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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

No. 34340-5-III

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RICH EGGLESTON,
Appellant,

v.

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

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~~BRIEF OF APPELLANT~~ Petition for Review

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## TABLE OF CONTENTS


TABLE OF AUTHORITIES ..... iii

INTRODUCTION ..... -1-

ISSUES PRESENTED FOR REVIEW ..... -2-

STATEMENT OF THE CASE ..... -3-

A. **Overview** ..... -3-

B. **The still undisclosed email/proposal was obtained by the County's agent, pursuant to a notice to proceed** ..... -4-

C. **The still undisclosed email/proposal was used by Asotin County and its agent in hiring the archeologist.** ..... -5-

D. **The still undisclosed email/proposal was used by Asotin County and its agent when they gave a notice-to-proceed to Mr. Cannell.** ..... -6-

E. **Mr. Eggleston made nine(9) requests for the email/proposal; despite knowing where it was, the County refused to provide it, or look for it.** ..... -6-

F. **The burden of justifying nondisclosure falls on the agency, and the County did not demonstrate it was not retained.** ..... -8-

REASONS TO GRANT REVIEW ..... -9-

A. **The Court of Appeals erred on an issue of substantial importance to the Washington citizens that substantially affects the interpretation of the Public Records Act.** ..... -9-

CONCLUSION ..... -12-

## TABLE OF AUTHORITIES

**CASES**

*Eggleston v Asotin County*, Washington State Court of Appeals No. 34340-5-III (December 14, 2017) ..... -1-

*Concerned Ratepayers Ass'n v PUD No. 1*, 138 Wn.2d 950, 961, 983 P.2d 635 (1999) ..... -1-, -8-

*Fisher Broadcasting-Seattle TV LLC v City of Seattle,* 180 Wn.2d 515, 326 P.3d 688 (2014) ..... -8-

*Gendler v Batiste*, 174 Wn.2d 244, 274 P.3d 346 (Wash. 2012) ... -1-, -10-

*Hearst Corp. v. Hoppe*, 90 Wn.2d, 123, 140, 580 P.2d 246 (1978) ..... -11-

*Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn. 2d 702, 720, 261 P.3d 119 (2011) ..... -11-

*Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, n.7, 884 P.2d 592 (1994) ..... -2-

*West v Thurston Co*, 168 Wn.App. 162, 186, 275 P.3d 1200 (Div. 2, 2012) ..... -4-

**STATUTES**

RCW 42.56.010(3) ..... -1-, -4-

RCW 42.56.030 ..... -1-, -2-, -9-

RCW 42.56.080 ..... -1-

**RULES**

RAP 13.4(b)(4) ..... -10-

## INTRODUCTION

Division Three held that a document (an undisclosed email/proposal) need not be disclosed pursuant to the Public Records Act when it was sent to the County's contracted agent. *Eggleston v Asotin County*, Washington State Court of Appeals No. 34340-5-III (December 14, 2017) (copy attached as Appendix B). This holding contradicts Washington's Public Records Act and precedent from this Court which requires that all public records must be disclosed upon request. RCW 42.56.010(3), .030, .080; *Gendler v Batiste*, 174 Wn.2d 244, 274 P.3d 346 (Wash. 2012). The holding also contradicts laws of agency as the Court of Appeals held that the County's agent was a private party despite the fact that they had received authorization (a notice-to-proceed) from the County and were acting pursuant thereto.

Division Three erred by putting a heightened "use" requirement on the document. *Concerned Ratepayers Ass'n v PUD No. 1*, 138 Wn.2d 950, 961, 983 P.2d 635 (1999), established that the document had to have a "nexus" with the agency's decision making process.

Any decision permitting agencies to contract around the PRA or which heightens the standard necessary for a document to be a public

record is contrary to the statute's thrice-repeated mandate that its provisions be liberally construed in favor of disclosure while its exemptions be narrowly construed. RCW 42.56.030; *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, n.7, 884 P.2d 592 (1994).

## ISSUES PRESENTED FOR REVIEW

1. Was the undisclosed email (the proposal) a Public Record where TD&H was acting pursuant to a notice-to-proceed and therefore was the County's agent?
2. Was the undisclosed email used by the County when it contained information necessary to the proposal and the proposal was accepted by TD&H and the County?
3. Was the undisclosed email retained by the County when they knew where it was and have not offered any evidence that it was not retained?
4. Is a penalty insufficient when it fails to discourage improper denial of access to public records and adherence to the goals and procedures dictated by the statute?

