42, 48, 60, 61, 64, 65. Eggleston repeatedly made these requests because he stated he believed Cannell informed the County in early 2002 there was an "extremely significant cultural resource at that location" and he was contending the County had an obligation to determine what that resource was before doing any engineering. CP 48.

Eggleston's requests for this "Proposal" were all premised on the assumption that there was a written request for a proposal and response. Randy Noble, the TD&H's Project manager, testified that TD&H did not send out written requests for proposals or qualifications; rather, sub-consultants were contacted telephonically to see if they were interested. CP 1069. Cannell was contacted in that way.

Apparently, Cannell responded to TD&H by sending back the scope of work by email on January 11, 2002, before TD&H was under contract with the County.[7] The only way this "undisclosed email" is "known," is because of a reference to it in a June 5, 2002 letter from TD&H to Cannell when he was asked to perform a preliminary review and told to reference the scope of work send to TD&H by email on January 11. CP 1024. A copy of that letter was sent to the County.

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[7] The County uses the term "apparently" because there is no way to verify if such an email actually exists. There is no evidence it was ever sent to the County. TD&H had no emails prior to August 2003. CP 127. Noble went back to 2001-02 and did not find the email. RP 196-97.

The County produced the June 5 letter, along with the scope of work, Cannell's report, and all other communications with Cannell in 2004. CP 903, 906, 996-1024.[8] From that point, Eggleston had as much knowledge of a January 11, 2002 email as did the County.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED[9]

Eggleston's petition for review to this Court is incorrectly denominated a "Brief of Appellant." Although Eggleston lists the sufficiency of the penalty imposed by the trial court as an issue, pet. at 2, the petition is devoid of *any actual argument* on penalties. As such, he has abandoned any argument that Division III's opinion improperly treated the penalty issue and this Court need not consider it. *State v. Gossage*, 165 Wn.2d 1, 8-9, 195 P.3d 525 (2008).

Division III addressed the January 11, 2002 email in its opinion at 9-13. There, Division III faithfully applied this Court's controlling precedent in *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1*, 138

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[8] Eggleston does not dispute that he was aware of the June 5 letter in 2008, years before he filed suit. CP 31.

[9] The County recognizes the PRA is a broad public mandate that allows citizens access to public records. RCW 42.56.070(1); *Belenski v. Jefferson County,* 186 Wn.2d 452, 456, 378 P.3d 176 (2016). While the PRA is a broad mandate for disclosure, it is not unlimited. In recognition of its PRA responsibilities, the County made timely responses to Eggleston's multiple requests, complied with the procedural requirements of the PRA, consulted counsel about requests, adequately trained its personnel, and had adequate systems in place to respond to PRA requests, as the trial court found. CP 562. It also answered numerous other requests from Eggleston, providing him with hundreds of pages of documents.

Wn.2d 950, 983 P.2d 635 (1999).

Eggleston's petition is largely unclear as to precisely how Division III's opinion merits review under the criteria of RAP 13.4(b) as he does not address those criteria with any specificity, and he certainly does not document how Division III's opinion departed from *Concerned Ratepayers*. Pet. at 9-11. Division III correctly discerned that the January 11, 2002 email is not a public record under the PRA. Review is not merited.

The trial court here correctly ruled that the January 11, 2002 email was not a public record. CP 549-51. There is no evidence in the record that the County ever possessed the email. There is no dispute that to the extent this document existed, it was possessed by TD&H, the County's private engineering consultant on the Project.

RCW 42.56.010(3) defines a public record as:

> [A]ny writing containing information relating to the conduct of government or any governmental or proprietary function *prepared, owned, used, or retained by any state or local agency* regardless of physical form or characteristics.

(emphasis added). Under that definition, the email cannot be a public record. There is no doubt Cannell was a Tribal employee, so it was not prepared by a public agency. The other statutory bases are also not present here.

The County did not "own" the record. The contract with TD&H provides: "All such material used in the project shall become and remain the property of the Agency." CP 1042. However, the same provision defines "such material" that shall be owned by the County as a list of documents TD&H is to furnish. None of the listed documents would cover the email. Similarly, the agreements General Requirements, relied upon by Eggleston (Br. of Appellant at 18), do not provide for County ownership.[10]

More significantly, at the time the email was sent (January 2002), the County had not entered into the contract with TD&H, which did not occur until March. CP 1028. Eggleston's argument below that the selection of TD&H as consulting engineer for the Project occurred in November 2001 and somehow conferred ownership of documents on the County, is simply wrong for the reasons noted *supra*. Not only was there no contract, under that contract, the email was not owned by the County.

