

NO. 47079-9-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JAMES J. WHITE,

Appellant,

v.

CITY OF LAKEWOOD,

Respondent.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. REPLY	1
A. The PRA Mandate.....	1
B. The First Request Was Not Time-Barred	2
C. The Second Request Was Also Not Time-Barred	5
1. A PRA Production of Records Triggers the Statute of Limitations On the Date On Which It Is Received By, Or At Minimum, Transmitted To, The Requestor	7
2. The City’s Tolling Arguments Are A Poorly Veiled Attempt At Burden-Shifting	10
D. Mr. White’s Requests Were Sufficiently Specific.....	11
E. The Trial Court Abused Its Discretion in Imposing a \$10 Per Day Penalty for the Third Request.	15
1. Mr. White Preserved All Of The Yousoufian Factors	15
2. The Trial Court Failed to Properly Consider The Factors And Abused Its Discretion.....	17
F. Mr. White’s Claims Related To The City’s Destruction And Failure To Protect Records Survive	20
G. Mr. White Is Entitled To Costs And Reasonable Attorneys Fees For This Appeal	20
1. Fees Earned Prior To The Appeal Have Not Been Waived.....	21
2. The Offer Of Judgment Has No Effect Here	22
II. CONCLUSION	24

TABLE OF AUTHORITIES

Cases

<i>Amren v. City of Kalama</i> , 131 Wn.2d 25, 929 P.2d 389 (1997).....	1
<i>Bartz v. State Dep't of Corr. Pub. Disclosure Unit</i> , 173 Wn. App. 522, 297 P.3d 737 (2013).....	9
<i>Belenski v. Jefferson Cnty.</i> , 45756-3-II, 2015 WL 2394974 (May 19, 2015).....	12
<i>Cannon v. Dep't of Licensing</i> , 147 Wn.2d 41, 57, 50 P.3d 627 (2002).....	9
<i>Cedar Grove Composting, Inc. v. City of Marysville</i> , 71052-4-I, 2015 WL 4080874 (July 6, 2015).....	19
<i>City of Lakewood v. Koenig</i> , 182 Wn. 2d 87, 343 P.3d 335 (2014).....	3
<i>Corey v. Pierce Cnty.</i> , 154 Wn. App. 752, 225 P.3d 367 (2010).....	21
<i>Cowles Publ'g Co. v. Spokane Police Dep't</i> , 139 Wn.2d 472, 987 P.2d 620 (1999).....	1
<i>Haines-Marchel v. State, Dep't of Corr.</i> , 183 Wn. App. 655, 334 P.3d 99 (2014).....	23
<i>Hangartner v. City of Seattle</i> , 151 Wn. 2d 439, 90 P.3d 26 (2004).....	13, 14, 15
<i>Haslund v. City of Seattle</i> , 86 Wn.2d 607, 547 P.2d 1221 (1976).....	6, 11
<i>Hobbs v. State</i> , 183 Wn.App. 925, 335 P.3d 1004 (Oct. 7, 2014).....	13
<i>In re Marriage of Horner</i> , 151 Wn. 2d 884, 93 P.3d 124 (2004).....	18
<i>Johnson v. State Department of Corrections</i> , 164 Wn. App. 769, 265 P.3d 216 (2011).....	7
<i>Newman v. King Cnty.</i> , 133 Wn. 2d 565, 947 P.2d 712 (1997).....	4

<i>Ockerman v. King County Dep't of Developmental & Envtl. Servs.</i> , 102 Wn.App. 212, 6 P.3d 1214 (2000).....	2
<i>Progressive Animal Welfare Soc'y v. UW</i> , 114 Wn.2d 677, 790 P.2d 604 (1990).....	21
<i>Progressive Animal Welfare Soc. v. Univ. of Washington</i> , 125 Wn. 2d 243, 884 P.2d 592 (1994).....	3
<i>Sanders v. State</i> , 169 Wn. 2d 827, 240 P.3d 120 (2010)	3
<i>Sargent v. Seattle Police Dep't</i> , 179 Wn. 2d 376, 314 P.3d 1093 (2013).....	2
<i>Seattle Times Co. v. Serko</i> , 170 Wn. 2d 581, 243 P.3d 919 (2010).....	3, 4
<i>West v. Thurston Cnty.</i> , 168 Wn. App. 162, 275 P.3d 1200 (2012)	17
<i>Wood v. Lowe</i> , 102 Wn. App. 872, 10 P.3d 494 (2000).....	11, 12
<i>Wright v. State</i> , 179 Wn. 2d 1021, 309 P.3d 662 (2013).....	13
<i>Yousoufian v. Office of Ron Sims</i> , 137 Wn. App. 69, 151 P.3d 243 (2007).....	18
<i>Yousoufian v. Office of Ron Sims</i> , 152 Wn. 2d 421, 98 P.3d 463 (2004).....	18
<i>Yousoufian v. Office of Ron Sims</i> , 168 Wn. 2d 444, 229 P.3d 735 (2010).....	17
<i>Zink v. City of Mesa</i> , 140 Wn.App. 328, 166 P.3d 738 (2007).....	11