## STATEMENT OF THE CASE

### A. Overview.

On November 15, 2001, Asotin County provided Thomas, Dean & Hoskins (TDH) a notice to proceed regarding a County road project. CP 274. Pursuant to that notice, TDH sought a proposal from Kevin Cannell, an archeologist working for the Nez Perce Tribe. Mr. Cannell responded via email on January 11, 2002. RP, Vol. 1, p 8, ll 8-24. In February, 2002, the County confirmed the hiring of Mr. Cannell. CP 275. In March, 2002, the contract between TDH and the County was finalized. EX 23. On June 5, 2002, TDH notified Mr. Cannell to proceed with work. CP 276.

As detailed in the Brief of Appellant, from February, 2004, through November, 2011, Mr. Richard Eggleston made nine (9) public records requests to obtain the proposal, but, the County, stating they were "uninterested" in the document that was "maintained" by TDH, failed or refused to provide the proposal to Mr. Eggleston. BA 2-7.

After winning on other requests at trial, the trial court imposed a penalty of $35 per day. The County testified that they would not change what they do, demonstrating the penalty was insufficient to

change their behavior. *See i.e.:* RP, Vol. III, p. 466, ll 1-15.

A brief summary follows here.

**B. The still undisclosed email/proposal was obtained by the County's agent, pursuant to a notice to proceed.**

A public record includes any "writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3).

Use only requires that the information be "reviewed, evaluated or referred to and has an impact on an agency's decision-making process". *West v Thurston Co*, 168 Wn.App. 162, 186, 275 P.3d 1200 (Div. 2, 2012).

On November 15, 2001, Asotin County notified Thomas, Dean & Hoskins (TDH) that they had been selected to provide engineering services for the Ten Mile Creek Bridge Project. CP274. Pursuant to this notice to proceed, TDH began the process of soliciting required sub-consultants. Sub-consultants could only be hired with the express approval of Asotin County. EX 23, sec. VI Subcontracting.

One of the sub-consultants needed was for archeological

services. TDH contacted Kevin Cannell, who was the archeologist for the Nez Perce Cultural Resources. In response to the contact by TDH, Mr. Cannell sent an email on January 11, 2002[1]. RP, Vol. 1, p 8, ll 8-24.

### C. The still undisclosed email/proposal was used by Asotin County and its agent in hiring the archeologist.

No sub-consultant may be hired without the approval of Asotin County. Ex.23, Section VI, "Subcontracting". TDH obtained proposals from certain sub-consultants and the County approved them.

Asotin County saw and relied upon the Cannell email/proposal (email and attached documents) in the month that followed its receipt. This is demonstrated by the fact that on February 6, 2002, Asotin County confirmed they would be paying (through reimbursement) for the archeological services of the Nez Perce Tribe Cultural Resources program and referencing information would have come from "the Proposal" (the undisclosed email and its attachments). CP 126, 271, 275. Thus we see that the County (and its agent, TDH) must have seen

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[1] The County has repeatedly asserted on appeal that this still undislcosed email was merely a "transmittal" or cover email. That assertion is without any factual support or basis, and runs contrary to reason, as is shown *infra.*

and relied upon the email/proposal in order to hire Mr. Cannell. The Scope of Work portion was incorporated into the final contract between the County and TDH. The Scope of Work lacks important information required in a proposal, such as: who it is to and from, it's date, and so forth. BA App. F. This fact was raised to the County by Mr. Eggleston on November 7, 2007. CP 55. How much additional information is included in that email is still unknown as the County has refused to provide it.

**D. The still undisclosed email/proposal was used by Asotin County and its agent when they gave a notice-to-proceed to Mr. Cannell.**

On June 5, 2002, TDH sent an email to Mr. Cannell directing him to begin work pursuant to the "Cultural Resource Compliance Scope of Work submitted to our office via email on January 11, 2002." CP 276.

