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NO. 51487-7-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ARTHUR WEST

Appellant,

v.

CITY OF TACOMA,

Respondent.

RESPONDENT'S BRIEF

WILLIAM B. FOSBRE, City Attorney

MARGARET A. ELOFSON
WSB# 23038
Attorney for Respondent

Tacoma City Attorney's Office
747 Market Street, Suite 1120
Tacoma, Washington 98402
(253) 591-5885

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1. The trial court properly considered all of the records before it, and to the extent that additional emails were not considered, if that is error, it is harmless.

A. The 74 pages argued by the appellant had been properly provided to the trial court.

Mr. West complains that the trial court did not consider all of the individual emails that were responsive to his request and were not produced by the City. However, the trial court clearly indicated that the reason it did not review and consider these additional records is that these records were part of Mr. West's other lawsuit. In addition, Mr. West initially indicated that he was not going to attempt to draw in the documents related to his other lawsuit so that the documents were not briefed by the City at summary judgment. Therefore, it was not error for the court to consider only those records that were properly before it.

As outlined in Mr. West's brief as well as Commissioner Bearce's ruling of November 6, 2017, Mr. West filed two lawsuits concerning two public records requests about records related to the City's Stingray equipment. The first request was dated August 28, 2014 and the City's response was completed on November 4, 2014. Mr. West filed his lawsuit concerning this request on October 5, 2015. It is this lawsuit which is the subject of the current appeal.

The second Stingray request filed by Mr. West was received on November 10, 2015 and responded to by the City on December 22, 2015. Mr. West filed a lawsuit concerning this request on December 22, 2016. Mr. West acknowledged to the trial court in this second lawsuit that the

Stingray records at issue overlapped with the records he contended were at issue in his appeal of the first lawsuit. Appendix D. That second lawsuit was dismissed without prejudice on March 16, 2018. Appendix E.

Mr. West acknowledges that his argument here concerns 74 pages of emails that were disclosed *after* this lawsuit was filed. Appellant's Brief at 32. Mr. West apparently obtained these records from plaintiffs Banks and Christopher who had filed a separate lawsuit.¹ However, Mr. West had not indicated that these documents were at issue in the first lawsuit. He had attached to his complaint a copy of a privilege log which he indicated as encompassing the documents at issue in this lawsuit. And, he stated that he intended to limit his argument at summary judgment to even fewer. CP 712. As such, the 74 pages Mr. West complains about were not briefed by the City. The City would have briefed the documents had they properly been provided because it is clear that not all of those documents were responsive to Mr. West's first request. For example, Mr. West identifies one of those documents as a September 17, 2014 email which could not have been responsive to his first request because the email was not created until *after* the request had been submitted. Appellant's Brief, at 20. In fact, Mr. West had notified the City he was limiting the summary judgment to fewer documents than the emails withheld and documents redacted. See CP 712.

¹ These plaintiffs' lawsuit is also on appeal at Division II of the Court of Appeals. That appeal is No. 52072-9.

Once the trial court became aware of the additional 74 pages, the City asked the trial court to clarify which records the court was considering in the motion for summary judgment. The court clearly identified that its ruling considered only those emails and records properly before it as part of the instant lawsuit, as defined by the complaint, and did not concern the 74 pages belatedly identified and submitted. Appendix C, (VRP9-15-17) p. 7:12-25; Appendix B, (VRP 6-23-17) p. 7:13-25.

This Court should not hold that the trial court erred in not considering documents which the appellant had not timely filed and briefed; which it had told the City it was not briefing, which had not been responded to by respondent City; and which were the subject of a separate, ongoing lawsuit.

B. If even if the trial court erred in not considering all documents, such error was harmless.

Even if the trial court should have included in its consideration the additional emails, such error was harmless. An error is harmless when it is unlikely that the error affected the outcome of the case. Miller v. Arctic Alaska Fisheries, 133 Wn.2d 250, 262, 944 P.2d 1005 (1997). Generally, there is no error requiring reversal when the evidence excluded is merely cumulative. Miller, 133 Wn.2d at 262. (“Even though [the letters] exclusion by the trial court was improper, we hold such error to be harmless ... [and] unlikely to affect the outcome of the trial”)(citing Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 170-71, 876 P.2d 435 (1994)).

Here, consideration of additional documents would not have made a difference because the trial court grouped all undisclosed documents as a single record. Any additional documents or pages would be considered part of the same record. That is particularly true given that the documents Mr. West contends were not considered and were almost identical to the documents the court expressly considered. In his briefing to the trial court and to this court, Mr. West conceded that the records he believes the trial court failed to consider were identical in all relevant respects to the documents the court did consider. Mr. West states that they are “identical in terms of the parties, content, and date.” Appellant’s Brief, at 20-21. See also, Appellant’s Brief, p. 37 (documents not considered are “virtually indistinguishable from the 14 records” that served as the basis for the penalty).

The trial court was within its discretion to consider all documents as a single record. “PRA decisions have reconfirmed that a trial court has discretion to reject a per record penalty without reference to any ambiguity in RCW 42.56.550(4).” Bricker v. Dep't of Labor & Indus., 164 Wn. App. 16, 23, 262 P.3d 121 (2011)(citing Sanders v. State, 169 Wn.2d 827, 864, 240 P.3d 120 (2010) (upholding trial court's discretion not to impose penalties for each wrongfully withheld document individually); Soter v. Cowles Publ'g Co., 162 Wn.2d 716, 751, 174 P.3d 60 (2007) (referring to penalty for each day the “records” were wrongfully withheld); West v. Port of Olympia, 146 Wn. App. 108,121, 192 P.3d 926 (2008), review denied,

165 Wn.2d 1050(2009) (noting without objection that the trial court chose to impose a daily penalty rather than a per record penalty)).The Public Disclosure Act's purpose of promoting access to public records is better served by basing the penalty on the public agency's culpability rather than on the size of the plaintiff's request. Bricker, 164 Wn. App. at 18.

Moreover, Mr. West did not object to the trial court considering all documents as a single record. See Appendix B (VRP 6-23-17) p. 20-21. The trial court's consideration of 74 additional pages of emails or any other additional documents would not have made any difference to the outcome in this case because the court exercised its discretion to treat all documents as a single record for the purposes of the penalty. Thus, the penalty would not have increased even if the trial court had reviewed the extra pages, had determined that the extra pages were responsive, were within the possession of the City, and were non-duplicative of records previously provided. Given that the trial court's consideration of the additional records was unlikely to change the outcome of the case, any error was harmless.

2. The trial court found a violation of the PRA so plaintiff's arguments concerning the reasonableness of the City's search for records is not relevant.

Mr. West argues that the trial court inappropriately applied the standard of a reasonable search as set out in Neighborhood Alliance of Spokane County v. Spokane County, 172 Wn.2d 702, 261 P. 3 119 (2011). In that case, the court found that the agency had violated the PRA for not producing a document which could have been found if a reasonable search

had been conducted. The court went on to describe what constitutes a reasonable search. Neighborhood Alliance, 172 Wn.2d at 719-20.

However, the reasonable search standard of Neighborhood Alliance has no apparent relevance here where the trial court found that the City violated the PRA regardless of the adequacy of its search. This is not a case where the City is arguing that it failed to produce a record despite an adequate and reasonable search and therefore should not be penalized. Rather, this is a case where the trial court found that the City violated the PRA, and assessed penalties against the City, which the City did not appeal.

Mr. West also contends that the trial court's application of the reasonable search standard conflicts with Amren v. Kalama, 131 Wn.2d 25, 929 P.2d 389 (1997) and Zink v. City of Mesa, 162 Wn. App. 688, 256 P.3d 384 (2011), review denied, 173 Wn.2d 1010(2012), but those cases do not support Mr. West's argument. In Amren, the court concluded the agency improperly withheld a State Patrol report from the requester and that the requester was entitled to a penalty. The court stated that there is no requirement that the agency's error in withholding a document be deemed unreasonable or in bad faith before a penalty is applied. Amren, 131 Wn.2d at 37. Here, the trial court applied Amren and assessed a penalty against the City even though the trial court did not find bad faith or unreasonable conduct in the City's search. Thus, there is no conflict with Amren.

Similarly, there is no conflict with Zink. In Zink, the requester appealed the trial court's assessment of penalties arguing that the penalties were insufficient. The Zink court stated that when "determining the amount of a PRA penalty, the existence or absence of an agency's bad faith is the principal factor considered by the trial court." Zink, 162 Wn. App. at 703. The Court stated that challenges to agency's PRA responses are generally reviewed de novo but penalty determinations are determined according to an abuse of discretion. Id. The Zinks complained that the trial court's penalty was insufficient because the City of Mesa had "silently withheld" documents. Id. at 711. However, the Zink the court held that there was no silent withholding because the documents that Zink had not produced was not reasonably identified by the requester. Id. In our case, the trial court did not find silent withholding of any documents and Zink does not apply.

To the extent that Mr. West relies on Zink for his argument that there are still documents in the City's possession that are responsive to his request and which he does not currently possess, there is no evidence to support such an argument. Mr. West argues that additional documents must surely exist because he phrased his request so broadly. Appellant's Brief, at 32-33.

However, this argument is not well taken. Extremely broad requests that intend to sweep within them every possible document fail to reasonably identify the sought after documents. Both the legislature and the courts have deemed such language is insufficient to identify the records

sought. See RCW 42.56.080; Hangartner v. City of Seattle, 151 Wn.2d 439, 90 P.3d 26 (2004)(requester's request for all records was overbroad); Bonamy v. City of Seattle, 92 Wn. App. 403, 411, 960 P.2d 447 (1998)(agency not required to respond to request that does not reasonably identify documents sought).

Mr. West also argues that other documents likely exist because the City in appropriately "narrowed" the request to the actual language of the request. Appellant's Brief, at 37. However, the City is entitled to limit its production to the actual records requested. Mr. West's argument on this point has no merit and he has not cited any authorities in support of this argument.

Mr. West argues that additional documents surely exist because "common sense" dictates that additional documents exist that were not disclosed or produced. Appellant's Brief, at 32. However, the City has responded to many, many PRA variously worded requests for records concerning Stingray equipment over the last ten years. The City has completed searches for Stingray documents in response to each request. The City has spent many hundreds of hours searching for Stingray records. It has provided affidavits that all documents have been disclosed.

In addition, Mr. West participated in multiple depositions where City witnesses testified about the existence of documents and the searches for responsive documents. Given the multitude of searches and the amount of discovery concerning the searches, there is simply no evidence that

additional records exist. Purely speculative claims about the existence and discoverability of other documents will not overcome the City's testimony to the contrary, which is accorded a presumption of good faith." Forbes v. City of Gold Bar, 171 Wn. App. 857, 867, 288 P.3d 384 (2012). The courts are clear that to avoid summary judgment, in answer to the City's testimony, the plaintiffs must present the court with "facts ... not just mere speculation, not wishes, not thoughts, but facts that would be admissible at trial." Bldg. Indus. Ass'n of Wash. v. McCarthy, 152 Wn. App. 720, 736, 218 P.3d 196 (2009) (2009)(citing Las v. Yellow Front Stores, 66 Wn. App. 196, 198, 831 P.2d 744 (1992)). See also, West v. Dep't of Natural Res., 163 Wn. App. 235, 258 P.3d 78 (2012) (no duty to provide documents that no longer exist; Sperr v. City of Spokane, 123 Wn. App. 132, 137, 96 P.3d 1012 (2004) ("An agency has no duty to create or produce a record that is non-existent.")).

This Court should not hold that it was error for the trial court to state that the City did a reasonable search because appellant's argument is based only on his speculative assumptions that additional documents likely exist.

3. The trial did not expand the scope of the CR 56 hearing and did not consider the Travis declaration.

Mr. West contends that the trial court held a piecemeal hearing because following the hearing on cross motions for summary judgment, the court held a penalty hearing on June 23, 2017, requested additional briefing on the issue of the penalty period, and then heard additional

argument on the topic of the penalty period at the presentation of the summary judgment order. Plaintiff argues that two separate hearings are unusual. However, a separate penalty hearing is the norm. The parties do not generally brief the 16 Yousoufian factors to determine the amount of a penalty until after the court has determined that there is a violation of the PRA. And, Mr. West cites no authority to support his argument that his is somehow an unusual or inappropriate procedure.

Mr. West also contends that the court inappropriately considered a declaration submitted by the City from Lieutenant Chris Travis regarding his efforts in responding to Mr. West's request. However, the trial court stated multiple times that it had not read or considered Mr. Travis's declaration. See Appendix B(VRP 6-23-17) p. 30-32. The City contends that the Travis declaration was proper but if the declaration was somehow improper, there was no error because the court never read it.

Finally, Mr. West contends that the trial court's process violated West v. Gregoire, 184 Wn. App. 164, 336 P.3d 110 (2014). In that case, the Court determined that the trial court properly ruled that executive privilege exempted from production certain records requested by the plaintiff. Gregoire has no apparent relevance to this case.

4. The trial court properly applied the exemption found in RCW 42.56.240(1) for specific intelligence information possessed by law enforcement agencies.

When an agency withholds all or part of a document pursuant in response to a request for records, the agency bears the burden of demonstrating that a particular exemption applies. Prison Legal News,

Inc. v. Dep't of Corr., 154 Wn.2d 628, 636, 115 P.3d 316 (2005). The Court reviews the agency's decision de novo. Id., at 635. "In reviewing such agency action, the superior court may conduct a hearing based solely on affidavits." Haines-Marchel v. Dep't. of Corr., 183 Wn. App. 655, 663, 334 P.3d 99 (2014).

The City redacted the Stingray related documents under the exemption found in RCW 42.56.240(1) for specific intelligence information the nondisclosure of which is essential to effective law enforcement. That statute provides:

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

(1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.

RCW 42.56.240(1).

In construing this exemption, the Courts have said that the term "specific", as used in this statute, "must be read to require not that the information concern particular individuals, but that it disclose particular methods or procedures for gathering or evaluating intelligence information." Haines-Marchel, 183 Wn. App. at 669. In construing whether the information is essential to effective law enforcement, the question is whether the effectiveness of law enforcement would be

compromised, and is “not limited in application to only when law enforcement would cease to function were the document in question disclosed.” Ameriquest Mortg. Co. v. Office of Att’y Gen., 177 Wn.2d 467, 488, 300P.3d 799 (2013). The “inclusion of the word ‘effective’ allows for a broader application.” Id.

For example, in Fischer v. Dep’t of Corr., 160 Wn. App. 722, 727-28, 254 P.3d 824 (2011), review denied, 172 Wn.2d 1001 (2011), the requester, Fischer, was an inmate who alleged he had been assaulted by another inmate while at the prison library. Fischer requested the surveillance videos for the date and time of the alleged assault. The Department of Corrections (DOC) declined to produce the video recordings, claiming they were exempt from disclosure under RCW 42.56.240(1).

In his request, Fischer had detailed the components of the surveillance system, thus establishing that the existence of the system itself was not confidential at the time of the assault. In addition, Fischer also pointed out that the video produced by the system was not confidential at the time it was taken because “[a]ny inmate who goes into the library can take a position at the bookshelf and watch the monitor indefinitely.” Fischer, 160 Wn. App. at 725. Fischer contended that because inmates knew of the system and were allowed to view the monitors, DOC had failed to establish that nondisclosure of the

surveillance videos was essential to effective law enforcement. Id., at 726.

In response, DOC's expert pointed out that not all of the surveillance cameras actually record the images shown on the real-time cameras, and even those that do create a recording, may only do so intermittently. Fischer, 160 Wn. App. at 726. In addition, he explained that not all cameras record with the same clarity and some may not be operational. Some cameras are so well hidden that their presence is unknown, while rumors abound that certain cameras are located at spots where none exist. Id. Thus, despite the partial knowledge that the inmates have, there is much knowledge they do not have and some knowledge is wrong. DOC's expert explained that providing clarification and additional information would allow inmates to put together a more complete picture of the system, which would enable them to determine the weaknesses of the system and exploit those weaknesses in the commission of crimes. Id., at 726-27.

The Court held that DOC had properly claimed the surveillance videos were exempt from disclosure under RCW 42.56.240(1). In construing the statute, the court pointed out that "law enforcement" as used in this exemption includes "the detection and punishment of violations of the law." Fischer, 160 Wn. App. at 727 (quoting Prison Legal News, Inc., v. Dep't of Corr., 154 Wn.2d 628, 640, 115 P.3d 316 (2005)). "Intelligence information provided by the video surveillance systems

therefore falls squarely within the core definitions of ‘law enforcement.’” Fischer, 160 Wn. at 727-28. Even though some information about the system was widely known, “[c]oncealment of the full recording capabilities of those systems is critical to its effectiveness in the specific setting of a prison.” Id., at 728. Thus, DOC had satisfied its burden of demonstrating that nondisclosure of that information is essential to effective law enforcement. Id.

Similarly, in Gronquist v. Dep’t of Corr., 177 Wn. App. 389, 313 P.3d 416 (2013), Division II analyzed the effective law enforcement exemption claimed by DOC when it refused to produce to inmate Gronquist the videos of the chow hall and C-unit at the prison. DOC claimed that the videos were exempt and that production of the videos would reveal information that might be useful to those seeking to exploit the system’s weaknesses. DOC provided the declaration of DOC’s Director of Prisons, who explained that the surveillance system is “one of the most important tools for maintaining the security and orderly operation of prisons and is “an essential element of effective control of a population that is 100 percent criminal and is accustomed to evading and exploiting the absence of authority, monitoring, and accountability.” Gronquist, 177 Wn. App. at 399. Thus, as in Fischer, the Gronquist court held that “the intelligence information provided by video surveillance systems . . . falls squarely within the core definitions of law enforcement” and the agency had met its burden that the surveillance documents were

exempt from disclosure under the Public Records Act. Gronquist, 177 Wn App. at 400.

This Court should likewise affirm the trial court's finding that some identifying information in the invoices, shipping documents and similar Stingray records were properly exempt from disclosure under RCW 42.56.240(1). As the affidavit of FBI Agent Russell Hansen explained, confidentiality of how the technology is operated and the specific technology employed by various agencies is essential to its continued effectiveness.

As in Fischer and Gronquist, the documents sought by West pertain to law enforcement, which includes "the detection and punishment of violations of the law." Fischer, at 727. As in Fischer and Gronquist, confidentiality of some aspects of the Stingray equipment is essential to its effectiveness. And, like Fischer and Gronquist, while some of the information concerning the Stingray equipment has made it into the public awareness, the need for confidentiality as to the remaining elements still exists. Providing clarification and additional information would allow suspects to put together a more complete picture of the equipment, which would enable them to determine the weaknesses of the system and exploit those weaknesses to evade detection by law enforcement. See, CP 147-59. Therefore, the trial court properly applied Fischer and Gronquist and find that the Stingray-related documents fit within the exemption provided by RCW 42.56.240(1).