Nor did the County "use" the email it never saw. The seminal case

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[10] Below, Eggleston misrepresented what the General Requirements actually say. They provide for County ownership of:

> All designs, drawings, specifications, documents, and other work products *prepared by the Consultant* prior to completion or termination of the AGREEMENT are instruments of service for this PROJECT and are property of the AGENCY.

CP 1029. Cannell was not even a sub-consultant when the email was prepared. Thus, even under the contract, the County would not own the email.

on the "use" by a government agency of materials making such materials a public record under the PRA is *Concerned Ratepayers*. There, the PUD reviewed, evaluated, and referenced a technical document relating to the design specifications for a turbine generator to be installed in a proposed power plant in Vancouver prepared by the contractor selected by the PUD to provide the plant's turbine generators. Despite reviewing the document to determine the necessary contract requirements, the PUD did not retain the document in question. This Court approved of a definition of "use" that looked to whether the agency applied the document to a given purpose or the document was instrumental to a governmental end or purpose, *id.* at 959, stating:

> Whether information has been "used," should not turn on whether the information is applied to an agency's final work product. Rather, the critical inquiry is whether the requested information bears a nexus with the agency's decision-making process. A nexus between the information at issue and an agency's decision-making process exists where the information relates not only to the conduct or performance of the agency or its proprietary functions, but is also a relevant factor in the agency's action. That is, certain data may still be relevant and an important consideration in an agency's decision-making process even if it is not a part of the agency's final work product. Thus, mere reference to a document that has no relevance to an agency's conduct or performance may not constitute "use," but information that is reviewed, evaluated, or referred to and has an impact on an agency's decision-making process would be within the parameters of the Act.

Id. at 960-61 (citations omitted). The document *must be used in the*

government's decisionmaking process. That did not occur here.[11]

There is *no evidence* that the email was relied upon by anyone at the County in a decisionmaking process. Since the area's antiquities involved the Tribe, hiring the Tribal archeologist as the sub-consultant made sense no matter what any January 2002 email may have stated. Moreover, the letter relied upon by Eggleston to assert reliance and use proves that Cannell's scope of work is what was relied upon, not any email. The letter tells Cannell "Please refer to your Cultural Resource Compliance Scope of Work submitted to our office via email on January 11, 2002." CP 1024. The same document was produced to Eggleston in 2004, and was attached to Eggleston's Court of Appeals brief (Appendix F at 29-31). It contains a mere reference to a document that has no relevance to an agency's conduct or performance, which the *Concerned Ratepayers* court made clear is not "use." 138 Wn.2d at 960-61.

Nor was the email "retained" by the County. Obviously, it did not

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[11] The decision in *West v. Thurston County,* 168 Wn. App. 162, 275 P.3d 1200 (2012), relating to attorney billing invoices, is also instructive. There, Division II carefully examined the attorney billings at issue in light of RCW 42.56.010(3) and concluded that attorney invoices for services over the County's deductible limit of $250,000 were not public records because the records were not used by the agency as required by *Concerned Ratepayers where it never received them. Id.* at 185-86. *See also, Nissen v. Pierce County,* 183 Wn.2d 863, 882, 357 P.3d 45 (2015) (call/text message logs not used by County are not public records); *Chamber of Commerce of United States v. City of Seattle*, __ F. Supp.3d __, 2017 WL 3267730 (2017) (certain lists of drivers prepared by private driver coordinators under local ordinance providing employee-like rights for Uber/Lyft drivers held not subject to PRA as City never saw, possessed, or used them.

retain something it never had. There is no evidence TD&H retained it either. Nor was there any reason to do so. The email did not have to be retained because of litigation. The contract's Section D (CP 1046) requires "cost records and accounts pertaining to this AGREEMENT" to retained. A transmittal email of an archeological scope of work prior to the contract cannot be a cost record or account.

In sum, Division III was correct in affirming the trial court's decision that the January 11, 2002 email is not a public record.[12] Review is not merited. RAP 13.4(b).

