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NO. 50894-0-II

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

CHARLES WOLFE,

Appellant/Cross-Respondent,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent/Cross-Appellant.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. AMENDED STATEMENT OF CASE.....2

III. ARGUMENT4

 A. Equitable Tolling Should Not Be Applied Where There Is No Showing of Bad Acts by WSDOT That Inhibited Wolfe’s Timely Filing of This Lawsuit and Wolfe Has Failed To Show He Exercised Due Diligence4

 1. Wolfe was not misled by WSDOT’s defense of the Pacific County tort case.....5

 2. Wolfe’s argument is not supported by the cited case law7

 B. WSDOT Conducted a Reasonable Search for Records When It Identified All Employees Who May Have Had Knowledge Pertaining To the Requested Records, and then Based Upon That Knowledge Searched State Archives and Its Regional Office Because Those Two Locations Were the Only Locations Where Responsive Records Were Reasonably Likely To Be Found.....9

 C. Wolfe Failed To Carry His Burden of Proof To Show Reasonable Attorney Fees Related To His Successful Claims When He Did Not Distinguish Between His Successful and Unsuccessful Claims, and the Court Improperly Refused To Discount the Attorney Fee Award On This Basis as Required by Law.....16

 D. The Trial Court Failed To Properly Consider WSDOT’s Honest and Good Faith Attempt To Comply with the PRA When It Imposed \$20 Per Day Penalties.....21

IV. CONCLUSION22

TABLE OF AUTHORITIES

Federal Cases

<i>Citizens Comm'n on Human Rights v. Food and Drug Admin.</i> , 45 F.3d 1325 (9th Cir. 1995).....	14
<i>Gates v. Deukmejian</i> , 987 F.2d 1392, 1400 (9th Cir. 1992)	17
<i>Marks v. U.S. Dep't of Justice</i> , 578 F.2d 261, 263 (9th Cir. 1978)	14
<i>Meeropol v. Meese</i> , 790 F.2d 942, 952-53 (D.C. Cir. 1986).....	14
<i>Miller v. U.S. Dep't of State</i> , 779 F.2d 1378, 1384-85 (8th Cir. 1985).....	14
<i>Oglesby v. U.S. Dep't of Army</i> , 920 F.2d 57 (D.C. Cir. 1990).....	14
<i>Perry v. Block</i> , 684 F.2d 121, 128 (D.C. Cir. 1982).....	14
<i>Sec'y of Labor v. Barretto Granite Corp.</i> , 830 F.2d 396, 399 (1st Cir. 1987).....	5
<i>Welch v. Metro. Life Ins. Co.</i> , 480 F.3d 942, 948-49 (9th Cir. 2007).....	17

Cases

<i>Belenski v. Jefferson Cnty.</i> , 186 Wn.2d 452, 378 P.3d 176 (2016).....	8
<i>Block v. City of Gold Bar</i> , 189 Wn. App. 262, 355 P.3d 266 (2015).....	11
<i>Cedar Grove Composting, Inc. v. City of Marysville</i> , 188 Wn. App. 695, 354 P.3d 249 (2015).....	16, 17, 18

<i>Clausen v. Icicle Seafoods, Inc.</i> , 174 Wn.2d 70, 272 P.3d 827 (2012).....	17
<i>Cornu-Labat v. Hospital Dist. No. 2 Grant Cnty.</i> , 177 Wn.2d 221, 298 P.3d 741 (2013).....	21
<i>Finkelstein v. Sec. Props., Inc.</i> , 76 Wn. App. 733, 888 P.2d 161 (1995).....	4
<i>Gronquist v. State</i> , 175 Wn. App. 729, 309 P.3d 538 (2013).....	2
<i>Haines-Marchel v. Dep't. of Corr.</i> , 183 Wn. App. 655, 334 P.3d 99 (2014).....	19
<i>Hobbs v. State</i> , 183 Wn. App. 925, 335 P.3d 1004 (2014).....	10, 11, 13
<i>Millay v. Cam</i> , 135 Wn.2d 193, 955 P.2d 791 (1998).....	7
<i>Neighborhood Alliance of Spokane Cnty. v. Spokane Cnty.</i> , 172 Wn.2d 702, 261 P.3d 119 (2011).....	10, 13, 21
<i>Nickum v. City of Bainbridge</i> , 153 Wn. App. 366, 223 P.3d 1172 (2009).....	4, 9
<i>Sanders v. State</i> , 169 Wn.2d 827, 240 P.3d 120 (2010).....	19
<i>Wolfe v. Dep't of Transp.</i> , 173 Wn. App. 302, 293 P.3d 1244 (2013).....	5, 6, 7

