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74825-4

No. 74825-4-I

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

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REBECCA A. RUFIN,

*Appellant/Cross-Respondent,*

vs.

CITY OF SEATTLE,

*Respondent/Cross-Appellant,*

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RESPONDENT/CROSS-APPELLANT CITY OF SEATTLE'S  
ANSWERING BRIEF & OPENING BRIEF ON CROSS APPEAL

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2018 AUG 17 PM 2:11  
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## I. INTRODUCTION

This appeal rests on a debunked conspiracy theory. The central theme of each of Ms. Rufin's claims is that the City shirked its obligations under the Public Records Act, codified at RCW 42.56 ("PRA"), in order to advance its position in ongoing litigation. Unlike most PRA plaintiffs, Ms. Rufin had the opportunity to present her case at trial and made every effort to convince the court of her view of the facts. But after listening to six witnesses, reviewing over a hundred exhibits and hearing the arguments of counsel, the trial court was not persuaded. It categorically rejected Ms. Rufin's conspiracy theory, concluding that the City complied with the PRA with respect to the requests at issue on appeal. Stripped of her conspiracy theory, Ms. Rufin's case falls to pieces, as the trial court's factual findings are supported by substantial evidence, and its rulings consistent with the PRA. Because Ms. Rufin cannot meet her burden on appeal, the trial court's rulings with respect to Ms. Rufin's PRA claims must be affirmed.

In a case of first impression, the trial court made a legal error by concluding that judgments offered under CR 68 do not apply in PRA cases. All of the Civil Rules apply in PRA cases and there is nothing about CR 68 that undermines the PRA's policy of open government. To the contrary, important policy reasons exist to apply CR 68 in PRA cases and

this case presents a classic example of why CR 68 applies in PRA cases. The trial court's ruling in this regard must be reversed.

## **II. ISSUES PERTAINING TO RUFIN'S APPEAL**

Does substantial evidence support the trial court's factual findings that: (1) the City performed an adequate search with respect to Ms. Rufin's September 28, 2012 PRA request; and (2) the City's response to Ms. Rufin's March 17, 2014 PRA request was reasonable?

Was the City entitled to CR 41(b)(3) dismissal, at the close of Ms. Rufin's case, with respect to her March 4, 2014 request?

## **III. ASSIGNMENT OF ERROR AND STATEMENT OF ISSUE ON CROSS-APPEAL**

### **A. Assignment of Error:**

Did the trial court err, as a matter of law, by ruling that CR 68 categorically does not apply in PRA cases?

### **B. Issue pertaining to Assignment of Error:**

Given that the Civil Rules apply in all civil cases, and the PRA is a civil case, does CR 68 apply in PRA cases?

## **IV. STATEMENT OF THE CASE**

Although the focus should be on how the City responded to Ms. Rufin's requests for records, Ms. Rufin spills considerable ink detailing her view of the facts from her failed retaliation lawsuit against the City.

Brief of Appellant (“App. Br.”) at 1-3, 9-14. The City need not rehash those facts, as they are immaterial. For an objective view of those facts, see *Rufin v. City of Seattle*, No. 72012-1-I, WL 4886087 (Div. 1, August 17, 2015) (unpublished), where this court affirmed the jury’s verdict against Ms. Rufin in her retaliation lawsuit.

The following facts are material to this PRA case:

**A. City records management.**

The City receives and processes thousands of public records requests annually. RP 276. The City also deals with approximately 188 million emails per year. RP 276. Under the City’s established records retention policies for emails in existence at the time, all emails sent or received are automatically deleted after 45 days unless someone actively transfers the email into the archive system or that person is placed on litigation hold. RP 277. After transfer, the email will reside in the archives for a retention period of one to six years, during which time it cannot be destroyed. RP 277. Searches of archived emails are performed by selecting the individual archives for an employee or official and entering relevant search terms. RP 132-133. An email sent to more than one City employee may be archived by one employee but not another based on, for example, whether someone is on litigation hold. RP 131, 277.

**B. Ms. Rufin's public records requests.**

Ms. Rufin made 19 requests or attempted requests to the City for records under the PRA that all relate to the subject matter of her retaliation lawsuit. *See* Ex. 273. Most of the public records requests at issue are complex, involving several categories of records, often involving more than one City department and requiring searches of archived records. In addition, it is common practice for Ms. Rufin to ask questions and send lengthy emails to the City regarding her requests, oftentimes shifting the focus of her original request. RP 204, RP 173. Ms. Rufin alleged violations relating to six of these requests. CP 1-11.

**C. The City moves for summary judgment.**

The City moved for summary judgment on all six claims, prevailing on two claims. The first involved Ms. Rufin's March 3, 2014 request for hiring matrices in Excel format. The court found that the City provided the responsive records within three days of the request and dismissed the claim. CP 1325. The second involved her August 27, 2014 request for eleven categories of records, which was pending at the time Ms. Rufin filed suit. The court dismissed that claim as premature. CP 1326. Rufin does not appeal the trial court's dismissal of these claims.

**D. A bench trial occurs on the remaining claims.**

In January, 2016, the trial court conducted a bench trial on the remaining four claims over two days. The court heard testimony from six different witnesses, including Ms. Rufin. Prior to trial, Ms. Rufin requested penalties, in addition to fees and costs, of \$11,060,900.00. CP 1507. At closing, Ms. Rufin reduced her request to \$4,281,500.00, not including attorney's fees and costs. RP 327. Ultimately, the court determined that the City violated the PRA with respect to one request and awarded her \$1,688.00. CP 1717-1718.

The City now addresses the claims tried to the court.

1. March 4, 2014 request.

At the close of her case, the trial court dismissed Ms. Rufin's claim based on the March 4, 2014 request under CR 41(b)(3). RP 271.

With respect to that request—a request for salary information—Josh Walter, the Public Disclosure Officer for Seattle City Light (“SCL”) timely acknowledged the request and originally estimated the first installment would be available in 20 days. Ex. 256. To process that request, Mr. Walter contacted SCL's human resources department to compile responsive records on March 21, 2014. RP 151, CP 1994-96, Ex. 258. After the contact, there was an internal back and forth lasting several weeks to determine the best way to respond to Ms. Rufin's request given

its complexity, and based on the nature of the request it was determined that it was necessary to review “each individual employee” in order to respond to Ms. Rufin’s request. CP 2004, Ex. 261. Mr. Walter provided the records to Ms. Rufin on May 8, 2014—45 days after his original time estimate. Ex. 262. Of note, Mr. Walter testified that while he was working on this request, he was working on at least a couple of other very complex public records requests, from other requestors, requiring a significant amount of his time. RP 152. He was also working on Ms. Rufin’s March 3, 2014 and March 17, 2014 requests.

Ms. Rufin also testified about this request. RP 227-231, RP 237-239. Specifically, she testified that that she wrote the phrase “time is of the essence” in the March 4 request because she wanted to inform the City that the documents were important to her for her upcoming trial in the retaliation lawsuit. RP 230. She also noted that she “might” agree that the urgency of her request was because she did not adequately conduct discovery in her retaliation lawsuit. RP 230-231. When asked directly for the basis of her claim, Ms. Rufin testified that Mr. Walter’s failure to comply with his original time estimate violated the PRA because she put the phrase “time is of the essence” in her request. RP 237-238. In fact, she testified that a 65-day turnaround time violated the PRA when such

language was used, but that a 163-day turnaround time did not violate the PRA when such language was not used. *Compare* RP 237 *with* RP 239.

After reviewing the testimony and exhibits surrounding the March 4 request, the trial judge determined that the City diligently worked on the request as evidenced by various email communications, and that production of the records on May 8, 2014 was “clearly reasonable.” RP 270-271. Accordingly, the trial court granted the City’s CR 41(b)(3) motion with respect to this request. RP 271.

