68016-1

68016-1

FILED
COURT OF APPEALS
DIVISION ONE
JUN 14 2012

No. 68016-1-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TURNER HELTON, Respondent,

v.

SEATTLE POLICE DEPARTMENT, Appellant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Richard Eadie)

RESPONDENT TURNER HELTON'S AMENDED ANSWER TO APPELLANT SEATTLE POLICE DEPARTMENT'S OPENING BRIEF

Patrick J. Preston, WSBA #24361
Thomas M. Brennan, WSBA #30662
Attorneys for Respondent Turner Helton
McKay Chadwell, PLLC
600 University Street, Suite 1601
Seattle, WA 98101-4124
(206) 233-2800

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ISSUES 2

A. Following its ruling that SPD violated the PRA by improperly denying Helton access to records of closed incident and police misconduct investigations for over a year, the trial court imposed a conservative penalty of less than half the statutory per diem amount. The trial court applied the non-exclusive list of penalty considerations in *Yousoufian* and found aggravating and mitigating factors based upon the record. Under these circumstances, was the trial court's penalty manifestly unreasonable? 2

B. A prevailing records requestor is entitled to "all costs, including reasonable attorney fees, incurred in connection with such legal action." After prevailing in a PRA action against SPD, Helton submitted a request for reimbursement of attorneys' fees and costs supported by itemized billing entries and an expert declaration attesting to the reasonableness of the requested reimbursement based upon the current Seattle legal market and experience of plaintiff's counsel. SPD did not rebut this evidence. The trial court applied the controlling *Mahler* lodestar analysis to order reimbursement of Helton's costs and reasonable attorneys' fees based on Helton's unrebutted evidence. Under these circumstances, was the trial court's reimbursement of costs and fees manifestly unreasonable? 2

C. SPD's motion for reconsideration of the trial court's order for reimbursement of Helton's reasonable fees and costs presented untimely additional materials that did not

comply with CR 59. Was the trial court's denial of SPD's motion and exclusion of these materials under CR 59 manifestly unreasonable? Should the Court of Appeals refuse to consider SPD's untimely materials in reviewing the trial court's PRA penalty and reimbursement of attorneys' fees and costs earlier in the case? 3

III. STATEMENT OF THE CASE 3

A. Standard of Review 3

B. Facts 4

IV. ARGUMENT 17

A. The Trial Court's Determination Of A Penalty For SPD's Violation Of The PRA Was A Proper Exercise Of Discretion Under The Controlling Standard Of Review 18

B. The Trial Court's Mandatory Reimbursement Of Helton's Reasonable Attorneys' Fees And Costs Regarding SPD's Violation Of The PRA Was A Proper Exercise Of Discretion Under The Controlling Standard Of Review 27

C. The Trial Court Properly Denied SPD's Motion For Reconsideration Of Reasonable Fees And Costs Based On SPD's Failure To Show CR 59 Grounds 33

V. CONCLUSION 35

TABLE OF CASES, STATUTES & OTHER AUTHORITIES

CASES

Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503 (ACLU II), 95 Wn. App. 106, 975 P.2d 536 (1999) 27

Amren v. City of Kalama, 131 Wn.2d 25, 929 P.2d 389 (1997) 26

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 259 P.3d 190 (2011) 8, 9, 10, 25

Bellevue John Does 1-11 v. Bellevue School District #405, 164 Wn.2d 199, 189 P.3d 139 (2007) 25, 26

Bricker v. State Dept. of Labor and Industries, 164 Wn. App. 16, 262 P.3d 121 (2011) 24

Coalition on Government Spying v. King Co. Dept. of Public Safety, 59 Wn. App. 856, 801 P.2d 1009 (1990) 27

Cowles Pub. Co. v. State Patrol, 109 Wn.2d 712, 748 P.2d 597 (1988) 25

Ferree v. Doric Co., 62 Wn.2d 561, 383 P.2d 900 (1963) 4, 29

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 580 P.2d 246 (1978) 26

In re Marriage of Brewer, 137 Wn.2d 756, 976 P.2d 102 (1999) 4

In re Marriage of Tomsovic, 118 Wn. App. 96, 74 P.3d 692 (2003) 34

King Co. v. Wash. State Boundary Review Bd., 122 Wn.2d 648, 860 P.2d 1024 (1993) 4

Lindell v. City of Mercer Island, __ F. Supp. 2d __, 2011 WL 2535147 (W.D. Wash. 2011) 24

Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998) 4, 12, 15, 28, 29, 31

Prison Legal News, Inc. v. Dep't of Corrections, 154 Wn.2d 628, 635, 115 P.3d 316 (2005) 18

Sanders v. State of Washington, 169 Wn.2d 827, 240 P.3d 120 (2010) 3

Servais v. Port of Bellingham, 127 Wn.2d 820, 904 P.2d 1124 (1995) 26

Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 117 P.3d 1117 (2005) 17, 18, 22

Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 183 (1959) 4

Violante v. King Co. Fire District No. 20, 114 Wn. App. 565, 59 P.3d 109 (2009) 25

West v. Thurston County, 144 Wn. App. 573, 183 P.3d 346 (2008) 17, 33

Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 229 P.3d 735 (2010) 3, 11, 18, 19, 20, 21, 22, 23, 24, 27

STATUTES

RCW 42.56.030 22

RCW 42.56.050 26

RCW 42.56.100 25

RCW 42.56.210(1) 6

RCW 42.56.210(3) 6

RCW 42.56.230 5

RCW 42.56.240(1) 5, 7

RCW 42.56.550(3) 22

RCW 42.56.550(4) 18, 20, 21, 23, 24, 27, 29, 33, 35, 36

OTHER AUTHORITIES

RAP 18.1 36

RPC 1.5 29

RPC 1.5(a) 15, 28, 31

RULES

CR 59(a) 33
CR 59(b) 33

I. INTRODUCTION

Petitioner Seattle Police Department (SPD) denied respondent Turner Helton access to records from a closed incident investigation and related police misconduct investigation for more than one year. After Helton filed a Public Records Act (PRA) enforcement action and SPD presented a police captain's testimony undermining the exemptions it argued to justify the denial, SPD finally produced the records. The trial court determined aggravating and mitigating factors for SPD's PRA violation and exercised discretion to impose a conservative penalty of less than half the statutory per diem amount. The court ordered reimbursement of Helton's costs and attorneys' fees as a prevailing records requestor based on his unrebutted evidence, including an expert's opinion that the costs and fees were reasonable under the circumstances.