Statutes

RCW 4.16.130 5

RCW 42.56.080 8

RCW 42.56.520 15

RCW 42.56.550 5, 6

RCW 42.56.550(1)..... 2

RCW 42.56.550(6)..... 3

I. REPLY

The City of Lakewood's response brief in this matter represents a continued attempt to avoid responsibility for its failure to abide by the Public Records Act's mandate for disclosure. As was discussed in Mr. White's opening brief, the questions posed in this appeal can be solved by simple applications of past precedent and adherence to the drafter's intent in enacting our PRA. RCW 42.56 *et. seq.*. Adherence to precedent and the PRA drafter's intent will lead this Court to correct the trial court's mistakes and to ensure that public agencies cannot escape the responsibility for violating their duty to disclose records under the PRA.

A. The PRA Mandate

To properly analyze any PRA question, the focus must remain on the strongly worded mandate for broad disclosure of public records that the PRA provides. *See Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997). As the people of Washington "do not give their public servants the right to decide what is good for the people to know and what is not good for them to know," the PRA requirement of disclosure is broadly construed and any exemptions are narrowly construed. RCW 42.56.030; *Cowles Publ'g Co. v. Spokane Police Dep't*, 139 Wn.2d 472, 476, 987 P.2d 620 (1999). Because of the importance of public access to disclosure, the PRA provides citizens access to the courts to challenge

agencies' failures to comply with the PRA and makes it clear that the burden of proof in such matters is on the agency to establish that any refusal is in accordance with a statute that exempts or prohibits disclosure. RCW 42.56.550(1); *Sargent v. Seattle Police Dep't*, 179 Wn. 2d 376, 385-86, 314 P.3d 1093, 1097 (2013).

The PRA's mandate for access, and the importance of citizens' access to courts to enforce that mandate, also means that courts are directed to look at the Act in its entirety and the broad mandate when construing the statute of limitations sections located within the PRA. *See Ockerman v. King County Dep't of Developmental & Envtl. Servs.*, 102 Wn.App. 212, 217, 6 P.3d 1214 (2000); *RHA v. Des Moines*, 165 Wn. 2d 525, 536, 199 P.3d 393, 398 (2009). Analysis of this case with the PRA's purpose in mind requires that the trial court's erroneous decisions be corrected.

B. The First Request Was Not Time-Barred

In its response brief, the City continues its specious reliance on those portions of the "plain language" of the statute that might protect the City from the consequences of its failure to abide by the PRA. The City asks this Court to ignore the intent of the PRA's drafters and the guidance and interpretation provided by this Court and our Supreme Court. While the "plain language" of the limiting statute provides a one-year limit from

the “the agency's claim of exemption,” such a claim of exemption is only valid if accompanied by a sufficient¹ privilege or exemption log. *RHA v. Des Moines*, 165 Wn. 2d at 540-41. The purpose of this log requirement is to provide the requestor and any later reviewing court with sufficient information about the items withheld to allow for meaningful judicial review and a proper log is required to trigger the limitations period in RCW 42.56.550(6). *See id.*; *Sanders v. State*, 169 Wn. 2d 827, 846, 240 P.3d 120, 130 (2010); *City of Lakewood v. Koenig*, 182 Wn. 2d 87, 94, 343 P.3d 335, 338 (2014).