**E. Mr. Eggleston made nine(9) requests for the email/proposal; despite knowing where it was, the County refused to provide it, or look for it.**

Beginning in 2004, Mr. Eggleston made a series of nine (9) requests for this document (identified in the requests as "the proposal"), as follows:

February 2, 2004; April 3, 2007; September 29,2007; November 7, 2007; October 30, 2008; July 25, 2011; August 8, 2011; October 6, 2011; and November 22, 2011. BA, App A & B.

In response to the first request, the County stated that Mr. Cannell is contracted through TDH and "hence TDH has managed said correspondence." CP39. The County knew where the document was being held and managed.

In response to the April 3, 2003, request, the County stated that they were "uninterested" in the information in that document. CP 44.

In response to the September 29,2007, email, the County Engineer stated that "to the best of [his] knowledge no such documents are maintained by this office." However, he then also provided the Scope of Work to Mr. Eggleston.

On November 7, 2007, Mr. Eggleston pointed out that the Scope of Work was missing important information, stating: "The document you provided October 9th, if it is the document in question, cannot be clearly determined to be so because it is missing the signature page and is not dated." CP 55; BA, App. A, p. 3.

There is no way to determine where, or if, Asotin County looked

for the requested document, no search logs were kept. CP 126. It is known that they did NOT ask TDH for the document. CP 126. Asotin County knew the document would be with TDH. CP 39.

**F. The burden of justifying nondisclosure falls on the agency, and the County did not demonstrate it was not retained.**

The burden of justifying nondisclosure falls on the agency asserting that the document need not be disclosed. *Fisher Broadcasting-Seattle TV LLC v City of Seattle,* 180 Wn.2d 515, 326 P.3d 688 (2014); *Concerned Ratepayers Ass'n v PUD No. 1*, 138 Wn.2d 950, 958, 983, P.2d 635 (1999).

As noted above, the County cannot show they know whether they have or had it; there are no search logs. The County knew one place it would be, and they did not look there: TDH. We know, and Asotin County knew, that the document was "managed" by TDH. Throughout the County's seven (7) years of responses, they did not deny they had the document ... they only said it was "not in [the County Engineer's] office" because it was "maintained" by their agent, TDH.

The County did not, and could not, meet the burden of showing that it was not retained. It was integral to and, at very least, contained necessary elements of the proposal.

## REASONS TO GRANT REVIEW

The statute states in clear and strong terms that public records shall be provided to the public. Few, if any other, statutes carry such strong dictates:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030.

The Court should grant review to clarify that public agencies cannot contract around the PRA nor can they rely on inadequate searches to deprive a person access to the records.

### A. The Court of Appeals erred on an issue of substantial importance to the Washington citizens that substantially affects the interpretation of the Public Records Act.

Misinterpreting the Public Records Act (PRA) presents an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). Simply, public agencies cannot contract around the

PRA. By failing to recognize the agency relationship between Asotin County and TDH, Division III opened a hole in the PRA which can be exploited.

*Gendler* stands for the proposition that an agency cannot contract its way around the PRA. In *Gendler* the Washington State Patrol attempted to shield records from disclosure by depositing them in a forbidden DOT electronic database. The records were required to be produced.

We do not have cases which similarly deny the right to attempt to contract around the PRA by storing records with a non-governmental organization. This case gives the Court the opportunity to clarify that all public records, no matter where they are stored or managed, are subject to the PRA.

Further, failing to keep the burden on the public agency of proving why a document need not be disclosed would place an impossible burden on the requestor to know what records the agency has, and even where they are kept. Such burden-shifting is untenable and could work substantial mischief to the statute's intent. Division III ignored the County's willful lack of searching where they knew the

document was being held by their agent, and the County's lack of evidence regarding retention of the email/proposal.

In *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn. 2d 702, 720, 261 P.3d 119 (2011), the court held that an agency need not search "every possible place a record may conceivably be stored, but only those places where it is reasonably likely to be found." In the instant case the agency intentionally *ignored* the place where they knew the record was likely to be found. Such behavior should not be countenanced.