2. Modified September 28, 2012 request.

On August 15, 2012, Ms. Rufin made a public records request via email to Gary Maehara at SCL for emails to or from any employee or entity at SCL after a certain date that included the name “Rufin” or that referred to her. CP 1680-1681, Ex. 201. On August 21, Mr. Walter, the person responsible for responding to Ms. Rufin’s request, acknowledged receipt of the request and estimated that records would be available in whole or in part on September 14, 2012. RP 139-140, Ex. 202.

When Mr. Walter conducted the search for records containing the word “Rufin,” he found “thousands, if not tens of thousands of records, with her name.” RP 139; *see also* CP 1681. Mr. Walter informed Ms. Rufin that referring simply to her last name was turning up a significant amount of documents, most of which may not have been what she was

looking for. Mr. Walter printed out a number of the emails at random for Ms. Rufin's review. RP 163, CP 1681. After meeting with Mr. Walter in person to review her first installment on September 28, 2012, Ms. Rufin agreed with him that they were not representative of the documents she was seeking, and Mr. Walter suggested, and Ms. Rufin readily agreed, to narrow her request. RP 207, CP 1681.

Following the meeting, Ms. Rufin sent Mr. Walter an email narrowing her search to "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." CP 1681, Ex. 212.<sup>1</sup> To satisfy the modified request, Mr. Walter searched the email accounts of the four named employees, rather than the wide swath required under Ms. Rufin's original request. RP 141, CP 1681. Ms. Rufin received responsive records on March 12, 2013. Ex. 243, CP 1681.

As part of the discovery in this lawsuit, Ms. Rufin requested emails bearing her name that may exist among any of the City's formal public

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<sup>1</sup> At trial, Ms. Rufin claimed that some of these individuals were on litigation hold. The trial court found, however, that no "credible evidence" was presented to show that "any of those accounts were placed on litigation hold or that the email was archived prior to the time the email would have been deleted." CP 1683. No error is assigned to this factual conclusion. App. Br. at 7-8.

disclosure officers or people that work in public disclosure. CP 1681-1682. As a result of that search, the City produced an April 18, 2012 email containing Ms. Rufin's name. Ex. 1, CP 1682. The email was originally sent by Ms. Rufin to Mike Haynes on April 10, 2012. Mr. Haynes then forwarded the email to Mr. Maehara, Ms. Johnson and Mr. Kern. CP 1682.

Ms. Rufin labels this email as the "smoking gun" because she believes the email demonstrates City officials committed perjury in her retaliation lawsuit. App. Br. at 4. On direct examination, Ms. Rufin testified that the email was critical to that lawsuit because it would have led her to Mr. Maehara and she would have undertaken additional discovery had she known about his involvement in the hiring process at issue in that lawsuit.<sup>2</sup> RP 178. On cross-examination, however, Ms. Rufin was forced to admit that Mr. Maehara was on her witness list for her that trial, which focused on the hiring process, and that nothing prevented her from calling Mr. Maehara as a witness. RP 212-218, Ex. 279.

The unremarkable email was located in Gary Maehara's email archive account. RP 298. More specifically, it was located in Mr.

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<sup>2</sup> It is highly questionable that the "smoking gun" had any relevance in her retaliation lawsuit because, as Ms. Rufin admitted on cross-examination, nothing in the email said she was going to actually apply for the position that was at issue in her lawsuit. RP 219-221. In any event, as Ms. Rufin's counsel conceded at trial, the question of the email's importance to her retaliation lawsuit was irrelevant with respect to the adequacy of the City's search, and would only have been relevant to the penalty phase given Ms. Rufin's theory that the City intentionally withheld the email. RP 54.

Maehara's inbox, and it is possible Mr. Maehara never even opened and read the email. RP 298. Mr. Maehara's email account was not searched as part of the September 28, 2012 request given Ms. Rufin's modification. CP 1682, RP 141. As noted, Mr. Walter searched only those email accounts Ms. Rufin directed him to search after she narrowed her request. Mr. Walter testified that there were no obvious leads for him to search Mr. Maehara's email account. RP 148. Mr. Walter further testified that no one directed him to withhold any records, nor did he intentionally withhold any records responsive to Ms. Rufin's requests. RP 153-154. Other City witnesses testified similarly. RP 64-65, RP 95-96.

Based on all of this, the trial court determined:

Mr. Walter searched those email accounts that were specifically named by Ms. Rufin in her request. Although that search did not produce the April 18, 2012 email, 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. Although 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 at SCL as well. Mr. Walter was not required to search every conceivable email account at SCL. Furthermore, 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.

CP 1682-1683. Finally, the trial court rejected Ms. Rufin's theory that the City intentionally withheld the April 18, 2012 from Ms. Rufin. CP 1683.

3. January 3, 2013 request.

The third claim dealt with Ms. Rufin's January 3, 2013 request. Although neither party appeals any of the ruling regarding this request, the trial court's resolution of Ms. Rufin's claims is instructive nonetheless.

Although the trial court determined that the City violated the PRA, it also found that Mr. Walter

did not intentionally fail to respond to Ms. Rufin's request but instead inadvertently missed the request while assisting her with her other requests. When he learned of the request in response to this litigation, he promptly produced the records. Mr. Walter acted in good faith and his explanation for the delay is reasonable.

CP 1685. Given the City's showing of good faith, the trial court grouped the records into one category and assessed a penalty of \$2.00 per day for 844 days (\$1,688.00). CP 1685. Again, no party appeals this ruling.

4. March 17, 2014 request.

The fourth claim dealt with Ms. Rufin's request dated March 17, 2014, for certain partial hiring files. CP 1686, Ex. 263. Mr. Walter did not send a five-day letter acknowledging the request and estimating a time for production, but he did provide the first installment of responsive records on May 30, 2014. CP 1686, Ex. 264. Ms. Rufin responded to the receipt of those records and alerted Mr. Walter that the documents she received were not complete. CP 1686, Ex. 265.

On June 22, 2014, Ms. Rufin reminded Mr. Walter that she was waiting for the additional documents. CP 1686, Ex. 266. The very next day, Mr. Walter responded that he had just located the additional records in storage and that he should be able to provide them within a day. CP 1686, Ex. 267. On June 27, 2014, Mr. Walter provided the additional documents to Ms. Rufin. CP 1686, Ex. 268, Ex. 269. Ms. Rufin acknowledged receipt of the additional documents on the same day and asked Mr. Walter to confirm that there were no more records responsive to one of the hiring processes in her request. CP 1686, Ex. 270. On July 9, 2013, Mr. Walter informed Ms. Rufin that he had requested that SCL's human resources department look for any additional records responsive to that request. CP 1686, Ex. 271. On July 30, 2013, Mr. Walter provided one record responsive to that process and confirmed there were no more records responsive to Ms. Rufin's request. CP 1687, Ex. 272.

Mr. Walter testified that he did not delay the processing or production of this request, nor did anyone instruct him to delay. RP 153-154. Other witnesses testified similarly. RP 64-65, RP 95-96. Mr. Walter further testified that while he was working on this request and Ms. Rufin's March 4, 2014 request he was also working on at least two other complex requests from other requestors. RP 152. Ms. Rufin also testified about this request at trial. As with her March 4, 2014 request, Ms. Rufin testified that

the gravamen of her claim with respect to this request was that the City did not provide the requested records as quickly as she would have liked. RP 232.

Although it recognized that the City did not provide a five-day response to Ms. Rufin's request, the trial court concluded that Mr. Walter provided all the responsive records in a reasonable time period. CP 1687.