Mr. West may argue that the subsequent unredacted disclosure of the same or similar documents by the City of Tacoma or other agencies in the country is evidence that the original redactions were unnecessary. However, the fact that unredacted copies were later disclosed does not mean that the initial redactions were not authorized by the statute. Sanders v. State, 169 Wn.2d 827, 849-50, 240 P.3d 120 (2010) (“Nor do we believe that production of documents after the requester files suit ipso facto admits that the initial withholding of the documents was wrongful.”). The Courts have acknowledged that “documents properly withheld as exempt may later become subject to disclosure.” Sargent v. Seattle Police Dep’t., 167 Wn. App. 1, 10,260 P.3d 1006 (2011), rev’d in part on other grounds, 179 Wn.2d 376, 314 P.3d 1093 (2013.) Indeed, an agency properly re-evaluates the propriety of an exemption with succeeding requests for the document.

It is also anticipated that the plaintiff will argue that there was no legitimate concern about breaching confidentiality because certain aspects of the information may have already become public or had been shared with City officials. However, the fact that some information had become public about the Tacoma Police Department’s Stingray equipment does not mean that attempting to maintain confidentiality and limit public awareness was not an essential component of effective law enforcement. Haines-Marchel v. Dep’t. of Corr., 183 Wn. App. 655, 671,334 P.3d 99 (2014) (erroneous “release of some of the redacted information . . . does

not establish that keeping it confidential is not essential to effective law enforcement.”). The fact that some information within a confidential document has been made public, that does mean that that the document itself has lost its protection and must be disclosed. Soter v. Cowles Publishing Co., 131 Wn. App. 882, 9907, 130 P.3d 840 (2006).

The United States Government filed a Statement of Interest in this case in which it explained the necessity of keeping some aspects of the Stingray technology confidential. CP 42-45; 131-200. The U.S. explained the importance of the technology to U.S. interests beyond the City of Tacoma and Pierce County and how even small portions of information may be used to defeat the legitimate use of the technology. As emphasized by both the City and the U.S., very little was redacted from the documents at issue in this appeal. In most cases, just a few words or numbers were redacted, but those small redactions serve important governmental and public interests, and fall within the exemption for specific intelligence information.

The issue before this Court is whether the trial court properly found that the redactions applied to the documents in 2014 were authorized by RCW 42.56.040(1) at the time those documents were provided to the plaintiff in 2014. The evidence supports the trial court’s finding and this Court should affirm the trial court on this issue.

5. Mr. West claims the trial court abused its discretion when completing its Yousoufian analysis.

The trial court's determination of penalties is review for abuse of discretion. Bricker v. Dep't. of Labor & Indus. 164 Wn. App. 16, 21, 262 P.3d 121 (2011). Here, the parties briefed the Yousoufian factors for the trial court and a separate hearing was held so that the court could hear argument on the factors and set the penalty amount. At the hearing, Mr. West argued for a penalty of \$100 per day and the City argued for a penalty of \$5 per day. The trial court exercised its discretion to assess a penalty of \$10 per day. The trial court's order clearly spelled out its consideration of the Yousoufian factors and which factors it determined were significant. See Appendix B and C.

Despite the trial court's explicit consideration of the Yousoufian factors, Mr. West argues the analysis is in error because he considers it an inadequate amount to incentivize the City from making future errors. However, the court specifically found that the City's errors were unintentional and that the City provided a reasonable explanation. The court also expressly found that the City's process was reasonable and that there was no intentional effort to prevent Mr. West from getting all responsive records in 2014, thus a large penalty was unnecessary to incentivize the City from making future errors. The court found that under a Yousoufian analysis, there were multiple mitigating factors and did not find the presence of any aggravating factors. Therefore, it cannot be said

that the trial court's decision in fixing the amount of the daily penalties was an abuse of discretion.

Mr. West cites to Coggle v. Snow, 56 Wn. App. 499, 784 P.2d 554 (1990). However, Coggle is a medical malpractice case in which the appellate court held that the trial court abused its discretion in denying a motion to continue a summary judgment hearing and a motion for reconsideration where the plaintiff had obtained new counsel after the summary judgment motion had been filed and the new counsel had not had time to prepare a response to summary judgment. Coggle has no application here.

Mr. West also mentions two other PRA lawsuits that the City has been involved in, apparently to suggest that the City is bad actor and, as such, acted consistently with its bad character here. Such evidence of character is routinely held inadmissible. State v. Donald, 178 Wn. App. 250, 258, 316 P.3d 1081 (2013)(Washington follows the general rule that circumstantial evidence showing that the defendant acted consistently with his character on a particular occasion is inadmissible).

But more importantly, Mr. West mischaracterizes that other litigation. In Center for Open Policing v. City of Tacoma, there was one document at issue, which was a non-disclosure agreement concerning the Stingray equipment. The plaintiff In Center for Open Policing did not include in its lawsuit any of the other redacted Stingray documents such as

invoices, shipping notices and other documents which are included in Mr. West's lawsuit. Thus, that lawsuit is not relevant here.

The other lawsuit mentioned by Mr. West is Banks/Christopher v. City of Tacoma, which is currently on appeal in this Court. In that case, the trial court ruled that the City properly redacted the invoices, shipping documents and other records pursuant to the specific intelligence exemption of the PRA. The trial court nevertheless found a violation of the PRA for not providing several additional documents, none of which are at issue in this case.

The trial court considered the Yousoufian factors and appropriately exercised its discretion in setting a penalty amount. Mr. West does not provide any basis for saying the trial court abused its discretion.

6. The trial court correctly exercised its discretion in determining the number of days in the penalty period.

Mr. West contends that the trial court improperly calculated the penalty period in this case. At the hearing on the penalties to be assessed for the violation of the PRA, Mr. West argued that the penalty period must start on the day of the request. The City argued that the cause of action accrues with the denial of records and that the penalty period should thus start on the day of the denial, which the Courts have said is the day that it was apparent the agency was not going to produce any additional records.

“The determination of the number of days a public record request was wrongfully denied or delayed is a question of fact.” Zink v. City of Mesa, 162 Wn. App. 688, 707, 256 P.3d 384 (2011), review denied, 173

Wn.2d 1010(2012)(citing Yousoufian v. King County Executive (Yousoufian 2004), 152 Wn.2d 421, 439, 98 P.3d 463 (2005)). A trial court's determination of a question of fact is reviewed for substantial evidence. Zink, 162 Wn. App. at 706. At issue in Yousoufian 2004 was whether the court may shorten the penalty period when there is evidence that the plaintiff could have filed the lawsuit sooner and thereby shortened the penalty period. Yousoufian 2004, at 437-38. In analyzing the calculation of the penalty period, the Yousoufian 2004 Court pointed out that the statute expressly provides that "penalties are assessed for each day that [the plaintiff] was denied the right to inspect or copy said public record." Yousoufian 2004, at 433. Although the PRA statute analyzed in Yousoufian 2004 has been amended and recodified, the relevant portion of the statute remains the same. The current statute provides that 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 she was denied the right to or copy the said public record. RCW 42.56.550(4).

Thus, in calculating the penalty period, the Court must decide the number of days that the plaintiff was denied access to the record. A "denial" occurs "when it reasonably appears that an agency will not or will no longer provide responsive records." Hobbs v. Wash State Auditor's Office, 183 Wn. App. 925, 936, 335 P.3d 1004 (2014). The issue in Hobbs was when the cause of action accrues under the PRA. The Hobbs court interpreted the statute and determined that under RCW 42.56.550(1) a

cause of action accrues under the PRA when the agency denies access or takes its final action on a request for records. Hobbs, 183 Wn. App. at 936.

The Hobbs court explained that the language of the statute expressly provides that a requestor may seek relief when he or she has “been denied an opportunity to inspect or copy a public record.” Id.(quoting RCW 42.56.550(1)). The Hobbs court went on to explain that “[a]lthough the statute does not specifically define ‘denial’ of a public record, considering the PRA as a whole, we conclude that a denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records.” Hobbs, at 936. Thus, the cause of action for damages accrues when the request is closed. Id. The construction of the word “denied” as used in subsection 1 is the same construction that should be used for the word “denied” in subsection 4 of the statute. Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 133, 814 P.2d 629 (1991)(each provision of construction that should be used for the word “denied” in subsection 4 of the statute. Thus, in assessing the penalty period, the trial court properly applied the definition of “denied” provided by Hobbs.

Mr. West cites to Koenig v. Des Moines, 158 Wn.2d 173, 142 P.3d 162 (2006) and Yousoufian v. King County Executive, 152 Wn.2d 421, 98 P.3d 463 (2005) for the proposition that the court cannot reduce the penalty period beyond the actual number of days the documents were withheld. Appellant’s Brief, at 57. However, the trial court did not reduce the penalty

period beyond the days withheld. It accurately counted the days that the appellant was denied inspection and copying.

7. The trial court's finding of fact were supported by substantial evidence.

Mr. West contends that five of the trial court's findings on the Yousoufian factors were erroneous and unsupported by the evidence. They are:

1. The City's response was reasonably prompt. Mr. West submitted his request on August 24, 2014. It is undisputed that the City responded to the request within five business days as required by the statute. CP 704. The City provided its first installment of responsive records on September 4, 2014 (41 pages) with an estimate of when additional records would be provided. *Id.* A second installment was provided on September 26, 2014. CP 703. The final installment was provided on November 4, 2014 and it was a single document, the non-disclosure agreement, which is not at issue in this case. Thus, for purposes of this case, the City's response was provided to Mr. West very promptly and the trial court's finding is supported by substantial evidence.

2. The City conducted an adequate search but erroneously failed to produce a series of emails, which constitutes a violation of the PRA. As set in Section 2, above, the trial court found that the City's search process was reasonable but that it erred in construing Mr. West's request and thus violated the PRA. The City's search process was thoroughly explained in

numerous affidavits, depositions, and briefing. See, e.g., CP 882-897.

There is substantial evidence to support the trial court's finding.

3. The City provided reasonable explanation for its error. Again, the City provided affidavits and briefing which outline the error. See e.g., CP 879-81. While Mr. West may disagree with the trial court's finding, there is substantial evidence to support the finding that the City's explanation was reasonable.

4. There was no bad faith on the part of the City. Mr. West contends that this is an incorrect consideration when determining the penalty for a violation of the PRA. However, it is one of the Yousoufian factors and the courts have repeatedly stated that while a finding of bad faith is not necessary for determining whether a violation of the PRA has occurred, it is a primary factor in determining the amount of the penalty to be assessed. See., e.g., Zink, 162 Wn App at 703 ("When determining the amount of a PRA penalty, the existence or absence of an agency's bad faith is the principal factor considered by the trial court."). Thus, the trial court properly considered whether there was evidence of bad faith. And, the trial court's conclusion on this point was supported by evidence. In addition, the trial court distinguished the violation in this case from the one in COP which was decided by Judge Cuthbertson. Appendix B (VRP 6-23-17), p. 25.

5. Mr. West complains that certain responses of the Mike Smith and Lieutenant Travis reflect poor training and supervision. The City has

a thorough and responsive procedure for handling PRA requests and City personnel are provided substantial training and supervision. As to Mr. West's complaints, it seems perfectly reasonable that City employees would not recall the specifics of a search for records several years after the fact and when multiple searches for the same records had taken place in the interim along with other various PRA searches. In addition, the evidence before the trial court of the City's processes and its training and supervision was significant. See, e.g., CP 882-897.

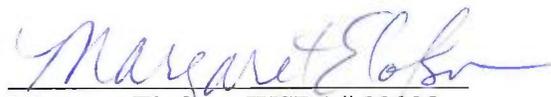
6. The City was helpful to Mr. West. The trial court cited to a specific example of the City's helpfulness to Mr. West. Mr. West's argument on this point is essentially that a violation of the PRA is per se unhelpful. In other words, Mr. West's approach is not to analyze this Yousoufian factor but to find strict liability in the event of a violation. That is not the approach set out by the Court. There is substantial evidence to support the trial court's finding of helpfulness.

CONCLUSION

This Court should affirm the trial court's determination that the City violated the PRA with respect to Mr. West's request of September and should affirm the trial court's discretionary penalty for that violation.

DATED this 5th day of February, 2019.

By:



Margaret Elofson, WSBA# 23038

Deputy City Attorney

Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I forwarded the foregoing documents: Respondent's
Brief to be filed and email to the following:

1. COURT OF APPEALS, DIVISION II
2. Arthur West
120 State Ave. NE #1497
Olympia, WA 98501
awestaa@gmail.com

EXECUTED this __5th__ day of February, 2019, at Tacoma, WA.

/s/ Gisel Castro
Gisel Castro, Legal Assistant

APPENDIX A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ARTHUR WEST,)	
)	
Plaintiff,)	
)	
vs.)	No. 15-2-12683-6
)	
CITY OF TACOMA, TACOMA POLICE)	
DEPARTMENT,)	
)	
Defendant.)	

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 24th day of May, 2017, the above-captioned cause came on duly for hearing before the HONORABLE KATHRYN J. NELSON, Department 13, Superior Court Judge in and for the County of Pierce, State of Washington; WHEREUPON, the following proceedings were had and done, to wit:

Reported by: Dana S. Eby, CCR

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APPEARANCES

For the Plaintiff:

Arthur West
Pro se

For the Defendant:

Margaret A. Elofson
Assistant City Attorney
747 Market Street, Room 1120
Tacoma, Washington 98402

For the United States, Department of Energy:

Marcia Kay Sowles
Attorney at Law
20 Massachusetts Avenue, NW
Room 7114
Washington, DC 20530

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MAY 24, 2017
MORNING SESSION

* * * * *

THE COURT: I didn't know you were here, so please come in next time and sit down so I just -- you know, I scheduled you specially at 10:00 and the other case was supposed to get done between 9:00 and 10:00. And when no one came in, it didn't occur to me to hurry them along.

MS. ELOFSON: I apologize, Your Honor. We were reluctant to interrupt, so it was our fault.

THE COURT: You weren't interrupting. You need to come in. That's why I told you, please come in in the future.

MS. ELOFSON: We will. Thank you, Your Honor.

THE COURT: All right. So I read everything, and it looks like at least there was one issue that was briefed that there's been a resolution on. Is that correct?

MS. ELOFSON: That's correct.

THE COURT: Let me start by calling the case. Arthur West versus City of Tacoma, Tacoma Police Department, 15-2-12683-6. And will the parties

1 present please introduce themselves?

2 MS. ELOFSON: Margaret Elofson on behalf of
3 the City of Tacoma.

4 MS. SOWLES: Marcia Sowles on behalf of the
5 Department of Energy and the United States, who filed
6 a statement of interest.

7 MR. WEST: Arthur West for the plaintiff.

8 THE COURT: All right. So let's put on the
9 record the resolution of the piece of this case that
10 was resolved.

11 MS. ELOFSON: Your Honor, one specific
12 document is called the non-disclosure agreement.
13 There was a companion case, Center for Open Policing,
14 that was consolidated with this current case, at least
15 in terms of discovery and some of the proceedings, and
16 it was heard by Judge Cuthbertson. In Center for Open
17 Policing, Judge Cuthbertson made a ruling as to that
18 one document, the non-disclosure agreement. Center
19 for Open Policing had submitted a public records
20 request very similar to Mr. West's in this case.
21 However, Center for Open Policing only contested that
22 the non-disclosure agreement had been improperly
23 redacted.

24 Because the non-disclosure agreement was a portion
25 of Mr. West's case, when Judge Cuthbertson ruled on

1 the non-disclosure agreement in the context of Center
2 for Open Policing, the parties agreed that that
3 portion of Mr. West's case could be decided
4 accordingly. It was not before Judge Cuthbertson, but
5 the parties voluntarily agreed to apply Judge
6 Cuthbertson's ruling concerning the non-disclosure
7 agreement in Center for Open Policing to the
8 non-disclosure agreement in this case with Mr. West,
9 so that's done. The money's been paid.

10 THE COURT: Do you concur with that,
11 Mr. West?

12 MR. WEST: Yes, in all essential facts.

13 THE COURT: Okay. So did that also include
14 the monetary penalty?

15 MS. ELOFSON: Correct. We applied the exact
16 same monetary penalty to the exact same document as if
17 it were the same.

18 THE COURT: Has a notice of partial
19 settlement been filed?

20 MS. ELOFSON: No, we haven't done that yet.

21 THE COURT: Okay.

22 MS. ELOFSON: But we will.

23 THE COURT: Yes.

24 MS. ELOFSON: Okay.

25 THE COURT: And at the end of this, we'll

1 probably set some dates, and we need to include that
2 in that date. And then once you have the notice of
3 partial settlement, you have 90 days to actually get
4 the order of settlement in. So it's a two-step
5 process, and it has a to do with our tracking of
6 cases, so we definitely need to take care of that.

7 MS. ELOFSON: Okay.

8 THE COURT: Okay. So we have other
9 documents, and this is Plaintiff's motion for summary
10 judgment, so --

11 MS. ELOFSON: There are actually cross
12 motions, Your Honor.

13 THE COURT: Right. And Tacoma's motion for
14 summary judgment. So who filed first?

15 MR. WEST: That would be me, Your Honor.

16 THE COURT: Okay. So would you like to
17 begin?

18 MR. WEST: If that's all right.

19 MS. ELOFSON: However the Court would like to
20 proceed.

21 THE COURT: Sure.

22 MR. WEST: Very good. Good morning, Your
23 Honor.

24 THE COURT: Before you start your comments,
25 would you -- can you group together the -- in the back

1 of my mind, and I'm hesitating because I did prepare
2 this very thoroughly a couple of weeks ago, after I
3 first wasn't prepared. Are there sort of two groups
4 of documents? I mean, I know there's the e-mail
5 group, and is there another group of documents that we
6 can just, in my mind, I can kind of line up the
7 arguments with?

8 MR. WEST: I have divided my argument into
9 three sections.

10 THE COURT: Okay. That's what I want you to
11 tell me about.

12 MR. WEST: And --

13 THE COURT: Just give me a little --

14 MR. WEST: Do you want the summary before I
15 go into the --

16 THE COURT: Just tell me the three sections.

17 MR. WEST: The three basic sections would be
18 the undisputed, the documents that the City doesn't
19 dispute withholding that appear in the privilege -- in
20 the 2015 privilege log but not in the 2014 privilege
21 log; the records that the City doesn't credibly
22 dispute withholding, and that would be the 74 pages of
23 e-mail communications pre-August 28th.

24 THE COURT: So that would be the e-mails.

25 MR. WEST: That would be the e-mails. I

1 believe there's some attorney/client, small group of
2 attorney/client privileged records as well that
3 were -- that were examined in camera. And the main
4 issue that we're here today, for the invoices,
5 purchase orders, and estimates that we're arguing the
6 effective law enforcement, slash, specific
7 intelligence information exemption for, and that's the
8 main issue, I think, we've got.

9 THE COURT: Okay. So I'm -- I'm really
10 tracking because I remember well, and that was the
11 invoice purchase order group and the e-mail group
12 which contains some attorney/client stuff.

13 MR. WEST: Yes.

14 THE COURT: Tell me a little bit more about
15 the first group, just to get my brain refreshed.

16 MR. WEST: There's a group of three records,
17 two of which are undisputably (sic) exigent that were
18 mentioned in the motion for summary judgment that were
19 not responded to or denied in any way by the City.
20 And those are appearing as the "X" marked on the 2015
21 log there, and the corresponding portion of the 2014
22 log without those three records on it is also in the
23 displays.

24 THE COURT: Since there isn't a jury to
25 display it to, could I have those up here on my bench

1 so I could read them, and are you familiar with these
2 charts?