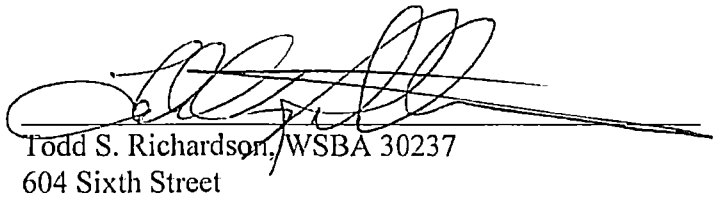
Finally, though trial court's have discretion in setting penalties, the direction from the Court that the penalty needs to "discourage improper denial of access to public records" needs to be heeded. *Hearst Corp. v. Hoppe*, 90 Wn.2d, 123, 140, 580 P.2d 246 (1978). But in the instant case, the County testified at trial that they wouldn't change their ways and then published an editorial saying they wouldn't change anything. *See i.e.:* RP, Vol. III, p. 466, ll 1-15, Appendix A. The penalty is objectively insufficient to accomplish the purpose of the penalty.

## CONCLUSION

For the reasons stated above, this Court should grant review.

RESPECTFULLY SUBMITTED this 16th day of January, 2018.

LAW OFFICES OF TODD S. RICHARDSON, PLLC



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***Certificate of Service***

I HEREBY CERTIFY that on the 16 day of January, 2018, I caused a true and correct copy of this Appellant's Brief to filed with Court of Appeals, Division 3 via JIS-Link, and that through their email service be served on the following:

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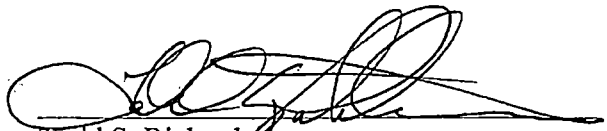

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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

[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.

**Chapter 42.56 RCW**

**PUBLIC RECORDS ACT**

**Chapter Listing | RCW Dispositions**

**Sections**


**42.56.001** Finding, purpose.
**42.56.010** Definitions.
**42.56.020** Short title.
**42.56.030** Construction.
**42.56.040** Duty to publish procedures.
**42.56.050** Invasion of privacy, when.
**42.56.060** Disclaimer of public liability.
**42.56.070** Documents and indexes to be made public—Statement of costs.
**42.56.080** Identifiable records—Facilities for copying—Availability of public records.
**42.56.090** Times for inspection and copying—Posting on web site.
**42.56.100** Protection of public records—Public access.
**42.56.110** Destruction of information relating to employee misconduct.
**42.56.120** Charges for copying.
**42.56.130** Other provisions not superseded.
**42.56.140** Public records exemptions accountability committee.
**42.56.141** Public records exemptions accountability committee—Wolf depredation information exemption.
**42.56.150** Training—Local elected and statewide elected officials.
**42.56.152** Training—Public records officers.
**42.56.155** Assistance by attorney general.
**42.56.210** Certain personal and other records exempt.
**42.56.230** Personal information.
**42.56.240** Investigative, law enforcement, and crime victims.
**42.56.250** Employment and licensing.
**42.56.260** Real estate transactions.
**42.56.270** Financial, commercial, and proprietary information.
**42.56.280** Preliminary drafts, notes, recommendations, intra-agency memorandums.
**42.56.290** Agency party to controversy.
**42.56.300** Archaeological sites.
**42.56.310** Library records.
**42.56.320** Educational information.
**42.56.330** Public utilities and transportation.
**42.56.335** Public utility districts and municipally owned electrical utilities—Restrictions on access by law enforcement authorities.
**42.56.340** Timeshare, condominium, etc. owner lists.
**42.56.350** Health professionals.
**42.56.355** Interstate medical licensure compact.
**42.56.360** Health care.
**42.56.370** Client records of domestic violence programs, or community sexual assault programs or services for underserved populations.
**42.56.380** Agriculture and livestock.
**42.56.390** Emergency or transitional housing.
**42.56.400** Insurance and financial institutions.
**42.56.403** Property and casualty insurance statements of actuarial opinion.