D. CONCLUSION

The trial court and Division III correctly found the Cannell January 11, 2002 email, the subject of requests 1-9, was not a public record under

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[12] Division III did not reach the statute of limitations. Op. at 13. This Court need not address it. But if the Court grants review, the County will raise that issue. *See* n.1 *supra*. The trial court correctly discerned that Eggleston's claims 1-5 were time-barred. CP 550. RCW 42.56.550(6) bars PRA actions unless filed within a year of the "agency's claim of exemption or the last production of a record on a partial or installment basis." *Belenski, supra* (statute triggered by County's denial of the existence of records responsive to request, emphasizing that the final, definitive response of the public agency is key).

Eggleston *conceded* below that the County's answer to the fourth request "was a final answer triggering the statute of limitations." Br. of Appellant at 26. Eggleston had a final answer as to the first four requests and he failed to act. He also got a final answer to his fifth request when the County provided him 784 pages of documents indicating that was what it had responsive to his request. At that point, it would be obvious to any reasonable person, and should have been obvious to Eggleston, that he had a final answer from the County. Eggleston tried to avoid the statute of limitations below claiming it must be "equitably tolled." Eggleston failed to establish that he was entitled to relief under that doctrine. *Millay v. Cam,* 135 Wn.2d 193, 206, 955 P.2d 791, 797 (1998); *Strickland v. Pierce County*, __ Wn. App. __, 2018 WL 582446 (2018).

the PRA. Eggleston has not shown how this decision was erroneous or otherwise meets the criteria of RAP 13.4(b). This Court should deny review. RAP 13.4(b). Costs on appeal should be awarded to the County.

DATED this 1st day of February, 2018.

Respectfully submitted,

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APPENDIX

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In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

RICHARD EGGLESTON, an individual, Appellant / Cross Respondent, v. ASOTIN COUNTY, a public agency; and ASOTIN COUNTY PUBLIC WORKS DEPARTMENT, a public agency, Respondents / Cross Appellants.	)	No. 34340-5-III UNPUBLISHED OPINION

PENNELL, J. — Richard Eggleston submitted several public records requests to Asotin County related to work on the Ten Mile Creek Bridge Project (the Project). After failing to receive copies of three specific documents, Mr. Eggleston filed a lawsuit against the County alleging violations of the Public Records Act (PRA), chapter 42.56 RCW. Mr. Eggleston's claims as to the first document were dismissed through summary

judgment. He later prevailed at a bench trial as to the remaining two documents and was awarded $49,385.00 in penalties and $50,133.67 in attorney fees, staff fees and costs. The parties cross appeal the trial court's rulings. We affirm.

FACTS

This case concerns Richard Eggleston's multiple public records requests for three specific records from the County. The initial record sought is a January 2002 e-mail written by archeologist Kevin Cannell to Thomas Dean & Hoskins (TD&H), an engineering firm hired by the County. The other two records consist of preliminary Project drawing sets, referred to as "the April Plans" and "the July Plans." Clerk's Papers (CP) at 553.

Background

In 2001, Asotin County decided to replace the Ten Mile Creek Bridge. In November 2001, TD&H received a letter from the County confirming it had been selected to provide engineering services for the Project. The contract was entered into on March 4, 2002, and provided that: "[a]ll designs, drawings, specifications, documents, and other work products prepared by the CONSULTANT [TD&H] prior to completion or termination of this AGREEMENT are instruments of service for this PROJECT and are property of the AGENCY [Asotin County]." CP at 1029.

TD&H was concerned about possible archaeological sites in the Project area and retained the services of Kevin Cannell to perform a "preliminary archaeological and cultural review of the proposed roadway" for the Project. CP at 276. In its June 5, 2002, retention letter to Mr. Cannell, TD&H referenced a "Cultural Resource Compliance Scope of Work" that Mr. Cannell had sent to TD&H via e-mail on January 11, 2002. CP at 276, 1024.

Requests regarding TD&H's agreement with archeologist Kevin Cannell

Richard Eggleston is a resident of Asotin County. Mr. Eggleston made several requests, spanning 2004-2011, for correspondence between TD&H and Mr. Cannell. Of particular concern to Mr. Eggleston was the original solicitation for Mr. Cannell to perform archeological services on the Project and Mr. Cannell's response to the solicitation. *See* CP at 38. The County provided some materials in response to Mr. Cannell's requests, but it also noted Mr. Cannell was contracted through TD&H and, therefore, the County may not have all correspondence. Eventually, the County provided Mr. Eggleston a copy of Mr. Cannell's Cultural Resource Program Scope of Work that had been sent to TD&H in January 2002. *See* CP at 53. However, the County never provided a copy of the 2002 e-mail Mr. Cannell sent to TD&H along with his proposed scope of work.

