

No. 70992-5

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

UNIVERSITY OF WASHINGTON,

Appellant,

vs.

ISABELLE BICHINDARITZ,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MONICA J. BENTON

BRIEF OF APPELLANT

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I. INTRODUCTION

In this Public Records Act case, the trial court penalized appellant University of Washington \$723,290.50, finding after trial by affidavit that the University should have produced over 12,000 pages of documents on the same day that the University received respondent Dr. Isabelle Bichindaritz's June 2011 PRA request.

The trial court had no basis for finding a PRA violation. While the trial court found that the University had "assembled" 25,000 pages under a September 2009 PRA request, Dr. Bichindaritz had closed that request in February 2011, after the University had produced 13,000 pages but had not reviewed the remaining 12,000 pages. When Bichindaritz asked the University to "restart processing" her records request in June 2011, the University processed and then produced the remaining 12,000 pages of documents in installments beginning two months after her request. It completed in just five months the process of determining which of the 12,000 pages were exempt from disclosure as public employee performance evaluations and student education records protected by federal law.

This Court should hold on de novo review that the University satisfied its obligations under the PRA as a matter of law, thereby

mooting the other issues raised in this appeal. But even if this Court finds a PRA violation, the trial court's unprecedented \$723,290.50 fine and accompanying \$102,958.03 fee award must be reversed because they are unsupported by the record. In imposing this massive penalty, the trial court not only fined the University for failing to produce documents on the very day Bichindaritz made her request, but calculated its fine based upon the number of pages responsive to her request, rather than "for each day that [the requestor] was denied the right to inspect or copy" a public record, as authorized by RCW 42.56.550.

The trial court's \$723,290.50 penalty must also be reversed because the University did not act in bad faith. The trial court's finding of bad faith is refuted by undisputed evidence, including the trial court's own unchallenged summary judgment order dismissing Bichindaritz's claim that the University violated the PRA in responding to her 2009 request and Judge Lasnik's decisions in Bichindaritz's federal lawsuit in which she unsuccessfully challenged under Title VII the University's refusal to award her tenure. At a minimum, this Court should reduce the \$723,290.50 penalty.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Order Granting Plaintiff's Motion To Conduct Trial By Affidavit, By Audio Link, Or Request To Move The Trial Date. (CP 193-94)

2. The trial court erred in entering Findings of Fact 1.21, 1.24, 1.34, 1.37, 1.39, 1.40, 1.43 and Conclusions of Law 2.7, 2.8, 2.9, 2.10, 2.11, 2.12, 2.16, 2.17, 2.19, 2.20, 2.21, underscored in Appendix A. (CP 1128-49)¹

3. The trial court erred in entering its Order Denying Defendant's CR 59 Motion. (CP 2082-83)

4. The trial court erred in entering its Order Granting Plaintiff's Motion To Strike Declarations Of Andrew Palmer, Lesa Olsen, And Seth Berntsen. (CP 2138-39)

5. The trial court erred in entering Findings of Fact 7, 9 and 15, Regarding Plaintiffs' Petition for Attorney Fees and Costs, underscored in Appendix B. (CP 2143-50)

6. The trial court erred in entering its Judgment against the University. (CP 2168-69)

¹ The trial court underscored a portion of Conclusion of Law 2.2. The University does not assign error to Conclusion of Law 2.2.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the University violate the PRA by not producing over 12,000 pages the same day it received a document request and before the University had reviewed and processed the documents for exempt information as required by the PRA? (FF 1.39, CP 1137; CL 2.8, 2.9, 2.11, 2.12, 2.21, CP 1142-44, 1148-49)

2. RCW 42.56.550 authorizes a court to fine an agency for “each day that [a requestor] was denied the right to inspect or copy said public record.” Is a \$723,290.50 penalty based upon the number of *pages* responsive to a PRA request contrary to the language of the statute, its policy, and the principle that PRA penalties should be based on an agency’s culpability rather than on the size of the plaintiff’s request? (CP 1148-49, CP 2168-69)

3. Must a fine based on the trial court’s determination that the University intentionally withheld documents of “import” to litigation brought by the requestor be reversed because it is refuted by the undisputed testimony of public records office employees and by the findings of the judge who presided over the requestor’s litigation? (CL 2.17, 2.19, CP 1145-48)

4. Was plaintiff's counsel entitled to a lodestar hourly rate of \$550, which exceeded the rate he charged his client and the rate of far more experienced litigators in PRA cases? (CP 2143-50)

5. Did the trial court err by assessing interest at 12% on its PRA penalty of \$723,290.50 against the State? (CP 2168-69)

IV. STATEMENT OF THE CASE

A. Statement of Facts.

1. Bichindaritz filed a Public Records Act request following the University's denial of her tenure application.

This is a Public Records Act (PRA) lawsuit arising from the University of Washington's denial of tenure to Isabelle Bichindaritz at the University's Tacoma Institute of Technology. (CP 1388-89; FF 1.17, CP 1132) The University postponed Bichindaritz's first application for tenure in 2005-06, made three years after she was hired. (CP 1383-84) The University's Provost again postponed a tenure decision on Bichindaritz's second application for tenure in 2007-08, and denied Bichindaritz's third and final application in 2008-09. (CP 1384-89)

Bichindaritz filed an administrative appeal of the denial of tenure and sued the University for gender discrimination in U.S. District Court. After a six-day trial, Judge Robert Lasnik found that

the University had not discriminated against Bichindaritz. (CP 1388; FF 1.38, CP 1137) The Ninth Circuit affirmed. *Bichindaritz v. Univ. of Washington*, 12-35405, ___ Fed. Appx. ___, 2013 WL 6671384 (9th Cir. Dec. 19, 2013). Her administrative challenge to the denial of tenure was rejected in King County Superior Court. See Cause Number 12-2-19058-5 SEA.

After the University denied her last tenure application, Bichindaritz emailed a public record request to the University's Office of Public Records and Open Meetings ("OPR") on September 9, 2009, seeking "a complete copy of all my personnel files and public records at the University of Washington, at the University of Washington Tacoma, and at the Institute of Technology." (FF 1.3, CP 1129; CP 393-96, 1166-68) The multi-layered tenure process draws on the recommendations of many participants – an initial tenure committee review, a vote by the candidate's senior faculty, a recommendation by the department chair, followed by a recommendation by the Chancellor and a final decision by the University Provost. (CP 331, 1384-85) Bichindaritz "request[ed] every email related to me (Isabelle, Isabelle Bichindaritz) among all the people involved below." (CP 393, 1166-67; FF 1.3, CP 1129) She

listed 96 individuals in 11 different University departments on two campuses. (CP 315, 393, 1166-67; FF 1.3, CP 1129)

The University's OPR received Bichindaritz's request on September 10, 2009, and responded on September 17, 2009, five business days later. (CP 314-15, 403) Through a series of letters to individual documents holders and department heads, the OPR sought responsive documents relating to the multiple levels of three tenure reviews, and followed up until the various faculty, staff, and administrators in Tacoma and in Seattle produced responsive documents. (CP 314-15, 398-401, 485-552, 1448-1513; FF 1.6, CP 1130) The OPR estimated in its response that it would take 25 days to assemble documents and process her request and told Bichindaritz that the documents would be produced "on a rolling production basis to avoid unnecessary delay." (CP 315, 1170; FF 1.7, CP 1130) The OPR also told Bichindaritz that it would contact her "if additional time is needed to locate, review or assemble documents." (CP 1170)

2. Many of the documents pertaining to Bichindaritz's tenure review were exempt from disclosure under state and federal law.

The PRA requires agencies to redact information exempt from production under state and federal law. See RCW

42.56.070(1) (record must be produced “unless the record falls within the specific exemptions of [the PRA], or other statute which exempts or prohibits disclosure of specific information or records”). Many of the documents pertaining to Bichindaritz’s tenure review contained information that could not be disclosed. (CP 322-23)

The PRA prohibits disclosure of “[p]ersonal information in files maintained for employees . . . of any public agency to the extent that disclosure would violate their right to privacy.” RCW 42.56.230(3). This exemption ensures “candor in the evaluation process” and applies to performance evaluations that do not mention specific instances of misconduct of public employees, including public educators. *Dawson v. Daly*, 120 Wn.2d 782, 799-80, 845 P.2d 995 (1993), *overruled on other grounds by Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994); *Brown v. Seattle Pub. Schools*, 71 Wn. App. 613, 619-20, 860 P.2d 1059 (1993) (exemption applies “to employees of public education”), *rev. denied*, 123 Wn.2d 1031 (1994). Evaluations conducted as part of the tenure review process fall squarely within this exemption to ensure that faculty provide their honest and candid assessments whether a candidate is deserving of tenure. (CP 331, 335-37)

The Family Educational Rights and Privacy Act (FERPA) prohibits disclosure of “education records” and other “personally identifiable information.” 20 U.S.C. § 1232g(b)(1)-(2). FERPA defines “education records” as “those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C. § 1232g(a)(4)(A). “Personally identifiable information” includes a student’s name, the name of the student’s parent or other family members, as well as “[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community . . . to identify the student with reasonable certainty.” 34 CFR § 99.3; *see* RCW 42.56.230(1) (exempting from disclosure “personal information in any files maintained for students in public schools”). University tenure files and faculty communications often contain confidential FERPA information. (CP 322-24)

3. Bichindaritz closed her 2009 request in February 2011 after receiving over 13,000 pages of documents in six stages.

The OPR produced the first set of documents to Bichindaritz on October 13, 2009, less than 30 days after its initial response,

informing her that additional documents “will be provided to you in subsequent stages.” (CP 315, 1172-73) The OPR continued to assemble and process documents, reviewing, logging, redacting, and then producing them to Bichindaritz on a rolling basis. (CP 315-16) Including its initial October 2009 production, the OPR produced 13,000 pages in six stages over the next year:

- Stage 1: October 13, 2009
- Stage 2: December 23, 2009
- Stage 3: January 26, 2010
- Stage 4: April 5, 2010
- Stage 5: July 30, 2010
- Stage 6: December 9, 2010

(CP 315-16, 1172-76, 1180, 1186-87, 1191-92, 1208-10)

OPR redacted some documents, explaining the applicable redactions, which in addition to RCW 42.56.230(3) and FERPA, included RCW 42.56.230(1) (student personal information), RCW 42.56.250(2)-(3) (public employment applications and public employee contact information), and RCW 42.56.420(4) (computer security). (CP 1172-76, 1180, 1186-87, 1191-92, 1208-10) When the OPR required additional time, it explained the delay to Bichindaritz by letter. (CP 407, 409, 413, 415, 419)

In June 2010, Bichindaritz requested that the OPR communicate about productions with her lawyer Frederick Gautschi, who was also representing Bichindaritz in her federal discrimination lawsuit. (CP 317-18, 417)

Neither Bichindaritz nor her lawyer picked up the Stage 2 and Stage 6 productions, and they delayed picking up the other stages for many months. (CP 316-18, 1178, 1182, 1214; FF 1.26, CP 1133)² The OPR advised Bichindaritz, consistent with RCW 42.56.120, that if she did not pick up the Stage 6 documents by February 7, 2011, it would close her request. (CP 318, 1214; FF 1.27, CP 1133-34)

On February 7, 2011, Bichindaritz's lawyer directed the OPR to close Bichindaritz's 2009 request. (CP 318, 423, 1212) At that time, the OPR had not reviewed or redacted more than 12,000 pages of documents. The OPR stopped processing assembled documents after Bichindaritz closed her request. (CP 323, 809)

² Appendix C is a table summarizing Bichindaritz's delay in picking up the documents the OPR produced.

4. After Bichindaritz reopened her request in June 2011, the OPR produced an additional 12,000 pages in stages over five months.

Bichindaritz did not contact the OPR between February 8 and June 7, 2011. (CP 318) On June 7, 2011, Bichindaritz asked the OPR “to restart processing the documents from my first public records request to you.” (CP 425) The OPR acknowledged Bichindaritz’s request by letter on June 14, 2011, five business days after receiving it. (CP 323, 427; FF 1.29, CP 1134)

At that time, the University had already produced 13,000 of the 25,000 pages of documents that it had assembled in response to Bichindaritz’s 2009 PRA request. (CP 316) The OPR retained the remaining 12,000 pages of documents from the 96 individuals identified in Bichindaritz’s 2009 request that it had stopped processing when Bichindaritz closed her initial request on February 7, 2011. (CP 318-19, 323-24, 670, 720) When Bichindaritz asked the OPR to “restart processing” those documents in June 2011, the OPR had to review those documents for exempt information, redact, and log those documents, just as it had with Bichindaritz’s first request. (CP 318-19, 324, 669-670)

Over the next five months, the OPR produced over 12,000 pages to Bichindaritz in four stages:

Stage	Number of Pages	Date of Production
1	4,379	August 15, 2011
2	1,795	October 7, 2011
3	3,112	November 3, 2011
4	2,793	November 15, 2011

(CP 323, 669, 1227-29, 1240-41, 1250-51, 1258-59, 1434) The OPR briefly extended its estimates for producing documents four times because it needed additional time to review the documents. (CP 1222, 1231, 1233, 1235)

In its last production, the OPR also sent Bichindaritz a twelve-page inventory, date and time stamped “11/15/2011 10:37:47 AM,” identifying each of the 276 documents that it withheld in their entirety, its number of pages, date, recipient and author, and its subject when that information was not itself exempt. WAC 44-14-04004 (withholding index should “identif[y] the type of record, its date and number of pages, and the author or recipient of the record (unless their identity is exempt)”); CP 326, 1260-72. The inventory cited the statutory basis for each exempt document. (CP 1260-72)

The OPR also redacted documents. Those that were redacted to protect employee privacy were stamped redacted per “RCW 42.56.230(2),” and the OPR cited that provision in its redaction letters and the November 2011 withholding inventory.