3 MS. ELOFSON: I am familiar with them, but it
4 doesn't -- Mr. West has said that the one that are
5 "X"ed are the first group, but the --

6 MR. WEST: No, this is the -- the one
7 denominated 9/3/14 is the first privilege log. The
8 one denominated 12/22/15 is the second privilege log,
9 and that has more records in it than the first one.
10 And these are the ones I referred to in my motion for
11 summary judgment. I provided copies of this to the --
12 to you at the first hearing.

13 MS. ELOFSON: I don't dispute that. I'm just
14 saying that we've identified two groups of records.

15 MR. WEST: Yeah.

16 MS. ELOFSON: And I think that the Court
17 wants to be sure that what group of records are these
18 that are marked by "X," and I think that's both one
19 and two, isn't it?

20 MR. WEST: What?

21 MS. ELOFSON: You've got quotations.

22 MR. WEST: These are -- these may also be in
23 your -- in the other one, but these were not listed in
24 the 20 -- response of 2014 request. The request we're
25 dealing with here is the 2014 request, the exemption

1 log that was provided for the 2014 request did not
2 reference the operator's manual for cell site
3 simulators, did not reference the 2014 Port Security
4 Grant upgrade, or the Harris quote -- Corporation
5 quotation of 8/12/14. Hence, the two operative
6 sections of the exemption logs.

7 On the back of these are two of the August 27
8 e-mails from Mike Smith regarding cell phone
9 procedures, which appear, I believe, at Page 47 and 49
10 of the exhibits to the March 13th declaration.

11 THE COURT: Okay.

12 MR. WEST: So I will -- if it's okay, I will
13 hand these up.

14 THE COURT: That would be great.

15 MR. WEST: And I have a set speech that will
16 explain all of this, if the Court would indulge me.

17 THE COURT: No, no. I know you do. I just
18 needed to get my head around it because, otherwise, I
19 may not follow. You know, it's oral and everything.

20 MR. WEST: It's confusing.

21 (Pause in proceedings.)

22
23 THE COURT: Okay. I think I'm following you
24 on that. So that sets the stage.

25 Now, if you would like to make your presentation,

1 I don't mean to make you nervous.

2 MR. WEST: Thank you, Your Honor. It's my
3 understanding, with discussions with the City, we're
4 talking today just about the potential violations of
5 the City, should there be a violation, with
6 consideration of the Yousoufian factors and any
7 possible penalty be considered at a later hearing, if
8 necessary. I just want to make -- establish for the
9 record I'm not waiving that, but we're not -- by
10 agreement, we are not considering that. Is that
11 correct, Ms. Elofson?

12 MS. ELOFSON: That's right.

13 MR. WEST: Thank you. In today's preliminary
14 hearing on the issue of whether the City violated the
15 Public Records Act...

16 THE REPORTER: I'm sorry, but when you're
17 reading, you have to slow down.

18 MR. WEST: I'm sorry.

19 THE COURT: And that's good for me, too.

20 MR. WEST: I apologize. And I have a second
21 copy of my statement today, just in case there's
22 any --

23 THE COURT: I think he wants to file it. As
24 long as he's going to file it, I'll take a look at it.

25 MR. WEST: Sometimes the transcriptionist

1 needs that, too, for spelling.

2 THE COURT: No, that's not how that works.

3 MS. ELOFSON: Your Honor, just so you know,
4 the City would object to filing that. I think that
5 he's entitled to make his oral argument, but putting a
6 transcript of his statement into the record... I
7 haven't been provided a copy of it. I haven't
8 provided a written copy of my oral argument to the
9 Court, and so I would object to that.

10 THE COURT: I think that's probably the
11 better thing, so I'm going to hand this back to you.
12 But just read slowly, and I'm sure we'll get
13 everything.

14 MR. WEST: I will do that. Thank you. In
15 today's preliminary hearing, we're going to be
16 discussing whether the City violated the Public
17 Records Act, and there are three basic groups of
18 issues: Those that are undisputed; those that are not
19 reasonably disputed; and those to which there is a --
20 an actual controversy. And this -- as we noted
21 before, this is exclusive of the non-disclosure
22 agreement which has been resolved in the previous
23 hearing.

24 As for the uncontested issues, Court Rule 8
25 provides that averments in a pleading that aren't

1 denied are considered -- are admitted when not denied.
2 City, significantly, hasn't denied the withholding,
3 silent withholding of the Harris Corporation quotation
4 of 8/12/14 or the Port Security Grant upgrade of 2014.
5 These records were specifically cited in Plaintiff's
6 CR 56 motion of January 30th at Page 3, Line 7 and 8,
7 and the supporting declaration at Page 3, Line 10.
8 They appear -- and they appear on the City's redaction
9 log of 12/22/15, responding to the later 2015 request.
10 But significantly, they are absent from the privilege
11 log of 9/31(sic)/14 that was issued in response to the
12 2014 request at issue in this case. Both of these
13 logs, or the significant portions of both these logs
14 have previously been presented to the parties and to
15 the Court.

16 Nowhere has the City addressed either of these
17 documents, attempted to claim they were
18 non-responsive, or denied that they were silently
19 withheld in response to the 2014 request. Thus, by
20 the express terms of CR 8(d), at the very least, the
21 unredacted portions of these documents were silently
22 withheld, and I'd ask that judgment issue on these
23 claims.

24 There's also an issue of a operator's manual that,
25 at first, didn't exist, then was alleged to exist, and

1 then apparently didn't exist again. And there's some
2 testimony that at least one version of this manual was
3 destroyed. There may be other exigent versions of
4 this, but it doesn't appear in the record. Further,
5 the operator's manual might actually be something that
6 could be withheld, so at this point, I'm not actually
7 seeking that, but its quantum existence aside is a
8 troubled matter.

9 The second category we'll consider today is what I
10 would term the claims the City has not reasonably
11 disputed. This includes two basic groups of records:
12 The silently withheld pre-August 28 e-mail
13 communications, the 74 pages that were appended to the
14 declaration, and -- a declaration of March 6th; and
15 the attorney/client communications that are appended
16 as Exhibits 3 and 4 of Plaintiff's reply in support of
17 the motion of March 13.

18 Again, the plaintiff clearly identified in his CR
19 56 motion at Page 2, Lines 9 through 11, that his
20 August 28th, 2014, request included the following
21 language: Any records concerning any agreements,
22 policies, procedures, or understandings related to the
23 acquisition, use, or operation of Stingray technology.
24 It's hard to imagine how a request might be fashioned
25 to more broadly encompass any records related to any

1 agreements, policies, procedures, or understandings
2 related to the use, acquisition, or operation of the
3 technology.

4 Despite the City's creative use of what I would
5 term the these-aren't-the-droids-you're-looking-for
6 defense, it's readily apparent that all, virtually
7 all, of the 74 pages of records appended to the March
8 6th, 2017, declaration were properly responsive to the
9 August 28, 2014, request, and were silently and
10 improperly withheld by the City until their belated
11 release in response to a later request after the
12 present suit was filed.

13 And again, nowhere in Defendant's replies do they
14 credibly deny that either the pre-August 28th records
15 or the silently withheld attorney/client
16 communications concern any agreements, policies,
17 procedures, or understandings related to the
18 acquisition, use, or operation of the Stingray
19 technology. In fact, where Mr. Smith on Page 5, Line
20 14 through 15 of his declaration, attempts to justify
21 the withholding, he misrepresents the request of
22 seeking records concerning only the acquisition, use,
23 and operation of the technology, leaving out the
24 entire first half of the request. This is akin to
25 representing lightning to be the same as a lightning

1 bug and fails to refute Plaintiff's request, as
2 written, sought information concerning any agreements
3 policies, procedures, or understandings related to the
4 technology.

5 Mr. Smith does not credibly dispute he failed to
6 respond to the request as it was actually written, nor
7 does he explain how he did not find his own e-mail
8 communications of 5/18 and 5/19 on August 27, 2014,
9 entitled, "Cell phone procedures responsive to
10 Plaintiff's requests for records relating to
11 procedures." No reasonable search -- and this request
12 was one day after the communications in question. No
13 reasonable search could possibly fail to locate
14 communications for the day before the request, bearing
15 the same descriptive word expressly included in the
16 records request. And Defendant's representations to
17 the contrary simply lack veracity. And again, a copy
18 of two of these records is included in -- on the back
19 of the sign boards.

20 Despite the defendant's creative arguments, the 74
21 pages of August 28 communications, pre-August 28
22 communications, and the silently withheld
23 attorney/client records that were subsequently
24 disclosed to the ACLU and which bear the designation
25 "Christopher" are undisputably (sic) related to or

1 concerning agreements, policies, procedures, or
2 understanding related to the acquisition, use, or
3 operation of the Stingray devices. The defendants
4 have not reasonably and credibly denied these
5 circumstances, and judgment should issue on these
6 claims as well.

7 Now, finally, we come to the central issue of this
8 case, and the one valid and credibly contested issue.
9 Does the specific intelligence clause of the effective
10 law enforcement exemption in the Washington state
11 Public Records Act apply to the official public
12 records regarding the Stingray purchases, invoices,
13 quotes, estimates, and purchase orders. This presents
14 a rather novel issue in Washington law. It has not
15 yet been directly addressed. However, Washington
16 courts have unanimously and narrowly construed the
17 essential law effective -- the essential to effective
18 law enforcement element of the Public Records Act in
19 favor of disclosure.

20 Sheehan and Prison Legal News are two of the
21 leading cases, and they -- and they stand for a very
22 narrow reading of this exemption. Moreover, as the
23 Court in Ameriquest pointed out, evidence of any
24 alleged threat to effective law enforcement must be
25 truly persuasive. In light of the narrow scope of

1 exemptions set in Sheehan and Prison Legal News and
2 the heavy burden in Ameriquest, the clear weight of
3 precedent -- and the clear weight of precedent, the
4 specific intelligence, slash, effective law
5 enforcement exemption should not be seen to apply to,
6 at the very least, the official public records of
7 invoices, estimates, purchase orders. The manuals,
8 should they exist, might present a more complicated
9 issue. For that reason, I'm not seeking those.

10 Another compelling reason -- oh, also, there are
11 some attorney/client redactions being argued, and the
12 Court has reviewed those in camera. I am not privy to
13 what's in those, so the Court can make a determination
14 as to those.

15 Another compelling reason why the compelling
16 exemption of effective law enforcement should not
17 apply lies in the definition of what effective law
18 enforcement is in the context of the sovereign rights
19 of citizens who are not subject to heightened scrutiny
20 and lesser rights as criminal defendants or convicted
21 felons in a pervasively regulated prison setting are.
22 Now, the defense has argued, and Plaintiff doesn't
23 dispute, in the context of discovery in a criminal
24 case in Arizona or in the specific context of
25 supervising dangerous convicted felons in prison, the

1 effective law enforcement exemption may be applied to
2 suppress surveillance technology employed for certain
3 specific purposes. You know, after all, there could
4 be a riot going on up in Cell Block Number 9.

5 Fischer, Gronquist, Haines-Marchel all involve
6 supervision of convicted felons in prison. The
7 excerpt of the AG's brief in Haines appended as
8 Exhibit 2 to Plaintiff's March 13 filing demonstrates
9 the context of such supervision when it states that
10 DOC is tasked with being in control of a population
11 that's a hundred percent criminal in compensation and
12 is accustomed to evading detection and exploiting the
13 avenues of authority, monitoring, and accountability.

14 The criminal cases the United States has cited,
15 primarily Rigmaiden, also underscores the limitations
16 of discovery in a criminal case and the Court's
17 ability to suppress information in the context of
18 discovery in a criminal prosecution. Their few civil
19 cases cited do not involve laws similar to the Public
20 Records Act of Washington state.

21 And I would suggest that, in contrast to the
22 prison environment, in regard to the supervision -- to
23 the supervision of dangerous felons in custody, the
24 very different context of what we would like to
25 believe is the free world, the State's legitimate

1 authority to mandate suppression of information as
2 well as to determine, behind closed doors, what type
3 of intrusive secret surveillance is essential to
4 effective law enforcement pose very different legal
5 issues.

6 Division I of the Court of Appeals recognized this
7 in a recent case involving Seattle Pacific University,
8 holding, finally, the University relies on Fischer v.
9 Department of Corrections, in which non-disclosure of
10 prison surveillance videos was found essential to
11 effective law enforcement. This was so because
12 concealing the security system was critical to the
13 effectiveness in the specific setting of a prison.
14 The University fails to explain why the rationale in
15 Fischer should be extended to the facts in this
16 matter, and I think the defendants in this case
17 similarly fail to explain that.

18 Unlike convicted felons or defendants in criminal
19 proceedings, honest, law-abiding citizens in a
20 democratic republic of sovereign states have
21 constitutional and penumbral rights to be free from
22 big brother watching over their every move and
23 conducting intrusive searches in violation of the
24 Fourth, Fifth, and Fourteenth Amendments, to say
25 nothing of their penumbral personal privacy rights

1 first recognized in Griswold v. Connecticut and the
2 greater rights of citizens of the State of Washington
3 under Article 1, Section 7.

4 And it should be recognized that effective law
5 enforcement in a democratic republic can only be
6 understood to be law enforcement in accord with the
7 laws, constitution, and civil rights of its
8 law-abiding citizens. In Washington, that would
9 include Article 1, Section 7, 10, as well as the
10 previous enumerated amendments to the federal
11 constitution.

12 Now, no one would debate whether the NKVD or the
13 Geheime Staatspolizei were effective in enforcing the
14 laws of the Soviet Union or the Third Reich. What an
15 efficient, law-abiding culture we might have if the
16 police could be as effective as those in Stalinist
17 Russia or Nazi Germany. But in America, the term
18 "effective law enforcement" does not mean the
19 government is free to trample upon our precious
20 liberties with hobnail boots, secretly monitor its
21 citizens, or as described in the Day in the Life of
22 Ivan Denisovich, lock them up in the gulag for decades
23 for thought crimes like telling jokes about the
24 supreme commander's moustache or perhaps toupee as a
25 present example.

1 There's also a very long and developed line of
2 precedent that universally condemned state-mandated
3 suppression of information as unconstitutional prior
4 restraint of First Amendment liberties. The
5 non-disclosure agreement and the policies of secrecy
6 it fostered undeniably has many aspects of a
7 unconstitutional prior restraint. This goes to the
8 argument that they make that -- they make that we are
9 required to do this because the NDA. This agreement,
10 by its intent and effect, allow for judges to be
11 misled into authorizing overbroad and intrusive
12 searches -- searches, the scope of which is still, to
13 this date, somewhat unknown, with equipment, the
14 nature and capabilities of which have yet to be
15 disclosed.

16 Regardless of the more technical aspects of law in
17 this case, I do not see how this type of suppression
18 and restraint upon information can be reconciled with
19 effective law enforcement in a free society under our
20 constitutional laws. As our State Supreme Court
21 recognized in Adams, freedom of speech, press, and
22 religion are entitled to preferred constitutional
23 positions because they are the very essence of a
24 scheme of ordered liberty. Any interference with them
25 is not only abuse, but an obstacle to the correction

1 of other abuses.

2 This exactly -- this is exactly what appears to
3 have been the result of the NDA in this case, the
4 state man -- the state-mandated interference with
5 dissemination of information has resulted in the
6 circumstance which even judges and those enforcing the
7 law had and have no idea what type of searches were
8 being conducted, the capabilities of equipment
9 employed, or the capability of equipment employed to
10 perform the searches.

11 Even at the last hearing, there appeared to be
12 some dispute as to what the actual capacity of the
13 technology is, and I think that uncertainty exists to
14 this day. Such secrecy in the administration of
15 justice is fundamentally incompatible with the
16 effective administration of law in a democratic
17 republic, just as the extension of the specific
18 intelligence exemption to veil official public records
19 is incompatible with established precedent and the
20 broad remedial intent of the Public Records Act.

21 As to the national security concerns, I would
22 assert the national government protests too much. I'm
23 not privy to the information they have, but as the
24 Martinez brief notes, all this technology is subject
25 to published patents. Any decent hacker with \$1,500

1 can make his own emulator with parts from Radio Shack.

2 As Division I recognized in the SPU case, citing
3 to Ameriquest Mortgage, in order to overcome the
4 presumption that such records are disclosable, the
5 University and the students must provide a truly
6 persuasive reason as to why disclosure would harm the
7 SPD's future law enforcement efforts.

8 The City and federal government's reasons, while
9 creative, fail to supply a truly persuasive reason why
10 the disclosure of purchase orders, estimates, and
11 invoices in this case would substantially harm the
12 goal of effective law enforcement.

13 Similarly, in the 2016 Everett barista video
14 surveillance case, the Honorable Judge Appel rejected
15 similar vague claims by the federal government that
16 the disclosure would interfere with effective law
17 enforcement.

18 It should be seen as no accident that the two
19 state courts in -- the two state courts in both
20 Illinois and New York, the only two states I'm aware
21 of that have conduct -- have considered these issues
22 in the context of similar public records laws, ended
23 up ordering disclosure of invoices and purchase orders
24 virtually identical to the ones at issue in this case,
25 some of which, from the invoices from the Martinez

1 case, with only signatures redacted, were appended as
2 Exhibit 2 to Plaintiff's January 3rd motion for
3 summary judgment.

4 If these records have been disclosed, why should
5 the same records in Tacoma be treated differently from
6 their counter parts -- parts in Chicago and New York,
7 especially since there's been no demonstration that
8 the sky has fallen on anyone's head despite these
9 disclosures.

10 Arizona, by contract, which the City and federal
11 government hold out as an example to be emulated, has
12 a broad exemption to disclosure of records which may
13 be contrary to the best interest of the state, and the
14 Arizona courts employ a balancing test. Neither of
15 these elements are features of the Washington State
16 Public Records Act.

17 Significantly, in the New York Civil Liberties
18 Union v. Erie County Sheriff's Office case, the New
19 York case -- court -- found the purchase orders,
20 essentially identical to the invoices, estimates, and
21 purchase orders in this case, to be non-exempt,
22 describing them as records of quintessentially
23 compelling interest to and of undeniable impact upon
24 the tax paying public. In that case, the Court ruled
25 that the purchase order should have been disclosed in

1 their entirety, without redaction of the words or
2 phrases.

3 This court -- this court should follow the cogent
4 logic and clear precedent of the state courts in New
5 York and Illinois that both required similar, nearly
6 identical, records to be disclosed and rule in accord
7 with all Washington precedent that the limits of the
8 effective law enforcement exemption are -- are very
9 narrow, based upon -- and require a truly persuasive
10 showing of harm to legitimate government interests.
11 Such a conclusion is supported by both the letter and
12 intent of the Public Records Act in Washington state.
13 Significantly, our Public Records Act clearly states,
14 in Section 030, that the people of this state do not
15 yield their sovereignty to the agencies that serve
16 them. The people, in delegating authority, do not
17 give their public servants the right to decide what is
18 good for the people to know and what is not good for
19 them to know. People insist upon remaining informed
20 so they may control -- they may maintain control over
21 the instruments that they have created.

