

FILED
7-18-16

Court of Appeals
Division I
State of Washington

No. 74825-4-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

REBECCA A. RUFIN,

Plaintiff/Appellant,

v.

CITY OF SEATTLE,

Defendant/Respondent,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Bill Bowman)

Case No. 14-2-32054-0 SEA

BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal arises from Public Records Act (“PRA”) requests Rebecca Rufin filed with Seattle City Light (“SCL”) in 2012, 2013, and 2014, before and during prior litigation between Ms. Rufin and the City of Seattle under the Washington Law Against Discrimination (“WLAD”). The PRA is intended to provide governmental transparency and accountability. However, the City’s managers frustrated that purpose by withholding important public records that contradicted defense witnesses’ version of events in the prior litigation under the WLAD, which allowed the witnesses to testify falsely, unimpeached in the previous case.

The prior case arose, in part, from SCL’s failure to hire Ms. Rufin for a Civil Mechanical Engineering Manager (“CMEM”) job in November 2011, after requiring a third round of interviews for the hiring decision.¹ *See* Exs. 60-62, 36; RP 60-61. Rufin previously worked at SCL, until 2006, when she resigned after making allegations of gender discrimination against the utility’s Superintendent, Jorge Carrasco.² Rufin sought to return to SCL in 2011, and the first of two interview panels for the CMEM job unanimously rated Rufin “high.” The second interview panel, in which Hiring Manager Mike Haynes participated, rated only Rufin “high” and

¹ In Rufin v. City of Seattle, 189 Wn. App. 1034 (2015), an unpublished decision, this Court affirmed rulings on summary judgment and regarding the admissibility of evidence related to Rufin’s non-selection for a Large Projects Senior Manager (“LPSM”) position.

² Ex. 65, at RTC 000007-8, 37-40.

rated all other candidates “medium,” including Dean McLean, the person eventually offered the job. After the second interview panel, Haynes wrote that McLean “needed more depth,” but then switched the ratings for McLean and Rufin after holding a third interview panel with Haynes’ boss, who was a direct report to Carrasco. McLean got offered the job, turned it down, and SCL declined to offer the job to Ms. Rufin.

Ms. Rufin then filed suit claiming retaliation and Mike Haynes filed a declaration in support of the City’s motion for summary judgment. In the declaration, Haynes testified that as a hiring manager he had filled positions other than the CMEM job “after three interviews” and named two specific instances. At the time Haynes gave this testimony, there was no time left under the case schedule for Rufin to conduct additional discovery. When she first filed her retaliation case, she had requested under the PRA any “records showing ... hiring processes in which three or more interviews were conducted” (Ex. 11), but the City never responded to that request.³ In March 2014, in advance of the WLAD trial, Rufin made a narrower request, asking for the “3rd interview rating sheets” and other portions of files for the hiring processes in which Haynes testified three interviews were held. *See* Ex. 31, RP 188-90. Rufin noted that “time

³ CP 1967-68 (the trial court found the public records officer “did not see” the request, although “there is no credible evidence ... that the request was particularly difficult to find.”)

was of the essence” due to her imminent trial, but the City failed to acknowledge the request until weeks after the trial was over. At trial in the WLAD case, Haynes testified that he used “three interviews,” just as he did with Rufin and Dean McLean, when he hiring other managers, naming as examples Lynn Mills and Terry Borden. *See* RP 56-58. The jury entered a defense verdict. Six weeks later the Public Records Office (“PRO”) began to release documents showing Haynes’ hiring of Mills and Borden that contradicted his trial testimony.

Rufin filed a lawsuit for violation of the PRA based on the City’s failure to promptly respond to the request for hiring files when it knew time was of the essence. CP 6, ¶ 3.20. Through discovery in the PRA suit, Rufin learned that the Legal Affairs Office (attorney Gary Maehara and paralegal Josh Walter), who also acted as the Public Records Office (“PRO”), were given regular updates by the City’s attorneys about the WLAD case, *see* RP 104-05, 109; Exs. 47-55, 40-43; RP 119-124; and communicated with the City’s trial counsel in the WLAD case about her pending PRA requests, *see* Ex. 31, RP 125-27—even while the PRO was at the same time failing to meet its statutory duty to communicate with Rufin about the same PRA request and neglecting to provide her an estimate of time for when responsive hiring files would be disclosed. *See* Ex. 31; CP 1970, ¶ 2.

In discovery for the PRA case, the City also produced a “smoking gun” that contradicted City managers’ testimony in the WLAD case about H.R. Officer DaVonna Johnson’s alleged lack of knowledge of Rufin’s application for the CMEM position. The lawyer for the City in the WLAD case had said in closing argument that Rufin “didn’t have a shred of evidence that linked Ms. DaVonna Johnson to this.” RP 178. The email at Exhibit 1 provided the necessary link and was responsive to PRA requests made in August and September 2012, but was not disclosed by the City until it was produced in May 2015 in discovery in the PRA case.

In January 2016, the Honorable Bill Bowman presided over a two-day bench trial related to the PRA claims. At the close of Plaintiff’s case, the court granted a motion under CR 41(b)(3) to dismiss the claim arising from Rufin’s March 4, 2014 PRA request for salary records (“the 3/4/14 request”). After trial, the court entered Findings of Fact and Conclusions of Law related to claims arising from other PRA requests, dated September 28, 2012 (“the 9/28/12 request”), January 3, 2013 (“the 1/3/13 request”) and March 17, 2014 (“the 3/17/14 request”). Judge Bowman found that the City violated the PRA with respect to the **1/3/13** request, awarding penalties of \$2 per day for 844 days of delay before the City produced responsive records. *See* CP 1683-85. As to the City’s response to the **9/28/12** request for emails by or between Haynes and Johnson

referencing Rufin and/or the CMEM job, Judge Bowman found no violation of the PRA, concluding that although the City's search failed to produce Exhibit 1, the April 18, 2012 email that Rufin argued was a smoking gun in the WLAD case, "the facts and circumstances of this case establish that the search conducted... was reasonably calculated to uncover all documents relevant to Ms. Rufin's request." CP 1966.

As to the City's response to the **3/17/14** PRA request, which involved the delayed disclosure of documents that would have impeached Haynes about the alleged normalcy of "third interviews" if they had been promptly disclosed, the court found that while the City "failed to initially respond to Ms. Rufin's request within five days, [it] provided all of the records responsive to her request in a reasonable time period." *See* CP 1687.

In determining the amount of costs including reasonable attorneys fees to award Rufin under RCW 42.56.550(4) based on her prevailing on the claim related to the 1/3/13 request, the trial court calculated a lodestar of \$127,393.25 and costs in the amount of \$5,523.21, for a total of \$132,916.46. The court also found "development of the claims for litigation [was] so related that segregation would not be practical," but that it was "appropriate to award Plaintiff twenty-five (25) percent of her total costs and fees to reflect the percentage of claims upon which she was

successful,” for a total recovery of \$33,229.12. CP 1988.

