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NO. 52072-9-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CITY OF TACOMA

Appellant,

v.

ARTHUR BANKS, ET. AL.,

Respondent.

RESPONSE TO PLAINTIFFS' CROSS APPEAL AND REPLY ON
PLAINTIFFS' RESPONSE

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I. RESPONSE TO PLAINTIFFS' CROSS APPEAL

Before responding to the plaintiffs'/respondents' arguments, the appellant City seeks to clarify some of the statements made in the plaintiffs'/respondents' Statement of the Case. It is important to distinguish statements which are applicable to the cell site simulator possessed by the Tacoma Police Department (TPD) from those statements which are theoretical but do not apply to TPD's cell site simulator.

For example, the plaintiffs¹ state that the cell site simulator is an "indiscriminate and intrusive means of collecting information," and that it "can be used to identify unknown cellular devices." Brief at 4. However, these theoretical statements about cell site simulators in general have no application here where all of the evidence is that TPD's cell site simulator is used only in conformance with the warrant requirement. It is undisputed in this case that there is "nothing we can do with that equipment until we have the court order." CP 1496, p. 23:3. Thus, in terms of being "intrusive," the equipment can only "intrude" to the extent that a superior court judge has determined is appropriate.

The warrant requirement also prevents the use from being "indiscriminant." The only information displayed about non-targeted cellular devices is the unique identifying number assigned to that device, and it is displayed only long enough so that it can be distinguished from the targeted device. That number is not retained. Even if it were able to be

¹ The City will refer to Respondents/Cross Appellants Banks as the plaintiffs in order to be consistent with prior briefing.

retained, that number could not be used to identify any particular cellular device much less a cellular device owner without the assistance of the phone company, which the phone company will provide only when served with a warrant. Thus, while the concept of collection of indiscriminate information about innocent persons is a compelling headline, it has absolutely no application in this context when discussing TPD's cell site simulator usage.

And, the TPD cell site simulator does not "collect information." CP 127; 143-44. Nor does the TPD cell site simulator collect or store any data and/or metadata from either the targeted device or non-target devices, contrary to the plaintiffs' Statement of the Case. Brief, p. 5. All of the actual, non-speculative evidence in this case establishes that the City's cell site simulator does not retain any data. CP 102; CP 125; CP 127; CP 144, CP 1393-94; CP 1502, p.44. Indeed, the Superior Court's Order states that no data may be retained, CP 1284, and the statute mandates that no data or metadata be retained. Again, while the concept of retaining surreptitiously collected data generates intense interest, it has no application in this case where the overwhelming evidence is that TPD's cell site simulator does not collect or retain any data.

In their Statement of the Case, the plaintiffs state that cell site simulator technology is fundamentally different from pen, trap and trace because cell site simulators locate a person, not just a phone. Brief, at 5. However, that is incorrect as has been explained to the plaintiffs during depositions on numerous occasions. CP 1497. See also, CP 144 ("cell site

simulators used by local law enforcement agencies must be configured as pen registers”). Again, while the concept of locating individuals in a new and sophisticated way is intriguing, that concept is not applicable here. As was discussed many, many times during this litigation, the cell site simulator used by TPD is a finishing tool that allows for a more precise location of a cellular device on the infrequent occasion when the traditional pen, trap and trace is not accurate enough. But the cell site simulator locates a cellular device, not a person.

In their Statement of the Case, the plaintiffs Banks also assert that TPD’s warrant applications, and the Superior Court Judges’ approvals of warrants, violate Washington State law. This assertion is frankly incredible and is reflective of the plaintiffs’ misunderstanding of police procedures and the legal requirements for both pen, trap and trace as well as cell site simulators. But, even if the plaintiffs are correct that Pierce County Judges and Tacoma Police Department detectives are interpreting the law incorrectly, it is completely irrelevant to the PRA issues before this court. Rather, the City believes that this portion of the Statement of Facts, along with other portions of the Statement of the Case, some of which are highlighted above, are interposed for the purpose of creating an impression that the City of Tacoma and the Tacoma Police Department are not earnest about compliance with the law. But, to the contrary, the City contends that this case shows the diligence of Tacoma Police Department and the City of Tacoma in creating an outstanding Public Records Act process and in

providing the fullest possible assistance to each requester that seeks public records from the City.