On appeal, SPD abandons its meritless exemption arguments and instead makes redundant assignments of error regarding the PRA penalty and fees. The deferential abuse-of-discretion standard of review, however, is dispositive. SPD cannot show the trial court's rulings were manifestly unreasonable or clearly untenable. Even SPD's creative reworking of its assertion during litigation that the Supreme Court's *Bainbridge Island Police Guild* decision did <u>not</u> affect its meritless exemption arguments does nothing to show an abuse of discretion by the trial court.

Instead, SPD implicitly invites improper *de novo* review of its error assignments and relies upon untimely materials that the trial court properly excluded under CR 59.

The trial court carefully weighed the evidence, considered the arguments of the parties, and articulated findings of fact and conclusions of law supporting its reasoned rulings. SPD's appeal is the product of an imprudent and overly litigious strategy, which unnecessarily consumed the resources of the parties despite the agency's now undisputed PRA violation in denying Helton public records for over a year. The discretionary standard of review, which promotes judicial economy and protects a prevailing party's interest in the finality of a judgment, precludes SPD's arguments. The trial court's rulings should be affirmed.

II. ISSUES

A. Following its ruling that SPD violated the PRA by improperly denying Helton access to records of closed incident and police misconduct investigations for over a year, the trial court imposed a conservative penalty of less than half the statutory per diem amount. The trial court applied the non-exclusive list of penalty considerations in *Yousoufian* and found aggravating and mitigating factors based upon the record. Under these circumstances, was the trial court's penalty manifestly unreasonable?

B. A prevailing records requestor is entitled to "all costs, including reasonable attorney fees, incurred in connection with such legal action." After prevailing in a PRA action against SPD, Helton submitted a request for reimbursement of attorneys' fees and costs supported by itemized billing entries and an expert declaration attesting to the reasonableness of the requested reimbursement based upon the current

Seattle legal market and experience of plaintiff's counsel. SPD did not rebut this evidence. The trial court applied the controlling *Mahler* lodestar analysis to order reimbursement of Helton's costs and reasonable attorneys' fees based on Helton's unrebutted evidence. Under these circumstances, was the trial court's reimbursement of costs and fees manifestly unreasonable?

C. SPD's motion for reconsideration of the trial court's order for reimbursement of Helton's reasonable fees and costs presented untimely additional materials that did not comply with CR 59. Was the trial court's denial of SPD's motion and exclusion of these materials under CR 59 manifestly unreasonable? Should the Court of Appeals refuse to consider SPD's untimely materials in reviewing the trial court's PRA penalty and reimbursement of attorneys' fees and costs earlier in the case?

III. STATEMENT OF THE CASE

A. Standard of Review

The trial court's determination of an appropriate penalty for an agency's PRA violation is reviewed for abuse of discretion. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010). An abuse of discretion is a manifestly unreasonable decision or one based on untenable grounds or for untenable reasons. *Id.* A decision is manifestly unreasonable if the trial court adopted a view "that no reasonable person would take," despite applying the correct legal standard to the supported facts. *Id.* (internal citations omitted).

The trial court's reimbursement of attorneys' fees and costs under the PRA also is reviewed for an abuse of discretion. *Sanders v. State of Washington*, 169 Wn.2d 827, 867, 240 P.3d

120 (2010). An award of fees and costs must be based on articulable grounds, making an adequate record so that the appellate court can review a fee award. *Mahler v. Szucs*, 135 Wn.2d 398, 433-35, 957 P.2d 632 (1998).

The trial court's findings of fact will not be overturned if supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Substantial evidence exists "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *King Co. v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 675, 860 P.2d 1024 (1993). A written decision controls over an oral ruling, which "is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963). Unchallenged findings of the trial court are verities on appeal. *In re Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999).

B. Facts

On June 8, 2010, Helton requested that SPD produce records from a closed incident investigation regarding his November 3, 2009 arrest, which never resulted in charges, and a subsequent misconduct investigation of two arresting SPD officers, SPD Officers Matt Hurst and Brian Shaw. CP 1-2, 52-53. Helton

used SPD's "Seattle Police Department Information Request" form to specifically identify and request the "Incident Report," "Follow up" records and a 911 call recording from the incident date of November 3, 2009 at 5:25 p.m. CP 52; 1124. Under the topic of "Other" records, Helton supplied the misconduct investigation number, "IIS 09-0451," to specifically identify and request the misconduct investigation records described in an attached June 2, 2010 letter from SPD for his request. CP 52-53; 1124.

Despite the clarity of Helton's request and the PRA's broad mandate of disclosure, SPD refused to provide a single incident investigation record and, over a month later, produced only a redacted two-page summary report from the misconduct investigation. CP 1-2, 61-62. SPD asserted the same blanket exemption ("RCW 42.56.240(1) and RCW 42.56.230 . . . Information is essential to effective Law enforcement and right to privacy") to withhold all remaining records entirely. CP 63-64. The misconduct summary report redacted the names of the investigated officers, Hurst and Shaw, despite SPD's identifying them in its June 2, 2010 letter to Helton. CP 55, 61-62.

Citing the above blanket exemptions, SPD withheld records relating personally to Helton, including a medical incident report generated by a separate agency, the Seattle Fire Department, whose medics who treated Helton for his arrest injuries, his medical release form and the transcript of his statement to the misconduct

investigator. CP 2, 60, 63-64. SPD's "Public Disclosure Redaction Log" robotically asserted the same blanket exemption even for "In-Car video," even though no such record was available. CP 64. Despite significant differences in the various records requested from two separate investigations, SPD failed the PRA requirement under RCW 42.56.210(3) that the agency must provide "the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." Nor did SPD attempt any redactions as required by RCW 42.56.210(1) as a prerequisite to asserting an exemption.