This appeal follows. The Court should hold there was insufficient evidence for the trial court to find that the City’s search for emails responsive to the 9/28/12 request was reasonable, as Gary Maehara, the Public Records Officer who received the request knew that he himself was a recipient of an email from Mike Haynes that referenced both Ms. Rufin and the CMEM hiring process—an “obvious lead” for finding precisely the topic of email that Rufin asked Maehara to disclose four months later. The City offered no evidence or explanation for why Mr. Maehara did not alert his staff that his own email account was a place the PRO was likely to find responsive records and ought to be included in the search. It was the City’s burden to prove that its search was reasonable. It failed to meet that burden when it presented no evidence to explain its Public Records Officer’s failure to speak up about his own knowledge, and failed to direct his staff to search his own account for responsive records.

The Court should also find that the City failed to provide substantial evidence to meet its burden of proving that it responded to the 3/17/14 request in a reasonable time; or that it was diligently processing the 3/4/14 request before it missed the initial 20-day deadline provided to Ms. Rufin. Additionally, as Ms. Rufin ought to have prevailed on claims based on four PRA request, not one, the award of attorneys fees should

also be adjusted, consistent with this Court's decision.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in finding that “the facts and circumstances of this case establish that the search conducted by Mr. Walter was reasonably calculated to uncover all documents relevant to Ms. Rufin’s request” made on 9/28/12. CP 1682.

2. The trial court erred in finding that “there is no evidence that any documents produced as a result of Mr. Walter’s search would have obviously led him to search the email account of Mr. Maehara,” and that “[a]lthough it was conceivable that, given his role, an email responsive to Ms. Rufin’s request could have been forwarded to Mr. Maehara and stored in his account, that would be true of numerous other employees of SCL as well. Mr. Walter was not required to search every conceivable email account at SCL.” CP 1966-67.

3. The trial court erred in finding that “Mr. Walter promptly responded to Ms. Rufin’s request [made March 17, 2014] and to each of her subsequent contacts”; and “provided all records responsive to her request [dated March 17, 2014] in a reasonable time period.” CP 1687

4. The trial court erred in dismissing pursuant to CR 41(b)(3) Ms. Rufin’s claim related to the March 4, 2014 PRA request. RP 269-71.

5. The trial court erred in awarding Rufin 25% of her attorneys fees and costs. CP 1988.

B. Issues Pertaining to Assignments of Error

1. Did the City present substantial evidence to meet its burden of proving that its search for records responsive to Rufin’s September 28, 2012 request was “reasonable”? No.

2. Did the court improperly fail to consider the personal knowledge of Public Records Officer Gary Maehara in its analysis for deciding whether the City followed “all obvious leads” and searched “all places likely to contain responsive materials” to the request directed to Mr. Maehara for all emails containing Rufin’s name or reference to the CMEM job – subjects Maehara knew he had received email about? Yes.

3. Did the City present substantial evidence to support finding that it promptly responded to Rufin’s March 17, 2014 request and provided all records responsive to the request in a reasonable time period? No.

4. Is there substantial evidence to support finding the City was “diligent” in responding to the March 4, 2014 PRA request where it is undisputed that the PRO failed to forward Ms. Rufin’s request to the custodian of records to begin searching for responsive records until 14 days after the PRO told Rufin records would be provided within 20 days?

No.

5. Did the Court error when it failed to decide whether the City acted with reasonable diligence in the period before the 20-day initial estimate for the PRA response expired, and analyzed instead whether the City acted with reasonable diligence in the period “beyond” the initial 20-day estimate? Yes.

6. Whether the trial court calculating the award of attorneys fees ought to have found Rufin prevailed on more claims than just the PRA claim arising from the 1/3/13 request? Yes.

III. STATEMENT OF THE CASE

A. Background for Rufin’s Public Records Act Requests.

1. The 2011 Non-Selection of Rufin for CMEM.

This case involves a female manager, Ms. Rufin, who while employed at SCL provided evidence in an investigation of a gender-based complaint by another female manager to the effect that the utility’s Superintendent, Jorge Carrasco, mistreated women and favored men.⁴ Soon after providing that testimony, feeling harassed and fearing retaliation, Rufin transferred out of Carrasco’s organization and went to the Seattle Parks and Recreation Department, where she remains employed today. Ex. 65 at RTC 000008. In 2007, Rufin testified in a

⁴ Ex. 65, at RTC 000007-9, 37-40.

discrimination lawsuit, again recounting the discriminatory treatment she had endured from Superintendent Carrasco. Ex. 65 at RTC 000009.

Rufin sought to return to SCL in 2011 by applying for a Civil Mechanical Engineer Manager (“CMEM”) job. The first of two interview panels for the CMEM job unanimously rated Rufin “high.” Exs. 60-61. The second interview panel, which included Hiring Manager Mike Haynes, rated only Ms. Rufin “high”; all other candidates were rated “medium,” including Dean McLean, the person eventually offered the job. Ex. 61, Ex. 36. After the second interview panel, Haynes wrote that Dean “needed more depth.” *Id.* Haynes switched his ratings for Dean and Rufin after organizing a third interview panel with Haynes’ boss, Steve Kern, a direct report to Superintendent Carrasco. Exs. 61-62; RP 47-48. Kern’s ratings for applicants in the third interview were identical to Haynes’ ratings. Ex. 62. The City offered the CMEM job to Mr. McLean. Ex. 36. Mr. McLean turned down the job offer. RP 61. After Mr. McLean turned down the job, Haynes and the City did not offer the job to Rufin. *Id.*

Rufin “knew from [her] experience working as a manager at the City that having third interviews is very rare,” but “the City, when they were at trial [in the WLAD retaliation case], ... made it sound like it was sort of normal for that to happen.” RP 188; *see also* Ex. 65 at RTC0000011; RP 56-58; RP 49-55.

2. City Light's Relisting of the CMEM Job and Non-Selection of Rufin in 2012.

On April 4, 2012, Ms. Rufin spoke about her non-selection for the CMEM job with Darnell Cola, a manager who sat on the second interview panel that had unanimously rated Rufin, and only Rufin, "High," before the third interview with Haynes' boss. Ex. 51 at SEA-Rufin 1381; Ex. 61. Cola told Rufin that Mike Haynes said the decision to not hire Rufin was "political." Ex. 51 at SEA-Rufin 1381. Shortly thereafter, on April 10, 2012, Rufin received an email, informing her City Light was again accepting applications for the CMEM job. Ex. 1. Rufin immediately emailed Hiring Manager Haynes a copy of the job posting with a note asking if there was "any point" in her applying again. *Id.* In the note to Haynes, Rufin wrote, "I still don't understand how I failed to measure up with the last lengthy process." *Id.*

Through the PRA lawsuit, it was uncovered that Mike Haynes forwarded Ms. Rufin's April 10th email to DaVonna Johnson (the H.R. Officer and direct report to Jorge Carrasco, RP 72); and to Gary Maehara, an attorney who was Legal Affairs Advisor and in that role reported directly to Carrasco, *see* RP 109, RP 104-05, Ex. 38 at SEA-Rufin 1372; and who also held roles as the acting H.R. Director / Director of Talent Acquisition, RP 76; and as SCL's Public Records Officer, RP 105, Ex. 46. *See* Mike Haynes' April 18, 2012 email (Ex. 1); RP 175; RP 165-166; RP

130. Ms. Rufin testified in the PRA trial that discovery of Exhibit 1 was important because in the WLAD trial the City claimed Rufin “had no solid evidence linking either of these players to [the] discrimination claim. ... [Haynes] said that he had never spoken to DaVonna Johnson specifically about anything to do with [her] candidacy or the civil mechanical engineering position,” RP 175-76; and DaVonna Johnson testified “she wasn’t even aware that [Rufin] had been applying for any of these jobs until [the] June [2012] conversations with her.” RP 177-78; RP 83-84. Exhibit 1 contradicted Haynes and Johnson’s denials. *See* Ex. 1. Rufin would have asked Haynes and Johnson about the document if it had been produced to her during the WLAD litigation. *See* RP 178-79. After the Exhibit 1 was produced in the PRA litigation in May 2015, Haynes and Johnson testified they could no longer recall if they had discussions about the subject of the email. *See* RP 83; RP 69; CP 1651-52; RP 175.