A. The City conducted an adequate search and this Court should not take the unprecedented step of ordering an agency to do an additional search just because the requester believes that additional records *should* exist.

Plaintiffs Banks contend that the City's search was inadequate and justifies this Court ordering the City to do additional searches for documents which the City has attested do not exist. Plaintiffs argue that the City failed to provide enough detail about its searches in the numerous affidavits it provided along with the hundreds of pages of deposition testimony from six City employees deposed by Banks. Despite all of this discovery, Banks contend additional searches should be done because, in Banks' opinion, additional records *should* exist. However, the City has conducted an adequate search and there is no basis to order further searching.

1. The cell site simulator and laptop do not collect data, are prohibited from collecting data, and the City has not data from that equipment to produce.

For example, Banks argues that the City should again search the cell site simulator and the associated laptop used with the simulator. Banks has obtained cell site simulator manuals and other documents from outside sources which Banks contends indicate that the City's cell site simulator retains data. Banks concedes that its experts, two graduate students at the University of Washington, have not examined Tacoma's cell site simulator and they do not know what type of software the City's simulator uses. Brief, at 15, n. 6. Banks' experts nevertheless make statements about theoretical

operations, which Tacoma personnel who have been trained on the equipment and used the equipment have explicitly disavowed. In this case, all of the testimony from TPD personnel using the equipment, and FBI personnel explaining the equipment, attest that Tacoma's equipment does not collect and retain data. The PRA requires the City to look in places where documents are reasonably likely to be found. The key concept is reasonableness. It is not reasonable to require the City to do an exhaustive search, hiring forensic experts to determine if some form of unknown data is hidden somewhere on the cell site simulator particularly when the City has provided affidavits in good faith which state no such data exists.

The Washington courts have made clear that "the focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate." Neigh. Alliance, 172 Wn.2d at 719-20. "A reasonable search need neither be exhaustive nor successful." Kozol v. Dep't of Corr., 192 Wn. App. 1, 9, 366 P.3d 933, review denied, 185 Wn.2d 1034 (2016).

Plaintiffs even offer to do the searching of the City's computer themselves. However, "the PRA has never authorized 'unbridled searches' of every piece of information held by an agency or its employees to find records the citizen believes are responsive to a request. Nissen v. Pierce County, 183 Wn.2d 863, 885, 357 P.3d 45 (2015) (citing Hangartner v. City of Seattle, 151 Wn.2d 439, 448, 90 P.3d 26 (2004)). Rather the PRA requires employees "to perform 'an adequate search' for the records

requested.” Id., quoting Neigh. All., 172 Wn.2d at 720-21. “To satisfy the agency’s burden to show it conducted an adequate search for records, we permit employees in good faith to submit ‘reasonably detailed, nonconclusory affidavits’ attesting to the nature and extent of their search.” Nissen, 183 Wn.2d at 721. There is no basis under Washington law to order further searching of the computer.

2. Banks also argue that the City should undertake additional searches for documents related to warrants used with the cell site simulator.

The City has testified over and over again about the fact that the original warrants are filed with the court under seal per the statute and that the City does not retain copies of warrants. E.g., CP 1499, p. 34:9-12. Nevertheless, Plaintiffs Banks argue that additional email accounts should have been searched for warrants. For example, Banks argue that Detective Chris Shipp should have searched his email. Brief, at 19. But Det. Chris Shipp was not part of the Tech Unit until after Banks made their request for public records. Because Det. Shipp was not submitting any warrants to phone companies at the time that Banks made their request, there is no reason for Shipp to search his email account for warrants. And, Det. Chris Shipp specifically testified he has not emailed any phone companies for any cell site simulator purposes at all, CP 1638, and the equipment had only been used one time since 2016. CP 1629.