The City argues, without support, that when it claims a categorical exemption, like the open investigation exemption, it is absolved of the responsibility to identify or protect the records it refuses to provide to the requestor. *Respondent's Brief*, at 9. To support this false position, the City cites to *Seattle Times Co. v. Serko*, 170 Wn. 2d 581, 243 P.3d 919 (2010). Alas, *Serko* is not supportive of the City's position that it may wrongfully claim the open investigation exemption without providing any

¹ A legally sufficient exemption log will include “the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content,” and a brief explanation of how the exemption applies to each document withheld. *RHA v. Des Moines*, 165 Wn. 2d at 538 (quoting *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn. 2d 243, 271, 884 P.2d 592, 608 (1994)(*PAWS II*); *Sanders v. State*, 169 Wn. 2d 827, 846, 240 P.3d 120, 130 (2010); *City of Lakewood v. Koenig*, 182 Wn. 2d 87, 94, 343 P.3d 335, 338 (2014). For situations where the identification of specific records may reveal protected information, an “agency may designate the records by a numbered sequence.” *RHA v. Des Moines*, 165 Wn. 2d at 538.

record on which the exemption may later be vetted or reviewed by our courts. In fact, the portion of the *Serko* decision cited by the City discusses circumstances where investigative activity is “on-going” and the subject may not know of the investigation and, as such, their apprehension could be hampered. *Serko*, 170 Wn. 2d at 592-594 (citing *Newman v. King Cnty.*, 133 Wn. 2d 565 (1997)). Here, all investigative activity had ceased and the search warrant had already been executed while the investigation’s target was home. If any investigative exemption existed here, it was of the type where “the risk of inadvertently disclosing sensitive information that might impede apprehension of the perpetrator no longer exists” and in such circumstances, the “application of the exemption requires a record-by-record analysis.” *Serko*, 170 Wn. 2d at 594. Such an analysis is impossible in this case because the City did not create an exemption log or protect the records in question.

“Without the information a privilege log provides, a public citizen and a reviewing court cannot know (1) what individual records are being withheld, (2) which exemptions are being claimed for individual records, and (3) whether there is a valid basis for a claimed exemption for an individual record.” *RHA v. Des Moines*, 165 Wn. 2d at 540. As a result, a claim of exemption lacking these required items fails to trigger the requestor’s duty to file a lawsuit within one year. *Id.* Where RCW

42.56.550's one-year limitation does not apply, the statute of limitations reverts to the "catch-all" two-year statute of limitations. RCW 4.16.130.

The City's failure to provide any exemption log robbed Mr. White of his opportunity to have a court meaningfully vet the City's falsely claimed exemptions for validity, and did not trigger the one year statute of limitations. Accordingly, Mr. White's claims related to the first request were not time-barred.

C. The Second Request Was Also Not Time-Barred

The City's response with regard to the second request focused entirely on the second prong of the statute of limitations, related to its partial production of records in response to this request. Mr. White's opening brief combined the analysis of both statute of limitation's prongs as the analysis is substantially identical with regard to whether the statute can be triggered by mere preparation, and not transmittal, of a PRA response. It cannot.

The analysis of both the exemption letter and the partial production of records still must focus on when the City of Lakewood can prove that it dispatched a proper exemption letter or production of records to Mr. White and/or when he may have received them.

The City's statute of limitations argument was an affirmative defense. Accordingly, the City should have been required to meet its

burden of proof in order to prevail. CR 8(c); *Haslund v. City of Seattle*, 86 Wn.2d 607, 620–21, 547 P.2d 1221 (1976). Pursuant to the statute, the time clock starts at “the last production of a record on a partial or installment basis.” RCW 42.56.550. Thus, to meet its burden on this affirmative defense, at minimum the City should have to provide some evidence that it produced records to Mr. White, perhaps by placing them in the mail, on a certain date. Here, the mailing date of the letter was disputed and no evidence supported that the letter was mailed on September 5, 2012.

If some evidence, like a tracking number or even a certificate of service, existed, then perhaps the court could consider September 5th as the date the statute of limitations was triggered. The court was unable to reach a finding as to when the letter and accompanying records were mailed. *See* CP 401. Without providing some evidence of such a mailing date, the City cannot have met its burden on this affirmative defense. The City failed to meet this burden regardless of whether we accept the insufficient exemption letter or the partial production of records as the would-be triggering event.

1. A PRA Production of Records Triggers the Statute of Limitations On the Date On Which It Is Received By, Or At Minimum, Transmitted To, The Requestor

It is absurd to contend that the statute of limitations is triggered by the *drafting* of a letter that accompanies a partial production of records. Despite the City's attempt to distinguish it, the rationale described in *RHA v. Des Moines* clearly supports Mr. White's position. Mr. White's position is further supported by the "plain language" of the statute.