22 If the people have not yielded their sovereignty
23 to the City of Tacoma to determine what is good for
24 them to know, it's doubtful that certain elements of
25 the City may yield this very right on their behalf

1 secretly without anyone knowing or actually making an
2 informed decision. Nor should the federal government
3 be able to commandeer such secrecy in light of the
4 Anti-Commandeering Doctrine set forth in Printz,
5 New York, Justice Kosinski's concurrence in Conant v.
6 Walters, or the recent ruling on the limits of federal
7 coercive powers in Sebelius.

8 In addition to his other notable acts, Benjamin
9 Franklin once observed, those that would give up
10 essential liberty to purchase a little temporary
11 safety deserve neither liberty nor safety. I think
12 that the concealment of the purchase orders,
13 estimates, and invoices in this case does little to
14 preserve safety and poses a threat, rather than an
15 aid, to the effective administration of law in accord
16 with the laws and constitutions of the state of
17 Washington and the United States.

18 Again, as to any penalties or potential costs,
19 these, by agreement, have been reserved for later
20 argument. Thank you very much for your time.

21 THE COURT: Thank you. I think City of
22 Tacoma and Ms. Elofson should be next, and I don't
23 know if you can combine your motion and response
24 together.

25 MS. ELOFSON: I believe I can, Your Honor.

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THE COURT: Thank you.

MS. ELOFSON: And I will defer much of my argument regarding that second set of documents that we are describing as the invoices, estimates, quotations to Ms. Sowles, who's here representing the interest of the United States. I will touch on that just briefly to the extent that it's in my materials.

A little background here. One of the things that's happened in this case, as well as the other, what we'll call Stingray cases, is a lot of hyperbole, a lot of emotion, and a lot of, I would say, not careful use of language. And I did submit an affidavit in this case, which I hadn't done in the Center for Open Policing case, because there were -- there are certain quote, unquote, facts that are continually referred to which are inaccurate.

Number one, in terms of this unconstitutional search and seizure and this tracking of citizens without constitutional protections or gathering of evidence, that's simply not true. It is repeatedly asserted by the plaintiffs in these cases, and it is simply not true.

The undisputed evidence is that the City of Tacoma Police Department has never used this equipment except in conformance with a warrant requirement. There is

1 either exigent circumstance or a warrant obtained
2 prior. In exigent circumstances, the warrant is
3 obtained immediately after, all in accordance with a
4 warrant requirement.

5 There are -- this whole idea of unconstitutional
6 searches is a red herring that has created a lot of
7 problems for the Court in trying to weave its way
8 through the actual legal arguments that matter. So
9 let's get that up front. That's not here. No
10 constitutional problems of search and seizure.

11 And I put in my materials, it only makes sense,
12 because what this equipment does is it pings a
13 cellular device. The only way the police department
14 know what device to ping is they get a warrant. They
15 go to the phone company and say, can you give me the
16 unique identifier, the VIN number, if you will, to
17 this cellular device. So they can't even begin to
18 think about using it unless they've already gone
19 through the warrant requirement. So to say, oh,
20 you're using it without a warrant is not only untrue,
21 it's just not reasonable.

22 The second thing is, is, oh, they're gathering
23 information about people. They're collecting
24 information. We don't know what this is capable of.
25 You could be getting cell phone conversations. The --

1 the evidence in this case, the undisputed factual
2 evidence in this case and in all of these cases is
3 that this equipment does not obtain or store any such
4 information. It pings. That's what it does. It lets
5 you know where a particular cellular device is
6 located. That's it. So all of these arguments, and I
7 don't dispute, I love living in America because we do
8 have these freedoms and I will -- boy, that's part of
9 my job is protecting them, too. I don't take those
10 lightly. They aren't at issue here.

11 Some of the cases from other jurisdictions where
12 their equipment isn't subject to a warrant requirement
13 or hasn't been used in conformance with a warrant
14 requirement, okay. They've got an issue over there.
15 They should discuss that. Here, today, we don't need
16 to. That's not what's happening.

17 Plaintiff West submitted a request for records. I
18 would suggest at this point we've had -- what --
19 probably less than a hundred such requests but well
20 over 50, so he's one of many. Each request, as
21 Mr. Smith has indicated in his affidavit, is looked at
22 according to the language that it states. We don't
23 look for one word in a request and say, okay. You get
24 every document with the -- that pertains to that one
25 word. Number one, it wouldn't be a good request. It

1 would not be a good search to do it that way. And it
2 would be contrary with what the courts have required
3 us to do. We aren't allowed to do data dumps. We
4 have to look at every single request, parse out what
5 are the documents that you are requesting, and give
6 you those documents.

7 There have been cases where agencies do do the
8 data dump because, frankly, it's easier. We'll give
9 you everything. We will drown you, Plaintiff, in
10 paper and require you to pay for the copies. We don't
11 do that. We do what's required of us under the PRA,
12 which is we look at each request. We look at
13 whether -- can we identify the documents that are
14 being requested? The law requires us to do a
15 reasonable, adequate search, looking in those places
16 where we believe responsive documents will be kept.
17 We provide those to the requester, making the
18 exemptions provided by Washington law.

19 Yes, we provide as much information as we can.
20 But there's some information, much information now, as
21 it turns out, over the years as the PRA has been
22 modified and altered, much information that should not
23 be disclosed for a variety of reasons, and one of
24 those is information essential to effective law
25 enforcement. Another one is attorney/client

1 privilege.

2 Effective law enforcement has been much more
3 broadly interpreted than Mr. West asserts. It
4 includes information that will inhibit, not totally
5 destroy, but inhibit or impact the tools and
6 procedures that the police currently are employing.
7 It's not limited to corrections in any manner. And it
8 doesn't need to be as specific as Mr. West suggests or
9 that the sky is going to fall if you let this one
10 piece of information out.

11 As in both Fischer and Gronquist, the Court said,
12 yeah, the plaintiff's already got some information,
13 and what they're asking for now is going to help them
14 fill in the missing gaps in the information they have
15 or correct some of the misinformation they have. And
16 the more information you give them, the easier it's
17 going to be for them to piece together a system to
18 evade and get around this useful equipment. That's
19 exactly what we've got going on here.

20 No, this isn't -- this isn't equipment that's used
21 in corrections to surveil incarcerated people. This
22 is equipment that's used by our forces overseas to
23 defeat improvised explosive devices. So to suggest
24 that this is equipment that has less value in keeping
25 secret, I think, is completely contrary to the facts.

1 We're talking about the lives of people. That's
2 obviously not how the City uses it, but that's the
3 equipment. And if that information is out, does the
4 U.S. government have a legitimate interest in seeking
5 to keep that under wraps? Absolutely. Does the City
6 of Tacoma have an interest in making sure that it's
7 kept under wraps on behalf of those soldiers?
8 Absolutely.

9 So what we're using it for is to ping, undisputed
10 in this case. The e-mails that came in -- the e-mails
11 that we didn't provide to Mr. West initially all have
12 to do with a press release the City was putting
13 together.

14 THE COURT: Okay. First of all, there are
15 two categories, right?

16 MS. ELOFSON: Now I'm moving to --

17 THE COURT: Those -- the e-mails that weren't
18 even in existence until after the PRA --

19 MS. ELOFSON: And I don't think anybody --

20 THE COURT: -- by Mr. West.

21 MR. WEST: We're not arguing about any
22 records that weren't --

23 THE COURT: So these are the ones, one
24 string. Go ahead.

25 MS. ELOFSON: Yeah, the one string that came

1 into -- into existence just about the time of his
2 request, and it's not surprising that his request came
3 in at that time. What had happened is the newspaper
4 had published an article about this equipment. It
5 spawned a lot of activity. It spawned a number of
6 requests from Mr. West and other people, and it also
7 generated activity internally at the City of Tacoma.
8 And the City of Tacoma and the police department
9 undertook an effort to determine, what information can
10 we put out there to the public to allay their
11 concerns, to let them know what this equipment is,
12 what it does, and what we're using it for and still
13 comply with the non-disclosure agreement that we're
14 required to abide by? Mr. Smith was giving legal
15 advice because that's, obviously, a contractual
16 concern: How do we abide by our agreement and yet
17 still do this other activity, this press release, that
18 we want to do? And Mr. Smith was giving legal advice
19 to his clients, the police department, about how to go
20 about doing that.

21 It's true that one of the e-mails in that string
22 had to do with -- uses the word "procedures." But if
23 you look at the content of the e-mail, that's not what
24 it was about. The -- it wasn't about the use,
25 acquisition, and operation of the equipment. It was

1 about a press release, a public relations effort on
2 behalf of the City of Tacoma towards its citizens and
3 the newspaper. It was not responsive, and it was not
4 interpreted as responsive by Mr. Smith.

5 Later on, and you can see the difference in the
6 2015 request Mister -- or request that Mr. West
7 submitted. It was broader. It asked for
8 communications, and Mr. Smith legitimately determined,
9 okay, now I've got to do an e-mail search. Did he do
10 that e-mail search in terms of the first one? No,
11 because the one asked for -- he -- Mr. Smith wasn't
12 involved in the use, acquisition, or operation of the
13 equipment. He didn't search there. His job is, under
14 the law, is to do a reasonable search in those places
15 where documents are expected to be found, can
16 reasonably be expected to be found. He doesn't -- he
17 had no involvement whatsoever in the use, acquisition,
18 or operation of the equipment. Did he search his
19 e-mails? No.

20 When Mr. West asked for communications, he
21 searched his e-mails. Those were provided. To say
22 that we silently withheld them, and I have to --
23 Mr. West said we didn't respond to the silent
24 withholding argument so he wins on that by default,
25 basically. And I think that what he's saying is that

1 the City's silent withholding arguments are contained
2 in its materials as opposed to the City's responsive
3 materials to his motion because we do have a long
4 section of what it means to silently withhold, and
5 this is not a case of silent withholding. Silent
6 withholding is you know you have a document, and
7 you've chosen not to provide it. You've chosen not to
8 provide it. And in this case, Mr. Smith didn't search
9 for his e-mails because those weren't asked for. It's
10 not called silent withholding in that case.

11 What it means is that, if you have something and
12 you know you have it that's responsive, you have to
13 put it on the privilege log. This is not that case.

14 I think he's -- Mr. West has dropped the issue as
15 to the operator's manual because that error has been
16 explained ad infinitum in discovery about how it ended
17 up on the privilege log.

18 THE COURT: Well, it's dropped, so let's move
19 on.

20 MS. ELOFSON: Okay. Sorry about that. I
21 don't believe that there are any other documents at
22 issue other than the e-mails. I'm not sure what he --
23 which we withheld as to -- some of them were withheld
24 as to attorney/client privilege, and he's conceded
25 that those are for the Court's review.

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MR. WEST: I -- thank you.

MS. ELOFSON: Am I wrong, Arthur?

MR. WEST: I object to the assertion of the privilege, and the Court has those in front of it and it can make whatever decision it feels best.

MS. ELOFSON: The only other, and I want to make sure there's no other set of documents that we are talking about because it was a little confusing to me in Plaintiff's materials, that he submitted a bunch of documents that he obtained from third parties, I think -- I believe the Port of Tacoma -- and says that those documents, which some of them are e-mails that include city officials or people on them, and he says, well, I should have been able to get these from the City. We don't have those documents, and our affidavits say we gave you everything we have.

It is not uncommon in these PRA cases that requesters get information from third parties and say, gee, I should have gotten it from you. The Courts are very clear. That does not establish improper withholding, the fact that you're getting a document from another party. So, I don't know if he's continuing to argue about that, that the City should have provided some of those documents he got from the Port. There's no evidence that we have them and that

1 we failed to provide them. So I believe we're just
2 talking about the e-mails.

3 THE COURT: I remember, and again, I
4 misplaced these documents because we kind of cleaned
5 up. I remember looking at the unredacted copies of
6 the purchase orders, and they were tabbed with little
7 tiny slips of paper. Is that right? Is that --

8 MS. ELOFSON: They have -- they might have
9 had little red tabs on them.

10 THE COURT: Yeah. Whose -- because I'm not
11 finding that in my materials right here right now. So
12 it may be that I'm missing another document.

13 MS. ELOFSON: I believe I have -- I don't
14 know if I have the unredacted with me.

15 THE COURT: Whose declaration was that
16 attached to?

17 MR. WEST: The unredacted copies would have
18 had to have been --

19 MS. ELOFSON: Mike. I believe Mike Smith.
20 Yeah. Let me look.

21 THE COURT: Affidavit, Mike Smith's affidavit
22 in support.

23 MS. SOWLES: I don't believe there was any
24 unredacted copies of invoices because, by its very
25 nature, they were --

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THE COURT: No, there were submitted.

MS. ELOFSON: Under seal.

MS. SOWLES: Under seal.

MR. WEST: With a declaration of Ms. Elofson on the front of it, I imagine.

MS. SOWLES: That would have been something that was submitted in camera, I believe.

THE COURT: Right, and that's what I'm saying. I can't find my in-camera version of those, although I remember them vividly and comparing the redacted to the unredacted. And so I was just, especially since they were in camera, I don't want to lose them, so I was just --

MS. ELOFSON: I'm not sure I have unredacted here.

THE COURT: I doubt whether there's a lot of that going around. But Ginele, I think there's another notebook that is the declaration of Mike Smith with unredacted copies and little red tabs in this case. Can you look quickly for me?

MS. ELOFSON: And I'm going to defer to Ms. Sowles on those documents.

THE COURT: Okay. So your argument has mainly been with respect to those e-mails, and as I understand a summary of your argument, it wasn't --

1 wasn't a deficiency to not interpret the -- Mr. West's
2 PRA request to include communications, and so there
3 was no e-mail communications search done because they
4 were focused on searching invoices and procedure
5 manuals and other documents.

6 Oh, you found it. Yay. Right here, little blue.

7 MS. ELOFSON: It said records concerning the
8 use, acquisition, and operation, and Mr. Smith was not
9 involved in the use, acquisition, or operation, so
10 when it -- yeah. And I understand his argument now.
11 Well, oh, you should have interpreted it more broadly.
12 Hindsight is a little bit of 20/20 on these things.

13 THE COURT: But you say the standard is
14 reasonable. They have to do reasonable
15 interpretation.

16 MS. ELOFSON: And the other language used by
17 the Court is adequate. And the -- and adequate
18 search, as we've put in our materials, is not
19 determined by did you find documents later? An add --
20 that happens all the time. An adequate search is, at
21 the time, did you reasonably interpret and did you
22 reasonably look? The fact that you found something
23 later does not mean that you didn't do an adequate
24 search in the first place.

25 THE COURT: But what didn't come across in

1 your briefing that I heard you argue was that, because
2 communications about these things was not part of the
3 request, they didn't search anybody's e-mails for
4 policies and procedures. I mean, there could be an
5 e-mail exchange about developing policies for the use
6 of cell phone site receivers, but those wouldn't have
7 come up either because he didn't look at any of the
8 e-mails. Is that right?

9 MS. ELOFSON: No, no. I think there's two
10 parts to it. One is that it was -- he didn't look for
11 his communications, but as to other persons, had they
12 been told to look for communications regarding a press
13 release or communications regarding what can we tell
14 the public about this equipment, they would have also
15 done it. No. I think procedures would have been
16 responsive. It's just that there weren't any to
17 disclose, and nobody is arguing that those should have
18 been disclosed.

19 THE COURT: Okay. So thank you for
20 clarifying that. He did not believe that he should
21 search his for those terms because he wasn't involved
22 in policy, procedures, whatever.

23 MS. ELOFSON: He wasn't involved in it at
24 all. All he was involved with is the press release.

25 THE COURT: He was later involved in the

1 legal aspect of disclosure of same.

2 MS. ELOFSON: And when he helped the other
3 people gather their documents, he told them, "Limit it
4 to acquisition, use, operation." And they did.

5 THE COURT: Okay. I'll hear from the U.S.

6 MS. SOWLES: Okay. In this case, we file a
7 statement of interest because cell site simulators is
8 an important technology that's used by the federal
9 government in both criminal investigation and involved
10 in terrorist activities. And in this case, we're --
11 although some information about cell site simulators
12 have been released, the FBI and the United States
13 seeks to protect technical specifications and
14 capabilities, techniques about how it's used and the
15 trade craft in employing it, and the makes and model
16 numbers of the cell site simulator and systems, and
17 that's the thing that's being protected in the
18 invoices at issue.

19 We believe that this information clearly falls
20 within the exemption for specific intelligence
21 information. The courts in Washington have
22 interpreted specific intelligence information to
23 include the particular methods and procedures for
24 gathering information. In other words, it protects
25 investigative techniques that are sensitive and that

1 haven't been disclosed to the public and that this was
2 clear in the -- in the Fischer case, the Gronquist
3 case, and the Haines/Marchel case.

4 The Gronquist and Fischer case involved the cell
5 site or involved videotapes at -- in prison. As the
6 City has pointed out, that is in this case, there was
7 certain information about videotapes that was known
8 but that other information concerning the
9 capabilities, which ones are operating, which ones
10 were not, were -- and the Court found, therefore, that
11 the videos, even though certain information had been
12 released, it was necessary to withhold the information
13 because, if all the information was released, the --
14 you could -- it would be harmful because they could
15 spot the weaknesses, detect and try to circumvent
16 that, and that would enable inmates to evade detection
17 and exploit weaknesses.

18 The same concerns are present here. Although some
19 general information about cell site simulators are
20 available, the specific models that are used by the
21 City in this case are not protected -- have not been
22 revealed, and that's the concern. As the Special
23 Supervisor FBI Agent Russell Hansen has explained, and
24 he's the chief of the tracking technology for the FBI
25 operational technology, as he explained, that

1 information would allow criminals and terrorists to
2 evade detection, and that is because there is, you
3 know, certain information that's already out there.
4 And as you get more and more pieces of the puzzle,
5 that allows them to determine, you know, certain
6 capabilities.

7 It also allows the criminals to -- that the
8 models, by revealing the particular makes and models
9 that are used by different jurisdictions, it's also
10 harmful because it allows them to build sort of a heat
11 map in trying to determine, well, which agencies and
12 localities have certain types of facilities and
13 certain capabilities and makes and models, which ones
14 don't have those things, and therefore, allows them
15 to, you know, make a determination as to, you know,
16 where they're going to have their criminal activity.
17 And the courts have consistently protected these makes
18 and model numbers in the United States v. Rigmaiden,
19 again, this was in the context of a criminal
20 discovery, but again, they protected the -- under the
21 investigative privilege which protects techniques,
22 they protected the make and model numbers.

23 Also, in Rigmaiden v. FBI and the Hodai case,
24 which is an Arizona Public Records Act case, and the
25 Rigmaiden v. FBI is a federal FOIA case, again, under

1 the idea of protecting investigative techniques and
2 the harm that would be released, they protected makes
3 and model numbers.

4 The courts -- and in this case, the plaintiff has
5 tried to compare this case to the Doe case involving a
6 university surveillance tape and tried to say, well,
7 that this investigative technique here should only be
8 limited to prisons, and they really focus on that
9 case. But that case is totally different. In that
10 case, it was a university videotape. The university,
11 and there was, on that, it had caught a shooting on a
12 university campus. The university had then given this
13 to the county and the prosecutor for its criminal
14 investigation. There was then a FOIA request, not to
15 the university but to the county and the prosecutor,
16 and the county and the prosecutor found that, based on
17 the -- you know, that particular facts in those cases,
18 that they could release the video without harming the
19 investigation by redacting and that they would redact
20 or sort of blank out the faces of the people on --
21 that were revealed in the videos. Then the university
22 and the -- and witnesses brought a separate action to
23 enjoin the county from giving that relief and
24 releasing that information in the public case.

