Supreme Court No. 97005-0

Court of Appeals No. 77433-6

THE SUPREME COURT
OF THE STATE OF WASHINGTON

ERIC HOOD

Appellant

v.

CITY OF LANGLEY,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
ISLAND COUNTY

PETITION FOR REVIEW

Eric Hood, Pro Se
PO Box 1547
Langley, WA 98260
360.632.9134

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A. IDENTITY OF PETITIONER

Petitioner Eric Hood ("Hood") respectfully requests review of decisions issued by the Court of Appeals, Division I, in *Hood v. City of Langley,* and designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Hood requests review of the Court of Appeals Division I's Opinion ("Op.") dated January 28, 2019 (Appendix A) and of its February 26, 2019 Order (Appendix B) denying Hood's Motion for Reconsideration.

C. ISSUES PRESENTED FOR REVIEW

1. Should courts of appeal remand issues not genuinely disputed?

2. Did the Division I Court of Appeals err by failing to find that requested records were not disclosed?

3. When evaluating agency responses, how should courts consider and apply RCW 42.56.100, which requires "fullest assistance to inquirers"?

D. STATEMENT OF THE CASE

1) Brief summary of facts relevant to this Petition

On January 5, 2016, Hood requested records pursuant to the Public Records Act ("PRA") including "all" former Mayor Fred McCarthy's ("McCarthy") "daily calendars." Op., p.2. On January 8, City Clerk Debbie Mahler ("Mahler") told Hood all McCarthy's records were contained in

boxes, binders, and a laptop, and because of their volume, invited him to the City to review and copy any documents he identified. *Id.* On January 11 she added that she did "not know what all is contained in the Mayor's records" and confirmed the City had "no other records than what we are making available to you." *Id.*

On January 15, Hood visited the City, was denied access to the laptop and conversed with Mahler. *Id*., p. 3. He "subsequently" made a request for electronic records that concerned him and his dealings with the City of Langley. Op. p. 3 *and* CP 695.

The party's relevant arguments are referenced in section E, *infra.*

2) The Court of Appeals Opinion

After acknowledging the calendars are public and electronic, the Court of Appeals discussed whether the City printed and set them aside for Hood's review. Op. p. 8. It then remanded the following issues:

- […] whether the City performed an adequate search for responsive electronic documents before the City issued its January 8, 2016 response […].

- […] whether Hood intended to narrow his January 5, 2016, request, as the City contends, or whether the January 15, 2016, request was a new request, as Hood contends […].

- [Given the disputed "narrowing," the trial court] erred in granting summary judgment on whether the City violated the PRA by failing to produce McCarthy's electronic calendars.

Op., p.8-11.

In summary, the Court of Appeals remanded to determine whether the City adequately searched for the calendars. Though unstated, this remand would seem to include determining whether the City printed and produced the calendars to Hood along with thousands of paper records on January 15.

It also remanded to determine whether Hood's January 15 request excluded the calendars and thus whether the City violated the PRA. That the calendars should have been searched for and produced to Hood before he made a subsequent request on January 15 was also unstated but likely presumed by the Court of Appeals.

3) Reasons for review

Hood here summarizes two reasons for review, argued in Section E, *infra*.

First, the Court of Appeals improperly remanded what is undisputed: The City failed to disclose the electronic calendars to Hood on or before January 15. The City thus violated the PRA and the "narrowing" issue is irrelevant. The Court of Appeals' unnecessary remand to determine whether the City adequately searched for the calendars resulted from 1) its speculative inferences that favor the City, and 2) its misapprehension of the concept of disclosure articulated by this court.

Since making inferences in favor of a movant on summary judgement is contrary to appellate and Supreme Court opinions, review pursuant to RAP 13.4(1) and (2) is warranted.

Second, the Court of Appeals' conclusions did not consider the City's failure to provide "fullest assistance" to Hood pursuant to RCW 42.56.100.[1] The meaning and application of this broad but ambiguous provision affects every citizen's access to governmental decision-making via the PRA and ought to profoundly affect every agency's response. Because this provision must also be considered by any court reviewing an agency's response to a requester, this court's comprehensive review under RAP 13.4(4) is warranted.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Court of Appeals' Improper Inferences and Misapprehension of the Concept of Disclosure Led It to Remand Issues Not Genuinely Disputed, an Absurd and Uneconomical Result

a. The Court of Appeals' unsupported, crucial inference

An appellate court reviewing a summary judgment should "place itself in the position of the trial court" and consider "the evidence and all reasonable inferences therefrom […] in the light most favorable to the

[1] *Note*: Hood is not attempting here to raise an assignment of error not argued in his opening brief. Rather, he argues herein that a failure to consider the City's duty to provide "fullest assistance" prejudiced the Court of Appeals' perception of the City's response and hence its Opinion.

plaintiff, the nonmoving party." *Young v. Key Pharm., Inc*., 112 Wn.2d 216, 225, 226, 770 P.2d 182 (1989).