(CP 325, 1227-29, 1240-41, 1250-51, 1258-59 (all citing “RCW 42.56.230(2)” as “Employee Privacy” exemption), 1260-72) Effective July 22, 2011, the Washington Legislature had amended RCW 42.56.230 by adding a new exemption for the contact information of youth in public programs, which was codified as subsection .230(2). (CP 325-26; Laws of 2011, ch. 173 § 1) As a result, former subsection .230(2), which concerned public employee privacy, was renumbered .230(3). The OPR intended its citation to subsection .230(2) to refer to the employee-privacy exemption that had been recodified just a few months earlier as subsection .230(3). (CP 325-26)

Bichindaritz did not pick up or review Stages 2-4 when the OPR produced them to her in October and November 2011. (CP 326, 684; FF 1.36, CP 1136) On January 20, 2012, Bichindaritz inquired about those documents. (CP 326, 684) On January 31, 2012, the OPR mailed Bichindaritz two CDs containing Stages 2-4, comprising over 7,500 pages. (CP 326, 454)

B. Procedural History

- 1. In an unappealed summary judgment order, the trial court dismissed as time barred Bichindaritz's PRA claim based upon the University's response to Bichindaritz's initial 2009 PRA request.**

On February 14, 2012, with her trial in federal court two months away, Bichindaritz sued the University in King County Superior Court asserting the same claims for discrimination and retaliation that she had made in her federal lawsuit. (CP 1-11) On February 23, 2012, Bichindaritz amended her complaint in superior court to allege this claim under the PRA. (CP 12-53)

In June 2012, after a trial in federal court resulted in a judgment in the University's favor on Bichindaritz's discrimination and retaliation claims, Judge Monica Benton ("the trial court") dismissed Bichindaritz's state court discrimination and retaliation claims as "frivolous," because they were "fully and finally adjudicated in federal court" and thus "clearly barred by res judicata and collateral estoppel." (CP 69-70)

The trial court also dismissed with prejudice "all claims associated with or arising from the University's response to Plaintiff's September 9, 2009 public records act request . . . [as] barred by the one-year statute of limitations set forth in RCW

42.56.550(6).” (CP 70) Bichindaritz has not appealed the trial court’s dismissal of her 2009 PRA claims.

2. Following trial by affidavit, the trial court imposed a \$723,290.50 penalty, finding that the University acted in bad faith in producing 12,000 pages of documents in stages within five months of Bichindaritz’s 2011 request.

The trial court conducted a trial by affidavit under RCW 42.56.550(3) on Bichindaritz’s claim that the University violated the PRA in its handling of her 2011 request, rejecting the University’s request to resolve fact issues in an evidentiary hearing. (CP 193-94) The trial court considered Bichindaritz’s claim based entirely on documentary evidence. (CP 1128-29)

The trial court concluded that the University violated the PRA because “the 12,000+ documents could have been produced in June 2011,” (CL 2.8, 2.11, 2.12, CP 1142-43), finding that the documents responsive to Bichindaritz’s request were “assembled” and thus “ready for distribution” by October 2009. (CP 1149 (“The University is liable under the PRA for failing to produce 12,000 documents that were assembled and ready for distribution by October 2009”); FF 1.9, 1.19, 1.21, 1.39, CP 1130, 1132, 1137; CL 2.12,

CP 1143)³ Ignoring the November 15, 2011, date stamp on the OPR’s withholding index, the trial court also concluded that the OPR created the index before July 2011, when the Legislature renumbered the exemption for public employees’ personal information to RCW 42.56.230(3), finding that the OPR “knows the law” and therefore would not have cited RCW 42.56.230(2) after July 2011. (CL 2.8, 2.11, CP 1142-43) According to the trial court, “[Bichindaritz’s] request could have been met the next day, June 7, 2011, given completed *assembled* documents.” (CL 2.17, CP 1146 (emphasis added); *see also* CL 2.8, 2.9, 2.12, CP 1142-43)⁴

Of the thousands of documents and emails produced to Bichindaritz, the University produced three documents that Bichindaritz claimed bolstered her federal discrimination claim. (FF 1.37, 1.40, CP 1137-38; CL 2.17, 2.19, CP 1147-48) Bichindaritz received two of these documents – emails between Institute faculty referencing Bichindaritz’s French national origin – in the OPR’s

³ The trial court also found, based solely on Bichindaritz’s hearsay statement attributed to unnamed OPR staff, that the assembled documents were “in the possession of the Attorney General’s Office at the University.” (FF 1.24, CP 1133 (citing CP 880, 970-71))

⁴ The trial court also concluded that “there are dozens of examples in which the University[’s withholding index] does not sufficiently identify the author, recipient, subject of the document” (CL 2.10, CP 1143), rejecting the University’s explanation that its index omitted only information that was itself exempt. (CP 1160-61)

November 3, 2011, Stage 3 production, in time for Bichindaritz to offer them as exhibits in the April 2012 trial before Judge Lasnik. (FF 1.37, CP 1137; CP 388, 390, 687, 691, 1363)

The third document had been produced but redacted by the University. On August 2, 2013, after the trial in federal court, and after an *in camera* review, the trial court released an unredacted version to Bichindaritz. (CP 229-30) The document was a single email written by a professor at the Institute referencing an unidentified “nursing person” on one of Bichindaritz’s tenure review committees who “hinted that we might be picking on Isabelle’s teaching because she was a woman.” (CP 237) Citing the University’s failure to produce these three documents in discovery in the federal litigation, the trial court concluded that the University acted in bad faith, and that the federal litigation was its “motive for nondisclosure.” (CL 2.17, CP 1146; FF 1.37, 1.40, CP 1137-38; CL 2.7, 2.19, 2.20, CP 1141-42, 1148)

Judge Lasnik, who presided over Bichindaritz’s six day trial in federal court, however, found that the University did not violate its discovery obligations in that litigation by not producing the national origin emails and that Bichindaritz “intentionally chose not to pursue a national origin claim in this litigation [d]espite

having asserted a national origin claim before the Equal Employment Opportunity Commission.” (CP 1321) He further found that the University’s “discovery responses played no part in how [she] fashioned her complaint.” (CP 1321; *see also* 694, 1328-29) In an order issued following entry of Judge Benton’s findings and conclusions, Judge Lasnik denied Bichindaritz’s motion to vacate his judgment, finding that “the failure to produce th[e] single [‘nursing person’] email does not give rise to an inference of corrupt motive [i]n light of the University’s production of significant evidence going to the same issue” and that its late disclosure “in no way affected the outcome of” Bichindaritz’s federal litigation. (Appendix D)⁵

The trial court imposed a \$723,290.50 penalty against the University. (CL 2.21, CP 1148-49) The trial court arrived at this fine by establishing a \$.50 daily penalty, which it multiplied by both the number of days from June 7, 2011 to the date of production, and by the number of pages responsive to Bichindaritz’s request:

Stage 1: 70 days x 4,379 pages = \$153,265
Stage 2: 123 days x 1,795 pages = \$110,392.50
Stage 3: 150 days x 3,112 pages = \$233,400

⁵ This Court should take judicial notice of Judge Lasnik’s post-trial order as additional evidence on appeal under RAP 9.11. *See* Section VI.D.1, *infra*, and the University’s RAP 9.11 motion.

Stage 4: 162 days x 2,793 pages = \$226,233

(CL 2.21, CP 1148-49) The trial court entered judgment against the University for \$826,248.53, including \$102,958.03 in attorney's fees (at the rate of \$550 per hour) and costs, and imposed post-judgment interest at 12% per annum. (CP 2143-50, 2168-69) The University timely appealed. (CP 1721-45, 2170-74)

V. SUMMARY OF ARGUMENT

On de novo review (Arg. A), this Court should hold that the University did not violate the PRA. When Bichindaritz closed her 2009 request in February 2011, the University had reviewed and produced 13,000 of the 25,000 pages it had assembled in response to her request. The University had not reviewed the remaining 12,000 pages for applicable exemptions when Bichindaritz reopened her request four months later. The trial court erred by failing to recognize that the University could not *produce* the remaining 12,000 pages the same day Bichindaritz reopened her request simply because it had *assembled* those documents. Should this Court reverse the trial court's conclusion that the University violated the PRA, it need not consider the additional issues raised by the University. (Arg. § B)

Even were there a basis for finding a violation, the trial court's \$723,290.50 penalty is not authorized by the PRA, which allows a court to impose a penalty for "each *day*" at least one "record" is withheld. The statute does not authorize a court to penalize an agency based on the number of *pages* comprising a record. The trial court erred in fining the University based on the number of pages responsive to Bichindaritz's request for "a complete copy of all my personnel files and public records" and "every email related to me" among 96 individuals. No interpretation of RCW 42.56.550 supports the trial court's \$723,290.50 penalty, derived by multiplying its daily penalty of \$.50 by the number of pages. (Arg. § C)

The trial court also erred in finding the University acted in bad faith and intentionally withheld documents for "two years" to gain an "advantage" in Bichindaritz's federal discrimination suit. Bichindaritz herself was responsible for any delay and the trial court, in an unchallenged order had dismissed any claim arising from delay in responding to her 2009 PRA request. Further, Judge Lasnik, who presided over more than three years of litigation and a six-day trial in federal court, found that the University did not withhold any documents in bad faith. The trial court not only

ignored undisputed testimony that the OPR's employees did not withhold documents for any tactical or strategic reasons, but resolved credibility issues without holding the evidentiary hearing that the University requested. (Arg. § D)

The trial court also erred in awarding Bichindaritz attorney's fees at an hourly rate of \$550, which exceeded the rate her counsel charged Bichindaritz. (Arg. § E) The trial court further erred in awarding interest on its \$826,248.53 total penalty at 12% per annum and in the absence of a waiver of the State's sovereign immunity for interest under the PRA. (Arg. § F) This Court should reverse the trial court's judgment, or, at a minimum, remand with instructions to recalculate the PRA penalty and its attorney fee award, and reverse the award of interest.

VI. ARGUMENT

A. **This Court owes no deference to the trial court's findings and conclusions, which it entered after a trial by affidavit.**

This Court reviews the trial court's decision de novo and gives no deference to its findings of fact.⁶ Where the record in a

⁶ This court is not bound by the trial court's label of findings of fact or conclusions of law. *See Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 342, ¶ 11, 308 P.3d 791 (2013), *rev. denied*, 179 Wn.2d 1011 (2014).

Public Records Act case “consists entirely of written materials and the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of a witness, weigh evidence, nor reconcile conflicting evidence, then an appellate court stands in the same position as the trial court in looking at the facts of the case and should review the record de novo.” *Gronquist v. Dep’t of Corrections*, 159 Wn. App. 576, 590, ¶ 29, 247 P.3d 436 (citing *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994)), *rev. denied*, 171 Wn.2d 1023 (2011); *Robbins, Geller, Rudman & Dowd, LLP v. State*, ___ Wn. App. ___, ¶ 8, ___ P.3d ___, 2014 WL 839895 (2014); *Ockerman v. King Cnty. Dep’t of Developmental & Envtl. Servs.*, 102 Wn. App. 212, 216, 6 P.3d 1214 (2000). This Court reviews a trial court’s interpretation of the PRA de novo as an issue of law. *Ockerman*, 102 Wn. App. at 216.

Here, the trial court held that the University violated the PRA based solely on a written record. This Court should hold that the University did not violate the PRA or act in bad faith.

B. The University complied with the PRA by producing over 12,000 pages to Bichindaritz within two to five months of her 2011 request.

1. The PRA requires public agencies to review and redact records for exemptions.

The PRA grants agencies like the University a reasonable period of time to gather, review, and produce records and “additional time” to process documents, where, as here, the documents are rife with exempt information. The trial court erred in holding that the University violated the PRA by not producing over 12,000 pages of documents the same day it received Bichindaritz’s request “to restart processing the documents,” four months after she had closed her first public record request.

The PRA requires agencies to “promptly” respond to a record request within five business days by either producing the responsive record or providing a “reasonable estimate of the time the agency . . . will require to respond to the request.” RCW 42.56.520. An agency “produces” records by making them “available for inspection and copying.” *Sanders v. State*, 169 Wn.2d 827, 836, ¶ 2, 240 P.3d 120 (2010); *see also* CL 2.5, CP 1141.

Public agencies must withhold a record that “falls within the specific exemptions of [the PRA], or other statute which exempts or prohibits disclosure of specific information or records,” and must

“delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record.” RCW 42.56.070(1). The PRA allows agencies to take “[a]dditional time . . . to locate and assemble the information requested . . . [or] to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.” RCW 42.56.520; *see also* Public Records Act Deskbook, Washington State Bar Association, 5.3(3) at § 5-21 (2006 Ed. & 2010 Supp.) (agency “must evaluate whether any record or part of a record is statutorily exempt from public disclosure”) (emphasis removed).

“[W]here the legislature has exempted disclosure, a court has no authority to thwart that legislative mandate.” *Harley H. Hoppe & Associates, Inc. v. King Cnty.*, 162 Wn. App. 40, 55, ¶ 23, 255 P.3d 819, *rev. denied*, 172 Wn.2d 1019 (2011). “Certain types of records may require extensive review before disclosure because of . . . exemptions.” Public Records Act Deskbook § 5.3(1) at 5-13; *see also* § 5.3(3) at 5-20.