Commencement of the Project and discovery of archaeological sites

Construction on the Project commenced during June 2010. But by October, crews working on the Project encountered human remains and realized they had unearthed Native American graves. The Project then stalled to allow for negotiations between the County, the Nez Perce tribe and other agencies on how to handle the remains. During this delay, the project plans went through numerous changes. A final set of plans for the Project were not completed until September 2012.

Requests for "current sheets" of the Project plans and initiation of litigation

Mr. Eggleston's next records request came on April 26, 2012. At this point, he did not ask for documents related to Mr. Cannell or his archaeological work. Instead, he sought copies of the current drawing sheets (the April Plans) for the Project. Mr. Eggleston indicated he had received page one of the April Plans[1] at a meeting with the County and he wanted to view the remaining pages. The County responded on May 16, 2012, claiming the April Plans were exempt from disclosure under RCW 42.56.280. The County reasoned that this exemption applied because the April Plans were preliminary

[1] Apart from the page Mr. Eggleston obtained at the County meeting, Mr. Eggleston had actually received a copy of the April Plans from the Nez Perce Tribe. Mr. Eggleston sought a copy of the plans at the behest of the tribe because the tribe did not fully trust the County and wanted to test the accuracy of its records.

drafts and the design for the Project was still in flux as discussions with the tribe continued. Until an agreement on the redesign was reached, the April Plans were exempt from disclosure.

Mr. Eggleston filed suit against the County on June 18, 2012, alleging violations of the PRA. Subsequent to filing suit, Mr. Eggleston submitted a request on July 17, 2012 for "current project plans." CP at 69. The County responded on July 19, 2012, and provided Mr. Eggleston with a set of documents, referred to in the record as "the Nez Perce submittal." 1 Verbatim Report of Proceedings (VRP) (Mar. 5, 2013) at 18; 1 VRP (Apr. 1, 2015) at 42; CP at 70. The County also indicated that it had fully responded to Mr. Eggleston's request and now considered it closed.

Mr. Eggleston's attorney sent a letter to the County's attorney on August 2, 2012, claiming the County's responses to Mr. Eggleston's request for plans were incomplete. Counsel explained Mr. Eggleston was looking for current project plans, not the Nez Perce submittal. Counsel asserted that if the County intended to withhold pages, a withholding log must be provided. The County responded on August 9, 2012, and offered further explanation as to why Mr. Eggleston's request was denied pursuant to RCW 42.56.280. The County explained Mr. Eggleston had been provided everything that had been submitted to the tribe. However, the materials provided to the tribe did not contain a complete copy of the preliminary project plan. Thus, nothing currently available had been

withheld. The County offered to provide the finalized plans to Mr. Eggleston when the documents were available.

Mr. Eggleston's attorney sent additional letters on August 24 and September 7, 2012, following up on the prior requests. The August 24 letter requested a withholding log and the September 7 letter clarified that the County had not complied with the requests for the April and July plans. Counsel reiterated that Mr. Eggleston had not requested the plans that were submitted to the Nez Perce Tribe. Instead, Mr. Eggleston had requested a complete set of plans as they existed on the date of his request. Although the County responded to the August 24 letter, it did not provide a withholding log. The County never responded to the September 7 letter.

Although the County did not provide Mr. Eggleston with copies of the April and July plans as requested, Mr. Eggleston did obtain copies of the documents. Mr. Eggleston had received a copy of the April Plans from the Nez Perce Tribe prior to ever requesting the documents from the County. The County ultimately provided Mr. Eggleston a copy of the April Plans on December 10, 2012. In addition, during January 2013, Mr. Eggleston received copies of the April and July plans at a pretrial deposition of a TD&H employee.

Summary judgment

The trial court initially addressed the merits of Mr. Eggleston's PRA complaint

through cross motions for summary judgment. With respect to Mr. Eggleston's requests regarding the 2002 e-mail from archaeologist Kevin Cannell, the court held the requested information was not a public record and that, in any event, those portions of Mr. Eggleston's complaint were untimely under the statute of limitation. The court ordered a trial on whether the County was entitled to withhold disclosure of the April and July plans.

Trial, penalties, and attorney fees and costs

After hearing from multiple witnesses over the course of a two-day bench trial, the trial court largely ruled in favor of Mr. Eggleston as to the April and July plans. The trial court determined that both sets of plans constituted public records and the County violated the PRA by failing to disclose the documents to Mr. Eggleston. The trial court specifically rejected the County's claim that the records were exempt from disclosure under RCW 42.56.280, which pertains to preliminary drafts, notes, recommendations, and intra-agency memoranda.