When Mike Haynes responded to Rufin’s April 10th email on April 19, 2012, he did not answer the question posed to him (*i.e.*, whether “there was any point in [her] applying for this position”). *See* Ex. 2. So, Rufin again submitted her application for the CMEM job. *See* Ex. 63. Although she was unaware of it at the time, on May 21, 2012, three reviewers rated Rufin’s resume for the CMEM job, and unanimously rated it “*high*.” *Id.* Of nine candidates, only one other candidate received unanimous high

ratings. *Id.* Yet, Rufin received no response to her 2012 application. *See* Ex. 3. On June 11, 2012, having no response to the application she had submitted in April, Rufin wrote Mr. Carrasco for an explanation regarding City Light's failure to rehire her. *Id.* Carrasco asked DaVonna Johnson to follow up with Rufin about her email. *Id.*

Ms. Johnson met with Ms. Rufin on June 20, 2012. Ex. 65 at RTC000013. By that time, Rufin had received in the mail a letter dated June 12, 2012, from a personnel specialist working in Johnson's H.R. organization, stating City Light "will not be considering your application at this time" without further explanation. *Id.*; Ex. 4. Three individuals who the resume review panel had rated below Rufin in May 2012 were advanced to the First Interview panel that took place June 13 and 14, 2012. *See* Exs. 64-65. Rufin was denied even an interview. Ex.64; Ex. 4.

On July 30, 2012, Rufin filed a tort claim alleging retaliation. Ex. 65. She stated under oath in the claim that when Ms. Johnson met with her six weeks earlier in June 2012, Johnson told Rufin that when Rufin made the decision to leave City Light in 2006, she made it very clear that she was dissatisfied with her employment at the utility. *Id.*, at RTC000013. Johnson was unable to provide a specific example of exactly what Rufin did in 2006 that left such a negative impression. *Id.* Rufin of course had testified in a gender discrimination investigation and litigation against

Superintendent Carrasco around that time. *Id.* at RTC00007, 9. Rufin testified in the tort claim that Johnson had told her while she may be technically qualified, she “burned her bridges” by making it clear she was unhappy when she left SCL, and that Rufin would never be considered for any future management positions at City Light. *Id.*, at RTC000013.

Johnson would later testify in the WLAD trial that she never said that, and claimed she was not even aware that Rufin was reapplying to work at SCL until Carrasco informed Johnson in June 2012 (after the CMEM hiring decisions had been made). *See* RP 178-79; RP 72-74; Ex. 3-4.

B. Rufin’s PRA Request to Gary Maehara For Emails With Her Name or Any Reference to CMEM Job Failed to Result in the Disclosure of Records in Maehara’s Own Files, But Was Promptly Followed by His Office Tracking Each Step of the WLAD Litigation.

On August 15, 2012, Gary Maehara received a PRA request directly from Ms. Rufin asking for, *inter alia*, all emails that reference her name or the CMEM job. Exs. 6, 201. Maehara had received an email referencing both Ms. Rufin *and* the CMEM job four months earlier. *See* Ex. 1. While the 8/15/12 PRA request asked Maehara to search for responsive records in, among other places, the email archives of Jorge Carrasco, Steve Kern, Mike Haynes and DaVonna Johnson, Rufin also asked that Maehara “not limit” the search to those archives. Exs. 6, 201.

At the time Maehara received Rufin’s PRA request, he was Legal

Affairs administrator, reporting directly to Superintendent Carrasco.⁵ Mr. Maehara wore other hats and also acted as interim H.R. Director and Director of the Talent Acquisition unit responsible for SCL's hiring; in those roles, Maehara reported to H.R. Officer, DaVonna Johnson. RP 75-76. On August 21, 2012, on behalf of the PRO, Maehara's paralegal, Josh Walter, sent Rufin the statutorily mandated 5-day notice of acknowledgment of the request. Ex. 8, RP 104-05. Walter wrote, "I anticipate delivering responsive records City Light may have in their entirety or in installments on or about Friday, September 14, 2012." Ex. 8.

Three days after Walter gave Rufin this estimate, he wrote his boss (Maehara): "I ran into DC [Bryan, a litigation paralegal in the City Attorney's office] at coffee and asked him to forward the Rufin [tort] claim to us. Please see attached." RP 109-10; Ex. 65. In the email, Walter forwarded Maehara the 117-page tort claim with exhibits that Ms. Rufin had filed and which Walter testifies he read. *Id.* Thus, the Public Records Office informed itself of Rufin's WLAD claims, including her detailed allegations against Maehara's supervisors (Carrasco and Johnson) and regarding the hiring process Maehara was himself partly responsible for, as Interim Director of Talent Acquisition and Human Resources. *See id.*;

⁵ *See* Ex. 39 (organizational chart showing vacancy in Chief of Staff position in July 2012, when Maehara was Legal Affairs advisor, leading to direct reporting relationship with Carrasco); RP 104; *cf.* RP 75-76.

Ex. 39. While a conflict of interest in handling the PRA request was self-evident after having notice of Rufin's tort claim, there is no evidence that Maehara recused himself from involvement in responding to the request. *See* RP 142. Mr. Maehara supervised Walter in his search for responsive emails. RP 118, 134. The responsive emails Walter later disclosed to Rufin had headers showing they were printed from Gary Maehara's computer. Exs. 72-73, Ex. 79.

Mr. Walter admits he did not look in Gary Maehara's own email account to find responsive records, testifying that he did not think it was a logical place to look for responsive records; and that he had not known that there was email communication in April 2012 between Mike Haynes, DaVonna Johnson and Mr. Maehara (Exhibit 1). *See* RP 132-34. Walter admits the communication at Exhibit 1 was responsive to Rufin's PRA request and never produced. RP 130. Maehara, Johnson, and Haynes failed to inform Walter about the email. *See* RP 132-34. While Walter searched the email accounts of Haynes and Johnson (the sender and one of the receivers of Exhibit 1), there is no evidence either manager "archived" the record, which meant their copies were deleted after 45 days and thus not found by Walter in his search. *See* RP 133-34, 141, 143; CP1966, ¶ 7; CP 1967. The Local Government Common Records Retention Schedule (CORE) that applies to the City of Seattle broadly requires all

communications sent via email “in connection with the transaction of public business” to be preserved for 2 years. *See* Ex. 29 at 7, GS2010-001, Rev. 2 (retention schedule for internal emails that provide “information” and/or seek “advice,” as distinguished from emails with “routine information,” such as: “[b]usiness hours, locations/directions, web/email addresses,” *id.*, at 123 (GS50-02-01, Rev. 0)); Ex. 30; RP 131-32.