Courts determine on a case-by-case basis whether an agency has “promptly” responded to a PRA request, considering the number of documents responsive to the request, the need to locate and assemble the information requested, the need to review

documents for exempt information, and the number and size of other public record requests pending with the agency. Public Records Act Deskbook, § 5.3(1) at 5-12. Here, the trial court ignored that the PRA required the University to balance competing obligations in responding to Bichindaritz's public record request, including the obligation to protect personal privacy.

2. The PRA did not require the University to produce 12,000 pages of documents the same day it received Bichindaritz's 2011 request.

The trial court plainly erred in finding that the University violated the PRA by not producing more than 12,000 pages on June 7, 2011, the same day it received Bichindaritz's request "to restart processing the documents." (FF 1.39, CP 1137; CL 2.8, 2.9, 2.11, 2.12, 2.21, CP 1142-44, 1148-49) This Court should hold that the University complied with the PRA in reviewing, redacting and producing more than 12,000 pages of documents starting two months after, and completed within five months of, Bichindaritz's PRA request.

The trial court erroneously concluded that the University violated the PRA "in failing to *produce* 12,000 documents *assembled* in 2009 until the end of 2011." (CL 2.12, CP 1143) (emphasis added) The documents were not "ready for distribution"

simply because they had been “assembled.” (CP 1149; FF 1.9, 1.19, 1.21, 1.39, CP 1130, 1132, 1137; CL 2.8, 2.11, CP 1142-43).

To “assemble” is “to bring or gather together into a group or whole” the responsive documents. The American Heritage Dictionary, Second College Edition at 134 (1982); *see also* RCW 42.56.520 (agencies allowed additional time to “assemble” information before producing). Once assembled, however, the OPR could not “produce” the documents, *i.e.*, make them “available for inspection and copying,” without first reviewing them for applicable exemptions and making appropriate redactions or withholdings. RCW 42.56.070; *Sanders*, 169 Wn.2d at 836, ¶ 2; *see also* CL 2.5, CP 1141. Thus, no evidence supports the trial court’s conclusion that the “assembled” documents were “ready for distribution by October 2009.” (CP 1149)

The OPR *produced* 13,000 of the 25,000 pages it had *assembled* in response to Bichindaritz’s 2009 request by the time she closed it on February 7, 2011. (CP 316-18) When Bichindaritz closed her 2009 PRA request, the OPR stopped processing documents, as the PRA directs. WAC 44-14-040(10) (“When the requestor . . . withdraws the request . . . the public records officer

will close the request . . .”).⁷ The OPR had not reviewed the remaining 12,000 pages of documents for applicable exemptions when Bichindaritz closed her request in February 2011. (CP 318-19, 323-24, 670) When Bichindaritz reopened her request four months later in June 2011, the OPR began anew its review of the remaining 12,000 pages of assembled documents, redacting or withholding exempt information, investigating documents as necessary, and logging the documents into its tracking system. (CP 318-19, 322-24, 670)

Many of the 12,000 pages awaiting production concerned the tenure review process, perhaps the quintessential evaluation of a public employee that is exempt under RCW 42.56.230(3). *See Dawson v. Daly*, 120 Wn.2d at 799-80; *Brown*, 71 Wn. App. at 619-20. Others included faculty emails with or about students that were potentially exempt under FERPA, which required the OPR to determine if any information would identify a student. 20 U.S.C. § 1232g(b); *see also* RCW 42.56.230(1). (CP 314, 318-19, 322-24, 669-670)

⁷ WAC ch. 44-14 contains the Attorney General’s model regulations for PRA compliance. The model regulations, issued pursuant to RCW 42.56.570(2), are non-binding advisory regulations representing “best practices” for complying with the PRA. *See* WAC 44-14-00001-00003.

The trial court erred by failing to allow a reasonable time for the University to process the requested documents for exemptions before producing them as expressly mandated by RCW 42.56.520. *See Forbes v. City of Gold Bar*, 171 Wn. App. 857, 863-64, ¶¶ 11-13, 288 P.3d 384 (2012), *rev. denied*, 177 Wn.2d 1002 (2013). *See also* RCW 42.56.550(2) (if challenged, agencies are to be given an opportunity to demonstrate reasonableness). The trial court's finding that the OPR "could have simply reopened the [2009] request under the old case number" (FF 1.30, 1.34, CP 1134, 1136) ignores that OPR staff still had to review the 12,000 pages for applicable exemptions.

The trial court also ignored that RCW 42.56.520 gives an agency five business days to respond to a request, as the University did here. (CP 323, 427) "Under the plain terms of the statute," a penalty cannot include "the five days allowed for agency action." *Zink v. City of Mesa*, 162 Wn. App. 688, 709-10, ¶ 36, 256 P.3d 384 (2011), *rev. denied*, 173 Wn.2d 1010 (2012). The trial court's conclusion that "the 12,000+ documents could have been produced in June 2011" (CL 2.11, CP 1143; CP 1149) must be reversed.

3. No evidence supports the trial court's finding that the OPR created the withholding index before July 2011.

The trial court's "circumstantial" finding that the OPR created the withholding index before July 2011, when the Legislature renumbered the exemption for public employee privacy, is contradicted by direct and undisputed evidence. (CL 2.8, CP 1142; CL 2.11, CP 1143) First, the withholding index itself is date and time stamped in the bottom left corner "11/15/2011 10:37:47 AM." (CP 1260-72) This was the same day the OPR produced the final installment. (CP 1258-59)

Second, the OPR created the index for "Request Number PR-2011-00286," a number that the OPR assigned only *after* Bichindaritz restarted her request in 2011. (CP 318) Third, the OPR created the index using recently acquired "Privasoft" software that the OPR did not own or use when it responded to Bichindaritz's 2009 request. (CP 328) Fourth, the OPR inadvertently cited the former subsection, not just in its index but also in its redaction letters, which it indisputably sent *after* the statutory change. (CP 325-26, 1227-29, 1240-41, 1250-51, 1258-59)

Fifth, the trial court's finding also contradicts its other finding that the OPR "cited the wrong statutory basis for a number

of withholdings.” (CL 2.11, CP 1143; *see also* FF 1.44, CP 1139) This Court must reverse the finding of intentional delay in the face of this undisputed evidence. *Darrin v. Gould*, 85 Wn.2d 859, 875, 540 P.2d 882 (1975) (reversing finding that “ignores other findings as well as undisputed evidence”).⁸

This Court should reverse the trial court’s conclusion that the University violated the PRA by not producing 12,000 pages of raw, unprocessed documents *the same day* it received Bichindaritz’s request. At a minimum this Court should remand for specific findings regarding the date upon which the OPR could have “promptly produced” documents after complying with the PRA’s mandate to withhold or redact exempt information.

C. The trial court’s \$723,290.50 penalty is not authorized by the PRA, which allows a court to impose a penalty for “each day” a “record,” not a page of a record, is withheld.

While the trial court’s conclusion that the University violated the PRA by failing to produce documents on the day they were

⁸ An agency’s citation to the wrong statutory exemption does not constitute a freestanding violation of the PRA. (FF 1.44, CP 1139) An agency is entitled to argue that *any* provision of the PRA exempts disclosure, not just those cited in its correspondence. *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) (“We therefore decline to consider only those bases cited by the University in its letter denying disclosure.”); *Sanders v. State*, 169 Wn.2d 827, 848, ¶ 23, 240 P.3d 120 (2010) (same).

requested mandates reversal, no interpretation of RCW 42.56.550 supports the trial court's \$723,290.50 penalty, which it derived by multiplying a daily penalty by the number of pages. The PRA does not authorize a trial court to compute a penalty based upon the number of pages responsive to a request for a "public record."

RCW 42.56.550(4) authorizes a court to penalize an agency "for each day that [the requestor] was denied the right to inspect or copy said *public record*" – not each "page" or other component of a record. "Determining a PRA penalty involves two steps: '(1) determine the amount of days the party was denied access and (2) determine the appropriate per day penalty' up to the statutory of maximum of \$100 per day. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459, ¶ 26, 229 P.3d 735 (2010) (quoting *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 438, 98 P.3d 463 (2004)); *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 751, ¶ 56, 174 P.3d 60 (2007) (penalties are "assessed for each day the records were wrongfully withheld"). Had the Legislature mandated penalties on a per-page basis it could have expressly said so. See, e.g., RCW 42.56.120 (agency shall charge "the actual per page cost" for photocopies).

Here, Bichindaritz submitted a single public records request to a single agency for documents relating to herself. The 12,000 pages of documents comprised the “public record” that she requested. RCW 42.56.550(4). The trial court’s reliance on the number of pages finds no support in the language of the PRA.

The PRA directs a court to determine the penalty “based on an agency’s culpability” rather than “on the size of the plaintiffs [sic] request.” *Yousoufian*, 152 Wn.2d at 435-36. A per-page penalty encourages lengthy and cumbersome requests. *See Bricker v. State, Dep’t of Labor & Indus.*, 164 Wn. App. 16, 20-24, ¶¶ 8-15, 262 P.3d 121 (2011) (“there is no appropriate purpose that would be served in imposing a per day *and* per document penalty”) (emphasis in original). A per-page penalty encourages plaintiffs to submit broad “fishing expedition” requests in the hope of obtaining a large award and contravenes the PRA’s policy of encouraging clear and focused requests. RCW 42.56.520 (agencies can ask requestors to “clarify the intent of the request”; agencies “need not respond to” requests that a requestor fails to clarify).

Even if this Court holds that Bichindaritz requested more than one “public record,” Bichindaritz did not seek 12,000

“records” as the trial court held. The trial court erred in failing to group thousands of documents concerning the same subject matter that comprised a single “record.” See *Sanders v. State*, 169 Wn.2d 827, 864, ¶ 67, 240 P.3d 120 (2010) (affirming decision not to impose penalties for each wrongfully withheld document; “the trial court interpreted the PRA request as seeking two records, as grouped broadly by subject matter.”); *Double H, L.P. v. Washington Dep’t of Ecology*, 166 Wn. App. 707, 713-15, ¶¶ 11-17, 271 P.3d 322 (trial court did not abuse its discretion “in deciding one group existed based on subject matter when calculating the PRA penalty”), *rev. denied*, 174 Wn.2d 1014 (2012); *Bricker*, 164 Wn. App. at 23-24, ¶ 14 (affirming trial court’s penalty based on two groups of records). Here, Bichindaritz requested at most two groups of documents: one for her “personnel files” and another for “email[s] related to me.” (CP 1166-67; FF 1.3, CP 1129)

The trial court lacked any basis for concluding that the 12,000 pages of documents comprised 12,000 individual “records.” Many single documents, such as Bichindaritz’s curriculum vitae, were over several dozen pages in length. Bichindaritz’s “personnel file,” comprised of her three multi-tiered tenure evaluations, contained multiple copies of the same document as each successive

evaluation considered all previous recommendations. (CP 331, 1384-85) Other duplicates include emails from 96 individuals, produced by both the author and recipient. *Bricker*, 164 Wn. App. at 24 n.5, ¶ 14 (questioning “a per record award of penalties based on both signed and unsigned but otherwise duplicate documents”). The Legislature did not intend to penalize agencies multiple times for the same documents.

This Court should reverse the trial court’s \$723,290.50 penalty. In the event this Court finds that Bichindaritz was denied access to a “public record,” the Court should calculate the penalty based on one, or at most two, violations, not 12,000.

D. The University, which produced over 12,000 pages within a few months, did not intentionally withhold documents to thwart Bichindaritz’s discrimination claim or otherwise act in bad faith.

The trial court erroneously concluded that the University acted in bad faith by delaying production of documents of “import” to thwart Bichindaritz’s federal lawsuit. (CL 2.17, 2.19, CP 1145-48) No evidence supports that conclusion, or the trial court’s other conclusions imposing this \$723,290.50 penalty.

The daily penalty under RCW 42.56.550 must be based on the mitigating and aggravating factors that the Supreme Court

identified in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467, ¶¶ 44-45, 229 P.3d 735 (2010). The mitigating factors include “the agency’s prompt response,” “the agency’s good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions,” and “proper training and supervision of the agency’s personnel.” *Yousoufian*, 168 Wn.2d at 467, ¶ 44. Aggravating factors include agency “bad faith,” “agency dishonesty,” and “a delayed response by the agency, especially in circumstances making time of the essence.” *Yousoufian*, 168 Wn.2d at 467, ¶ 45.

The trial court’s “strict and singular emphasis” on bad faith “is inadequate to fully consider a PRA penalty determination.” *Yousoufian*, 168 Wn.2d at 461, ¶ 31. Moreover, the factors identified by the trial court do not support its finding of bad faith, and its finding ignores uncontroverted mitigating evidence.

1. The University did not intentionally delay production of documents in bad faith to gain an “advantage” in Bichindaritz’s discrimination lawsuit.

No evidence supports the trial court’s finding that the University’s OPR in bad faith intentionally delayed or withheld production of three documents of “import” to gain an advantage in Bichindaritz’s federal discrimination lawsuit. (FF 1.37, 1.40, CP

1137-38; CL 2.7, 2.17 (“ongoing [federal] litigation” was “motive for delay”), 2.19, 2.20, CP 1141-42, 1146-48) The mere existence of related litigation cannot establish bad faith as the trial court concluded – otherwise bad faith would exist any time a PRA request is made in connection with litigation, as it often is. The trial court’s finding of bad faith conflicts with Judge Lasnik’s orders, in which he found that “[d]espite having asserted a national origin claim before the Equal Employment Opportunity Commission,” Bichindaritz “intentionally chose not to pursue a national origin claim in this litigation.” (CP 694, 1319-22, 1328-29) This Court should defer to Judge Lasnik’s findings after hearing six days of live testimony and presiding over more than three years of litigation, rather than to Judge Benton’s assumptions, based on a documentary record, about the University’s motives in litigation over which she not preside.