**E. Post-trial procedure and relevant facts.**

On February 22, 2016, the trial court denied Ms. Rufin's motion for reconsideration. CP 1698. On March 1, 2016, the trial court entered judgment in Ms. Rufin's favor for \$1,688.00, a mere fraction of the \$11,060,900.00 she had originally requested. CP 1507, 1717-1719.<sup>3</sup>

**V. ARGUMENT**

No basis exists for second-guessing the trial court's conclusion that no one at the City engaged in any intentional conduct with the goal of thwarting Ms. Rufin's access to public records. Indeed, Ms. Rufin fails to assign error to those factual findings, even though her appeal is predicated on the notion that the City acted in bad faith. All of the trial court's rulings regarding the City's responses to Ms. Rufin's numerous and complex requests should be affirmed. All of the trial court's factual findings are

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<sup>3</sup> The City will address the relevant facts and rulings regarding attorney's fees in the "Cross-Appeal" section of its Brief. *See infra* § VI.

supported by substantial evidence, and Ms. Rufin cannot meet her burden to overcome any of those findings. For all the reasons that follow, the trial court's rulings should be affirmed.

**A. Standard of Review**

The standard of review in this case is more deferential than in traditional PRA cases. While review under the PRA is generally *de novo*, where, as here, the trial court sits as the trier of fact, its findings are reviewed for substantial evidence. *Zink v. City of Mesa*, 140 Wn.App. 328, 336-37, 166 P.3d 738 (2007); see *Gronquist v. Dep't of Corrections*, 159 Wn.App. 576, 590, 247 P.3d 436 (2011).

“Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *In re Custody of A.F.J.*, 179 Wn.2d 179, 184, 314 P.3d 373 (2013) (citing *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978)). Once satisfied, “we will not substitute our judgment for that of the trial court even though we might have resolved disputed facts differently.” *Green v. Normandy Park*, 137 Wn.App. 665, 689, 151 P.3d 1038 (2007). Further, “[t]here is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence.” *Id.* Here, Ms. Rufin has not

discharged her burden.<sup>4</sup>

**B. The trial court rejected Ms. Rufin’s alleged conspiracy.**

Ms. Rufin’s case rests heavily on a conspiracy theory based on innuendo and alleged motive. Her opening brief reads like a crime novel, accusing City officials of purposefully withholding a “smoking gun,” strategically dragging its feet when responding to her requests, acting nefariously in “tracking” litigation, and intentionally neglecting to respond to one request. *See generally* App. Br.; *see also* RP 303-27. This theory, however, was thoroughly tested, and squarely rejected, by the trier of fact.

Unlike most PRA plaintiffs, Ms. Rufin had the rare opportunity to present these theories through the crucible of trial, and the trial court, after hearing from six witnesses and reviewing more than one hundred exhibits, found no evidence of bad faith on the part of the City. While Ms. Rufin may want to wish away the trial, she cannot do so. *See, e.g., Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 36, 366 P.3d 1246 (2015) (“Trials matter. The results of trials matter. The manner in which a trial takes place, the evidence admitted, and the judicial rulings made all matter.”).

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<sup>4</sup> The City will address the standard of review for its cross-appeal below. *See infra* § VI.B.

What is more, Ms. Rufin fails to assign error to any of the factual conclusions that undercut her conspiracy theory. These findings are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). For example, Ms. Rufin fails to assign error to the finding that “there is no credible evidence to support Ms. Rufin’s claim that Mr. Walter located the [‘smoking gun’] email in his search and purposefully withheld it from her.” CP 1683.<sup>5</sup> Likewise, she fails to challenge the finding that Mr. Walter “did not intentionally fail to respond to Ms. Rufin’s [January 3, 2013] request but instead inadvertently missed the request while assisting her with her other requests,” as well as the related finding that “Mr. Walter acted in good faith.” CP 1685. These unchallenged findings lay to waste Ms. Rufin’s conspiracy theory because had the court accepted her version of the events it would have necessarily had to accept that the City acted in bad faith—her central theme on appeal. Again, trials matter.

In any event, even if Ms. Rufin had properly preserved her conspiracy theory by assigning error to these findings, the result is the

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<sup>5</sup> It is of no import that certain findings are styled as “Conclusions of Law.” *See, e.g., Smith v. Breen*, 26 Wn. App. 802, 614 P.2d 671 (1980) (“Several of the conclusions of law are findings of fact and will be so treated.”). Questions of good faith, reasonableness and intention are inherently factual. *See, e.g., Green*, 137 Wn. App. 693 (noting “reasonableness . . . is a question of fact”).

same because substantial evidence supports these findings. At trial, the City's witnesses testified that they did not purposefully destroy any documents or intentionally slow down the production of documents responsive to her requests. RP 64-65, RP 95-96, RP 153-43, RP 299. Unable to present any contrary direct evidence, Ms. Rufin relied on circumstantial evidence based on alleged motive (frustration of her other lawsuit) to attack these witnesses' credibility and advance her conspiracy theory.<sup>6</sup> For example, Ms. Rufin chides the City because its lawyers were coordinating with Mr. Walter given the related nature of Ms. Rufin's PRA requests and her retaliation lawsuit. *See, e.g.*, App. Br. at 22-24, RP 308. That Ms. Rufin continues to advance this argument is curious given her own action. At trial, Ms. Rufin was forced to admit that she engaged in the same exact practice herself as a City employee. RP 202-203, Ex. 278. As the trier of fact, the trial court was free to weigh the evidence and accept or reject Ms. Rufin's conspiracy theory based on the evidence presented to it. The court rejected her theory, and that conclusion cannot be disturbed on appeal.

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<sup>6</sup> These findings turn on the credibility of the City's witnesses, and credibility determinations "cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

**C. The City complied with the PRA.**

When stripped of their conspiratorial nature, Ms. Rufin's claims are straightforward. The City does not violate the PRA by failing to find a single email, nor does it violate the PRA by not giving Ms. Rufin preferential treatment. In all respects, the City's efforts in responding to Ms. Rufin's numerous and confusing requests were reasonable and in full compliance with the PRA.

**1. Ms. Rufin bears the burden of proof.**

Although Ms. Rufin acknowledges she is challenging factual conclusions that must be upheld on appeal if they are supported by substantial evidence, *see* App. Br. at 7-8, 31, she nevertheless claims that the City bears the ultimate burden of proof. App. Br. at 35 (citing *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 720-21, 261 P.3d 119 (2011)); App. Br. at 37 (citing no authority). Ms. Rufin is wrong.

"The PRA provides a cause of action for two types of violations: (1) when an agency wrongfully denies an opportunity to inspect or copy a public record, or (2) when an agency has not made a reasonable estimate of time required to respond to the request." *Andrews v. Washington State Patrol*, 183 Wn. App. 644, 651, 334 P.3d 94 (2014) (citing RCW 42.56.550(1), (2)). Here, all of Ms. Rufin's claims fall into the first

category because she claims that the City did not provide her with all of the requested records in a timely fashion, which is tantamount to wrongfully denying access to a document under RCW 42.56.550(1). *See, e.g., Neighborhood Alliance*, 172 Wn.2d at 723 (agreeing with court of appeals “that County wrongfully withheld documents in violation of PRA as a result of [its] inadequate search”).

Ms. Rufin claims that the City bore the burden at trial, but she misreads *Neighborhood Alliance* on this point. At issue there, and in particular the passage to which Ms. Rufin cites, is the burden of an agency on *summary judgment*. *See id.* at 720-21 (“[M]any FOIA cases are resolved on motions for summary judgment concerned with the adequacy of the search. *In such situations*, the agency bears the burden, beyond material doubt, of showing its search was adequate.” (emphasis added)). In fact, the court held an agency meets *its summary judgment burden* by providing “reasonably detailed, nonconclusory affidavits submitted in good faith.” *Id.* at 721; *see also Nissen v. Pierce Cty.*, 183 Wn.2d 863, 885-87, 357 P.3d 45 (2015) (discussing how affidavits can satisfy “adequate search” requirement).

