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Division II
State of Washington
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No. 51487-7-II

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

**ARTHUR WEST,
appellant,**

Vs.

**THE CITY OF TACOMA,
respondent**

Review of decisions entered by
the Honorable Judge Nelson

**APPELLANT'S
OPENING BRIEF**

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III. SUMMARY OF ARGUMENT

This case concerns records related to the City of Tacoma's covert use of cell phone emulator “Stingray” technology, and whether records concerning “*any agreements, policies, procedures, or understandings related to the acquisition, use, or operation of stingray technology*” or those describing the actual equipment used by the city should have been and/or should be disclosed.

It is apparent from the uncontested evidence in this case that the city deliberately narrowed the scope of West's request to conceal the existence of politically damaging records until late in 2015, and that it produced a number of responsive records to a third parties, the ACLU plaintiffs in Banks, which had not been identified or produced to West.(CP 519-527, 513-14, 515-15)

This case features yet another case of the City of Tacoma artificially and deliberately narrowing the scope of a PRA request to silently withhold known responsive records, and then attempting to argue that it should not be held to a strict standard for compliance with the PRA.

There is also an interesting issue as to whether an affidavit that a witness “cannot recall” is admissible or sufficient to meet an agency's burden of proof under CR 56 and the PRA, and an issue as to whether a Court may set a penalty under Yousoufian for withheld records prior to reviewing or disclosing the records, for a number of days that does not

even come close to the number of days the records were actually withheld.

However, the primary legal issue presented in this case is whether agency records describing the type of “Stingray” cell phone emulators an agency employs must be disclosed under the Public Records Act, or whether such records are properly exempt under the narrow scope of the specific intelligence information and/or specific investigative records exemption of RCW 42.56.240(1).

The record in this case demonstrates that the City of Tacoma first deliberately and silently withheld records it knew to be in existence and knew to be responsive to West's records request and then subsequently attempted to conceal some of them under an inapplicable attorney-client exemption, while at the same time disclosing many of the withheld records to a third party.

Nor can there be any credible denial, in light of the City's representations of Mike Smith at CP 555 and CP that the City deliberately narrowed the scope of West's request to exclude responsive communications, without any rational or colorable basis, and without indicating that these other records were in existence.

Only after the City had, (with the blessings of its “Big Brother” agency, the FBI) reversed its policy of universal Stingray secrecy in December of 2015 and responded to subsequent PRA requests did plaintiff West discover that a large number of records had been silently withheld

from him that were responsive to his August 2014 request.

Although the Pierce County Superior Court did rule in late 2017, that a small set of these suppressed communications had been improperly withheld, their nearly identical similarity to the “Christopher” Bates Stamped records 721-730 (CP 519-527) and 74 pages of emails (CP 247-361) the Court inexplicably ruled were non-responsive to the narrowed scope of the city's unilateral redefinition of the request merely underscores that the Court erred in excluding them from its disclosure order and penalty calculations.

Further, the Court improperly assessed a de minimus per diem penalty for much less days than the actual amount of days the records were withheld, and it did so a priori, without reviewing the records or ordering their disclosure, or considering the Yousoufan factors, a manifest abuse of discretion.

Substantively, the Court erred in allowing the city to submit a declaration of Lieutenant Travis (CP 554-564) that he *did not recall* what records the city had at any given point to meet the city's burden of demonstrating (alleged) compliance with the PRA.

In 2009, so far as can be determined, the city originally and clandestinely acquired the disputed “Stingray” cell phone emulator technology.

For several years, the city employed the stingray equipment pursuant

to a Non Disclosure Agreement with the FBI to keep the use of the technology secret. The secrecy agreement worked for over 5 years and no one of the public was the wiser.

After the existence of this technology was inadvertently revealed to a TNT reporter, in August of 2014, a number of PRA requests for stingray related records were made, including one from plaintiff West.

In 2015-16, 3 entities filed complaints seeking disclosure of records related to the city's emulator systems, among them the center for open policing, a number of clergymen represented by the ACLU, and plaintiff West.

Subsequent to the filing of these suits, the city, after conferring with the FBI reversed its policy and disclosed the NDA. It also disclosed and/or revealed the existence of numerous responsive records that it had silently withheld from plaintiff West.

The first phase of this case (consolidated with the Center for Open Policing suit) before the Honorable Judge Cuthbertson concerned the disclosure of the unredacted FBI NDA, along with a finding of bad faith by the city and the imposition of the maximum \$100 in per diem penalties, totaling nearly \$100,000 in penalties to West and COP.

Similarly, in June of 2018 the case brought by the ACLU plaintiffs over similar withholding by the city of stingray records resulted in nearly \$300,000 in penalties and fees. (See Plaintiff's Supplemental Authority,

June 25, 2018 ruling in *Banks v. City of Tacoma*)

In contrast, the present appeal concerns rulings by the Honorable Judge Nelson on 4 categories of records, and a penalty two orders of magnitude smaller, of \$3,830 for the one group of records the court found were unlawfully withheld.

Yet the Court's ruling was not internally consistent, for it failed to recognize that 2 other groups of virtually identical records between some of the same people on the same subject matter and date had also been improperly and silently withheld.

In addition, the Court erred in allowing the city to submit a declaration that it did not know if it was in possession of records of its own grant application or a security upgrade as of the date of West's request to meet its burden of justifying non-disclosure of this third group of records.

Significantly, the penalty ruling for the 1 group of records the court did recognize were unlawfully withheld issued prior to the court ordering disclosure of or reviewing that group of records, and the penalty was imposed on October 13, 2017 (CP 628-632) for a number of days that was less than one half of the actual time these records were actually withheld. (See CP 614-619, 634-652)

Nor did the court even address the improper invocation of the attorney-client exemption of the need for deterrence in its penalty review. (See CP 628-632, Transcript of June 23, Transcript of October 13)

These rulings issued in proceedings before the Honorable Judge Nelson, wherein the Court (CP 577-580, 628-632) denied disclosure of 4 classes of records and imposed a de minimus penalty of \$3,830 for the silent withholding of critical records concerning the policies and understandings behind the NDA, such as the memo for law enforcement and prosecutors appearing at CP 513-514 .

These records, had the court reviewed them, would have been seen as critical to the understanding of how the NDA operated between the city and the federal government, and what its actual effects in fostering secrecy and erosion of due process and reasonable search rights were.

Their disclosure was less defensible, and as important, or arguably even more important than the NDA itself to the public's understanding of what the NDA improperly required and mandated on the part of the city.

In light of the clear precedent soundly denouncing the type of deliberate silent withholding and bad faith invocation of inapplicable privileges practiced by the City in this case, and the undeniable circumstance that all of the disputed and silently withheld records were responsive to West's August 28, 2014 request, and critically important to understanding what the NDA required of the city, this case should be remanded back to the Trial Court with instructions to find that the City of Tacoma violated the Public Records Act and for an award of costs and any appropriate per diem penalties under RCW 42.56.550.

IV. ASSIGNMENTS OF ERROR

1. The Court erred in failing to find that responsive records withheld from West but disclosed to third party ACLU plaintiffs under “Christopher” Bates Stamp Nos. 721, 723-4, 725, 727 and 728 were improperly and unlawfully withheld when they were identical in regard to the parties, dates and subject matter to some of the 14 records it did order disclosed as responsive to West's request.....
2. The Court erred in finding, pursuant to an erroneous “reasonable interpretation” standard, that PRA officer Mike Smith conducted an adequate search for “*records concerning any agreements, policies, procedures, or understandings related to the acquisition, use, or operation of stingray technology*” when he deliberately excluded *his own emails from one day before the request* bearing the caption “CELL PHONE PROCEDURES” and over 100 pages of other easily available and undeniably responsive records as “not pertinent” and when it was painfully obvious that no adequate search had been conducted.....
3. The Court erred in admitting and considering, in a post-CR 56 hearing proceeding, statements of Lieutenant Travis that he could not recall² what records existed on the date of West's request as relevant evidence sufficient to meet the city's burden of proof that records were not in the city's possession.....
4. The Court erred in over broadly expanding the scope of the State specific intelligence and investigative records exemption to justify withholding of official public records identifying the nature of the Stingray technology employed by the City of Tacoma appearing on purchase orders, estimates, and invoices.....
5. The Court erred and acted in excess of the reasonable scope of judicial discretion in making a Yousoufian penalty determination prior to reviewing or requiring disclosure of the actual records that it ruled were unlawfully withheld.....
6. The Court erred and acted in excess of the reasonable scope of judicial

² See CP , (Travis Declaration, Page 2), Containing the following three statements. (1.) “I do not recall at this point what records were in existence at that time or what records I provided to Mr. Smith...”, (2.) “As far as the document concerning the Port Security Upgrade,...I am unsure if we had a copy of the (grant) application until the grant was awarded...”, (Travis Declaration, Page 2, lines 12-14). (3.) “As far as the Harris quotation dated August 12, 2014,... I do not recall when I received a copy of this...“I simply cannot recall”

discretion in failing to set an appropriate penalty for the actual number of days that the city unlawfully withheld records in light of the City's silent withholding, its' wrongful claim of exemption, and the stare decisis effect of a prior ruling in the case.....

7. The Court erred in making mixed findings of law and fact³ that were erroneous and misleading, based upon incorrect legal standards, and unsupported by substantial evidence or reasonable inference therefrom.....

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Court err in failing to find that responsive records withheld from West but disclosed to third party ACLU plaintiffs under "Christopher" Bates Stamp Nos. 721, 723-4, 725, 727 and 728 were improperly and unlawfully withheld when they were identical in regard to the parties, dates and subject matter to the 14 records it did order disclosed as responsive to West's request? Yes.....

2. Did the Court err in finding, pursuant to an erroneous "reasonable interpretation" standard, that PRA officer Mike Smith conducted an adequate search for "*records concerning any agreements, policies, procedures, or understandings related to the acquisition, use, or operation of stingray technology*" when he deliberately excluded *his own emails from one day before the request* bearing the caption "CELL PHONE PROCEDURES" and over 100 pages of other easily available and undeniably responsive records as "not pertinent" and when it was painfully obvious that no adequate search had been conducted? Yes.....

3. Did the Court err in admitting and considering, in a post-CR 56 hearing proceeding, statements of Lieutenant Travis that he could not recall⁴ what

³ The court finds that the City's overall response to west was reasonably prompt. The court finds that the city conducted a reasonable search and that the City's failure to produce the emails was due to an error on the part of the City in interpreting the scope of west's request. The City has provided a reasonable explanation for that error. The court does not find that the error was due to any bad faith on the part of the City. The court finds that the City has a thorough and responsive procedure for handling PRA requests and City personnel are provided substantial training and supervision. The City was helpful to Mr. West, such as when the City promptly converted the produced emails to a different format at Mr. West's request.

⁴ See CP , (Travis Declaration, Page 2), Containing the following three statements. (1.) "I do not recall at this point what records were in existence at that time or what records I provided to Mr. Smith...", (2.) "As far as the document concerning the Port Security Upgrade,...I am unsure if we had a copy of the (grant) application until the grant was

records existed on the date of West's request as relevant evidence sufficient to meet the city's burden of proof that records were not in the city's possession? Yes.....

4. Did the Court err in over broadly expanding the scope of the State specific intelligence and investigative records exemption to justify withholding of official public records identifying the nature of the Stingray technology employed by the City of Tacoma appearing on purchase orders, estimates, and invoices? Yes.....