At the time of the plaintiff’s request for records, all pen trap and trace orders, as well as all cell site simulator requests, were handled by Detective

Terry Krause. CP 1496, p. 20:2-5. Det. Krause testified that warrants were generally delivered to him by hand, not email. CP 1512, p. 17-25; CP 1499, p. 34. They were then scanned and transmitted to the phone company using the stand alone printer. For security reasons, the printer does not retain any copies of any documents so the printer is not searched. CP 1642-43. Det. Krause testified that he searched his email for any cell site simulator related documents and produced all documents that he had. CP 1393; 1501. Thus, there is no merit to the plaintiffs' argument that additional email accounts should have been searched in order to locate copies of warrants.

Plaintiffs also allege that additional officers should have searched their email accounts for copies of warrants related to the use of the cell site simulator, stating that is "highly likely that officers using the cell site simulator would have emails discussing such use." Brief, at 20. Banks then cite to a portion of Chris Shipp's deposition that does not support Banks' assertion that there are such emails. Moreover, all the testimony in this case has been that only the Tech Unit uses the cell site simulator and all of their email accounts were searched. It is undisputed that the only persons that ever use the cells site simulator are the two or three Tech Unit detectives. The testimony has been that the reports filled out by case agents do not mention cell site simulator usage, CP 1299, that neither case agents or Tech Unit detectives retain copies of warrants, and that only the supervising Tech Unit detective submitted warrants to the phone companies (Jeff Shipp from 2009 to 2014; Terry Krause from 2104 to 2017). Thus, there is no purpose

in asking additional case file agents and detectives to search their computers. It is not reasonable to expect that any responsive documents would be found on such computers.

Banks' purely speculative claims about the existence of other documents will not overcome the City's testimony to the contrary, which is "accorded a presumption of good faith." Forbes, 171 Wn. App. at 867. 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 (2009)(citing Las v. Yellow Front Stores, 66 Wn. App. 196, 198, 831 P.2d 744 (1992)).

Plaintiffs' argument concerning the non-existence of responsive documents is similar to that made by the plaintiff in Bldg. Indus. Ass'n of Wash v. McCarthy, 152 Wn. App. 720, 733, 218 P.3d 196 (2009). In that case, the plaintiff sought records from the Pierce County Auditor's office. After the records were produced, the plaintiff contended that surely there were more responsive emails than had been produced. The auditor's office responded that its office was small and much of the communication took place face-to-face instead of by email. Id., at 728. Plaintiff also argued that he had obtained emails from other sources that were sent to the auditor's office but which the Auditor's Office had not produced. The Auditor's Office replied that they had deleted those emails before the plaintiff's request came in. Plaintiff had no evidence to refute the explanations of the

Auditor's Office but contended that the Auditor's Office's explanation was "extremely unlikely." Id. at 730.

The appellate court held that the summary judgment for the Auditor's Office was proper. The plaintiff had failed to provide any evidence that could overcome the testimony of the Auditor's Office that no such records existed. Id. at 736. There can be no denial of an opportunity to inspect a public record that "did not exist." Bldg. Indus. Ass'n of Wash v. McCarthy, 152 Wn. App. 720, 733, 218 P.3d 196 (2009). See also, Sperr v. City of Spokane, 123 Wn. App. 132, 137, 96 P.3d 1012 (2004) ("An agency has no duty to . . . produce a record that is non-existent.").

3. South Sound 9-1-1 does not have any responsive documents.

Banks also contends that the City should have contacted South Sound 9-1-1 for responsive records because, according to Banks, it is "common sense" that South Sound 9-1-1 might have responsive records. South Sound 9-1-1 is an independent agency contracted to provide records management for Tacoma Police Department and other Pierce County law enforcement agencies. Plaintiffs asked Det. Chris Shipp during his deposition for a description of how South Sound 9-1-1 operates and about the computer program officers use to submit reports to South Sound 9-1-1. CP 1631- 36. From that, the plaintiffs have surmised that South Sound 9-1-1 might have responsive documents.