With respect to the statutory penalty, the trial court determined Mr. Eggleston had established two violations of the PRA pertaining to the April and July plans. Although Mr. Eggleston had made multiple requests for each of these plans, the trial court ruled that the multiple requests were followups, not new independent requests. Relying on the

framework from *Yousoufian v. Office of Ron Simms, King County Executive*, 168 Wn.2d 444, 467-68, 229 P.3d 735 (2010) (*Yousoufian* II), the trial court analyzed a number of aggravating and mitigating factors before setting the penalty amount. The trial court then arrived at a penalty of $35.00 per day. Applied to a total of 1,411 days,[2] the total penalty award came to $49,385.00.

The trial court then addressed an award of attorney fees and costs to Mr. Eggleston based on the lodestar method. In determining the number of hours worked by counsel, the trial court indicated it had disregarded the time spent by counsel on Mr. Eggleston's claims that were dismissed through summary judgment, ignored entries related to other litigation and from contracted law firms, and adjusted seemingly duplicative or excessive time entries noting that some of the briefing in this case was excessive. Also, the trial court lowered the hourly rate for counsel's office staff from $95.00 per hour to $25.00 per hour, for 122.8 hours, due to a lack of evidence on the staff's training and qualifications. Lastly, the trial court set a reasonable hourly rate of $190.00 per hour for 233.3 hours of attorney time. The trial court awarded $44,327.00 for counsel's time, $3,070.00 for office staff time, and $2,736.67 for miscellaneous court costs for a total attorney fee and

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[2] From April 26, 2012 (date of request for the April Plans) until December 10, 2012 (when Mr. Eggleston received the April Plans) is 228 days. From July 17, 2012 (date of request for the July Plans) until October 13, 2015 (Day 1 of the penalty phase of trial since the July Plans were never produced by the County) is 1,183 days.

cost award of $50,133.67. A judgment against the County was entered shortly thereafter.

Mr. Eggleston appeals. The County cross appeals.

ANALYSIS

Summary judgment dismissal of the 2002 e-mail claim

The PRA is a broad public mandate, requiring that citizens be afforded access to public records. *Belenski v. Jefferson County*, 186 Wn.2d 452, 456-57, 378 P.3d 176 (2016). A public record "includes any [1] writing [2] containing information relating to the conduct of government or the performance of any governmental or proprietary function [3] prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3). Although the PRA exempts certain records from production, the statute is to "be liberally construed and its exemptions narrowly construed" to promote public access to information. RCW 42.56.030.

In PRA litigation, a threshold question is whether requested information constitutes a public record. Our case law fails to provide clear guidance on who bears the initial burden of showing that a request made of a public agency was directed at a public record. Division One of this court has suggested the burden falls on the plaintiff. *Dragonslayer, Inc. v. Washington State Gambling Comm'n*, 139 Wn. App. 433, 441, 161

P.3d 428 (2007). However, our Supreme Court has stated, without equivocation, that the burden of justifying nondisclosure always falls on the government agency. *Fisher Broad.-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 522, 326 P.3d 688 (2014) ("The agency refusing to release records bears the burden of showing secrecy is lawful."); *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1*, 138 Wn.2d 950, 958, 983 P.2d 635 (1999). Our review of whether a document constitutes a public record is de novo. *See Gronquist v. Dep't of Licensing*, 175 Wn. App. 729, 741-42, 309 P.3d 538 (2013).

The parties' dispute over the 2002 e-mail revolves around the threshold issue of whether the information sought by Mr. Eggleston meets the definition of a public record. No claim of exemption has been made. With respect to the conflict over the public record definition, the parties specifically debate whether the 2002 e-mail constituted something prepared, owned, used, or retained by the County, as a public agency.

It is uncontroverted that the 2002 e-mail was not prepared by the County and does not qualify as a public record under that basis. The 2002 e-mail was prepared by Mr. Cannell prior to TD&H hiring him as a subcontractor. Thus, the 2002 e-mail can only constitute a public record if it was owned, used, or retained by the County.

Mr. Eggleston claims the County owned and retained the 2002 e-mail based on language contained in the County's contract with TD&H. Specifically, the contract states that "[a]ll designs, drawings, specifications, documents, and other work products

prepared by [*TD&H*] . . . are property of [the County]." CP at 1029.[3] Again, the 2002 e-mail was prepared by Mr. Cannell, not TD&H. The contract language is inapplicable.