Following SPD's denial of access to the records requested by Helton, he initiated this PRA enforcement action in June 2011 by filing a complaint and a subsequent show cause motion. CP 1-12; 18-78. Helton moved for a ruling that SPD violated the PRA under the statutory language and existing controlling PRA cases and sought an order compelling records production. His motion was supported by the exhibits attached to his declaration, including his June 8, 2010 SPD records request. CP 48-49; 52-53. The complaint gave SPD notice that Helton would seek a PRA penalty based on aggravating circumstances. CP 10-11.

SPD nevertheless continued to withhold the requested records and aggressively litigated the PRA violations set forth in Helton's complaint and the PRA motion to show cause. SPD filed an answer on July 19, 2011 denying any violation of the PRA. CP

95-100. On August 3, 2011, SPD filed a 50-page pleading consisting of declarations, exhibits and a response to Helton's motion. CP 101-150. SPD sought a hearing and stated its plan to present testimony on the blanket exemptions it asserted. The trial court made special accommodations to schedule testimony by SPD's proposed witnesses, including SPD Captain Thomas Gleason, on separate hearing dates. CP 386.

The initial motion hearing occurred on August 5, 2011. During cross-examination of Captain Gleason, he admitted that SPD's withholding of several records sought by Helton was not essential to effective law enforcement, thereby undermining SPD's argued exemption under RCW 42.56.240(1). 1RP 69-73;[1] CP 386-87. These records included portions of SPD's policies and procedures manual that were reviewed during the misconduct investigation, Helton's medical incident report, Helton's transcribed statement alleging police misconduct, Helton's medical records release form, and a SPD form requesting an "In-Car video" recording. 1RP 69-73. Gleason testified that he was unaware of any harm to any essential function of SPD arising from SPD's disclosure of the names of the officers investigated for misconduct in a letter to Helton prior to his June 8, 2010 PRA request. 1RP 73.

[1] The verbatim report of proceedings are designated as follows: August 5, 2011, "1RP"; September 28, 2011, "2RP"; and November 18, 2011, "3RP."

Gleason further testified that a general offense report, also known as an incident report, was disclosable to the public upon request. 1RP 61. He admitted that SPD also released 911 recordings to the public upon request. 1RP 67-69. SPD did not call as witnesses Officers Hurst or Shaw, who had been investigated for misconduct, nor did these officers intervene to raise privacy objections disclosure of misconduct investigation records sought by Helton. These omissions undermined the factual basis for any privacy exemption under the PRA.

The trial court concluded the August 5, 2011 hearing by directing the parties to submit trial briefs in advance of continued proceedings. 1RP 82-83. A subsequent order directed SPD to show cause at a September 9, 2011 hearing why the trial court should not rule that SPD violated the PRA. CP 377-78. SPD continued to withhold the records requested by Helton in their entirety, and the parties prepared for continued litigation of SPD's violation of the PRA.

On August 18, 2011, the Washington Supreme Court issued its opinion in *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 416, 259 P.3d 190 (2011), holding that police misconduct investigation reports must be disclosed under the PRA, even where the investigated officer raises a privacy objection to disclosure. After receiving notice of this decision, SPD continued to withhold both the incident and police misconduct investigation

records requested by Helton. SPD took a position it later abandoned that Helton's June 8, 2010 records request on SPD's own check-the-box form did not clearly seek the Incident Report, follow-up report and 911 recording. CP 388.

At the same time, SPD's counsel correctly asserted that *Bainbridge Island* addressed "only the privacy exemption contained in the PRA." CP 523; *see Bainbridge Island*, 172 Wn.2d at 433 n.4. Based on this assertion, SPD denied that *Bainbridge Island* required it to produce any records requested by Helton, drawing no distinction between the separate records of incident and misconduct investigations, and representing further that "application of the separate 'essential to effective law enforcement' exemption is also an issue squarely before the Court in this litigation, and we will be continuing to present witnesses to support the application of that exemption." CP 523.

On August 30, 2011, two months after Helton filed his PRA complaint, and one year and two months after Helton filed his June 8, 2010 request for public records, SPD abruptly produced the records and notified Helton and the trial court that it would not recall Captain Gleason, or any other witness, to further dispute SPD's violations of the PRA. CP 388, 396, 529-628. SPD conceded that the remaining issues for the trial court's determination were limited to the amount of the PRA per day penalty to be imposed and reimbursement of mandatory attorneys' fee and costs. CP 388.

Yet, this was only the beginning of SPD's subsequent onslaught of litigation. On September 16, 2011, SPD filed a 134-page pleading in response to Helton's narrowly tailored motion for a PRA penalty and reimbursement fees and costs. CP 647-780. SPD's pleading included six declarations and multiple evidentiary exhibits in which SPD continued to dispute any PRA violation, arguing instead that "SPD complied with the law as it existed at the time of Mr. Helton's request, and again complied with the law after *Bainbridge Island*," while presenting a new argument that Helton was not a prevailing requestor. CP 650. SPD also moved to strike Captain Gleason's damaging August 5, 2011 testimony that undermined SPD's continuing PRA exemption arguments. CP 648.

At the September 28, 2011 hearing on Helton's motion, the trial court's initial focus, thus, was on ruling that SPD had violated the PRA by wrongfully withholding the records at the time of Helton's June 2010 request, rendering Helton a prevailing records requestor. 2RP 5. The court made clear that SPD violated the PRA under the law as it existed at the time of Helton's request, and not just under recent PRA decisions such as *Bainbridge Island*: "So there is a violation. Under the laws that developed, they should have provided all of it. I don't think that the recent cases are cases that change the law, but recognize what the law is in public disclosure. And it's what the law is in public disclosure established by the legislature that is the duty of everyone to follow." 2RP 5.

The trial court then turned to the issue of imposition of a $45 per day PRA penalty based upon its review of the *Yousoufian* decision and determination of aggravating and mitigating factors arising from SPD's violation from the record. 2RP 5-6. SPD's counsel fully embraced the court's determination of these factors, stating "the Court made a really great finding of mitigating factors and aggravating factors." 2RP 14.