Statutes

RCW 4.16.130	7
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I. INTRODUCTION

Appellant Charles Wolfe (Wolfe) has not shown that he is entitled to equitable tolling of the statute of limitations because he submits no evidence that: (1) WSDOT committed an act in bad faith that inhibited his ability to timely file this lawsuit, or (2) that he exercised due diligence in filing it.

Instead, Wolfe misrepresents the circumstances surrounding an appeal heard by this Court in connection with his Pacific County torts case. In that matter, this Court knew of the 1998 rip-rap project but concluded it did not affect the two-year statute of limitations applicable to his tort claims and the subsequent purchaser doctrine, which barred his inverse condemnation claim.

If this Court applies the doctrine of equitable tolling to excuse Wolfe's untimely filing of this case, it should reduce the attorney fees and statutory penalties awarded by the trial court. Despite Wolfe prevailing on only a small portion of his claims, the trial court awarded all the attorney fees he sought. The trial court did not discount this award to reflect the fact that Wolfe prevailed on only three of his total 58 claims of Public Records Act (PRA) violations. Further, the trial court did not give proper consideration of WSDOT's honest effort to comply with the PRA requests

when assessing penalties; thereby setting a per day penalty that is unreasonably high given the particular circumstances of this case.

II. AMENDED STATEMENT OF CASE

The following correction of two facts cited by WSDOT in its briefing to this Court do not change the legal analysis in this case. WSDOT's statement that the standard of review is *de novo* remains unchanged. The prejudice shown by WSDOT is undiminished by moving the date Cynthia Whaley (Whaley) left her employment as WSDOT Public Disclosure Coordinator to after this suit was filed.

WSDOT agrees that on May 1, 2015, the trial court issued a ruling in a show cause hearing, and not on previously heard motions for summary judgment and dismissal. This distinction, however, does not change the standard of review put forth by WSDOT in its cross-appeal brief because PRA show cause hearings decided solely based on documentary evidence are also reviewed *de novo*. *Gronquist v. State*, 175 Wn. App. 729, 309 P.3d 538 (2013).

WSDOT also mistakenly represented that Whaley was not employed by WSDOT when Wolfe filed this lawsuit in May 2012. Resp. Br. Appellant at 13. That this misstatement of fact is only an oversight is shown by WSDOT's simultaneous and contradictory statement that Whaley was employed by WSDOT when she sent the spreadsheet in

question via email on November 29, 2012. Resp. Br. Appellant at 12.

However, this correction does not negate the prejudice suffered by WSDOT from Wolfe's late filing of this matter. This is because Wolfe's allegations are premised upon only two facts: (1) his interpretation of the spreadsheet attached to Whaley's email in 2012, which does not specify the documents Wolfe was provided for inspection; and (2) his impugning the credibility of Denys Tak (Tak), whose declaration does specify the documents Wolfe was provided. Wolfe attacks Tak's credibility using the spreadsheet attached to Whaley's 2012 email.

But Cynthia Whaley was not involved in the production of documents at issue in this case. Her involvement with Wolfe's multiple PRA requests is limited to his later requests numbered 08-0856 and 10-0414. CP at 1854. As stated in WSDOT's responsive brief, Michelle Ewaniac, not Cynthia Whaley, was the WSDOT Public Records Coordinator in 2008. CP at 1937.

It therefore remains undisputed that if Wolfe had timely filed this lawsuit, he could not now claim that by the mere passage of time Denys Tak's declaration is not credible. Essentially, it remains true that Wolfe seeks to benefit from the prejudice he created by not timely filing this lawsuit.