1. Ms. Rufin Had to Repeatedly Follow Up with the City to Obtain Emails Responsive to the 9/28/12 Request.

After the Public Records Officer reviewed her tort claim, the date originally given to Rufin as an estimate for the disclosure of responsive records, September 14, 2012, passed without City Light disclosing records or providing Rufin any update. *See* Ex. 207. A week later, on September 21, 2012, Gary Maehara was copied on an email from Walter to Ms. Rufin, in which Walter wrote, *inter alia*, “Seattle City Light will have a first installment of documents ready for your review next Friday. ... Also, I am finding that documents referring simply to your last name is overly broad and may not be what you are looking for. ... Please refine your request to be more specific for what you are looking for.” *Id.* On September 28, 2012, Rufin met with Walter to review the first installment of records, which included 24 pages of emails written “To:” or “From:” DaVonna Johnson and Jorge Carrasco, containing Rufin’s name. *See* Ex. 216; Ex. 73. At the urging of SCL, Rufin agreed in the September 28,

2012 meeting to narrow her request for emails as follows:

5. ... all emails by or between DaVonna Johnson, Jorge Carrasco, Steve Kern, Mike Haynes, and/or any individual in the Law Department that mention my name or the Civil/Mechanical Engineering Manager hiring process.

Ex. 212.

After the meeting, Ms. Rufin emailed Mr. Walter. *Id.* While the email confirmed that Rufin was requesting emails to or from, Ms. Johnson, Mr. Carrasco, Mr. Kern, Mr. Haynes and/or anyone in the Law Department, Rufin nowhere asked the PRO “to limit [the search] to their accounts.” *Id.*; RP 206.

On October 9, 2012, Ms. Rufin was provided copies of the first installment of records, which were records she previously reviewed with Mr. Walter at their September 28th meeting before agreeing to narrow her request, including 24 pages of responsive emails from Mr. Carrasco and Ms. Johnson. Ex. 72-73. Each of the emails had “Maehara, Gary” printed at the top of the page in bold letters, indicating the emails were printed on Mr. Maehara’s computer. *Id.* All of the emails were more than 45 days old at the time the PRA request was made. *Id.*

On November 28, 2012, Rufin again wrote Walter, asking if the City “had found any documents responsive to Items 2-7 with regard to my September 28 email [] yet.” Ex. 232. Those items included Item #5; the request for emails referencing Rufin’s name or the CMEM job. *Id.*, at

SEA-Rufin 5027. On December 3, 2013, Walter responded, in relevant part: “I continue to search for responsive records for your request. I have a few updates.” Ex. 233. The update he provided did not relate to emails referencing Rufin’s name or the CMEM job. *Id.*

On January 3, 2013, Mr. Walter wrote to Ms. Rufin, “[I]f there are other items to your request you believe I am missing, please let me know and I will do my best to find any responsive records.” Ex. 235. Rufin responded with a summary of her understanding of SCL's responses to various outstanding requests and with respect to Item #5 of the 9/28/12 request, Rufin wrote to Mr. Walter:

You have provided emails from DaVonna Johnson and Jorge Carrasco that responded to some emails I had sent them in June 2012. You also provided a few emails from 2005-06 where I had corresponded with these same two individuals on work-related matters. You have not provided anything from Mike Haynes or Steve Kern or anyone else. Does this mean that there are no further records, such records have been destroyed or are missing, or that they are being withheld?

Id., at SEA-Rufin 5027.

The same day Mr. Walter received the above email, the City was served with the summons, complaint and first set of discovery requests in the WLAD lawsuit filed by Ms. Rufin. Ex. 44. Mr. Walter sent a copy of these pleadings to DaVonna Johnson and Mr. Maehara on January 7, 2013. Ex. 47, RP 112-113.

Mr. Walter initially did not respond to Rufin’s January 3, 2013

email (Ex. 235), so Rufin sent the email again on January 17, 2013, “in case [the earlier email] got lost in the shuffle.” Ex. 76. Walter sent a brief reply on January 25, 2013, promising to give Rufin a “detailed explanation on where things stand with your request” the following week. Ex. 77. On January 29, 2013, the detailed explanation that had been promised was not forthcoming; instead Rufin received an email from Mr. Walter in which he stated, in relevant part:

I am working with the Law Department to provide you with a full and accurate response to your request. I do not want to be in a position where one of the two departments provides a responsive document, either through discovery or through your PDR, where the other department states there are no responsive records. I also do not want to inundate you with records you may have already received from one of the two departments. Once I get a clear understanding of what the law department has already provided, City Light will be in a better position to respond to your request.

Ex. 78, at 3.

On March 12, 2013 email, Mr. Walter gave the second installment of emails responsive to Item #5 of the 9/28/12 PRA requests, attaching 12 pages of emails To: or From: Mike Haynes with reference to Ms. Rufin’s name, involving various dates in 2001, 2007, and 2011. Ex. 79. It took 165 days from the date of the 9/28/12 PRA request for the City to disclose the Haynes’s emails. Mr. Walter offered no explanation for why Haynes’ emails were not located or disclosed previously with Carrasco and Johnson’s emails in October 2012, or where the City ultimately found the

emails that proved so challenging for the City to produce sooner. *See id.*

All of the Haynes emails included in the March 12, 2013 installment again had printed at the top of the page in bold letters: “Maehara, Gary”. *Id.*

In the email accompanying this production, Mr. Walter wrote:

“There are no additional emails that have not previously been disclosed from/to Jorge Carrasco, DaVonna Johnson, Mike Haynes, or Steve Kern.”

Id., at 2, ¶ 5; *accord* Ex. 244, at 2, ¶ 5.

2. Rufin Discovered The Email From Mr. Haynes To Ms. Johnson and Gary Maehara, Which The PRO Failed to Disclose in Response to the PRA Request.

City Light admits that Hiring Manager Haynes’ email to DaVonna Johnson and Gary Maehara on April 18, 2012 was responsive to Rufin’s PRA request and not disclosed. RP 130. The City defends itself by claiming Mr. Walter at all times acted in “good faith,” and simply did not know that Exhibit 1 existed, or that Mr. Maehara’s inbox was a logical place to search for responsive records. RP 132-134, RP 154.⁶

Working under Mr. Maehara’s supervision, Mr. Walter failed to search for responsive records in Maehara’s email account, where a copy of

⁶ Mr. Walter’s trial testimony is consistent with the CR 30(b)(6) testimony he earlier gave, which the court considered in deciding Defendant’s motion for summary judgment, where Mr. Walter explained his failure to locate Exhibit 1, testifying, “Well, the -- you know, the -- the request was -- had nothing -- you know, there was no indication that there was -- that Gary [Maehara] was involved with what we were looking for.” CP 885. “The -- as mentioned, I was using -- there was no indication that -- you know, that there - - we should have or that I -- you know, that I did include Gary [Maehara] as a recipient to a particular email.” CP 886. Roughly translated, Walter explained that his boss, Maehara, failed to let him know that he had recently received communications about Rufin, or that they ought to include Maehara’s archives in the search for responsive records.