The Court of Appeals' inference that the City "set aside" the electronic calendars is quoted at length for appropriate context:

> The record is less clear regarding the City's search for responsive electronic documents. […]
>
> Hood claims the City failed to search McCarthy's laptop and failed to discover the responsive daily calendars. *But Mahler testified she "searched the City's computer records for responsive records" and set aside those responsive documents for Hood to review. This testimony suggests Mahler printed copies of responsive electronic records for Hood's review.* We cannot determine from Mahler's statement whether a search of "the City's computer records" led to the discovery or production of McCarthy's electronic calendars. We cannot find any affirmative testimony from Hood that he was not given access to printouts of McCarthy's electronic calendars.
>
> Nor can we determine if a search of the City computer network would have been duplicative of a search of McCarthy's laptop. It may be the records contained in the City computer system are the same as those saved on the laptop. If so, searching the laptop may have been unnecessary. There is a genuine issue of fact as to whether the City performed an adequate search for responsive electronic documents before the City issued its January 8, 2016, response. Summary judgment as to this element of Hood's PRA claim was error.
>
> […W]e cannot find evidence to substantiate one way or the other whether Hood was given access to paper copies of these electronic records when he inspected documents at City Hall.

Op. p. 8, emphasis added.

Nothing in the record supports the inference that Mahler "set aside those responsive documents for Hood to review." Op. p. 8, and *supra*. The *only* City testimony related to Mahler's search for electronic calendars

makes no mention of possibly printing and/or setting aside calendars. Instead it states:

> In addition to the records provided by former mayor McCarthy in his office, I *searched the City's computer records for responsive records* and searched her desktop for records concerning "Eric Hood", "Hood", or "Eric."

CP 694 (emphasized clause is quoted by the Court of Appeals, *supra*.) [2]

The Court of Appeals' conflation of truncated, questionable testimony with unsupported inference prejudiced its ensuing "suggestion" that "Mahler printed copies of responsive electronic records for Hood's review," and hence its uncertainty regarding "whether Hood was given access to paper copies of these electronic records." Op., p. 8

b. The Court of Appeals' misapprehension of the concept of disclosure resulted in a determinative but improper inference

Even if the City could verify that it printed the calendars, the Court of Appeals' perhaps inadvertent [3] speculation that the calendars were "set aside" and possibly produced is irrelevant to the City's duty to *disclose*.

> Records are either "disclosed" or "not disclosed." *A record is disclosed if its existence is revealed to the requester* in response to a PRA request, regardless of whether it is produced. […] Disclosed

[2] This testimony is questionable: Hood's January 5 request does not ask for records concerning himself, the word "her" confuses, and it contradictorily implies Mahler searched the Mayor's paper records. Also, several years of daily calendars would have been the *only* productive result of the *only* search she performed. *See* CP 694 ("broader search" was "unnecessary").But just three days after receiving Hood's January 5 request, Mahler said she did "not know what all is contained in the Mayor's records." Op., p.2.

[3] *McCarthy*, not Mahler, "set aside" *paper* records – i.e., "boxes and binders". CP 694.

> records are either "produced" (made available for inspection and copying) or "withheld" (not produced).

Sanders v. State, 169 Wash.2d 827, 836, 240 P.3d 120 (2010). (Emphasis added.)

The Court of Appeals' conclusory [4] inference that the calendars were set aside led it to speculate that the calendars might have been "produced"; rather, the calendars were "withheld" because their existence was not revealed to Hood. *Id.*

Inferring that the calendars *might have been* "produced" led the Court of Appeals to also determinatively infer a "genuine issue of fact as to whether the City performed an adequate search […]." Op. p. 8. But since the calendars were not "disclosed", there is no ground for inference and no genuine issue. The Court of Appeals thus made two related pivotal inferences in favor of the City that conflict with Supreme Court opinions, *supra*.

> *c. Since the calendars were not disclosed, there are no genuine issues of material fact to remand*
>
> Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

[4] "Conclusory" is defined as "expressing a factual inference without stating the underlying facts on which the inference is based." *Black's Law Dictionary* 351 (10th ed. 2014). "Ultimate facts or conclusions of fact are insufficient." *Grimwood v. Univ. of Puget Sound, Inc.,* 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (citation omitted).

Cerrillo v. Esparza, 158 Wash.2d 194, 200, 142 P.3d 155 (2006); accord CR 56(c).

"A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton Condo. Apartment-Owners Ass'n Bd. of Dir. v. Blume Dev. Co.,* 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Here, the undisputed material fact is the City's failure to *disclose* the calendars to Hood. Issues arising from Hood's subsequent January 15 request are thus irrelevant because the City's failure to disclose the calendars violated the PRA.