The trial court memorialized its PRA penalty considerations in a subsequent written order. CP 1124-25. The court expressly found two aggravating factors regarding SPD's violation of the PRA: "Under *Yousoufian*, the following aggravating factors are supported by the evidence: (a) unreasonableness of explanation for nondisclosure that relied upon a narrow reading of PRA exemptions by agency in its own interests; (b) the public importance of imposing a PRA penalty to encourage law enforcement agencies to comply in good faith with the PRA's broad mandate of disclosure of records to foster public trust and allow public access to records." CP 1125. The court also found three mitigating factors, which included "(a) prompt procedural response [of] the records request; (b) strict PRA procedural compliance; (c) no evidence of improper training or supervision of agency personnel." CP 1125. Consistent with its oral ruling, the order also found "no evidence of any lack of clarity regarding the records identified and requested by Helton," demonstrating the absence of

this *Yousoufian* mitigating factor, which raised SPD's culpability. CP 1124; 2RP 2.

The trial court concluded the September 28, 2011 hearing by reserving ruling on Helton's request for reimbursement of attorneys' fees and costs for the parties to address the fees analysis in *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998). 2RP 6-7. The court made clear that it expected a "motion, response, reply," including a "critical response" by SPD to specific issues under *Mahler* involving the experience of Helton's counsel, reasonableness of hourly rates, reasonableness of time devoted to the case, block billing practices, and use of contemporaneous billing records. 2RP 16. At no point did the court make final determination on any fees issue, but instead sought additional briefing and argument by the parties before ruling. 2RP 6-7. The court's directions also allowed Helton to submit a request for fees and costs incurred through the September 28 hearing date.

Helton's November 9, 2011 fees motion addressed the *Mahler* lodestar fees analysis and issues identified at the hearing, as directed by the trial court, was supported by the expert declaration of Shelley Hall, a partner at the Seattle law firm of Stokes Lawrence, P.S., regarding the reasonableness of the reimbursement under controlling law and the current Seattle legal market, and included a complete itemization of fees and costs. CP 853-65, 1021-1025. Ms. Hall specifically found that Helton's

counsel devoted a reasonable amount of time prosecuting Helton's PRA claim and in response to SPD's failed litigation tactics:

> 12. In my opinion and based on my experience in access matters, Mr. Helton's counsel spent a reasonable amount of time on this matter. The Seattle Police Department's ("Seattle") tactics caused Mr. Helton to incur much of the attorney's fees. Rather than respond to Mr. Helton's Public Records Act ("PRA") show cause motion on the briefs and with argument, as is typical, Seattle decided to call multiple witnesses. This choice turned the show cause hearing into a mini-trial. Mr. Helton's counsel was forced to prepare cross-examination of at least three witnesses, work on what essentially was a trial brief, and participate in a full-day hearing. Seattle's approach was unusual for a show cause motion and obviously was costly to all parties.
>
> 13. Seattle continued this unusual and inefficient approach as the case continued. Seattle made two Rule 68 offers of judgment, which required more research and work. Even after producing the documents, Seattle attempted to turn the fee/penalty hearing into a full hearing on the merits. This again caused more work and more corresponding attorney's fees because a hearing that typically would have been short and focused on the issues turned into a full morning of argument. Finally, Seattle refused to cooperate on a proposed order (despite receiving a transcript of the Court's ruling) and demanded oral argument on both the entry of the order and on attorney's fees. This again not only complicated issues but lengthened proceedings and increased the amount of attorney work required. Notably, Mr. Helton's counsel did not request argument on the presentation of the order or on the second fee motion. It was Seattle's tactical decisions – rather than excessive work by Mr. Helton's counsel – that increased attorney's fees in this case.

CP 1023-24.

SPD filed a response to Helton's motion and declaration of counsel with exhibits, but did not include an expert rebuttal to Ms. Hall's declaration. CP 1028-1113. SPD instead resorted to inflammatory rhetoric and disparaging Helton's counsel through assertions that counsel sought to be "rewarded for sub-par work by being allowed to raid the public treasury . . . during a time when public funds are being drastically reduced to the detriment of most vulnerable in our society – the sick, the elderly, and children." CP 1039. SPD also unilaterally sought a hearing for presentation of the order regarding its PRA violation, despite the lack of any apparent necessity to consume additional time in court.

At the November 18, 2011 hearing on Helton's motion and presentation of the order, SPD also did not call any witness to rebut Ms. Hall's declaration or present rebuttal evidence. SPD relied on a lengthy oral presentation and a PowerPoint presentation, projecting exhibits that previously had not been disclosed to Helton while its counsel struggled to answer inquiries from the trial court regarding numerous problems with SPD's response. CP 1424; 3RP 1-87. For example, although SPD maintained records of the time that its attorneys had spent litigating the case, SPD conceded in response to an inquiry by the court that it did not supply these records for comparison to Helton's billing entries that it criticized. 3RP 14. Instead of providing an evidentiary basis for SPD's request for a reduction in the fees and costs Helton sought, SPD

made a novel argument that the trial court should reimburse only 45% of the total because the PRA penalty was $45 of a possible $100 per diem amount. 3RP 41-42. SPD's counsel conceded making this argument because it was the "easy thing for me to do in this case." 3RP 45. Ultimately, SPD's argument simply was that in SPD's view as the defeated party, the substantiated reimbursement sought by Helton was "inherently unreasonable." 3RP 50.

The trial court found that Helton had satisfied his burden of proof under the controlling *Mahler* lodestar analysis and based upon his RPC 1.5(a) showing. The court ordered SPD to pay $132,585.50 in proven fees. CP 1149-1152. The court deducted $700.00 to eliminate portions of two time entries discussed at the November 18, 2012 hearing. CP 1151; 3RP 79-80, 84-85. The court rejected SPD's unprecedented theory that only 45% of Helton's fees and costs should be reimbursed based upon the $45 per diem PRA penalty. 3RP 76. Lastly, the court also entered the order on SPD's violation of the PRA. CP 1123-26; 3RP 86-87.