The trial court’s finding of bad faith also conflicts with Judge Lasnik’s post-trial order, in which he expressly rejected Bichindaritz’s allegation that the University attempted to conceal evidence relevant to her discrimination claim, finding that “the failure to produce th[e] single [‘nursing person’] email does not give rise to an inference of corrupt motive [i]n light of the

University's production of significant evidence going to the same issue." (App. D) While Judge Lasnik's order was entered after the judgment in this case, this Court should take judicial notice of it here under RAP 9.11 because it directly refutes Judge Benton's finding that the federal litigation motivated the University to delay production of certain documents.⁹

The trial court also ignored that the OPR produced two of the documents of "import" in November 2011, in time for Bichindaritz to use them as exhibits in the federal trial (CP 687, 691, 1363), and after the OPR had no obligation to continue producing documents because Bichindaritz failed to pick up her previous record installments. See RCW 42.56.120 (agency may produce documents on "a partial or installment basis" and if a requestor fails to claim an installment then "the agency is not obligated to fulfill the balance of

⁹ This Court may take judicial notice of related proceedings on appeal under the standards of RAP 9.11. See *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 98-99, 117 P.3d 1117 (2005). Judge Lasnik's order is "needed to fairly resolve the issues on review" and "would probably change the decision being reviewed." RAP 9.11(a)(1)-(2). The University could not have offered Judge Lasnik's order at trial because he had not yet entered it. RAP 9.11(a)(3). As this Court is reviewing the record de novo, consideration of Judge Lasnik's order on appeal furthers judicial economy. RAP 9.11(a)(4),(5). Given Judge Benton's express findings that the federal litigation was the "motive for delay" "it would be inequitable to decide the case" without considering a contrary finding entered by the very judge who presided over the litigation that allegedly motivated the University's actions. RAP 9.11(a)(6).

the request”). If the University intended to deny Bichindaritz documents of “import,” it would not have *voluntarily* produced them after its legal obligation to do so ceased. The trial court’s finding of bad faith should be reversed.

2. Bichindaritz’s own failure to timely retrieve documents caused the alleged delay in production.

The trial court further erred in concluding that the University’s “two year” “delayed” response warranted a higher penalty. (CL 2.9, 2.16, 2.17, 2.19, CP 1142, 1145-48) The trial court’s conclusion that the University delayed producing documents for “two years” ignores that the court had dismissed all of Bichindaritz’s claims “associated with or arising from” the OPR’s handling of her 2009 request in an unappealed summary judgment order. (CP 70) It also flies in the face of undisputed evidence that Bichindaritz did not pick up two entire installments in response to her 2009 request, and delayed picking up other installments for months at a time. (CP 316-18, 1178, 1182, 1214; FF 1.26, CP 1133; App. C) Bichindaritz then closed her request for four months, between February 2011 and June 2011. (CP 318, 423, 1212)

Bichindaritz again delayed picking up documents after she reopened her request in June 2011. Bichindaritz conceded that the

OPR could not immediately produce the remaining 12,000 pages of documents when she asked the OPR to “restart processing” the request in June 2011. (CP 425) She told the OPR that she was “reassured by the fact that you have all the documents . . . and that it is only a matter of processing them,” (CP 429) and conceded “that a reasonable period of time would be six months from the date of the request.” (CP 1415-16) Bichindaritz never objected to the OPR’s response estimates or the production dates, nor did she file a motion to challenge the OPR’s response, as authorized by RCW 42.56.550(2).

Bichindaritz failed to pick up Stage 2 documents, produced by the OPR on October 7, 2011, and made no effort to review or obtain Stages 2-4 until January 20, 2012, more than three months later. (CP 326, 684; FF 1.36, CP 1136; App. C) Under RCW 42.56.120, the University had no obligation to produce *any* remaining documents after Bichindaritz declined to review them.

Bichindaritz’s conduct confirmed that time was not “of the essence” and mandated a lower, not a higher, penalty. *Yousoufian*, 168 Wn.2d at 467, ¶ 45; Public Records Act Deskbook, § 17.5(2) at 17-21 (requestor’s delay is “a legitimate basis for limiting the size of the daily penalty”). Bichindaritz’s own failure to retrieve

documents, not the University's "bad faith," caused the "delay." At a minimum, this Court should eliminate any penalty for the period after October 7, 2011, as barred by RCW 42.56.120.

3. The University demonstrated its good faith by complying with all procedural requirements of the PRA.

The trial court's finding of bad faith also ignored the OPR's consistent compliance with the procedural requirements of the PRA. *Yousoufian*, 168 Wn.2d at 467, ¶ 44. The OPR responded to Bichindaritz's request within five business days, as required by RCW 42.56.520. (CP 323, 427; FF 1.29, CP 1134) The OPR produced documents to Bichindaritz in installments under RCW 42.56.120 to ensure that she would receive the documents as quickly as possible. *See also* WAC 44-14-04004(3); Public Records Act Deskbook § 5.3(2) at 5-14 ("When responding to very large or complex requests, an agency should provide requested public records in installments, as they are processed.").

When the OPR needed additional time to process Bichindaritz's request it promptly informed her, provided a new estimate for production of the documents, and produced documents on or before that date. (CP 1222, 1231, 1233, 1235) These extensions were not "meaningless" (CL 2.17, CP 1147), but

complied with RCW 42.56.520, which allows extensions when “additional time” is needed “to determine whether any of the information requested is exempt.”

The OPR’s well-trained staff reviewed and completed its production of over 12,000 pages of documents to Bichindaritz in five months, despite the OPR’s increasingly heavy workload as the public records office for Washington’s largest public university. (CP 324 (OPR’s staff collectively reviewed nearly 250,000 pages in 2011 in response to 648 active requests, up 205% from 2004), 670) *See* Public Records Act Deskbook, § 5.3(1) at 5-12) Far from demonstrating bad faith, the OPR’s prompt response and strict compliance with the PRA’s procedural requirements confirm that the University acted in good faith.

4. The trial court erred in finding the University acted in bad faith based entirely on circumstantial documentary evidence that the University could not rebut without an evidentiary hearing.

The trial court’s findings of bad faith are further undermined by its erroneous rejection of the University’s request for an evidentiary hearing at which the credibility of its witnesses could be judged via live testimony and it could present rebuttal evidence. While the PRA authorizes trial by affidavit, credibility should be

judged through live testimony, not through affidavits or declarations. *See Zink v. City of Mesa*, 162 Wn. App. 688, 706, ¶ 28, 256 P.3d 384 (2011) (deferring to trial court’s findings in PRA case because it “heard live testimony and judged the credibility of witnesses”); *see also Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994) (“A court may abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact whose resolution requires a determination of witness credibility.”).

The trial court rejected undisputed testimony from the OPR’s employees that they did not withhold or redact documents for any tactical or strategic reason or treat Bichindaritz’s request differently than any other request. (CP 319, 328) To the extent it relied on Bichindaritz’s declaration to find otherwise, it should have held an evidentiary hearing. “When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts” *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776, 167, L.Ed.2d 686 (2007).

The trial court’s refusal to hold an evidentiary hearing also prevented the University from presenting evidence to rebut Bichindaritz’s hearsay allegation “that the responsive documents

were in the possession of the Attorney General’s Office” when she reopened her request in 2011. (FF 1.24, CP 1133 (citing CP 880, 970-71)) Other evidence offered by Bichindaritz impeaches her hearsay allegation. OPR’s Program Coordinator, Madolyne Lawson, stated that the OPR did not send any documents to the Attorney General’s Office. (CP 805) An evidentiary hearing would have definitively resolved this issue.

After the trial court seized on Bichindaritz’s hearsay in its findings,¹⁰ the University submitted the declaration of former OPR employee, Andrew Palmer, who handled Bichindaritz’s requests. (CP 1703-07; *see* CP 1693-1702) Mr. Palmer rebutted Bichindaritz’s hearsay and further confirmed that Bichindaritz’s own failure to retrieve documents caused the “two year” delay in production because he stopped processing Bichindaritz’s 2009 request every time she failed to retrieve the current installment. (CP 1704) The trial court struck Mr. Palmer’s declaration as untimely. (CP 2138-39) The trial court erred by not allowing the University to present

¹⁰ The University had no opportunity to rebut Bichindaritz’s allegation because Bichindaritz submitted her evidence to the trial court after the deadline had passed and the court did not allow rebuttal submissions. (CP 2000)

live testimony **or** rebuttal evidence to refute Bichindaritz's unfounded allegations of bad faith.

Because the University did not violate the PRA, no penalty should be imposed on the University. (Arg. § B) However, should this Court find that the University violated the PRA, it should hold that the University did not act in bad faith, and remand with instructions to impose a penalty consonant with its good faith.

E. The trial court erred in setting lodestar fees at an hourly rate of \$550.

Because the University did not violate the PRA, the trial court's award of \$102,958.03 in attorney's fees and costs must also be reversed. (CP 2149) To the extent any fees are allowed, however, the trial court erred in awarding Bichindaritz fees at an hourly rate of \$550 for her lead counsel. (FF 7, CP 2146) In the event of a remand, this Court should apply a substantially reduced and reasonable market rate.

Fees awarded under the PRA must be "reasonable." RCW 42.56.550(4). "Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel." *Berryman v. Metcalf*,

177 Wn. App. 644, 657, ¶ 27, 312 P.3d 745 (2013), *rev. denied*, 179 Wn.2d 1026 (2014) (emphasis in original), quoting *Mahler v. Szucs*, 135 Wn.2d 398, 434–35, 957 P.2d 632, 966 P.2d 305 (1998). The trial court must consider the opposing party’s “objections to the hourly rate” *Berryman*, 177 Wn. App. at 658-59, ¶¶ 29, 31. “The burden of demonstrating that a fee is reasonable is upon the fee applicant.” *Berryman*, 177 Wn. App. at 657, ¶ 25.

Bichindaritz’s counsel charged his client \$450 per hour, not \$550, as the trial court found. (*Compare* CP 1851 *with* CP 2146) *See Berryman*, 177 Wn. App. at 677, ¶ 77 (reversing fee multiplier where “the fee agreement itself indicate[d] that [plaintiff’s attorneys] were willing to work for less than” the reasonable hourly rate calculated by the trial court). The trial court erroneously set the lodestar rate at \$550 based on counsel’s experience litigating employment discrimination, not PRA, cases. (CP 1782-88, 2146 (“Mr. Sheridan has focused his practice on civil rights and public interest law”)) The \$550 hourly rate is more than double the \$250 hourly rate charged by lead counsel for the University. (CP 1908) Counsel far more experienced in the PRA do not command a \$550 hourly rate. (CP 1937, 1941-44) *See West v. Port of Olympia*, 146 Wn. App. 108, 123, ¶ 30, 192 P.3d 926 (2008) (“\$300 per hour is

unreasonable in a [PRA] case of this type.”), *rev. denied*, 165 Wn.2d 1050 (2009); *Zink v. City of Mesa*, 162 Wn. App. 688, 701, ¶ 11, 256 P.3d 384 (2011) (fee award after five years of litigation totaled \$72,309))

The trial court also erred in refusing to discount the lodestar to reflect Bichindaritz’s unsuccessful efforts. *See Sanders*, 169 Wn.2d at 868, ¶ 77 (“Around 95 percent of the claimed exemptions proved valid, suggesting that Justice Sander’s fees and costs should be deeply discounted.”). For example, before trial Bichindaritz erroneously claimed that the University improperly redacted 485 pages of documents. (CP 89) In fact, 384 pages were not redacted at all. (CP 89) Following in camera review, the trial court held that the University improperly redacted only 16 of the 101 pages containing redactions. (CP 229-30) This Court should remand with instructions to reduce the lodestar rate and to reduce the award for time spent on unsuccessful efforts.

F. The trial court erred in awarding Bichindaritz postjudgment interest of 12% per annum.

The Legislature has not waived the State’s sovereign immunity for interest to interest on PRA penalties. Even if it had,

the State is not liable for judgment interest at 12% under RCW 4.56.110(3)(a).

“The general rule is that as a matter of sovereign immunity, the state cannot, without its consent, be held to interest on its debts.” *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 455-56, 842 P.2d 956 (1993) (quotation omitted). The State may consent to liability for interest only by (1) expressly doing so by statute or (2) through “implication in situations where State agencies were authorized to enter into contracts.” *Kringel v. State Dep’t of Soc. & Health Servs.*, 45 Wn. App. 462, 463-64, 726 P.2d 58 (1986). RCW 4.56.110, which governs the interest rate for judgments, “does not apply to public agencies absent a clear waiver of sovereign immunity.” *Jenkins v. Washington State Dep’t of Soc. & Health Servs.*, 160 Wn.2d 287, 302, ¶ 35, 157 P.3d 388 (2007).