5. Did the Court err and act in excess of the reasonable scope of judicial discretion in making a Yousoufian penalty determination prior to reviewing or requiring disclosure of the actual records that it ruled were unlawfully withheld.? Yes.....

6. Did the Court err and act in excess of the reasonable scope of judicial discretion in failing to set an appropriate penalty for the actual number of days that the city unlawfully withheld records in light of the City's silent withholding, its' wrongful claim of exemption, and the stare decisis effect of a prior ruling in the case? Yes.....

7. Did the Court err in making mixed findings of law and fact that were misleading and erroneous and unsupported by any reasonable factual basis or substantial evidence? Yes.....

V. STATEMENT OF THE CASE

On August 28, 2014, plaintiff submitted requests under the Public Records Act to the City of Tacoma's Public Records Coordinator for Stingray related records. (CP 1-13)

The request sought the following records

1. Any records of any purchase or use agreement of, or for, a cell site simulator or stingray device.

awarded...”, (Travis Declaration, Page 2, lines 12-14). (3.) “As far as the Harris quotation dated August 12, 2014,... I do not recall when I received a copy of this...“I simply cannot recall”,

2. All records and communications concerning the use or assignment of officers to operate any such device.
3. Any index, list or log of information intercepted by any such device.
4. Any records released in response to any previous request or requests for stingray related records.
- 5 . *Any records concerning any agreements, policies, procedures, or understandings related to the acquisition, use, or operation of stingray technology.* (CP 3-4)

In response to this request the city substantially redacted the NDA and provided two privilege logs identifying (1) the NDA and (2) Stingray purchase Orders, estimates and Invoices. (CP at 10-13)

However, the city silently withheld 4 other groups of records including **(1.)** responsive records withheld from West but disclosed to third party ACLU plaintiffs under “Christopher” Bates Stamp Nos. 721, 723-4, 725, 727 and 728. (CP at 518-527)

(2.) 74 pages of responsive communications “concerning any agreements, policies, procedures, or understandings related to the acquisition, use, or operation of stingray technology”. (CP at 247-361)

(3.) a Harris Company Quotation of 8-12-14 and a Port Security Grant upgrade of 2014, (CP at) and

(4.) a number of responsive stingray related records (CP at 638-652) described in the Court's Order of October 13, 2017 (CP at 628-632) which the Court ruled were unlawfully withheld, but which were not reviewed, disclosed, or filed in the case until October 19, when West moved for reconsideration. (CP at 624-652)

West filed suit on on October 5th, 2015. (CP at 1-13)

Subsequent to the filing of the lawsuit, after it reversed its policy on complete Stingray secrecy, the City disclosed the existence of the 4 groups of additional Stingray related records in its response to subsequent requests for stingray related records by West and members of the ACLU and the Center for Open Policing. (CP at 50-53)

On February 5, 2016 West's complaint was consolidated with the COP complaint. (CP 18-19)

Plaintiff moved for Summary Judgment on January 31, 2017. (CP 49-130) In the Motion he identified the records at issue in this appeal.

Plaintiff filed copies of “Christopher” Bates Stamp Nos. 721, 723-4, 725, 727 and 728. (CP at 518-527), the 74 pages of responsive communications “concerning any agreements, policies, procedures, or understandings related to the acquisition, use, or operation of stingray technology”, (CP at 247-361), and the city's 2015 privilege logs identifying records not produced or identified in response to his 2014 request. (CP)

West also filed copies of records the city had withheld from him under claim of privilege but which had been disclosed to the Christoipher-Banks plaintiffs represented by the ACLU. (CP at 513-514, 516-517 518-527)

No objection to the filing of any of these records was made by the

city, which thereby waived any right it might have had to object to their presence in the record. (CP 529-534)

The United States filed a Statement of Interest on February 3, 2017. (CP 131-200)

Defendant City moved for Summary Judgment on February 16, 2017. (CP 201-215)

On February 27, 2017, a hearing was held on the withholding of the redacted portions of the NDA on (Transcript of Feb 27 Hearing)

On March 17, 2017, the Court entered an uncontested Order setting penalties for the withholding of the NDA in accord with the determination in the consolidated COP case. (CP 537-538)

The Order expressly found the City to have acted in bad faith and imposed a maximum per diem penalty of \$100 per day for the redaction of a single document. The Court then, for unspecified reasons, recused itself. (CP 537-538)

The case was subsequently reassigned to Department 13.

On May 24, 2017, a hearing was held before the honorable Judge Kathryn Nelson on the remaining 4 groups of records. (See Transcript of May 24, 2017)

Due to what can only be described as a profound uncertainty on the part of the Court as to its own ruling at this hearing, a number of further proceedings were necessary to conclude the case. (See Transcript

of June 23, etc.)

As plaintiff pointed out on page 13 of the transcript of May 24th, the City had completely failed in its pleadings to address or contest the plaintiff's claims of silent withholding of a Harris Company Quotation of 8-12-14 and a Port Security Grant upgrade of 2014, which appear on page 3, of plaintiff's CR 56 Motion and page 3 of the supporting declaration. (See page 13-15 of the transcript of May 24th, CP 51, 245)

Yet despite the City's complete failure to contest these claims in its pleadings, the Court's Order of June 23, 2017, by its express terms, erroneously granted summary judgment for the City on the uncontested issue of the first group of records, **(1.)** the Harris Corporation "Quotation" and Port Security Grant upgrade. (CP 577-580)

Plaintiff also asserted silent withholding of three further groups of responsive records:

(2.) responsive records silently withheld from West but disclosed to third party ACLU plaintiffs under "Christopher" Bates Stamp Nos. 721, 723-4, 725, 727 and 728 (CP 518-527), which are still being withheld to this day.

(3.) 74 pages of Emails responsive to West's request that were silently withheld, (CP 247-361), and disclosed on December 22 of 2015 after the city's stingray secrecy policy reversal.

(4.) 14 silently withheld records that the City withheld from West's 2014 request but which, subsequent to his filing suit, were identified as

“Attorney-client” privileged in the City's response to his 2016 request, which records were not disclosed until October 19, 2018, **after having been withheld for 1,121 days.** (CP 568-576)

Incidentally, in regard to the 14 records the court did find were withheld under a false claim of attorney-client privilege,, after first silently withholding these records from West, then asserting them to be privileged, the City disclosed a number of these same records to the ACLU, while continuing to withhold them from plaintiff until after the court's penalty determination. (CP 568-576)

These records including a September 17, 2014 email and a set of “talking Points for Judges and Prosecutors” that the City sent to the federal government to vet *before misrepresenting the technology to Judges, Prosecutors and other members of the Law Enforcement community in order to conceal the facts and circumstances of its use.* (CP 513-514)

Further responsive records silently withheld from West but disclosed to third party ACLU plaintiffs under “Christopher” Bates Stamp Nos. 721, 723-4, 725, 727 and 728. Significantly, these records were identical in terms of the parties, content, and date with some of the 14 records found by the Court to have been responsive to West's request and improperly withheld by the city. (CP 518-527)

In addition, the 74 pages of additional responsive records were

also identical in terms of the parties, content, and date with some of the 14 “Attorney-client” records the court found to be responsive had also been silently withheld from West due to the City having deliberately narrowed the scope of his request, although these records had been disclosed by the city on December of 2015 following its stingray secrecy policy reversal. (CP 247-361)

As in numerous other cases, (Including Banks and the LNG records appeal heard by this Court on September 4, 2018), the City of Tacoma deliberately and unilaterally re-defined and narrowed the records request to exclude responsive “records”, and attempted to assert that an erroneous “reasonable interpretation” or good faith standard should apply to their compliance with the act to justify and legitimize blatantly evasive conduct. (CP 554-564)

Nowhere did the city, in its responses to plaintiff's Summary Judgment Motion, credibly deny that the silently withheld 74 pages of emails and silently withheld attorney-client records appearing on the 2015 log should have been produced and/or identified in response to West's 2014 request. On Page 59 of the transcript of the 24th, the Court appeared to recognize this. (transcript of May 24th, at page 59)

Yet, rather than signing an order on the record as developed on Summary Judgment, the Court subsequently adopted an unprecedented procedure of granting the City a do-over, allowing it to file, on June 21,

after 4:00 P.M. and a mere two days before the next hearing, a voluminous pleading which made additional and different arguments than were advanced in the actual Summary Judgment process, a reply unsupported by any basis under CR 59. (See CP 568-576)

This manifestly violated the principles set forth by his court in *West v. Gregoire*, 336 P.3d 110 (2014), because the Court allowed the City to file additional post-CR 56 hearing briefing and then granted a rehearing to the City without any colorable basis under CR 59, and without allowing plaintiff reasonable time to respond. (CP 568-576)

The City was also improperly and belatedly allowed to file, and prevail upon, supplementary non-evidence in the form of a Declaration of Lieutenant Travis (CP 554-564) that, in the space of a single page (Page 2) employed the following phrases:

- (1.) “I do not recall at this point what records were in existence at that time or what records I provided to Mr. Smith...”, (Travis Declaration, Page 2, lines 7-8).
- (2.) “As far as the document concerning the Port Security Upgrade,...I am unsure if we had a copy of the (grant) application until the grant was awarded...”, (Travis Declaration, Page 2, lines 12-14).
- (3.) “As far as the Harris quotation dated August 12, 2014,... I do not recall when I received a copy of this...“I simply cannot recall”, (Travis Declaration, Page 2, lines 20-22). (CP at 555)

As the transcript of the June 23, 2017 hearing reveals, the Court erred in allowing the City a do-over of the Summary Judgment Hearing, and allowing inadmissible “evidence” to be submitted by Lieutenant

Travis. (See Transcript of June 23)

Further, the Court denied claims that had been properly argued by West and not disputed by the City in the Summary Judgment proceedings. (CP 568-576)

The Court failed to enter judgment on the undisputed records, (The Harris Corporation Quotation and the Security Grant Upgrade) and the not reasonably disputed records; the responsive records silently withheld from West but disclosed to third party ACLU plaintiffs under “Christopher” Bates Stamp Nos. 721, 723-4, 725, 727 and 728 as well as the 74 pages of responsive Emails.. (CP 568-576)

The Court also erred in expanding the Investigative Records Exemption far beyond its narrow scope as it has been consistently recognized in black letter precedent in the State of Washington, to justify the withholding of the Stingray purchase Orders, Invoices, Estimates and Quotations, when these were required to be disclosed not only as Public Records under RCW 42.56.010(3) but also as Official Public Records of the disposition of public funds as defined in RCW 40.14.010(1). (CP 577-580)

On June 23, 2017 the Court entered an Order on the city's Motion granting it as to the invoices, quotations, estimates, purchase orders, and shipping orders. (CP 577-580)

On October 13, 2017 the Court entered an Order on West's Partial

Summary Judgment and setting a penalty for the one group of records it decided had been unlawfully withheld. (CP 628-632)

On October 23, 2017, West moved for reconsideration. (CP 568-576)

On November 15, 2017, the Court entered an Order on Costs. (CP 85-86)

On November 15, 2017, the Court entered an Order denying reconsideration. (CP 670)

On December 12, 2017, the Court, in an irregular ex parte proceeding, for reasons known only to itself, entered a supercilious order of dismissal without prejudice. (CP 673)

Finally, on March 30, 2018, the Court entered a final order subject to appeal. (See 2nd Amended Notice of Appeal in supplemental designation)

On April 6, 2018 a timely 2nd Amended Notice of Appeal was filed.(See 2nd Amended Notice of Appeal in supplemental designation)

These rulings of the Court, whether factual substantive and procedural, constituted clear, palpable, and manifest error under the de novo and substantial evidence standards. (CP 577-580, 628-632)

The penalty determination issued without consideration of the nature of the actual records withheld or the actual number of days the records were withheld or the reasons for the withholding, and without any

concern for deterrence, also constituted an abuse of discretion under the abuse of discretion standard of review. (CP 628-632)

STANDARD OF REVIEW

This Court reviews questions of law and statutory construction de novo. Likewise, judicial review of all agency actions under the Public Records Act chapter is de novo, as is the question of construction and interpretation of statutes. RCW 42.56.550(3); State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 777, 380 P.2d 735 (1963). The Court's due exercise of discretion in setting a penalty pursuant to Yousoufian is reviewed for abuse of discretion. This Court should review all legal and substantive issues de novo, factual findings under the substantial evidence standard, and review the penalty issues under the abuse of discretion standard.

