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

DONALD HERRICK,

Appellant,

v.

SPECIAL COMMITMENT CENTER,

Respondent.

SPECIAL COMMITMENT CENTER'S RESPONSE BRIEF

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I. INTRODUCTION

This Public Records Act case involves four requests from Donald Herrick to the institution where he is confined – the Special Commitment Center (SCC) on McNeil Island. Mr. Herrick has sent scores of requests to the SCC concerning other residents, staff, and communications within the institution. After scouring the SCC’s responses for anything suggesting that additional documents might exist, Mr. Herrick brought this lawsuit seeking penalties against the SCC, alleging it had withheld documents and unlawfully delayed production.

The trial court granted summary judgment in favor of the SCC, correctly acknowledging that an agency’s search for public records need only be reasonable and adequate under the circumstances rather than perfect. Despite Mr. Herrick finding four documents (various meeting minutes) in one response that were not initially included in another, the trial court found that SCC conducted adequate searches and otherwise complied with its duties under the Public Records Act. The evidence from the SCC showed that its employees promptly responded to Mr. Herrick’s requests, searched for documents in the places where they should have been kept, expanded those searches as appropriate, and provided all the responsive records that were located. Because the SCC complied with the Public

Records Act, this Court should affirm the trial court's grant of summary judgment in all respects.

II. COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. In response to Mr. Herrick's requests, SCC staff looked for documents in the places where they should have been kept and expanded their searches. One SCC staff member spent over a month searching for the Alder Meeting Minutes. In these circumstances, did the trial court properly conclude that SCC conducted an adequate search?

2. In response to Mr. Herrick's requests, the SCC issued prompt five-day letters, billing letters, and communicated with the requestor(s). There was a several month delay between payment for the records and production of them because of mutual confusion regarding the status of payment. The requester repeatedly assured SCC that he had "no worries" about the timing of the response. Under these circumstances, did the trial court correctly find that SCC complied with the timeliness requirements of the PRA?

3. The SCC closed two of Mr. Herrick's requests as abandoned for non-payment after Mr. Herrick never paid the fee to receive the records, and SCC explicitly warned him this would occur. Richard Podriznik later contacted SCC indicating that he wanted to pay for and receive the records underlying Mr. Herrick's previous two requests. Did the trial court correctly

determine that the SCC complied with the PRA by treating this as a new request under Richard Podriznik's name and producing all the responsive records to Mr. Podriznik as requested?

III. COUNTERSTATEMENT OF THE CASE

A. Statement of Facts

Donald Herrick is one of the most demanding residents at the Special Commitment Center in terms of the burden he places on the facility's Records and Public Disclosure Unit. Clerks Papers (CP) at 137-38 (¶ 2). Whether intentional or not, Mr. Herrick complicates his requests because some of the communications and requests come from him directly, while others come from people acting at his behest such as his attorney, paralegal, or the SCC Resident Advocates. CP at 137-38 (¶ 2). During the time frame at issue in this case, Mr. Herrick had submitted approximately 30 public records requests, a subpoena duces tecum in his SVP civil commitment case, and multiple requests for production of documents in one of his two pro se federal civil rights lawsuits against SCC officers and staff. CP at 137-38, 232. The volume, detail, overlapping nature, and ever changing instructions make Mr. Herrick's requests very complex for the staff at SCC to follow and respond to. CP at 137-38 (¶¶ 2-4).

Responding to all of these requests is the SCC's Records and Public Disclosure Unit. CP at 138-39 (¶¶ 3-6). At the time of these events, Shannon Gill was the Legal Coordinator and Records Manager. CP at 139 (¶ 5). She led this unit, which consisted of her, up to six "Forms and Records Analysts," and an Administrative Assistant. *Id.* Cheryl Medina was one of the senior Forms and Records Analysts and was serving as SCC's Public Disclosure Coordinator. CP at 139 (¶ 6). In this role, she was tasked with the responsibility of meeting SCC's obligations and responding specifically to the requests made under the PRA. CP at 139 (¶ 6), 225 (¶ 1). Additionally, during part of this time, the Records portion of the department was shorthanded, so Ms. Medina was filling in there, responding to subpoenas and other requests for resident records. CP at 225 (¶ 1).

1. New Arrival Profiles (PRR-677), Joint Forensic Records (PRR-67), and Mr. Podriznik's Consolidated Request (PRR-927)

These three requests may be considered together for purposes of this appeal. The first of the requests at issue in this case was for all SCC resident "New Arrival Profiles" (NAPs) concerning anyone ever committed or held at SCC dating back to 1990. CP at 237.¹ The NAP is a short (1-2 page) document drafted by a clinician at SCC designed to give staff a quick

¹ The request for NAPs was entered into the Agency Records Request Tracking System (ARRTS) and assigned the number 201407-PRR-677 referred to in short as PRR-677 in the SCC's pleadings. *See* CP at 228, 236.

snapshot of a resident, including his diagnosis, criminal and institutional history, and any particular medical or behavioral concerns. *See* CP at 131 (description), CP at 287-93 (examples). Mr. Herrick’s second request was for a variety of records pertaining to the “Joint Forensic Unit” (JFU) in which the SCC participated. CP at 245.²