Even if Mahler searched the City's computer records for calendars, the City presents no evidence they were printed and "set aside", and they were certainly not disclosed in electronic format, argued *infra*. Moreover, on appeal the City admitted the records provided to Hood on January 15 "constituted all the paper records" and the "*only remaining records would be those on the City laptop*", including, of course, the calendars. BR., p. 13 (emphasis added).[5]

Thus, the key issue considered and remanded by the Court of Appeals –whether the City adequately searched for the calendars -- has no basis. Since it is undisputed that the calendars were not disclosed, remand

[5] Admissions on appeal are binding. See Hood's Motion for Reconsideration in the Court of Appeals, p. 5.

conflicts with Supreme and appellate court decisions, including *Cerrillo v. Esparza*, P.3d 155, *Id*., and *Block v. City of Gold Bar*, 189 Wn.App.262, 271,355 P.3d 266 (2015). Op., p.5.

The Court of Appeals may consider an issue "not set forth in the briefs". RAP 12.1(b). However, "[i]t is proper to do so when there is no dispute about the law." *Alverado v. Washington Pub. Power Supply Sys.,* 111 Wash.2d 424, 429, 759 P.2d 427 (1988).

Since the PRA undisputedly mandates disclosure of requested records, the appellate court's consideration of an issue generated from its own speculation is improper. Rather, evidence, proper inferences, City admissions and proper interpretation of the PRA show the City failed to *disclose* the calendars to Hood. Its search for them was thus necessarily inadequate. The City did not disclose the calendars, thus remanding to determine whether Hood narrowed or intended to narrow his request on January 15 is irrelevant.

In short, the appellate court's remands have no basis.

d. Remanding certain issues to the trial court would create an absurd result contrary to judicial economy

Remanding to the trial court to determine whether the City adequately searched for the calendars defeats the:

> […] purpose behind the summary judgment motion: to examine the sufficiency of the evidence behind the plaintiff's formal

> allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists.

Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 226, 770 P.2d 182 (1989) (quotations omitted.)

In all its briefings in two courts, the City failed to present any evidence or argument showing that it disclosed the calendars on or before January 15, 2016. Rather, evidence and City admissions show the opposite. Since the calendars weren't disclosed, the City's purported search for them was inadequate and Hood's January 15 request is irrelevant. Remanding to the trial court to determine issues of genuine fact when no issues of genuine fact exist is contrary to judicial economy and creates an absurd result that courts have a "duty to avoid". *Estate of Bunch v. McGraw Residential Ctr.,* 174 Wash.2d 425, 433, 275 P.3d 1119 (2012). And see *Anderson v. State Farm Mut. Ins. Co*., 101 Wn. App. 323, 329, 2 P.3d 1029 (2000) (Courts may exercise discretion to "serve the interest of judicial economy where there are no genuine issues of material fact.")

2. The Court of Appeals Erred by Failing to Find That the Calendars Were Not Disclosed Electronically

Hood's Motion for Reconsideration in the Court of Appeals ("MR") argued that the City did not meet its burden of production because it failed to disclose the admittedly public calendars in their electronic format, the format in which they were "kept" by the City.

MR, p. 4-7. That is, paper or even pdf copies of the electronic calendars would not be fully responsive to his request since the calendars existed in electronic form.

It follows that Hood was not obligated to specifically request that they or their metadata be disclosed in electronic form. *O'Neill v. City of Shoreline*,170 Wn.2d 138, 151-152, 240 P.3d 1149 (2010). In other words, Hood's request for all calendars sufficed to prompt the City to electronically disclose them.

Hood concedes that he "did not have the right under the PRA to search McCarthy's laptop." Op., p. 11. But on January 15 the City admittedly could have created "a partition within the laptop to isolate" the calendars for his inspection. CP 695. [6]And if it could not produce them electronically, then it should have partially produced them in an alternative manner. "[A] partially responsive response could have been produced at the time of the original denial. The failure to do so violated the PRA." *Fisher Broad.-Seattle TV LLC v. City of Seattle, 180 Wash.2d 515, 524, 326 P.3d 688 (2014).*

[6] "[A] trial court may require an agency to disclose records electronically if it is reasonable and feasible to do so." *Mitchell v. Washington State Dept. of Corrections,* 64 Wash.App. 597, 277 P.3d 670 (2011) at 674.