Exhibit 1 was still located and would have found been if the account had been search. *See* CP 1966, ¶ 6; RP 118, 132, 134.

Mr. Maehara does not bare sole responsibility for failing to inform Walter about the existence of the email. DaVonna Johnson and Mike Haynes both met with Josh Walter to review documents he had assembled as responsive to the PRA request before they were disclosed to Rufin. *See* RP 81; RP 133-34. As Mr. Walter testified that he was unaware of the email's existence, the Court may infer that neither Ms. Johnson nor Mr. Haynes ever told Mr. Walter about the existence of the April 2012 email communication, or that the email account of his supervisor, Gary Maehara, was a potential source for finding the email sent among the managers that appeared to be missing from Johnson and Haynes' accounts. *See* RP 81, 133-34. Because Maehara's account was not included in the PRO's search, Rufin did learn about the communication shown in Exhibit 1 until May 2015, long after a verdict was reached in the WLAD litigation. RP 175; CP 1641; CP 1966.

3. In Discovery Rufin Learned the Persons Working in the Public Records Office Tracked the WLAD Litigation.

During discovery in the PRA suit, Rufin learned that SCL's Legal Affairs Office (attorney Gary Maehara and paralegal Josh Walter), which doubled as the Public Records Office, not only obtained Rufin's tort claim in August 2012, Ex. 65, but also received regular updates from the City's

attorneys about the WLAD case. *See* RP 104-05, 109, 119-24; Exs. 47-55, 40-43 (the PRO received the summons, civil complaint, plaintiff's discovery requests, defendant's discovery answers, the response to plaintiff's motion to compel, defendant's motion for summary judgment and related pleadings). Walter, who was giving Rufin SCL's response to each of her PRA requests, even attended the summary judgment hearing in the WLAD case. RP 122-24, Ex. 56. Mr. Maehara received a declaration that DaVonna Johnson filed in the WLAD case, in which she testified that "Any of my email communications that are not privileged and relate to Ms. Rufin's recent attempts to be rehired by Seattle City Light, in 2011 and 2012, have already been provided to Ms. Rufin in response to public disclosure requests..." Ex. 51, at SEA-Rufin 1362. Johnson testified that Maehara attended at least one "strategy session" with the City's lawyers regarding the WLAD case. RP 79-80. *See also* Ex. 48 (Maehara's invitation to attend meeting about Defendant's discovery answers). In February 2014, after Maehara had left SCL and Mr. Walter was promoted to interim Legal Affairs advisor, Mr. Walter was tasked with updating Superintendent Carrasco on the status of various pieces of litigation, including Rufin's WLAD case. *See* RP 115-16; Ex. 43.

During the same time period, Walter also continued responding to Rufin's PRA requests. *See, e.g.,* Ex. 251-52, 255. When Mr. Walter was

asked if he helped out with the *Rufin* discrimination litigation he answered, “I’m not sure” and said that he could not recall. RP 106-07. Mr. Walter does not dispute that he considered one of his responsibilities to be helping the City’s defense team when a PRA request came in from a litigant like Rufin. RP 108-09, 125-27. He sent several emails to defense counsel alerting her of Rufin’s requests in March 2014. Exs. 31, 57-58.

C. Mr. Walter failed to respond at all to a request for records of hiring files showing three interviews; and delayed responding to a specific request for hiring processes that Haynes testified involved three interviews until after the WLAD trial was over.

1. The City ignored Rufin’s early PRA request for comparator hiring files that would have shown City Light’s infrequent use of “three interviews.”

On January 3, 2013, the day the complaint in the WLAD litigation was served, Ex. 44, and around the time that Mr. Walter sent Ms. Johnson and Mr. Maehara that pleading, Ex 47, RP 112-13, Ms. Rufin sent Mr. Walter an email in which she asked for “records... of any other hiring process at SCL where three interviews were conducted for a single process, and any written policies as to what circumstances would trigger a third interview.” Ex. 235. Mr. Walter did not respond to the January 3rd email, so Ms. Rufin sent the email again on January 17, 2013, “in case [the earlier email] got lost in the shuffle.” Ex. 76. Mr. Walter sent a brief reply on January 25, 2013, promising a more detailed email the following week, Ex. 77, and then on January 29, 2013, Mr. Walter sent the email in which

he explained to Rufin that he was now “working with the Law Department” and would provide further updates at a later date. Ex. 78 at 3.

Mr. Walter testified that he “missed the request,” and thus failed to respond. RP 129; CP 1968, ¶ 4; CP 1969. The trial court found this request was “clearly recognizable as a request made pursuant to the PRA,” and “there is no credible evidence that Ms. Rufin attempted to hide her request or that the request was particularly difficult to find.” CP 1968.

On February 10, 2015, in response to the allegations made in the complaint filed in the PRA litigation, the City’s counsel provided the “Response to Rufin 1/3/13 PDR,” writing, in relevant part: “Staff at City Light researched over 1,000 hiring processes and identified 13 hiring processes that involved three rounds of interviews... I attach examples from each of those processes [29 pages] showing a third interview was conducted. Please note City Light does not have written policies as to the circumstances that would trigger a third interview.” Ex. 68. Rufin “received the final installment of documents (five pages) relevant to this request on April 27, 2015, a total of 844 days after the request.” CP 1968, ¶ 5.

2. **Mr. Walter notified the City’s trial counsel in the WLAD case about Rufin’s “time is of the essence” PRA request; but failed to communicate with Ms. Rufin about the request in any way until after trial.**

On January 30, 2014, Haynes filed a declaration in support of the City's motion for summary judgment in the WLAD case. RP 48-50. In the declaration, Haynes testified that as hiring manager, he had filled positions "after three interviews" in two instances other than the hiring process for the CMEM job. RP 50, 55. The discovery cutoff in the WLAD case was February 10, 2014, leaving Rufin with no time for additional discovery in response to such claims in Haynes' declaration. RP 243; Ex. 276, at 3.

On March 17, 2014, Rufin requested records of specific hiring processes for which Haynes testified three interviews were held. *See* Ex. 31 (requesting 3rd interview rating sheets for processes "where Terry Borden was hired" and "Lynn Mills was hired"); RP 188-90. Rufin noted in the 3/17/14 PRA request that "time is of the essence, as these items may become important exhibits in a trial scheduled for the end of March 2014." Ex. 31. Mr. Walter testified that he "knew it was [Rufin's] trial and she wanted these records right away." RP 125. Upon receiving the 3/17/14 PRA request, Mr. Walter forwarded it to the City's trial counsel. RP 125-27. As for Ms. Rufin, Mr. Walter did not communicate with her about the request and failed to "send [her] a five day letter acknowledging the request and estimating a time for production." CP 1970, ¶ 2.