Consistent with its practice, the SCC entered both of these requests into the DSHS Agency Records Request Tracking System (ARRTS). *See* CP at 227-28 (¶¶ 7-8), 236, 244. The SCC issued five-day letters to Mr. Herrick in response to each of them. CP at 235, 246. Each of these letters had an estimate for the time required to locate and copy any responsive records. *Id.* Testimony from Ms. Medina was that she made these estimates in good faith based on her experience and familiarity with the type of records being sought. CP at 227 (¶ 7). When the records were located, the SCC sent billing letters to Mr. Herrick informing him of the cost associated with obtaining copies of these records. CP at 240 (\$29.95 for the NAPs), CP at 248 (\$48.41 for the JFU records). Both of these letters informed Mr. Herrick that if the SCC did not receive payment within ten working days, the SCC would consider that Mr. Herrick did not want the

² The request for JFU records was assigned number 201408-PRR-67, referred to in short as PRR-67. CP at 244.

records and close his requests as abandoned. CP at 240, 248. No payment was received within these times.

About a month after the billing letters were sent, on October 29, 2014, Ms. Medina received an email request from Richard Podriznik, a paralegal in the public defense firm representing Mr. Herrick in his civil commitment case, asking to be billed for these two requests. CP at 255. Rather than reopen the then-closed requests, Ms. Medina treated this as a new request from Mr. Podriznik for the same records, essentially consolidating Mr. Herrick's two previous requests into one for Mr. Podriznik. CP at 256.³ The next day, Ms. Medina issued a new response letter, billing Mr. Podriznik for a total of \$78.36 for these records as he had requested. CP at 256. This letter also had the ten-business day deadline for payment included. *Id.* Again, no payment was received by this deadline.

On December 4, 2014, the SCC Fiscal office received a check from the King County Finance & Business Operations Divisions for \$78.36 which stated PRR-927. CP at 258. Rather than reject it as past the deadline, Ms. Medina emailed Mr. Podriznik and told him she had received the payment. CP at 260. She also told him that due to what was being requested, she would have to do a lot of redactions, and that it would take her a while.

³ Mr. Podriznik's request was assigned the number 201410-PRR-927, or PRR-927 in short. CP at 256.

*Id.*⁴ She apologized for the inconvenience and said she would try to get it to him as soon as possible. *Id.* Mr. Podriznik responded, “No worries, Cheryl—it’s the holidays, and we all need to chill.” *Id.*

Then began a period of apparent confusion between both Mr. Podriznik and Ms. Medina. On December 11, Mr. Podriznik emailed Ms. Medina to ask, “[D]id you ever send me invoices [for PRR-67 and PRR-677]—I thought you did, but I can’t find them. Did you send me the responses. [sic] I’m having a senior moment, sorry.” CP at 262. Ms. Medina responded, “Yes I sent you [a] bill for this request on October 30,[]2014.” CP at 265. Ms. Medina attached a copy of the billing letter to the email. *Id.* Mr. Podriznik replied, “I even remember doing an[] expenditure request, but I have no record of it—I’m losing it. Oh well, *I will go ahead and do a new one just in case.*” CP at 268 (emphasis added). At this point, Ms. Medina was apparently waiting for a new check that she had not yet received. *See* CP at 272-74 (Dec. 16, 2014, emails). It was not clear if Mr. Podriznik had sent another check or not. *See id.*

On January 15, 2015, Mr. Herrick sent a letter to Ms. Medina inquiring about a number of public records requests including PRR-67, PRR-677, and PRR-927. CP at 275. In this letter, Mr. Herrick indicated (for

⁴ Because the SCC receives a high number of requests that are never paid for, Ms. Medina does not begin to perform redactions until the payment is received. CP at 228.

the first time) that he believed PRR-927 was his request. *Id.* On January 20, Ms. Medina responded by letter, telling Mr. Herrick that PRR-67 and PRR-677 were consolidated at Mr. Podriznik's request and that a bill was sent to Mr. Podriznik on October 30, 2014, but that "payment has not been received as of yet. What was requested will have to have some redactions done and it will take a while to complete. When this request is paid for it will be processed and sent out to Richard Podriznik." CP at 276.

Mr. Podriznik and Ms. Medina continued to correspond about this request. CP at 279. While there was still confusion about payment, Ms. Medina said she would begin working on the redactions, reiterated that they would take time, and again apologized to Mr. Podriznik, "Sorry about the delay and thank you for being understanding." CP at 281. To which, Mr. Podriznik again responded by saying, "No worries." *Id.*

On February 27, 2015, Mr. Podriznik confirmed that payment for the request had been both sent and received. CP at 278. On March 6, 2018, Ms. Medina mailed a disc to Mr. Podriznik containing all of the records relating to the JFU, responsive to the PRR-67 portion of the request. CP at 282. Ms. Medina continued to work on the NAPs, emailing SCC Psychologist Dr. Carole DeMarco to find NAPs for two residents that were missing from the folder. CP at 283-84 (emails); CP at 226 (¶ 3) (description of search). Ms. Medina also sent a letter to Mr. Herrick to update him about

the NAPs, telling him that the records responsive to PRR-67 had been sent to Mr. Podriznik and that the PRR-677 records were still being redacted and would be sent to Mr. Podriznik when complete. CP at 285. Ms. Medina completed the redactions, and on June 6, 2015, she mailed a compact disc containing all of the NAPs to Mr. Podriznik and stated that she now considered the request closed. CP at 286. On summary judgment, Ms. Medina provided a declaration stating that she knows she produced all of the NAPs because there is a folder on the SCC intranet that contains a copy of all the NAPs, and she produced all of the NAPs that were in the folder that had been created as of the date of Mr. Herrick's request. CP at 226 (¶ 3). Ms. Medina even checked a list to verify that she had them all, and when she found that two were missing, she sought them out and obtained them from Dr. DeMarco. *Id.*