In short, even if an adequate search is still genuinely disputed, the City's failure to produce the calendars in their electronic format, or to "partially" respond to Hood's request for them, violated the PRA. *Id.*

3. The Court of Appeals' Opinion Failed to Consider the Entirety of the PRA, Including RCW 42.56.100, Which Requires "Fullest Assistance to Inquirers"

By ignoring the City's flawed responses, the Court of Appeals failed to consider RCW 42.56.100, which requires "fullest assistance to inquirers". That was improper because "[i]n construing the PRA, we look at the Act in its entirety in order to enforce the law's overall purpose." *Rental Hous. Ass'n of Puget Sound v. City of Des Moines, 165 Wash.2d 525, 536, 199 P.3d 393 (2009).*

Given multiple opportunities to provide assistance, the City failed to reveal the existence of the calendars to Hood. Hood finds no case law specifying the elements of "fullest assistance" in RCW 42.56.100 but this court may recognize its absence in the City's responses: [7]

- On January 10, 2016, Hood asked Mahler whether the term "City records" included the records on McCarthy's computer. CP 761.

[7] RCW 42.56.100, states in part, "Agencies shall adopt and enforce reasonable rules and regulations […] consonant with the intent of this chapter to provide full public access to public records […]. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information."

Rather than tell Hood that "City records" included the calendars or that she had found the calendars, she ignored his question. CP 736.

- On January 11, Mahler stated that she did "not know what all is contained in the Mayor's records." Op., p. 2. That may have been true for paper records which she admittedly did not search. But a search for electronic records, the sole search she purportedly performed, would have found *only* the calendars. Yet Mahler failed to inform Hood of the results of her search.
- When Hood visited the City on January 15 Mahler did not tell him of the calendars' existence or arrange for him to view them. Rather, she merely denied his access to the laptop. *Id*., p. 3.
- A proper response to Hood's January 15 request would have resolved any dispute regarding whether it "narrowed" his January 5 request. Instead Mahler did not statutorily respond "within five business days." [8] CP 738.
- On January 22, Hood again inspected paper records. CP 495 at 11. Mahler obviously did not forbid his access to them in accordance

[8] The City claimed Mahler complied by providing an estimate "when [Hood] orally narrowed his request […]." CP 485. But Mahler testified that Hood's written request was made "subsequently" to his conversation with her. CP 695. There is no record of a response "within five business days" of Hood's request pursuant to RCW 42.56.520.

with her purported understanding that Hood, a week earlier, had "narrowed" his request to *only* electronic records.

- On January 27 and 28, Hood thrice attempted to schedule a time to "examine the computer files on the laptop" mentioned in Mahler's response to his January 5 request. CP 537-539. In reply to Hood's second attempt, Mahler asked "Are there specific documents you want to view?" CP 538. Given Hood's specific request for calendars, her response was disingenuous. She also *again* failed to express the City's purported understanding that Hood had narrowed his January 5 request.
- On February 5, Hood asked the City to specify "for certain what you are proposing in terms of my access to the records on the laptop." CP 537. It did not respond. Only after Hood filed suit did the City tell him it would search if he would "identify what you want from the laptop". CP 542. Hood's request for calendars and Mahler's testimony that she had already searched the City's computer betrays this response also as disingenuous, at best. [9]
- On March 1, 2016 Hood stated to the City's counsel:

> [T]he City's later purported confusion regarding my January 15 request in no way muddies and cannot be

[9] Mahler knew that Hood did not seek electronic records other than what he had specified in his January 5 request: "[Hood] never explained what *additional* electronic records he was seeking." CP 215 (emphasis added).

> conflated with [the City's] unambiguous responses to my January 5 request. […] Does the City now claim that certain records responsive to my January 5, 2016 request are exempt? If so, please identify every such exempt record in strict accordance with the PRA.

CP 544-545. The City did not reply. CP 499. Instead it filed its Answer and never claimed the withheld calendars were exempt. CP 730.

Although the City's improper response obscured its failure to disclose the calendars, it must nonetheless bear its statutory burden.

> The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute[...].

RCW 42.56.550.

"[T]he agency bears the burden, beyond material doubt, of showing its search was adequate." *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 721, 261 P.3d 119 (2011). This is because "failure to perform an adequate search *precludes* an adequate response and production [and is] comparable to a denial because the result is the same." *Id.,* (emphasis added).

Determining an "adequate response and production" per *Neighborhood Alliance* requires that a court consider the PRA "in its entirety" (see *Rental Hous*., *supra*), including RCW 42.56.100. "Courts may not interpret a statute in a way that renders a portion meaningless or

superfluous." *Cent. Puget Sound Reg'l Transit Auth. v. WR-SRI 120th N. LLC, 191 Wn.2d 223, P.3d 891 (2018),* ¶17 (internal citations omitted), and see *Rental Hous.,* supra. Failing to consider an agency's responses through the lens of "fullest assistance" renders RCW 42.56.100 superfluous.