**42.56.410** Employment security department records, certain purposes.
**42.56.420** Security.
**42.56.430** Fish and wildlife.
**42.56.440** Veterans' discharge papers—Exceptions.
**42.56.450** Check cashers and sellers licensing applications.
**42.56.460** Fireworks.
**42.56.470** Correctional industries workers.
**42.56.510** Duty to disclose or withhold information—Otherwise provided.
**42.56.520** Prompt responses required.
**42.56.530** Review of agency denial.
**42.56.540** Court protection of public records.
**42.56.550** Judicial review of agency actions.
**42.56.560** Application of RCW **42.56.550**.
**42.56.565** Inspection or copying by persons serving criminal sentences—Injunction.
**42.56.570** Explanatory pamphlet—Advisory model rules—Consultation and training services.
**42.56.580** Public records officers.
**42.56.590** Personal information—Notice of security breaches.
**42.56.600** Mediation communications.
**42.56.610** Certain information from dairies and feedlots limited—Rules.
**42.56.615** Enumeration data used by the office of financial management for population estimates.
**42.56.620** Marijuana research licensee reports.
**42.56.625** Medical marijuana authorization database.
**42.56.630** Registration information of members of cooperatives to produce and process medical marijuana.
**42.56.640** Vulnerable individuals, in-home caregivers for vulnerable populations.
**42.56.645** Release of public information—2017 c 4 (Initiative Measure No. 1501).
**42.56.900** Purpose—2005 c 274 §§ 402-429.
**42.56.904** Intent—2007 c 391.

**NOTES:**

*Criminal records privacy: Chapter **10.97** RCW.*

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## 42.56.001
## Finding, purpose.

The legislature finds that *chapter **42.17** RCW contains laws relating to several discrete subjects. Therefore, the purpose of chapter 274, Laws of 2005 is to recodify some of those laws and create a new chapter in the Revised Code of Washington that contains laws pertaining to public records.

**[ 2005 c 274 § 1.]**

**NOTES:**

***Reviser's note:** Provisions in chapter **42.17** RCW relating to public records were recodified in chapter **42.56** RCW by 2005 c 274, effective July 1, 2006. Provisions in chapter **42.17** RCW relating to campaign disclosure and contribution were recodified in chapter **42.17A** RCW by 2010 c 204, effective January 1, 2012.

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## 42.56.010
## Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

(2) "Person in interest" means the person who is the subject of a record or any representative designated by that person, except that if that person is under a legal disability, "person in interest" means and includes the parent or duly appointed legal representative.

(3) "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW **40.14.100** and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives. This definition does not include records that are not otherwise required to be retained by the agency and are held by volunteers who:

(a) Do not serve in an administrative capacity;

(b) Have not been appointed by the agency to an agency board, commission, or internship; and

(c) Do not have a supervisory role or delegated agency authority.

(4) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

**[ 2017 c 303 § 1; 2010 c 204 § 1005; 2007 c 197 § 1; 2005 c 274 § 101.]**

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## 42.56.020
## Short title.

This chapter may be known and cited as the public records act.

**[ 2005 c 274 § 102.]**

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## 42.56.030
## Construction.

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

and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

[ **2007 c 197 § 2; 2005 c 274 § 283; 1992 c 139 § 2.** Formerly RCW **42.17.251.**]

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## 42.56.040
## Duty to publish procedures.

(1) Each state agency shall separately state and currently publish in the Washington Administrative Code and each local agency shall prominently display and make available for inspection and copying at the central office of such local agency, for guidance of the public:

(a) Descriptions of its central and field organization and the established places at which, the employees from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain copies of agency decisions;

(b) Statements of the general course and method by which its operations are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(c) Rules of procedure;

(d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(e) Each amendment or revision to, or repeal of any of the foregoing.

(2) Except to the extent that he or she has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published or displayed and not so published or displayed.

[ **2012 c 117 § 127;** 1973 c 1 § 25 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW **42.17.250.**]

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## 42.56.050
## Invasion of privacy, when.

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.

[ **1987 c 403 § 2.** Formerly RCW **42.17.255.**]

**NOTES:**

**Intent—1987 c 403:** "The legislature intends to restore the law relating to the release of public records largely to that which existed prior to the Washington Supreme Court decision in "*In Re Rosier*," 105 Wn.2d 606 (1986). The intent of this legislation is to make clear that: (1) Absent statutory provisions to the contrary, agencies possessing records should in responding to requests for disclosure not make any distinctions in releasing or not releasing records based upon the identity of the person or agency which requested the records, and (2) agencies having public records should rely only upon statutory

exemptions or prohibitions for refusal to provide public records. Further, to avoid unnecessary confusion, "privacy" as used in RCW **42.17.255** is intended to have the same meaning as the definition given that word by the Supreme Court in "*Hearst v. Hoppe*," 90 Wn.2d 123, 135 (1978)." [ **1987 c 403 § 1.**]

**Severability—1987 c 403:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [ **1987 c 403 § 7.**]

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## 42.56.060
## Disclaimer of public liability.