III. ARGUMENT

A. **Equitable Tolling Should Not Be Applied Where There Is No Showing of Bad Acts by WSDOT That Inhibited Wolfe's Timely Filing of This Lawsuit and Wolfe Has Failed To Show He Exercised Due Diligence**

Equitable tolling should be used only where the plaintiff can show both bad acts on the defendant's part that misled the plaintiff, and due diligence on the part of the plaintiff. The responsive brief filed by Wolfe contains no assertion of fact that he exercised due diligence in filing this lawsuit and that he was somehow frustrated in this effort by some bad act by WSDOT. Wolfe bears the burden of proof to show he is entitled to equitable tolling. *Nickum v. City of Bainbridge*, 153 Wn. App. 366, 379, 223 P.3d 1172 (2009). Because a court may toll the statute of limitations only when justice requires, and it must use the doctrine sparingly, Wolfe's argument that equitable tolling applies in this case should be rejected. *Id.* at 379 (citing *State v. Duvall*, 86 Wn. App. 871, 875, 940 P.2d 671 (1997)); *Finkelstein v. Sec. Props., Inc.*, 76 Wn. App. 733, 739-40, 888 P.2d 161 (1995).

Equitable tolling is appropriate when the delay in filing is caused by defendant's deception, failure to follow proper procedures, or other agency action that misled or confused a plaintiff. *Danzer v. Dep't of Labor & Indus.*, 103 Wn. App. 1041 (2000) (COA II unpublished opinion that has no

precedential value, is not binding on any court, and is cited only for such persuasive value as this Court deems appropriate); *relying upon, Sec'y of Labor v. Barretto Granite Corp.*, 830 F.2d 396, 399 (1st Cir. 1987). Wolfe has failed to assert any action by WSDOT occurring prior to the running of the statute of limitations that prevented him from filing this PRA lawsuit. He only alleges actions occurring after the limitations period expired and so has failed to show this Court adequate grounds for equitable tolling.

1. Wolfe was not misled by WSDOT's defense of the Pacific County tort case

Wolfe directs this Court to the acts of WSDOT in litigating the Pacific County tort case as providing a basis for equitable tolling in this matter. This is illogical because the statute of limitations in this case expired in August 2009, and Wolfe filed the Pacific County case in June 2010. *Wolfe v. Dep't of Transp.*, 173 Wn. App. 302, 304, 293 P.3d 1244, 1245 (2013).

In essence, Wolfe argues WSDOT had an incentive in 2008 to impede his timely filing of this PRA lawsuit in order to better defend itself from a tort liability suit he filed in 2010. Br. Appellant at 12. This "incentive" cannot be true because its own incongruent timing, i.e., WSDOT did not know of the tort suit when it responded to Wolfe's PRA request. Likewise, it is impossible for Wolfe to have been misled or

confused by WSDOT's acts after the tort case was filed in June 2010 so as to inhibit him from filing this suit before the statute of limitations expired in August 2009.

Even assuming the timing of the cases did not destroy Wolfe's logic, his assertion that WSDOT wrongfully denied the existence of the 1998 rip-rap project records to this Court in Wolfe's appeal of the Pacific County case is misleading. Wolfe does not cite any support of this assertion. Furthermore, this Court's decision in the Pacific County case specifically refers to WSDOT's installation of "additional erosion-causing rip-rap and weir projects along the riverbank near the bridge." *Wolfe*, 173 Wn. App. at 309 n.7. This Court dismissed any significance of the 1998 rip-rap project to the issues presented by that appeal when it noted there was no governmental action since Wolfe purchased the property in 2003 and 2004. *Id.* at 308-09. This Court noted, "we find no support in the record before us on appeal for the Wolfes' factual assertions that the DOT installed riprap and weir project *after* the Wolfes' purchase." *Id.* (emphasis in original).

Even if Wolfe used the 1998 rip-rap project records in the Pacific County case, he still would have lost that case. Wolfe's argument was that those records would have changed the outcome by defeating WSDOT's defense using the 10-year statute of limitations period for inverse

condemnation actions. Resp. Br. Appellant at 12. But, the 10-year statute of limitations was not at issue in the Pacific County case.