Rufin did not receive any documents responsive to the 3/17/14 request in time for trial, which ended April 14, 2014. RP 191, 248. When

Mr. Walter was asked by his counsel in the PRA trial, “[W]hat did you do to respond to this request?” his answer was vague: “I again identified the appropriate person to help compile the responsive records, emailed, maybe even made a call to talk about what was being requested and for that information to be compiled so I could review it for disclosure.” RP 152. Defendant did not offer any emails to establish how soon or when Walter contacted “the appropriate person” to begin searching for responsive records. *Compare* Exs. 257-262 (compiling salary records from HR in response to 3/4/14 request) *with* Ex. 263-64 (receiving and responding to 3/17/14 request).

On May 8, 2014, Mr. Walter wrote Ms. Rufin about the 3/17/14 request: “I have additional records associated with your request for hiring files but they did not scan properly. I will be sending those in a separate email either today or tomorrow.” Ex. 262; CP 7, ¶ 3.23 and CP 52, ¶ 3.23. Mr. Walter did not provide the records as promised “today or tomorrow”; instead records responsive to the 3/17/14 request were first provided on May 30, 2014—more than three weeks later. Ex. 98; CP 7, ¶ 3.24; CP 52, ¶ 3.24; CP 1970, ¶ 3; Ex. 100. When Mr. Walter provided Rufin the first installment of records on May 30, he curiously asked if she still “wish[ed] to receive the other hiring files requested.” Ex. 18. Rufin responded the same day to confirm she still wanted the “full response.” Ex. 101.

The file produced on May 30th related to the hiring process for the Boundary/Lucky Peak Operations Manager job, in which Mike Haynes hired Terry Borden. *See* Ex. 264, at SEA-Rufin 5080, 5086. The records that the City produced after the WLAD trial about that hiring process offered no support for Haynes’ testimony about having required a third interview for the hiring decision. *Compare* Ex. 264, at SEA-Rufin 5035, 5069-80; *with* RP 57-58. Mr. Walter also provided records regarding the other hiring process that Haynes testified about (the Skagit Operations Manager job, in which Lynn Mills was hired) on July 27, 2014, and the file for that hiring process likewise offered no indication that a third interview took place. *Compare* Ex. 268, at SEA-Rufin 4657 (discussing only “2nd Intv. Panel”), 4665-73 (same); *with* RP 57. In contrast, in the hiring process for the CMEM position in which Rufin and Mr. McLean had third interviews, there was clear documentation in the file reflecting the same, including rating sheets and information about who participated in the third interview panel and what date it occurred. *See* Ex. 62.

D. Walter failed to meet the 20-day estimate for providing salary records in response to the 3/4/14 request.

On March 4, 2014 Rufin requested certain current and past employee’s salary records, noting “time is of the essence, as these items may become important exhibits in a trial scheduled for the end of March 2014.” Ex. 257. Mr. Walter promptly forwarded the request to the City’s

trial counsel. Ex. 58. On March 7, 2014, Mr. Walter wrote Rufin to acknowledge the 3/4/14 request, stating “I will begin to compile responsive records” and “anticipate I will have the requested records in a first installment or in their entirety within the next twenty days.” Ex. 256. Despite that promise, the record shows Mr. Walter neglected to give the custodian of records the list of names for which he needed payroll records to be compiled, until March 21, 2014—2 weeks later. Ex. 258. The 20-day estimate of time given to Rufin was not met; records responsive to the 3/4/14 request were produced on May 8, 2014. CP 5, ¶ 3.17; CP 14, ¶ 4.17.

E. Procedural History

On January 11-12, 2016, a bench trial was held on Ms. Rufin’s PRA claims. CP 1964. At the close of Plaintiff’s case, the court granted a motion under CR 41(b)(3) to dismiss the claim arising from the 3/4/14 request. RP 269-71. The Court recognized “[t]here was an estimate of 20 days to produce those particular documents” and that documents “weren’t produced within 20 days.” RP 269-70. The Court then analyzed “whether or not the City worked diligently beyond that time to be able to fulfill the request,” without considering whether the City was acting diligently at the time that it failed to meet its self-imposed 20-day deadline. *See* RP 264, 270-71.

After the trial, the court entered Findings of Fact and Conclusions of Law related to Rufin's remaining claims, arising from the 9/28/12 request, the 1/3/13 request, and the 3/17/14 request. CP 1964-72. Judge Bowman found the City violated the PRA with respect to the **1/3/13** request, awarding penalties of \$2 per day for 844 days of delay before the City produced its responsive records. *See* CP 1683-85. As to the City's response to the **9/28/12** request, Judge Bowman found no violation of the PRA, concluding that although the City's search failed to produce the April 18, 2012 email that Rufin argued was a smoking gun in the WLAD case, "the facts and circumstances of this case establish that the search conducted... was reasonably calculated to uncover all documents relevant to Ms. Rufin's request." CP 1966. As to the City's response to the **3/17/14** PRA request, for which Rufin had told the Public Records Office "time is of the essence," and which involved the disclosure of documents Rufin argued would have impeached defense Haynes about his alleged use of third interviews in other hiring processes if they were promptly disclosed, Judge Bowman found that although the City "failed to initially respond to Ms. Rufin's request within five days, [it] provided all of the records responsive to her request in a reasonable time period." *See* CP 1687.

Ms. Rufin filed a motion for reconsideration arguing that the City "failed to meet its burden of proving that it searched 'all places likely

to contain responsive emails” and presented a lack of evidence to justify finding that “the facts and circumstances of this case establish that the search conducted by Mr. Walter was reasonably calculated to uncover all documents relevant to Ms. Rufin’s request.” CP 1690-94. Rufin’s motion for reconsideration was denied. CP 1698.

IV. ARGUMENT

A. Standard of Review and Purpose of the Public Records Act

The Court “review[s] de novo all questions regarding the City's obligations under the P[R]A, [and] review[s] the trial court’s findings of fact based on the testimonial record to determine if there is substantial evidence to support them.” Zink v. City of Mesa, 140 Wn. App. 328, 337, 166 P.3d 738 (2007) . *See also* Andrews v. Wash. State Patrol, 183 Wn. App. 644, 650, 334 P.3d 94 (2014), review denied, 182 Wn.2d 1011, 343 P.3d 760 (2015) (“Judicial review of an agency’s compliance under the PRA is de novo.”)

The Public Records Act “is a strongly worded mandate for broad disclosure of public records”⁷ that places the burden of proof on the agency to justify any withholding of records. *See* RCW 42.56.550(1), (2); *accord* Rental Hous. Ass’n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 535, 199 P.3d 393 (2009); and Neighborhood All. of Spokane

⁷ Nissen v. Pierce Cty., 183 Wn.2d 863, 874, 357 P.3d 45 (2015), *quoting* Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978).

Cty. v. Cty. of Spokane, 172 Wn.2d 702, 725, 261 P.3d 119 (2011)

(stating agency bears “burden of showing an adequate search”).