The Legislature did not expressly waive the State’s sovereign immunity in the PRA. RCW 42.56.550(4) authorizes the exclusive remedies under the PRA – a maximum \$100 daily penalty, and attorney’s fees and costs. The Legislature knows how to clearly authorize interest when it intends to do so. *See, e.g.*, RCW 82.32.060(4)(a) (“Interest . . . must be allowed . . . on the amount of any refund, credit, or other recovery allowed to a taxpayer”); RCW

4.56.110(3)(a) (“Judgments founded on the tortious conduct of a ‘public agency’ . . . shall bear interest . . .”). The Legislature included no language authorizing interest in the PRA.

That the Legislature authorized punitive, rather than compensatory damages under the PRA, further confirms that the Legislature did not intend to authorize postjudgment interest. *Blake v. Grant*, 65 Wn.2d 410, 413, 397 P.2d 843 (1964) (“interest is generally disallowed on punitive damages”); *Ventoza v. Anderson*, 14 Wn. App. 882, 897, 545 P.2d 1219 (“Interest is generally disallowed when recourse upon a punitive statute is sought.”), *rev. denied*, 87 Wn.2d 1007 (1976). Courts refuse to award judgment interest on penalties because the purpose of a penalty is to discourage the defendant’s conduct, not to compensate the plaintiff. *See Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 552, ¶ 37, 114 P.3d 1182 (2005) (purpose of postjudgment interest is “to compensate the plaintiff”; “Interest is not imposed as a punishment.”).

To the extent the University is liable for judgment interest, it must be at the 2.061% per annum rate established by RCW 4.56.110(3)(a), which sets the interest rate for “[j]udgments founded on the tortious conduct of a ‘public agency.’” The trial

court's PRA award, based on a finding that the University acted in bad faith, sounds in tort. *See Miller v. Kenny*, ___ Wn. App. ___, ¶ 117, ___ P.3d ___, 2014 WL 1672946 (2014) (judgment against insurer for bad faith sounds in tort). This Court should reverse the trial court's award of judgment interest, or reduce judgment interest to 2.061% under RCW 4.56.110(3)(a).

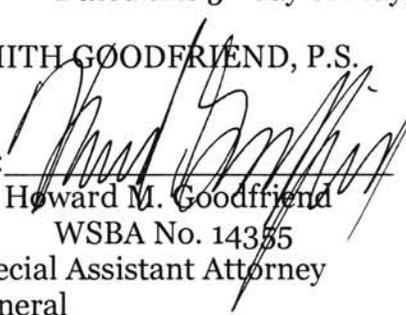
VII. CONCLUSION

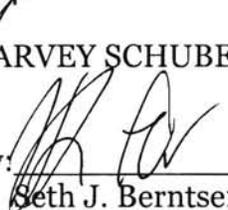
This Court should hold that the University did not violate the PRA, or, at a minimum, remand with instructions to reduce the PRA penalty, interest and the award of attorney's fees.

Dated this 5th day of May, 2014.

SMITH GOODFRIEND, P.S.

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By: 

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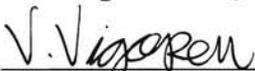
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 5, 2014, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Seth J. Berntsen Garvey, Schubert & Barer 1191 2nd Ave Ste 1800 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
John Patrick Sheridan David J. Whedbee MacDonald Hoague & Bayless 705 2nd Avenue, Suite 1500 Seattle, WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 5th day of May, 2014.



Victoria K. Vigoren

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STATE OF WASHINGTON
2014 MAY -7 AM 11:45

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KING COUNTY, WASHINGTON

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DEPUTY

David Witten

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ISABELLE BICHINDARITZ,

Plaintiff,

v.

UNIVERSITY OF WASHINGTON,

Defendant.

No. 12-2-05747-8 SEA

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

THIS MATTER came on regularly before this Court for a trial held by affidavit pursuant to RCW 42.56.550. The Court having considered the following:

Plaintiff's Trial Brief in Support of Trial by Affidavit;

Plaintiff's Trial Exhibits and Deposition Transcripts Submitted in Support of Trial by Affidavit;

Defendant University of Washington's Trial Brief;

Defendant University of Washington's Submission of Evidence for Trial;

Declaration of Seth J. Berntsen in Support of University of Washington's Trial Submission;

Declaration of Orlando Baiocchi in Support of University of Washington's Trial

Submission;

Declaration of Madolyne Lawson in Support of University of Washington's Trial

Submission;

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

ORIGINAL

1 Declaration of Larry Wear in Support of University of Washington's Trial Submission;
2 Declaration of Eliza Saunders in Support of University of Washington's Trial
3 Submission; and,
4 The record of these proceedings.

5 Having been fully advised, the Court makes the following findings of fact and
6 conclusions of law.

8 I. FINDINGS OF FACT

9 1.1. Plaintiff Isabelle Bichindaritz was at all times material to this lawsuit a resident of
10 King County, Washington.

11 1.2. University of Washington University of Washington is an agency of the State of
12 Washington.

13 1.3. On September 9, 2009, Plaintiff filed a Public Records Act ("hereafter referred to
14 as PRA") request with the University of Washington. Ex. 9. The request asked for a complete
15 copy of all of her personnel files and public records at the University of Washington, at the
16 University of Washington Tacoma, and at the Institute of Technology in Tacoma, where she
17 worked at the time. She also requested every email related to her, including emails to or from
18 Institute of Technology Director Dr. Orlando Baiocchi and colleague Dr. Larry Wear.

19 1.4. The September 9, 2009 PRA request was assigned #09-11792. Ex. 11

20 1.5. The University did not disclose certain responsive emails, which Dr. Bichindaritz
21 could have used in the federal court litigation, until November 2011, after discovery had closed
22 in the federal case. Ex. 7 and 8 (national origin emails), Ex. 70, Ex. 76 at 6. These emails
23 criticized Dr. Bichindaritz's French national origin. Ex. 7 and 8. The emails reflect a print date
24 of October 6, 2009, as listed in the bottom right-hand corner, which is consistent with Dr.
25 Baiocchi's memory of printing the emails. *Id.*, Ex. 71
26
27

1 1.6. On or around September 15, 2009, the University sent letters to individuals who
2 may have documents responsive to #09-11792. Ex. 10, 34, 41, 42, 53, see also Ex. 36, 37, 38,
3 39, 40, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 55, 60. The letters asked the individuals to produce
4 responsive documents by October 8, 2009 or earlier. Ex. 10, 34, 41, 42, 53.
5

6 1.7. In a letter dated September 17, 2009, the Office of Public Records and Open
7 Meetings, (hereafter referred to "OPR"), estimated that answering Dr. Bichindaritz's records
8 request, numbered #09-11792, would take approximately twenty-five days. Ex. 11. OPR also
9 notified her that they would make some of the records available to her on a rolling basis to avoid
10 unnecessary delay.

11 1.8. During her deposition, UWT employee and CR 30(b)(6) witness BrieAnna Bales,
12 who assisted with the 2009 PRA request, testified that boxes of documents responsive to the
13 PRA request were taken up to OPR in Seattle in late September 2009. Ex. 72. Bales testified
14 that a second, much smaller batch of documents was sent via intercampus mail in mid-late
15 October 2009. *Id.* at 13, see also Ex. 35. Bales testified that they received responses from every
16 individual from whom they had requested responses and that these were completed by October
17 2009. *Id.* Bales' testimony is corroborated by her supervisor at the time, and CR 30(b)(6)
18 witness Mike Wark. Ex. 73. The October 2009 time frame is also consistent with Dr. Baiocchi's
19 testimony that he printed the documents in October 2009 after requesting a short extension when
20 he would be out of the country. Ex. 71, Ex. 2.
21
22

23 1.9. The Court finds that by the end of October 2009, all of the documents responsive
24 to Dr. Bichindaritz's 2009 request were assembled by the University, slightly more than 12,000
25 documents that were made available to Dr. Bichindaritz in late 2011.
26
27

1 1.10. In emails produced "on a rolling basis," the discussions about Dr. Bichindaritz's
2 tenure, were produced blank with the explanation that: "Faculty Tenure Review" is exempt from
3 public requests disclosure due to RCW 2.56.230(2)/ 42.56.250(2). Ex. 33. Other documents
4 contained redacted sentences and paragraphs about Dr. Bichindaritz in gray boxes with the
5 explanation "RCW 42.56.230(2)." Ex. 75.
6

7 1.11. On November 12, 2009, Dr. Bichindaritz submitted another PRA request, which
8 was assigned #09-11886. Ex. 12, Ex. 3, Ex. 56, 57, 62. On June 7, 2010, Dr. Bichindaritz made
9 another PRA request for one specific email. Ex. 18, see also Ex. 58, 59.

10 1.12. Over several months, Dr. Bichindaritz paid for and picked up boxes of emails
11 responsive to her 2009 records request, which were made available on several dates in October
12 and December 2009 and January and April 2010, but this was only a fraction of the responsive
13 documents. Ex. 4. Dr. Bichindaritz contacted the OPR in June 2010 to ask when the final
14 documents would be provided to her and was told that the request would be completed in July
15 2010. Ex. 76.
16

17 1.13. According to the University, in its court-ordered response to Plaintiff's Third Set
18 of Interrogatories, dated July 29, 2013, the University offered production of documents to
19 Plaintiff's September 9, 2009 PRA request in four stages, as follows:
20

- 21 • Stage 1: October 13, 2009, which were picked up by the plaintiff on or about
22 November 17, 2009;
- 23 • Stage 2: December 23, 2009, which were viewed by the plaintiff between
24 January 25, 2010 and April 1, 2010;
- 25 • Stage 3: January 26, 2010, which were picked up by the plaintiff on or about
26 April 1, 2010; Ex. 69.
27

1 1.14. On March 11, 2010, Dr. Bichindaritz filed a complaint with the EEOC alleging
2 sex discrimination, retaliation, and national origin discrimination, which gave notice to the
3 University that she was likely going to file a lawsuit. Ex. 63.

4 1.15. On April 5, 2010, the University offered for production more documents
5 responsive to Plaintiff's September 9, 2009, which University has identified as Stage 4, and
6 which were picked up by the plaintiff on or about May 25, 2010. Ex. 69.

7 1.16. In a document produced by the University on Friday, May 31, 2013, it appears
8 that by June 9, 2010, there were still 3.5 boxes to review regarding Dr. Bichindaritz's 2009 PRA
9 request. Ex. 1 at UWPR000113.

10 1.17. Plaintiff was an assistant professor at the University's Tacoma campus at the
11 Institute of Technology, from 2002 to 2010. In 2009, the University denied Plaintiffs third and
12 final application for promotion and tenure ("P&T"). Her employment ended in June 2010, Ex.
13 78.

14 1.18. On July 30, 2010, the University offered for production more documents
15 responsive to Plaintiff's September 9, 2009, which University has identified as Stage 5, and
16 which were picked up by the plaintiff on or about September 13, 2010. Ex. 69.

17 1.19. According to the University, the productions through July 2010 represent only
18 about one-half of the documents that had been assembled by October 2009—so as of July 30,
19 2010, about 12,000 pages had still not been produced by the University. Ex. 68.

20 1.20. On August 25, 2010, Dr. Bichindaritz filed a discrimination complaint in federal
21 district court, which did not include national origin discrimination. Ex. 78.

22 1.21. With 12,000 documents still not produced, even though they had been assembled
23 by October 2009, more than one year passed without any action from the University.
24
25
26
27

1 1.22. On November 12, 2010, the federal judge set trial for October 3, 2011 and the
2 discovery cutoff for June 5, 2011. Ex. 64.

3 1.23. Dr. Bichindaritz was out of the country between mid-June 2010 and February 1,
4 2011, working in France. Ex. 76. During that time, her former attorney, Rick Gautschi, handled
5 some of the follow-up with the public records requests. *Id.* Dr. Bichindaritz submitted an email
6 to the OPR following-up with them about the advancement of her request for public records on
7 July 28, 2010 and learned that the final emails would be provided in September 2010. *Id.*
8 However, the OPR later informed Dr. Bichindaritz that it was necessary to continue working on
9 her request through October 2010. Ex. 13, 14, 15, 16, 17, 18, 19.

11 1.24. During one of her conversations with the OPR, Dr. Bichindaritz was informed
12 that the responsive documents were in the possession of the Attorney General's Office at the
13 University of Washington. Ex. 76, Ex. 79.
14

15 1.25. The University asserts that in 2010, Dr. Bichindaritz's PRA request #09-11792
16 was changed to TR-2010-00156. Ex. 70, Ex. 79.

17 1.26. On December 9, 2010, the University offered more responsive documents for
18 production, which were not picked up by the plaintiff. Ex. 69. The University believes that
19 these documents were subsequently produced in the late 2011 production. *Id.* But the University
20 does not know how many documents were included in this production. Ex. 68.

21 1.27. On January 31, 2011, the University sent Dr. Bichindaritz, through her attorney, a
22 letter referencing TR-2010-00156 stating:
23

24 On December 9, our office mailed you an invoice for stage 6 of the material
25 responsive to your public records request. To date, we have not received payment
26 for these records.
27

1 Please remit payment or call and make an appointment to view these records by
2 February 7, 2011. If we have not heard from you by that date, we will dispose of
the copied records and close your request.

3 Ex. 20. On February 7, 2011, likely in response to the January 31, 2011 letter, Mr. Gautschi
4 called the University and closed TR-2010-00156. Ex. 21.

5 1.28. The discovery cut-off date in the federal litigation was June 5, 2011. Ex. 64.
6 After still having not received the remaining documents, Dr. Bichindaritz contacted the OPR and
7 asked them to resume request #09-11792. Ex. 22. She sent a letter dated June 6, 2011 to that
8 effect: "This letter informs you that I am asking you to restart processing the documents from my
9 first public records request to you, which is #09-11792." *Id.* Dr. Bichindaritz was told that
10 about half of this request had been processed; she wrote, "You indicated to me that still about
11 10,000 documents have not been produced. I would like to receive these directly at the
12 following address ..." *Id.* In fact, twelve thousand documents had not been produced at that time.
13 Ex. 79.