4. The Meaning and Application of the Concept "Fullest Assistance to Inquirers" Merits This Court's Comprehensive Consideration

The legislature's separate provision of RCW 42.56.100 in the PRA shows it is essential. However, contrasted to essential concepts like "adequacy of search" or "aggravating / mitigating factors", neither of which is provisioned in the PRA, Hood found no comprehensive discussion of the meaning, import, elements or application of "fullest assistance" in case law. While dozens of higher court cases cite RCW42.56.100, none applied the concept of "fullest assistance" to, as here, an agency's failure to respond to a requester's repeated attempts to determine the extent and content of its production.

Several cases may indirectly apply. For example, in addressing whether an agency met its own estimated date of production, Division III determined that "thoroughness and diligence of an agency's response is most consistent with the concept of "'fullest assistance.'" *Andrews v. Wash. State Patrol*, 183 Wash. App. 644, 653, 334 P.3d 94 (2014). It found that an agency's failure to "respond promptly" violated the PRA.

Doe I v. Washington, 80 Wn. App. 296, 908 P.2d 914 (1996). And that "agencies should have limited protections when carrying out their duties." *Benton Cty. v. Zink,* 361 P.3d 801, 806 (Wash. Ct. App. 2015).

Division II stated, "a trial court may require an agency to disclose records electronically if it is reasonable and feasible to do so." *Mitchell v. Washington State Dept. of Corrections,* 64 Wash.App. 597, 277 P.3d 670 (2011) at 674. This court has stated "Agencies must make a sincere and adequate search for records. RCW 42.56.100 [And evince a sincere attempt] 'to be helpful.'" *Fisher Broadcasting,* 326 P.3d at 692, *supra.*

Applying these few indirect examples to the instant case, electronically disclosing the calendars was reasonable and feasible. Moreover, the City's response should have been sincere, helpful, prompt, thorough, diligent, and the City should have "limited protection." [10] Instead, the City's evasive, absent or negligent responses aided both its failure *and* its defense of its failure to disclose the calendars.

Despite the paucity of pointed case law, this court recognizes:

> To serve the broad goal of transparent government, agencies are required to adopt rules and regulations that "provide for the fullest assistance to inquirers and the most timely possible action on requests for information."

[10] This Court should consider whether these adjectives, themselves subject to broad interpretation, adequately guide courts in applying the concept of "fullest assistance."

Spokane Research & Def. Fund v. City of Spokane, 155 Wash.2d 117 P.3d 1117 (2005) at 1123.

Even if the City could show that it was somehow confused about Hood's request for the calendars or how to disclose them, this court should find that providing "fullest assistance" at least obligated the City to reveal their existence to him and that they were electronic. To another purpose of this Petition, however, the meaning, constituent elements and application of the currently vague concept of "fullest assistance" is "of substantial public interest that should be determined by the Supreme Court." RAP 13.4 (4).

F. CONCLUSION

If this court finds the City violated the PRA by failing to disclose the calendars, then it should clarify that the determination of penalties and attorney fees is the only remaining issue for the trial court's consideration.

If this court determines that the disclosure of the electronic calendars is still genuinely disputed, then it should order a forensic analysis of all metadata for the calendars, including inspection of the laptop and any relevant hard drive.[11] Such information would likely reveal when or whether the calendars were accessed, printed or altered.

[11] Specific guidance is appropriate when remanding to the trial court. See, e.g., *Yakima County v. Yakima Herald-Republic,* 170 Wash.2d 775, 783, 246 P.3d 768 (2011), (remanding for in camera review).

Finally, for the benefit of citizens, agencies and courts, this court should clarify the meaning and application of the concept "fullest assistance to inquirers". RCW 42.56.100.

DATED this 28th day of March 2019

/s/ Eric Hood
Eric Hood, Pro Se

CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on or before March 28, 2019 in Langley, WA Washington, I emailed the foregoing documents to:
Jeffrey S. Myers, WSBA No. 16390 Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S. P.O. Box 11880 Olympia, WA 98508-1880
(360) 754-3480
jmyers@lldkb.com:

By: /s/ Eric Hood Date: March 28, 2019
ERIC HOOD

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

ERIC HOOD, an individual, Appellant, v CITY OF LANGLEY, a public agency, Respondent.	)	No. 77433-6-I DIVISION ONE UNPUBLISHED OPINION FILED: January 28, 2019

ANDRUS, J. — Eric Hood appeals the summary judgment dismissal of his Public Records Act claims against the City of Langley. Because there are issues of fact as to the adequacy of the City's search and compliance with the PRA, we reverse.

FACTS

Former Langley Mayor Fred McCarthy left office on December 31, 2015. When his term ended, McCarthy left all of his records in his former office, including six boxes and his City-issued laptop McCarthy informed the City Clerk, Debbie Mahler, who was in charge of records requests, that he was leaving the records in the office to comply with public records laws.