*Neighborhood Alliance* only addressed the summary judgment burden and the court had no occasion to address who would have the burden at trial, let alone who had the burden on appeal after the trial court

heard testimony, reviewed evidence and made extensive factual findings. That the City has the burden on summary judgment does not mean that it has the burden at trial. “One who moves for summary judgment has the burden of proving that there is no genuine issue of fact, irrespective of whether he or his opponent would, at the trial, have the burden of proof on the issue concerned.” *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 561, 998 P.2d 856 (2000) (citing *Preston v. Duncan*, 55 Wn.2d 678, 682, 349 P.2d 605 (1960)). At base, Ms. Rufin assumes that the City bears the burden of proof in every regard under the PRA. This is not so.

*First*, it is inconsistent with the PRA, which only expressly places the burden on an agency in two specific instances, neither of which apply here. For example, RCW 42.56.550(1) states: “The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that *exempts or prohibits disclosure* in whole or in part of specific information or records.” (emphasis added). Thus, the statute places the burden on agency to prove that a particular exemption applies, and that burden is not at issue here because Ms. Rufin does not claim that the City improperly withheld any documents based on erroneous claim of exemption.

Likewise, RCW 42.56.550(2), which is not at issue here, states: “The burden of proof shall be on the agency to show that the estimate it provided is reasonable.” Here, Ms. Rufin does not claim that the City failed to provide a reasonable estimate; instead, she argues only that the City failed to show “Mr. Walter was acting diligently” with respect to her March 2014 requests. App. Br. at 37, 40. This lack of diligence, in turn, would constitute a wrongful withholding of documents under RCW 42.56.550(1). The fact that the Legislature chose to only place the burden of proof on an agency in two specific instances strongly suggests that it did not intend to place the burden of proof on agencies with respect to other claims under the PRA. *See In re Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (“Under *expressio unius est exclusion alterius*, a cannon of statutory construction, to express one thing in statute implies the exclusion of the other.”). In fact, the court of appeals recently rejected a similar argument, noting these sections do “not address the burden of proving any other matters” in a PRA case. *Adams v. Washington State Dep’t of Corrections*, 189 Wn. App. 925, 952, 361 P.3d 749 (2015).

*Second*, Ms. Rufin’s position is at odds with the general rule that a plaintiff bears the burden of proof on the claims they make. *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn.2d 127, 135, 769 P.2d 298 (1989 (noting “general burden of proof rules requir[e] the plaintiff to

prove all elements of the cause of action.”); *see also Adams*, 189 Wn. App. at 952.

Given this, Ms. Rufin’s suggestion that the City bore the burden at trial on these issues is simply wrong. Having said that, however, that question may be academic in light of the fact that the trial court made extensive factual findings and Ms. Rufin acknowledges those factual determinations are reviewed under the substantial evidence standard on appeal. App. Br. at 7-8, 31. After all, the question of “whether an agency complies with the PRA is a fact specific inquiry and must be decided on a case-by-case basis.” *Andrews*, 183 Wn. App. at 653 (2014).

**2. Failing to produce a single email responsive to the modified September 28, 2012 request does not prove the City’s search was inadequate.**

Ms. Rufin fails to meet her burden and establish that the trial court’s findings with respect to her September 28, 2012 request are not supported by substantial evidence. The trial court should be affirmed.

Under the PRA “a search need not be perfect, only adequate.” *Block v. City of Gold Bar*, 189 Wn. App. 262, 273, 355 P.3d 266 (2015) (quoting *Neighborhood Alliance*, 172 Wn.2d at 720). Under this standard, “the focus of the inquiry is not whether responsive documents do exist, but whether the search itself was adequate.” *Neighborhood Alliance*, 172 Wn.2d at 719-20. A search is adequate if it is “reasonably calculated to

uncover all relevant documents.” *Id.* at 720. And the question of what is “considered reasonable will depend on *the facts of each case.*” *Id.* (emphasis added).

Based on the facts of each case, “the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found.” *Id.*; *see also Kozol v. Washington State Dep’t of Corrections*, 192 Wn. App. 1, 8, 366 P.3d 933 (2015); *Hobbs v. State*, 183 Wn. App. 925, 945, 35 P.3d 1004 (2014); *Block*, 189 Wn. App. at 272; *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 866, 288 P.3d 384 (2012). Moreover, an agency need not “search *every possible place* a record may conceivably be stored, but only those places where it is *reasonably likely* to be found.” *Neighborhood Alliance*, 172 Wn.2d at 720 (emphasis in original). Judged against this standard, the trial court’s findings are supported by substantial evidence.

Ms. Rufin’s modified September 28, 2012 request specifically sought “all emails by or between Davonna Johnson, Jorge Carrasco, Steve Kerns, Mike Haynes, and/or any individual in the Law Department that mention my name or the Civil/Mechanical/Engineering Manager hiring process.” CP 1681, Ex. 212.<sup>7</sup> The City’s search, which included the email

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<sup>7</sup> Despite some suggestion to the contrary in her brief, Ms. Rufin testified at trial that she was under no compulsion to limit her initial request in this regard. RP 207.

accounts of each of the custodians named in Ms. Rufin's request, was, by definition, "reasonably calculated" to generate all emails by or between these individuals.<sup>8</sup> See *Neighborhood Alliance*, 172 Wn.2d at 720.

The facts of this case contrast starkly with those of *Neighborhood Alliance*. There, the agency limited its search to a custodian's new computer, despite the agency's knowledge that responsive records could only be found on the custodian's old computer. *Id.* at 711-12. Consequently, the agency "had some idea that searching only the new computer would prove unfruitful" and thus failed to conduct an adequate search. *Id.* at 722-23. Here, however, one would expect all of the emails "by or between" a discrete group of individuals to reside in their respective email accounts. Having no reason to believe that this approach would be "unfruitful," the City had no obligation to look further. See *id.*

In challenging the trial court's factual findings, Ms. Rufin makes much of the City's failure to produce the so-called "smoking gun" email. But Ms. Rufin's result-oriented approach is inconsistent with the PRA. Courts inquire into "the agency's search process[,] not the result of that process." *Forbes*, 171 Wn. App. at 866. "The fact that the record

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<sup>8</sup> Whether the City's search was reasonably calculated to yield all emails from Law Department employees is not at issue in this appeal. Although Mr. Maehara was an attorney, he was an SCL, not Law Department employee, and Ms. Rufin's testimony indicates that she understood that distinction. RP 204-205.

eventually was found does not establish that the agency’s search was not adequate.” *Kozol*, 192 Wn. App. at 8 (citing *Neighborhood Alliance*, 172 Wn.2d at 719). Indeed, Ms. Rufin’s focus on one email mirrors the argument this court rejected in *Block*, where the requestor argued that when responsive records are later uncovered, a responding agency commits a *per se* violation of the PRA, notwithstanding the fact that its search was adequate. 189 Wn. App. at 278. This court rejected that argument as inconsistent with *Neighborhood Alliance*, because “the issue of whether the search was reasonably calculated and therefore adequate is *separate from* whether additional responsive documents exist but are not found.” *Id.* (quoting *Neighborhood Alliance*, 172 Wn.2d at 720) (emphasis added).

On appeal, Ms. Rufin challenges the trial court’s factual conclusion 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.” App. Br. at 7, CP 1683. While the City does not dispute its obligation to pursue “obvious leads” in searching for responsive records as set forth by *Neighborhood Alliance*, 172 Wn.2d at 720, Ms. Rufin’s characterization of the email as an “obvious lead” reflects a fundamental misunderstanding of the relevant facts, applicable law and her burden on appeal.