2. Alder Meeting Minutes (PRR-720)

The fourth request came directly from Mr. Herrick. On August 25, 2014, Mr. Herrick sent a request to the SCC for a variety of documents related to a search of his room and computer, staff emails with his name, and “[c]op[ies] of all unit sign up sheets and the unit meeting minutes for Alder [living] unit from Dec. 2012 to present.” CP at 144. Ms. Medina sent a five-day letter out that same day. CP at 145. After locating records, billing Mr. Herrick, and receiving the fee, Ms. Medina sent 2 DVDs and 13 pages

of responsive records to Mr. Herrick on December 9, 2014. CP at 159. The letter noted that the SCC's search for Alder Meeting Minutes did not uncover any documents. *Id.* Mr. Herrick responded with his own letter on December 16, 2014, stating a number of complaints, including that, "[w]ith regards to the Alder Unit community meetings and resident agenda sign up sheets for the meetings I know that there are records that are kept of these meetings." CP at 160.

Ms. Medina received this letter on December 17, 2018. CP at 165. That same day, Ms. Medina contacted Amy Mosley, who was the SCC's Secretary Senior for the program area that includes the Alder Unit. CP at 162-64. Ms. Medina said that there was a PRA request for community meeting minutes and signup sheets, that she had checked the folders where they were supposed to be kept and found them empty, and asked if there was somewhere else they could be found or if Ms. Mosley had them. CP at 163. Ms. Mosley explained that she had already been contacted about this by Resident Advocate Kyle Ghan on Mr. Herrick's behalf, that there were a lot of times that meetings weren't held, that she had two months, and that she would continue to ask and look around. CP at 162; *see also* CP at 161 (Ghan – Mosely emails). Ms. Medina asked to get whatever Ms. Mosely could find. *Id.* The next day, Ms. Medina sent another letter responding to Mr. Herrick and relaying this. CP at 165. Among other things, Ms. Medina

explained, “As for the Alder meeting minutes there was nothing in the Community Meeting Minutes folder, but have asked staff to look for anything responsive. When I receive these I will forward them onto you.”

Id.

The evidence shows that four pages of meeting minutes were subsequently produced to Mr. Herrick. *See* CP at 166-69 (bearing the PRR-720 numbers indicating public records production). These same four pages were also produced to Mr. Herrick in response to his discovery requests in his federal court litigation on two occasions. *See* CP at 179-90 (Apr. 15, 2015, production); CP at 191-98 (Oct. 26, 2015, in his federal court case production). In still another request for production of documents, Mr. Herrick requested a “Copy of all Alder Unit Community Meetings between 12-1-2012 and 12-31-2014 (*Note: some of these may have been stored, filed, or provided to the Inspection of Care*)” CP at 199-200 (Plaintiff’s Second Request for Production of Documents, Number 9). This April 27, 2015, discovery request was the first time Mr. Herrick had suggested this is where the minutes might be located.

The SCC provided a response to Mr. Herrick on May 22, 2015. CP at 202-07. These documents included an undated meeting cancelation notice, CP at 208; unfilled blank forms used for the minutes and agendas, CP at 209, 211; and meeting minutes from June of 2012 that were outside

the date range of Mr. Herrick's PRR-720 request, CP at 210, 212. This production also included four documents (consisting of five pages) of meeting minutes from the Alder North and West units that would have been responsive to Mr. Herrick's PRR-720 request. CP at 213-17.

When Mr. Herrick filed the Complaint in this case and it became clear that he viewed the prior response to his request for Alder Meeting Minutes as still incomplete, and was requesting penalties, the SCC again produced the four documents (five pages) of Alder Meeting Minutes to him explicitly under the public records request number PRR-720. CP at 219-24, 227 (¶ 6).

On summary judgment, Ms. Medina and Ms. Mosley also submitted detailed declarations describing their searches for documents in response to Mr. Herrick's requests. CP at 225-29 (Medina); CP at 133-35 (Mosley). As further detailed below, these searches involved looking in the place where the documents were supposed to be kept, following obvious leads as they arose, searching in good faith, and promptly sending responsive documents when they were located. *Id.* Ms. Mosely stated, "I spent over a month looking everywhere I could think of for minutes or sign-up sheets that I could not locate on the SCC Intranet." CP at 134 (¶ 4).

B. Statement of Procedural History

Mr. Herrick filed this case in Pierce County Superior Court on January 19, 2016. CP at 1. Following discovery, on February 21, 2017, the SCC filed a Motion for Summary judgment under CR 56. CP at 83-125 (motion). The SCC included an Appendix providing a timeline and table of contents to the evidence. CP at 128-29. Evidence in support consisted of declarations from SCC Psychologist Dr. Carole DeMarco, CP at 130-31; former SCC Secretary Senior Amy Mosely, CP at 133-35; SCC Legal Coordinator and Records Manager Shannon Gill, CP at 137-40, and attachments, CP at 142-224; and SCC Public Disclosure Officer Cheryl Medina, CP at 225-29, and attachments, CP at 231-99. Mr. Herrick filed a response, CP at 300-32, with attachments, CP at 333-61. The SCC filed a Reply. CP at 362-75.