The Court in *RHA v. Des Moines* explained that for the statute of limitations to be triggered, the requestor must be provided with a sufficient explanation of an exemption to notify him of the basis for withholding, which in turn provides him with sufficient information to determine he may have a claim and file suit. The reasoning is the same for a partial production of records, as a requestor cannot know that he has any basis for a claim until any production of records is received by or, at very minimum, transmitted to him.

This reasoning was highlighted in Mr. White's reference to *Johnson v. State Department of Corrections* in his opening brief. 164 Wn. App. 769, 265 P.3d 216 (2011). The Court allowed in its statute of limitations calculation for a week of "reasonable time by which Johnson should have received" DOC's response. *Id.*, at 778-79.

Rationally extending *RHA v. Des Moines*, the time to file this action would have expired one year after the City could prove the production of records and sufficient exemption log were mailed, in this case one year after September 6th or 7th. Applying the reasoning in *Johnson* would add a week of time for White to receive the production, pushing the date to September 12th or 13th.

Perhaps the only time we can accept the City's suggestion of adherence to the mere "plain language" of the statute is one where guidance has not yet been provided by the appellate courts. An agency's responsibility under the PRA is to produce records, or as is stated in the statute, to "make them promptly available to any person." RCW 42.56.080. Perhaps because its meaning is obvious, Mr. White has found no appellate court ruling defining when a record has been produced or made available. Under any plain or rational reading, a record has not been produced or made available to a requestor before the requestor has received it and certainly not prior to the records being placed in the mail.

Additionally, the City's insistence that the courts should rely on the date records were printed or placed in an envelope, but not transmitted, to trigger the statute of limitations would create an absurd result. Were this allowed, agencies could assemble productions of records, thereby triggering the clock for filing an action -- without transmitting anything to

the requestor. Such patently absurd interpretation must be rejected: courts must “avoid readings [of the PRA’s statute of limitations] that lead to absurd results.” *Bartz v. State Dep’t of Corr. Pub. Disclosure Unit*, 173 Wn. App. 522, 538, 297 P.3d 737, 744 (2013) *review denied* 177 Wn. 2d 1024, 309 P.3d 504 (2013), *citing Cannon v. Dep’t of Licensing*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002).

If the Court is inclined to view this from the agency-centric perspective suggested by the City, then the statute would be triggered by the actual transmission of the partial production of records. For mailing, such an agency-centric view may nonetheless need to account for time the records spend in transit. Perhaps this would be best accomplished with accounting for a time-delay as we observe in our own civil rules. *See* CR 5 (a)(2)(A). As statute of limitation is an affirmative defense, the burden to prove this transmission rests on the City’s shoulders.

The City’s assertion that it does not have the power to document when an item was placed in the mail is suspect at best. In today’s modern era, electronic postal tracking is an inexpensive protection easily available to the City. Even more simply, the City could rely on a certificate of service similar to that which accompanies any legal pleading. Such a certificate would have offered the City some evidence of mailing date and might have supported its attempt to raise this affirmative defense. Alas,

the City chose not to document the mailing date here and the staff member who mailed the records could not recall when they were actually dispatched. Minimal documentation like postal tracking or a certificate of service would be prudent for any agency seeking enforcement of a bright-line rule denying public access to records.

In short, the date the City prepared an exemption letter or records for production, without more, cannot be the trigger event for Mr. White's time to file an action. That clock only begins ticking when the exemption or production is made available (transmitted) to, or in a more requestor-centric view, actually received by the requestor. For this second request, even taking the agency-centric view, time for the statute of limitations did not begin to run until the production of records was actually dispatched to Mr. White. The City could not prove this happened until September 7, 2012, at the earliest. Thus, Mr. White's filing on September 6, 2013 was timely, regardless of the sufficiency of the exemption logs provided by the City.