*First*, by suggesting Mr. Maehara should have remembered the email upon receipt of her request four months later, Ms. Rufin vastly overstates the email's significance. In fact, Ms. Rufin did not even establish that Mr. Maehara had opened and read the email, RP 298, and, even if he had, it is unlikely to have left a lasting impression. Mr. Haynes forwarded Ms. Rufin's email for informational purposes only, not in an effort to seek advice on how to respond to Ms. Rufin. RP at 67-68. Indeed, Mr. Haynes responded to Ms. Rufin within a day of forwarding her email to his colleagues, allowing little time for them to weigh in on the matter. RP 70. Also, the email was not significant enough to warrant any follow-up discussion between Mr. Haynes and his colleagues. *See* RP 68-69.

*Second*, regardless of whether Mr. Maehara had any recollection of the email, Mr. Maehara had no personal involvement in responding to Ms. Rufin's request. RP 142. The emails that the City released to Ms. Rufin only had his name on them because Mr. Walter needed to use software installed on Mr. Maehara's computer. RP 141-42. Thus, even if Mr. Maehara remembered the email at the time of Ms. Rufin's request, any lead that may have existed in his mind was not "obvious" to the City.

*Third*, because Ms. Rufin provided a specific list of SCL employees for whom she wanted emails, and because Mr. Walter had the ability to search the email accounts of each of these employees, it was not

incumbent on Mr. Walter to ask other individuals, such as Mr. Maehara, whether they recalled other responsive emails. In a City that receives 3,300 public disclosure requests per year (excluding requests to the police) and 188 million emails per year, relying on personal recollections would be unworkable. RP 276. Individuals cannot be expected to remember every email they receive—particularly unremarkable emails such as the April 18, 2012 email. Yet, that is the crux of Ms. Rufin’s argument.

*Fourth*, although it is “conceivable” that an email lacking retention value would not appear in the archives of a named custodian but would turn up in a search of another individual’s email account, the PRA does not demand such mathematical precision. The City is not required to “search *every* possible place a record may conceivably be stored.” *Neighborhood Alliance*, 172 Wn.2d at 720. (emphasis in original) “A reasonable search need neither be exhaustive or successful.” *Kozol*, 192 Wn. App. at 9. By the same token, whether Ms. Rufin’s proposed approach would have been successful is beside the point, as courts “inquire into the scope of the agency’s search as a whole and whether that search was reasonable, not whether the requestor has presented alternatives that [she] believes would have more accurately produced the records [she] requested.” *Hobbs*, 183 Wn. App. at 944.

In claiming that the City should have looked beyond the locations where responsive records were reasonably likely to be found and that an unremarkable email received several months before the request—by an individual with no involvement in responding to the request—was an “obvious lead,” Ms. Rufin demands perfection. But the PRA requires only an “adequate search,”—not a perfect one. *Neighborhood Alliance*, 172 Wn.2d at 719. The trial court’s ruling on the matter should be affirmed.

**3. The City responded to Ms. Rufin’s March 4, 2014 request in a reasonable amount of time.**

The evidence amply demonstrates that the City responded diligently and thoroughly, and therefore reasonably, to Ms. Rufin’s March 4, 2014 request. The PRA requires nothing more. Thus, the trial court’s CR 41(b)(3) ruling should be affirmed. RP 271.

“In granting a CR 41(b)(3) motion, a trial court may either weigh the evidence and make a factual determination that the plaintiff has failed to come forth with credible evidence of a prima facie case, or it may view the evidence in the light most favorable to the plaintiff and rule, as a matter of law, that the plaintiff has failed to establish a prima facie case.” *In re Dependency of Schermer*, 161 Wn.2d 927, 939, 169 P.3d 452 (2007). Here, the trial court chose the latter approach.

So given the – with regard to the March 4<sup>th</sup> request, I think if I look at the facts even in the light most favorable to the plaintiff there is no prima facie case here that the records were not provided in a reasonable amount of time, that the City did not work reasonably diligently beyond their initial 20-day request, and for those reasons I’m going to grant the 41(b)(3) as it relates to the March 4<sup>th</sup>, 2014, request.

RP 271. Where, as here, the trial court rules as a matter of law in granting a CR 41(b)(3) motion, “review is de novo, and the question on appeal is whether the plaintiff presented a prima facie case, viewing the evidence in the light most favorable to the plaintiff.” *Schermer*, 161 Wn.2d at 939-40.<sup>9</sup> Even when the evidence is viewed in the light most favorable to her, Ms. Rufin failed to present any evidence—much less a *prima facie* case—that the City failed to reasonably respond to her request.

At trial, Ms. Rufin explained that the gravamen of her claim with respect to this request was that the City had failed to comply with its self-imposed deadline. RP 238. Such a claim, however, is squarely foreclosed by *Andrews*, 183 Wn. App. at 651-52, which established that an agency has no obligation to meet self-imposed deadlines under the PRA:

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<sup>9</sup> Curiously, Ms. Rufin misconstrues the trial court’s ruling as a factual determination and thus asks the Court to review the trial court’s ruling for substantial evidence—a less favorable standard for an appellant. App. Br. at 39. In any event, even if the court reviews the ruling under the less-rigorous substantial evidence standard, the City still prevails because *all of* the evidence indicates that the City responded to Ms. Rufin’s request within a reasonable amount of time.

The PRA contains no provision requiring an agency to strictly comply with its estimated production dates. In fact, the statute gives an agency additional time to respond to a request based upon the need to “locate and assemble the information requested.”

*Id.* (quoting RCW 42.56.520).

Recognizing that her prior position is foreclosed by the very case upon which she now relies, Ms. Rufin changes course and now argues that the trial court misapplied *Andrews* by focusing only on the City’s “diligence in the period ‘beyond’ (or following) the self-imposed deadline[.]” App. Br. at 40. In essence, Ms. Rufin’s argument is really that the City did not act diligently in responding to this request because Mr. Walter did not reach out to the custodians at SCL “for *fourteen days*.” App. Br. at 41 (emphasis in original). Simply put, as a matter of law, the City did not violate the PRA by waiting fourteen days to begin processing this request.

Even though the trial court’s application of *Andrews* was correct, that question has no bearing on whether this court should affirm, because this court may “affirm on any ground the record adequately supports.” *Skinner v. Holgate*, 141 Wn. App. 840, 849, 173 P.3d 300 (2007).

As Ms. Rufin now concedes, an agency need not meet its own deadlines in responding to a request, so long as it “respond[s] with reasonable thoroughness and diligence to public records requests.”

*Andrews*, 183 Wn. App. at 653; *see also* RCW 42.56.550(4) (establishing “the right to receive a response to a public record request within a *reasonable* amount of time” (emphasis added)); *Forbes*, 171 Wn. App at 864 (“The operative word is ‘reasonable’” (quoting RCW 42.56.550(4))).

On this record, it is abundantly clear that the City exercised “reasonable thoroughness and diligence” in responding to what proved to be a complex request for records. *See Andrews*, 183 Wn. App. 653. The following facts were undisputed.

On March 21, Mr. Walter sent a detailed inquiry to Jana Elliott, an SCL human resources professional, in order to collect the requested records. Ex. 258. Ms. Elliott promptly forwarded the inquiry to one of her colleagues, Diane Washburn, who began a dialogue with Mr. Walter over the course of the next few days to clarify the inquiry. Ex. 259. A few days later, Mr. Walter followed up with Ms. Elliott to discuss Ms. Rufin’s request. Ex. 260. Less than a week later, Ms. Washburn provided materials to Mr. Walter indicating that additional legwork would be required to compile the records. Ex. 261. Within a month, Mr. Walter provided Ms. Rufin with more than 400 pages responsive to her request. Ex. 262. All told, it took the City 65 days to respond to this complex request.