No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter.

[ **1992 c 139 § 11.** Formerly RCW **42.17.258.**]

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## 42.56.070
## Documents and indexes to be made public—Statement of costs.

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (8) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.

(2) For informational purposes, each agency shall publish and maintain a current list containing every law, other than those listed in this chapter, that the agency believes exempts or prohibits disclosure of specific information or records of the agency. An agency's failure to list an exemption shall not affect the efficacy of any exemption.

(3) Each local agency shall maintain and make available for public inspection and copying a current index providing identifying information as to the following records issued, adopted, or promulgated after January 1, 1973:

(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(b) Those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the agency;

(c) Administrative staff manuals and instructions to staff that affect a member of the public;

(d) Planning policies and goals, and interim and final planning decisions;

(e) Factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports, or surveys, whether conducted by public employees or others; and

(f) Correspondence, and materials referred to therein, by and with the agency relating to any regulatory, supervisory, or enforcement responsibilities of the agency, whereby the agency determines, or opines upon, or is asked to determine or opine upon, the rights of the state, the public, a subdivision of state government, or of any private party.

(4) A local agency need not maintain such an index, if to do so would be unduly burdensome, but it shall in that event:

(a) Issue and publish a formal order specifying the reasons why and the extent to which compliance would unduly burden or interfere with agency operations; and

(b) Make available for public inspection and copying all indexes maintained for agency use.

(5) Each state agency shall, by rule, establish and implement a system of indexing for the identification and location of the following records:

(a) All records issued before July 1, 1990, for which the agency has maintained an index;

(b) Final orders entered after June 30, 1990, that are issued in adjudicative proceedings as defined in RCW **34.05.010** and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(c) Declaratory orders entered after June 30, 1990, that are issued pursuant to RCW **34.05.240** and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(d) Interpretive statements as defined in RCW **34.05.010** that were entered after June 30, 1990; and

(e) Policy statements as defined in RCW **34.05.010** that were entered after June 30, 1990.

Rules establishing systems of indexing shall include, but not be limited to, requirements for the form and content of the index, its location and availability to the public, and the schedule for revising or updating the index. State agencies that have maintained indexes for records issued before July 1, 1990, shall continue to make such indexes available for public inspection and copying. Information in such indexes may be incorporated into indexes prepared pursuant to this subsection. State agencies may satisfy the requirements of this subsection by making available to the public indexes prepared by other parties but actually used by the agency in its operations. State agencies shall make indexes available for public inspection and copying. State agencies may charge a fee to cover the actual costs of providing individual mailed copies of indexes.

(6) A public record may be relied on, used, or cited as precedent by an agency against a party other than an agency and it may be invoked by the agency for any other purpose only if:

(a) It has been indexed in an index available to the public; or

(b) Parties affected have timely notice (actual or constructive) of the terms thereof.

(7) Each agency may establish, maintain, and make available for public inspection and copying a statement of the actual costs that it charges for providing photocopies or electronically produced copies, of public records and a statement of the factors and manner used to determine the actual costs. Any statement of costs may be adopted by an agency only after providing notice and public hearing.

(a)(i) In determining the actual cost for providing copies of public records, an agency may include all costs directly incident to copying such public records including:

(A) The actual cost of the paper and the per page cost for use of agency copying equipment; and

(B) The actual cost of the electronic production or file transfer of the record and the use of any cloud-based data storage and processing service.

(ii) In determining other actual costs for providing copies of public records, an agency may include all costs directly incident to:

(A) Shipping such public records, including the cost of postage or delivery charges and the cost of any container or envelope used; and

(B) Transmitting such records in an electronic format, including the cost of any transmission charge and use of any physical media device provided by the agency.

(b) In determining the actual costs for providing copies of public records, an agency may not include staff salaries, benefits, or other general administrative or overhead charges, unless those costs are directly related to the actual cost of copying the public records. Staff time to copy and send the requested public records may be included in an agency's costs.