Because the 2002 e-mail was prepared by a private party, Mr. Eggleston's claims regarding the e-mail can only succeed if there are facts indicating the County "used" the 2002 e-mail as contemplated by the PRA. In order to have used the 2002 e-mail, the e-mail must have been "(1) employed for; (2) applied to; *or* (3) made instrumental to" the county's project or some other governmental function. *Concerned Ratepayers*, 138 Wn.2d at 960 (emphasis in original).

Mr. Eggleston claims the County used the 2002 e-mail when TD&H referred to the e-mail in a June 2002 letter. We disagree. TD&H's letter was written to Mr. Cannell in order to retain his services as an archaeological consultant. The letter references a scope of work sent to TD&H by Mr. Cannell "*via email* on January 11, 2002." CP at 276 (emphasis added). TD&H's passing reference to the 2002 e-mail, even if attributed to the County, is insufficient to constitute "use." *Concerned Ratepayers*, 138 Wn.2d at 960-61.

This case is much different from *Concerned Ratepayers*, wherein the plaintiffs requested technical plans for a type of generator that had been considered for use at a

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[3] Mr. Eggleston also briefly refers to a portion of the contract that requires the consultant (TD&H) to keep documents for three years. However, that portion of the contract only pertains to "cost records and accounts." CP at 1046. It is not applicable

public power plant. Although the technical plans were owned and possessed by a subcontractor, there was evidence the public utility district employees had reviewed and evaluated the plans during meetings with the contractors. This substantive consideration, along with various references to the generator in other public documents, was sufficient to show the generator's technical plans had a nexus to the public utility district's activities in constructing its power plant and that the document constituted a public record, used by the public agency. 138 Wn.2d at 961-62. The lone fact proffered by Mr. Eggleston as to "use" of the 2002 e-mail pales in comparison to the facts set forth in *Concerned Ratepayers*.

Mr. Eggleston voices frustration with the fact that the 2002 e-mail has never been produced and thus we can never know for certain that it did not contain substantive information. We understand this concern. But the County had no duty to procure a document from a third party that did not meet the definition of a public record. Mr. Eggleston suggests the County is hiding something and speculates the 2002 e-mail contained substantive information, important to the Project.[4] Such speculation is

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here.

[4] Mr. Eggleston claims that a conversation he had with Kevin Cannell suggests the 2002 e-mail contained substantive information. During that conversation, Mr. Cannell told Mr. Eggleston he had written a proposal in about 2001, documenting cultural resource concerns with the project location. However, Mr. Cannell did not indicate his "proposal" took the form of a 2002 e-mail. Given that Mr. Cannell's scope of work,

insufficient to raise an issue of fact necessary to overcome summary judgment. *See Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 626-27, 818 P.2d 1056 (1991); *Wash. Fed. Nat'l Ass'n v. Azure Chelan LLC*, 195 Wn. App. 644, 662, 382 P.3d 20 (2016).

Because the 2002 e-mail was not a public record, we need not address whether Mr. Eggleston's requests for the e-mail fell outside the statute of limitation.

The April and July plans

As it did with the 2002 e-mail, the County claims the April and July plans are not public documents. However, the plain terms of the contract provide otherwise. The April and July plans were created and used by TD&H during its substantive work on the County's Project. As such, both documents were captured by the contract's clause on ownership and both fall squarely in the definition of public records.

The County asserts that even if the April and July plans are public records, they are exempt from production. As the agency claiming an exemption, the County bears the burden of proving an exemption applies. *See Am. Civil Liberties Union of Wash. v. City of Seattle*, 121 Wn. App. 544, 89 P.3d 295 (2004). The only exemption that has been

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which was attached to the 2002 e-mail and which was disclosed as a public record, identified cultural resource concerns for the site, Mr. Cannell's conversation with Mr. Eggleston does not suggest the existence of any undisclosed documents.

preserved for our review is the preliminary draft exemption, RCW 42.56.280.[5] We review the applicability of this exemption de novo. *Id.* at 549.