25 So in that case, unlike here, there was no law

1 enforcement agency. The county in that case was not
2 saying that release of this videotape would harm its
3 investigation. It wasn't saying that release of this
4 videotape would reveal or -- in their investigative
5 techniques or, you know, intelligence information.
6 Just the opposite. They were willing to, with -- they
7 were willing to give it. The only concern was
8 protecting the privacy of particular victims, and they
9 were doing that by, you know, again, blanking out or
10 doing those little blue circles over the -- over the
11 faces.

12 And so in that case, you know, it's completely
13 opposite. The university, which doesn't have any law
14 enforcement technique, was coming up with this theory
15 that somehow it would harm investigation, so the
16 Court, you know, in that case rejected that argument
17 because there was no allegation by the -- by the
18 county, and it wasn't the, you know, the -- the --
19 the -- it was the university's videotape. It wasn't,
20 you know, a city police or a county that has law
21 enforcement agency. So there's nothing similar to
22 that.

23 They also try to make some -- try to find some
24 support for their argument in the New York City or the
25 New York Civil Liberties case versus Erie County and

1 the Martinez case versus Chicago. And they say, well,
2 those also -- there may have been some invoices
3 released in those cases. And therefore, they're --
4 the sky didn't fall.

5 But that case is completely different because, at
6 most in those cases, it revealed, you know, what
7 was -- you know, what those particular entities use,
8 not what other things, and that, again, the concern is
9 building a heat map to try to reveal, you know, where,
10 you know, what type of equipment is at different
11 areas.

12 But more importantly in that case, unlike in this
13 case, the FBI did not file, or the United States did
14 not file a statement of interest, and therefore, the
15 courts in those cases, when they were looking at that,
16 did not have the benefit of an FBI declaration that
17 discussed the specific documents at issue in this --
18 that was before them, and therefore -- and the
19 specific harm.

20 And that's again, why we're -- we feel that it's
21 important and why we're filing these statement of
22 interests in these types of cases because, you know,
23 again, it's like a jigsaw puzzle. Each little piece
24 of the information, wow, looks like, oh, well, that's
25 not harmful, but when you put it all together, it is

1 harmful because it would reveal the capabilities of
2 different law enforcement agencies and also, you know,
3 other -- you know, what the capabilities are, and
4 that's exactly why we're here. This concern is, you
5 know, is a real concern because this equipment is
6 used, you know, in criminal investigations across the
7 country. It's also used in, you know, to fight
8 terrorism as we, you know, know from the recent London
9 bombing, you know, this is a, you know, growing
10 concern, and this technology is important. Again,
11 while, you know, each piece of the puzzle is revealed
12 and the fact that some pieces have already been
13 released doesn't mean that you should release the
14 other pieces, and we're prepared here to -- we've
15 submitted a declaration that describes that, and to
16 the extent that this court would want any additional
17 information, the United States would be willing to
18 submit a declaration in camera.

19 THE COURT: Okay. You both get replies, but
20 I'll give you yours, Mr. West.

21 MR. WEST: Thank you, Your Honor.

22 Ms. Elofson raises the issue of hyperbole and facts
23 being blown out of proportion, and then attempts to
24 talk about what the capacities of the system is. And
25 I would put forth that, it's improper for the City to

1 attempt to, at one point, hide the capacity of the
2 system and then provide self-serving evidence as to
3 what the capacity is. To the extent the City is
4 testifying to what the capacities of the system is, I
5 believe they've waived the issue of disclosure of the
6 technology. You can't say that something is one way
7 and not produce the records that support that.

8 The reason people are suspicious of this is
9 because they don't know, and none of this information
10 is secret in the manner they propose to make it. All
11 of the Harris equipment is patented, as the Martinez
12 brief show. Every piece of equipment Harris sells is
13 in the U.S. Patent Office. Anyone who wants to see
14 the equipment capacities can go to the U.S. Patent
15 Office and order it up.

16 So the reason that there's any hyperbole or people
17 are talking about that is we don't know what the
18 capacity of this equipment is, and I don't think that
19 Ms. Elofson's statements resolve that.

20 Now, as far as whether or not this was always used
21 in accord with the law, in Exhibit 4, Exhibit 3 to the
22 Plaintiff's Reply in Support of Motion for Summary
23 Judgment, there appears a -- two pages from the
24 Christopher release, 862 and 863, that talk about the
25 talking points that the -- that the federal government

1 okayed the City to tell judges and prosecutors about
2 this equipment.

3 What we have here -- now, this postdates the
4 request, so this wasn't withheld, but not all of the
5 Christopher documents postdate the request, and some
6 of those were silently withheld to the 2014 request,
7 withheld by exemption in response to my 2015 request,
8 but then, bizarrely, produced without redaction to the
9 ACLU. So there's a series of different types of
10 responses by the City depending on who is making the
11 request, whether they've sued and whether they're a
12 powerful civil rights organization.

13 If you look at 863 of the Christopher release, it
14 talks about what we're going to tell the judges and
15 prosecutors about this equipment. And the judges,
16 to -- to all -- all the facts that I'm aware of, show
17 that, before this equipment was known to exist,
18 warrants were being issued without the equipment being
19 described in the warrants or its capabilities. And to
20 the extent that warrants are still being issued from
21 this equipment, we still don't know its capabilities.
22 So I'm not sure how that comports with the
23 requirements in our constitution for precise warrants,
24 but I -- I would assert that people's concerns are not
25 hyperbole.

1 The fact is, some of this equipment is capable of
2 intercepting content. Some of it is -- it interferes
3 with cell signals. Some of it has a potential for
4 interception of conversations. And to the extent that
5 the City might have equipment that can do that, the
6 citizens, I think, have a right to know, and the
7 disclosure of what equipment the City has should not
8 be a matter of national security. If all it does is
9 pings and locates people, that's not a national
10 security issue.

11 So, the second issue about Mike Smith could not
12 find his own communications from the day before the
13 request or didn't believe that records included
14 communications. The Public Records Act specifically
15 defines records to include communications. When you
16 ask for records under the Public Records Act, that, by
17 reference, includes the definition of records in the
18 Public Records Act. It's very broad. That's why I
19 use that. The request, if read in good faith, for any
20 records concerning any agreements, policies,
21 procedures, or understandings related to the
22 acquisition, use, or operation of the Stingray
23 technology would have to include the communications
24 such as those involving the press release because, if
25 you look at the press release, it was all about

1 communi -- agreements, policies, procedures, and
2 understandings related to the acquisition, use, or
3 operation of the Stingray technology. You could not
4 find a better way to describe what that press release
5 was. I challenge the City to do so. So Mr. Smith
6 could not have performed a reasonable search and yet
7 fails to find his own communications from a day before
8 the request.

9 Now, they talk -- the defendants talk a lot about,
10 you know, Fischer and Gronquist, Haines-Marchel.
11 These were felons in prison, that plaintiffs in those
12 cases were felons in prisons. And then they talk --
13 they raise the specter of this being used in Iraq.
14 I'm not asking for what the Marines on the ground in
15 Iraq or Afghanistan are using. I don't think that the
16 disclosure of what the City of Tacoma uses to locate
17 criminals here in Tacoma has any application to what's
18 going on in Iraq or Afghanistan or any of those
19 countries in the Middle East.

20 Again, Harris patents are publicly available,
21 and -- and as to the City, again, sort of glosses over
22 the two documents on the exhibit, the two -- the -- on
23 the other side. Those are the Mike Smith -- yes. The
24 ones marked there. Again, they existed in response to
25 2015 request. They were responsive. City has not

1 mentioned those or in any way disputed that in their
2 argument.

3 So, as far as their argument as to what silent
4 withholding is, I find it sort of disingenuous to say
5 that Mr. Smith didn't know about his e-mail or provide
6 it, and I don't think that an adequate search is
7 satisfied by the expedient of turning a blind eye to
8 records reasonably known to exist in the manner of
9 Admiral Nelson at the Battle of Trafalgar. The press
10 release was a penultimate document concerning records
11 involving policies, procedures, or understanding
12 regarding these -- the acquisition, use, or operation
13 of the technology. I don't see how he could define it
14 otherwise.

15 Again, there's a difference between a mosaic and a
16 piece of glass. And I think the idea of a prior
17 restraint says nobody can have any pieces of glass
18 because they might make a bad mosaic out of it. That,
19 I think, is alien to the American view of information
20 and the First Amendment. Again, the Arizona cases
21 that have been cited simply aren't applicable. Now,
22 the -- and I understand that Ms. Sowles cited to the
23 SPU case, I participated in the briefing in the SPU
24 matter, and there was a very serious discussion of the
25 intelligence information and effective law enforcement

1 exemptions, and the ruling of that said that there was
2 no persuasive reason why that should be extended past
3 the prison environment, and I think that ruling does
4 apply to this case.

5 So, yes, for -- for -- for many years, our
6 government and other governments have tried to control
7 the flow of information, saying that -- that
8 information should be suppressed because if people get
9 information, they're going to do bad things with it.
10 This is the essence of a prior restraint. If you look
11 at the Emerson's treatise on the Doctrine of Prior
12 Restraints, all such systems tend to irrational,
13 excessive enforcement and censorship. And once we
14 start down the road of saying we should not allow you
15 to have one piece of information because, later on,
16 you might put it to a dangerous and unlawful purpose,
17 that's the essence of what a prior restraint is and
18 why the First Amendment prohibits such prior
19 restraints. Thank you for your time.

20 THE COURT: Thank you. Brief reply.

21 MS. ELOFSON: Very brief. Couple things
22 about that. It occurs to me that, you know, when we
23 look at these documents and the amount that was
24 redacted, it's very small. Only the barest has been
25 removed in order to protect a necessary, vital

1 function of the government. There's no question but
2 that it's the government's function to accomplish law
3 enforcement. And I think it's nonsensical for us to
4 say that certain aspects of that have to be withheld
5 from public knowledge. I mean, that's why we have the
6 exemption. It's because we all know some aspects of
7 it are going to have to be confidential in order for
8 it to be effective. And that's why the exemption, as
9 it's been construed, is -- is not that it's only
10 exempt if it prevents law enforcement from functioning
11 at all. No. It's exempt if it impacts effective law
12 enforcement. And we have affidavits here from a
13 detective that say yes, this information out there
14 does impact law enforcement.

15 Now, there was a difference with a document that
16 Judge Cuthbertson ruled should be out there. That was
17 the non-disclosure agreement, and it was very broad
18 and very vague. And it didn't identify specific
19 portions of the equipment in pieces in that
20 capabilities, and that's what he said. He said, I
21 don't see that here. The non-disclosure agreement can
22 go out. I don't see how just this very broad, vague
23 thing is going to allow people to put together a
24 system to defeat the equipment. And that went out.
25 And -- and he said, you should have done it from the

1 beginning. However, as Judge Cuthbertson indicated,
2 the invoices, the quotations, the estimates, those are
3 different matters, and the amount that we're redacting
4 from that is very small.

5 In terms of the equipment that the City of Tacoma
6 is using, part of the problem with telling everybody
7 exactly what equipment is located in which cities is
8 part of that overall mosaic. And it is a
9 legitimate -- it is a real concern. All the evidence
10 is the City's equipment pings. Yes, there's a lot of
11 talk out there. Oh, people -- we see it every day.
12 The government's collecting my phone conversations.
13 There's no evidence of it, but I just believe it. And
14 therefore, I want to look through all their documents
15 to disprove it. That's not what -- that's not the way
16 it works. You're entitled to get the documents.
17 We'll give you everything that's responsive, but we
18 will exempt out that which we have determined as a
19 society should not go out. And does this information
20 fit within it? Yes.

21 The e-mails were withheld for a variety of
22 reasons, and Mr. Smith is right. They went out later
23 on in some of the other -- he said that they were
24 released to Christopher because they had a big buck
25 attorney asking. Wrong. Those were releases as part

1 of discovery, and as is required by the City, as time
2 goes on, we have to reevaluate what we send out and
3 what we aren't and it can change, as it did with the
4 NDA. Documents that were once prohibited from
5 disclosure, we now allow to go out. So it had nothing
6 to do with the attorney that requested them.

7 These are talking points, developed by a city
8 attorney with his client about what can be discussed
9 in the public without violating a contractual
10 agreement. They don't talk about -- at least that's
11 the way they viewed them. And so when looking for
12 documents that concern the use, operation, and
13 acquisition, that's what they were provided. They
14 were given all of those documents. He says that
15 there's some on that second one that appear that we
16 didn't provide. We're not going to go into the
17 operator's manual. They didn't have one. It got on
18 there by accident. So I think he's dropped that. The
19 other ones are the e-mails, most of which were
20 withheld according to attorney/client privilege, once
21 they were finally produced.

22 THE COURT: Well, the e-mails, but that's not
23 on this chart here.

24 MS. ELOFSON: Now, what was the third one,
25 Your Honor?

1 THE COURT: This chart -- the manuals -- this
2 chart is the 2014 Port Security Grant update with no
3 date.

4 MS. ELOFSON: Yes, I believe that was -- I
5 disagree that that one was improperly withheld. I --
6 and I believe that --

7 THE COURT: You think those documents were
8 given?

9 MS. ELOFSON: I do.

10 THE COURT: Without any redactions, so they
11 don't need to be on this log?

12 MS. ELOFSON: I believe that they were --
13 they were -- they were either not done or prepared
14 prior to his request. I don't believe that they were
15 withheld from him. In 2014.

16 THE COURT: And then there's an 8/12/14
17 Harris Corporation quotation.

18 MS. ELOFSON: And that's part of this other
19 set of documents which -- I see that what he's saying,
20 that that should have been included on the log and
21 provided. Is there a date of it?

22 THE COURT: 8/12/14.

23 MS. ELOFSON: I'll have to look at that, Your
24 Honor. I'm not so -- I don't know if that was the
25 date that it was prepared. I don't know if we'd

1 received it by that date. I don't know any more
2 information about that. Then I would agree that yes,
3 that should be -- should have been provided in a
4 redacted form, but I'm not sure of the date that we
5 have that.

6 THE COURT: And you don't know about --

7 MS. ELOFSON: Or that it wasn't provided
8 because we provided all of the invoices and
9 quotations, I think, in redacted form, unless, because
10 of the timing, we missed that one within two weeks.

11 THE COURT: But -- but I think, if you were
12 provided redacted, you're supposed to put it on the
13 log.

14 MS. ELOFSON: If it's redacted, correct.

15 THE COURT: And so, unless you can find that
16 you gave these two documents without any redactions --

17 MS. ELOFSON: The other thing is, wasn't
18 there more than one log in 2014? So it might be on
19 the other log.

20 MR. WEST: No. The other log we had was very
21 limited. That was the section of the log dealing with
22 that -- that --

23 THE COURT: Okay. Well, obviously there's a
24 dispute over the facts about that.

25 MS. ELOFSON: Yeah.

1 THE COURT: But this oral argument has helped
2 on that. Any brief reply --

3 MS. SOWLES: Again --

4 THE COURT: -- from the U.S.?

5 MS. SOWLES: Again, just that, you know,
6 there is this mosaic effect, and that every little bit
7 of information, you know, that it's harmful. And
8 that, in this case, the government has -- the City has
9 pointed out, we're only redacting certain things, and
10 that includes the make and model number. And that's
11 information, while it may not seem to be harmful, as
12 explained in the United States' declaration, release
13 would be harmful because it would create this heat
14 map, and this is the very type of information that has
15 been withheld in other cases.

16 THE COURT: Okay. So I believe that, for
17 most of the reasons given by Mr. West, that the
18 e-mails prior to his request concerning the press
19 release should have been discovered and provided
20 and -- and/or, at a minimum, noted on the log
21 concerning attorney/client privilege. However, I'm
22 not even sure that attorney/client privilege obtains
23 to those, all of those e-mails, because I don't think
24 you get attorney/client privilege just by CCing
25 somebody on an e-mail string.

1 I will, however, agree that the redacted invoices
2 and quotations and things that have been provided to
3 me in camera need not be disclosed in their unredacted
4 form, so there's no violation with respect to those.

5 The operator manual's off the table, but I'm still
6 concerned about the 8/12/14 quotation, if it was given
7 and it was redacted and they simply left it off the
8 redaction log. I'm not sure --

9 MS. ELOFSON: I can research that.

10 THE COURT: -- if that's an issue. And on
11 this 2014 Port Security Upgrade, we don't know the
12 date of that, so it could have been later than the
13 request. So that's pretty much my ruling.

14 MR. WEST: Would you like the parties to
15 prepare an order and bring that back for presentation?

16 THE COURT: Yes. Thank you.

17 MS. ELOFSON: I'm sure that we can -- I'm
18 sure that we can do that.

19 MR. WEST: I thank you, Your Honor.

20 THE COURT: Appreciate that.

21 MS. ELOFSON: Thank you, Your Honor.

22 THE COURT: Ginele will give you a date. How
23 long do you think it will take?

24 MR. WEST: I can't imagine it will take very
25 long.

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MS. ELOFSON: A week?

MR. WEST: Could be back next week.

THE COURT: Make a week from Friday?

MS. ELOFSON: Perfect.

THE CLERK: June 2nd at 9:00.

THE COURT: Let's do it toward the end.

MS. ELOFSON: I think we have another hearing
on the 2nd, don't we?

MR. WEST: Do we? That would be very
convenient then.

MS. ELOFSON: June 2nd, but closer to 11:00?

THE COURT: We'll set it at 11:00, but if you
come early and we are done, we'll take you.

MS. ELOFSON: Okay, great.

MR. WEST: Thank you very much, Your Honor.

(Proceedings concluded.)

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REPORTER'S CERTIFICATE

I, Dana S. Eby, Official Court Reporter for Department 13 of the Pierce County Superior Court, do hereby certify that the foregoing transcript entitled, "Verbatim Report of Proceedings," was taken by me stenographically and reduced to the foregoing typewritten transcript at my direction and control, and that the same is true and correct as transcribed.

DATED at Tacoma, Washington, this _____ day of June, 2017.

Dana S. Eby, CCR

APPENDIX B

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ARTHUR WEST,)	
)	
Plaintiff,)	
)	
vs.)	No. 15-2-12683-6
)	
CITY OF TACOMA, TACOMA POLICE)	
DEPARTMENT,)	
)	
Defendant.)	

VERBATIM REPORT OF PROCEEDINGS
PRESENTATION

BE IT REMEMBERED that on the 23rd day of June, 2017, the above-captioned cause came on duly for hearing before the HONORABLE KATHRYN J. NELSON, Department 13, Superior Court Judge in and for the County of Pierce, State of Washington;

WHEREUPON, the following proceedings were had and done, to wit:

Reported by: Dana S. Eby, CCR

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APPEARANCES

For the Plaintiff:

Arthur West
Pro se

For the Defendant:

Margaret A. Elofson
Assistant City Attorney
747 Market Street, Room 1120
Tacoma, Washington 98402

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1 JUNE 23, 2017

2 MORNING SESSION

3 * * * * *

4
5 THE COURT: The next matter is West versus
6 City of Tacoma, 15-2-12683-6. And I have read
7 everything that's been submitted, and I did not
8 understand the reply that was provided by Mr. West
9 that talks about a declaration of Detective Travis.