On January 5, 2016, Eric Hood e-mailed a public records request to the City. The request sought:

> [A]ll journals, diaries, notebooks, daily calendars, the small pocket notebooks, and any handwritten records or handwritten comments or marginalia or transcribed comments on any records . . . kept or created by former Mayor Fred McCarthy.
>
> [A]ny comments dictated by Fred McCarthy, whether recorded by himself or others, not to include videotapes or audiotapes of Council meetings.
>
> [A]ll city records . . . that are or were maintained in the locked cabinet in former Mayor McCarthy's locked office, at his home, or on his personal computer or any other personal device, even if the records in those locations contain both city and McCarthy's personal information.
>
> [A]ll records showing the retention schedule for the above requested documents, and any records showing whether any of the above documents or portions thereof have been destroyed.
>
> The date range for this request extends from McCarthy's first day in office to the present.
>
> Please provide an exemption log for any records or portions of records that you withhold.

CP 148.

> On January 8, 2016, Mahler responded to Hood's request via e-mail.
>
> We have received your request for records relating to Mayor Fred McCarthy. He had no dictation or recordings other than recorded Council meetings and no videotapes. All of Mayor McCarthy's City records are contained in 6 boxes, 25 binders and on a laptop located here at Langley City Hall. Due to the volume of documents, please schedule a time to come into City Hall and review those files. Copies can be made of any documents that you identify.

CP 147. Hood e-mailed Mahler on January 10, 2016, asking whether Mahler was the records custodian and knew what the records contained, whether McCarthy's pocket notebooks were among the available records, whether Mahler was providing an exemption log, and whether any additional records were available or if Mahler was closing the request. On January 11, Mahler replied:

> Yes, I am the records custodian, but I do not know what all is contained in the Mayor's records. They were kept by him in his office while he was Mayor and accessed if needed for a public disclosure request. He then boxed them up and put them alphabetically into file boxes and binders were kept from every meeting. Mayor McCarthy's pocket notebooks are not included as he has stated that they were personal notes and not related to city business. I have not redacted or exempted anything from those files, so no exemption log is provided. I have no other records than what we are making available to you.

CP 146

Hood arranged to review the documents at City Hall on January 15, 2016. The interactions between Hood and Mahler during this visit are in dispute. It is undisputed, however, that Mahler would not allow Hood to search McCarthy's laptop while he was there. Hood then e-mailed a specific request for "all electronic files that reference Eric Hood or any of his dealings with the City of Langley." Hood continued his review of documents at City Hall on January 22, 2016.

On January 27, 2016, Mahler responded to Hood's request for electronic files and provided a redaction log. Hood later e-mailed Mahler asking to examine McCarthy's laptop. Mahler refused, informing Hood that all electronic files mentioning Hood had been produced. Hood again asked when he could examine the laptop, and Mahler told Hood that, with supervision, he could view the contents of the laptop but asked if there was something specific he was looking for, as she did not have the time to supervise him at that time. Hood objected to the restrictions Mahler placed on his access to the laptop, noting that in Mahler's original reply on January 8, 2016, she had indicated all of McCarthy's records were available for his inspection, including his laptop.

Hood, representing himself, commenced the present action on February 16, 2016.[1] Hood claimed the City withheld records in violation of the PRA. He argued that the City had a duty to sort records according to his request and that Mahler should have known what was contained in McCarthy's former office. He also claimed failure to redact certain documents was a violation of the PRA. Hood asked the court to order the City to disclose all documents, as well as an exemption log, and asked for monetary damages, including attorney fees and statutory penalties.

The City moved for summary judgment on May 10, 2017. The City filed declarations from both McCarthy and Mahler. It later submitted a second declaration from Mahler, as well as a declaration from the attorney for the City, Jeffrey Myers, who was involved in communicating with Hood. Hood submitted a responsive declaration challenging the City's version of events

The trial court granted summary judgment on July 11, 2017. The trial court concluded the City provided Hood access to the requested records in a timely manner without making any exemption claims. Furthermore, the trial court concluded Hood modified his January 5 request on January 15, 2016, by asking for electronic documents relating only to Hood. Finally, the trial court concluded that while "not perfect," the City's search for the records was reasonably calculated to uncover all relevant documents and was therefore adequate under the statute.