However, all of the testimony from those that are familiar with South Sound 9-1-1- and use the system is that South Sound 9-1-1- would

not have responsive records. E.g., CP 1299. The TPD legal Coordinator, Michael Smith, who oversaw the collection of responsive records testified that there was no reasonable basis to think South Sound 911 had responsive records. He testified:

Q: So my question was, when you were responding to this or searching for answers, to your knowledge were any of the documents that were sought by the ACLU within the control or custody of South Sound 911?

A: I did not, by looking at this, think that records responsive to this would be at South Sound 911.

Q: Is it possible, though, that there are documents responsive to this request at South Sound 911.

A: Not based upon my reading.

CP 1321- 22. Mr. Smith went on to explain that if he had believed that South Sound 9-1-1 would have had records, he simply would have referred the requester to that agency for those records. CP 1322-23. That is his standard practice; he testified, "We do it every day." CP 1321. But if he thought that a portion of a responsive file was at South Sound 9-1-1- and a portion at TPD, he would proceed to fulfill that portion that was at TPD and direct the requester to South Sound 9-1-1 for the remainder. CP 1350-51. The point here is that there was an established process regarding records retained at South Sound 9-1-1. That process was not utilized here because it was not reasonably likely that South Sound 9-1-1 had any records were responsive. Banks' "common sense" understanding of how they think TPD's reporting system should work and what documents they think should exist in a certain location is not justified by the facts and the testimony of those familiar with the actual system. In this case, if plaintiffs Banks really believed that South

Sound 9-1-1 had responsive documents-it is curious why Banks has never submitted a request to that agency for such records.

Because there is no actual evidence that further searching would produce responsive documents, Plaintiffs Banks's request for injunctive relief ordering the City to do further searching is without merit. Banks rely on Neighborhood All. of Spokane County v. Spokane Cty. 172 Wn.2d 702, 261 P.3d 119 (2011), and Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 327 P.3d 600 (2013) but in neither of those cases did the Courts order any additional searching for documents which the agency attested did not exist. Here, the trial court declined Banks' request for such extraordinary relief. This Court should also decline Banks' request for such relief.

B. The trial court properly ruled that limited identifying information about the cell site simulator could be redacted pursuant to the exemption in RCW 42.56.240(1).

Plaintiffs appeal the trial court's order ruling that the City properly redacted certain limited identifying information from invoices and shipping documents pursuant to the exemption in RCW 42.56.240(1).

At the outset, the City wishes to emphasize that the City is only referencing the invoices and shipping documents that were redacted. Interestingly, Banks spends considerable briefing discussing whether a cell site simulator manual can be withheld under the "specific intelligence information." Brief, p. 27, 30, 32-37. However, the City did not possess nor withhold a copy of a cell site simulator manual at the time of Banks' request for records. One of the privilege logs provided to Plaintiffs Banks by the

City referenced a manual, but that was an error and the error was pointed out to Banks' counsel early in the case. And, it was discussed in multiple depositions and briefs. CP 245; CP 326; CP 596; CP 604; CP 606; CP 1506-07, p. 63-65; CP 1508, p.70:13-16. While the City at one time did have a manual, it was discarded when the cell site simulator was upgraded and the manual became obsolete, and the City has not had a manual since that time. Det. Jeff Shipp testified about disposing of the manual in his deposition in November, 2016 and Det. Krause testified about the lack of a manual in his deposition. CP 604. Given that this has been discussed with Banks on multiple occasions beginning at least two and half years ago, it is unclear why Banks continues to refer to a cell site simulator manual as being withheld.

However, given that the City did not withhold a manual, and given that the City does not possess a manual that it can produce to either Plaintiffs Banks or to the Court for the in camera review requested by the plaintiffs, the City will not respond to Banks's arguments concerning a cell site simulator manual. Banks's counsel did bring a copy of a cell site simulator manual to a deposition and Banks's copy is included in the Clerk's Papers here. See CP 1188-1245. However, the manual was not obtained from the City and is not part of this case. The City has no knowledge about where Banks obtained the manual and it would be inappropriate for Banks to ask this court to review Banks's own copy of the manual.