In fact, this Court noted in its decision that, “[t]he DOT argued . . . at RCW 4.16.130’s two-year statute of limitations for tort actions applies,” and that “Wolfes do not directly contest application of this two-year statute of limitations to their negligence claim.” *Wolfe v. Dep’t of Transp.*, 173 Wn. App. 302, 306, 293 P.3d 1244, 1246 (2013).

Finally, this Court did not hold that Wolfe’s inverse condemnation cause of action was barred by the 10-year statute of limitations; rather, it held that claim was barred by the subsequent purchaser rule. *Id.* at 309. Therefore, the 1998 rip-rap project was irrelevant to the issues presented in Wolfe’s Pacific County case. He lost that case because of this Court’s application well-established law that a subsequent purchaser may sue only for a new taking or injury. *Id.* at 307 (citing *Hoover v. Pierce Cnty.*, 79 Wn. App. 427, 903 P.2d 464 (1995), *reviewed denied*, 129 Wn.2d 1007, 917 P.2d 129 (1996)).

2. Wolfe’s argument is not supported by the cited case law

Wolfe’s failure to show bad acts by WSDOT that inhibited his ability to file this lawsuit also defeats his reliance on *Millay v. Cam*, 135 Wn.2d 193, 955 P.2d 791 (1998). In *Millay*, the court addressed the defendant’s act of grossly exaggerating the sum required for property

redemption such that, “the prospective redemptioner cannot with due diligence ascertain the sum required to redeem within the time remaining.” *Id.* at 207. Unlike *Millay*, Wolfe cannot direct this Court to any fact that he could have relied upon that would have misled or confused him, or otherwise frustrated his rights under the PRA. Furthermore, the court in *Millay* went on to hold that the prospective redemptioner must show more than just good faith and was required to file a declaratory action within the redemption period. *Id.* at 207. Wolfe has not alleged any good faith reliance on his part to justify his delay, nor has he shown any act he made before August 2009 to protect his legal rights under the PRA. Accordingly, his reliance on *Millay* is misplaced.

Likewise, Wolfe puts forth a specious assertion that WSDOT had bad faith incentives similar to those described in *Belenski v. Jefferson Cnty.*, 186 Wn.2d 452, 378 P.3d 176 (2016). Again, he refers to WSDOT’s incentive to defeat his Pacific County lawsuit filed after the statute of limitations ran in this case. In *Belenski*, the court noted an agency’s incentive to withhold information in order to invoke the statute of limitation and avoid liability under the PRA. *Id.* at 461. Nothing in *Belenski* supports equitable tolling when the alleged bad acts of an agency occur after expiration of the PRA statute of limitations.

In summary, Wolfe has not shown any basis for this Court to find that WSDOT acted in bad faith at the time it responded to his PRA request in 2008, and so he cannot invoke equity to excuse his failure to timely file this lawsuit. “[E]quity cannot be invoked in the absence of bad faith on the part of the defendant and reasonable diligence on the part of the plaintiff.” *Nickum*, 153 Wn. App. at 379 (citing *Prekeges v. King Cnty.*, 98 Wn. App. 275, 990 P.2d 405 (1999)). Wolfe has also failed to show any proof of exercising reasonable diligence in filing this lawsuit. His lack of action from the time WSDOT closed his request in August 2008 through the date the statute of limitations expired in August 2009 remains unexplained.

B. WSDOT Conducted a Reasonable Search for Records When It Identified All Employees Who May Have Had Knowledge Pertaining To the Requested Records, and then Based Upon That Knowledge Searched State Archives and Its Regional Office Because Those Two Locations Were the Only Locations Where Responsive Records Were Reasonably Likely To Be Found

WSDOT submitted detailed, non-conclusory declarations of Bart Gernhart (CP at 1946-49), Denys Tak (CP at 1940-45), Michelle Ewaniac (CP at 1937-39), David Bellinger (CP at 1812-36), and Ashley Holmberg (CP at 1854-1916) to show it conducted a reasonable search for the records requested in Wolfe’s PRA request at issue.

It is uncontested that after consulting with Wolfe, WSDOT understood his PRA request to be seeking bridge construction records.