2. The City's Tolling Arguments Are A Poorly Veiled Attempt At Burden-Shifting

The City now argues that because it failed to prove or otherwise document when it mailed the production of records to Mr. White, the presumption should be that the records were produced when the City

wants them to have been. *See Respondent's Brief*, at 7-22. Instead, the City suggests, it should be up to Mr. White to argue for equitable tolling and prove that the City failed to produce the records and engaged in bad faith delay. *Id.*, at 20-22. Alas, as has been noted time and again, the statute of limitations is an affirmative defense on which the City has the burden of proof. CR 8(c); *Haslund v. City of Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976). The City needed to prove, through evidence, that they produced records and a sufficient exemption log on a specific date in order to succeed with their statute of limitations defense. This burden cannot be shifted to the plaintiff, and especially not in the context of the PRA mandate for strict compliance, and the fact that administrative inconvenience or difficulty for the agency cannot excuse failures to comply with the PRA. *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn. 2d 525, 535, 199 P.3d 393, 398 (2009) (*citing Zink v. City of Mesa*, 140 Wn.App. 328, 337, 166 P.3d 738 (2007)). In the context of an affirmative defense, Mr. White cannot be asked to prove that the City willfully failed to mail their documents. The City's tolling argument fails.

D. Mr. White's Requests Were Sufficiently Specific

The City's next attempt to deflect liability is an effort to blame Mr. White for the City's failure to gather records by incorrectly claiming that

two of the requests were illegally overbroad. In this last-ditch effort, the City attempts to link Mr. White's requests to the incomparable example in *Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000). The City's rather incredible position seems to be that any request for records "pertaining to" or related to a specific event is overbroad and that their staff simply cannot be expected to know what a requestor may be looking for. *Wood* is wholly inapplicable here and the "pertaining to" argument fails the common sense test and stands in firm opposition to the purposes of the PRA.

To evaluate the City's attempt to analogize to *Wood*, it is best to start with a comparison of the actual requests made. The initial request made in *Wood* sought "any other information or documentation that you may have in your custody or under your control that relates to Ms. Wood and her past and current employment with your office and the Prosecutor's Office in general." *Wood v. Lowe*, 102 Wn. App. at 875. *Wood* requested any and all documents related to a person's long term employment with an office, and all such records for "the Prosecutor's Office in general." *Wood* was correctly decided; such a broad request cannot be reasonably collected and produced.

Similarly, an examination of the request found to be not for "identifiable" records in the City's second cited case, *Belenski v. Jefferson*

Cnty., benefits only Mr. White. 45756-3-II, 2015 WL 2394974, at *7 (May 19, 2015). Belenski requested “electronic copies of every electronic record for which Jefferson County does not generate a back up,” which was determined not to be a request for identifiable public records because the County did not maintain a list of records it had not backed up. *Id.*

Mr. White’s requests were not even in the same ballpark of broadness. He sought records related to a single incident and investigation.

The City has also cited to *Hangartner v. City of Seattle*, 151 Wn. 2d 439, 90 P.3d 26 (2004) to support the premise that an agency does not need to comply with an overbroad request. Here again, the Court was correct in deciding that an agency should not have to respond to a blanket request for ALL of its records. *Id.*, at 448. Alas, Mr. White did not seek all of the police department’s records, just those related to one investigation.²

The proper inquiry for a court considering overbreadth in the PRA context is to examine whether the person seeking records has asked for

² Our courts have upheld far broader requests. *See e.g. Wright v. State*, 179 Wn. 2d 1021, 309 P.3d 662 (2013). In *Wright* the court did not find a request for all records related to one person overbroad. *Id.* It did find that such a request did not reasonably include the investigation manual used in creating the individual’s records. *Id.* Here Mr. White only sought the records related to the investigation and search in question and has not sued over the City’s investigation manuals or other non-responsive documents.

records “with sufficient clarity to allow the agency to locate them” and whether the agency’s response and search were reasonable. *Hobbs v. State*, 183 Wn.App. 925, 944, 335 P.3d 1004, 1013 (Oct. 7, 2014)(citing *Hangartner*, 151 Wn.2d at 447). Plainly, a request for records related to a specific incident or investigation provides sufficient information for the City to have contacted the investigator and asked what records may exist or be responsive.

This is confirmed by Lieutenant Unfred’s deposition. Unfred was asked: “if you got a request for any documents pertaining to the search of blank address and also listed some incident numbers, where would you go looking for stuff?” CP 294-296. His response was direct and on point: “The first thing I’d do is find the reports, and then I would also look at, find the CAD, computer-aided dispatch, patrol officer that went out there and they served the search warrant, there would be a record in CAD in the dispatch computer. Then, I would contact the assigned officer or investigator and see if they had any other notes or anything else in the file.” *Id.* The records that Lt. Unfred would have searched for include the missing CAD documents, paper investigative files and CI files that the City chose not to produce or protect in response to these requests. Lt. Unfred’s response would have been reasonable and proves that Mr. White’s request sufficiently identified the records sought, but

unfortunately the City chose not to contact the investigator at all and did not conduct a reasonable search. Instead, it issued blanket denials and withheld records.