ORDERS ON APPEAL

Appellant seeks review of the following Orders:

The June 23, 2017 Order on the city's Motion granting it as to the invoices, quotations, estimates, purchase orders, and shipping orders. (CP 577-580)

The October 13, 2017 Order on West's Motion for Partial Summary Judgment and setting a penalty. (CP 628-632)

The November 15, 2017, Order denying reconsideration. (CP 670)

The March 30, 2018 final Order unambiguously subject to appeal.

(See Amended Designation)

VI. ARGUMENT

1. The Court erred in failing to find that responsive records withheld from West but disclosed to third party ACLU plaintiffs under “Christopher” Bates Stamp Nos. 721, 723-4, 725, 727 and 728 were not improperly and unlawfully withheld when they were identical in regard to the parties, dates and subject matter to the 14 records it did order disclosed as responsive to West's request.

Perhaps the most evident defect in the Court's rulings in this case is that they are not internally consistent. This is evident from the undeniable circumstance that the “Christopher” records bearing Bates Stamp Nos. 721, 723-4, 725, 727 and 728 that the court did not order disclosed to plaintiff as responsive to his request and unlawfully withheld were identical in terms of the parties, subject matter, and date with many of the 14 records the court did find were responsive and which had been unlawfully concealed, first silently, and then under false color of a non-existent attorney-client privilege.

Christopher Bates Stamp No. 721 includes August 27 communications between Terry Krause, Mike Smith, and Katherine Mcalpine *concerning agreements, policies, procedures, or understandings related to the acquisition, use, or operation of stingray technology.*

Christopher Bates Stamp No. 723-4, includes August 27

communications between Terry Krause, Mike Smith, and Katherine Mcalpine *concerning agreements, policies, procedures, or understandings related to the acquisition, use, or operation of stingray technology.*

Christopher Bates Stamp No. 725, includes August 27 communications between Terry Krause, Mike Smith, and Katherine Mcalpine *concerning agreements, policies, procedures, or understandings related to the acquisition, use, or operation of stingray technology.*

Christopher Bates Stamp No. 727 includes August 27 communications between Terry Krause, Mike Smith, and Katherine Mcalpine *concerning agreements, policies, procedures, or understandings related to the acquisition, use, or operation of stingray technology.*

Christopher Bates Stamp No.728 includes August 27 communications between Terry Krause, Mike Smith, and Katherine Mcalpine *concerning agreements, policies, procedures,or understandings related to the acquisition, use, or operation of stingray technology*

All of these records bear an extremely close identity with many of the 14 records of this very same date between the very same individuals and concerning the very same subject matter that the Court ordered disclosed as responsive to West's August 28 request. (CP 628-632)

Obviously, no substantial evidence or reasonable inference therefrom could possibly support the court's conclusion that these “Christopher” records are in any way distinguishable from the 14

“attorney-client” records that the court ordered were improperly withheld by the city.

Appellate review of Public Records Act cases is de novo where the trial court decision is based on affidavits. *O’Connor v. Dep’t of Soc. & Health Servs.*, 143 Wn.2d 895, 904, 25 P.3d 426 (2001).

However, by either the de novo or substantial evidence standard, the trial court erred in finding that the “Christopher records were not responsive to West's request and were not (and are not still being) withheld from plaintiff in violation of the PRA.

2. The Court erred in finding, pursuant to an erroneous “reasonable interpretation” standard, that PRA officer Mike Smith conducted an adequate search for “*records concerning any agreements, policies, **procedures**, or understandings related to the acquisition, use, or operation of stingray technology*” when he deliberately limited his search to exclude *his own emails from one day before the request* bearing the caption “CELL PHONE PROCEDURES” and over 70 pages of other easily available and undeniably responsive records as “not pertinent” and when it was painfully obvious that no adequate search had ever been conducted for responsive records.....

The requirements for establishing that an agency has conducted a reasonable search were clearly established in *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011)

To establish that a reasonable search has been conducted, an agency must “establish that all places likely to contain responsive materials were searched.” *Neighborhood Alliance*, supra at 721. The

standard of reasonableness "requires a search reasonably calculated to uncover the sought materials." *Miller v. US. Dep't ofState*, 779 F.2d 1378, 1384-85 (8th Cir., 1986)

It is clear from the transcript of May 24 that city did not "establish that all places likely to contain responsive materials were searched" On the contrary, the city clearly established that it deliberately refused to search the most available and basic places likely to contain records responsive to the actual language of the records request, and attempted to conflate the requirement of an objectively reasonable search with its own concept of a subjective "reasonable" redefinition of the clear language of the request deliberately designed to exclude broad classes of locatiions where responsive records could reasonably be presumed to exist, such asv Mr. Smith's own communications concerning cell phone procedures from just one (1) day prior to the request.

The Court erred in failing to employ the objective standards of *Zink and Neighborhood Alliance* and instead applying a subjective and amorphous "reasonable interpretation" standard to justify evasion of the strict duty imposed upon agencies to comply with the Public Records Act, when it was evident that Mr. Smith, "when he helped other people gather their documents, he told them "Limit it to acquisition, use, operation" And they did." (See counsel Elofson, speaking on page 42, lines 2-4 of the Transcript of May 24, 2017.

As the Superior Court stated to counsel, in adopting this novel and completely unprecedented subjective and amorphous standard...

“So you say the standard is reasonable. They have to do (sic) reasonable interpretation.” See Transcript of May 24, Page 40, line 13- page 41 line 24

This was error in that the Supreme Court in *Hearst*, Division III in *Amren V. Kalama*, and *Zink v. City of Mesa*, and, more recently, the Pierce County Superior Court in *Banks, et al v. City of Tacoma* have all concurred that this amorphous type of subjective “reasonable interpretation” standard employed by the Court in this present case to justify the city's intentional mis-interpretation of the plain language of West's PRA request is completely incompatible with the statutory requirement that public agencies strictly comply with the PRA.

However,...the PDA requires strict compliance. *See Hearst Corp. (v. Hopp)*, 90 Wn.2d at 130. The City's good faith or reasonableness does not determine whether it complied with the PDA... *Id.* at 131-32. Good faith is only relevant to assessing the *amount* of damages to be awarded for violations of the PDA— *Amren (v. Kalama)*, 131 Wn.2d at 37-38. Similarly, the reasonableness of the City's actions does not excuse noncompliance with the PDA. *Id.* at 37. As our Supreme Court observed in *Amren*, "to require unreasonable conduct as the standard for award of penalties would be inconsistent with the strong policy of the Act to discourage improper denial of access to public records." *Id.* at 37 n.10.

Similarly, the recent Opinion and Order of the Honorable Pierce County Superior Court Judge Whitener of June 25, 2018 involving, by

coincidence, a PRA case brought by members of the ACLU in regard to Stingray related records held by the City of Tacoma,

On Page 2, line 17 through page 4, line 9 the Court soundly rejected the City's arguments, closely paralleling those of the city in this case, that its noncompliance was a result of “overlooking” “random” documents or a “misunderstanding of the plaintiff's request”.

The Superior Court concludes, on Page 4, line 7-9 that:

To adopt the city's interpretation of the PRA would defeat the broad mandate of the PRA to allow access to public records not covered by an exemption.

This June 25, 2018 ruling is relevant to the nearly identical and spurious defense raised by the city in this present case, as well as the strict standard that should apply to an agency's re-definition of a request to exclude responsive records in accord with the manifest intent of the people in enacting the PRA.

"The primary purpose of the PRA is to provide broad access to public records to ensure government accountability." *Livingston v. Cedeno*. 164 Wn.2d 46,52, 186 P.3d 1055 (2008). The intent section of the PRA clearly states that the people:

“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.” LAWS OF 1992, ch. 139, § 2 (codified at RCW 42.56.030).

In judicial review of agency action under the PRA, the burden is

on the agency to show a withheld record falls within an exemption, to identify the document withheld and to explain how the specific exemption applies. See *Sanders v. State*, 169 Wn.2d 827, 845- 46, 240 P.3d 120 (2010).

The City did not meet this burden as it failed to identify known responsive records. In addition, the City violated the PRA by failing to conduct a reasonable search to discover the records it was aware of the existence of to begin with or which would have been uncovered in even the most superficial reasonable search.

The Court erred in in issuing the Orders of June 23 and October 13 2017, when it failed to find a violation of the PRA in the face of clear, readily apparent and palpable silent withholding of responsive records by the City of Tacoma.

Even if the city had not disclosed the 74 pages of emails, (in December of 2015, well after West had filed a lawsuit), there is no credible argument that the request for “*records concerning any agreements, policies, procedures, or understandings related to the acquisition, use, or operation of stingray technology*” failed to encompass this additional group of records silently withheld by the City in this case.

As common sense and the City's belated disclosures in 2015 underscore, there were known responsive records that should have been produced, or at the very least identified, in response to West's broad

request for “*records concerning any agreements, policies, **procedures**, or understandings related to the acquisition, use, or operation of stingray technology*”.

“*Record*” is a broad term defined in RCW 42.56.010 to include "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics...

Similarly, the other terms in the request---*concerning any agreements, policies, procedures, or understandings related to the acquisition, use, or operation of stingray technology*---were broad terms clearly encompassing the discussion of stingray technology by Mr. Smith and other city officials on August 27, 2015, which expressly concerned *agreements, policies, procedures, or understandings related to the acquisition, use, or operation of stingray technology*.

It is beyond reasonable dispute that the “Christopher” records and the 74 pages of withheld emails were known or readily discoverable responsive records that fell within the broad scope of the term records, and the broad terms of West's request.

The City completely failed to make any objective reasonable search argument to justify their refusal to identify or produce these records, but instead relied upon clear statements from Mike Smith that he

deliberately narrowed the scope of the request to exclude his own and other officials' responsive communications which he cannot reasonably have failed to know about or not have discovered in even the most superficial objectively reasonable search for responsive records, and it is evident that responsive records were deliberately concealed in a classic case of deliberate and silent withholding.

When an agency withholds or redacts records, its response "shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." RCW 42.56.210(3); see PAWS II, 125 Wn.2d at 270. The purpose of the requirement is to inform the requester why the documents are being withheld and provide for meaningful judicial review of agency action. See PAWS 11, 125 Wn.2d at 270; Sanders v. State, 169 Wn.2d 827, 846, 240 P.3d 120 (2010).