(8) This chapter shall not be construed as giving authority to any agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall not do so unless specifically

authorized or directed by law: PROVIDED, HOWEVER, That lists of applicants for professional licenses and of professional licensees shall be made available to those professional associations or educational organizations recognized by their professional licensing or examination board, upon payment of a reasonable charge therefor: PROVIDED FURTHER, That such recognition may be refused only for a good cause pursuant to a hearing under the provisions of chapter **34.05** RCW, the administrative procedure act.

[ **2017 c 304 § 1; 2005 c 274 § 284; 1997 c 409 § 601.** Prior: **1995 c 397 § 11; 1995 c 341 § 1; 1992 c 139 § 3; 1989 c 175 § 36; 1987 c 403 § 3; 1975 1st ex.s. c 294 § 14;** 1973 c 1 § 26 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW **42.17.260.**]

**NOTES:**

**Part headings—Severability—1997 c 409:** See notes following RCW **43.22.051.**

**Effective date—1989 c 175:** See note following RCW **34.05.010.**

**Intent—Severability—1987 c 403:** See notes following RCW **42.56.050.**

*Exemption for registered trade names: RCW **19.80.065.***

*Paid family and medical leave information: RCW **50A.04.195(4).***

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## 42.56.080
## Identifiable records—Facilities for copying—Availability of public records.

(1) A public records request must be for identifiable records. A request for all or substantially all records prepared, owned, used, or retained by an agency is not a valid request for identifiable records under this chapter, provided that a request for all records regarding a particular topic or containing a particular keyword or name shall not be considered a request for all of an agency's records.

(2) Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure. Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad. Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW **42.56.070**(8) or **42.56.240**(14), or other statute which exempts or prohibits disclosure of specific information or records to certain persons. Agency facilities shall be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency. Agencies shall honor requests received in person during an agency's normal office hours, or by mail or email, for identifiable public records unless exempted by provisions of this chapter. No official format is required for making a records request; however, agencies may recommend that requestors submit requests using an agency provided form or web page.

(3) An agency may deny a bot request that is one of multiple requests from the requestor to the agency within a twenty-four hour period, if the agency establishes that responding to the multiple requests would cause excessive interference with other essential functions of the agency. For purposes of this subsection, "bot request" means a request for public records that an agency reasonably believes was automatically generated by a computer program or script.

[ **2017 c 304 § 2; 2016 c 163 § 3.** Prior: **2005 c 483 § 1; 2005 c 274 § 285; 1987 c 403 § 4; 1975 1st ex.s. c 294 § 15;** 1973 c 1 § 27 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW **42.17.270.**]

**NOTES:**

**Finding—Intent—2016 c 163:** See note following RCW **42.56.240.**

**Intent—Severability—1987 c 403:** See notes following RCW **42.56.050.**

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## 42.56.090
## Times for inspection and copying—Posting on web site.

Public records shall be available for inspection and copying during the customary office hours of the agency, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives for a minimum of thirty hours per week, except weeks that include state legal holidays, unless the person making the request and the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives or its representative agree on a different time. Customary business hours must be posted on the agency or office's web site and made known by other means designed to provide the public with notice.

[ **2009 c 428 § 2; 1995 c 397 § 12;** 1973 c 1 § 28 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW **42.17.280.**]

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## 42.56.100
## Protection of public records—Public access.

Agencies shall adopt and enforce reasonable rules and regulations, and the office of the secretary of the senate and the office of the chief clerk of the house of representatives shall adopt reasonable procedures allowing for the time, resource, and personnel constraints associated with legislative sessions, consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information. Nothing in this section shall relieve agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives from honoring requests received by mail for copies of identifiable public records.

If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives shall retain possession of the record, and may not destroy or erase the record until the request is resolved.

[ **1995 c 397 § 13; 1992 c 139 § 4; 1975 1st ex.s. c 294 § 16;** 1973 c 1 § 29 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW **42.17.290.**]

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# LAW OFFICES OF TODD S. RICHARDSON

## January 16, 2018 - 3:45 PM

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| **Appellate Court Case Title:** | Richard Eggleston v. Asotin County, et al |
| **Superior Court Case Number:** | 12-2-00459-6 |

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