14 1.29. The OPR answered on June 14, 2011, entering a new case number for this
15 request, which became #PR-2011-00286, with the explanation: "I am writing to acknowledge
16 receipt of your public records request received by this office on June 7, 2011. We estimate we
17 will respond to your request by July 20, 2011. As allowed by RCW 42.56.520, if additional time
18 is needed to locate, review or assemble documents or to notify third parties affected by your
19 request, we will contact you." Ex. 23.

20 1.30. At her deposition, OPR Program Coordinator Madolyne Lawson admitted that she
21 could have simply reopened the request under the old case number. Ex. 74 (Lawson Dep. at 29-
22 30). Dr. Bichindaritz followed-up with a certified letter on June 16, 2011:

23 I am only requesting the public records already assembled by you in the above
24 request #09-11792 since you have confirmed to me that these documents are
25

1 available. Therefore I am not requesting a new set of documents, as your letter
2 dated 6/14/2011 seems to indicate. I am not in a situation to be able to wait the
3 years taken by request #09-11792 to assemble the documents.

4 Ex. 24.

5 1.31. In her deposition, OPR Director Eliza Saunders testified that OPR already had the
6 documents responsive to Dr. Bichindaritz's 2009 PRA request. Ex. 70 (Saunders Dep. at 36-37).
7 This is why OPR did not send out letters requesting the documents from individuals identified in
8 the request as they had done in 2009 (See Ex. 10 and 35 for sample 2009 letters).

9 1.32. Trial in the federal court litigation, which was previously scheduled for fall 2011,
10 was rescheduled to March 19, 2012. Ex. 64.

11 1.33. After several emails notifying her of delays in the availability of the records, the
12 final documents responsive to request #09-11792 were made available to Dr. Bichindaritz
13 electronically in several batches:

14 8/15/2011 Stage 1 at a cost of \$661.18
15 10/7/2011 Stage 2 at a cost of \$273.58
16 11/3/2011 Stage 3 at a cost of \$468.83
17 11/15/2011 Stage 4 at a cost of \$420.98

18 Ex. 4, Ex. 25 (8/15/11 email from Palmer re: first batch of documents and plaintiff's response),
19 Ex. 26 (8/17/11 email notifying plaintiff of delay), Ex. 27 (9/15/11 email notifying plaintiff of
20 delay), Ex. 28 (10/7/11 email from Palmer re: second batch of documents reviewed), Ex. 29
21 (email exchange between Palmer and plaintiff regarding additional delay and remaining
22 documents), Ex. 30 (11/3/11 email notifying plaintiff of delay and plaintiff's response), Ex. 31
23 (11/3/11 email from Palmer re: payment for additional records), Ex. 32; *see also* summary of
24 production at Ex. 79. The University charged the plaintiff \$0.15 per page even though the
25 University provided electronic copies, not paper copies. Ex. 4. Moreover, the University made
26
27

1 no offer to produce the documents for free on its website as provided by RCW 42.56.520 and
2 WAC 44-14-04004. Ex. 67.

3 1.34. In its communications with Dr. Bichindaritz, the University repeatedly referred to
4 the 2011 productions by referencing the 2009 request number, which is strong evidence that the
5 University considered this to be a reactivation of the 2009 request:

- 7 • Stage 1: "This letter is provided in response to your public records request for documents
8 prepared, but not yet provided to you in response to your previous public records request
9 #09-11792, Bichindaritz." Ex. 67, Aug. 15, 2011 letter.
- 10 • Stage 2: "This letter is provided in partial response to your public records request for
11 further documents from your previous public records request #09-11792." Ex. 67, Oct. 7,
12 2011 letter.
- 13 • Stage 3: "This letter is provided in partial response to your public records request for
14 documents responsive to your previous public records request #09-11792." Ex. 67, Nov.
15 3, 2011 letter.
- 16 • Stage 4: "This letter is provided in final response to your public records request for
17 documents compiled from your previous public records #09-11792." Ex. 67, Nov. 15,
18 2011 letter.

19 1.35. University filed a summary judgment motion in federal court on July 5, 2011. Ex.
20 78 (federal docket). The trial judge denied summary judgment on September 19, 2011. *Id*

21 1.36. Dr. Bichindaritz visited the OPR on August 19, 2011 to view all the Stage 1
22 records identified above, selected some, and received an electronic copy of them on a CD after
23 paying for them. Ex. 76. Because of the events taking place in the federal lawsuit, and her
24 financial situation, she did not request at that time to view or receive the records in Stages 2, 3,
25 and 4. *Id*. However, Dr. Bichindaritz contacted the OPR by email on January 20, 2012 to let
26 them know that she wanted to obtain all of the records, and to ask how much this would cost. *Id*.
27 The University answered by email on January 30, 2012 advising plaintiff that it would make the
records available to her without charging for copies: "We are no longer charging for records

1 responsive to public record requests...” Ex. 6. Dr. Bichindaritz then received a CD in the mail
2 with Stages 2, 3, and 4 on February 1, 2012. *Id.* See also, Ex. 79.

3 1.37. The Stage 3 production offered to Dr. Bichindaritz by the University on
4 November 3, 2011 includes matters of import in the federal litigation, emails in which peers and
5 management exchanged comments that refer to her French national origin. Ex. 7 and 8, Ex. 70.
6 Dr. Bichindaritz is French and speaks English with an accent. Ex. 76. These emails were not
7 produced by the University during the federal litigation. *Id.* Dr. Bichindaritz also observed that
8 other emails in the production contain new and very important evidence about her tenure
9 candidacy. *Id.* Dr. Bichindaritz’s former attorneys deposed Orlando Baiocchi and Larry Wear in
10 2011. To her knowledge, her attorneys did not have copies of these emails, and have never had
11 copies of these emails. *Id.*

12 1.38. A bench trial was held from April 9, 2012 to April 16, 2012, and the court entered
13 judgment for the University. Ex. 64.

14 1.39. The 2011 Stage 1-4 documents were assembled by the University by October or
15 November 2009. As of June 6, 2011, all documents should have been produced, thus, the delay
16 in production was as follows:

17 Stage 1: 70 days.
18 Stage 2: 123 days.
19 Stage 3: 150 days.
20 Stage 4: 162 days.

21 1.40. This Court conducted in camera review of the redacted documents and
22 determined that several should have been produced unredacted. Ex. 66. Important to the federal
23 litigation, one of the documents was an email between Wear and Baiocchi revealing that a
24 “nursing person who was on Isabelle’s committee hinted that we might be picking on Isabelle’s
25
26
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1 teaching because she is a woman.” Ex. 66 (Bates 006792). It was written on November 14,
2 2007. *Id.* This is the same time frame that Dr. Bichindaritz’s first tenure application was
3 considered. Ex. 77. The document was printed on October 6, 2009, but not produced unredacted
4 until the July 2013, pursuant to the Court’s order. Ex. 66 (Bates 006792), Ex. 77. Dr.
5 Bichindaritz never saw this document during her federal litigation or during the adjudication,
6 because it was never produced. Ex. 77. Yet, its absence in the federal litigation permitted the
7 University to argue in the federal litigation that no one had complained that she was a victim of
8 gender discrimination.
9

10 1.41. In this PRA proceeding, plaintiff originally filed state discrimination and
11 retaliation claims against the University under the Washington Law Against Discrimination as a
12 “placeholder” to avoid issues with the statute of limitations in the event the Ninth Circuit appeal
13 succeeds and the case is remanded back to federal court. Dkt. #1. On June 4, 2012, plaintiff
14 filed a motion to stay any discovery or other proceedings under those “placeholder” claims
15 pending a favorable outcome of the federal appeal. Record of these proceedings, Dkt. #13.
16

17 1.42. On June 8, 2012, the University filed a motion for partial summary judgment and
18 for sanctions. Record of these proceedings, Dkt. #18. In the motion, the University of
19 Washington argued that the statute of limitations had run on the claims before June 2011 because
20 plaintiff’s former counsel withdrew the 2009 PRA claim in February 2011. *Id.* The University
21 did not reveal to the Court or to the plaintiff that all of the 12,000 documents had been assembled
22 in 2009 but not produced until 2011. *Id.* This Court ultimately granted University’s summary
23 judgment motion and awarded costs and fees as a sanction totaling \$20,266.16, at 12 per cent
24 interest. Record of these proceedings, Dkt. #67.
25
26
27

1 2.2. The PRA “is a strongly worded mandate for broad disclosure of public
2 records.” *Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007) (quoting *Hearst*
3 *Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). “The PRA’s purpose is to increase
4 access to government records.” *Sanders v. State of Washington*, 169 Wn.2d 827, 849, 240 P.3d
5 120 (2010). To that end, the legislature has declared:

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

16 RCW 42.56.030 (Emphasis added).

17 2.3. Under the PRA, each agency must make their records available for public
18 inspection unless, “the record falls within the specific exemptions . . . of this section, this
19 chapter, or other statute which exempts or prohibits disclosure of specific information or
20 records.” RCW 42.56.040. The statute permits the State to redact certain information “to
21 prevent an unreasonable invasion of personal privacy interests protected by this chapter,” but
22 “the justification for the deletion shall be explained fully in writing.” *Id.*

23 2.4. If the University fails to provide requested documents in violation of the PRA, the
24 University must pay attorney fees, costs, and penalties to the person who requested the
25 documents:

26 Any person who prevails against an agency in any action in the courts seeking the
27 right to inspect or copy any public record or the right to receive a response to a
public record request within a reasonable amount of time shall be awarded all
costs, including reasonable attorney fees, incurred in connection with such legal
action. In addition, 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.

1 RCW 42.56.550(4). “The PRA penalty is designed to discourage improper denial of access to
2 public records and [encourage] adherence to the goals and procedures dictated by the statute.”
3 *Yousoufian v. Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010) (internal quotations and citations
4 omitted). A penalty “is not dependent upon a showing of an agency’s good or bad faith in its
5 claim of exemptions under the Act.” *Amren v. City of Kalama*, 131 Wn.2d 25, 37, 929 P.2d 389
6 (1998).

7
8 2.5. “Records are either ‘disclosed’ or ‘not disclosed.’ A record is disclosed if its
9 existence is revealed [by the State] to the requester in response to a PRA request, regardless of
10 whether it is produced.” *Sanders v. State of Washington*, 169 Wn.2d at 836. “Disclosed records
11 are either ‘produced’ (made available for inspection and copying) or ‘withheld’ (not produced).”
12 *Id.* “A document not covered by one of the exemptions is, by contrast, ‘nonexempt.’
13 Withholding a nonexempt document is ‘wrongful withholding’ and violates the PRA.” *Id.*
14 (citing *Yousoufian* at 429).

15
16 2.6. “Responses to requests for public records shall be made promptly by agencies.”
17 RCW 42.56.520. Under this section, an agency has five days to respond to a PRA request by:
18 “(1) providing the requested records, (2) providing a reasonable time in which the requested
19 records will be provided, or (3) denying the request.” *Smith v. Okanogan County*, 100 Wn. App.
20 7, 994 P.2d 857 (2000), *Doe I v. Washington State Patrol*, 80 Wn. App. 296, 908 P.2d 914
21 (1996). A delayed response, especially when time is of the essence, is an aggravating factor
22 justifying an increased penalty. *Yousoufian v. Sims, Id.* At 467.

23
24 2.7. The University knew in March 2010 that Dr. Bichindaritz filed an EEOC
25 Complaint to include the national origin claim. The University was a party to the subsequent
26 federal lawsuit, and delayed the production of documents in this any discovery requests until the
27

1 after discovery time limits in the federal lawsuit had passed. Yet, limits set by the trial court
2 under civil rules of discovery, underscore that time was of the essence in the production of the
3 PRA documents. *Yousoufian v. Sims, Id.* At 467.

4 2.8. A summary of salient facts supporting a finding of unreasonable delay are as
5 follows:
6

- 7 (1) The 12,000+ documents were assembled in October or November 2009.
8 (2) There were 3.5 boxes of documents left to review in June 2010, implying the
9 University languished in their document review between October 2009 and
10 February 2011, and again after June 2011 during the pendency of the federal suit.
11 (3) Circumstantially, the record reflects the University reviewed and completed the
12 withholding index before the statute changed, explaining why the University cited
13 the wrong section in the index—before July 2011.
14 (4) Uncontested, the University took between 752 and 744 days to respond to
15 plaintiff's request (stages 1-4).
16

17 2.9. Taking over two years to produce documents is bitterly, indeed, grievously
18 unreasonable as a matter of law. “The burden of proof shall be on the agency to show that the
19 estimate it provided is reasonable.” RCW 42.56.550(2). The University has not met its burden.
20 The University's reliance on *West v. Wash. State Dept. of Natural Res.*, 163 Wn. App. 235, 258
21 P.3d 78 (2011), is particularly unjustified. Unlike these facts, in *West*, the court found a six-
22 month delay reasonable because the plaintiff kept on changing the substance of the request,
23 resulting in the University of Washington hiring an outside expert to locate missing documents.
24 *Id.* at 245-46.
25
26
27

1 2.10. Additionally, “withholding an entire record where only a portion of it is exempt
2 violates the act.” WAC 44-14-04004; see also *Seattle Firefighters Union Local No. 27 v.*
3 *Hollister*, 48 Wn. App. 129, 132, 737 P.2d 1302 (1987). Ex. 67 shows that on dozens of
4 occasions the University withheld entire documents without explaining why the entire document
5 needed to be withheld. Also, there are dozens of examples in which the University does not
6 sufficiently identify the author, recipient, subject of the document. This is also a violation of the
7 PRA.