An agency may not "silently withhold" a public record "because it gives requestors the misleading impression that all documents relevant to the request have been disclosed." See Zink: II, 162 Wn. App. at 71. "The agency's failure to properly respond is treated as a denial of records." Soter v. Cowles Pub'g Co., 162 Wn.2d 716, 750, 174 P. . 2d 60 (2007).

Here, the City never argued that the withheld records were located elsewhere and could not have been located by an adequate search. Instead the City argues as it did in Banks that it should be held to an improperly lax standard so deferential as to eviscerate the intent of the PRA.

As the Superior Court recently ruled in *Banks*, to adopt the city's interpretation of the PRA would defeat the broad mandate of the PRA to allow **access** to public records⁵ not covered by an exemption

This silent withholding violated the Public Records Act for, as the Court explained in *PAWS*...

Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. *See PAWS v. UW*, 125 Wn.2d 243 at 270, (1994), citing *Fisons*, 122 Wn.2d at 350-55.

Just as the Supreme Court noted in *PAWS*, the silent withholding of literally hundreds of pages of critical stingray related records by the City of Tacoma in this case created the misleading impression that all documents relevant to plaintiff West's request had been disclosed. The city cannot fairly be permitted to evade the provisions of clearly established law by flaunting the fundamental policy of disclosure in the PRA and committing a textbook example of silent withholding of records.

The Superior Court's failure to address the City's manifest silent

⁵ RCW 42.56.010(4)

withholding in this case justifies an order of remand from this Court

There is no colorable claim by the city that it conducted a reasonable search in order to fulfill the August 28 request, or for that matter that any search whatsoever was performed for the records actually requested, as it is undisputed that the City deliberately restricted the scope of West's request in order to conceal documents it wished to have suppressed. This violated the established duty of an agency in responding to a PRA request in that, as the Attorney General's Model Rules provide...

An agency must conduct an **objectively reasonable** search for responsive records. A requestor is not required to "ferret out" records on his or her own. WAC 44-14-04003 (9), Citing to *Daines v. Spokane County*, 111 Wn. App. 342, 349, 44 P.3d 909 (2002) ("an applicant need not exhaust his or her own ingenuity to 'ferret out' records through some combination of 'intuition and diligent research'").

In addition to the established requirement of strict compliance with the terms of a request and an **objectively reasonable** search for the actual records requested, the manifest and clearly expressed intent of the Public Records Act clearly establishes that agencies must rely *solely on statutory exemptions* for withholding records *and cannot rely upon ad hoc unilateral determinations of "relevance" or "pertinence"* such as those claimed by the City of Tacoma⁶ as the basis for withholding known

⁶ As the Court ruled in *Banks*...The PRA establishes a **positive** duty to disclose public records unless they fall within specific exemptions...the PRA does not require the agency to analyze the reasons for the request or to determine the relevance of records requested...it is not for the city to analyze its relevance.

responsive records in this case...

The intent of this legislation is to make clear that: (1) Absent statutory provisions to the contrary, *agencies possessing records should* in responding to requests for disclosure *not make any distinctions in releasing or not releasing records* based upon the identity of the person or agency which requested the records, and (2) *agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records*. Laws of 1987, ch. 403, § 1, at 1546; (emphasis added)

Based upon the express admissions of city PRA officer Mike Smith that he unilaterally narrowed the scope of the request to exclude records and communication that failed to meet the impossibly high bar of his subjective “pertinence” and “relevance” criteria, the City violated the PRA in failing to conduct a reasonable search, instead deliberately limiting its search and relying upon an extra-statutory basis for withholding known or readily discoverable responsive records, as it did in Banks and the LNG threat assessment records cases.

In addition to the city having stipulated to purposefully restricting the scope of its response in order to conceal responsive records, the trial court erred in failing to find that the 74 pages of emails had been unlawfully withheld when they, too, like the “Christopher” records were virtually indistinguishable from the 14 records it did find were responsive, and no substantial evidence or reasonable inference therefrom supported a conclusion that these records were not responsive and would not have

been found by even the most superficial type of reasonable search.

The determination of the court in this present case flies in the face of the determinations of the Supreme Court in *Hearst*, Division III in *Amren V. Kalama*, and, more recently, the Pierce County Superior Court in *Banks, et al v. City of Tacoma* that an agency must strictly comply with the disclosure requirements of the PRA and is not free to subjectively redefine the terms of records requests to justify its refusal to search locations where responsive records are almost surely to exist.

As the Banks Court cogently recognized: To adopt the city's interpretation of the PRA would defeat the broad mandate of the PRA to allow access to public records not covered by an exemption.

For the foregoing reasons the rulings of the trial court in this matter concerning and justifying what can only be described as the city's deliberate policy of suppression and silent withholding of records should be reversed and this matter remanded for further proceedings in accord with the actual language of the PRA.

3. The Court erred in admitting and considering, in an unorthodox post-CR 56 hearing proceeding, statements of Lieutenant Travis that he could not recall⁷ what records existed on the date of West's request as relevant evidence sufficient to meet the city's burden of proof that responsive records were not in the city's possession.....

⁷ See CP , (Travis Declaration, Page 2), Containing the following three statements. (1.) "I do not recall at this point what records were in existence at that time or what records I provided to Mr. Smith...", (2.) "As far as the document concerning the Port Security Upgrade,...I am unsure if we had a copy of the (grant) application until the grant was awarded...", (Travis Declaration, Page 2, lines 12-14). (3.) "As far as the Harris quotation dated August 12, 2014,... I do not recall when I received a copy of this..." "I simply cannot recall",

This Court, in *West v. Gregoire*, drew a line in the sand denouncing piecemeal adjudication of issues in PRA hearings. CR 56 further provides that declarations must be made upon personal knowledge.

The court erred in the Orders of June 23 and October 13 by violating the sound precedent of *Gregoire* prohibiting piecemeal adjudication as well as the requirements of CR 56⁸ that affidavits be made on personal knowledge.

The City filed a declaration of detective Travis and made a number of completely unsupported representations as to the alleged lack of a single record concerning a city grant application for over a hundred thousand Dollars.

Far from establishing the existence or non-existence of documents, Lieutenant Travis represents that “I do not recall”, (*Travis Declaration* Page 2, lines 7-8) “I am unsure” (*Travis Declaration* Page 2, lines 12-13) and again “I do not recall”. (*Travis Declaration* Page 2, lines 21-22)

This type of defective or selective memory is an astonishing phenomenon to be exhibited by a law enforcement officer whose testimony is relied upon by the courts in the criminal arena to convict serious violators of the law.

⁸...Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein...

Further, it is a significant omission that the City did not obtain a declaration from Mr. Smith, who actually responded to the request. The City's refusal to provide testimony from the best source of evidence is troubling. Such conduct raises the presumption that such testimony, if presented, would be harmful to the City, under the doctrine of *omnia praesumuntur contra spoliatorum*. (see *Mcfarland v. Commercial Boiler Works*, 10 Wn.2d 81, (1941))

Even aside from the curious lack of substance in the City's response, and the absence of any competent evidence of what records were in existence, it is incomprehensible that the City would be able to or would even consider the procedure of applying for a grant for \$175,000 without a single page or electronic record of the transaction.

It is simply not credible to believe that the City was applied for and was awarded such a substantial grant without any single precursor, in the manner of Venus arising fully formed from the sea foam⁹. Does a lieutenant in the Tacoma Police Department have unilateral authority to bind the City in contractual agreements with the federal government without any record of approval or even of the proposed contract? This is incredulous.

What is far more credible is that the City has deliberately and silently withheld all of the many records it generated in the grant

⁹ See, e.g. Sandro Botticelli, *The Birth of Venus* (c. 1486). Tempera on canvas.

application and approval process. As the contact point for the grant Lieutenant Travis would have been a party to such communications, and would have corresponded with his superiors.

In addition, where is the record of approval by the Police Chief or City Council for this Grant application? The representation of such a complete lack of records on the part of the City is a clear indication of deliberate silent withholding, which should justify a maximum penalty for the entire period that the grant related records were, and continue to be withheld, and the grouping of such records as a separate group apart from the emails the Court has already ruled upon.

4. The Court erred in overbroadly expanding the scope of the State specific intelligence and investigative records exemption to justify withholding of official public records identifying the nature of the Stingray technology employed by the City of Tacoma appearing on purchase orders, estimates, and invoices.....

Now, finally, we come to the one substantive legal issue in this case: Does the specific intelligence clause of the effective law enforcement exemption in the Washington State PRA apply to the official public records regarding the Stingray purchases, the invoices, quotes, estimates and purchase orders? This presents a rather novel issue in Washington Law that has not yet been directly addressed.

West asserts that the Court erred in entering the Orders of October

13, 2018, November 15 2017, and March 30, 2018, in that the Specific Intelligence Information Exemption should be Narrowly Construed and does not properly encompass non-investigative records describing electronic equipment such as the the redacted sections of the purchase orders, invoices, and estimates at issue in this case.

Defendants appear to have relied upon the Specific Intelligence Information and Investigative Records Eemptions of RCW 42.56.240 to withhold the city's Stingray purchase orders, estimate and invoice related records.

Yet courts are required to narrowly construe these “essential to effective law enforcement” elements of the PRA in favor of disclosure. *Prison Legal News*, 154 Wn.2d at 640. Moreover, evidence of an alleged threat to effective law enforcement must be “truly persuasive” to the court. *Ameriquest Mort. CO. v. Office of the Attorney Gen.*, 177 Wn.2d 467, 492, 300 P.3d 799 (2013). This standard was not met by the city.

The PRA does not define “specific intelligence information,” in the context of RCW 42.56.240(1) or elsewhere. Therefore, courts are to give the words their “ordinary meaning.” *Sheehan*, 114 Wn. App. at 337 (citing *Washington State Coalition for the Homeless v. D.S.H.S.*, 133 Wn.2d 894, 905, 949 P.2d 1291 (1997)).

In this context, “intelligence” may be defined as “the gathering or distribution of information, especially secret information,” or

“information about an enemy” or “the evaluated conclusions drawn from such information.” Random House Unabridged Dictionary 990 (1993). . . . In addition, the exemption applies only to *specific* intelligence information, suggesting an even narrower interpretation. *Sheehan*, 114 Wn. App. at 337 (emphasis in original).

Additionally, RCW 42.56.240(1) does not authorize a balancing of the public’s right to disclosure with its interest in effective law enforcement, nor does any other portion of the act. *See Sheehan*, 114 Wn. App. At 341 (considering identical precursor exception under RCW 42.17.310(1)(d)). *Sheehan* rejected a claim by the King County Sheriff’s Office that a list of officer surnames could be withheld as “specific intelligence information” because disclosure might compromise law enforcement activities where some officers “might someday go undercover.” 114 Wn. App. at 338.

Salient to the analysis here, *Sheehan* also rejected the more general “position that [the] exemption applies to all information ‘reasonably related to criminal activity,’” because, the court found, “such an interpretation would ‘effectively exclude the law enforcement function of state and local governments from any public scrutiny.’” *Id.* (quoting *A.C.L.U. v. Deukmejian*, 32 Cal.3d 440, 186 Cal.Rptr. 235, 651 P.2d 822,827 (1982)).