[1] Hood had previously served the City with a summons and complaint on January 26, 2016, and an amended complaint on February 10, 2016, but he "withdrew" service of the original complaint and the amended complaint, citing improper service

Hood appeals, contending that there are issues of fact as to the adequacy of the City's search and its compliance with the PRA

ANALYSIS

Standard of Review

Judicial review of agency actions taken or challenged under the PRA is de novo. RCW 42 56.550(3); see also Neigh. Alliance of Spokane County v. Spokane County, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). Similarly, grants of summary judgment are reviewed de novo. Id In a summary judgment motion, the moving party bears the initial burden of showing there is no genuine issue of material fact. If the moving party meets the initial showing, then the inquiry shifts to the nonmoving party. Block v. City of Gold Bar, 189 Wn. App. 262, 269, 355 P.3d 266 (2015). If the nonmoving party fails to make a sufficient showing of a genuine issue of material fact, the trial court should grant summary judgment Id. A party may not rely on allegations made in its pleadings; a party's response must set forth specific facts showing that there is a genuine issue for trial. CR 56(e); see also Block, 189 Wn App. at 269.

Adequacy of the City's Search

Hood challenges the adequacy of the City's search. Our state Supreme Court has held that the adequacy of a search for records under the PRA is the same as the adequacy requirements of the Freedom of Information Act (FOIA). "Under this approach, the focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate." Neigh. Alliance of Spokane County, 172 Wn.2d at 719-20. An adequate search is one that is

reasonably calculated to uncover all relevant documents. Id at 720. Additionally, an agency must make more than a perfunctory search and follow obvious leads as they are uncovered. Id

An agency bears the burden of showing that its search was adequate. Id. at 721. To establish an adequate search on summary judgment, an agency may rely on reasonably detailed, non-conclusory affidavits submitted in good faith Block, 189 Wn. App. at 271. These affidavits should describe the search and show that all places likely to contain responsive materials were searched. Id.

On appeal, this court examines the evidence presented by the City to determine if it bore its burden of proof. Block, 189 Wn. App. at 272. Although the reasonableness of a search generally depends on the facts and circumstances of each case, when reasonable persons could only conclude that the search was reasonably calculated to uncover all relevant documents, summary judgment would be appropriate. Id. at 274.

We reject Hood's argument that the City produced too many paper records and failed to "search" through paper documents in McCarthy's office to pull out those Hood does not deem responsive. Hood explicitly asked the City to produce "all city records" maintained in a locked cabinet in McCarthy's locked office, at his home, on his personal computer or on any personal device. Hood essentially asked for every public record McCarthy ever had in his possession.

The trial court held, and we agree, there is no cause of action under the PRA against an agency for producing documents to which it could have claimed an exemption. RCW 42.56.550(1) merely provides a cause of action when a

person is denied the opportunity to inspect or copy a requested public record. None of the documents Hood claimed should have been withheld related to him. Producing documents the City could have withheld does not establish the City's search was inadequate.

Additionally, the City provided affidavits detailing the location of the requested paper documents The City provided four declarations—one from McCarthy, two from Mahler, and one from the City's attorney, Myers McCarthy testified that his work-related notes were either filed in folders organized by topic, or in one of three miscellaneous notes binders, one for each year he was in office McCarthy also testified that before his departure, he searched his personal computer and cell phone to ensure that no communications regarding City business were on the devices. He informed Mahler that the records he left behind in his office were all the public records he had.

Mahler testified that because she knew all of McCarthy's records were in his former office at City Hall, and therefore, any available responsive documents were inside, she did not perform a broader search for paper records in response to Hood's January 5 request. This evidence is sufficient to demonstrate the City's search for responsive paper documents was adequate. Partial summary judgment was appropriate as to this element of Hood's PRA claim.

The record is less clear regarding the City's search for responsive electronic documents. Hood requested copies of "daily calendars . . . kept or created by former Mayor Fred McCarthy." This request included public records kept in electronic format. Hood presented evidence that before McCarthy left the City,

McCarthy informed counsel for the City that his calendars were maintained by his administrative assistant in electronic format and that he considered the electronic calendars to be public records. The city's attorney asked McCarthy to provide the electronic calendars to the City Clerk to be processed and released to a prior PRA requestor. On appeal, the City concedes the electronic calendars are public records and accessible from McCarthy's laptop.[2]

Hood claims the City failed to search McCarthy's laptop and failed to discover the responsive daily calendars. But Mahler testified she "searched the City's computer records for responsive records" and set aside those responsive documents for Hood to review. This testimony suggests Mahler printed copies of responsive electronic records for Hood's review We cannot determine from Mahler's statement whether a search of "the City's computer records" led to the discovery or production of McCarthy's electronic calendars. We cannot find any affirmative testimony from Hood that he was not given access to printouts of McCarthy's electronic calendars.