As to the shipping documents and invoices that were redacted, the PRA provides that some information is properly exempt from disclosure. The “PRA’s mandate for broad disclosure is not absolute.” Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 432, 300 P.3d 376 (2013). Exemptions have been created to “exempt from public inspection those categories of public records most capable of causing substantial damage to the privacy rights of citizens or damage to vital functions of government.” Ameritrust Mortg. Co., v. Office of Attorney Gen., 177 Wn.2d 467, 486, 300 P.3d 799 (2013); see also Laws of 2007, ch. 198, §1 (“The legislature recognizes that public disclosure exemptions are enacted to meet objectives that are determined to be in the public interest.”). 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

The City redacted certain invoices, and shipping documents to remove information that would identify the specific make and model of the equipment used by TPD. Such redactions were done under the exemption found in RCW 42.56.240(1) for specific intelligence information for which

nondisclosure is essential to effective law enforcement.² 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 v. Dep't. of Corr., 183 Wn. App. 655, 669, 334, P.3d 99 (2014). In deciding 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

² These same redactions are at issue in Arthur West v. City of Tacoma, No. 51487-7-II, which is also pending in Division II. No oral argument has yet been scheduled.

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. DOC declined to produce the video recordings that Fischer requested, claiming they were exempt from disclosure under RCW 42.56.240(1).

In his request, Fischer had detailed the components of the surveillance system, 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, 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. Fischer, at 726.

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, 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. 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 that 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, 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. “Concealment 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), this Court 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 that a prison population is "accustomed to evading and exploiting the absence of authority, monitoring, and accountability." Gronquist, at 399. Thus, 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 PRA. Gronquist, at 400.

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 cell site simulator equipment is essential to its effectiveness. And, like Fischer and Gronquist, while significant information concerning the cell site simulator 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 147-53. Therefore, the trial court properly applied Fischer and Gronquist and found that the redacted information on the invoices and shipping documents for the cell site simulator fit within the exemption provided by RCW 42.56.240(1).

Plaintiffs argue that neither Fischer or Gronquist applies because in those cases it was undisputed that surveillance video tapes and equipment constituted specific intelligence information so no actual analysis of this element was conducted. However, the cases are still on-point analogies for the specifics of surveillance equipment as qualifying as specific intelligence information for purposes of RCW 42.56.240(1). Lack of a specific analysis by the court does not alter that fact.

Plaintiffs also argue that neither Fischer or Gronquist applies because the “secrecy around the make and model of equipment is not essential to effective law enforcement.” Brief, at 31. Plaintiffs interpretation of “essential to effective law enforcement” is narrower than the interpretation applied by the Court. See, Ameriquest Mortg. Co., 177 Wn.2d at 488. In this regard, the plaintiffs compare cell site simulator technology to radar speed detectors, which are widely available and can be purchased at the local Walmart store. However, a radar detector is not the same as a cell site simulator.

The United States submitted a Statement of Interest in this case supported by the attached declaration of FBI Agent Russell Hansen. As

Special Agent Hansen has pointed out, the Federal Government has authorized only two private companies to manufacture cell site simulators and “conditioned their ability to sell the equipment to state and local law enforcement agencies under specific and controlled terms reflecting its sensitive nature.” CP 144. “[C]ell site simulators are defense articles on the U.S. Munitions list” and the export of the equipment as well as technical data about the equipment is regulated by federal law. CP 142. Special Agent Hansen describes that even though the release of make and model numbers may appear to be innocuous, such information is known to be used by criminals and terrorists to defeat the technology and endanger citizens. The U.S. pointed out three main areas of concern regarding disclosure of cell site simulator equipment. They are: (1) the technical specifications and capabilities of cell site simulators, (2) techniques and tradecrafts employed in operating cell site equipment, and (3) makes and model of cell site simulator systems and components. Thus, contrary to plaintiffs’ arguments, the interests at stake are not the same as radar detectors and the importance of maintaining confidentiality is not equivalent.