8
9 One way to properly provide a brief explanation of the withheld record or
10 redaction is for the agency to provide a withholding index. It identifies the type of
11 record, its date and number of pages, and the author or recipient of the record
12 (unless their identity is exempt). The withholding index need not be elaborate but
13 should allow a requestor to make a threshold determination of whether the agency
14 has properly invoked the exemption.

15 WAC 44-14-04004; see also *Progressive Animal Welfare Soc’y. v. Univ. of Wash.*, 125 Wn.2d
16 243, 271, n.18, 884 P.2d 592 (1994) (“PAWS II”). Thus, the University failed to properly
17 identify the documents withheld.

18 2.11. Moreover, the University admits that it cited the wrong statutory basis for a
19 number of withholdings listed in its withholding index Ex. 67 (Saunders Dec., Ex. 15). This is a
20 clear violation which raises some inferences for the penalty phase. First, the University would
21 have cited to the correct provision because OPR is competent and knows the law. Second, the
22 citation to the law before the change in July 2011, properly leads to the conclusion that the
23 University created the withholding index before the law changed, which means the 12,000+
24 documents could have been produced in June 2011.

25 2.12. Most importantly, the University violated the PRA in failing to produce 12,000
26 documents assembled in 2009 until the end of 2011. “Where the PRA is violated, trial courts
27 must award penalties.” *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 465, 229 P.3d 735,

1 747 (2010). The PRA is a forceful reminder that agencies remain accountable to the people of
2 the State of Washington:

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

9 *Id.*, RCW 42.56.030.

10 2.13. The Washington Supreme Court has left in the hands of trial judges the decision
11 of how large or small a penalty should be, and provided a nonexclusive list of mitigating and
12 aggravating factors the court may consider. *In Yousoufian*, that Court stated, "We emphasize
13 that the factors may overlap, are offered only as guidance, may not apply equally or at all in
14 every case, and are not an exclusive list of appropriate considerations. Additionally, no one
15 factor should control. These factors should not infringe upon the considerable discretion of trial
16 courts to determine PRA penalties." *Id.* at 468.

17 2.14. Listed as follows, the Court has considered all, both mitigating and aggravating
18 factors. The mitigating factors include:

- 19 (1) a lack of clarity in the PRA request;
 - 20 (2) the agency's prompt response or legitimate follow-up inquiry for clarification;
 - 21 (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural
22 requirements and exceptions;
 - 23 (4) proper training and supervision of the agency's personnel;
 - 24 (5) the reasonableness of any explanation for noncompliance by the agency;
 - 25 (6) the helpfulness of the agency to the requestor; and
- 26
27

1 (7) the existence of agency systems to track and retrieve public records.

2 *Id.* at 467.

3 2.15. As to the first factor, there is no evidence that the 2009 request was confusing or
4 needed clarity, nor the resumption of the 2009 request in Plaintiff's 2011 request.

5 2.16. As to the second, third and fifth factors, the University listed its reasons for not
6 producing 12,000 pages for a two year period, as follows:
7

8 Documents responsive to Plaintiffs PRA requests, including emails, were
9 promptly produced on a rolling basis after they had been assembled and reviewed
10 for potential exempt information. Various factors contributed to the time it took to
11 produce records, including the broad scope of the requests, that the records were
12 in the possession of at least 96 different record holders in at least 11 different
13 departments across 2 different campuses, the massive volume of records
14 assembled by record holders and provided to the OPR (more than 25,000 pages
15 counting records responsive to both Plaintiff's 2009 and 2011 PRA Requests), the
16 nature of the records (including tenure files and faculty emails) contained
17 statutorily exempt information requiring extensive time to review, the volume of
18 work at the OPR during this period and the limited staff available at the OPR.
19 Moreover, Plaintiff closed her 2009 PRA Request on February 7, 2011 and did
20 not purport to re-open it (by initiating another request) for another four months,
21 further delaying the production of records. *See also*, the declarations of Madolynne
22 Lawson and Eliza Saunders and the exhibits thereto. Ex. 68.

23 These are unsatisfactory under the current case law.

24 2.17. On the issue of timeliness and reasonableness of delay, the University urged
25 the Court to find that the University's work resources were stretched with fewer
26 personnel; that all documents after the 2011 request were provided within five months,
27 (save those ordered by the court); that the exemptions identified on the redacted
documents justified non-disclosure; and that Plaintiff's own delay in retrieving the
documents vitiated any delay or showing that "time was of the essence." These reasons
are insufficient in this Court's view under the current case law for the following reasons:
First, the University's devotion of resources to PDA requests is solely within its discretion and,
having fewer personnel is not recognized as a justification because of the strict time statutory

1 constraints. Second, bad faith or dishonesty are weighty propositions yet applicable here
2 diminish the argument that five months was sufficient. Given the context of ongoing litigation
3 from March of 2010 until disclosure in November of 23011, more than five months are at issue.
4 This litigation was known to the University, thus, this Court is required to consider whether it
5 can rule out the client's self-interest as an over-arching motive or constitutes bad faith.

6
7 Without litigation there is arguably no motive for nondisclosure, with it there is the client's
8 self-interest, motive in fact. All documented communications concerning the plaintiff's tenure
9 process were pertinent to the PDA request as well as the federal suit. These issues were not
10 narrow, as only gender or national origin discrimination, but broad because of the ambit of other
11 available claims, as alleged retaliation. The University's liability exposure as a government
12 entity with vast financial resources only heightened the need for a prompt and thorough records
13 review. Yet, the record shows this is was completed by the end of October, 2009.

14
15 Thus, because these records were assembled within several weeks of the request
16 despite of their numerousity, that they were not produced to the plaintiff in a timely way
17 required by law, only points to ongoing litigation as motive for delay. Here, the timetable
18 of disclosures reveal circumstantially that the plaintiff's requests were thwarted, and thus
19 failure to produce the documents only skewed in the University's favor.

20
21 Upon close scrutiny, such a delay is unreasonable in light of the strict deadlines of the
22 PDA. The Court certainly considered the fact that plaintiff's counsel abandoned the
23 request amid litigation, which ordinarily would have vitiated plaintiff's 2009 claim.
24 Because this court had already granted partial summary judgment, that fact was not
25 dispositive. By reactivating the 2009 PDA request on June 6, 2011, plaintiff's request
26 could have been met the next day, June 7, 2011, given completed assembled documents.
27

1 Of lesser concern, as to the second factor, the agency's actions of ongoing
2 communications in the context of litigation were meaningless by continually extending
3 distribution without giving "good" cause, punctuated by an inventory list which was not
4 accurate. Finally, in view of what was ultimately discovered in the second to the last
5 distribution, the two emails of substance, the delayed distributions strongly suggest the
6 interposition of self-interested litigation motives.

8 Finally, the last factor, unhelpful to the University, the court-ordered interrogatory responses
9 show that the University did not keep track of its records production in 2009. Accordingly, the
10 mitigating factors do not diminish the wrong attended upon the plaintiff here.

12 2.18. *In Yousoufian*, the Court also listed aggravating factors that may support
13 increasing the penalty which are:

- 14 (1) a delayed response by the agency, especially in circumstances making time of the
15 essence;
- 16 (2) lack of strict compliance by the agency with all the PRA procedural requirements
17 and exceptions;
- 18 (3) lack of proper training and supervision of the agency's personnel;
- 19 (4) unreasonableness of any explanation for noncompliance by the agency;
- 20 (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA
21 by the agency;
- 22 (6) agency dishonesty;
- 23 (7) the public importance of the issue to which the request is related, where the
24 importance was foreseeable to the agency;
- 25 (8) any actual personal economic loss to the requestor resulting from the agency's
26 misconduct, where the loss was foreseeable to the agency; and
- 27 (9) a penalty amount necessary to deter future misconduct by the agency considering
 the size of the agency and the facts of the case. *Yousoufian*, 168 Wn.2d at 467-8.

FILED
KING COUNTY, WASHINGTON

Hon. Monica J. Benton

OCT 30 2013

SUPERIOR COURT CLERK
TONJA HUTCHINSON
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ISABELLE BICHINDARITZ,

Plaintiff,

v.

UNIVERSITY OF WASHINGTON,

Defendant.

No. 12-2-05747-8 SEA

**[PROPOSED] FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
PLAINTIFFS' PETITION FOR
ATTORNEY FEES AND COSTS**

THIS MATTER came on regularly before this Court on Plaintiffs' Petition for Attorney Fees and Costs. The Court considered the following:

Plaintiffs' Petition for Attorney Fees and Costs;

The Declaration of John P. Sheridan in Support of Plaintiffs' Petition for Attorney Fees and Costs with attached exhibits;

The Declaration of Beth Touschner in Support of Plaintiffs' Petition for Attorney Fees and Costs;

The Declaration of Scott Blankenship in Support of Plaintiffs' Petition for Attorney Fees and Costs;

The Defendant's response in opposition to Plaintiff's Petition for Attorney Fees and Costs;

ORIGINAL

**[PROPOSED] FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
PLAINTIFFS' PETITION FOR ATTORNEY FEES,** CP 2143

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1 The declaration(s) of counsel in opposition to Plaintiffs' Petition for Attorney Fees and
2 Costs with attached exhibits;

3 Plaintiffs' Reply and supporting declaration with attached exhibits; and,
4 The record of these proceedings.

5 Having been fully advised, the Court makes the following findings of fact and
6 conclusions of law.
7

8 1. These findings of fact and conclusions of law are issued in connection with the
9 plaintiffs' petition for attorney fees. Our Supreme Court requires the entry of findings of fact
10 in fee award decisions. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

11 **Background**

12 2. This case was filed on February 14, 2012, in King County Superior Court
13 alleging violations of the Public Records Act, RCW 42.56. This Court entered findings of fact
14 and conclusions of law on September 11, 2013, which provided in part, that plaintiff shall be
15 awarded attorney fees and costs.
16

17 3. Under the PRA, if the State fails to provide requested documents in violation of
18 the PRA, the State must pay attorney fees, costs, and penalties to the person who requested the
19 documents:
20

21 Any person who prevails against an agency in any action in the courts seeking
22 the right to inspect or copy any public record or the right to receive a response to
23 a public record request within a reasonable amount of time shall be awarded all
24 costs, including reasonable attorney fees, incurred in connection with such legal
25 action. In addition, 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).

1 4. The plaintiff prevailed in this case, and with a \$723,000.00 verdict, achieved
2 excellent results. *See, e.g., Blair v. Wash. State University*, 108 Wn.2d 558, 572 (1987), *Steele*
3 *v. Lundgren*, 96 Wn. App. 773, 783 (2000). Thus, she is entitled to an award of reasonable
4 attorney fees. Our Supreme Court has given trial courts broad discretion in awarding attorney
5 fees. “In order to reverse an attorney fee award, an appellate court must find the trial court
6 manifestly abused its discretion.” *Pham v. Seattle City Light*, 159 Wn.2d 538, 540, 151 P.3d
7 976 (2007).

8
9 5. The Washington State Supreme Court has determined that the calculation of an
10 award of a reasonable attorney fee involves several determinations, the first of which is the
11 calculation of a “lodestar figure.” *Id.* (citing *Bowers v. Transamerica Title Insurance Co.*, 100
12 Wn.2d 581, 597 (1983)). The lodestar figure is the product of the attorney’s reasonable rate of
13 hourly compensation multiplied by the number of attorney hours reasonably expended in the
14 litigation. *Bowers*, 100 Wn.2d at 593. An attorney’s established rate for billing clients is
15 usually the reasonable hourly rate for calculation of the lodestar. *Id.* at 596-598. **“Where the**
16 **attorneys in question have an established rate for billing clients, that rate will likely be a**
17 **reasonable rate.”** *Id.* at 597. Trial judges are in the best position to determine the amount of
18 attorney fees and costs, and are thus given broad discretion in determining the lodestar. *Pham v.*
19 *Seattle City Light*, 159 Wn.2d at 540.

20
21
22 **Plaintiffs’ Attorneys’ Hourly Rates**

23 6. In assessing the reasonableness of the hourly rates of counsel, the Court has
24 independently reviewed the billing records submitted by the parties and the declarations of their
25 attorneys and staff.