If the City was genuinely concerned that it could not understand the requests for records, its staff had every right, opportunity, and likely even a duty, to seek clarification. *See Hangartner*, 151 Wn. 2d at 448; *also* RCW 42.56.520. No clarification was sought or needed because to suggest the city cannot understand or respond to a request for records related or pertaining to a specific incident is unreasonable.

E. The Trial Court Abused Its Discretion in Imposing a \$10 Per Day Penalty for the Third Request.

The City puts forward two main arguments in response to Mr. White's contention that the trial court abused its discretion in imposing only \$10 per day in penalties for the third request. The City argues that Mr. White failed to preserve his appellate rights relating to most of the factors the court should have considered, and, that the trial court did not abuse its discretion because in one sentence of an order drafted by The City's counsel, the court states it considered the factors, without entering any findings about them. Both of these arguments fail.

1. Mr. White Preserved All Of The Yousoufian Factors

With regard to preserving the issues for appeal, Mr. White's opening brief listed all of the *Yousoufian 2010* factors and clearly and unequivocally stated Mr. White's position that the trial court here failed to analyze the full list of factors in setting the penalty amount. Indeed, Mr. White pointed out that the court completely ignored all but one of the factors. Mr. White then proceeded to provide examples of the trial court's improper analysis of the City's negligence and its failure to engage in any analysis of the lack of mitigating factors and obvious existence of aggravators.

In the opening brief, Mr. White argued each of the mitigating factors was not present. He showed that his requests were sufficiently clear, that the City's responses were not prompt, that the City did not demonstrate any honest, timely and strict compliance with PRA or provide sufficient PRA staff training and supervision, nor did it effectively use or use any agency systems to track and retrieve public records. The City offered no satisfactory explanation for non-compliance, nor was it particularly helpful to Mr. White.

In addition Mr. White's brief contained discussion of each of the nine aggravating factors. It discussed the City's delayed and dilatory responses, lack of compliance with procedural requirements, lack of training, gross negligence/recklessness, and the unreasonable nature of its

explanations. Mr. White delved into the public importance of his requests, the economic loss related to the City's failure, and the important deterrent effect of a proper penalty.

All of the factors were raised in Mr. White's opening appellate brief and in his initial motion before the trial court. They have all been preserved and this Court is empowered to correct the trial court's failure to properly evaluate them.

2. The Trial Court Failed to Properly Consider The Factors And Abused Its Discretion

In *Yousoufian 2010*, the Supreme Court reestablished the 16-factor non-exclusive guide of mitigating and aggravating factors to be used by trial courts in assessing PRA penalties. *Yousoufian v. Office of Ron Sims*, 168 Wn. 2d 444, 466-68, 229 P.3d 735, 747-48 (2010). PRA penalty awards are reviewed for abuse of discretion, and trial courts abuse their discretion when they fail to consider all of the factors in the *Yousoufian 2010* framework, or act in a way that is manifestly unreasonable or based on untenable grounds or reasons. *Sargent v. Seattle Police Dep't*, 179 Wn. 2d 376, 397-98, 314 P.3d 1093, 1102-03 (2013); *Yousoufian 2010*, 168 Wn.2d at 458; *West v. Thurston Cnty.*, 168 Wn. App. 162, 187, 275 P.3d 1200, 1214 (2012).

The trial court here failed to properly analyze the above factors in setting the penalty amount. Indeed, the court completely ignored such factors. Despite stating that it had considered the factors, the trial court failed to make any findings regarding, nor put on the record any discussion of, any of the above-listed factors, focusing solely on what it called the City's "simple neglect." RP 27. This was confirmed by the trial court's addition of language to the order in this matter, stating: "The Court views negligence as simple and not gross or egregious." CP 403.