Prison Legal News similarly limited the sweep of the exemption,

rejecting DOC's broad definition of "law enforcement" and holding DOC may not withhold staff names subject to investigations for medical misconduct. *Prison Legal News*, 154 Wn.2d at 644; *see also id.* At 640 (to "accept DOC's definition, investigations of all aspects of DOC's operations would be off limits from public disclosure"). *Sheehan* and *Prison Legal News* foreclose the City's position.

Here, the mere fact of what Stingray technology the TPD possessed cannot constitute "specific intelligence information" because this information reveals nothing about any "specific" TPD intelligence or investigation. The City and its' interested federal "Big Brother" posit that criminals might vary their malfeasance to avoid detection if TPD acknowledged possession of Stingray Technology. But, as *Sheehan* expressly holds, this (unpersuasive) concern is insufficient under RCW 42.56.240(1) because it does no more than pertain generally to "information reasonably related to criminal activity." 114 Wn. App. at 338.

Thus it can be seen that such technical commercial information is not properly subject to the narrow scope of this exemption under *Sheehan*, and as exemptions are required to be construed under the broad remedial provisions of the PRA.

the exemption applies only to *specific* intelligence information, suggesting an even narrower

interpretation. Other jurisdictions and courts have narrowly defined "intelligence information" (See Sheehan, *A C L U v. Deukmejian*, 32 Cal.3d 440, 651 P.2d 822, 827 (1982))

Sheehan did not rule on whether information about *how* a police agency carries out investigations qualifies as specific intelligence information. That issue was reached in *Fischer v. State, Department of Corrections*, 160 Wn. App. 722, 727-28, 254 P.3d 824 (2011) and *Gronquist v. State, Department of Corrections*, 177 Wn. App. 389, 400-01, 313 P.3d 416 (2013), *review denied*, 180 Wn.2d 1004 (2014), which held that prison video surveillance recordings were exempt from disclosure under RCW 42.56.240 (1) as intelligence information. *Haines-Marchel v. Department of Corrections*, 183 Wn. App. 655, 674, 334 P. 3d 99 (2014)

Significantly, both *Fischer* and *Gronquist* concerned actual video camera surveillance of convicted felons, and did not involve the purchase orders or invoices for the cameras, for which a different conclusion would almost certainly have been reached. Further, the legitimate scope of surveillance and secrecy is heightened in the context of the necessary administration of corrections facilities supervising and housing tried and convicted dyed-in-the-wool dangerous felonious malefactors in a pervasively regulated prison environment.

The defendants may assert, like the ill fated prince of Denmark¹⁰, that “all of the world's a prison in which there are many confines, wards, and dungeons, with Tacoma being one o' th' worst”, yet such an argument is less than “truly persuasive” in the way of justifying an expansion of the

¹⁰ See *The Tragedy of Hamlet, Prince of Denmark*, Act II, Scene 2

narrowly defined Specific Intelligence or Investigative Information Exemption.

This is even more the case, because the Stingray invoice, estimate, and purchase related records are Official Public Records under the definition of RCW 40.14.010, and Purchase orders and invoices are the type of records found by other courts to be of quintessentially compelling interest to and of undeniable impact upon the taxpaying public.

Official public records shall include all original vouchers, receipts, and other documents necessary to isolate and prove the validity of every transaction relating to the receipt, use, and disposition of all public property and public income from all sources whatsoever;.....RCW 40.14.010(1)

An illustrative 2015 case that considered similar principles in regard to Stingray Purchase Orders is New York Civil Liberties Union v. Erie County Sheriff's Office, 47 Misc.3d 1201(A), 2015 N.Y. Slip Op. 50353(U) In that case, a New York Court, in a case brought by the Civil Liberties Union against the Erie County Sheriff's Department properly found purchase orders similar to those being withheld in this case to be non-exempt, describing them as records "*of quintessentially compelling interest to and of undeniable impact upon the taxpaying public.*" In that case the Court ruled that...

The purchase orders should have been disclosed in their entirety, without redaction of the various words, phrases, and figures.[FN2] The purchase orders (and

more particularly the redacted contents) were not "compiled for law enforcement purposes" in the sense meant by the statute but, even if they were, their disclosure would not: "interfere with law enforcement investigations or judicial proceedings"; "identify a confidential source or disclose confidential information relating to a criminal investigation," meaning a particular ongoing one; or "reveal [non-routine] criminal investigative techniques or procedures," meaning techniques a knowledge of which would permit a miscreant to evade detection, frustrate a pending or threatened investigation, or construct a defense to impede a prosecution (see Public Officers Law § 87 [2] [e] [i], [iii], [iv]; ... Indeed, the instructions set forth in the purchase orders — in essence, "Pay this bill of this vendor for this item purchased by the Sheriff's Office at this price" — was and is of quintessentially compelling interest to and of undeniable impact upon the taxpaying public. *New York Civil Liberties Union v. Erie County Sheriff's Office*, 47 Misc.3d 1201(A), 2015 N.Y. Slip Op. 50353(U),

This Court should follow the examples set in *Sheehan*, *Martinez* and *Erie*, and determine that, at the very least, the Purchase Orders, Estimate and Invoice related records are non-exempt Official Public Records of quintessentially compelling interest to and of undeniable impact upon the taxpaying public.

From one viewpoint, this all comes down to an issue of sovereignty. The PRA clearly states, in 42.56.030, that:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, 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 people insist on remaining

informed so that they may maintain control over the instruments that they have created.

If the people have not yielded their sovereignty to the City of Tacoma to determine what is good for them to know, West questions how certain elements in the City may properly yield this very same right on their behalf secretly, without anyone knowing or actually making an informed decision via a contract with their Big Brother, the Department of Justice.

Now the city and its' "Big Brother" have argued, and appellant West does not dispute, that in the context of discovery in a criminal case or in the specific context of supervising convicted criminals in prison, the effective law enforcement exemption may be applied to suppress records of actual surveillance conducted for these specific purposes. Yet this principle does not logically or reasonably extend to the records at issue in this present case.

Significantly, Fischer Gronquist, and Haines-Marchell all involved supervision of dangerous convicted felons in a prison setting. The excerpt of the AG's Brief in Haines-Marchell demonstrates the context of such supervision of 100% criminal population with dangerous violent tendencies. The Criminal cases the United States has cited also underscore the limitations of discovery in a criminal case and the Courts ability to suppress information in this context.

But appellant West would suggest that in the very different context of what we would like to believe is the free world the ability of the State to mandate suppression of information as to what type of surveillance technology law enforcement employs to snoop on free citizens as a supposed adjunct to effective law enforcement poses a very different set of legal questions.

Unlike convicted felons or defendants in criminal proceedings, honest citizens in a democratic republic of sovereign states have constitutional and penumbral rights to be free from big brother watching over our every move and conducting intrusive searches in violation of the 4th, 5th and 14th Amendments, to say nothing of the penumbral personal privacy rights first recognized in *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678; 14 L. Ed. 2D 510, (1965) and the greater rights of Citizens of the State of Washington under Article 1 section 7¹¹.

There is also the additional consideration that “effective law enforcement” in a democratic republic is law enforcement in accord with the laws and constitution and the civil rights of its law abiding citizens. In Washington that would include Article 1 section 7, and 10, as well as the 1st, 4th, 5th and 14th Amendments.

No one would debate whether the NKVD or the Geheime Staatspolizei were effective in enforcing the laws of the Soviet Union or

¹¹ No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

the Third Reich. What a well ordered and law abiding culture we might have if our police and surveillance operatives could be as effective as those in Stalinist Russia or the Großdeutsches Reich!

But in America, the term “Effective Law Enforcement” does not mean that government is free to monitor the private communications of its citizens or lock them in the Gulag for decades for “crimes” like telling anecdotes about the supreme commanders' moustache¹².

There is also a very well developed line of precedent that universally condemns state mandated suppression of information as unconstitutional prior restraint of first amendment liberties.

The NDA and the policy of secrecy it fostered undeniably had many aspects of an unconstitutional prior restraint. This agreement by its intent and effect allowed judges to be misled into authorizing overbroad and intrusive searches of a scope that is still to this day largely unknown. West simply does not comprehend how this type of suppression of basic due process can be reconciled with effective law enforcement in a free society under our Constitution and laws.

As our Supreme Court recognized in *Adams v. Hinkle*, 51 Wn.2d 763, 322 P.2d 844, (1958):

Freedoms of speech, press, and religion are entitled to a preferred constitutional position because they are of the very essence of a scheme of ordered liberty.....Any interference with them is not only an abuse but an obstacle

¹² See *Humor behind the Iron Curtain*, 1962, Mishka Kukin, (AKA Simon Wiesenthal)

to the correction of other abuses.

This is exactly what appears, from the newly disclosed records, to have been the result of the NDA in this case. The mandated interference with the dissemination of information of the NDA resulted in a circumstance when even judges and those enforcing the law had and have no idea what type of searches are being conducted. Even at the hearings after the disclosure of the NDA there appears still to be some secrecy as to what the capacities of the city's technology is and what types of searches the city continues to conduct with its unknown technological capabilities.

Secrecy in the administration of justice suchg as that practiced by the TPD in its use of its (still undisclosed) Stingray technolgy is fundamentally incompatible with effective administration of law under Article 1, section 7 in our democratic republic, just as the extension of the specific intelligence or investigative exemption to veil official public records would be incompatible with the PRA.

As to the national security concerns, West believes the National government protests too much. We are not privy to the information they seek to hide from the public, but all of this technology is subject to published patents. Any decent hacker with 1500 dollars can make his own emulator with parts from an electronic supply website.

Two States that have considered this issue in the context of public records laws similar to that we have in Washington, Illinois and New York

State, and ended up ordering disclosure of invoices and purchase orders virtually identical to the ones at issue in this case. These are good examples for this court to follow.

As one of our founding fathers observed...

"Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."

This pretty much sums up the argument as to the concealment of the purchase orders, estimates and invoices in this case.

5. The Court erred and acted in excess of the reasonable scope of judicial discretion in making a manifestly improper penalty determination prior to reviewing or requiring disclosure of the actual records that it ruled were unlawfully withheld upon untenable grounds and reasons and by failing to consider undisputed facts and circumstances in a manifestly unreasonable manner based.....

While trial courts have broad discretion under the PRA, in the present case the court's refusal to actually review or require timely disclosure of even the subset of records it ruled had been improperly withheld or make any attempt to calculate the correct number of penalty days, in combination with its refusal to consider the stare decisis effect of the previous finding of bad faith withholding, or the significant nature of the information withheld, demonstrates that the court acted in a manner that no reasonable person would have.

The Court further erred in failing to even attempt to set a penalty

sufficient to deter the city from continuing to unlawfully withhold records of its use of the stingray technology from other requestors.

Under these circumstances the court failed to exercise its discretion within the limits of such discretion, and completely failed to apply the yousoufian factors in the manner they were designed to be employed.

The PRA mandates an award of “all costs, including reasonable attorney fees” to a person who prevails against an agency in an action in the courts seeking the right to inspect or copy a public record or to receive a response to a public record request within a reasonable amount of time. RCW 42.56.550(4).

In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record. *Id.* (emphasis added). The appellate courts review a trial court’s award of penalties under the PRA for an abuse of discretion. *Bricker v. Dep’t of Labor & Indus.*, 164 Wn. App. 16, 21, 262 P.3d 121 (2011).