“[T]he purpose of the PRA is for agencies to respond with reasonable thoroughness and diligence to public records requests,” Andrews, 183 Wn. App. at 653, in order “to increase access to government records.” Sanders v. State, 169 Wn.2d 827, 836, 240 P.3d 120 (2010). “The Act reflects the belief that the sound governance of a free society demands that the public have full access to information concerning the workings of the government....” Amren v. City of Kalama, 131 Wn.2d 25, 31, 929 P.2d 389 (1997).

The Act provides every record related to the conduct of an agency that is “prepared, owned, used, or retained” by the agency is a “public record,” RCW 42.56.010(3), which must be made “promptly available” upon request, RCW 42.56.080. *See also* RCW 42.56.520. The statute creates a “positive duty to disclose public records unless they fall within the specific exemptions.”⁸ The Act requires agencies to adopt and enforce regulations consonant with the intent of the law “to provide full public access to public records” and “to protect public records from damage or disorganization.” RCW 42.56.100. The City acknowledges that it can constructively deny a request if it fails to conduct an adequate search. CP

⁸ Progressive Animal Welfare Soc’y v. Univ. of Wash., 114 Wn.2d 677, 682-83, 790 P.2d 604 (1990) (“PAWS”).

1392, *citing* Neighborhood Alliance, 172 Wn.2d at 721 (“The failure to perform an adequate search precludes an adequate response and production.”).

B. The trial court erred when it found that search for emails, which omitted Mr. Maehara’s account and led to the City’s failure to produce the smoking gun, was reasonable.

SCL had the burden of establishing that its public records search was “reasonably calculated to uncover all relevant documents” and “that all places likely to contain responsive materials were searched.”

Neighborhood Alliance, 172 Wn.2d at 720-21. This required the agency to show that it “follow[ed] obvious leads” and did not ignore “record system[s] ... likely to turn up the information requested.” Id. at 720, 722. “If the agency, after establishing the primary source of requested information, finds that the information is not there, it may not assert the information has been moved so as to avoid its duty to search. The agency must determine where the information has been moved and conduct a search there, where reasonable.” Id., at 723. The record in this case, which contains no testimony to explain omissions by the Public Records Officer, Gary Maehara, lacks sufficient evidence for the City to meet its burden.

Public Records Officer Gary Maehara, having personally received an email from Mike Haynes about Ms. Rufin and the CMEM hiring process in April 2012, Ex. 1, had an “obvious lead” when he received the

PRA request from Ms. Rufin, Ex. 6, four months later in August 2012. Maehara knew or should have known that his own email account was a place likely to turn up records directly responsive to Rufin's request. He was fully aware that Ms. Rufin was requesting emails like the email he received, Ex. 1 (*i.e.*, email from Haynes or to Ms. Johnson, discussing Rufin and/or the CMEM hiring process). *See* Exs. 6-8; Ex. 11 at 3; and Ex. 12. Yet, Public Records Officer Maehara failed to share with his assistant, Mr. Walter, the obvious lead. *See* RP 132-34. Ms. Rufin, as the applicant seeking records, is not required to "exhaust ... her own ingenuity to 'ferret out' records through some combination of intuition and diligent research." Daines v. Spokane County, 111 Wn. App. 342, 349, 44 P.3d 909 (2002).

The record offers no reasonable excuse for Maehara's failure to speak up. Maehara and Walter were already sharing information about Rufin, including the tort claim forwarded to Maehara on August 24, 2012, days after receiving Rufin's PRA request. Ex. 65. The tort claim specifically discussed Rufin's April 2012 email to Haynes. *See id.*, at RTC0000103 ("Rufin sent emails to Mr. Haynes in December of 2011 and April 2012 asking for some sort of explanation. Mr. Haynes never provided a meaningful response.") Maehara failed to direct his staff to include his account in the search for responsive records, even though when he received the tort claim in August 2012, he knew the request for an

explanation Rufin sent to Haynes in April 2012, referenced in the tort claim, had been forwarded to Maehara and his boss, Ms. Johnson. *See* Ex.

1. Maehara was subsequently involved in strategy sessions for the litigation, in meetings to discuss discovery answers, and was given a plethora of pleadings about the case. RP 79-80; Exs. 40-42, 48-50 51, 52, 53.

Despite the fact that the agency carries the burden of showing an adequate search under the standards set forth in Neighborhood Alliance, the City offered no testimony nor evidence to explain why Maehara, the Public Records Officer who received, supervised, and was aware of Rufin's request for emails, failed to communicate his personal involvement and participation, an obvious lead as to "place[s] likely to contain responsive materials." The explanations presented by the City for failing to uncover Exhibit 1, that Mr. Walter acted in "good faith" and had no reason to believe Exhibit 1 existed or that Mr. Maehara's account held responsive records, *see* RP 134, 154, is not adequate as a matter of law where the Public Records Officer who personally received Rufin's request himself possessed the knowledge that his assistant allegedly lacked, yet failed to share it.

For these reasons, the Court should hold that the City's search was not reasonable and that the record lacks substantial evidence for the trial

court to find that the City met its burden of proving “the facts and circumstances of this case establish that the search conducted by Mr. Walter was reasonably calculated to uncover all documents relevant to Ms. Rufin’s request.” CP 1682.

C. The City failed to present substantial evidence to meet its burden of proving that it promptly responded to the 3/17/14 request.

Agencies have a duty to provide “the fullest assistance to inquirers and the most timely possible action on requests for information.” PAWS, 125 Wn.2d at 252 (“PAWS”); RCW 42.56.100. “Responses to requests for public records shall be made promptly by agencies.” RCW 42.56.520. Under this section, the agency is required to respond to a PRA request within 5 days by: (1) providing the requested records; (2) acknowledging the request and providing a “reasonable estimate” of time in which the requested records will be provided; or (3) denying the request. *See* RCW 42.56.520.

The City gave no such acknowledgment with respect to the 3/17/14 request. CP 1970, ¶ 2. At trial, the City offered no explanation for why it failed to give the acknowledgment and estimate of time within 5 days, as required. *See* RP 28, 151-52. Nor did the findings of the trial court offer any explanation for why Mr. Walter failed to comply with the requirements of RCW 42.56.520 as to the 3/17/14 request, when Walter

otherwise understood and would comply with the law. *See* RP 137; CP 1970, ¶ 2. Such failure is aggravated by the fact that Walter *was* communicating with the City’s trial counsel about the 3/17/14 request at the same time he was *not* communicating with Ms. Ruffin about the request. *See* Ex. 31.

When Mr. Walter’s counsel asked him in the PRA trial “what [he] did ... to respond to this request?” his vaguely answered, “I again identified the appropriate person to help compile the responsive records, emailed, maybe even made a call to talk about what was being requested and for that information to be compiled so I could review it for disclosure.” RP 152. The City does not present “substantial evidence” to meet its burden of showing Mr. Walter was acting diligently simply by having Mr. Walter generically proclaim that he “worked diligently to fulfill this request.” *Compare* RP 28 with RP 151-52.