10 MR. WEST: Lieutenant Travis?

11 THE COURT: This is what I received is your
12 reply. I suspect that it's another case that got --

13 MS. ELOFSON: You did not get a copy of the
14 declaration of Christopher Travis?

15 MR. WEST: Can I approach?

16 MS. ELOFSON: It should have been attached,
17 Your Honor, to the City's -- I believe it was attached
18 to the City's motion, and it deals only with those two
19 documents which I believe were reserved in the Court's
20 oral ruling.

21 THE COURT: Okay. Okay. I must have spaced
22 out on something. So yeah, please hand that back,
23 Ginele.

24 MR. WEST: Perhaps, I could suggest how we
25 could proceed.

1 THE COURT: Yes. I'd like to hear from
2 someone on that.

3 MR. WEST: Ms. Elofson's prepared an order
4 concerning the issues which nobody has any dispute
5 about: The order on the redactions to purchase
6 orders, invoices, and estimates. And I agree with
7 this order with a minor amendment to show that it's
8 dealing with the redactions to these documents. It
9 would be an appropriate order.

10 And then I'd ask that CR 54 findings be made for
11 this order so that that issue could proceed while we
12 consider the rest of the issues. And I would ask that
13 the other issues in this case, which Counsel's filed a
14 number of pleadings very recently, be re-set for
15 hearing in two weeks when the Court's had more time to
16 review them, when we've got a transcript, and when I,
17 myself, have had more time to review all the filings.

18 THE COURT: I'll hear from the City of
19 Tacoma.

20 MS. ELOFSON: And Your Honor, as to the order
21 that we're prepared -- that I prepared and that we'd
22 like the Court to sign today, I disagree that the
23 order should make clear --

24 THE COURT: Can you hand me up another copy
25 of that?

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MS. ELOFSON: Oh, sorry. Yeah.

THE COURT: I'm --

MS. ELOFSON: I think Mr. West's suggestion goes to the very last paragraph. The language of the order says, "The plaintiff's claims concerning those documents is denied and the defendant's motion as to those documents is granted."

As you know, we had cross motions. I would disagree that that should be limited to redactions. I don't believe that there are any claims left, and I don't want that being interpreted as that there are other claims left as to those documents.

THE COURT: Mr. West, any final words on that?

MR. WEST: The reason that I would ask that it be limited to redactions is that two of the records that the Court reserved ruling on on the 24th of May were the silently withheld estimate that appeared in the 2015 privilege log, and I don't think the Court ruled on that. And so that, I would ask, be excluded from this.

And then the other part that I would ask be changed is the representation that the claims regard to the non-disclosure agreement have been settled. The claims regard to the non-disclosure agreement

1 appear in a order in this case filed March 17 as the
2 result of a motion by the plaintiff for an order
3 setting penalties. So there was no settlement. There
4 was a motion and an order that was entered with full
5 opportunity for the City to object. And so I'd ask
6 that the Court take judicial notice of the fact that
7 there was not a settlement outside of the court. This
8 was an order entered by Judge Cuthbertson in open
9 court in accord with the Yousoufian findings made in
10 the Center for Open Policing case.

11 MS. ELOFSON: Your Honor -- you're right.
12 That was a different case. It was not this case. It
13 was a different -- Mr. West was not a party to that
14 case. And what happened after that other case went to
15 hearing, the City approached Mr. West and we settled
16 it.

17 THE COURT: So I should say ordered, adjudged
18 and decreed that the non-disclosure agreement claims
19 are not part of this motion.

20 MR. WEST: That's acceptable to me.

21 MS. ELOFSON: Let's just -- I would prefer
22 that we strike the whole paragraph, and the City will
23 bring a motion as to that settlement agreement. Why
24 don't we just -- you can put it's not part of this.

25 THE COURT: Well, I've already stricken it.

1 MS. ELOFSON: Here's the problem, Your Honor,
2 is almost all of the briefing goes to --

3 THE COURT: I know. That's what was very
4 difficult for me to deal with, but --

5 MS. ELOFSON: There won't be any
6 misinterpretation, I don't think, if there's nothing
7 there at all is what I was thinking.

8 MR. WEST: Either way is fine with me, Your
9 Honor.

10 THE COURT: Okay. So it's stricken. I'm not
11 going to make any other changes to the last paragraph.
12 I think it accurately reflects my order in this case.

13 MS. ELOFSON: And then as to the other, Your
14 Honor, if you would like my thoughts on how to go
15 forward, it may be that I'm the only one that's
16 confused. I submitted some materials that there are
17 continually -- there's a new set of documents that
18 continually makes it into the record, and I did not
19 understand that Mr. West was arguing about 74 pages of
20 e-mails at the hearing.

21 THE COURT: No. The only thing that I ruled
22 on were those e-mails prior to April (sic) 28th that
23 had to do with the preparation of the information for
24 the newspaper. That was the only thing that was in
25 this case related to that.

1 MS. ELOFSON: And I believe those are the
2 ones that were identified in my materials. Is that
3 right?

4 THE COURT: Yes.

5 MS. ELOFSON: Okay.

6 MR. WEST: I would respectfully object to
7 that ruling. I would point out Plaintiff's motion for
8 partial summary judgment at Page 3, Plaintiff's
9 response --

10 THE COURT: But --

11 MR. WEST: -- at Page 5.

12 THE COURT: This case has to do -- Mr. West.

13 MR. WEST: Yeah.

14 THE COURT: This case has to do with your
15 request on April (sic) 28th.

16 MS. ELOFSON: August.

17 MR. WEST: I agree.

18 THE COURT: So things that happened --
19 documents that came into existence after April (sic)
20 28th are not part of this case.

21 MR. WEST: I understand that, Your Honor.
22 I'm not asking for this court to make any rulings on
23 documents that existed after -- that were created
24 after the 28th. That's not what this is about. What
25 we're talking about is the records that existed at the

1 time of the request that should have been produced in
2 response.

3 THE COURT: And the only one I agreed with
4 you was that those e-mails that are attached to her
5 complaint.

6 MS. ELOFSON: I think they're attached --
7 they're the ones --

8 THE COURT: Or attached to your motion.

9 MS. ELOFSON: Yes, and they're identified in
10 the privilege log of December 22nd, 2015. Is that
11 right?

12 MR. WEST: Well, there -- the -- the
13 difficulty with that is that the records that are
14 identified in the privilege log have not been fully
15 produced yet. There were records that were produced
16 in response to the 2015 request which I filed. There
17 are also records that were withheld in the privilege
18 log of 2015, portions of which have been produced in
19 the Christopher case, which I filed in the case.

20 So if the Court's making a ruling that all the
21 records in the privilege log of 2015 should have been
22 disclosed, I don't dispute that. That's a very good
23 ruling. I agree with that. I'd like to have them
24 produced.

25 THE COURT: No. No. That wasn't my ruling.

1 The counsel for the City has accurately related what
2 my ruling is and what documents that I was speaking of
3 when I made my ruling.

4 MR. WEST: Okay.

5 THE COURT: So I don't follow your arguments,
6 Mr. West, at all. I just don't.

7 MR. WEST: Okay. I apologize, Your Honor.
8 As I say, perhaps we should re-set this.

9 THE COURT: No. I'm ready to sign the City
10 of Tacoma's order today --

11 MR. WEST: Okay.

12 THE COURT: -- concerning this case, which is
13 what I ruled on.

14 MR. WEST: Okay.

15 THE COURT: And you may have other claims
16 related to your subsequent requests for production,
17 but it's not this case.

18 MR. WEST: Thank you very much, Your Honor.

19 MS. ELOFSON: And so is the Court prepared to
20 set a penalty so that the case can be concluded today?

21 THE COURT: I would like to hear argument on
22 the penalty for the 383 days that the documents were
23 withheld when this court has ruled that they should
24 have been included.

25 MS. ELOFSON: And Your Honor, from the City's

1 perspective, as you -- and as the case law says, as
2 you know, the Court has wide discretion in setting a
3 penalty. And the cases set out a number of factors
4 besides the Yousoufian factors which guide the courts
5 in exercising that discretion.

6 The cases make clear that the primary factor the
7 Court should consider is good faith and bad faith. Is
8 there evidence that the City withheld these e-mails
9 for a particular purpose, knowing that they were
10 responsive, and with bad motive? And there's no
11 evidence of that here. The reason that Judge
12 Cuthbertson, in a different case, has, on the
13 non-disclosure agreement, said that he found it was
14 bad faith is because the City knew it had a document,
15 knew the document was responsive, and purposefully
16 withheld it and believed it was doing so with good
17 reason but the Court said no. That was not good
18 reason, and you haven't shown that it was.

19 This case is entirely different. We have a series
20 of benign e-mails -- it's a single e-mail string --
21 talking about how should we respond to these questions
22 by the newspaper that has created a public concern so
23 that we can get as much information out there to allay
24 any concern -- concerns that the public has. I mean,
25 it's completely opposite. It is an effort to produce

1 as much as much to the public as it can.

2 Mr. Smith, you said, made an error. He should
3 have seen these e-mails as responsive. That's fine.
4 He made an error. It wasn't that he was trying to
5 hide them. Had that been the case, he wouldn't have
6 produced them -- he wouldn't have disclosed them the
7 next year. He simply didn't see these communications
8 as responsive to the request for documents concerning
9 the use, operation, and acquisition of the equipment.
10 Okay. We made a mistake. That's not evidence of bad
11 faith. There's no evidence of bad faith here.

12 The other Yousoufian factors basically go -- both
13 mitigating and aggravating, really go to this whole
14 idea of do you have an agency that's trying to do the
15 best it can and be responsive and attentive to its
16 Public Records Act obligations? And in this case, I
17 don't think that you'll find an agency that is more
18 attentive. Every week, there's a meeting with a
19 Records Act coordinator at the City with the City
20 Attorney, the PRA advisor, every single week, talking
21 about the requests that are before the City at that
22 time and any issues that are coming up. The City
23 holds either two or three meetings per year,
24 triennial, biannual meetings per year that include all
25 the legal staff and they go over all the case law that

1 has come out or any other sources of information so
2 that everybody, every legal representative of the
3 city, is up to date on the PRA. That includes all the
4 PRA coordinators as well. The PRA coordinator meets
5 quarterly with the person designated in every
6 department or division responsible for gathering and
7 facilitating responses for that division or
8 department. We are meeting constantly, updating
9 constantly. We're members of WAPRO, the Washington
10 Association for Public Records Officials. We couldn't
11 be more attentive.

12 Do we make mistakes occasionally because we get
13 2,500 requests a year? We're responding to more than
14 10 a day. Some are simple. Some take years and
15 hundreds of thousands of pages. We have an excellent
16 tracking program. There's no evidence here that we
17 didn't comply with every other aspect of the PRA in
18 regards to this request.

19 So is this a case where, one, you have an agency
20 that knew it had a document that was responsive and
21 tried to keep it secret for bad reasons? No. And
22 two, do you have an agency that needs to be schooled
23 in its obligations under the PRA and penalized and
24 punished for not living up to those obligations? And
25 I would suggest, no. We have a robust, thorough

1 program. We're spending, I can't tell you how many
2 hours, responding to and complying with and doing the
3 best we can to give every requester all the documents
4 that they seek.

5 So I would suggest that, in this case, the
6 appropriate penalty, if any -- the Court doesn't have
7 to award any penalty -- but the appropriate penalty is
8 the minimal penalty. It used to be the minimal
9 penalty was \$5 a day. Now the least the Court can
10 award is zero. But the minimal penalty of \$5 a day
11 adequately and appropriately fulfills the goals of the
12 PRA regarding this document, this record.

13 THE COURT: Thank you. Mr. West.

14 MR. WEST: A lot of judges, a lot of
15 agencies, have a prejudice against the Public Records
16 Act. They don't believe that agencies should be
17 responsive. They discriminate against -- they look
18 down upon citizens who attempt to get records. I
19 believe that that prejudice is what Ms. Elofson is
20 speaking to today.

21 This case was originally brought for -- in the
22 pleadings -- for records that were -- should have been
23 produced in response to a request of August 28th,
24 2014. The plaintiff has argued in the pleadings that
25 there were records, e-mails, produced in response

1 that -- to a subsequent request that were not
2 identified or produced in response to the 2014
3 response. There are also records exempted from that
4 request prior that originated prior to the 28th which
5 were subsequently produced to Christopher in the ACLU
6 case. Those are two classes of records. The City has
7 not produced those records, which it produced to
8 Travis -- to Christopher, to myself.

9 Also, the Port -- the Court deferred ruling, as
10 the transcript will show, on two records involving
11 invoices and an estimate, a purchase order and an
12 estimate for which Mr. Travis produced an affidavit
13 which the Court has not yet examined. So I would say
14 that the Court would manifestly abuse discretion by
15 ruling upon evidence which -- in the record which it
16 has not examined.

17 I would -- I would -- will respectfully object to
18 the Court not finding violations for the records
19 preexisting the request that were not produced until
20 2015 and the records that were exempted. Those are
21 two groups. As well as the records appearing on the
22 exemption log that Mr. Travis discussed. So that I
23 would -- I would argue there are three groups of
24 records, and I understand that the Court doesn't share
25 that, but I'd like to make a record and put my

1 objections on the record very clearly so no one has
2 any -- any -- so a reviewing court cannot have any --

3 THE COURT: Can you hand up -- well, Ginele,
4 can you print out Mr. Travis's declaration?

5 MS. ELOFSON: I can give you a copy if you'd
6 like, Your Honor.

7 THE COURT: Or can you give me a copy?

8 MS. ELOFSON: And Your Honor --

9 THE COURT: So, Mr. West, do you want to
10 address what we all agree upon? The Court ruled that
11 you didn't get the e-mails that were being generated
12 on August 26th and 27th, just prior to your request,
13 having to do with communicating to the news media
14 about cell site simulators that you haven't had or you
15 didn't have for 383 days and the amount of money.

16 MR. WEST: I would be happy to do so, with
17 the understanding that is a subset of the records --

18 THE COURT: Sure.

19 MR. WEST: -- that were dealt with in the
20 Complaint and that I'm reserving an objection to the
21 court --

22 THE COURT: Sure. Sure. Just tell me about
23 the part that we all agree upon, and then we can deal
24 with the rest.

25 MR. WEST: Thank you, Your Honor. Well, for

1 the -- in the first point, I don't agree that 386 days
2 were -- is the proper time limit.

3 THE COURT: I think she said 383.

4 MR. WEST: 383. My calculation from the date
5 of the request is 480, and there's case law stating
6 that the Court is without discretion to modify the
7 penalty days. The penalty calculation goes from the
8 date of the request to the date of production, and so
9 for the records that have been produced, excepting, of
10 course, the records that have not yet been produced to
11 me by the City, that would be 480 days.

12 Now, in contrast to the City's representations,
13 there was an order entered in this case on March 17th,
14 2017, finding the City acted in bad faith in
15 withholding --

16 MS. ELOFSON: In this case, Arthur?

17 MR. WEST: This case. I've got the order
18 right here. Order setting penalties for withheld NDA.

19 MS. ELOFSON: Oh, this is an agreed order.

20 MR. WEST: The withholding in bad faith in
21 consideration of the Yousoufian factors.

22 MS. ELOFSON: It mimics the order that was --
23 that was part of our settlement, mimics the order that
24 the Court entered in COP, yeah.

25 THE COURT: So we did order bad faith?

1 MS. ELOFSON: As the non-disclosure -- no,
2 you did not. It was -- was it this judge?

3 MR. WEST: It was Judge Cuthbertson, but on
4 the face of the record, there's an explicit finding in
5 an order signed that the City acted in bad faith,
6 justifying a maximum penalty under the Yousoufian
7 factors.

8 MS. ELOFSON: Only as to that document.

9 MR. WEST: As to that document.

10 THE COURT: But I'm not doing that document.
11 That document, you address with Judge Cuthbertson.

12 MR. WEST: I agree. But this is a pattern
13 and a continuum of withholding, and I would argue that
14 it would be a manifest abuse of discretion for this
15 court to depart from the sound reasoning of the
16 Honorable Judge Cuthbertson in records that were more
17 necessary than the non-disclosure agreement for the
18 plaintiff to understand what the non-disclosure
19 agreement required and what -- how it -- how the
20 rubber met the road. The fact that the City had to
21 check with the FBI prior to publishing anything or
22 allowing things to be published in the newspaper,
23 that's the objectionable part of this non-disclosure
24 agreement. That's how the non-disclosure agreement
25 functioned as a prior restraint to keep information

1 out of the public's knowledge, and so I would ask
2 that, far from being an innocuous violation, the
3 withholding of the non-disclosure agreement and the
4 concealment of evidence stemming from the
5 non-disclosure agreement were one of the most
6 egregious violations of the Public Records Act that I
7 have seen.

8 And if the Court reviewed the testimony of Officer
9 Travis and Mr. Smith, I think there's some very
10 serious questions as to the legitimacy of the
11 plaintiff's responses. I have never seen a
12 declaration that -- similar to the one of Mr. Travis
13 that talks about not remembering what records existed,
14 not -- not -- not remembering anything, three times in
15 the space of a half a dozen lines. This does not
16 establish that there were no records.

17 Furthermore, this was a \$175,000 grant that they
18 were applying for, and they're representing to this
19 court that there was not a single electronic record,
20 not a single page that the City had about this grant
21 until it was awarded. That's simply incredulous.
22 Many of the representations, the ones of the public
23 records officer responding to this case, just do not
24 pass the straight face test.

25 THE COURT: Okay. Thank you.

1 MR. WEST: Thank you, Your Honor.

2 THE COURT: Thank you, Mr. West. And I'm
3 trying to do this so that I understand you. Let's
4 forget what Mr. Travis is talking about because that's
5 not the e-mail that I'm talking about.

6 MR. WEST: Okay.

7 THE COURT: What I understand is that you and
8 the City of Tacoma have a disagreement about when to
9 count the days from. They say the proper time to
10 count the days from is the time they answered your
11 request. You say it goes back to the day you
12 requested it. Did I capture that correctly?

13 MR. WEST: Certainly, Your Honor.

14 MS. ELOFSON: (Nodding head.)

15 THE COURT: Okay. And then they have urged
16 minimum \$5. You did not -- you said it was bad faith,
17 so am I to take it you think it should be the maximum
18 \$100 a day? You didn't give me a number that I heard.

19 MR. WEST: I believe that the Honorable Judge
20 Cuthbertson, in setting a hundred-dollar penalty, was
21 correct, and as I said, it was my belief that, in this
22 case, the -- it might be appropriate for the Court, in
23 its discretion, to consider groupings of records since
24 there are a lot of records. But in -- at the very
25 least, I think the Court should follow in the

1 ruling -- the ruling of Judge Cuthbertson in regard to
2 the 480 days that I -- that the case law would
3 establish that the records were withheld. Thank you.