CP at 1940-41; 1947-48. WSDOT then searched where construction records were likely to be found, and then produced or made available to Wolfe everything it located. Only years later, when searching for records responsive to another Wolfe PRA request for riverbank stabilization records in the environmental office, were the 1998 maintenance project records first found. The fact that the people working on Wolfe's numerous PRA requests found these maintenance records in the environmental office is not evidence that WSDOT's conducted an unreasonable search for what it thought he was seeking, i.e., construction records.

Whether a search is adequate "is separate from whether additional responsive documents exist but are not found." *Neighborhood Alliance of Spokane Cnty. v. Spokane Cnty.*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011). "The adequacy of a records search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents." *Hobbs v. State*, 183 Wn. App. 925, 943, 335 P.3d 1004 (2014) (citing *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 866, 288 P.3d 384 (2012) (quoting *Neighborhood Alliance*, 172 Wn.2d at 720)).

In *Hobbs*, the court rejected the plaintiff's argument that the failure to search back up tapes that were kept off-site specifically for disaster recovery constituted an unreasonable search for documents. *Hobbs*,

183 Wn. App. at 945. The court held, “[t]hese alleged ‘failings’ do not render the Auditor’s records search unreasonable. Rather, the record shows that the Auditor performed a comprehensive search of its paper and electronic files using numerous terms meant to comprehensively identify records related to the . . . subject of Hobbs’ public records request.” *Id.* at 945.

The analysis of *Hobbs* reveals the trial court’s error in this case. There, the requested records were known to exist in the off-site back-up tapes of its databases. That is the nature of off-site back-up database tapes. In *Hobbs*, the court found the agency’s search reasonable, even though it did not search a location where they knew the records existed. Applying *Hobbs* here, Gernhart’s directing the search for records to both places where construction records were likely to be found is surely reasonable because, unlike the respondent in *Hobbs*, he did not know the 1998 rip-rap project records even existed. It remains undisputed fact that bridge construction records are stored in the State Archives and regional office, and that these locations were where Gernhart directed the search for them.

WSDOT’s actions in this case are exactly analogous to the search for records conducted in another PRA case in which the court found the search to be reasonable. *Block v. City of Gold Bar*, 189 Wn. App. 262, 355 P.3d 266 (2015). There the court reviewed detailed declarations of the

public records officer and mayor who prepared the city's response to a PRA request. *Id.* at 274. Like WSDOT in this case, the City of Gold Bar determined the scope of the request and where responsive documents were likely to be found. *Id.* It also identified the persons likely to have responsive records, just as WSDOT did here. *Id.* The declarations in that case, just like those presented here, described the gathering of the documents, the city's review of them, and finally their production to the requestor. *Id.* at 272-73. The declarations also set forth difficulties encountered from a lack of specific personal knowledge. *Id.* at 272. Like Wolfe, the plaintiff in *Block* did not contest the factual basis establishing the reasonable search. *Id.* at 276.

Just as Wolfe is attempting to do in this case, the plaintiff in *Block* based the claimed PRA violation on the fact that several responsive records existed on the date of the PRA request, but were only obtained by plaintiff in response to other record requests or from other sources. *Id.* at 276. Rejecting this claim, the court stated, "that is not the law." *Id.* It held this fact does not show a search is unreasonable because "a search need not be perfect, only adequate." *Id.* (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986)). Additionally, the court reviewed the plaintiff's declaration for evidence challenging the city's declarations. Finding that it did not challenge the reasonableness of the search efforts, the court found

plaintiff's argument to be unsupported by any evidence in the record. *Id.* at 277. Likewise, Wolfe also does not present evidence contesting the reasonableness of WSDOT's searching the State Archives and regional office but not the environmental office. Therefore, the holding in *Block* directly applies to the issues presented by this appeal and requires reversal of the trial court with respect to the reasonable search for records here.