While Ms. Rufin does not dispute having received a timely 5-day letter, she nevertheless faults the City for taking two weeks to begin

working on her request. App. Br. at 41. But that timeframe was eminently reasonable given the City’s workload and resources. Her March 4 request came directly on the heels of her March 3 request, and was being worked on during her March 17 request. Mr. Walter testified that in addition to these requests he was working on several other complex public records requests, from other requestors, requiring a significant amount of his time. RP 152.

As noted, in a City that receives approximately 3,300 public disclosure requests per year—excluding those directed to the Police Department—individuals cannot reasonably be expected to process a request, conduct a search for documents, then review and produce documents responsive to a request immediately. *See Andrews*, 183 Wn. App. at 646 (“Some agencies are beleaguered with several hundred or even thousands of public records request in a short period of time.”). Agencies need some flexibility in responding to PRA requests and the PRA recognizes as much, because “RCW 42.56.520 does not limit the number of extensions an agency may require to respond to a request.” *Id.* at 652. Plainly stated, responding agencies must act reasonably and diligently under the facts and circumstances extant at the time.

Ms. Rufin makes much of the fact that she alerted the City in making the request that “time was of the essence” App. Br. at 41; *see also*

RP 239. Requesters with time sensitive requests are not entitled to preferential treatment under the PRA. RCW 42.56.080 (“Agencies shall not distinguish among persons requesting records....”).<sup>10</sup> If it were otherwise, an enterprising requestor could simply label her request as “time is of the essence” to the detriment of other requestors in order to receive the very type of preferential treatment the PRA expressly prohibits.

Given this, the alleged time-sensitive nature of her request has no bearing on the reasonableness of the City’s response time. However, even if it were considered, the urgency was of her own making. Ms. Rufin admitted that she could have requested the same records during the discovery period for her retaliation suit rather than relying on an eleventh-hour public disclosure request, but that she failed to do so. RP 230-31. Ms. Rufin cannot be now heard to complain about the City failing to give her preferential treatment based on an emergency of her own making.

Ms. Rufin presented no evidence, other than a discredited conspiracy theory, supporting her claim that the City failed to respond to this request within a reasonable amount of time. The court should affirm.

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<sup>10</sup> Time-sensitivity of a request may be an aggravating factor in computing penalties. *See Yousofian v. Office of Ron Sims*, 168 Wn.2d 444, 467, 229 P.3d 735 (2010). “For instance, delaying production of documents long past their ability to influence a public vote defeats the PRA’s purposes of keeping people informed....” *Id.* at 467 n.13.

**4. The City’s response to Ms. Rufin’s March 17, 2014 request was proper under the PRA.**

The question of “whether an agency complies with the PRA is a fact specific inquiry and must be decided on a case-by-case basis.” *Andrews*, 183 Wn.App. at 653. Substantial evidence supports the trial court’s finding that the City “promptly responded to Ms. Rufin’s request” and “provided all of the records responsive to her request in a reasonable time period.” CP 1687.

The record shows that Mr. Walter worked diligently to contact the appropriate SCL employees, compile and review the requested records, and respond to Ms. Rufin’s March 17 request while juggling a number of complex public disclosure requests—including other requests from Ms. Rufin. RP 152-53.<sup>11</sup> In fact, the record also shows an extensive email dialogue between Mr. Walter and Ms. Rufin, in which Mr. Walter responded promptly to each of Ms. Rufin’s inquiries concerning her request. Exs. 265-272. While the City may not have responded to Ms. Rufin’s request as quickly as she would have liked, the PRA only requires agencies to provide a response within a “reasonable” amount of time.

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<sup>11</sup> Ms. Rufin’s characterization of Mr. Walter’s testimony as “conclusory” and “non-specific,” App. Br. at 38, ignores that a trial occurred in this matter. This court is not reviewing an affidavit presented on summary judgment; rather, it is reviewing a factual finding made by the trial court sitting as the trier of fact. While Ms. Rufin may want to ignore the fact that a trial occurred, the fact remains that a trial did, in fact, occur.

RCW 42.56.550(4). Given Mr. Walter's workload and the complexity of Ms. Rufin's request, the City's response time was entirely reasonable and the trial court's finding of the same is supported by substantial evidence.

Ms. Rufin's arguments to the contrary are unavailing. *First*, the gist of her claim is that the City strategically slow-played its response to gain a competitive advantage in the ongoing litigation. App. Br. at 37-39. As detailed above, however, the trial court has squarely rejected this theory, and those findings cannot be disturbed on appeal. *See supra* § V.B.

*Second*, as detailed above, the City's failure to meet its own, self-imposed deadline does not negate the reasonableness of the City's response time. *See Andrews*, 183 Wn. App. at 651. Thus, that the City anticipated providing additional records within a day and ultimately required a few weeks has no bearing on the City's compliance with the PRA. App. Br. at 38. *Third*, Ms. Rufin was not entitled to preferential treatment on the basis that "time was of the essence." It would be absurd to construe the PRA's "fullest assistance" requirement as an obligation to place certain requesters at the front of the line, as Ms. Rufin suggests. App. Br. at 36. "Fullest assistance" does not mean preferential treatment; rather, it requires only that agencies "respond with reasonable

thoroughness and diligence to public records requests.” *Andrews*, 183 Wn. App. at 653.<sup>12</sup> The City did just that.

At bottom, the trial court’s factual conclusion that the City responded reasonably to this request is supported by substantial evidence, and its ruling with respect to this request should be affirmed.

**D. Attorney’s fees and costs.**

Ms. Rufin’s appeal regarding attorney’s fees and costs is contingent. App. Br. at 42. Ms. Rufin does not argue that the trial judge abused discretion with respect to any of his rulings on attorney’s fees and costs. App. Br. at 7-8, CP 1767-68. Instead, she claims only that *if* this court reverses on the merits of any of her claims, this court should remand to “reconsider” its determination that Ms. Rufin was only entitled to 25 percent of her requested fees. App. Br. at 42. As for fees on appeal, fees should only be awarded if Ms. Rufin succeeds in demonstrating that any of the trial court’s rulings were wrong. If this occurs, additional briefing may be necessary depending on the level of Ms. Rufin’s success on appeal.

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<sup>12</sup> That the City failed to provide her with a five-day letter with respect to this request is beside the point because Ms. Rufin does not appeal the determination that “Mr. Walter’s failure to provide a five day letter to Ms. Rufin does not warrant penalties.” CP 1688.

## VI. CITY'S CROSS-APPEAL

The trial court's conclusion that CR 68 categorically does not apply in PRA cases should be reversed. First, because PRA cases are civil cases, all of the Civil Rules apply in such cases. Second, assuming the trial court's policy-based rationales are appropriately considered, neither of them supports the trial court's conclusion that CR 68 does not apply in PRA cases. Thus, the fee ruling should be reversed and remanded.

### A. Facts relevant to cross-appeal.

On November 26, 2014, Ms. Rufin filed a complaint against the City alleging deficiencies with six of her PRA requests. CP 1-11. Upon receipt of the complaint, the City realized that Mr. Walter inadvertently missed her January 3, 2013 request and "promptly" produced the records to Ms. Rufin. CP 1685. In discovery, the City produced the so-called "smoking gun" email, which the City acknowledges would have been responsive to Ms. Rufin's modified September 28, 2012 request. CP 1681-82.

In an effort to resolve the entirety of the litigation, on June 18, 2015, the City served Ms. Rufin with a CR 68 offer of judgment ("Offer"). CP 1751-52. The Offer was for \$40,000.00 and also included attorney's fees (subject to court approval). *See id.* When the City made its Offer, Ms. Rufin had incurred only \$12,966.11 in fees and costs. CP 1756-57. Thus,

had Ms. Rufin accepted the Offer, she would have received almost \$53,000.00. She did not accept the Offer. CP 1759.