The trial court held a hearing on Defendant SCC's Motion for Summary Judgment. On April 19, 2017, the trial court issued an Order Granting Defendant's Motion for Summary Judgment, and dismissing all of Mr. Herrick's claims with prejudice. CP at 377-81. Mr. Herrick timely appealed. CP at 382-83.

IV. STANDARD OF REVIEW

The Court reviews challenges to agency actions under the PRA de

novo. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009). Appellate courts stand in the same position as the trial courts when the record consists only of affidavits, memoranda of law, and other documentary evidence. *Mitchell v. Wash. State Dep't of Corr.*, 164 Wn. App. 597, 602, 277 P.3d 670 (2011), *as amended on reconsideration in part*.

V. ARGUMENT

The trial court properly granted summary judgment in favor of the SCC on all claims in this case. Mr. Herrick's first claim, that the SCC failed to produce certain records to him, was properly dismissed because the evidence showed that the SCC conducted adequate searches, even if those searches did not uncover all responsive documents. The trial court also properly dismissed Mr. Herrick's additional claims, finding that the SCC had met the timeliness requirement and had otherwise discharged its duties under the PRA with respect to Mr. Herrick's requests.

A. The Trial Court Correctly Granted Summary Judgment In Favor Of The SCC

The trial court correctly determined that the SCC complied with the Public Records Act when the SCC conducted adequate searches for NAPs and Alder Meeting Minutes and produced the responsive documents that were located.

1. Standard for an Adequate Search

In response to a request for identifiable public records, an agency must make a sincere and adequate search for records. *Fisher Broad.-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 522, 326 P.3d 688 (2014). “When an agency denies a public records request on the grounds that no responsive records exist, its response should show at least some evidence that it sincerely attempted to be helpful.” *Id.* (citing *Neighborhood All. of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011)). In assessing whether a search is adequate, the “focus of the inquiry is not whether responsive documents do in fact exist,” but if the agency’s search was “reasonably calculated to uncover all relevant documents.” *Neighborhood All. of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 719-20, 261 P.3d 119 (2011) (holding the test for adequacy of a search under the PRA is the same as under FOIA). The SCC complies with its duty under the PRA when it performs an adequate search even if that search does not uncover all the responsive records. *See Block v. City of Gold Bar*, 189 Wn. App. 262, 355 P.3d 266 (2015) (affirming summary judgment on basis that city performed adequate search, notwithstanding that it omitted some records).

The adequacy of a search is judged under a standard of reasonableness. *Neighborhood All.*, 172 Wn.2d at 720. Agencies are

required to make more than a perfunctory search and must “follow obvious leads as they are uncovered.” *Id.* An agency is not required to search every possible place a record may be conceivably stored, only those places where it is reasonably likely that records will be found. *Id.* “[A] search need not be perfect, only adequate.” *Id.* (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986)). What is considered reasonable depends on the facts and circumstances of each case. *Id.* Reasonableness is traditionally an objective inquiry, taken in light of the facts known to the actor at the time and without the distorting effects of hindsight. *See, e.g., In re Cross*, 180 Wn.2d 664, 694, 327 P.3d 660 (2014) (attorney conduct); *Dep’t of Nat. Res. State of Wash. v. Littlejohn Logging, Inc.*, 60 Wn. App. 671, 677, 806 P.2d 779 (1991) (negligence). The reasonableness inquiry is separate from whether additional responsive documents did in fact exist. *Block*, 189 Wn. App. at 272. To establish that a search was adequate in a motion for summary judgment, an agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. *Id.* at 271 (quoting *Neighborhood*, 172 Wn.2d at 721)). This evidence should describe the search and establish that all places likely to contain responsive materials were searched. *Id.*

An especially on point example of what is needed to establish an adequate search is the case of *Kozol v. Washington State Department of*

Corrections, 192 Wn. App. 1, 8, 366 P.3d 933 (2015), *as amended* (Jan. 12, 2016). In *Kozol*, the plaintiff was a serial requestor who had submitted 31 separate requests to the Department of Corrections. *Id.* at 4. One of these requests was for “any and all” records concerning a particular inmate grievance which Mr. Kozol identified by number. *Id.* While the Department was able to identify and produce records in response to the other requests, Department staff was unable to locate any records responsive to the particular grievance identified in Mr. Kozol’s request. *Id.* The parties exchanged correspondence in which Mr. Kozol accused the Department of silently withholding records, the Department asked for proof of the withholdings, and ultimately the Department declined to provide any additional records. *Id.*

Mr. Kozol then filed suit, vaguely alleging a number of non-specific PRA violations. *Id.* at 4-5. One of his claims was that the Department violated the PRA by failing to disclose any responsive documents related to the particular grievance. *Id.* at 5. During discovery, the Department located and disclosed to Mr. Kozol the grievance records responsive to this request. *Id.* Notwithstanding the Department’s subsequent location of responsive records, the Court of Appeals held that the PRA search was adequate because “[t]he agency looked in the places where the grievance was supposed to be found.” *Id.* at 8.

Grievance forms [we]re supposed to be scanned into the grievance records system and then destroyed. The public disclosure officer for DOC checked the records system and then, when there was no record for the grievance, contacted the statewide grievance coordinator to determine if the record was located elsewhere. Neither officer knew of another location where it would likely find the missing grievance. The fact that the record eventually was found does not establish that the agency’s search was not adequate. . . . A reasonable search need neither be exhaustive or successful.