SPD, however, continued to aggressively pursue post-judgment litigation by filing voluminous pleadings that required significant additional time for review and response by Helton's counsel. On January 9, 2012, SPD filed a motion for reconsideration of the trial court's order on PRA attorneys' fees and costs. SPD's motion, two supporting declarations and multiple exhibits totaled 234 pages. CP 1163-1400. SPD subsequently

filed *two* supporting reply briefs (one filed prematurely *before* Helton filed his timely response to the motion at the trial court's direction), an additional declaration and additional exhibits totaling 93 more pages. CP 1486-1572.

Despite the volume of SPD's reconsideration materials, SPD's motion failed to provide the basic grounds for relief under CR 59 regarding presentation of otherwise untimely evidence. Thus, the trial court denied SPD's motion in a written order on February 9, 2012. CP 1441-43. Helton sought reimbursement of additional attorneys' fees and costs reasonably incurred to respond to SPD's reconsideration motion, again providing the court with a supporting itemization of the work. CP 1444-1481

SPD responded with another 87 pages of materials including its response, a declaration from a purported expert, Ramsey Ramerman, whose prior declaration had been excluded as untimely under CR 59 (a)(4), and additional exhibits. CP 1486-1572. The court issued a March 16, 2012 order rejecting SPD's argument that "the cumulative total fees claimed are excessive as a matter of law," and other arguments lacking an evidentiary basis. CP 1596-98. The court's final order reimbursed Helton's additional attorneys' fees and costs, while deducting $600.00 based upon three billing entries that lacked sufficient specificity. CP 1607-09.

IV. ARGUMENT

"Government agencies may not resist disclosure of public records until a suit is filed and then, by disclosing them voluntarily, avoid paying fees and penalties." *West v. Thurston County*, 144 Wn. App. 573, 581, 183 P.3d 346 (2008) (citing *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005)). SPD's litigation tactics before the trial court were designed to seek this unlawful objective after Helton incurred significant legal expenses to obtain public records SPD withheld in violation of the PRA. On appeal, SPD's objective remains the same.

The trial court's penalty for SPD's violation of the PRA and its reimbursement of Helton's fees and costs, however, were well within the controlling and deferential abuse-of-discretion standard of review and must be affirmed. Helton objects to SPD's 14 assignments of error, which are redundant of the dispositive two issues in this appeal on whether the trial court properly exercised its discretion in setting the amount of the PRA penalty (Assignments A – F) and reimbursing Helton's costs and fees (Assignments G – N). Helton further objects to these assignments of error because SPD seeks *de novo* review of findings that are not subject to such scrutiny under the controlling standard of review. Lastly, Helton objects to consideration of SPD's CR 59 materials, which the trial court properly excluded as untimely based on SPD's failed CR 56 showing.

Because SPD fails to show that the penalty or fees were manifestly unreasonable, the trial court should be affirmed.

A. The Trial Court's Determination Of A Penalty For SPD's Violation Of The PRA Was A Proper Exercise Of Discretion Under The Controlling Standard Of Review

The PRA is a "strongly worded mandate for broad disclosure of public records." *Prison Legal News, Inc. v. Dep't of Corrections*, 154 Wn.2d 628, 635, 644, 115 P.3d 316 (2005). If a court rules that an agency has violated the PRA, "it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record." RCW 42.56.550(4). Judicial enforcement of the PRA through imposition of a penalty promotes the legislative intent of the statute: "Strict enforcement of this provision discourages improper denial of access to public records." *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005). A court has "considerable discretion under the PRA's penalty provisions in deciding where to begin a penalty determination." *Yousoufian*, 168 Wn.2d at 466-67.

In *Yousoufian*, the Supreme Court set forth sixteen aggravating and mitigating factors for consideration in determining an appropriate PRA penalty. *See Yousoufian*, 168 Wn.2d at 459-64. The *Yousoufian* factors, simply put, set the daily penalty based

upon an agency's culpability level in violating the PRA. The aggravating factors that may increase a PRA penalty are:

> (1) a delayed response by the agency, especially in circumstances making time of the essence, (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions, (3) lack of proper training and supervision of the agency's personnel, (4) unreasonableness of any explanation for noncompliance by the agency, (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency, (6) agency dishonesty, (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency, (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency, and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

Id. at 467-68 (footnotes omitted).

Mitigating factors are:

> (1) a lack of clarity in the PRA request, (2) the agency's prompt response or legitimate follow-up inquiry for clarification, (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions, (4) proper training and supervision of the agency's personnel, (5) the reasonableness of any explanation for noncompliance by the agency, (6) the helpfulness of the agency to the requestor, and (7) the existence of agency systems to track and retrieve public records.

Id. at 467 (footnotes omitted).

SPD's challenge to the PRA penalty determined by the trial court is premised on its misreading of *Yousoufian* that the above factors constitute an exclusive list. To the contrary, the *Yousoufian* Court made clear that the factors were nonexclusive and merely a starting point to provide guidance to a trial court for determining a PRA penalty using its considerable discretion:

> Our multifactor analysis is consistent with the PRA and our precedents and provides guidance to trial courts, more predictability to parties, and a framework for meaningful appellate review. **We emphasize that the factors may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate considerations.** Additionally, no one factor should control. **These factors should not infringe upon the considerable discretion of trial courts to determine PRA penalties.**

Id. at 467-68 (footnotes omitted and emphasis added).

The trial court's imposition of a conservative $45 per diem penalty, at less than half the $100 statutory maximum under RCW 42.56.550(4), constituted a proper exercise of discretion based upon the record that promoted the PRA's strongly worded mandate for broad disclosure of public records and legislative intent to discourage improper denials of access in the future. The court's written order of November 18, 2011 articulated findings of fact and conclusions of law that amply supported this PRA penalty. CP 1123-26. By its plain terms, the order showed that the court

reviewed the record in its entirety, the applicable PRA provisions, and the controlling *Yousoufian* decision before imposing a penalty appropriate to address SPD's violation of the PRA by denying Helton access to requested records for over a year. CP 1124.