The United States Government’s Statement of Interest further explains the necessity of keeping some aspects of the cell site simulator technology confidential. CP 120-153. 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 2015 were authorized by RCW 42.56.040(1) at the time those documents were provided to the plaintiff in 2015. The evidence supports the trial court's finding and the City respectfully requests that this Court affirm the trial court's decision on summary judgment on this issue. The City requests attorney fees on appeal pursuant to RAP 18.1.

II. THE CITY'S REPLY TO PLAINTIFF/RESPONDENT BANKS'S RESPONSE

A. The City conducted an adequate search and an inadvertent failure to locate a responsive document is not an automatic violation of the PRA.

Plaintiffs Banks respond that the trial court was justified in finding an inadequate search because the City failed to produce records that were later discovered during the discovery phase of the litigation. However, this results-based analysis is contrary to Washington law which focuses on the search itself, not the results of the search. Block v. City of Gold Bar, 189 Wn. App. 262, 270-71, 355 P.3d 266 (2015) (the focus "is not whether responsive documents do in fact exist, but whether the search itself was adequate"). Plaintiffs point out that the City failed to require additional

police personnel to search their email accounts, but as demonstrated by the City, none of those places is likely to turn up a responsive document.

Plaintiffs also contend that even if the City's search were determined reasonably calculated to reveal all responsive records, the failure to locate and provide a responsive record automatically constitutes a violation of the PRA. Brief, at 38. However, that is not the way that the PRA has been interpreted by the Courts. Rather, under Washington law, the focus is on the adequacy of the search, not the results of the search. Thus, if an agency has performed a reasonable search and attempted to locate all responsive records, the agency's inadvertent failure to find and disclose a record is not a violation of the PRA. As the courts have indicated, "a search need not be perfect, only adequate." Block, 189 Wn. App. at 276, quoting Neighborhood Alliance, 172 Wn.2d 702, 720, 261 P.3d 119 (2011)). See also, Forbes v. City of Gold Bar, 171 Wn. App. 857, 866, 288 P.3d 384 (2012), review denied, 177 Wn.2d 1002 (2013) (A court's review focuses on "the agency's search process, not the outcome of its search."). This language is meaningless under the plaintiffs' interpretation. Here, both the trial court and the plaintiffs erroneously equated non-production with an automatic violation regardless of the adequacy of the search.

B. The responsive documents located during discovery did not constitute violations of the PRA in this case.

1. Blank warrant form

Plaintiffs argue that the warrant template is obviously responsive because it is a record regarding the "use" of the cell site simulator. Brief, at

40. However, the blank form does not reveal any actual “use” and the City reasonably interpreted the plaintiffs’ request as seeking records of actual use. The issue of the template, or blank form, came up during the deposition of Detective Krause. He was asked to walk counsel through the steps necessary to use the cell site simulator. CP 1496, p. 20:18-19. During his description of obtaining a warrant for pen trap and trace, Det. Krause testified that he would sometimes provide a template for a pen, trap and trace warrant to the requesting detective or neighboring jurisdiction to fill out. CP 1496, p. 21. Det. Krause was then asked if he produced the template in response to the plaintiffs’ request for records. CP 1497, p. 24. Det. Krause responded that according to his reading of the request, the only responsive warrants would be those that were actually used and were under seal. CP 1498, p. 24:15-17. As far as the template, he testified, “But the blank, there’s nothing on the blank but the RCW.” 1497, p. 24:23-24. Det. Krause’s and the City’s understanding of the plaintiff’s request as not calling for blank forms is reasonable. After all, the City provided actual emails, not a blank email template. The City provided actual memos, not memo templates. The City does not provide blank Request for Proposal forms, but only RFPs that have some actual language inserted into them.

Finally, the plaintiffs also claim that the City’s non-production of actual warrants makes the non-production of the blank form even more important. However, the actual warrants cannot be produced because they are filed under seal as required by the statute. Plaintiffs cannot seriously

complain about the City not providing documents that the Legislature and the Courts have required be sealed, and which the City is legally prevented from disclosing even if it had them. The trial court erred in finding that the City's failure to provide a blank form constituted a violation of the PRAS.