But an agency's level of neglect cannot be the only factor given weight in deciding the penalty amount. *Yousoufian 2010*, 168 Wn. 2d at 461 ("a strict and singular emphasis on good faith or bad faith is inadequate to fully consider a PRA penalty determination"), citing *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 71, 151 P.3d 243, 244 (2007) *aff'd as modified*, 168 Wn. 2d 444, 229 P.3d 735 (2010); *Yousoufian v. Office of Ron Sims*, 152 Wn. 2d 421, 427, 98 P.3d 463, 466 (2004), *as amended* (Jan. 25, 2005).

A single sentence stating that the factors were considered cannot suffice as consideration of a complex 16-factor analytical framework. In other contexts, our Supreme Court has held that when the law sets out a clear list of factors that must be used to make a decision, the trial court must make oral or written findings addressing each of the prescribed

factors. *In re Marriage of Horner*, 151 Wn. 2d 884, 896-97, 93 P.3d 124, 131 (2004). The Court found that lower courts' failure to make such findings was improper because it foreclosed proper appellate review. *Id.*

In the PRA context, appellate courts have not been quite as stringent, supporting a trial court decision on fees where the trial court explicitly discussed the fact that it considered the entire statutory penalty range and made clear findings on most of the factors available. *See Cedar Grove Composting, Inc. v. City of Marysville*, 71052-4-I, 2015 WL 4080874, at *13-14 (July 6, 2015). Given that some of the factors may overlap and some aggravating and mitigating factors are mirror images, trial courts are not required to discuss each factor in detail in the findings. *Id.* Nonetheless, trial courts must leave the appellate court with more than a single dismissive sentence in order to facilitate review. Failure to do so belies the truth, that they did not engage in any meaningful analysis of the factors or statutory penalty range, and thereby abused their discretion.

Here, the lack of any discussion and use of only a single factor, combined with the manifestly unreasonable \$10 per day penalty, show that such an abuse of discretion occurred and must be remedied.

F. Mr. White's Claims Related To The City's Destruction And Failure To Protect Records Survive

The City claims that Mr. White does not appeal the dismissal of his claims related to City's destruction or failure to protect records. *Respondent's Brief*, at n. 4. This is incorrect. The records that the City destroyed and failed to protect were responsive to Mr. White's first two requests for records. The trial court incorrectly dismissed all claims related to those requests as time-barred. Should this court correct that error and revive the claims stemming from those requests, it will also revive the failure to protect/destruction of records claim for examination by the trial court. The paper investigative file was created at the time of the investigation, was responsive to and in the possession of the City at the time of Mr. White's requests, but was never preserved or produced. CP 153-156, 161, 166, 184-186, 220-221. When the first two requests are revived, so is Mr. White's related claim that records responsive to these requests were wrongfully not preserved.

G. Mr. White Is Entitled To Costs And Reasonable Attorneys Fees For This Appeal

Mr. White is entitled to costs and reasonable attorney fees for this appeal and he respectfully requests an award of attorneys fees pursuant to RAP 18.1. The PRA provides for an award of reasonable attorney fees to:

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 shall be including reasonable attorney fees, awarded all costs, incurred in connection with such legal action.

RCW 42.56.550. This provision includes awards of attorney fees on appeal. See *Progressive Animal Welfare Soc'y v. UW*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990). Nothing the City has presented in its brief changes this.

1. Fees Earned Prior To The Appeal Have Not Been Waived

The City asks this Court to act outside the scope of this appeal and deem fees predating the appeal to be forfeit. To support this contention, the City cites to *Corey v. Pierce Cnty.*, claiming that the case supports their contention that fees have been forfeited because Mr. White did not ask the trial court for them, yet. 154 Wn. App. 752, 225 P.3d 367 (2010). Alas, *Corey* does not stand for this proposition. In *Corey*, the trial court denied an untimely motion for attorney's fees and this denial was upheld. *Id.*, at 774. Here, the trial court has not denied Mr. White's motion for fees, as none has been filed yet. Given the erroneous nature of the trial court's decision on the statute of limitations, Mr. White decided that litigating fees based on the original judgment would be wasteful and duplicative as this appeal was imminent.

CR 56(d)(2) notes that a claim for attorney's fees and costs should be filed within 10 days after the entry of judgment. As was discussed before the trial court, if any portion of this matter is reversed or remanded after the appeal, a new judgment shall issue. Accordingly, Mr. White will be entitled to file a timely motion for his trial court fees and costs at that time.

2. The Offer Of Judgment Has No Effect Here

The City also claims that fees and costs related to this appeal should not be granted because of the CR 68 offer of judgment the City made early in this case. The City is incorrect in this assertion for a number of reasons.