The $45 per diem penalty reflected the court's finding of both aggravating and mitigating factors that roughly balanced each other. Although the order cited two aggravating and three mitigating factors, the court's additional finding that Helton's request did not lack clarity raised SPD's culpability under *Yousoufian*. Yet the penalty was conservatively less than half the full amount authorized by statute. *See* RCW 42.56.550(4).

SPD's complaint that the trial court found "just two *Yousoufian* aggravating factors" begs improper *de novo* review. Substantial evidence supports both factors. Substantial evidence shows that SPD's explanations for violating the PRA were patently unreasonable and premised on its unauthorized assertion of blanket exemptions. SPD unreasonably withheld records that had nothing to do with effective law enforcement or officer privacy, including Helton's own medical release form and medical incident report generated by a separate agency, the Seattle Fire Department.

The trial court's aggravating factor regarding the "public importance of imposing a PRA penalty to encourage law enforcement agencies to comply in good faith with the PRA's broad

mandate of disclosure," which tracked the seventh *Yousoufian* factor, also was supported by substantial evidence. This evidence included SPD's size as a large municipal police department and the seriousness of the public safety issues related to records of alleged police misconduct and the violation of Helton's civil rights during a time when SPD remained subject to an investigation by the U.S. Department of Justice for a pattern of widespread civil rights violations. CP 10-11, 28, 37. Given these circumstances, the court's determination of a second aggravating factor arising from SPD's PRA violation was fully consistent with promoting the statutory public policy favoring disclosure through strict judicial enforcement. *See Spokane Research*, 155 Wn.2d at 101; RCW 42.56.030 ("The people of this state do not yield their sovereignty to the agencies that serve them. . . . The people insist on remaining informed so that they may maintain control over the instruments that they have created"); RCW 42.56.550(3) ("Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others").

Thus, SPD's conclusory assertion that the trial court's penalty was "arbitrary and manifestly unreasonable" is insufficient to show error under the controlling standard of review. *See Appellant's Opening Brief* at 18. Instead, the trial court's

comparison of the determination of a PRA penalty to a standard range sentence in a criminal case provided a compelling analogy regarding its considerable discretion. 3RP 68-69. While a trial court's selection of the exact number of months for a sentence or the exact dollar amount for a PRA penalty is inherently a subjective judicial process turning on the evidence presented by the parties, it also is a matter of discretion that the legislature and appellate courts have allocated to the trial court for statutory enforcement.

Moreover, there is no holding in *Yousoufian* requiring a finding of gross negligence before a trial court may impose a $45 per diem penalty, as implied by SPD. Nor did the *Yousoufian* Court impose a proportionality requirement that the penalty reflect a mathematically precise proportion of aggravating to mitigating factors. Such a formulaic approach would deprive the trial court of discretion to balance and weigh aggravating and mitigating factors in assessing an agency's culpability for a PRA violation in any given case. Instead, *Yousoufian* merely requires a trial court to consider the non-exclusive list of aggravating and mitigating factors before exercising its "considerable discretion" to determine a per diem penalty of up to $100 as set forth by the statute under RCW 42.56.550(4).

SPD's argument that a $45 per diem penalty must be premised upon a finding of gross negligence is not supported by controlling law, undermines the purposes of the penalty provision

under RCW 42.56.550(4), and should be rejected. At the same time, the trial court's $45 per diem PRA penalty should be upheld as fully consistent with the *Yousoufian* factors and based upon a demonstrably reasoned exercise of proper discretion. SPD fails to show that "no reasonable person" would have adopted the court's view of the record in imposing this penalty.

SPD's comparison of the trial court's $45 per diem penalty to penalties imposed by different courts on different facts also goes beyond the deferential standard of review. It is largely irrelevant to a review of the trial court's penalty for an abuse of discretion that the *Yousoufian* Court set a $45 per diem penalty, or that the Court of Appeals in *Bricker v. State Dept. of Labor and Industries*, 164 Wn. App. 16, 262 P.3d 121 (2011) upheld a $90 per day penalty, or the U.S. District Court in *Lindell v. City of Mercer Island*, __ F. Supp. 2d __, 2011 WL 2535147 (W.D. Wash. 2011) determined penalties that ranged from $5 to $75. Instead, the inquiry is whether the trial court imposed a PRA penalty based upon a consideration of the *Yousoufian* factors and the facts contained in the record. Here, the trial court did precisely that.

On appeal, SPD's penalty argument additionally suffers from the flaw that the trial court found SPD unlawfully withheld basic incident investigation records, including the Incident Report, follow-up reports and a 911 recording. These incident investigation records were never subject to the discussions of exemptions

applying to police misconduct investigation records in *Bainbridge Island* or *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988), or to the even more removed facts regarding investigations of teachers for sexual misconduct in *Bellevue John Does 1-11 v. Bellevue School District #405*, 164 Wn.2d 199, 189 P.3d 139 (2007). Instead, the PRA obligated SPD to produce these incident investigation records promptly. *See* RCW 42.56.100 (agencies "shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information"). Agencies cannot play "hide the ball" by withholding existing and identifiable records that are part of a larger records request. *See Violante v. King Co. Fire District No. 20*, 114 Wn. App. 565, 571 n.14, 59 P.3d 109 (2009) (holding that PRA required agency to produce existing budget records in response to request for "2001 budget" that was subsumed by agency's 2000-2002 budget).

SPD's citation of *Bainbridge Island* and *Bellevue John Does* further undermines its argument, because third parties in both cases specifically asserted privacy rights and moved to enjoin disclosure based upon PRA privacy exemptions. In *Bellevue John Does*, the non-party teachers who did not assert a right of privacy, like Officers Hurst and Shaw, were not entitled to an exemption for nondisclosure, and the agencies produced the records without redactions to the requestor. *Bellevue John Does*, 164 Wn.2d at 206 n.4. Therefore, it was never reasonable for SPD to rely on a

blanket privacy exemption to avoid the PRA's broad mandate of disclosure where no privacy interest was asserted by the individuals who held such interests.