Washington courts use the same analysis as federal courts in determining whether a search for documents responsive to a public records request is reasonable. *Neighborhood Alliance*, 172 Wn.2d at 719. Washington courts have adopted the federal courts' reasonableness standard as articulated by the Tenth Circuit Court of Appeals:

[T]he focal point of the judicial inquiry is the agency's search process, not the outcome of its search. The issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents as adequate[,] [which is determined under] a standard of reasonableness, and is dependant upon the circumstances of the case. The reasonableness of an agency's search turns on the likelihood that it will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives.

Hobbs, 183 Wn. App. at 943-44 (citing *Forbes*, 171 Wn. App. at 866, 288 P.3d 384 (alterations in original) (internal quotation marks omitted) (quoting *Trentadue v. Fed. Bureau of Investigation*, 572 F.3d 794, 797-98 (10th Cir. 2009)).

In *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57 (D.C. Cir. 1990), one of the many issues the court addressed was whether a search is unreasonable because the agency searched the only record system most likely to contain the requested information. Rejecting plaintiffs' argument that a search of only a central record system was itself an unreasonable search, the court noted well-established law that, "[t]here is no requirement that an agency search every record system." See *Meeropol v. Meese*, 790 F.2d 942, 952-53 (D.C. Cir. 1986) (search is not presumed unreasonable simply because it fails to produce all relevant materials); *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (agency need not demonstrate that all responsive documents were found and that no other relevant documents could possibly exist); *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978) (no requirement that an agency search every division or field office on its own initiative in response to a FOIA request when the agency believes responsive documents are likely to be located in one place). Further, in *Citizens Comm'n on Human Rights v. Food and Drug Admin.*, 45 F.3d 1325 (9th Cir. 1995), the court held the responding agency's search was reasonably calculated to reveal requested documents where it searched its main office, forwarded the request to seven of its divisional offices, and

spent over one hundred and forty hours reviewing the active and retired files.

Wolfe's claim here that Bart Gernhart failed to direct the search to a location where responsive records were likely to be found is contradicted by any fair reading of his declaration. CP at 1946-49. In it, Gernhart details why he thought Wolfe was looking for construction records and not maintenance records like the 1998 rip-rap project. CP at 1947. This belief came from Gernhart's "many prior communications" with Wolfe. *Id.* Gernhart explains why he did not search the regional environmental office for maintenance records but for construction records. CP at 1948. Further, it is uncontested that Gernhart had no knowledge the 1998 maintenance rip-rap project records even existed, and therefore, there is no evidence he or any other WSDOT employee intentionally did not look for them. *Id.* Gernhart and his team expected construction records to be located in State Archives or the regional office, so that is where they searched for them. Accordingly, the uncontested evidence shows that WSDOT met the legal standard of a reasonable search of repositories where construction records were likely to exist; i.e., the State Archives and the southwest regional office. The trial court erred in concluding otherwise.

C. Wolfe Failed To Carry His Burden of Proof To Show Reasonable Attorney Fees Related To His Successful Claims When He Did Not Distinguish Between His Successful and Unsuccessful Claims, and the Court Improperly Refused To Discount the Attorney Fee Award On This Basis as Required by Law

If this Court affirms the trial court's decision to equitably toll the statute of limitations and its decision that WSDOT's search for records was unreasonable, then WSDOT asks that the attorney fees awarded to Wolfe be reduced so that it reflects only fees incurred for his successful PRA claims.

The trial court awarded Wolfe all the attorney fees he claimed were related to this PRA lawsuit, and denied only those charges incurred in a different lawsuit. However, it is undisputed that Wolfe prevailed on only three of his 58 total PRA-violation claims. The trial court did not address why it failed to discount the award of attorney fees, and there is nothing in the record to support such a conclusion. Therefore, the trial court's award is contrary to well-established law requiring such discounting. "In determining a reasonable number of hours, the court 'discounts hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.'" *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 730, 354 P.3d 249 (2015); citing, *O'Neill v. City of Shoreline*, 183 Wn. App. 15, 25, 332 P.3d 1099 (2014). "Courts have also recognized

the utility of applying percentage reductions to fee requests.” *Id.*; *see also Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 82, 272 P.3d 827 (2012) (appellate courts have used a percentage reduction when specifics of a case make segregating actual hours difficult); *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948-49 (9th Cir. 2007) (20 percent reduction appropriate where trial court “expressly correlated its reduction of quarter hour billing to [law firm’s] actual over-billing”); *Gates v. Deukmejian*, 987 F.2d 1392, 1400 (9th Cir. 1992) (use of percentages acceptable so long as trial court independently reviews applicant’s fee request and sets forth “concise but clear” explanation of its reasons for choosing given percentage).