Id. at 8-9. Because the Department looked in all of the places where the record should have been, the court held that “Nothing more was required of it.” *Id.* at 9.

2. Analysis

The summary judgment evidence submitted by the SCC, including the declarations of Cheryl Medina, Shannon Gill, Amy Mosely, and Dr. Carole DeMarco – together with the attached documentation – conclusively established that SCC personnel conducted a search that was more than perfunctory, reasonable under the facts and circumstances, and reasonably calculated to uncover all the responsive documents. This Court should affirm the trial court’s determination that the SCC conducted an adequate search.

a. NAPs (PRR-927)

With respect to the search for NAPs, Ms. Medina had every reason to believe the central folder where NAPs were stored would contain a copy

of all of the NAPs at the SCC because, based on the descriptions of the filing system from both her and Dr. DeMarco, it should have. *See* CP at 226 (¶ 3) (Medina Decl.); CP at 130-31 (¶ 3) (DeMarco Decl.). Further, when Ms. Medina checked the NAPs against a list and found that two of them were missing from the folder, she sought those two NAPs out from Dr. DeMarco and obtained them. CP at 226 (¶ 3). The evidence indicates that the number of pages of NAPs produced, 449 pages, is roughly appropriate for the number of SCC residents since the NAPs started being created. CP at 256. Ms. Medina's search was reasonable in light of the facts and circumstances known to her at the time.

Although Mr. Herrick now says, in hindsight, that Ms. Medina should have sifted through every resident's individual clinical file looking for additional NAPs, CP at 309, there is no evidence indicating that was called for at the time. Mr. Herrick's assertions are apparently based on his misreading of Dr. DeMarco's declaration. Both in Mr. Herrick's summary judgment response and again on appeal, he asserts without any evidentiary basis that, "[t]he most commonly accessed point for the NAP's [sic] are in the resident's folder." CP at 309; Brief of Appellant (Br. Appellant) at 11. Dr. DeMarco's actual declaration does not say this. *See* CP at 131 (¶ 3). Similarly, Mr. Herrick placed no evidence in the record that would indicate

the SCC has always created NAPs or always retained them throughout the 28 years and three facilities across which the SCC has operated.

In the end, Mr. Herrick's claim that the SCC violated the Public Records Act by not producing all of the NAPs is based on his assertions that he saw a NAP for Mr. Bargas that he did not receive, and that the numbers of NAP provided were not equal to the total number of residents who ever came through the SCC's program. Neither of these shows that the SCC's search was not adequate. Coupled with the trial court's finding that Mr. Podriznik received the records responsive to this request and that there was "no evidence that Mr. Herrick ever received a true and complete copy of these records" from Mr. Podriznik – and the record amply supports the trial court's determination that the SCC's search was adequate under the circumstances.

b. Alder Meeting Minutes (PRR-720)

The evidence also establishes that the search for Alder Meeting Minutes under PRR-720 was reasonable. CP at 226-27 (¶¶ 4-6); CP at 133-35 (¶¶ 1-6). Both Ms. Medina and Ms. Mosley looked in the place where the minutes should have been kept and found that folder empty. CP at 226-27 (¶ 4); CP at 134 (¶ 4). They continued to search, communicating with other staff and Mr. Herrick along the way. CP at 227 (¶¶ 5-6); CP at 134-35 (¶¶ 3-6). The evidence showed this search was

diligent; Ms. Mosely stated that she spent over a month searching for the Alder Meeting Minutes and that she “look[ed] everywhere [she] could think of.” CP at 134 (¶ 4).

Following this, responsive meeting minutes were produced to Mr. Herrick. *See* CP at 165-69. Mr. Herrick subsequently received copies of these same minutes in discovery in his other litigation. CP at 187-90, 195-98. Mr. Herrick then received *additional* minutes in discovery when he indicated some of these documents might be with the Inspection of Care related documents. CP at 199-200 (request); CP at 208-17 (response). And when Mr. Herrick filed his Complaint in this case alleging he had not received the additional minutes under the original public records request, the SCC produced yet another copy of them. CP at 219-224. Just as with *Kozol*, the SCC conducted a search that was reasonably calculated to uncover all responsive documents, continued to follow leads as they arose, and promptly provided copies of documents when they were discovered. *See Kozol*, 192 Wn. App. at 8-9. Similarly, this Court should find that the SCC did what was required of it.

3. Mr. Herrick Did Not Rebut The SCC’s Showing of Adequacy in the Search or Put That Issue In Dispute.

“[O]nce the agency has shown by convincing evidence that its search was reasonable, . . . then the burden is on the requester to rebut that

evidence by a showing that the search was not in fact in good faith.” *Miller v. U.S. Dep’t of State*, 779 F.2d 1378, 1383 (8th Cir. 1985); *see Neighborhood*, 172 Wn.2d at 719-20 (holding the test for adequacy of a search under the PRA is the same as under the FOIA). “A requester does not raise a substantial and material factual issue in regard to the reasonableness of the agency’s search for requested documents by identifying for the agency particular documents which were internally referred to in documents released to him or her.” 37A Am. Jur. 2d Freedom of Information Acts § 492 (citing *Miller*, 779 F.2d at 1383). This is so because an agency is not required to perform an absolutely exhaustive search, but only a reasonable search. *Miller*, 779 F.2d at 1383. The fact that a document once existed does not necessarily imply that it still exists or that the agency has retained it. *Id.* at 1385.