Although also beyond the deferential abuse-of-discretion standard of review, SPD fails to demonstrate how disclosure of the records of the internal investigation of Officers Hurst and Shaw "(1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public" under RCW 42.56.050. *See also Bellevue*, 164 Wn.2d at 212; *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 135-36, 580 P.2d 246 (1978). The record contains no evidence specifically relating to Officers Hurst and Shaw to satisfy SPD's burden to demonstrate the applicability of an exemption. Instead, SPD failed to weigh longstanding precedent in denying Helton misconduct investigation records under blanket exemptions. *See Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997) (City failed burden to prove applicability of exemption to request for records of police misconduct in light of PRA's "strongly worded mandate for broad disclosure of public records").

As the Supreme Court has noted, "'[l]eaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.'" *Amren*, 131 Wn.2d at 34, n.6 (quoting, *inter alia*, *Servais v. Port of Bellingham*, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995). The trial court properly exercised discretion to impose a per diem penalty that weighed SPD's violation of the PRA

for over a year in denying Helton access to public records under the controlling *Yousoufian* factors and express legislative purposes of the Act. Accordingly, the trial court should be affirmed.

B. The Trial Court's Mandatory Reimbursement Of Helton's Reasonable Attorneys' Fees And Costs Regarding SPD's Violation Of The PRA Was A Proper Exercise Of Discretion Under The Controlling Standard Of Review

Under the PRA, a prevailing records requestor is entitled to recover "all costs, including reasonable attorney fees, incurred in connection with such legal action." RCW 42.56.550(4). The mandatory award of attorney fees and costs to a prevailing records requestor in a PRA action is intended to make enforcement of the Act "financially feasible" by citizens. *Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503 (ACLU II)*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999) ("permitting a liberal recovery of costs is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access public records"). At the same time, "permitting an agency to avoid attorney fees by disclosing the documents after the plaintiff has been forced to file a lawsuit also would undercut the policy behind the Act. This we refuse to do." *Coalition on Government Spying v. King Co. Dept. of Public Safety*, 59 Wn. App. 856, 862, 801 P.2d 1009 (1990).

The trial court properly exercised discretion to reimburse Helton's reasonable fees and costs under RCW 42.56.550(4)

based on clearly articulated factual findings satisfying the factors under *Mahler* and RPC 1.5(a). SPD's overly litigious approach in disputing every aspect of the case required Helton to submit multiple requests for reimbursement each time SPD protracted the litigation, e.g., by filing a motion for reconsideration. On each such occasion, Helton satisfied his burden to prove the reasonableness of the fees and costs that the court awarded, while SPD failed to rebut this showing. Under these circumstances, SPD cannot show that the trial court's reimbursement was manifestly unreasonable.

Instead, SPD raises several meritless points to avoid the controlling and deferential standard of review. To begin, SPD mischaracterizes the trial court's September 28, 2011 hearing at which the court directed the parties to submit additional briefing to address certain factors under the controlling *Mahler* decision. Contrary to SPD's description, the court did not "rule" at this hearing on any fees issue, and therefore did not "reverse" itself later.

Rather, the trial court deferred its ruling until after the parties briefed the *Mahler* factors. During its instructions to the parties, the court appropriately gave notice that that it would closely scrutinize block billing, attorney conferences and other factors under its *Mahler* analysis. Helton's subsequent motion and supporting materials provided detailed descriptions of each task performed for

each day spent working on the case and satisfied the court's inquiries by addressing the *Mahler* factors.

Ultimately, the court's December 30, 2011 written order contained its singular ruling on the reimbursement of Helton's reasonable fees and costs. CP 1149-52. This written order controls over any oral comments from the bench. *See Ferree*, 62 Wn.2d at 567. Since the written order articulated findings of fact and conclusions of law that amply weigh the *Mahler* and RPC 1.5 factors based on the record, SPD fails to show that the order reimbursing Helton's reasonable fees and costs was an abuse of discretion.

Next, SPD complains that the trial court shifted the burden of proving the reasonableness of the requested fees and costs. SPD cites no authority for its proposition that once a prevailing records requestor demonstrates the reasonableness of requested fees and costs, as Helton did, an agency may avoid a judgment for reimbursement of those fees and costs under RCW 42.56.550(4) without offering rebuttal evidence. This is because no such authority exists, and SPD's contention is without merit. The strict limitations under CR 59 on additional evidence after such a judgment demonstrate the need for an agency to timely present evidence when the issue is pending for adjudication.

The trial court made clear to SPD that it was providing an opportunity for a "critical response" to Helton's fees and costs

motion. 2RP 16. SPD forfeited this opportunity by failing to rebut the expert opinion evidence Helton presented in the declaration of Shelley Hall and making the uncorroborated argument that the reimbursement sought was inherently unreasonable. 3RP 57-58. Yet, Ms. Hall's declaration demonstrated the reasonableness of the reimbursement Helton sought in light of the experience of counsel, Seattle legal market rates and time necessary to respond to SPD's "unusual and inefficient approach as the case continued." CP 1023. SPD's dereliction in not timely presenting rebuttal evidence does nothing to demonstrate a manifestly unreasonable ruling by the trial court, which specifically addressed and rejected SPD's burden-shifting argument: "This court's comments during our hearings on the attorney fee petition inquiring whether defendants had affidavits, evidence or specifics supporting their objections to Plaintiff's petition were not intended to shift the burden to the Defendants, but only to give Defendants the opportunity to clearly identify any evidence or arguments that pertained to the question. The Court agrees, the burden is on Plaintiff to establish the entitlement and reasonableness of the fees he is requesting the Court to approve." CP 1442. Nor did the trial court's exclusion of SPD's untimely evidence under CR 59, as discussed below, constitute an abuse of discretion.

The trial court also made clear that its reimbursement of Helton's reasonable fees and costs was not based upon a punitive

purpose, but rather upon a weighing of the *Mahler* and RPC 1.5(a) factors and the following findings based upon the record: "The hourly rates charged and the number of hours performed in order to prosecute the case for Helton were reasonable. The record is clear that SPD chose to dispute the PRA complaint. The scope and extent of courtroom hearings and underlying briefing may have exceeded the amount of work necessary to present a typical PRA case. Plaintiff was required to prepare for the testimony of SPD witnesses and to respond to SPD's claimed PRA exemptions. The time expended by Plaintiff's counsel has been found to be reasonable under the circumstances." CP 1150-51; *see* 3RP 66 ("And I agree with that. Attorney's fees are not here to penalize"). Thus, the record does not support SPD's argument that the court relied on "an incorrect standard of law" in ordering reimbursement of Helton's reasonable fees and costs.