It is Wolfe’s burden to show his attorney fees are reasonably related to his successful PRA claims. *Cedar Grove*, 188 Wn. App. at 730; citing *Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d 745 (2013). The billing records he submitted do not distinguish between work performed on his successful claim involving the three 1998 rip-rap project records and his unsuccessful claims of 55 more PRA violations. It is within this context that WSDOT urged the trial court to apply a percentage discount to the attorney fees award. The trial court erred in refusing to apply a discount.

In *Cedar Grove*, the court used the same analysis WSDOT put forth to the trial court below. The court determined that because only 15 of 22 documents were found to be wrongfully withheld, some of the hours billed

were necessarily spent on unsuccessful theories. “The Court therefore reduced the number of hours proportionately for a reduction of 37.5 percent.” *Cedar Grove*, 188 Wn. App at 731. The court also noted the relatively straightforward nature of the case and, among other factors, the large number of hours billed after prevailing on summary judgment when the plaintiff “knew it would receive an attorney fee award.” *Id.* at 731.

These same considerations apply to this case. Because WSDOT had already provided the three 1998 rip-rap project records before this lawsuit was filed, and in light of the straightforward nature of Wolfe’s claims, i.e., whether there were more records that had also not been provided, Wolfe’s attorney’s knew they were likely to receive at least some attorney fee award at the conclusion of this case. Like the plaintiff in *Cedar Grove*, Wolfe submitted all of the attorney fees he incurred in the case without taking into account whether those fees related to his unsuccessful claims. Therefore, the trial court’s award of attorney fees is directly contrary to the holding in the *Cedar Grove* decision.

Furthermore, the record shows most of the work Wolfe’s attorneys performed focused on his unsuccessful claims. WSDOT has proved the other 55 records Wolfe claims as PRA violations were in fact at the Kelso office for his inspection. CP at 3270. Whether the three 1998 rip-rap project records were not present in Kelso has never been at issue in this case.

Accordingly, the record reflects that most of the work performed by Wolfe's attorneys relate to his unsuccessful claims.

This situation is directly addressed in the decision of *Haines-Marchel v. Dep't. of Corr.*, 183 Wn. App. 655, 334 P.3d 99 (2014). There the court held, "in determining the amount of the attorney fees award, the superior court must take into account the relatively large share of the redacted materials that we hold was properly withheld." *Id.* at 674. Applying that holding to the facts of this case, Wolfe did not present records to the trial court that could be used to differentiate between attorney fees expended on his unsuccessful claims versus those expended on his successful claims. Coupled with the fact that the primary effort in this case involved his unsuccessful claims, the court's failure to discount the attorney fees award at all shows its award to be untenable based upon the facts of this case, and directly contrary to this Court's precedent in *Haines-Marchel*.

Finally, contrary to Wolfe's interpretation, the Supreme Court in *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010), did approve pro-rata computation for attorney fees. The court stated, "[a]round 95 percent of the claimed exemptions proved valid, suggesting that Justice Sanders' fees and costs should be deeply discounted." *Id.* at 868. The trial court in that case had apportioned fees based upon the types of issues litigated and whether Justice Sanders prevailed on those issues. The Supreme Court affirmed a

greater award of 37.5 percent because, “there were economies of scale involved, such that it was fairer to award Justice Sanders 75 percent of the fees allocated to issue (1). The court therefore awarded Justice Sanders 37.5 percent (75 percent x 50 percent) of his total fee request.” *Id.* at 866. The 50 percent figure is the weight the court gave to the first issue category based on difficulty and the work involved in litigating. *Id.* at 865. Therefore, the trial court deviated from the pro-rata allocation by awarding 75 percent, instead of 5 percent (the percentage of documents Justice Sanders prevailed upon), due to this consideration of economies of scale. In essence, both the trial court and the appellate court approved of pro rata allocation based on the number of documents on which the plaintiff prevailed, but modified the calculation due to the particular circumstances presented by the issues in that case.