First, the trial court has not reviewed the offer of judgment and the record does not reflect what effect, if any, the offer would have on attorney's fees and costs in this case generally. At the trial court, Mr. White made clear that he believes the offer to be powerless.

There is no direct case law related to how offers of judgment apply with regard to the fee-shifting provisions of Washington's Public Records Act. This is especially true when the relief sought in an action includes the production of improperly withheld records and the offer made was

purely financial³. Here, the City made a financial offer, which did not include further production of improperly withheld records. Subsequent to the offer, Mr. White obtained additional records⁴ that would have been responsive to his requests and should have been disclosed. Given that the goal of the PRA is access to records, Mr. White is the prevailing party regardless of whether the City's financial offer was better than his current, improperly small, recovery of penalties.

Additionally, this Court has clearly defined who is a prevailing party in a PRA appeal. *Haines-Marchel v. State, Dep't of Corr.*, 183 Wn. App. 655, 673-74, 334 P.3d 99, 107 (2014). Even if a party succeeds on “only one relatively minor violation,” that “party prevails under this statute if the records should have been disclosed on request,” and is thus the prevailing party for determining fees. *Id.* (internal citations omitted).

³ Even in the context of cases seeking only monetary relief, the interpretation of CR 68 in reference to cases with fee-shifting statutes has included recovery of attorney's fees and costs. Most recently, with regard to a Washington Law Against Discrimination claim, the Court of Appeals held that the Plaintiff was entitled to costs and attorney's fee accrued up to the date of rejection of the offer of judgment. *Johnson v. State, Dep't of Transp.*, 177 Wn. App. 684, 695-96, 313 P.3d 1197, 1203-04 (2013) *review denied*, 179 Wn. 2d 1025, 320 P.3d 718 (2014). This decision was based on the predicate that in construing Washington's CR 68, the courts above have directed us to look to the Federal Rules for guidance. *Id.* In section 1988 fee-shifting cases, the U.S. Supreme Court has also held that Plaintiffs are entitled to fees and costs accrued up to the date of rejection of the offer. *Marek v. Chesny*, 473 U.S. 1, 11-12, 105 S. Ct. 3012, 3018, 87 L. Ed. 2d 1 (1985). At minimum, Mr. White will be entitled to such fees and costs, which are significant.

⁴ After their existence was confirmed through depositions, the computer aided dispatch (CAD) records were first obtained from a source other than the City, in August of 2014. *See* CP 392. Both the depositions and the discovery of the CAD records came after the rejection of the City's financial offer of judgment.

Here, if Mr. White is successful in any portion of his appeal, he will be the prevailing party and entitled to fees.

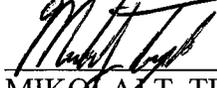
II. CONCLUSION

For the foregoing reasons, Mr. White respectfully requests this Court find the trial court erred in dismissing the claims stemming from the first two requests for records. Both here and at the trial court, the City has failed to carry its burden on the statute of limitations defense. Mr. White also seeks an order finding that the City of Lakewood violated the Public Records Act by falsely claiming the active investigations exemption, by silently withholding documents, by failing to provide the required exemption logs and by destroying or failing to protect public records for those two requests. Thus, Mr. White requests an order directing the City to immediately produce the outstanding responsive records, and ordering the City to pay the Plaintiff appropriate daily penalties for each of the categories of records wrongfully withheld from each of the requests made. With regard to the penalty amount for the thirteenth request, Mr. White requests an order from this Court correcting the trial court's abuse of discretion and directing the trial court to set a daily penalty amount nearer the top of the daily penalty range. Finally, Mr. White respectfully asks this Court to award costs and attorneys fees for this appeal and to direct

the trial court to award Mr. White costs and fees for the pre-appeal litigation in this matter.

RESPECTFULLY SUBMITTED this 15th day of July, 2015.

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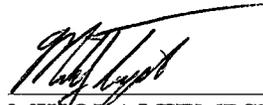
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CERTIFICATE OF SERVICE

I hereby certify that I have transmitted electronically to “mkaser@cityoflakewood.us,” and placed in the United States Postal Service, postage prepaid, the forgoing Appellant’s Reply Brief to the following participant:

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EXECUTED this 15th day of July, 2015, at Bellevue, WA.



MIKOLAJ TEMPSKI

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