Lastly, SPD's argument that the trial court's application of *Mahler* constituted an abuse of discretion is undermined by SPD's gross simplification of the record regarding its meritless efforts to dispute its violation of the PRA through excessive litigation. Even after producing the records it had withheld unlawfully for over a year during the middle of proceedings before the trial court, SPD continued to rely on inapplicable exemptions to dispute that Helton was the prevailing party. The work that Helton's counsel performed to respond to SPD's contentious litigation tactics throughout this

period of the case was documented in itemized billing records that were reviewed and found reasonable by Helton's expert witness, Ms. Hall, whose qualifications are not challenged on appeal and whose opinion was not rebutted by SPD. Nor does SPD challenge the sufficiency of the qualifications and experience of Helton's counsel, or the rates charged in the Seattle legal market, which are verities on appeal.

Instead, SPD seeks improper *de novo* review of the same distinguishable cases it belatedly presented to the trial court in its untimely motion for reconsideration. *See Appellant's Opening Brief* at 44-45. None of these cases involved the reimbursement of attorneys' fees within the last year in the Seattle legal market. Nor is it possible for a reviewing court to determine whether the agencies utilized the same litigation tactics as SPD to dispute PRA violations. The cited commentary of Mr. Ramerman, whose qualification as a fees expert on behalf of SPD remains unproven because of the untimeliness of his statements in the case under CR 59, does nothing to establish an abuse of discretion by the trial court. In the end, SPD's efforts to shoehorn this authority into its arguments regarding the trial court's reimbursement of Helton's reasonable attorneys' fees and costs must fail.

C. The Trial Court Properly Denied SPD's Motion For Reconsideration Of Reasonable Fees And Costs Based On SPD's Failure To Show CR 59 Grounds

SPD's motion for reconsideration of the trial court's order reimbursing Helton's attorneys' fees and costs as a prevailing records requestor under RCW 42.56.550(4) failed to make a showing of legal grounds under CR 59 to justify consideration of untimely additional evidence. CP 1442. The motion did not "identify the specific reasons in fact and in law as to each ground for which the motion is based" to show how it qualifies under any of the nine grounds set forth in CR 59(a), a requirement imposed upon SPD by CR 59(b). Instead, SPD presumptuously stated, nearly two months after the trial court's November 18, 2011 hearing and oral ruling, that it was "now" presenting additional evidence. CP 1169. SPD did so under the pretense of addressing "the Court's concerns." CP 1167. But the trial court's December 30, 2011 order memorializing its November 18 ruling reflected no such "concerns." CP 1149-52.

SPD further made no attempt to satisfy the legal standard for newly discovered evidence under CR 59 (a)(4), the only possible ground authorizing consideration of additional evidence on the merits of a determined issue. CR 59(a)(4) bars relief to a party moving for reconsideration that fails to show it could not have obtained the newly discovered evidence earlier. *See West v. Thurston County*, 144 Wn. App. 573, 580, 183 P.3d 346 (2008)

(affirming trial court's denial of motion for reconsideration under CR 59(a)(4) where moving party "made no showing" that it could not have obtained the newly discovered evidence earlier). This is because "evidence presented for the first time in a motion for reconsideration without a showing that the party could not have obtained the evidence earlier does not qualify as newly discovered evidence." *See In re Marriage of Tomsovic*, 118 Wn. App. 96, 109, 74 P.3d 692 (2003). SPD made no showing that it could not have obtained the additional evidence, including Mr. Ramerman's purported expert declaration, prior to the trial court's November 18, 2011 oral ruling. Therefore, SPD's motion was barred by CR 59 and the additional materials presented by SPD were properly excluded.

The February 8, 2012 order denying SPD's motion for reconsideration made clear that the trial court held Helton to his burden to prove "the entitlement and reasonableness of the fees" he requested and did not shift this burden to SPD. CP 1442. Instead, the trial court gave SPD every opportunity to "clearly identify any evidence or arguments that pertained to the question." CP 1442. The fees ordered were "not a reward or bonus," but rather met the "standard of reasonableness." CP 1442. The trial court gave careful consideration to the petition. At the same time, SPD's untimely evidence did not constitute "newly discovered evidence" under CR 59 (a)(4).

On appeal, SPD again ignores the provisions of CR 59, which is not cited or discussed in SPD's Opening Brief, and the preclusive effect of the trial court's ruling regarding SPD's untimely materials. Given the trial court's clearly articulated order denying SPD's motion for reconsideration, SPD fails to demonstrate an abuse of discretion in the CR 59 ruling. CP 1441-43. Thus, SPD's excluded evidence, including the untimely declarations of Ramsey Ramerman and Gary Smith, and exhibits, should not be considered on the merits of SPD's appeal.

V. CONCLUSION

For over a year, SPD denied Helton access to public records relating to an arrest that did not support charges and for which he alleged he was the victim of police misconduct and civil rights violations. SPD obstinately continued to withhold the records under inapplicable exemptions, even after Helton filed this PRA enforcement action and gave notice of aggravating factors warranting a PRA penalty. On appeal, however, SPD no longer disputes that it violated the PRA through its actions. Because SPD has failed to demonstrate that the trial court's imposition of a $45 per diem penalty based upon SPD's PRA and mandatory reimbursement of Helton's attorneys' fees and costs under RCW 42.56.550(4) was an abuse of discretion, the Court of Appeals should affirm both rulings. In addition, Helton requests

reimbursement of costs and attorneys' fees incurred on appeal under RCW 42.56.550(4) and RAP 18.1.

DATED this 14th day of June, 2012.

Patrick J. Preston, WSBA No. 24361
Thomas M. Brennan, WSBA No. 30662
McKay Chadwell, PLLC
Attorneys for Respondent Turner Helton