Here, Mr. Herrick has not shown that the SCC’s searches were in bad faith or otherwise inadequate. With respect to the search for NAPs (PRR-927), Mr. Herrick repeatedly argues that the SCC “knowingly and blatantly” withheld NAPs, Br. Appellant at 3, 10—but the evidence does not show that. The evidence shows that Ms. Medina believed, in good faith, that she had produced all of the NAPs because she produced all of the NAPs that were in the centralized folder on the intranet as of the date of Mr. Herrick’s request. CP at 226 (¶ 3). Mr. Herrick says he notified

Ms. Medina that her previous response was incomplete, but he did so only in a general way in a postscript amongst his other generalized complaints. CP at 295. He did not identify any particular NAPs that he believed were missing until the summary judgment phase of litigation. CP at 307. Given all of these factors, Ms. Medina's response to Mr. Herrick, that she had produced everything in the central folder where NAPs are kept, CP at 296, was reasonable under the circumstances and Mr. Herrick failed to produce any evidence suggesting that the search was in fact not in good faith.

So too with the Alder Meeting Minutes. Mr. Herrick's requests for these prompted at least three SCC staff to participate in the search. CP at 161-62. Amy Mosely spent over a month searching and looked "everywhere [she] could think of." CP at 134 (¶ 4). Here too, the evidence shows only that there was a high staff turnover during this time period, CP at 134 (¶ 5), and that the SCC's filing could have been better kept. This does not equate to an inadequate search.

Mr. Herrick also makes demonstrably untrue statements. He asserts that, "I did not receive any responsive materials from PRR-720 until February 26th, 2016, well over a year later." Br. Appellant at 13; *see also* Br. Appellant at 4-5 (same allegation). This is flatly contradicted by the summary judgment evidence showing that the SCC provided two DVDs and 13 pages of responsive materials to Mr. Herrick on December 9, 2014.

CP at 159. Further, even narrowly in respect to the Alder Meeting Minutes, the evidence suggests that four pages of minutes were sent to Mr. Herrick in late December. CP at 165-69. It shows conclusively that these same four pages were provided to Mr. Herrick twice in discovery in other cases. CP at 187-90; 195-98. The additional four documents (five pages) of responsive meeting minutes were produced to Mr. Herrick on May 22, 2015. CP at 202-17. And upon filing of Mr. Herrick's complaint these materials were re-produced to him specifically under the public records request number PRR-720. CP at 219-224. Mr. Herrick received all of the responsive Meeting Minutes the SCC was able to locate, several times over.

Mr. Herrick disputes the legal effect of records being sent to him in discovery in another case, and whether that satisfies the SCC's public records burden. Br. Appellant at 12-13. But again, this sidesteps the controlling question of whether the SCC's search was adequate. Rather, this shows that Mr. Herrick is in a similar position to the plaintiff in *Kozol*, litigating and pursuing a case for damages over records he had long since received—multiple times. In light of this, and Mr. Herrick's pattern of confusing requests and communications, the Court should affirm the trial court's determination that the SCC adequately responded to Mr. Herrick's requests.

B. The Trial Court Properly Found That the SCC Complied with the Public Records Act Regarding Mr. Herrick's Other Complaints

Mr. Herrick raises a number of other issues in his opening brief that similarly do not rise to the level of actionable violations of the PRA.

1. The SCC Did Not Violate the PRA By Treating Mr. Podriznik's Email as a New Request

Mr. Herrick, both on summary judgment and again on appeal, suggests that the SCC violated the Public Records Act when it treated Mr. Podriznik's email as a new request and opened a new entry in its tracking system ARRTS. Br. Appellant 9-10; CP at 304-07. This is not the case.

On summary judgment, the SCC initially argued that Mr. Herrick lacked standing to sue on behalf of Richard Podriznik. CP at 92-93. Mr. Herrick opposed this. CP at 304-07. The trial court declined to grant the SCC's motion in this respect, essentially finding that Mr. Herrick had standing to challenge the adequacy of the SCC's responses to the consolidated request PRR-927. *See* CP at 378. The SCC did not cross-appeal on this issue, and for the sake of this appeal assumes that Mr. Herrick has a sufficient personal stake to bring suit regarding PRR-927. Especially given this concession, it is unclear how opening a new consolidated request under Mr. Podriznik's name—as the person paying for and receiving the records at issue—could possibly violate the PRA.

The Public Records Act contains no specific requirements on who is required to be the named requestor when two or more people co-request records. Nor does it contain any provision that would have required the SCC to re-open Mr. Herrick's previously closed requests at Mr. Podriznik's command.⁵ Given this, and the less than clear relationship between the two of them, the SCC's decision to treat this as a new request was reasonable. Mr. Herrick cites no authority that would provide an independent cause of action for treating this request in this manner.