An abuse of discretion occurs when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Graves v. Emp’t Sec. Dep’t*, 144 Wn. App. 302, 309, 182 P.3d 1004 (2008), or "upon a ground, or to an extent, clearly untenable or manifestly unreasonable." *Friedlander v. Friedlander*, [80 Wn.2d 293](#), 298, 494 P.2d

208 (1972)

While this is a deferential standard, the circumstances of this present case as such as to place it within the very small bounds of the minority of occasions where a court has exceeded the bounds of its discretion by failing to

Our Supreme Court has stated that the PRA penalty “is intended to ‘discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute.’” *Yousoufian v. Office of King County Exec.*, 152 Wn.2d 421, 429-30, 98 P.3d 463 (2004) (*Yousoufian I*) (alteration in original) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978)), quoted in *Yousoufian III*, 168 Wn.2d at 461. The PRA’s goals and procedures, as we often repeat, serve as a “strongly worded mandate for broad disclosure of public records.” *Hoppe*, 90 Wn.2d at 127.

To accomplish the PRA’s purpose, the court said, “the penalty must be an adequate incentive to induce future compliance.” *Yousoufian III*, 168 Wn.2d at 463.

In the present case the court erred in failing to even apply the factors to any records actually before it, and manifestly erred in failing to consider or apply the penalty analysis in a manner the would reasonably deter the city from further violations, said further violations being demonstrated by the city's continuing conduct in *Banks*.

The 16-factor process adopted in *Yousoufian 2010* is only meant to provide a general framework for setting penalties and should not be applied in a rigid manner so as they do not “infringe upon the considerable discretion of trial courts to determine PRA penalties.”

Yet even under this framework and a deferential standard of review, the court in this present case erred in failing to conduct an adequate penalty analysis based upon examination of the actual records that had been improperly withheld and the facts of their withholding in accord with accepted notions of due exercise of judicial discretion, which requires decision making founded upon principle and reason. See *Cogle v. Snow*, 56 Wn. App. 49 at 504, 784 P.2d 554, (1990).

For the foregoing reasons, the Court's penalty determination should be overturned and amended.

6. The Court erred and acted in excess of the reasonable scope of judicial discretion in failing to set an appropriate penalty for the actual number of days that the city unlawfully withheld records in light of the City's silent withholding, its' wrongful claim of exemption, and the stare decisis effect of a prior ruling in the case.....

Due to the manner in which the Court imposed a penalty prior to ruling on what records were actually withheld, (see Transcript of October 13) upon incorrect legal standards and in deliberate disregard of the stare decisis and convincing effect of the previous ruling by the Honorable Judge Cuthbertson, and its' unorthodox ruling on records not before it for

in camera review, which records were still, as of October 13, being withheld unlawfully by the City, (See Plaintiff's Motion for Reconsideration) it was impossible for the Court to rule in an appropriate and informed manner as to appropriate penalty, or even know how many days the disputed records had been and continued to be withheld.

Determining the penalty in a PRA case has been described as a two-step process. First, the court determines the number of days the person was denied access. Second, it determines the appropriate per day penalty. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 438, 98 P.3d 463 (2004).

As the supreme Court ruled in *Koenig*, a trial court lacks discretion under former RCW 42.17.340(4) to reduce the number of days for which to award the daily penalty. *Koenig v. Des Moines*, 142 P.3d 162 at 169-70 (2006)

Similarly, the trial court must assess a mandatory monetary penalty against the County for each day that it withheld the SSOSA evaluation. RCW 42.56.550(4); see *Yousoufian v. King County Executive*, 152 Wash.2d 421, 437, 98 P.3d 463 (2004). We lack discretion to limit this penalty even when the case at hand raises “compelling, but conflicting, public policy considerations” that required our adjudication. *Koenig v. Thurston County*, 155 Wn.App. 398 (2010)

In *Yousoufian II*, the plaintiff delayed suing for 647 days but ultimately prevailed on the issue of production. 152 Wn.2d at 426-28. The trial court held that 120 days was the longest the plaintiff should

reasonably have delayed, and so reduced the number of days for purposes of calculating the penalty by 527 days (647 minus 120). *Id.* The Court of Appeals upheld the calculation under an abuse of discretion standard. *Id.* at 428-29. The Supreme Court reversed, holding that the standard of review was *de novo*. *Id.* at 436-38. It read the PRA to unambiguously provide that the penalty must be for each day the record was wrongfully withheld. *Id.*

In this present case, since the bulk of the records ruled upon by the Court to have been unlawfully withheld were not disclosed, or even reviewed prior to the trial court's erroneous penalty day determination, which improperly omitted an additional 659 days that the Court failed to recognize in its faulty *per diem* calculation, an appropriate penalty should have been levied not just for the silent withholding for 383 days, but for the additional bad faith withholding for the additional 659 days the records were actually and subsequently withheld under a false claim of Attorney-Client privilege that the City failed to even attempt to argue convincingly. The Court's failure to calculate the days correctly was manifest error of the most evident variety, which should be reversed and corrected by this Court.

Significantly, the egregious nature of the very type of bad faith withholding of records under false claim of Attorney-Client privilege (as perpetrated by the City of Tacoma in this case) was specifically addressed

in Hangartner:

...should an agency prepare a document for a purpose other than communicating with its attorney, and then claim that the document is protected by the attorney-client privilege, the requesting party might well claim that the agency has acted in bad faith. A finding of bad faith could cost the agency dearly since a requesting party is "entitled" to an award of between \$5 and \$100 for each day that it was wrongfully denied " 'the right to inspect or copy [the requested] public record.' " *Amren v. City of Kalama*, 131 Wn.2d 25, 35, 37, 929 P.2d 389 (1997) (quoting RCW 42.17.340 (4)). When deciding where, between \$(0) and \$100 per day, the appropriate per day award should rest, the court must consider whether the agency claimed an exemption in bad faith. *Id.* At 38. *Hangartner v. City of Seattle*, 151 Wn.2d 439, (2004).

Since these now belatedly disclosed records demonstrate the FBI dictating to the City of Tacoma what it could disclose about the Stingray equipment and controlling the content of these disclosures, these newly disclosed records throw doubt on the veracity of the City's representations as to the reason for their "error" in withholding records as well as the capabilities of their Stingray equipment, and provide an additional valid basis for a finding of bad faith and a higher per diem penalty *that should be issued based upon separate records for the actual number of days the records were withheld.*

In addition, now that these "New" records have been disclosed, it is apparent that 2 of the other 4 categories of records West argued were unlawfully withheld were so similar to those found to be disclosable as to have had to be responsive to the same request that must now be seen to

reasonably encompass and require disclosure of these two other groups of nearly identical responsive records in addition to the the “New” attorney-client records.

This Court should issue an Order of Remand for additional rulings that all of the responsive records described in the arguments above were deliberately and unlawfully withheld and for a new and correct penalty determination based upon correct legal standards and the actual number of days each of the records were or are being withheld, so that an appropriate final penalty might be set upon full consideration of all relevant factors and circumstances.

One outstanding relevant circumstance to which the Court applied an erroneous standard of law to and abused its discretion in failing to consider was the stare decisis effect of the previous ruling in this case of the Honorable Judge Cuthbertson that the city had acted in such extreme bad faith in withholding the redacted portions of the NDA that a maximum per diem penalty was justified. (CP 537-538)

This ruling, which the city does not contest and has not appealed, should have been seen to have stare decisis effect, or at the very least been factored into the Court's subsequent penalty calculations in some meaningful way. The failure of the Court to do so wa an abuse of discretion and an application of an incorrect legal standard.

According to the Supreme Court, the Doctrine of Stare Decisis...

(P)romotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. See *Kimble v. Marvel Entertainment, LLC*, 576 U.S. ___, 135 S. Ct. 2401 (2015)

By failing to duly consider the reasonable and legal effects of the sound prior ruling in the case, (at CP 537-538), and by failing to correctly calculate the number of penalty days, or conduct an actual penalty analysis in accord with the Yousoufian guidelines, the trial court failed to promote the evenhanded, predictable, and consistent development of legal principles, foster reliance on judicial decisions, and contribute to the actual and perceived integrity of the judicial process.

It also committed manifest and reversible errors of fact and law and acted in disregard for facts and circumstance in a manner susceptible to reversal even under the deferential terms of the abuse of discretion standard.

For the following reasons, the rulings of the Superior Court in this case, as described above, should be reversed, and this case remanded for further proceedings.

7. The Court erred in making mixed findings of law and fact that were erroneous and misleading, based upon incorrect legal standards, and unsupported by substantial evidence or reasonable inference therefrom.....

The Court also erred in the Order of October 13 in attempting to justify, *ex post facto*, its previously made decision by entering findings that were wholly defined by city counsel and which were erroneous and misleading, based upon manifestly wrong and/or incorrect legal standards, and unsupported by substantial evidence or reasonable inference therefrom.

While these findings are of mixed law and fact and subject to *de novo* review, in an abundance of caution, West takes exception to each one, setting them forth verbatim, and asserts that they were erroneous and misleading, based upon manifestly wrong and/or incorrect legal standards, and unsupported by substantial evidence or reasonable inference therefrom as described above and in the following particulars:

(1.) “The court finds that the City's overall response to West was reasonably prompt.” This finding was incorrect and erroneous as the records clearly demonstrates that the city silently withheld the very existence of 4 categories of records for over a year. This finding was made in error and in manifest disregard of the facts of the case..

(2.) “The court finds that the city conducted a reasonable search and that the City's failure to produce the emails was due to an error on the part of the City in interpreting the scope of West's request.” This finding was based upon a woefully incorrect legal standard and flies in the face of the city's own representations that, far from an inadvertent error, the city

through Mike Smith deliberately redefined the PRA request in a manner that justified suppression of responsive records, and that Mr. Smith deliberately refused to search communications and his own correspondence from a day prior to the request where responsive records could reasonably be expected to be found.

(3.) “The City has provided a reasonable explanation for that error.”

As explained at length above and in the argument in support of assignment of error No. 2 above, there was no “error” but rather a deliberate policy of refusal to conduct the type of reasonable search required under Neighborhood Alliance.

(4.) “The court does not find that the error was due to any bad faith on the part of the City.” Again, this finding is erroneous and based upon an incorrect legal standard which does not require bad faith for a substantial violation to be found. In any case, the city's continuing regular business pattern of deliberately refusing to conduct searches of all places records might reasonably be expected to exist based upon the actual language of records requests without artificially narrowing them to suppress disclosure is the archetype of bad faith evasion of the PRA, for as the court in Banks recognized:

(5.) “The court finds that the City has a thorough and responsive procedure for handling PRA requests and City personnel are provided substantial training and supervision.”

This finding was also in error as the repeated lack of adequate searches by city staff and the “I didn't look” and “I cannot recall” declarations of Mike Smith and Lieutenant Travis, respectively, palpably demonstrate that the training and supervision, such as it is, is woefully inadequate for their performance to even approach adequate standards of disclosure of public records in accord with the intent of the people in adopting the PRA.

(6.) “The City was helpful to Mr. West, such as when the City promptly converted the produced emails to a different format at Mr. West's request.”

This finding was also neous and misleading, and not in accord with any substantial factual basis, because the city's isolated island of “helpfullness” was vastly overshadowed by an interminable ocean of “unhelpful” evasion and delay in regard to the disclosures that actually mattered.