4 THE COURT: I still need to know what you're
5 asking for. You're asking for 480 days. I know that.

6 MR. WEST: Yeah.

7 THE COURT: And I know why. You're asking
8 for it to be considered a bad faith withholding. I
9 understand that.

10 MR. WEST: Okay.

11 THE COURT: How much per day?

12 MR. WEST: A hundred dollars, Your Honor.

13 THE COURT: Okay. I just wanted to make sure
14 because I asked you that and I got a different answer
15 back.

16 MR. WEST: I -- what I said was it would
17 be -- I believe it was -- it would be abuse -- an
18 abuse of discretion to depart from the ruling of the
19 Honorable Judge Cuthbertson, which was a hundred
20 dollars a day. And in doing so, I do not waive my
21 previous arguments that there are other records
22 redacted or the request that the Court --

23 THE COURT: Right, we are going to get there.

24 MR. WEST: -- exercise its discretion.

25 THE COURT: We are going to get there.

1 MS. ELOFSON: And I have a suggestion on
2 that, Your Honor. As you know, the Complaint in this
3 matter doesn't deal with, really, any of these records
4 beyond the invoices you already ruled on and the
5 non-disclosure agreement. He attached to his
6 Complaint the privilege log and said these are the
7 documents I'm concerned with. It doesn't have
8 anything to do with the documents we're ruling on
9 today and discussing. So we are, in essence, amending
10 the Complaint to conform to the evidence. I
11 understand that. But I do think we need to make clear
12 exactly what documents are going to be disposed of and
13 what are part of this case.

14 He said, I think we should consider groupings, and
15 he's referred to the Christopher documents. My
16 understanding is, those are -- and those are documents
17 that were produced in discovery in another case, and I
18 don't believe they've ever been part of this motion.
19 He's also referred to that 74 pages which I think the
20 Court has accurately stated weren't really a part of
21 the motion we discussed and not part of today's
22 ruling. So I just -- I want to make sure that we --
23 if we're going forward on documents that weren't pled
24 as part of this case from the outset and --

25 THE COURT: We're not. We're not.

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MS. ELOFSON: So --

THE COURT: I'm still -- I'm way behind you. Your -- he's telling me that -- that Judge Cuthbertson used 480 days with the non-disclosure agreement.

MR. WEST: The non-disclosure agreement was withheld for a different period of time.

THE COURT: Calculated from what? From the date of your request or calculated from the date of the response?

MR. WEST: Judge Cuthbertson made his calculation from the date of the request to the date that the document was produced. I would ask that the Court do the same at the hearing today.

THE COURT: Is that correct?

MS. ELOFSON: I simply don't recall, Your Honor. It may be.

THE COURT: But is that in accordance with case law, or is your case law correct that it stems from the time the response is completed as opposed to the date of the request, because I thought in your brief, you told me it was the latter, and that was 383 days.

MS. ELOFSON: I did tell you that in my brief because the case law I looked at said that's when the cause of action accrues. That's when -- it's when the

1 denial occurs.

2 Now, if Mr. West is suggesting that the case law
3 says something else, I'm simply unaware of it. I'm
4 not trying to, you know, mislead the Court in any way.

5 MR. WEST: Your Honor, case law is very
6 explicit on the point that the Court lacks discretion
7 to reduce the number of penalty days, but this is
8 calculated -- the calculation of a PRA penalty starts
9 with a calculation of days from the request to the
10 production.

11 THE COURT: Do you have the case?

12 MR. WEST: I could -- I have written briefs
13 on it. Today, I do not recall that exact case, but I
14 believe that would -- I think that's -- the Koenig
15 versus, one of the early Koenig cases. I think it
16 might have been Koenig v. Thurston County.

17 THE COURT: And you're not aware of that?

18 MS. ELOFSON: I know that there are -- I
19 do -- I am aware that penalties have been calculated
20 from the date of the request. I don't know the
21 circumstances. Certainly -- well --

22 THE COURT: So, I thought I was going to be
23 prepared to rule, but I don't have all the information
24 that I need with respect to how to calculate the
25 number of days. So I'm going to need additional

1 briefing from the both of you on that.

2 MS. ELOFSON: All right.

3 THE COURT: I am confident that I do not
4 consider the withholding of the e-mail that I
5 previously ruled upon to be a bad faith withholding.
6 Unlike the circumstances that Judge Cuthbertson was
7 faced with, the arguments made to me were an error in
8 interpreting Mr. West's request that it would not
9 include communications, and that type of error is not
10 the same kind of bad faith error that Judge
11 Cuthbertson was dealing with with the non-disclosure
12 agreement. So I think a penalty in the nature of \$10
13 a day for this error is appropriate. I just do not
14 know the right date from which to calculate it, so I
15 will need further briefing on that issue.

16 MR. WEST: Thank you, Your Honor. I will be
17 happy to produce that. I would ask three weeks or a
18 month for the next hearing.

19 THE COURT: Yeah. I don't mind. However
20 long you need, Mr. West. Do you have any --

21 MS. ELOFSON: (Shaking head.)

22 THE COURT: Okay. So we'll -- I actually
23 won't -- well, I'll just be coming back in a month, so
24 a month isn't real good for me because I'll have heavy
25 dockets. So I'd like to go six weeks out, if

1 possible.

2 MR. WEST: That would be fine, Your Honor.
3 I've got a response due in the Supreme Court of the
4 United States in early June, so the longer, the
5 better, as far as I'm concerned.

6 MS. ELOFSON: And the City is not requiring
7 oral hearing, if you simply want to look at the
8 written briefing.

9 THE COURT: I could do that, if Mr. West was
10 also okay with not presenting it orally. What I'm
11 expecting is I'm going to read your cases, I'm going
12 to read her cases, and then I'm going to decide what I
13 think applies.

14 MR. WEST: I think perhaps we may not have
15 any oral argument at the hearing, but I'd like to have
16 a presentation of an order.

17 THE COURT: Date.

18 MR. WEST: Yeah.

19 THE COURT: Okay.

20 MS. ELOFSON: Okay.

21 THE COURT: So let's do something like the
22 second Friday in August. Does that work?

23 MR. WEST: Fine with me, Your Honor.

24 THE COURT: And if you could get your
25 materials to me two weeks before the presentation

1 date, then I'll be ready on the presentation.

2 MR. WEST: Very good. Does the Court want to
3 set those dates?

4 THE COURT: Yes. Ginele is going to give
5 them to me in a second.

6 MR. WEST: Thank you, Your Honor.

7 THE CLERK: So the presentation will be on
8 August 11th at 11 o'clock.

9 THE COURT: August 11th at 11 a.m. for
10 presentation. And two weeks before that is July --

11 THE CLERK: 28th.

12 THE COURT: 28th. So if you'd get your
13 materials to me by July 28th.

14 Now, I don't know what to do with these other
15 documents because I don't think I -- I don't think I
16 said any other documents were wrongfully withheld.

17 MR. WEST: You did not.

18 THE COURT: So I guess if I was wrong, it
19 should be a motion to revise and it should be very
20 tailored to how I made my mistake and it can include
21 that, if you're right, the penalty should be... We
22 can handle it all in one lump, if you want to do that.

23 Otherwise, I think the presentation of this order,
24 given my ruling that the redactions were appropriate
25 on the documents that were provided, is where we are

1 in this case, and there is no more, short of a motion
2 to reconsider.

3 MR. WEST: Of the ruling that the Court will
4 enter in August.

5 THE COURT: No. I -- well, I mean, I made my
6 oral ruling, and so if you want me to reconsider that,
7 you could do it any time after the oral ruling.

8 MR. WEST: I agree, Your Honor, but procedure
9 requires that it be either set in tandem with the
10 presentation of the order or within 10 days of the
11 entry of an order, under CR 59.

12 THE COURT: But that's for -- that's for
13 revision of a commissioner order. If you're asking me
14 to reconsider my own order, I think you have different
15 parameters.

16 MR. WEST: Thank you very much, Your Honor.
17 I will review CR 59, but it's my understanding that a
18 motion to reconsider is not ripe until there's
19 actually a written order but that the rule provides
20 that it may be consolidated on presentation of the
21 order.

22 THE COURT: City of Tacoma want input on
23 this?

24 MS. ELOFSON: Well, I think he's right
25 that --

1 THE COURT: I mean, this is an oral ruling,
2 so nothing has been written, so that's why I'm
3 thinking it can come at any time.

4 MS. ELOFSON: Right.

5 THE COURT: Even before I write it down.

6 MS. ELOFSON: That's correct, Your Honor. I
7 would agree with that, that he can seek to ask you to
8 reconsider and to revise your ruling, your oral
9 ruling, at any time prior to the written ruling.

10 MR. WEST: Thank you, Your Honor. For the
11 sake of not confusing anyone any more than they
12 already may be confused, always been my practice to
13 wait for a written ruling to issue.

14 THE COURT: That's fine.

15 MS. ELOFSON: You're not waiving your right
16 to do it.

17 MR. WEST: Thank you for your time and
18 consideration of these matters, Your Honor.

19 THE COURT: Okay. So I'll get your cases on
20 the correct number of days that I should apply the \$10
21 penalty to, and then we will present -- have a
22 presentation of an order on August 11, which will
23 encapsulate all of my oral rulings up to this time.

24 MR. WEST: Thank you very much, Your Honor.

25 MS. ELOFSON: Thank you, Your Honor.

1 MR. WEST: And before we go, I'd just like to
2 point out that I did have a motion to strike the
3 declaration and pleadings filed on the June 21st, and
4 I imagine the Court is denying that motion but I'd
5 like that to appear on the face of the record that
6 that motion was denied, in which I object to.

7 MS. ELOFSON: He gave me something yesterday.
8 I don't think it was actually noted as a motion before
9 the Court.

10 THE CLERK: There's no note for motion.

11 THE COURT: There's no note for motion.

12 MR. WEST: CR 11 sanctions, Your Honor.

13 THE COURT: Right.

14 MR. WEST: On a motion to strike on pleadings
15 filed two days before the hearing, it would be
16 impossible to properly note such a motion.

17 THE COURT: You're right. And again, I don't
18 know that I'm actually denying your motion to strike
19 in the sense that I never read it, so --

20 MR. WEST: Well, then, I would ask the Court
21 to review that motion and issue a ruling.

22 THE COURT: Well, it -- yeah, I'm not --

23 MR. WEST: I believe that there's some very
24 critical misrepresentations in the pleadings and
25 the -- and the declaration of Ms. Elofson, and again,

1 I would ask that the Court review that and I would
2 suggest that it would be a manifest abuse of
3 discretion for the Court to refuse to read documents
4 submitted to it or rule upon a motion for CR 11
5 sanctions for -- for CR 11 striking.

6 THE COURT: Well, I can't rule on your motion
7 for CR 11 sanctions because it hasn't been noted for
8 today. If you're asking on oral -- on an oral motion
9 for me to strike the affidavit of Lieutenant
10 Christopher, I think that motion is essentially moot
11 since I didn't read it to begin with and I haven't
12 considered it in conjunction with what we've done here
13 today.

14 MR. WEST: Thank you, Your Honor. It was --
15 the motion was not for sanctions but to strike
16 Ms. Elofson's affidavit and the memorandum that was
17 filed on June 21st.

18 MS. ELOFSON: I believe, Your Honor, he's
19 saying that my reply was late.

20 THE COURT: Your response.

21 MS. ELOFSON: My -- sorry. My response to
22 his motion -- to his memorandum was late. It should
23 have been filed at noon. His was late to me, not as
24 late as mine, but mine was late to him so he wants it
25 stricken, I believe, is what he's saying. I don't

1 know what he's talking about in terms of the CR 11.

2 THE COURT: Well, I did read the City of
3 Tacoma's response to Plaintiff's motion and the
4 affidavit of Margaret Elofson. What I did not see is
5 the separate document called affidavit of Christopher
6 Travis.

7 MS. ELOFSON: And that had been filed
8 previously. It was not a part of what he's seeking to
9 strike, and I believe that the Court is within its
10 discretion to review any material presented to it,
11 whether -- you know, whether it was -- as the Court is
12 aware, I believe, there has been a lot of
13 communication between Mr. West and I to try to get
14 this whole thing untangled. And my briefing was a few
15 hours late, and I believe that's the primary basis he
16 wants the Court not to consider it.

17 THE COURT: Well --

18 MR. WEST: I would object to that
19 characterization, but should the Court wish to make a
20 ruling that it's denying that motion at this point,
21 that would be acceptable to me. I'll object to the
22 ruling, and we can move on from there.

23 MS. ELOFSON: I would suggest --

24 THE COURT: Well, I had no way of knowing,
25 really, because I only pay attention to whether or not

1 the documents are there prior to Friday. So I did
2 review, as I indicated, City of Tacoma's response to
3 Plaintiff's Motion re: Penalties for PRA Violation as
4 well as the affidavit of Ms. Elofson. So to the
5 extent I understood that you wanted me not to consider
6 these documents, I guess your motion was denied.

7 MR. WEST: Thank you, Your Honor.

8 THE COURT: However --

9 MR. WEST: I respectfully object.

10 THE COURT: However, I must admit, Mr. West,
11 that I couldn't really understand your motion because
12 it dealt with so many things that were extraneous to
13 what I ruled in my oral ruling.

14 MR. WEST: Thank you very much, Your Honor.

15 THE COURT: Thank you.

16 THE CLERK: I have the summary judgment
17 order. I need signatures, please.

18 MR. WEST: And again, I would object that
19 this doesn't address the redactions to the purchase
20 orders and invoices, the -- the two documents that
21 were silently withheld until the 2015 response. I
22 would object to that, and I would put on the record
23 that this is a partial order, does not address all the
24 issues in the case. That's correct.

25 MS. ELOFSON: I agree it's a partial order.

1 MR. WEST: And does not address all the
2 issues.

3 THE COURT: Why don't you just put "partial"
4 in the caption at the top.

5 MR. WEST: Thank you, Your Honor. And,
6 again, I apologize for being so meticulous of this,
7 but as I said, I see a lot of prejudice against the
8 Public Records Act and citizens trying to get records
9 from the government on the part of the judiciary and
10 reviewing courts, so I have to be --

11 THE COURT: Well, that's pretty insulting.
12 Thank you, Mr. West.

13 MR. WEST: I apologize, Your Honor, if you're
14 insulted by a general observation that I'm making that
15 has nothing to do with yourself or any --

16 MS. ELOFSON: Just sign the order.

17 THE COURT: I'm part of the judiciary, and
18 this is the second time you've pointed that out, so I
19 don't know how else I'm supposed to take it.

20 MR. WEST: I would ask at this point that the
21 Court recuse themselves due to their prejudice against
22 me.

23 THE COURT: No, Mr. West. No, Mr. West.
24 I've certainly given you some instruction --

25 MR. WEST: Thank you, Your Honor.

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THE COURT: -- about how it's appropriate to
have decorum in a case.

MR. WEST: Thank you very much for your time,
Your Honor. You have a very nice day.

MS. ELOFSON: Thank you Your Honor.

THE COURT: Thank you.

(Proceedings concluded.)

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REPORTER'S CERTIFICATE

I, Dana S. Eby, Official Court Reporter for Department 13 of the Pierce County Superior Court, do hereby certify that the foregoing transcript entitled, "Verbatim Report of Proceedings," was taken by me stenographically and reduced to the foregoing typewritten transcript at my direction and control, and that the same is true and correct as transcribed.

DATED at Tacoma, Washington, this 28th day of June, 2017.

Dana S. Eby, CCR

APPENDIX C

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ARTHUR WEST,)
)
Plaintiff,)
)
vs.) No. 15-2-12683-6
)
CITY OF TACOMA, TACOMA POLICE)
DEPARTMENT,)
)
Defendant.)

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 15th day of September, 2017, the above-captioned cause came on duly for hearing before the HONORABLE KATHRYN J. NELSON, Department 13, Superior Court Judge in and for the County of Pierce, State of Washington;

WHEREUPON, the following proceedings were had and done, to wit:

Reported by: Dana S. Eby, CCR

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APPEARANCES

For the Plaintiff:

Arthur West
Pro se

For the Defendant:

Margaret A. Elofson
Assistant City Attorney
747 Market Street, Room 1120
Tacoma, Washington 98402

1 SEPTEMBER 15, 2017

2 MORNING SESSION

3 * * * * *

4
5 THE COURT: All right. We are here on Cause
6 Number 15-2-12683-6, West versus City of Tacoma. And
7 this was a hearing that the Court set in order to give
8 the parties some more legal information about the
9 calculation of the penalty that the Court did find
10 should be paid by the City of Tacoma to Mr. West.

11 I note from the briefing that Mr. West apparently
12 has a preliminary motion to postpone what we're doing
13 today until a time after which the Court of Appeals
14 decides his petition for discretionary review. Did I
15 get that preliminary motion correct, Mr. West?

16 MR. WEST: I want to inform the Court there
17 is a petition for discretionary review. If the Court
18 sees it within its discretion to continue the hearing
19 until after the Court of Appeals rules or has a --
20 there was a hearing set for August 27th before the
21 commissioner of the Court of Appeals.

22 Then again, if the Court wants to proceed, I don't
23 think there's anything I can do to stop the Court --

24 THE COURT: Well, no. You're bringing it as
25 a request because, I guess, given your druthers, you'd

1 just prefer that it wait until the discretionary
2 petition is resolved.

3 MR. WEST: That would be my -- if I were to
4 make the decision, that would be the decision I would
5 make, Your Honor.

6 THE COURT: Okay. Do you have a response to
7 that preliminary motion, as I interpret it?

8 MS. ELOFSON: No. I think you've correctly
9 interpreted it. My response would simply be, I think
10 the Court needs a written order to review. I don't
11 think it can really go forward, but that's -- that's
12 Mr. West's petition. I've responded to the petition
13 in Division II, and other than I have no -- nothing to
14 say on it, Your Honor.

15 THE COURT: All right. So the way I looked
16 at it, in part, was the way the City of Tacoma was
17 looking at it. I wasn't sure, given that I hadn't
18 completed my decision, that it was kind of, maybe,
19 difficult for the discretionary review petition to go
20 through.

21 On the other hand, since what I do today will
22 cause the City of Tacoma to need to pay Mr. West, if
23 Mr. West isn't anxious to get paid, I don't see that
24 he can't have his requested relief.

25 MR. WEST: I think part of the problem that

1 we have is that both Counsel and myself are somewhat
2 confused about exactly what the Court ruled, and
3 perhaps it would be better if the Court did go forward
4 and issue a specific order for the purposes of review.
5 I think that might make for an orderly review process.
6 And the filing of the petition was partly a
7 frustration for not understanding what the Court's
8 ruling was, and in a previous case I have, Washington
9 Association of Counties, the Court split up a ruling
10 and the Court of Appeals found that since it -- the
11 original order wasn't appealed, the second appeal
12 wasn't timely. So perhaps this was an excess of
13 caution to make sure that I got this under the door.

14 I withdraw my objection to the Court ruling today.
15 I think that, in the context of a -- of a direct
16 appeal, all the same issues can be addressed, and due
17 to my conversation today with Ms. Elofson, neither one
18 of us is exactly sure what the contours of your ruling
19 were, so I don't think the Court has enough to
20 actually review in the discretionary review.

21 THE COURT: Well, I would like to hear from
22 Ms. Elofson next because I thought I had decided the
23 number of documents and the dollar per day that was
24 appropriate, and the question had to do with --

25 MR. WEST: If it might help the Court, I have

1 a spreadsheet and a proposed order that I produced and
2 I can file and give to Ms. Elofson. If I can
3 approach, I can hand that to the clerk.