In summary, it is well-established law that the trial court should have discounted the award of attorney fees in this case to account for the fact that Wolfe was successful in only three of his total 58 PRA claims. The trial court provided no basis for failing to do so in its ruling, and so the award should be reversed and this Court should apply the required discount as required by law, or remand to the trial court with instructions to do so.

D. The Trial Court Failed To Properly Consider WSDOT's Honest and Good Faith Attempt To Comply with the PRA When It Imposed \$20 Per Day Penalties

If this Court equitably tolls the statute of limitations and finds that WSDOT's search for records was unreasonable, then WSDOT urges it to reduce the penalties awarded to Wolfe to properly reflect the trial court's factual finding that it made an honest attempt to satisfy the PRA request. WSDOT sought clarification of Wolfe's request, and thinking he was looking for construction records, conducted a timely search of those locations where those records were likely to be found. Accordingly, if any penalty is assessed in this case it should be a minimal penalty to reflect these uncontested facts. "An agency that sought clarification of a confusing request and in all respects timely complied but mistakenly overlooked a responsive document should be sanctioned less severely than an agency that intentionally withheld records and then lied in its response to avoid embarrassment." *Neighborhood Alliance*, 172 Wn.2d at 718.

The trial court found WSDOT engaged in an honest and good faith effort to comply with the PRA. A similar situation was presented to the court in *Cornu-Labat v. Hospital Dist. No. 2 Grant Cnty.*, 177 Wn.2d 221, 298 P.3d 741 (2013). In that case, the trial court found the responding agency to have responded "honestly and in good faith" but awarded a penalty of \$10 per day. *Id.* at 240. The appellate court remanded on other

grounds with instructions to the trial court that if the plaintiff prevailed on remand, “daily sanctions on the low end of the scale are appropriate based on the trial court’s previous finding of good faith.” *Id.* at 241; following, *Limstrom v. Ladenburg*, 136 Wn.2d 595, 616, 963 P.2d 869 (1998) (the existence or absence of an agency’s bad faith is the principal factor which the trial court must consider in awarding penalties).

The penalty range for PRA actions is within the court’s discretion and can range from zero to \$100 per day. RCW 42.56.550(4) (amended in 2011 to remove \$5.00 per day minimum). Consistent with the trial court’s finding of fact that WSDOT responded honestly and in good faith, and applying the Supreme Court’s instruction in *Cornu-Labat*, the penalty awarded in this case should be zero, or at most, in the low end of the scale. Doing so will fulfill the purpose of the PRA statutes to encourage compliance by recognizing the value to agencies when they engage in honest and good faith efforts to comply with the PRA.

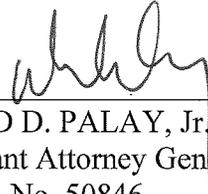
IV. CONCLUSION

The statute of limitations bars Wolfe’s PRA claims, and the trial court was wrong to hold otherwise. Wolfe is wrong that equitable tolling applies, but even if it did, the record is clear that WSDOT conducted a reasonable search.

If this Court affirms the trial court as to the PRA violations, it should remand on the issues of penalties and attorney fees, since the trial court did not appropriately analyze those issues. The attorney fees should reflect only Wolfe's successful claims, and this Court should reduce the statutory penalty to reflect WSDOT's good faith and honest attempt to comply fully with Wolfe's PRA request.

RESPECTFULLY SUBMITTED this 6th day of July 2018.

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CERTIFICATE OF SERVICE

I, Sarah A. Smith, an employee of the Transportation and Public Construction Division of the Office of the Attorney General of Washington, certify that on this day a true copy of the foregoing Reply Brief of Respondent/Cross-Appellant was served on the following parties as indicated below:

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

DATED this 6th day of July 2018, at Tumwater, Washington.


SARAH A. SMITH, Legal Assistant

ATTORNEY GENERAL'S OFFICE/TRANSPORTATION AND PUBLIC CONSTRUCTION

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