The purpose of the preliminary draft exemption, is to protect "the give-and-take of deliberations that are necessary to formulate agency policy." *Id.* This purpose "severely limits [the exemption's] scope." *Hearst Corp. v.* Hoppe, 90 Wn.2d 123, 133, 520 P.2d 246 (1978). "[O]nly those portions of documents actually reflecting policy recommendations and opinions may be withheld." *Id.* Factual data is not included. "Unless disclosure reveals and exposes the deliberative process, as opposed to the facts upon which a decision is based, the exemption cannot apply." *Id.*

In *Progressive Animal Welfare Society v. University of Wash.*, 125 Wn.2d 243, 844 P.2d 592 (1994) (*PAWS*), the Supreme Court analyzed the scope of the preliminary draft exemption in circumstances similar to here. At issue in *PAWS* was whether the University of Washington's unfunded grant proposals, submitted to the National Institute of Health (NIH), fell under the scope of the PRA. The Court held that the unfunded grant proposals did not reveal the kind of "deliberative or policy-making process contemplated by the exemption." *Id.* at 257. Thus the unfunded proposals themselves did not qualify

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[5] Two additional exemptions have been raised for the first time on appeal and are not preserved. *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 394-97, 314 P.3d 1093 (2013).

for exemption. However, the NIH's written comments on the unfunded proposals, referred to as "pink sheets," were quintessentially deliberative and, thus, qualified for exemption. *Id.*

The preliminary project plans, created by TD&H in April and July 2012, are akin to the unfunded grant proposals discussed in *PAWS*. They set forth the project ideas, some of which did not ultimately come to fruition. Nowhere on the preliminary plans is there any commentary. The testimony at trial was that, during negotiations over the Project, such commentary would be provided subsequent to review of a particular preliminary plan. While one might be able to guess at what the evaluations of the preliminary plans were by comparing the preliminary plans with the final project plan, this kind of indirect disclosure is not what is contemplated by the statute. Indeed, the same could be said for the university's unfunded grant proposals. The preliminary plans did not clearly express any opinions or recommendations regarding the Project's final plan. Accordingly, the April and July plans were not exempt from disclosure under the preliminary draft exception.[6]

Calculation of penalties, attorney fees and costs

Calculating a PRA penalty is a two-step process: "(1) determine the amount of

[6] Even if the April and July plans contained some commentary, they still qualified as public records and should have been disclosed in redacted form.

days the party was denied access and (2) determine the appropriate per day penalty" up to $100. *Yousoufian v. Office of King County Executive*, 152 Wn.2d 421, 438, 98 P.3d 463 (2004) (*Yousoufian* I). Both steps are contested here.

Penalty period

Both parties complain the trial court improperly calculated the penalty period for the County's PRA violations. Mr. Eggleston claims the trial court abused its discretion by treating his multiple requests for the April and July plans as followups to two requests, as opposed to multiple, separate requests. The County complains the trial court should have shortened the penalty period assessed for the July Plans since Mr. Eggleston received a copy of the plan at a pretrial deposition. Determining the number of days a public record request was wrongfully denied or delayed involves a question of fact. *Zink v. City of Mesa*, 162 Wn. App. 688, 706, 256 P.3d 384 (2011). "When, as here, the trial court heard live testimony and judged the credibility of witnesses, we afford deference to its determination of this fact." *Id.*

We disagree with Mr. Eggleston's claim that the trial court was required to treat his various requests for the April and July plans as separate requests for purposes of PRA penalties. The trial court had discretion to group together related requests in assessing penalties. *Id.* at 711-12, 722. The facts presented at trial justified its decision to group

together Mr. Eggleston's requests for the April and July plans as two requests, rather than several independent requests. In his followup inquiries regarding the April and July plans (dated August 2, August 24, and September 2, 2012), Mr. Eggleston did not seek new information. Instead, he complained about the County's failure to respond to his prior requests. Mr. Eggleston did seek a withholding log in one of his followup inquiries. But this did not constitute a new request. A withholding log is not a separate document that is subject to a PRA request. It is a document that forms a part of an agency's response to a records request. RCW 42.56.210(3). Given the totality of the circumstances, the trial court had ample grounds for finding only two PRA violations.

The County argues the trial court should not have calculated the penalty period for the July Plans to run until the first date of trial. Instead, the County claims the penalty period should have ended on January 18, 2013, when Mr. Eggleston received the July Plans from an employee of TD&H at a pretrial deposition. Assuming an agency can comply with the PRA by delegating the task of records disclosure to a third party,[7] there are no facts in the record suggesting that happened. The record on appeal merely indicates an employee of TD&H provided Mr. Eggleston a copy of the July Plans in compliance with a subpoena duces tecum issued by Mr. Eggleston's attorney. Nothing

[7] The parties on appeal agree that TD&H does not qualify as a de facto public agency.

indicates the County facilitated access to the document. *Cf.* RCW 42.56.070 (duty to make records available falls on the agency). Based on this circumstance, the trial court correctly calculated the penalty period for the July Plans as extending through the first day of trial.