2. Records revealed during discovery were not violations of the PRA.

a. Emails discovered during discovery

Exhibits 5-9 (CP 672-700) are emails between the City and the FBI regarding other requests for records made by other requesters for records related to the cells site simulator. Because the City was required to notify the FBI each time a request was received, each new request generated a set of emails. The plaintiffs received copies of these emails in discovery where they had requested copies of all previous PRA requests for records concerning the cell site simulator and all the responsive documents produced. The City identified 37 prior requests and provided all documents that had been produced in response to those requests. By comparing the documents produced in discovery to the documents the City provided in response to Banks' request, the Banks plaintiffs were able to see that several emails were provided in discovery that had not been provided to them in response to their PRA request.

In his affidavit, Mike Smith states that he believes that these were deleted from his computer at the time of the plaintiffs' PRA request. Plaintiffs criticize Mr. Smith for stating honestly that he does not recall actually deleting certain emails. What modern employee receiving hundreds

of emails each week can actually recall the date that particular emails were deleted? The best that an honest employee can do in most cases is to state the standard practice and what the employee believes was likely done with regard to an email that was deleted. Indeed, that was all that was required in McCarthy, 152 Wn. App. at 727. To require public employees to record the dates that emails are deleted, particularly emails such as these that have no retention value under the State's Records Retention Act and are not required to be retained, is simply impossible.

The plaintiffs are correct that copies of the emails in Exhibits 5-9 did exist somewhere at the City because the City was able to produce them in response to discovery requests. However, the City did not search every prior request at the time that these plaintiffs made their request. To do so in this case would have been a months-long task. To do so in all future cases would be an insurmountable task, in part because of the way such electronic documents are stored, which would require individual searches of individual folders in every request as opposed to being able to search across all requests at once. In addition, requiring searches of all previous PRA requests essentially enlarges the retention schedules under the Records Retention Act because a document otherwise appropriately deleted might still exist in a response to a closed or ongoing Public Records Act request. Some requests for records are so voluminous that they take years to complete. The City receives over 2,500 request each year. Thus, requiring

the City to search all of its previous PRA requests each time a new request comes in is not a reasonable interpretation of an adequate search.

Nor does such a requirement serve the function of the Public Records Act. The Act's purpose is served by making "a sincere and adequate search for records." Fisher Broad. V. Seattle, 180 Wn.2d 515, 522, 326 P.3d 688 (2014). It is not designed "for playing 'gotcha' with litigation." Hobbs v. Wash. State Auditor's Office, 183 Wn. App. 925, 928, 335 P.3d 1004 (2014).

b. Advisory Committee Meeting Minutes and Agenda

The agenda and minutes were posted to the City's website following the meetings. However, here, the City failed to find these minutes when providing documents in response to the plaintiffs' request. Instead, the plaintiffs obtained the minutes themselves, most likely from the City's website on the internet.

Plaintiffs argue that the City is suggesting that requesters should scour the internet for responsive records. This is not so. However, by publicly posting the minutes the City did not actually "deny" the plaintiffs access to these minutes and the agenda. "The purpose of the Public Records Act (PRA), Wash. Rev. Code ch. 42.56, is to encourage open and transparent government by ensuring public access to government records." Hobbs, 183 Wn. App. at 928.

The City's posting the information on the website clearly reflects the openness and transparency that the Public Records Act is designed to

achieve. Thus, at a minimum, the trial court erred in not including this among the non-exclusive list of mitigating factors when determining a penalty.

c. Billing Spreadsheet

The billing spreadsheet is a “record for paying phone bills.” CP 292; CP 1627. It records the bills received from phone companies for all pen, trap and trace orders. CP 294. Because the purpose of the record is to make sure phone bills are paid, it is not an accurate representation of cell site simulator usage. As Det. Krause testified, “it’s not 100 percent accurate. But it’s got some record in there whether or not the equipment may have been deployed, just by how we do the- how we fill out the spreadsheet.” CP 1499, p. 34:19-22.