After receiving \$1,688.00 for a singular violation of the PRA, Ms. Rufin requested \$168,038.96 in fees and costs. CP 1721.<sup>13</sup> Ultimately, based on her limited success, the trial court awarded Ms. Rufin \$33,229.12 in attorney's fees and costs. CP 1768. In ruling on her request, the trial court ruled that, as a matter of law, CR 68 did not apply in PRA cases, basing its ruling on two rationales: (1) the mandatory nature of costs under the PRA; and (2) fear of a "chilling effect" the "public policy" underlying the PRA. CP 1762-63. The City timely appealed. CP 1769-83.

**B. Standard of review.**

Whether CR 68 applies in PRA cases is a question of law that is reviewed *de novo*. *Neighborhood Alliance*, 172 Wn.2d at 715.

**C. Civil Rule 68 applies in PRA cases.**

While the question of whether CR 68 applies in PRA cases is one of first impression, numerous courts have held that the Civil Rules apply in PRA cases. Because those cases control, reversal is required.

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<sup>13</sup> In her reply papers, Ms. Rufin acknowledged that the amount she requested was not proper because she had sought recovery of fees and costs that were associated with her retaliation case, not this PRA case. As a result, she requested \$167,351.46 in fees and costs. CP 1760-61.

The Civil Rules govern the procedure in the superior courts in all civil suits, except where inconsistent with the rules or statutes applicable to special proceedings. *In re Detention of Williams*, 147 Wn.2d 476, 488, 55 P.3d 597 (2002). Thus, unless a PRA case is a special proceeding under CR 81, *all* of the Civil Rules apply in PRA cases, including CR 68. Our Supreme Court has held that a PRA lawsuit is not a “special proceeding.” *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 104-05, 117 P.3d 1117 (2005). Because CR 68 is a rule of procedure, *Critchlow v. Dex Media West, Inc.*, 192 Wn. App. 710, 717, 368 P.3d 246 (2016) (“CR 68 sets forth a procedure for defendants to offer to settle cases before trial.”), the trial court erred as a matter of law.

Numerous courts have held that the Civil Rules apply in cases brought under the PRA. *See, e.g., Neighborhood Alliance*, 172 Wn.2d at 716 (holding “that civil rules control discovery in a PRA action.”); *City of Lakewood v. Koenig*, 160 Wn. App. 883, 889, 250 P.3d 113 (2011) (“The Rules of Civil Procedure apply in a PRA action.”). The fact that the PRA is to be “liberally construed,” does not change the analysis. Our Supreme Court rejected similar reasoning, noting “normal civil procedures are an appropriate method to prosecute a claim under the liberally construed PDA.” *Spokane Research*, 155 Wn.2d at 105.

In addition, nothing in the text of the PRA forecloses the application of CR 68. “When a statute is silent on a particular issue, the civil rules govern the procedure.” *Spokane Research*, 155 Wn.2d at 105. For example, in holding that a party may intervene under CR 24 in a PRA case, the court held that intervention was allowed because “[t]he PDA says nothing about intervention, implying that such procedure is proper to the extent allowed by the civil rules.” *Spokane Research*, 155 Wn.2d at 105. The same is true here: given the PRA’s silence as to CR 68, “no reason exists to treat” CR 68 differently in the context of the PRA. *See Neighborhood Alliance*, 172 Wn.2d at 716.

Furthermore, Federal Rule 68 applies to cases brought under the federal Freedom of Information Act (“FOIA”). *Electronic Privacy Info. Ctr. v. U.S. Dep’t of Homeland Security*, 982 F. Supp. 2d 56, 62 (D.D.C. 2013). Given the parallels between the PRA and the FOIA, cases applying the FOIA “are particularly helpful in construing” the PRA. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978).

Because *all* of the Civil Rules apply in PRA cases and nothing in the PRA suggests otherwise, the trial court’s ruling must be reversed.

**D. Public policy supports applying CR 68 to PRA cases.**

Even if this court considers the policy-based rationales advanced by the trial court, the result is the same. Applying CR 68 in PRA cases

does nothing to undermine the PRA’s purposes. Indeed, CR 68’s function and purpose dovetails neatly with the PRA.

Civil Rule 68 is designed to “encourage settlements and avoid lengthy litigation.” *Dussault v. Seattle Pub. Schools*, 69 Wn. App. 728, 732, 850 P.2d 581 (1993). Offers made under CR 68 operate as a contract, and the City’s offer expressly included, in addition to the \$40,000 penalty amount, an award of fees to be decided by the court upon acceptance of the Offer.<sup>14</sup> CP 1751. The effect of a Rule 68 offer, when it includes attorney’s fees and costs, is simple: it cuts off those fees and costs “up to the date of the offer.” *Johnson v. State Dep’t of Trans.*, 177 Wn. App. 684, 692, 313 P.3d 1997 (2013). “When the offer of judgment reads that the offered amount includes all reasonable attorney fees and costs, the plaintiff may not recover reasonable attorney fees and costs, beyond the offered amount, even if a statute affords recovery for fees and costs.”

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<sup>14</sup> Ms. Rufin never argued that the Offer did not encompass attorney’s fees or that it did not put her on notice that the City intended the offer to include attorney’s fees. CP 1942-1944. Indeed, the Offer followed the “prudent practice” of being as clear as possible with respect to fees. *See, e.g., Hodge v. Dev. Servs. of Am.*, 65 Wn. App. 576, 584, 828 P.2d 1175 (1992). Moreover, the PRA’s fee-shifting provision expressly includes attorney’s fees in the definition of costs. *See* RCW 42.56.550(4) (“shall be awarded all costs, including reasonable attorney fees”). Thus, attorney’s fees are included within a Rule 68 offer under the PRA. *See Hodge*, 65 Wn. App. at 579.

*Critchlow*, 192 Wn. App. at 719 (applying CR 68 to Consumer Protection Act claim).<sup>15</sup>

The trial court’s first rationale—the mandatory nature of fees under the PRA—is based on an apparent misunderstanding of how CR 68 operates. CR 68 does not extinguish a party’s right to attorney’s fees; it only prohibits recovery for such fees from the date the offer is made if a party ultimately recovers less than the offer at trial. *Johnson*, 177 Wn. App. at 692-93. Thus, even accepting the assumption that under the PRA fees are mandatory, nothing in CR 68 frustrates the PRA’s fee provision.<sup>16</sup> In many ways, this is no different from placing a “reasonableness” requirement on the amount of fees a prevailing plaintiff may recover in a PRA case. That, of course, is precisely how fee awards are calculated in PRA cases. *See, e.g., ACLU of Washington v. Blaine School Dist.*, 95 Wn. App. 106, 117-18, 975 P.2d 536 (1999). And courts have acknowledged

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<sup>15</sup> Both the PRA and the CPA are remedial statutes. *See, e.g., Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 732, 354 P.3d 249 (2015).

<sup>16</sup> On this score, the ruling below is internally inconsistent. On the one hand, the court noted that applying CR 68 would undermine the liberal purposes of the PRA. On the other hand, it ruled that a seventy-five percent reduction of the fees and costs requested by Ms. Rufin was appropriate under the facts of and circumstances of this case. These are two sides to the same coin. If it is appropriate (which it plainly is) and consistent with the PRA’s purposes to reduce attorney’s fees and costs when a party prevails under the PRA, it is likewise appropriate and consistent with the PRA’s purposes to apply CR 68. After all, the PRA is a normal civil action to which *all* the Civil Rules apply.

that reducing fee amounts does not “undermine the liberal purposes of the PRA.” *Cedar Grove Composting*, 188 Wn. App. at 732.