Nor can we determine if a search of the City computer network would have been duplicative of a search of McCarthy's laptop. It may be the records contained in the City computer system are the same as those saved on the laptop. If so, searching the laptop may have been unnecessary. There is a genuine issue of fact as to whether the City performed an adequate search for responsive electronic

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[2] The City concedes that McCarthy's electronic calendars are public records subject to disclosure under the PRA We decline, however, to establish a rule that daily calendars are always public records subject to disclosure. See Yacobellis v City of Bellingham, 55 Wn App 706, 712, 780 P 2d 272 (1989)(daily appointment calendars are not public records when created solely for individual's convenience or to refresh writer's memory, are maintained in a way indicating a private purpose, and are not circulated or intended for distribution within agency channels)

documents before the City issued its January 8, 2016, response. Summary judgment as to this element of Hood's PRA claim was error.

PRA Violations

Hood argues the City violated the PRA by failing to produce McCarthy's electronic daily calendar records.[3] As indicated above, we cannot find evidence to substantiate one way or the other whether Hood was given access to paper copies of these electronic records when he inspected documents at City Hall.

The City nevertheless contends it could not have violated the PRA in failing to produce these electronic records because Hood "clarified" his January 5, 2016, request on January 15, 2016, by asking only for electronic documents relating to him. Hood challenges the factual assertion that his January 15, 2016, request constituted a "clarification" of his January 5, 2016 request.[4]

We conclude there is a genuine issue of fact as to whether Hood intended to narrow his January 5, 2016, request, as the City contends, or whether the January 15, 2016, request was a new request, as Hood contends. First, when the City sent Hood an email on January 8, 2016, it did not request a clarification regarding the documents he sought to review on McCarthy's laptop. The City said the documents were available for his inspection. One could reasonably assume if the City needed clarification as to the scope of Hood's request for electronic documents, it would have included such a request in the January 8 email.

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[3] Hood argued below that the City violated the PRA by failing to produce McCarthy's personal journals. The trial court held these journals were not public records subject to the PRA, and Hood has not challenged that legal determination on appeal.

[4] Under RCW 42.56.520(1), a city has five business days in which to provide the requested records, acknowledge the request and provide a date by which the city will respond, or request a clarification

Second, according to Mahler, while Hood was at City Hall to review records on January 15, 2016, Hood "orally clarified and narrowed his request to only those records that concerned himself." Mahler testified she asked Hood to confirm this clarification in writing and informed him it would take a couple of weeks to respond.

But Hood testified "I never altered my January 5, 2016 or January 15, 2016 requests either orally or in writing." Following his January 15 visit to City Hall, Hood sent an email seeking "all electronic files that reference Eric Hood or any of his dealings with the City of Langley." He did not limit this request to the contents of McCarthy's laptop.[5] Nor did Hood indicate in his January 15 email that it constituted a modification of the January 5 request. There is nothing in the record to indicate that after receiving the January 15 request, the City sought clarification from Hood to confirm an intent to narrow the request for electronic records. Given the disputed evidence, the trial court erred in granting summary judgment on whether the City violated the PRA by failing to produce McCarthy's electronic calendars.

Hood also argues the City violated the PRA by failing to give him unfettered access to McCarthy's laptop to perform his own search. We reject this argument. While the purpose of the PRA is to provide "full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes," RCW 42.17A.001, there is no right under the PRA to an "unbridled search," Nissen v. Pierce County, 183 Wn.2d 863, 885, 357 P.3d 45 (2015).

[5] Mahler and newly-elected Mayor Tim Callison, who had been reassigned the laptop, searched the laptop for documents specifically mentioning Hood's name. Mahler produced copies of records responsive to the January 15, 2016, request on January 27, 2016, along with an exemption log. The adequacy of the search in response to the January 15 request is not an issue on appeal.

In Sperr v. City of Spokane, this court rejected a requestor's claim that the PRA entitled him to access the Spokane Police Department's computer to run his own search for police records. 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004) The court held that "the Act does not provide a right to citizens to indiscriminately sift through an agency's files in search of records or information which cannot be reasonably identified or described to the agency." Id. at 137 (internal quote marks omitted) (citing Limstrom v. Ladenberg, 136 Wn 2d 595, 604-05. 963 P.2d 869 (1998)). The trial court correctly concluded Hood did not have the right under the PRA to search McCarthy's laptop

Hood requests an award of appellate fees and costs. Given that a prevailing party in a PRA action may be awarded costs and attorney fees at the discretion of the trial court, Neigh., 172 Wn.2d at 725, we reserve to the trial court the appropriateness of such an award at the conclusion of the case.

For these reasons, we reverse summary judgment and remand for further proceedings consistent with this opinion

WE CONCUR:

Andrus, J.

Chun, J.

Mann, ACJ

APPENDIX B

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

ERIC HOOD, an individual,

Appellant,

v.

CITY OF LANGLEY, a public agency,

Respondent.

No. 77433-6-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Eric Hood, has filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Andrus, J.
Judge

ERIC HOOD

March 28, 2019 - 8:01 AM

Filing Petition for Review

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