Unlike other requests, Defendant presented no emails with respect to the 3/17/14 request to show how soon or on what date Mr. Walter contacted “the appropriate person” to begin searching for records related to the hiring processes Haynes testified about, or when he otherwise acted to fulfill the request. *Compare* Exs. 257-262 (Walter compiling salary records from HR in response to 3/4/14 request) *with* Ex. 263-64 (Walter receiving and responding to 3/17/14 request). The absence of any

documentation of Mr. Walter processing the 3/17/14 request, combined with his demonstrated delay in processing other requests during the same time period (on the eve of trial), *see* Sect. IV.D., *infra*, suggests the City had no evidence that would support Mr. Walter’s conclusory, non-specific testimony that he was allegedly acting diligently.

The record reveals that by May 8, 2014, Mr. Walter possessed “records associated with [the] request for hiring files but they did not scan properly,” and promised Rufin to send them to her “either today or tomorrow.” Ex. 262; CP 7, ¶ 3.23 and CP 52, ¶ 3.23. However, Mr. Walter did not provide the records “today or tomorrow”; the first installment of hiring files (which it turned out contradicted Mike Haynes’ testimony) were not provided until May 30, 2014—three weeks later. Ex. 98; CP 7, ¶ 3.24; CP 52, ¶ 3.24; CP 1970, ¶ 3; Ex. 100. Where the City fails to comply with such self-imposed deadlines, it must show it was nevertheless acting “diligently in responding to the request in a reasonable and thorough manner.” *See Andrews*, 183 Wn. App. at 653-54. The City presented no evidence to explain why the City missed its promised deadline. When Mr. Walter finally provided the first installment of records to Rufin on May 30, his question to Rufin, asking if she “wish[ed] to receive the other hiring files requested,” Ex. 100, implied that he understood the WLAD litigation he was tracking had concluded with the trial, and that Rufin may

no longer require the records she was requesting. He understood the importance of the records.

It is uncontested that the City did not respond to Rufin's 3/17/14 within five days or provide the statutorily required estimate of time for when records would be produced, even though the PRO was communicating with defense counsel about the same request; and gave no explanation for the lack of communication with Rufin. It is also undisputed that the PRO had records available to produce to Rufin on May 8, promising to produce them tomorrow, but still failed to produce records for 3 more weeks. Under these facts, there is a lack of substantial evidence for the City to meet its burden of establishing that it "promptly responded" to the 3/17/14 request or that it "provided all records responsive to [the] request in a reasonable time period." CP 1687. The Court should reverse these findings by the trial court and remand the matter for a determination of the penalties to be awarded Rufin in relation to the 3/17/14 request.

D. The trial court erred when it dismissed the PRA claim based on the 3/4/14 request, as the record conclusively showed that the PRO failed to respond with "reasonable diligence."

When, in the context of a CR 41(b)(3) motion to dismiss, "the trial court acts as a fact-finder, appellate review is limited to whether substantial evidence supports the trial court's findings and whether the findings support its conclusions of law. In re Dependency of Schermer,

161 Wn.2d 927, 940, 169 P.3d 452 (2007). The trial court dismissed the PRA claim under CR 41(b)(3) relying on the standard that Defendant had cited from Andrews v. Wash. State Patrol, 183 Wn. App. 644, 334 P.3d 94 (2014). *See* RP 263-64, 269-71; *see also* CP 1389 (“RCW 42.56.550(1) is satisfied when agencies ‘respond with reasonable thoroughness and diligence to public records requests.’ Andrews, at 653”). The Andrews standard allows the agency to fail to comply with a “self-imposed deadline” without penalty, contingent on the agency showing it was nevertheless “acting diligently.” *See* Andrews, 183 Wn. App. at 646, 653-54. The trial court misapplied the standard and thereby undermined the purpose of requiring agencies to set a “reasonable estimate” of time for when records will be produced, RCW 42.56.520, by focusing the inquiry into the agency’s diligence in the period “beyond” (or following) the self-imposed deadline, rather than analyzing what evidence, if any, supported that the agency was acting diligently at the time it blew the deadline. *See* RP 264; 270-71. If the rule applied as the trial court applied it, and courts reviewed only whether a lack of diligence is shown beyond the deadline, agencies will be incentivized to set estimates for themselves for long periods of time, and could potentially take no action for months under the deadlines they set for themselves without fear of being penalized for their delay. Such construction betrays the PRA’s mandate that the Act be

“liberally construed... to assure that the public interest will be fully protected.” RCW 42.56.030.

In this case, the analysis of the court, focusing on whether the agency was “diligent” after its self-imposed deadline passed, was outcome determinative, prejudicing Ms. Rufin. *See* RP 264; 270-7. The undisputed record showed that after Mr. Walter promised Ms. Rufin to “have the requested records in a first installment or in their entirety within the next twenty days,” Ex. 256, Mr. Walter neglected to give the custodian of records the list of names for which payroll records needed to be compiled for *fourteen days*. Ex. 258; CP 1502; *see also* RP 151. Thus, Rufin’s claim based on the 3/4/14 request is starkly different from *Andrews*, where “[t]he uncontested facts in th[e] case establish[ed] the WSP acted diligently.” 183 Wn. App. at 654. Here, under no definition could Mr. Walter’s prolonged inaction on the request meet the City’s duty of “fullest assistance to inquirers and the most timely possible action on requests for information.” RCW 42.56.100, *quoted in Andrews*, 183 Wn. App. at 646. The City set a 20-day deadline, then did little to meet it for two weeks, causing Rufin delay in the production of public records when the City understood time was of the essence. For such reasons, the Court should hold that the trial court misapplied *Andrews* when it concluded there was no evidence showing “the City was not diligently working on that request

beyond the 20 days,” and improperly dismissed the claim arising from the 3/4/14 request based on such analysis.

V. ATTORNEY FEES AND COSTS

Ms. Rufin respectfully requests that attorney fees for this appeal be awarded under RCW 42.56.550(4) (“Any person who prevails against an agency in any action in the courts seeking the 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.”)

With this appeal, Ms. Rufin challenges the findings made by the trial court regarding the 9/28/12 request, the 3/17/14 request, and the 3/4/14 request. Assuming Ms. Rufin succeeds with her appeal, on remand the trial court should be asked to reconsider the finding that it was “appropriate to award Plaintiff twenty-five (25) percent of her total costs and fees to reflect the percentage of claims upon which she was successful,” CP1988, to be consistent with this Court’s decision.

VI. CONCLUSION

For the foregoing reasons, the Court should hold that the search made in response to Ms. Rufin’s 9/28/12 request was not reasonable; that the City failed to promptly respond to the 3/17/14 request; and that the City failed to meet its burden of proving that it was working diligently

before it missed the self-imposed deadline for responding to Rufin's 3/4/14 request. The matter should be remanded to the trial court to make further findings on daily penalties and attorneys fees to be awarded consistent with such decision.

RESPECTFULLY SUBMITTED this 18th day of July, 2016.

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DECLARATION OF SERVICE

I, Mark Rose, state and declare as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by the Sheridan Law Firm, P.S., and I make this declaration based on my personal knowledge and belief.

2. On July 18, 2016, I caused a copy of the Brief of Appellant to be delivered via email and the Court's electronic filing system to:

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

DATED this 18th day of July, 2016 at Seattle, King County,
Washington.

s/Mark Rose
Mark Rose, WSBA #41916