1 7. Jack Sheridan—Mr. Sheridan requests an hourly rate of \$550 per hour. This
2 court finds that the \$550 per hour rate is Mr. Sheridan’s established hourly in that he bills
3 hourly clients at that rate. This rate “will likely be a reasonable rate.” *Bowers v. Transamerica*
4 *Title Insurance Co.*, 100 Wn.2d 581, 597 (1983). On January 1, 2013, I became a partner at
5 MacDonald, Hoague & Bayless, which is a prominent Seattle law firm that focuses on civil
6 rights and immigration. This Court finds Mr. Sheridan’s rate to be reasonable for attorneys
7 with his level of experience and expertise. This Court finds that Mr. Sheridan has been an
8 attorney since 1984 and that he has extensive experience as a trial attorney having conducted
9 numerous jury trials in his career both in the military and in private and public practice. This
10 Court finds that Mr. Sheridan has focused his practice on civil rights and public interest law
11 since 1994, and that some of his cases have helped shape the development of Washington law.
12 *See e.g., Martini v. Boeing*, 137 Wn. 2d 357 (1999), *Brundridge v. Fluor Fed. Services, Inc.*,
13 164 Wn.2d 432, 191 P.3d 879 (2008), *Pham v. Seattle City Light*, 159 Wn.2d 538, 540, 151
14 P.3d 976 (2007), *Trinh and Bailey v. City of Seattle*, 2008 Wash. App. LEXIS 1391 (1998),
15 *Johnson v. Chevron*, 159 Wn. App. 18, 244 P.3d 438 (2010), and *Lodis v. Corbis Holdings,*
16 *Inc.*, 172 Wash. App. 835, 852, 292 P.3d 779, 789 (2013). In support of the hourly rate, I note
17 that Scott Blankenship, the attorney expert retained by the plaintiff, found that Mr. Sheridan’s
18 rate is eminently reasonable for an attorney with his years of experience and level of
19 achievement. I also note that Mr. Sheridan has not requested fees for the period involving the
20 defendant’s first summary judgment motion.
21
22
23

24 8. Beth Tuschner—plaintiffs request an hourly rate of \$325 per hour. This Court
25 finds that rate to be reasonable for attorneys with her level of experience and that \$325 per hour
is the rate she currently charges clients who retain her services on an hourly basis. This Court

1 finds that Ms. Touschner has been an attorney since 2008, and that she has worked for the
2 Sheridan Law Firm, P.S. for over three years and MHB since January. She has supported Mr.
3 Sheridan in drafting pleadings, including summary judgment responses and appellate briefs,
4 and has second-chaired trials with Mr. Sheridan, including this one. In support of the hourly
5 rate, I note that Steve Frank, the attorney expert hired by the plaintiffs, has found that Ms.
6 Touschner's rate is reasonable.
7

8 9. Staff fees—Ashalee May requests an hourly rate of \$200 per hour. Ms. May has
9 worked as Mr. Sheridan's paralegal since June 2008, and has provided a diverse range of
10 services under Mr. Sheridan's supervision from document management to litigation support,
11 including drafting document and witness-related pleadings such as lists of primary witnesses
12 and pre-trial statements. She also interviews witnesses, helps draft witness declarations, and
13 attends trials when required. Ms. May's hourly rate has been deemed reasonable by Mr.
14 Sheridan and the Court so finds.
15

16 **Total Hours Worked**

17 10. Attorneys must document their work. The Court has reviewed the extensive
18 billing records submitted by the plaintiffs. "This documentation need not be exhaustive or in
19 minute detail, but must inform the court, in addition to the number of hours worked, of the type
20 of work performed and the category of attorney who performed the work (*i.e.*, senior partner,
21 associate, etc.)." *Bowers* at 597. This court finds that the records submitted by plaintiffs'
22 counsel contain sufficient detail under the standard set forth in *Bowers*.
23

24 11. Plaintiffs billed 285.3 hours in this litigation. "The court must limit the lodestar
25 to hours reasonably expended, and should therefore discount hours spent on unsuccessful
claims, duplicated effort, or otherwise unproductive time." *Bowers* at 597. The hours

1 reasonably expended must be spent on claims having a “common core of facts and related legal
2 theories.” *Pham*, 159 Wn.2d at 538 (citing *Martinez v. City of Tacoma*, 81 Wn. App. 228, 242-
3 43, 914 P.2d 86 (1996)).

4 12. Mr. Sheridan and his staff used an electronic billing program to record and edit
5 the time billed to this client, and they deducted unbillable, unproductive, and duplicative times
6 and reduced time spent based on his business judgment as each time slip was created.

7 13. The plaintiffs prevailed on their statutory PRA claim. The pleadings submitted
8 by the plaintiffs and the hours billed were based on a common core of facts and related legal
9 theories, and plaintiffs should be compensated for those hours.

10 14. The hours expended by the plaintiff in this case were reasonable. Plaintiff’s
11 approach was economical and does not include billings before January 1, 2013. Here, plaintiff
12 conducted key depositions before trial, and successfully moved to compel evidence withheld by
13 the defendant. The defendant filed a summary judgment motion in 2013 and a CR 59 motion,
14 both of which were denied.

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16
17 **Lodestar**

18 15. Pursuant to *Bowers*, once the hourly rates and total hours worked have been
19 determined, “[t]he total number of hours reasonably expended is multiplied by the reasonable
20 hourly rate of compensation.” *Bowers*, 100 Wn.2d at 597. That figure becomes the lodestar.

21 The calculation is as follows:

22

<u>Attorney/Staff</u>	<u>Hourly Rate</u>	<u>Hours Billed</u>	<u>Total</u>
Sheridan	\$550	90.80	\$49,940.00
Touschner	\$325	82.60	\$26,845.00
May	\$200	111.90	\$22,380.00
	Total Hours Worked:	285.3	\$99,165.00

Expert Scott Blankenship	\$550	2.1	\$1,155.00
		Total Fees Requested for Lodestar:	\$100,320.00

Sheridan Dec., Ex. 9. The lodestar in this case is the product of the rates and hours billed as set forth above, which totals \$100,320.00. The Court finds this amount to be reasonable.

Costs

19. RCW 42.41 specifically provides for costs. In civil rights cases in Washington, victims of discrimination may recover, "actual costs of the litigation, including expert witness fees, facsimile and copying expenses, cost of depositions, and other out-of-pocket expenses." *Hume v. American Disposal, Co.*, 124 Wn.2d 656, 674, 880 P.2d 988 (1994), *Xieng v. Peoples Nat. Bank of Washington*, 120 Wn.2d 512, 528-530, 844 P.2d 389 (1993). There is no reason to think that the legislature intended that victims of agency abuses under the PRA should get less.

20. Plaintiffs incurred costs of \$2,638.03 in connection with this litigation, which are reasonable. Sheridan Dec., Ex. 10.

Summary and Allocation

30. The defendant is ordered to pay the plaintiffs the attorneys' fees and costs as follows:

Attorney Fees:	\$100,320.00
Costs:	\$2,638.03
Total Owing:	\$102,958.03

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DATED this 30 day of October, 2013.



Hon. Monica J. Benton
King County Superior Court

Presented by:
THE SHERIDAN LAW FIRM, P.S.

By: s/John P. Sheridan
John P. Sheridan, WSBA # 21473
Attorneys for Plaintiffs

Bichindaritz's Delays In Retrieving Records After Production By The OPR

2009 Request

Stage	Date Produced By OPR	Date Retrieved By Bichindaritz	Delay
1	October 13, 2009	November 17, 2009	35 days
2	December 23, 2009	Not picked up	Not picked up
3	January 26, 2010	April 1, 2010	65 days
4	April 5, 2010	May 25, 2010	50 days
5	July 30, 2010	September 13, 2010	45 days
6	December 9, 2010	Not picked up	Not picked up

2011 Request

Stage	Date Produced By OPR	Date Retrieved By Bichindaritz	Delay
1	August 15, 2011	3,867 pages on February 1, 2012 (512 pages on August 19, 2011)	170 days
2	October 7, 2011	February 1, 2012	117 days
3	November 3, 2011	February 1, 2012	90 days
4	November 15, 2011	February 1, 2012	78 days

1 whether relief under Rule 60(d)(3) is appropriate.² Having reviewed the memoranda,³
2 declarations, and exhibits submitted by the parties, the Court finds as follows:

3 Rule 60(d)(3) affirms the Court's inherent power to set aside a judgment that is
4 obtained through fraud on the court. Rule 60(d)(3) is narrowly construed, however, and requires
5 more than simple fraud, misrepresentation, or misconduct by an opposing party. The latter type
6 of fraud may be remedied under Rule 60(b)(3), but must be raised within a year after the entry of
7 judgment. Relief under Rule 60(d)(3) is available only if the fraud "defiles the court or is
8 perpetrated by officers of the court." United States v. Chapman, 642 F.3d 1236, 1240 (9th Cir.
9 2011). The fraud must rise "to a level of an unconscionable plan or scheme which is designed to
10 improperly influence the court in its decision." Id.

11 The basis for plaintiff's motion for relief from judgment is a recent state court
12 decision finding that the University of Washington violated the Washington Public Records Act
13 ("PRA") when it failed to produce certain records in an unredacted and timely manner. The
14 Honorable Monica J. Benton of the King County Superior Court found that documents related to
15 plaintiff's national origin may have been useful in this case and should have been produced to
16 plaintiff as soon as she reopened her PRA request in June 2011. In addition, Judge Benton found
17 that an email from Dr. Wear to Dr. Baiocchi indicating that a "nursing person who was on
18 [plaintiff's 2007-2008 tenure] committee hinted that we might be picking on Isabelle's teaching
19 because she is a woman" should have been produced in response to the PRA request and would
20 have contradicted Dr. Baiocchi's testimony that he had not received any complaints that he was
21 favoring men over women.

22 The state court has now resolved plaintiff's PRA claims: the University of
23 _____

24 ² To the extent plaintiff seeks relief under Fed. R. Civ. P. 60(b), the motion is untimely. Fed. R.
25 Civ. P. 60(c)(1).

26 ³ The Court notes that a page is missing from plaintiff's reply memorandum (Dkt. # 208).

1 Washington was obligated to and should have produced certain documents in response to
2 plaintiff's record request and has been sanctioned for its failures. The issue before this Court is
3 whether the failure to timely produce unredacted documents in response to a PRA request was
4 designed to corrupt the legitimacy of the truth-seeking process in this litigation and/or whether
5 the integrity of the judicial process has been harmed. See Dixon v. C.I.R., 316 F.3d 1041, 1046
6 (9th Cir. 2003). As a general matter, a violation of the PRA does not necessarily establish a
7 discovery violation in related federal litigation, much less an intentional scheme to defraud the
8 court. As plaintiff's then-counsel recognized, the liberal rules of federal discovery gave plaintiff
9 an opportunity to obtain documents in this venue separate and apart from the PRA and without
10 regard to whatever redaction and privacy limitations the University might rely upon in responding
11 to the PRA request. The mere fact that Judge Benton found that the University violated the PRA
12 does not establish fraud on the court.

13 With regards to the specific documents highlighted by plaintiff in her motion (*i.e.*,
14 the national origin documents and the "nursing person" email), plaintiff has failed to raise a
15 reasonable inference of fraud that would justify either reinstating her claims or allowing post-
16 judgment discovery. The national origin documents were not responsive to any discovery request
17 served in this litigation, and plaintiff has not attempted to explain how the failure to produce a
18 document that was not requested in this litigation could constitute fraud on the court.⁴ The Court
19 will assume, for purposes of this analysis, that the "nursing person" email was responsive to one
20 or more discovery requests served in this litigation and that plaintiff was entitled to rely on
21

22 ⁴ The national origin emails were produced in response to the PRA request in November 2011.
23 More than four months later (and less than three weeks before trial in this matter was set to begin),
24 plaintiff sought to amend her complaint to add a claim of national origin discrimination. The Court
25 denied the request, noting that plaintiff had intentionally chosen not to pursue a national origin claim
26 (she had asserted it before the Equal Employment Opportunity Commission), that the addition of the
new claim would necessitate the reopening of discovery, and that defendant had not violated its federal
discovery obligations. Dkt. # 163.

1 defendant's statement that all responsive documents had been produced in response to the public
2 records request. Nevertheless, the failure to produce this single email does not give rise to an
3 inference of corrupt motive or otherwise impugn the integrity of the judicial resolution of this
4 matter.⁵ The University produced - and plaintiff presented at trial - ample evidence of complaints
5 and concerns regarding gender issues within the Institute of Technology. In addition to various
6 reports, statements, and investigations related to allegations of unfair or unfavorable treatment of
7 women in the Institute, plaintiff presented evidence that the same tenure review process that
8 produced the "nursing person" email also revealed concerns on the part of the Vice Chancellor
9 for Academic Affairs, Dr. Beth Rushing, and the Chancellor of the University of Washington at
10 Tacoma, Dr. Patricia Spakes, regarding gender balance in the Institute and the possibility that Dr.
11 Bichindaritz had not been given the assistance, advice, and/or opportunities necessary to generate
12 an acceptable tenure application. In light of the University's production of significant evidence
13 going to the same issue, the University's failure to produce a single email reflecting one
14 committee member's concern that plaintiff's gender may have played a role in the tenure process
15 does not raise an inference of an intentional scheme to misdirect the court. The Court expressly
16 finds that the absence of this document in no way affected the outcome of this case and could not
17 reasonably be viewed as impugning the integrity of the judicial process in this matter.

18
19 For all of the foregoing reasons, plaintiff's motion for relief from judgment (Dkt.
20 # 202) is DENIED, her motion for post-judgment discovery (Dkt. # 210) is DENIED, her motion
21 to supplement (Dkt. # 213) is GRANTED, and defendant's motion to strike (Dkt. # 212) is

22
23 ⁵ Plaintiff, apparently recognizing that a belated discovery dispute regarding the production of a
24 single document is unlikely to impugn the integrity of the judicial process or otherwise constitute the
25 type of systemic fraud that would justify relief under Rule 60(d)(3), has requested leave to conduct
26 broad-ranging discovery of defense counsel in the hopes of uncovering evidence of fraud on the part of
the attorneys. Dkt. # 210. In light of the public interest in the finality of judgments and the lack of
evidence of fraud on the court, the request will be denied.

1 DENIED.

2 Dated this 12th day of December, 2013.

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4 Robert S. Lasnik

5 United States District Judge

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