2. The SCC Complied with the Timeliness Requirement in RCW 42.56.520

The timeline requirements for responding to a public records request are contained in RCW 42.56.520. Where an agency promptly acknowledges receipt of a records request, provides a reasonable estimate of the time required to respond, provides responses in the timeliest manner possible, and sets reasonable deadlines for the requestor to provide clarification or remit payment, it cannot be said that the agency has violated the PRA. “[T]he PRA contains no provision requiring an agency to strictly comply

⁵ Although not pleaded as a claim for relief in Mr. Herrick's complaint or litigated below, the SCC was justified in closing Mr. Herrick's requests for nonpayment. *See* former RCW 42.56.120 (2005) (allowing that a “reasonable charge may be imposed for providing copies of public records”); *Smith v. Okanogan Cty.*, 100 Wn. App. 7, 21, 994 P.2d 857 (2000) (Holding the “County fully complied with its duty” when it informed requester that it had located two pages of responsive records and told him that he needed to remit \$0.30 to obtain them.).

with its estimated production dates.” *Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 651, 334 P.3d 94 (2014). “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.* at 651-52 (citing RCW 42.56.520). “The statute simply requires an agency to provide a ‘reasonable’ estimate, not a precise or exact estimate” *Id.* at 652. “[T]he statute does not envision a mechanically strict finding of a PRA violation whenever timelines are missed.” *Id.* at 653. Most importantly here, an agency is not required to provide an estimate of when it will fully respond to a public records request. *Hobbs v. State*, 183 Wn. App. 925, 942-43, 335 P.3d 1004 (2014).

Delay alone is not actionable under the PRA. While RCW 42.56.100 requires agencies to adopt rules and regulations that provide for public access to records, it does not itself create an actionable claim. The statute directs that the agency’s rules should provide reasonable procedures that allow consideration for the “time, resource, and personal constraints” and “prevent excessive interference with other essential functions of the agency,” while seeking to “provide for the fullest assistance to inquirers and the most timely possible action on requests[.]” RCW 42.56.100. However, our courts have not interpreted these directives as creating a separate cause of action under the PRA. In *Chen v. City of Medina*, No. 69429–4–I, 2014

WL 545759, at *6 (Wash. Ct. App. Feb. 10, 2014) (unpublished), a requester's suit included a claim that the city did not provide the "fullest assistance," the trial court declined to address this allegation, and the court of appeals affirmed. *Id.* "The PRA provides no separate cause of action for an agency's failure to provide the fullest assistance to a requester. [Plaintiff] raises no challenge to any City rules or regulations. Thus, the court did not need to address this allegation." *Id.*; see also *Benitez v. Skagit Cty.*, No. 73626-4-I, 2016 WL 1566780, at *11-12 (Wash. Ct. App. April 18, 2016) (unpublished) (finding a five month delay did not demonstrate bad faith). This Court should follow the persuasive reasoning of these nonbinding authorities.

Courts have acknowledged that assembling responsive documents is just the beginning; an agency is justified in taking additional time to review and redact those documents. *Bichindaritz v. Univ. of Wash.*, No. 70992-5-I, 2015 WL 677209, at *3-5 (Wn. Ct. App. Feb. 17, 2015) (unpublished) (declining to find a 14 month delay was a violation of the PRA). Similarly, an employee's honest mistake is not evidence that the agency did not diligently respond to a request. *Faulkner v. Wash. Dep't of Corr.*, 183 Wn. App. 93, 108, 332 P.3d 1136 (2014) (finding inadvertent mistake did not equal bad faith). Agencies are also allowed to cure their mistakes without liability. *Hobbs*, 183 Wn. App. at 940-41. "When an

agency diligently makes every reasonable effort to comply with a requester’s public records request, and the agency has fully remedied any alleged violation of the PRA at the time the requester has a cause of action . . . , there is no violation entitling the requester to penalties or fees.” *Id.* (noting the policy goals of the PRA are not served by encouraging a requester to play “ ‘gotcha’ with litigation”).

In contrast, in those cases where the delay has been found actionable, it rose to the level of constructive denial. *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 270, 884 P.2d 592 (1994) (silent withholding prohibited); *Neighborhood All.*, 172 Wn. 2d at 727-28 (agency “refused to produce anything at all”); *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 727-28, 354 P.3d 249 (2015) (finding the city “intentionally withheld responsive records and pursued a policy of evading the requirements of the PRA”). That is not the case here.

a. Analysis

The record shows that the SCC complied with the timelines in RCW 42.56.520 by sending Mr. Herrick or Mr. Podriznik the required five day letters in response to each of the PRRs at issue, giving estimates of how long it would take to “locate and copy any responsive records,” and informing them when the agency would need extensions of those estimated deadlines. The task that required the most time to complete was the

redaction of the NAPs, and the record shows that both Mr. Herrick and Mr. Podriznik were repeatedly informed of this. This delay is not an actionable PRA claim because an agency is not required to provide an estimate of when it will fully respond to a public records request and is justified in taking additional time to perform review and redaction. *Hobbs*, 183 Wn. App. at 941-43; *Bichindaritz*, 2015 WL 677209, at *3-5. Finally, the SCC cured any issues related to the delay when it produced the records.

With respect to Mr. Herrick's requests, the required five-day letters were sent out within five days of receiving each of Mr. Herrick's requests. *See* CP at 128-29 (timeline). These estimated timeframes relayed to Mr. Herrick did not include any time necessary to perform redactions. CP at 228 (¶ 8). Ms. Medina followed her normal process for the requests at issue in this case; after payment was made for the requests, she began the tedious process of redacting all of the personal information from 449 pages of the NAPs. *Id.* Mr. Podriznik repeatedly replied that he understood the delay and did not object to the timeframes that Ms. Medina provided. *Id.* Mistakenly telling Mr. Herrick documents would be "immediately available" does not create a claim under the PRA, especially where Ms. Medina repeatedly told both Mr. Herrick and Mr. Podriznik that it would take her time to do the extensive redactions necessary to fulfill this request.