4 THE COURT: Yes. I'd be happy to look at
5 whatever you have, Mr. West. Ms. Elofson, would you
6 like to jump in here as well?

7 MS. ELOFSON: Yes, Your Honor. My
8 understanding of the Court's oral ruling was that
9 there were a certain set of e-mails that you
10 determined should have been produced, and that that
11 set of e-mails was subject to a single penalty of \$10
12 per day, not a penalty per e-mail, but a record, as
13 that's interpreted by the case law.

14 And the question was when should that penalty
15 period begin. So the parties provided additional
16 briefing as to when that penalty period begins. The
17 City contended in its briefing and contends today that
18 the penalty period begins when it appears that the
19 agency is no longer going to produce any more records.
20 That's when we close it out, and I counted it from
21 that date.

22 Mr. West, on the other hand, counted it from the
23 date that the request is submitted. He gave you some
24 case law on that, which I believe I pointed out in my
25 briefing wasn't really on point because those cases

1 weren't determining the beginning of the penalty
2 period. And subsequent to those cases, there is the
3 Hobbs case which specifically identified, based on the
4 language of the PRA statute, what the penalty period
5 incorporates. And it -- it is designed to award a
6 penalty beginning when the document has been denied.
7 They interpreted and defined the word "denial" and
8 said that happens when it appears the agency is not
9 going to produce any more documents when they close
10 out their request. So we indicated in our briefing
11 that that's when it should begin.

12 Now, what Mr. West and I have talked about today
13 in terms of the confusion about what your ruling
14 applies to, and I think that what happened here, and
15 as Mr. West and I discussed this morning, is that he
16 has two lawsuits. They involve many of the same
17 documents. And when he filed his motion for summary
18 judgment, he included in there some documents that are
19 at issue in his other lawsuit, not the one before you,
20 Your Honor. I didn't catch that initially. I don't
21 know if --

22 THE COURT: I did, and I remember indicating
23 I was only deciding the lawsuit that was in front of
24 me, and I made that clear in my decision.

25 MS. ELOFSON: I believe you did. And I think

1 I was the last one to kind of get on that train and
2 understand that's what was going on. And so some of
3 my briefing might have been a little confusing, too,
4 because I addressed some of those documents that are
5 at issue in the other lawsuit. I shouldn't have, but
6 I followed that confusion.

7 So I think, as we talked this morning, in looking
8 at the order that Mr. West has given you, and I have
9 an order as well, Your Honor, that isn't as specific
10 as this. But in looking at this, I think that we've
11 agreed that, in Paragraph 1, the Court denied
12 Plaintiff's motion as to A and B, and we both agree
13 that that can be lined out. The purpose of that being
14 in there, according to Mr. West, is simply to show an
15 appellate court that, yes, those were considered and
16 it was denied.

17 And then as to Paragraph 2 --

18 MR. WEST: I agree with that
19 characterization.

20 THE COURT: I'm sorry. I'm sorry. Okay.
21 Because something was deleted in what was sent up to
22 me by Mr. West. So I'm reading. "Responsive records
23 silently withheld from West's August 28th, '14,
24 request but then subsequently identified by" -- and it
25 should be "the" -- "the City of Tacoma in an exemption

1 log on 12/22/2015 in response to a second request
2 'blank' silently withheld for 480 days and then
3 disclosed in partially redacted form."

4 MS. ELOFSON: And I think that the 480 days,
5 I would argue, should be 383 because we should count
6 that from the date the request was closed.

7 MR. WEST: But the Court ruled -- my
8 understanding of the Court's ruling is that the Court
9 did not rule that those documents were improperly
10 withheld, and I respectfully object to that portion of
11 the Court's ruling.

12 MS. ELOFSON: Right. But you do agree that,
13 according to the Court's ruling, A and B should be
14 stricken.

15 MR. WEST: The Court ruled that A and B were
16 not improperly withheld.

17 MS. ELOFSON: Right. Right.

18 MR. WEST: Yes. And that correctly
19 characterizes the Court's ruling. I don't have a
20 problem with that.

21 THE COURT: Okay. So --

22 MR. WEST: Well, I do have a problem with it
23 technically but not --

24 THE COURT: Yeah, we understand. Do you want
25 to use this one because it's more detailed, or do you

1 want to use yours?

2 MS. ELOFSON: This is fine to use this
3 because it is more detailed.

4 THE COURT: Okay. So I have now corrected
5 the word "the," and I've corrected it for 383 days
6 because I did find your briefing persuasive with the
7 Hobbs case versus Mr. West's briefing. And we cross
8 out "Harris quotation." Is that right?

9 MS. ELOFSON: That's correct.

10 THE COURT: And we cross out "Port security
11 grant upgrade"?

12 MS. ELOFSON: That's correct.

13 THE COURT: And we -- so what does one say,
14 if there's no A and there's no B?

15 MR. WEST: Well, that's Section 1. There's
16 four more sections of identified records that the
17 Court ruled on because basically you cross that whole
18 section out.

19 THE COURT: Cross that whole section out. It
20 doesn't say anything.

21 MS. ELOFSON: Okay. Cross all of
22 Paragraph 1?

23 THE COURT: I think so, yeah.

24 MS. ELOFSON: Okay.

25 THE COURT: Okay. Paragraph 2.

1 MR. WEST: Paragraph 2 involves the exemption
2 log that was produced in response to the second
3 request, and items one, two, and eleven on that index,
4 although they were withheld from the plaintiff, were
5 produced through the ACLU. So my argument was --

6 THE COURT: Well, I'm not really --

7 MR. WEST: -- that those were responsive
8 records that were silently withheld and there's no
9 claim of exemption for one, two, and eleven. But the
10 entire group was silently withheld, and one, two, and
11 eleven, the exemption was waived. At least to the
12 three, the Court should rule that those were
13 improperly withheld, and I would object --
14 respectfully object to the Court not so ruling, Your
15 Honor.

16 THE COURT: Ms. Elofson.

17 MS. ELOFSON: I'm not sure what his argument
18 is as to those. I understood you to say that all of
19 the e-mails, these 14 e-mails, should have been
20 produced and that that's the record we're talking
21 about.

22 THE COURT: And the issue was --

23 MS. ELOFSON: And the issue was the number of
24 days.

25 THE COURT: -- the number of days, which I

1 think should be 383.

2 MS. ELOFSON: I don't believe you ruled about
3 three of which are still being withheld despite having
4 waived --

5 THE COURT: No. I'm crossing that out.

6 MS. ELOFSON: The only other question I have,
7 Arthur, is -- is the date 12/22/2015, is that when we
8 produced them to you? Is that 383 days? I don't
9 believe that's the same date I came up with.

10 MR. WEST: What was your date? My
11 understanding of the Court's ruling was that it didn't
12 deal with these records at all and it was ruling that
13 the records identified in Subsection 4 were the ones
14 that had said needed to be disclosed.

15 MS. ELOFSON: Well, Your Honor, I haven't
16 gone through them carefully enough to know.

17 THE COURT: Here it is on your briefing.
18 Your briefing uses, "The City later produced the
19 e-mails on December 22nd, 2015."

20 MS. ELOFSON: Okay.

21 THE COURT: So that was the right -- and then
22 you go, "which is a span of 383 days."

23 MS. ELOFSON: Okay.

24 THE COURT: And the total is --

25 MS. ELOFSON: My concern is that I haven't

1 identified these as closely as he is, and I don't know
2 that -- I just saw this for the first time this
3 morning, Your Honor, when I got here, so I don't know
4 that these e-mails, as identified by sender and date
5 and time, are the actual ones that were on that
6 privilege log that you ruled on.

7 MR. WEST: But these are the e-mails from the
8 privilege log.

9 Then Subsection 4 is the e-mails that were
10 produced in total, that on -- so there's two set
11 tables of e-mails identified here and pled
12 specifically in the pleading, one being the ones on
13 the privilege log. That was Subsection 2. Then there
14 was the produced records including the records from
15 Terry Krause of August 27th, and that's in Subsection
16 4. Hence, and I hope the Court appreciates the
17 confusion I'm having here, because I'm uncertain as to
18 what the Court conceives its ruling to be, too.

19 MS. ELOFSON: Well, and Arthur --

20 THE COURT: Well, I do see that, in
21 Subsection 4, we have e-mails that are dated in May
22 6th of 2014, and I believe the argument that was
23 previously persuasive with me was that those are not
24 in this lawsuit.

25 MS. ELOFSON: That's my understanding, and I

1 don't know where all of these -- for example, I don't
2 know where all of these came from and where he got --
3 Mr. West got copies of them.

4 MR. WEST: Well, perhaps Counsel should read
5 the pleadings more carefully.

6 THE COURT: Well --

7 MR. WEST: They were appended to the --

8 THE COURT: Okay. So my decision today is
9 it's 383 days, and I'll ask both of you to prepare an
10 order for next Friday at 9 o'clock and make your
11 arguments because, clearly, we're not prepared to
12 argue on the precise format right now.

13 But I did not grant Mr. West penalties for items
14 that were not in the lawsuit in front of me. I did
15 grant him \$10 a day for a period of time which I've
16 now established is 383, and it was my belief that it
17 was clear as to which e-mails that was and it could
18 not include e-mails that were not in the lawsuit that
19 I was addressing.

20 MR. WEST: How do you define "in the
21 lawsuit," Your Honor?

22 THE COURT: If you read the original briefing
23 of the State, they make very clear that -- and again,
24 I don't have everything in front of me, but they make
25 very clear that your first lawsuit was answered at a

1 certain time, and e-mails that weren't in existence
2 during that first lawsuit time are the e-mails that
3 are in existence in the second lawsuit.

4 MS. ELOFSON: I just need to identify those
5 for you.

6 THE COURT: Right.

7 MS. ELOFSON: Okay.

8 MR. WEST: So the e-mails post-dating August
9 28th, 2014, would be the second lawsuit.

10 MS. ELOFSON: I would respond not
11 necessarily, because he came across documents that
12 predate August 28th. He came across those documents
13 after this lawsuit in front of you was initially
14 started.

15 THE COURT: Well, there was an issue as to
16 the scope of what he requested, and so I was deciding
17 both whether the City of Tacoma should have understood
18 the request that he made or not. But I'm going to
19 have you prepare to argue it in front of me because,
20 very frankly, other than deciding the focus of today's
21 motion of the 383 days versus from the time the
22 request was filed, I was not revisiting, in my own
23 mind, the issues that were brought up and are posed in
24 the spreadsheet. So I'm going to give you another
25 week to get those in order for me so then I can take a

1 look at them.

2 MR. WEST: Thank you, Your Honor. My problem
3 is I have a commitment next Friday and I'm wondering
4 if we could put this off two weeks.

5 THE COURT: Is there a different time that
6 you would prefer, Mr. West?

7 MR. WEST: I'm planning to be in Eastern
8 Washington the whole day.

9 THE COURT: Right, so you want to push it out
10 another week?

11 MR. WEST: If that would be convenient for
12 the Court.

13 THE COURT: Absolutely. I don't have a
14 problem with that.

15 MR. WEST: Thank you very much, Your Honor.

16 THE COURT: If the two of you can confer and
17 get it worked out, I suspect I won't have a problem
18 with that. However, I'm here to decide it once I know
19 what I need to be prepared to decide.

20 MR. WEST: Thank you very much, Your Honor.

21 THE COURT: Thank you, Mr. West.

22 THE CLERK: I need to figure out a time that
23 works. Hold on one moment. We have several matters
24 scheduled for that day.

25 (Proceedings concluded.)

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REPORTER'S CERTIFICATE

I, Dana S. Eby, Official Court Reporter for Department 13 of the Pierce County Superior Court, do hereby certify that the foregoing transcript entitled, "Verbatim Report of Proceedings," was taken by me stenographically and reduced to the foregoing typewritten transcript at my direction and control, and that the same is true and correct as transcribed.

DATED at Tacoma, Washington, this 20th day of September, 2017.

Dana S. Eby, CCR

APPENDIX D

January 03 2018 1:23 PM

HON. TIMOTHY L. ASHCROFT
COUNTY CLERK
NO. 16-2-13755-1
Hearing date: January 5, 2018
9:00 A.M.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ARTHUR WEST,

Plaintiff,

vs.

CITY OF TACOMA,

Defendant.

NO. 16-2-13755-1

AFFIDAVIT OF MARGARET
ELOFSON IN RESPONSE TO
PLAINTIFF'S MOTION TO STRIKE

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

MARGARET ELOFSON, being first duly sworn upon oath deposes and says:

1. I am one of the attorneys for the defendant in this matter, am over the age of eighteen and am competent to testify herein.

2. Plaintiff Arthur West asks this court to conduct an *in camera* review of "Stingray" related documents. At the hearing on November 17, 2017 before this court, Mr. West acknowledged that the documents at issue in this court are also the subject of an appeal in Division II in PCSC No. 15-2-12683-6, which was heard by Hon. Kathryn J. Nelson.

1 3. Mr. West has not indicated to this court how its review should differ from
2 the issues considered and ruled upon by Judge Nelson. Mr. West has not indicate to
3 what extent, if any, the documents at issue are the same or different from the documents
4 at issue in PCSC No. 15-2-12683-6.

5 4. Both Mr. West and counsel for the defendant City have acknowledged that
6 there has already been significant confusion as to the overlapping nature of Mr. West's
7 two lawsuits, each of which alleges a violation of the PRA concerning records produced
8 by the Tacoma Police Department related to its "Stingray" equipment. Therefore, the
9 defendant requests that the review of "Stingray" documents be kept separate and
10 distinct from the review of the invoices that the City has asked this court to review.
11 Attached as Exhibit 1 is a true and accurate copy of an email I sent to Mr. West in which
12 I expressed my concern about combining these two sets of documents for this court's
13 review.
14

15 5. The City does not oppose *in camera* review of "Stingray"-related
16 documents as long as those documents are clearly identified before presentation to this
17 court so that the City has an opportunity to object to review of documents that have
18 already been reviewed by another department of the superior court or which are the
19 subject of the appeal pending in Division II.

20 6. Mr. West complains that some of the supporting documents provided to
21 this court for its use in doing the in camera review were not provided to Mr. West. As
22 explained in my previous affidavit, these documents were requested by Judge Serko
23 when she did her in camera review of the Pacifica Law Group invoices. Judge Serko
24 kept these documents confidential because they explained and described the attorney
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DECLARATION OF SERVICE

I hereby certify that on January 3, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Attorneys for Plaintiffs

Arthur West, Pro Se Plaintiff
120 State Ave. NE #1497
Olympia, WA 98501

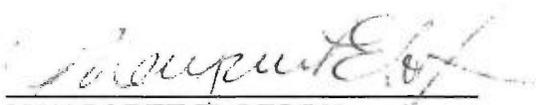
DATED: January 3, 2018

/s/ Staci Black

Staci Black, Paralegal
Tacoma City Attorney's Office
747 Market Street, Suite 1120
Tacoma, WA 98402
(253) 591-5268
Fax: (253) 591-5755

1 client privilege and work product issues in the invoices. When providing those same
2 documents to this court, my legal assistant called the judicial assistant for Department
3 2 in order to get a court order for filing these documents under seal. My legal assistant
4 was advised to simply provide copies of the documents to Department 2 and any order
5 for filing sealed copies would be taken care of at a later date. Therefore, my affidavit
6 stated that I was providing copies to Judge Ashcraft but I was not providing copies to
7 Mr. West.

8 FURTHER YOUR AFFIANT SAYETH NAUGHT.

9 
10 MARGARET ELOFSON

11 SUBSCRIBED and SWORN to before me this 3rd day of January, 2018.

12
13 
14 Printed Name: Staci L. Black
15 NOTARY PUBLIC in and for the State of
16 Washington, residing at: Pierce County
17 My commission expires: 5/9/18



EXHIBIT 1

Elofson, Margaret (Legal)

From: Elofson, Margaret (Legal)
Sent: Tuesday, December 26, 2017 5:10 PM
To: 'Arthur West'
Cc: Castro, Gisel (Legal)
Subject: RE: West v. City of Tacoma- agreed order re in camera review

Mr. West,

I do not think we should combine the two sets of documents at this point. They are discrete sets of documents, and you have sought appellate review of the exemptions claimed for the Stingray documents. Combining them for purposes of in camera review at this time will lead to additional confusion. I will prepare an order that deals only with the invoices. If you decide not to sign it, that is fine and we can appear on January 5. However, the only motion that will be in front of Judge Ashcraft on January 5 is whether or not he will do an in camera review. He will not be deciding whether the exemptions are or are not proper. He has already indicated that he thinks he needs to do a review of the invoices so I thought we could simply avoid having to appear on the 5th if we sign an agreed order as to the review.

Margaret

From: Arthur West [mailto:awestaa@gmail.com]
Sent: Friday, December 22, 2017 5:18 PM
To: Elofson, Margaret (Legal) <margaret.elfson@ci.tacoma.wa.us>
Subject: Re: West v. City of Tacoma- agreed order re in camera review

Ms. Elofson:

Thank you for the email.

I am appearing in Vermillion on the 5th anyway,
but send me a proposed Order.

Also, there are other records from the Stingray request that are being withheld. Can the Order cover those too? I was intending to note a motion for the 5th for the in camera review of those as well.

I don't believe the Court would want two separate in camera review proceedings in the same case.

How about if we have the Court consider all of the withheld records at one time?

On Fri, Dec 22, 2017 at 4:50 PM, Elofson, Margaret (Legal) <margaret.elfson@ci.tacoma.wa.us> wrote:

Arthur,

I filed a motion for in camera review in order to get the documents before Judge Ashcraft. The motion is set for Jan 4, as you know. However, the court does not want to see the documents until it has entered an order that in

camera review is appropriate. If we can agree to an order that in camera review is appropriate, I can provide the docs to the court before Jan. 5 and we can avoid having to appear on Jan. 5. Shall I send over an agreed order that states we both agree that in camera review is appropriate? Thanks. Margaret

APPENDIX E

0161



16-2-13755-1 50966454 ORDSMWO 03-19-18



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

ARTHUR WEST,
Plaintiff(s)

Case No. 16-2-13755-1

vs.

ORDER OF DISMISSAL

CITY OF TACOMA,
Defendant(s)

THIS MATTER having come on regularly for Mandatory Court Review Hearing on March 16, 2018 and the Plaintiff(s)/Petitioner(s) having not appeared personally or through counsel, and the Defendant(s)/Respondent(s) having not appeared personally or through counsel, and there being no other matters now pending under this cause number, Now, Therefore, it is hereby

ORDERED that this matter is hereby Dismissed without Prejudice.

DATED this 16th day of March, 20 18.

[Signature]
Judge Timothy L. Ashcraft

3/20/2018 4:59

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CITY OF TACOMA

February 05, 2019 - 4:31 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
Superior Court Case Number: 15-2-12683-6

The following documents have been uploaded:

- 514877_Briefs_20190205163001D2552708_5582.pdf
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A copy of the uploaded files will be sent to:

- awestaa@gmail.com

Comments:

Sender Name: Margaret Elofson - Email: margaret.elifson@ci.tacoma.wa.us
Address:
747 MARKET ST # 1120
TACOMA, WA, 98402-3726
Phone: 253-591-5888

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