Thus it can readily be seen that the court's findings were belatedly made to justify, ex post facto, a prior and unreasonable decision to issue a de minmus penalty based upon an incorrect number of penalty days, in stubborn refusal to acknowledge the actual number of nearly identical records withheld, the dates of their withholding and disclosure, or even the actual basis for the city's withholding under pretextual mistakes that were not, in fact actual good faith mistakes, and under pretextual inapplicable spurious claims of privilege that were similarly advanced in

bad faith for the purposes of evasion and delay.

This type of ruling is the acme of reversible error.

CONCLUSION

In summary, it is readily apparent, as it was to the Superior Court in Banks, that the City of Tacoma deliberately narrowed the scope of West's request in order to justify evasion of disclosure of known or readily discoverable responsive records in response to plaintiff's August 28, 2014 request; and that that the Purchase Orders, Estimates, and Invoice related records are beyond the narrow scope of the claimed investigative records exemption.

It is similarly apparent that the "Christopher" bates stamped records and the 74 pages of other responsive emails were improperly suppressed and concealed by the city when they were in large part nearly identical to the 14 records the court ruled were improperly suppressed and concealed. and that the City had no lawful basis to continue to withhold records or attempt to assert that its conduct in withholding these many groups of records was excusable or done in good faith.

As for the Grant Application and Security Upgrade that Lieutenant Travis is on record having testified his ignorance about in tripartite and duly certified fashion, in improper post CR 56 hearing submissions that shoul properly have been stricken, this Court should find, as the Banks

Court did in regard to similar records and similar representations, that the City of Tacoma has not carried its burden of justifying nondisclosure.

As the recent ruling in Banks demonstrates, far from being deterred by the court's penalty in this case, the city continued to conduct its regular business practice of perpetrating a continuing pattern of deliberate evasion of the sunshine laws.

Significantly, the Banks Court held that:

To adopt the city's interpretation of the PRA would defeat the broad mandate of the PRA to allow access to public records not covered by an exemption.

RELIEF REQUESTED

West respectfully requests that an Order of Remand issue compelling the Trial Court, to enter judgment for the plaintiff that the city unlawfully withheld the redacted portions of the Harris invoices, quotations, estimates, purchase orders, and shipping orders, and ordering their immediate disclosure, and in addition,

That the Order of Remand (in accord with the July 25, 2018 ruling of the Superior Court in Banks v. City of Tacoma), require the city be found to have unlawfully withheld 4 further groups of responsive records in the following particulars:

(1.) That the responsive Harris Corporation “Quotation” and Port

Security Grant upgrade were unlawfully withheld by the city in violation of the PRA (CP 577-580), which records have never been provided in unredacted form.

(2.) That the responsive records silently withheld from West but disclosed to third party ACLU plaintiffs under “Christopher” Bates Stamp Nos. 721, 723-4, 725, 727 and 728 (CP 518-527), which are still being withheld to this day, were, and continue to be unlawfully withheld by the city in violation of the PRA

(3.) That the 74 pages of Emails responsive to West's request that were silently withheld, (CP 247-361), and disclosed on December 22 of 2015 after the city's stingray secrecy policy reversal were unlawfully withheld by the city in violation of the PRA.

(4.) That the 14 silently withheld records that the City withheld from West's 2014 request but which, subsequent to his filing suit, were identified as “Attorney-client” privileged in the City's response to his 2016 request, which records were not disclosed until October 20, 2018, **after having been withheld for days**, were unlawfully withheld by the city in violation of the PRA for days.

Finally, West respectfully requests that the Order of Remand direct the trial court to re-apply the Yousoufian factors to the various groups of records the city unlawfully withheld, in consideration of the finding of bad faith made by Honorable Judge Cuthbertson and the cogent reasoning of

the Honorable Judge Whitener in the June 25 2018 ruling in Banks v, Tacoma, to set a penalty in conformity with the intent of the people in adopting the PRA.

For the foregoing reasons, appellant respectfully requests that this Court reverse the Trial Court's ruling failing to disclose records in every respect and remand this matter back to the Superior Court with instructions to find that the City engaged in multiple violations of the PRA, and to issue such further relief in the form of costs and penalties as may be appropriate.

Respectfully submitted this 5th day of November, 2017.

s/Arthur West
ARTHUR WEST

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2017, I caused to be served a true and correct copy of the preceding document on the party listed below at their addresses of record via Email:

Margaret Elofson, Attorney for Respondent City of Tacoma, at

@ci.tacoma.wa.us

s/Arthur West
ARTHUR WEST

ARTHUR WEST - FILING PRO SE

November 05, 2018 - 3:31 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51487-7
Appellate Court Case Title: Arthur West, Appellant v. City of Tacoma, Respondent
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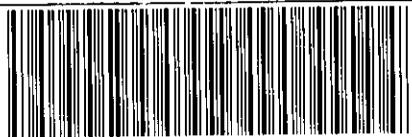
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16-2-05416-7 51536789 CTD 06-26-18

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

ARTHUR C. BANKS, an individual, TONEY MONTGOMERY, an individual, WHITNEY BRADY an individual

Case No. 16-2-05416-7

Plaintiff(s)

COURT DECISION

vs.

CITY OF TACOMA, a municipal corporation
Defendant(s)

THIS MATTER having come on regularly before the above-entitled Court on April 13, 2018 Plaintiffs' Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment and on May 17, 2018 for Jury Trial. The Court heard oral arguments and reviewed the following pleadings submitted¹:

Defendant's Motion for Summary Judgment; Affidavit of Margaret Elofson in support of Defendant's Motion for Summary Judgment; Plaintiffs' Motion for Partial Summary Judgment; Declaration of John Midgley in support of Plaintiffs' Motion for Partial Summary Judgment; Plaintiffs' Opposition to Defendant's Motion for Summary Judgment; Motion to allow filing of two Exhibits under Seal; Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment; Affidavit of Margaret Elofson in support of Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment; Affidavit of Michael Smith in support of Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment Affidavit of Detective Christopher Shipp; Affidavit of Captain Fred Scruggs in support of Defendant's Motion for Summary Judgment; Supplemental Statement of Interest of the United States; Expert Report Exhibit 6 & 7;

¹ Pleadings as identified in the Court's LINX system

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Affidavit of Benjamin Inman; Supplemental Declaration of Marcia K. Sowles; Plaintiffs' Reply in support of Motion for Partial Summary Judgment; Affidavit of Catherine Journey in support of Defendant's Reply Re: Defendant's Motion for Summary Judgment; Affidavit of Margaret Elofson in support of Defendant's Reply Re: Defendant's Motion for Summary Judgment; Defendant's Reply regarding Defendant's Motion for Summary Judgment; Affidavit of Michael Smith in support of Defendant's Reply Re Defendant's Motion for Summary Judgment; Declaration of Terry Krause in support of Defendant's Reply on Defendant's Motion for Summary Judgment; Plaintiffs' Brief in support of Proposed Order on Cross Motions for Summary Judgment and for Penalties, Fees, and Costs; Defendant's Response to Plaintiff request for Penalties and Fees; Affidavit of David Nash-Mendez in support of Defendant's Response to Plaintiff Motion for Penalties and Fees; Affidavit of Lisa Anderson in support of Defendant's Response to Plaintiff Motion for Penalties and Fees; Affidavit of Margaret Elofson in support of Defendant's Response to Plaintiff Motion for Penalties and Fees; Supplemental Affidavit of Detective Christopher Shipp; Plaintiffs' Reply Brief in support of Proposed Order on Cross Motions for Summary Judgment and for Penalties, Fees, and Costs; Declaration of Captain Charles P. Taylor in support of Defendant's Response to Plaintiff Motion for Fees and Penalties and the Supplemental affidavit of Margaret Elofson in support of Defendant's Response to Plaintiff Motion for Penalties and Fees.

DECISION

Strict enforcement of the Public Records Act (PRA) discourages improper denial of access to public records and Washington law is clear that a court shall award attorney fees to a person who prevails against an agency in an action seeking the disclosure of public records.² Records are never exempt from disclosure, only production so an adequate search is required in order to properly disclose responsive documents.³ The PRA "treats a failure to properly *respond* as a denial."⁴ The burden of proof shall be *on the agency* to establish that refusal to permit

² *Amren v City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997); *American Civil Liberties Union of Washington v. Blaine School Dist. No. 503*, 786 Wn.App. 688, 937 P.2d 1176 (1997)

³ *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011), (citing) *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010)

⁴ *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 750, 174 P.3d 60 (2007)

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public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.⁵ PRA is a forceful reminder that agencies remain accountable to the people of the State.⁶

The basic policy of the PRA is prompt access to non-exempt public records and penalizing an agency failing to do so.⁷ Purpose of the PRA's penalty provision is to deter improper denials of access to public records.⁸ Penalty for violation of PRA (PRA) must be an adequate incentive to induce future compliance. When determining the amount of the penalty to be imposed on government agency that violated PRA, the existence or absence of an agency's bad faith is the principal factor which the trial court must consider, however, no showing of bad faith is necessary before a penalty is imposed on a government agency that violates the PRA⁹. Agency culpability, mitigating and/or aggravating is key.¹⁰

In the present case the City asserts that there is no evidence of bad faith and that mitigating factors weigh in favor of no penalty or a minimal penalty. The City describes its noncompliance with the PRA violations as “*overlooking several random documents*,” or as “*misunderstanding*” of the Plaintiff requests. For example, to prove its point the City states it did not see the Plaintiffs’ requests as seeking the “blank form that TPD personnel complete when obtaining a warrant for pen trap and trace or cell site simulator use” and that “the blank form does not reflect any actual use of the cell site simulator, so the City had no reason to interpret this request as seeking the blank form.” This assertion is not persuasive as the City found the requested documents, failed to produce the documents in its entirety as found, did not identify an exemption and did not seek clarification. Instead to justify its noncompliance the City asserts that it also “did not provide blank forms for invoices, blank templates for loan agreements, blank templates for grant applications, blank templates for emails, or any other of the many forms or templates used by the City in relation to the cell site simulator or to conduct other City business,”

⁵ RCW 42.56.080
⁶ *Faulkner v. Washington Dept. of Corrections*, 183 Wn.App. 93 332 P.3d 1136 (2014); *Yousoufian v. Office of King County Exec.* 168 Wn.2d 444, 229 P.3d 735 2010
⁷ *Yousoufian v. Office of King County Exec.*
⁸ *Id.*
⁹ *Id.*
¹⁰ *Id.*

1 in response to the public records requests. Under the PRA the City's failure to produce these
2 documents was deliberate and is treated as a denial.

3 The PRA establishes a *positive* duty to disclose public records unless they fall within
4 specific exemptions. This mandates that the City upon receiving a request for documents must
5 first do an adequate search and then must produce the documents requested if there is not an
6 exemption¹¹. The PRA does not require the City to *analyze the reasons* for why the document is
7 requested or to determine the relevance of the documents requested even if they are blank forms.
8 The blank form taken in context of the other forms may have meaning to the requestor and it is
9 not for the City to analyze its relevance. To adopt the City's interpretation of the PRA would
10 defeat the broad mandate of the PRA to allow *access* to public records¹² not covered by an
11 exemption.