Unlike the five day letters required by statute, an agency is not required to provide an estimate of when it will fully respond to a public records request. *Hobbs*, 183 Wn. App. at 941-43. The same analysis applies here. There is no question that the SCC sent, and that Mr. Herrick received, the statutory five day letters. While in hindsight, Ms. Medina's description of the documents as "immediately available" seems a poor one in light of the extensive redactions required, this adjective makes more sense when compared to the time needed to initially search out, locate, and copy the records. While this adjective was not the best or most precise turn of phrase, it does not create a PRA claim. Further, the evidence shows that, despite this initial use of the word "immediate," Ms. Medina repeatedly communicated with Mr. Herrick and Mr. Podriznik and explained that the request would require extensive redactions which would take significant time to complete. CP at 228 (¶ 8). In response, Mr. Podriznik was nothing but accommodating and twice stated that he had "No worries" about the timing. CP at 260, 281.

In sum, much of the delay was because of confusion of the requestors' own making. Although Mr. Herrick now in this lawsuit clearly indicates that he intended Mr. Podriznik to essentially be his agent for purposes of these requests, that was not initially made clear to Ms. Medina at the time. As the court stated in *Hobbs*, "[a]s a policy matter, the purpose

of the PRA is best served by communication between agencies and requestors, not by playing ‘gotcha’ with litigation.” *Hobbs*, 183 Wn. App. at 941 n.12. Interpreting RCW 42.56.520 to create liability under these circumstances—based on mutual confusion by both the requestor and the agency—is not supported by the plain language of the statute and would encourage confusing “gotcha” tactics that run counter to the policy goals of the PRA. The Court should affirm summary judgment in favor of the SCC on the claims that it unreasonably delayed production.

C. Mr. Herrick Cannot Now Raise Claims that were Not Pleaded in His Complaint

While not clearly specified as issues presented for review by this Court, Mr. Herrick mentions two additional items in his Opening Brief. Mr. Herrick claims that the SCC did not fully respond to his follow up request for NAPs, request number 201509-PRR-817. Br. Appellant at 3-4 (Assignment of Error #13). He also takes issue with what he characterizes as the “unreasonable cost” for obtaining records. Br. Appellant at 8-9. Neither of these arguments were pleaded as claims for relief in Mr. Herrick’s Complaint. CP at 10. This Court should accordingly not consider them.

The Rules of Appellate Procedure address this situation. “On review of an order granting or denying a motion for summary judgment the

appellate court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12. Courts have interpreted this to mean that, “[a]n argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal.” *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008); *see also Silverhawk, LLC v. KeyBank Nat’l Ass’n*, 165 Wn. App. 258, 265, 268 P.3d 958, (2011) (citing RAP 9.12 and *Sourakli*). Because Mr. Herrick’s claims for relief were limited to the four requests and four theories specified, this appeal must be similarly limited.

While Mr. Herrick’s Complaint no doubt mentions these two issues of cost and the follow up request for NAPs numbered 201509-PRR-817, the Complaint discussed these as factual allegations pleaded in support of the four main theories - not as specific independent causes of action. *See* CP at 4 (stating that the “exorbitant fees” for the NAPs request necessitated his “counsel [to] pick up the tab”); CP at 6 (mentioning request 201509-PRR-817 and alleging it was not fulfilled in its entirety). In this type of situation, appellate courts have allowed an appellant to use these kinds of factual allegations to the extent they are arguing it is simply additional evidence toward the originally pleaded claims - without reviewing the allegations as a separate claim. *Stenger v. State*, 104 Wn. App. 393, 398, 16 P.3d 655 (2001) (refusing to review allegation as a separate claim of negligence where not pleaded below but allowing plaintiff to raise it as part of argument

that the state breached its duty of care). This Court should take a similar approach here and allow Mr. Herrick to refer to these allegations as possibly supporting his existing pleaded claims for relief, without expanding the suit to allow him to raise issues on appeal that were not squarely addressed below. To do otherwise would allow Mr. Herrick to unfairly claim-shift this case to something that was not litigated below.

VI. CONCLUSION

This Court should affirm the trial court's grant of summary judgment in favor of the SCC in all respects. Because the SCC conducted adequate searches and disclosed all the responsive records it located, it complied with the PRA. Similarly, the SCC met the timelines in RCW 42.56.520 by promptly issuing five-day letters with reasonable

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estimates, communicating with the requester(s), and sending billing letters.
The trial court appropriately found the SCC had complied with its duties
under the PRA regarding all of Mr. Herrick's claims in this case.

RESPECTFULLY SUBMITTED this 12th day of October 2018.

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PROOF OF SERVICE

I, *Malai Malawo*, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein.

I certify that on September 12, 2018, I served a true and correct copy of this **DEPARTMENT OF SOCIAL AND HEALTH SERVICES' RESPONSE BRIEF** and this **CERTIFICATE OF SERVICE** by sending an electronic copy to Deborah Woodard, Administrative Assistant 3 at the Special Commitment Center and upon information and belief, the same was printed and delivered to Appellant, Donald Herrick, and a copy was also sent via U.S. Mail as follows:

Plaintiff-Appellant
Donald Herrick
Special Commitment Center
PO Box 88600
Steilacoom, WA 98388

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12th day of October 2018, at Tumwater, Washington.


MALAI MALAWO
Legal Assistant

SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE

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