Daily penalty amount

Both parties also complain the trial court improperly calculated the daily penalty amount for the County's PRA violations. Mr. Eggleston argues for an increase in the daily fee. The County claims it is excessive. A trial court's determination of daily penalties under the PRA is reviewed for abuse of discretion. *Yousoufian* II, 168 Wn.2d at 458. Discretion is abused if the trial court's decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.* Although the Supreme Court's *Yousoufian* II decision set forth a nonexclusive list of aggravating and mitigating factors relevant to the penalty analysis, trial courts retain "considerable discretion" to set PRA penalties. *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 279, 372 P.3d 97 (2016).

The trial court did not commit any legal error in assessing penalties against the County. The court correctly identified the applicable nonexclusive aggravating and mitigating factors. It did not improperly focus on one factor to the exclusion of others.

Sergent v. Seattle Police Dep't, 179 Wn.2d 376, 398, 314 P.3d 1093 (2013). Nor did the court erroneously adopt a presumptive starting point when considering the statutory penalty range. *Yousoufian* II, 168 Wn.2d at 466.

The trial court also supported its legal analysis with tenable facts. In essence, the trial court found some of the factors favored the County (e.g., county officials relied in good faith on legal counsel and were legitimately concerned about project delays), others favored Mr. Eggleston (e.g., legal counsel incorrectly advised the County of the law), and some went both ways (some of the County's interactions with Mr. Eggleston were fully appropriate, others bordered on bad faith). The record amply supports this position. The trial court was not required to make detailed findings regarding the *Yousoufian* II factors. *See id.* at 470. We therefore decline to quibble with aspects of the trial court's ruling that could have been stated with greater clarity.

In the end, the ultimate penalty selected by the trial court was not outside the broad realm of reasonableness. *See id.* at 458-59 (manifestly unreasonable decision is one that no reasonable person would take). The $35.00 daily penalty was not particularly low. *Cf. id.* (reversing a $15.00 per day penalty as manifestly inadequate). It therefore reflects that at least some of the County's responses to Mr. Eggleston at least bordered on bad faith. But at the same time, the penalty amount appropriately takes into account the County's limited resources and the lack of any proven economic loss by Mr. Eggleston.

Neither party has established a basis for altering the daily penalty amount.

Cost award

Any person who prevails in a PRA action shall be awarded "all costs, including reasonable attorney fees." RCW 42.56.550(4). Here, the trial court awarded $2,736.67 for various court costs. But Mr. Eggleston claimed $4,261.67 in costs. He argues the trial court erred in not awarding all of his costs because the PRA does not permit any discretion in an award of costs, like it does for reasonable attorney fees. While the PRA does not define "all costs," this phrase has been interpreted to allow a party to "recover all *reasonable* costs incurred in litigating the dispute." *Am. Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115-17, 975 P.2d 536 (1999) (emphasis added); *see also Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 828-30, 225 P.3d 280 (2009). While these cases indicate a liberal award of costs is preferred, the phrase reasonable costs implies some discretion on the part of the trial court to disallow costs that are unreasonable. Mr. Eggleston does not argue the trial court abused its discretion in not awarding any specific costs. He simply argues there was no room for discretion. He is incorrect. The trial court did not abuse its discretion in adjusting the cost award.

ATTORNEY FEES/APPELLATE COSTS

The attorney fee provision of the PRA, RCW 42.56.550(4), also applies to appellate costs. *PAWS*, 125 Wn.2d at 271. Because Mr. Eggleston has prevailed on his right to inspect the April and July plans, he is entitled to an award of fees and costs, limited to this aspect of his defense of the County's cross appeal. An award shall issue upon Mr. Eggleston's compliance with RAP 18.1(d).

CONCLUSION

The judgment of the trial court is affirmed. Mr. Eggleston's request for appellate fees and costs is granted in part, as set forth in this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Fearing, C.J.

Lawrence-Berrey, J.

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Answer to Petition for Review*** in Supreme Court Cause No. 95429-1 to the following:

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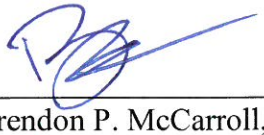
I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 1, 2018 at Seattle, Washington.



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