12 Pertaining to Plaintiffs' request Exhibit 4, the City's argument is unreasonable as after
13 conducting its search and after seeking clarification from the Plaintiffs' prior attorney the City
14 then *decided that it was not producing* the entire 2015 spreadsheet with the pen trap and trace
15 entries "because production of the billing spreadsheet led to *misunderstandings in the past*." The
16 City failed to cite an exemption yet argues that it "believes that the billing spreadsheet accurately
17 provided what the plaintiffs requested." Therefore, the City violated the PRA and many
18 aggravating factors are present. **Plaintiffs are awarded \$13,440.00 (\$70 multiplied by 192
19 days¹³) for the denial of the right to inspect or copy Exhibit 4.**

20 As to Plaintiffs' request Exhibit 5, the City identified 37 prior requests and produced all
21 the documents provided to those 37 requesters. Exhibit 5 is an email the City described as

22 *"among the documents produced to prior requesters." Stating that "the*
23 *email has no retention value; it is a "for your information" email from the FBI*
24 *with an attachment that was irrelevant to the City." The City argues that "the*
25 *City is not required to retain such an email though if it is the City's possession at*
the time of a records request, the City must produce it. The City believes that it
had the email at the time of previous requests but that it had been deleted by the
time of these plaintiffs' request. Plaintiffs have not presented any evidence that
the City was in possession of the actual email, other than as one of many
documents contained in the production of documents to previous requesters. To
that extent, the City still had it in its possession. However, it is not reasonable to

¹¹ *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978)

¹² RCW 42.56.010(4)

¹³ The dates used by the Plaintiff were not disputed by the Defendant and will be deemed agreed.

ask the City to search every prior request for public records to locate documents that have since been deleted from employees' computers and no longer exist on employees' computers at the time a request is received. The City receives over 2,500 requests per year. A search of all previous PRA requests and responses, in addition to a search of currently existing documents on individual computers, is simply not possible. Under these circumstances, the City's not providing this email to these plaintiffs is understandable."

The City's failure to produce Exhibit 5 for inspection or copying was unreasonable as the document was provided to 37 prior requestors, therefore it should have been foreseeable that the document was not irrelevant to the public even though it may have been to the City. Failure to retain this document is indicative of a lack of proper training and/or supervision as absent an exemption strict compliance with the PRA is required. At a minimum this document should have been placed on the City's website for retention purposes. **The City violated the PRA and Plaintiffs are awarded \$9,600 (\$50 multiplied by 192 days) for the denial of the right to inspect or copy Exhibit 5.**

Pertaining to Plaintiffs' request Exhibits 6-9 and 15, several emails with the FBI concerning requests made by other entities and an invoice. The City asserts it non-disclosure agreement with the FBI required notification to the FBI when requests for records were received and that it received many requests for records about the cell site simulators. However, the City violation is for *not producing* the nonexempt documents requested under the PRA. The City concedes that it is "unable to say whether these documents still existed at the time the City responded to the Plaintiffs' request other than as part of production to previous requestors. ... It is unknown for certain whether the City simply missed a few emails or whether they no longer existed at the time of these plaintiffs' request." Similar to Exhibit 5, the City's failure to produce Exhibits 6-9 and 15 for inspection or copying was unreasonable as the documents were provided to other requestors, including the media (Muckrock, the Associated Press, and the Tacoma News Tribune). Therefore, it should have been foreseeable that was not irrelevant and failure to retain or locate these documents is indicative of a lack of proper training and/or supervision. At a minimum these documents should have been placed on the City's website. **The City violated the PRA and Plaintiffs are awarded respectively \$48,000 (\$50 multiplied by 192 days multiplied by 5) for the denial of the right to inspect or copy Exhibit 6-9 and 15.**

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Pertaining to Plaintiffs' request number 10, the City asserts that it understood this request was for "completed applications, not a blank template." Under the PRA it is the City's responsibility to clarify any misunderstanding regarding a PRA request¹⁴ and therefore this violation could easily have been remedied with a request for clarification from the Plaintiffs. Instead the City states that it "does not generally provide blank forms and it did not occur to the City that these plaintiffs wanted one." Similar, to the request for the "blank warrant form" discussed above, the City failed in responding to the PRA request. The City's response when reviewed in its totality in responding to these Plaintiffs PRA requests was not misguided or mistaken but appeared to be deliberate as the City decided what it will produce citing to no exemption. In addition, it is important to note that the documents if found are to be produced for "*inspection or copying*," therefore it is for the requestor to decide if he or she will pay for the produced documents and not for the City to decide the value in the requestor's request even if it is "blank forms." **The City violated the PRA and Plaintiffs are awarded respectively \$33,540 (\$60 multiplied by 559 days) for the denial of the right to inspect or copy Exhibit 10.**

Pertaining to Plaintiffs' request number 11-13, the City's failure to produce paper copies of the minutes of two Citizen Review Panel meetings and the agenda for one meeting. According to the City "*these documents were publicly available to the plaintiffs online at the time of their request and remain available to them online to this day. ... The documents are easily obtainable by any member of the public by doing a simple Google search. Alternatively, any person can visit the City's website and obtain these documents.*" This response by the City is the most troubling and runs afoul of the PRA. The PRA does require state and local agencies to 'make available for public inspection and copying all public records, unless the record falls within the specific exemptions of the PRA. Placing a document on the City's website does not alleviate the City of its responsibility to produce the requested documents or at a minimum the City is required to inform the requestor of where it has placed the requested documents. Additionally, the City's argument requiring any member of the public to do a google search is unpersuasive as documents found through a google internet search may have no level of authenticity as that obtained from the guardian of the record – the governmental agency – the City. Therefore, the Plaintiffs were denied the ability to inspect or copy these records. **The City violated the PRA**

¹⁴ RCW 42.56.080

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and Plaintiffs are awarded respectively \$77,760 (\$80 multiplied by 324 days multiplied by 3) for the denial of the right to inspect or copy Exhibit 11-13.

In the Present case assuming the City's assertions are true, it was the City's responsibility after doing an adequate search to produce the documents for the Plaintiffs. In this instance notification by the City of where the City had placed the requested documents so that it could be easily retrieved by the public would have complied with the PRA requirements. The City knowing where the documents requested could be found admits to having produced the same documents to other requestors but for 324 days failed to produce the documents to the Plaintiffs' *or notify* them of where the documents could be found violated the PRA. The purpose of the PRA's penalty provision is to deter improper denials of *access to* public records¹⁵. The penalty must be an adequate incentive to induce future compliance. Strict enforcement of this provision discourages improper denial of access to public records¹⁶ and a showing of bad faith is not required.

In this case, the City's responses were troubling in many regards. To support its position that that "*there was no public importance associated with these Plaintiffs' request*" and "*that there is no basis to assess a penalty,*" The City asserts

*"it is significant that although the plaintiffs' request related to an issue that was of interest to the public, the City had already responded to many, many requests about the cell site simulator when these plaintiffs made their request. In fact, the City had already responded to over 30 other requests. These plaintiffs did not seek any documents that had not already been provided to other requesters. All of the documents at issue had been provided to other requesters or had been posted online. In fact, the local newspaper had already retrieved and publicized almost all of the documents at issue. These plaintiffs' request came in after the press release had been issued and the emails did not reveal any further detail about the equipment's acquisition, use, or operation that had already been publicized by the newspaper and the City's voluntary press release. These plaintiffs' request merely piggy-backed on other requests and on a story, that had already been well-publicized. Thus, while the topic of cell site simulators may have been of interest to the public at one point, the documents at issue in this motion did not further that public interest in any way."*¹⁷

¹⁵ *Yousoufian II*, 152 Wn.2d at 429-30, 98 P.3d 463.
¹⁶ *Amren v. City of Kalama*, 31 Wn.2d 25, 929 P.2d 389 (1997)
¹⁷ Defendant's Response to Plaintiffs' Request for Penalties and Fees, Page 6 lines 10 to 19.

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1 The City's responses to the Plaintiffs PRA requests resulted in delayed responses, lack of
2 compliance with PRA procedural requirements, showed a lack of proper training and/or
3 supervision, negligence, and unreasonableness in any explanations given for noncompliance. The
4 penalty awarded in this case is an amount necessary to deter future misconduct when considering
5 the City's agency size and the facts of this case.

6 The Plaintiff's requests attorney fees and costs. Strict enforcement of fees and fines will
7 discourage improper denial of access to public records¹⁸. This rule promotes the PDA's broad
8 mandate for broad disclosure of public records.¹⁹ The act's declaration of policy states that it is to
9 be liberally construed to promote "full access to public records so as to assure continuing public
10 confidence [in] ... government processes, and so as to assure that the public interest will be fully
11 protected²⁰. Therefore, the prevailing party is entitled to a "reasonable" **attorneys' fees** award.²¹

12 In the present case the Plaintiffs were the prevailing party regarding Exhibits 4-13 and
13 15. Therefore utilizing the "lodestar" approach²², the requested Plaintiffs attorneys' fees are
14 adjusted²³ to be comparable with those awarded in the Pierce County geographic area for PDA
15 cases. Attorney fees are awarded as follows:

- 16 John Midgley 103.4 hours at \$450.00/hour, total \$46,530
- 17 Lisa Nowlin 86.6 hours at \$325.00/hour, total \$28,145
- 18 Jennifer Campbell 28.6 hours at \$400.00/hour, total \$11,440
- 19 James Edwards- 43.5 hours²⁴ \$260.00/hour, total \$11,310
- 20 Jamila Johnson- 35.6 hours \$350.00/hour, total \$12,460

21 **COURT ORDER**

22 The Defendant's Summary Judgment Motion is **GRANTED in PART** as to the
23 redactions of documents pertaining specifically to the cell site simulator documents.²⁵

24 The Plaintiff Motion for Summary Judgment is **GRANTED**

25 ¹⁸ *Progressive Animal Welfare Soc. v. University of Washington*, 114 Wn.2d 677, 790 P.2d 604 (1990)

¹⁹ *Id*

²⁰ *Id*

²¹ *Id*

²² *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983).

²³ John Midgley- \$450.00 hour; Lisa Nowlin- \$325.00 hour; Jennifer Campbell- \$400.00 hour; James Edwards- \$250.00 hour; Jamila Johnson- \$325.00 hour

²⁴ Adjustment made for pre-filing work

²⁵ RCW 42.56.240(1)

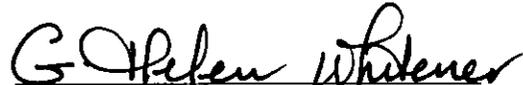
Pursuant to this Court's decision:

This Court **ORDERS** that Plaintiffs be awarded a Total of \$182,340.00 for violations of the PRA regarding Exhibits 4-13 and 15.

This Court **ORDERS** that Plaintiffs be awarded Attorney Fees in the amount of \$109,885.00.

This Court **ORDERS** that Plaintiffs be awarded Costs in the amount of \$5,645.04²⁶.

DATED this 25th day of June, 2018.


JUDGE G. HELEN WHITENER

²⁶ Adjustment made for deduction of 10/13/2014 charge totaling \$26.50

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ARTHUR WEST - FILING PRO SE

November 05, 2018 - 3:31 PM

Transmittal Information

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Appellate Court Case Number: 51487-7
Appellate Court Case Title: Arthur West, Appellant v. City of Tacoma, Respondent
Superior Court Case Number: 15-2-12683-6

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