Where, as here, the plaintiff’s post-offer efforts are fruitless, cutting off fees from the time of the Offer pursuant to CR 68 is wholly consistent with the PRA’s mandate to award *reasonable* attorney’s fees. After all, the purpose of the PRA’s fee provision is to “further[ ] the policy of the public’s right to access public records.” *O’Neill v. City of Shoreline*, 183 Wn. App. 15, 25, 332 P.3d 1099 (2014). Reducing the recovery of fees for wasteful and unnecessary litigation furthers, not hinders, the purposes of the PRA because it prevents the PRA from being used as a vehicle to generate high amounts of fees. *Mitchell v. Washington State Ins. of Pub. Policy*, 153 Wn. App. 803, 830, 225 P.3d 280 (2009) (“Using the PRA as a vehicle of personal profit . . . is contrary to the PRA’s stated purpose to keep the governed informed about the government and costs based on false, inaccurate, or inflated claims do not serve that purpose and are not reasonable.”). Plainly stated, applying CR 68 to PRA cases does not undermine the PRA’s fee provision.

The trial court’s “chilling effect” argument fares no better. CP 1763. Nothing in the PRA is inconsistent with CR 68’s dual purposes of promoting settlement and reducing litigation costs. *Cf. O’Neill*, 183 Wn. App. at 19 (noting use of CR 68 offer in PRA case). Indeed, the PRA

contains provisions allowing for a show cause hearing, which is intended to expedite PRA litigation. *See, e.g., Neighborhood Alliance*, 172 Wn.2d at 729 (Madsen, C.J., concurring) (describing “speedy” show cause process under PRA). There was no reason why Ms. Rufin could not have invoked this proceeding, which would have greatly reduced her attorney’s fees and costs.

For unknown reasons, Ms. Rufin eschewed this streamlined process, and instead chose to fully litigate this case. Yet, if the trial court’s conclusion is accepted, PRA requestors will be incentivized to reject reasonable settlement offers and run-up large fee amounts in the hopes they prevail at trial. Civil Rule 68 provides a necessary counterweight. Incentivizing such gamesmanship, by foreclosing the application of a valuable settlement tool, does not advance the PRA; rather, it undermines the societal benefits inherent in the settlement process and promotes misuse of PRA lawsuits.

Both this court and the United States Supreme Court considered, and rejected, similar “chilling effect” arguments. In *Johnson*, this court addressed the question of whether an accepted CR 68 offer that included attorney’s fees precluded the recovery of “fees and costs incurred while litigating an entitlement to fees violates the public policy” underlying Washington’s Law Against Discrimination (“WLAD”). *Johnson*, 177 Wn.

App. at 694-95. This court rejected this argument. In so doing, it noted that the “WLAD’s liberal construction is not without limits.” *Id.* at 695. In so doing, this court adopted the reasoning of the Ninth Circuit’s decision in *Guerrero v. Cummings*, 70 F.3d 1111 (9th Cir. 1995). *Id.* at 695-699. In the end, this court concluded that nothing in “public policy” underlying the WLAD was sufficient to overcome the application of CR 68 to the situation before the court. *See id.* at 699.

In *Marek v. Chesny*, 473 U.S. 1 (1985), a case brought under the federal civil rights statute, 42 U.S.C. § 1983, the Court noted that Federal Rule 68’s “policy of encouraging settlements is neutral, favoring neither plaintiff nor defendants; it expresses a clear policy of favoring settlement of all lawsuits.” *Id.* at 10 (superseded by statute on other grounds, Civil Rights Act of 1991, 42 U.S.C. § 1981(a)).<sup>17</sup> CR 68 reflects the same neutrality and promotes the same policy. Explaining further, the Court recognizes the benefits of applying Rule 68 equally to all civil litigation:

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<sup>17</sup> This court has previously adopted *Marek*’s interpretation of Federal Rule 68 when interpreting what constitutes “costs” under CR 68. *Hodge*, 65 Wn. App. at 579-81 (1992).

Civil rights plaintiffs—along with other plaintiffs—who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney’s fees for services performed after the offer is rejected. But, since the Rule is neutral, many civil rights plaintiffs will benefit from the offers of settlement encouraged by Rule 68. Some plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered. And, even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation. In short, settlements will serve the interests of plaintiffs as well as defendants.

*Id.* The same is true with CR 68. It does not matter, nor should it, that the underlying statute that creates the civil cause of action has a laudable public purpose in assessing whether CR 68 applies. *See, e.g., Interfaith Cmty. Org. v. Honeywell Intern., Inc.*, 726 F.3d 403, 410-11 (3d Cir. 2013).

This case presents a textbook example of why CR 68 should apply in PRA cases. At the time the City made its Offer, Ms. Rufin had incurred only approximately \$13,000 in fees and costs. CP 1756-57. The City’s Offer was for \$40,000, plus attorney’s fees. CP 1751. Thus, had Ms. Rufin accepted the City’s Offer, she would have recovered approximately \$53,000—\$20,000 more than what she actually recovered. Instead of accepting the City’s Offer, which in hindsight was, by all accounts, very generous, Ms. Rufin chose to roll the dice and seek a greater recovery at trial. As a result of her non-acceptance, Ms. Rufin and the City engaged in

costly and burdensome litigation to get to a place that left Ms. Rufin worse off than if she had accepted the offer. Doing so wasted everyone's time and effort. In fact, not accepting the Offer accomplished nothing because at the time the City made its Offer, Ms. Rufin has already received every document responsive to all of the requests at issue in this case.

Where, as here, an offer of judgment greatly exceeds post-offer recovery, the fee-shifting provisions of CR 68 play an important role in ensuring that attorney's fees meet statutory requirements of reasonableness. In *Marek*, the Supreme Court recognized that the applicable statute, 42. U.S.C. § 1988, "authorizes courts to award only 'reasonable' attorney's fees to prevailing parties," and concluded that Rule 68 was "in no sense inconsistent" with that statute. 473 U.S. at 11.

In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff—although technically the prevailing party—has not received any monetary benefits from the postoffer services of his attorney . . . Given Congress' focus on the success achieved, we are not persuaded that shifting the postoffer costs to respondent in these circumstances would in any sense thwart its intent under § 1988.

*Id.* This reasoning applies with equal force in the context of PRA litigation, as courts consider whether an attorney's efforts were worthwhile in determining whether attorneys' fees are reasonable. *See, e.g., ACLU of Washington*, 95 Wn. App. at 118.

At bottom, the purpose of the PRA is open government. *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 903, 346 P.3d 737 (2015). Foreclosing an agency's ability to utilize CR 68 to reduce litigation costs, avoid the burden and disruption associated with litigation, and to avoid potentially catastrophic penalty and fee awards does not advance open government. Rather, it incentivizes requestors to throw caution to the wind and proceed with litigation in the hopes of recovering substantial sums of money. Indeed, in this case, Ms. Rufin initially requested over \$11,000,000.00 in penalties and reduced that amount at closing argument to \$4,281,500.00. CP 1507; RP 327. In actuality, she received \$1,688.00. Civil Rule 68 has an important role to play in PRA cases, and that role does not undermine open government.

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For these reasons, the City requests that the court reverse the trial court's legal determination that CR 68 categorically does not apply in PRA cases and remand for further proceedings.

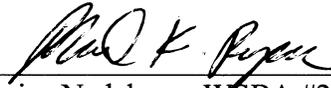
## VII. CONCLUSION

For the foregoing reasons, the City respectfully requests that this court (1) affirm the trial court's judgment regarding Ms. Rufin's PRA

claims, and (2) reverse the trial court's decision that CR 68 does not apply in PRA cases and remand this case for further proceedings.

DATED this 17th day of August, 2016.

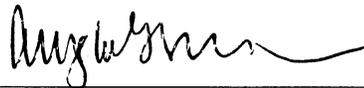
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**DECLARATION OF SERVICE**

I, Charolette Mace, certify under penalty of perjury under the laws of the State of Washington and the United States that, on the date below, I served the document to which this Certificate is attached to the parties listed below in the manner shown.

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