Plaintiffs now concede that their prior attorney modified the request for records such that they wanted a billing spreadsheet for 2015 that included only charges associated with instances where the cell site simulator was used. But the plaintiffs now contend that the problem is that the 2015 spreadsheet they were provided does not actually contain all usage for the year 2015 and that they know this by the number of times the word “capture” appears on later, unlimited versions of the spreadsheet. Plaintiffs first raised this argument in their Reply on Partial Summary Judgment so it was not addressed by the City in briefing before the trial court. CP 1248. However, the plaintiffs misread the spreadsheet.

- Det. Krause testified that “capture” *may* mean that the cell site simulator was used. CP 853. But “it’s not 100 per cent accurate.” Id. And not all detectives who added to the spreadsheet used the word “capture” to indicate that the cells site simulator was used. Det. Jeff Shipp testified the word “capture” is not used only in relation to the cell site simulator. CP 297. He indicated that may use the word “driver” to indicate cell site simulator usage, though not necessarily. CP 295; 301-02. . Det. Chris Shipp confirmed that different detective record things differently because the only real purpose of the spreadsheet is to see that phone bills get paid properly. CP 1628. And, the dates on the log reference when bills are received and when requests for payment are made. CP 295-96. Therefore, plaintiffs are incorrect in asserting that the 2015 was not accurate when it was provided to them. Moreover, the City provided affidavits that 2015 spreadsheet contained all instances where the cell site simulator was used during that year. CP 1469. The plaintiff’s erroneous understanding of a billing spreadsheet cannot overcome the good faith testimony of City witnesses.

The trial court erred in not considering the agreement between the City and plaintiffs’ counsel for a modified billing spreadsheet. The trial court also erred to the extent that it found that the modified spreadsheet did not contain all instances of cell site simulator usage in 2015 at the time that the spreadsheet was provided.

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d. Invoice

Plaintiffs argue that inadvertence in failing to produce a document is “an admission of a PRA violation.” Brief, at 48. However, an inadvertent failure to find a documents during an adequate search is not a violation of the PRA. Here, the City produced all invoices it could locate. These plaintiffs were able to compare all records provided to other requesters with the ones they receive and make a claim for any discrepancies. They found that one invoice was not included. However, the City is not required to do a perfect search. The failure to find a single invoice is not a violation unless there is evidence that the City’s search was inadequate. There is no credible evidence of an inadequate search process. The trial court erred in finding a violation of the PRA based on this invoice.

C. The trial court abused its discretion in determining penalties.

There is no evidence in this case that the City attempted to deny these plaintiffs any of the records they sought or that the City intended to prevent the public disclosure of any records. With the exception of the blank warrant form, every record which the plaintiffs claim they should have received had already been publicly produced, either on the City’s website or in response to a previous PRA request. The most that can be said about this case is that the City was unable to locate several documents despite diligent efforts. In assessing penalties, the trial court failed to adequately consider the important factor is assessing penalties, the presence or absence of bad faith.

Moreover, the trial court did not distinguish between responsive and non-responsive records, did not take into account that some of the documents were properly deleted as having no retention value, and did not accord affidavits the presumption of good faith and instead relied on speculative assertions of the plaintiffs.

The PRA is not designed to deliver a severe punishment to an agency that has used all reasonable efforts to provide requesters with the documents they seek. The City respectfully request that this Court hold that the trial court abused its discretion in assessing penalties.

D. The trial court abused its discretion in determining attorney fees.

The trial court did not discount the attorney fee award for unsuccessful claims. The plaintiffs argue that the trial court was not required make an explicit discount because the plaintiffs' attorneys had stated that their billing records did not include all the time they actually spent on the case. Such a blanket assertion is not a sufficient basis upon which to calculate an award of attorney fees.

Plaintiffs further contend that even if the trial court failed to make a discount for unsuccessful claims, the discount should be one-third, not one-half. Brief, at 54. The City disagree with this apportionment but the bottom line is that the trial court made no discount whatsoever for unsuccessful claims. The trial court also failed to make any discounts for non-productive matters and duplicative effort. Thus, the trial court abused its discretion in calculating the attorney fees in this matter.

Dated this 3rd day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this April 3, 2019, I filed, through my staff, the foregoing with the Clerk of the court for the Court of Appeals, Division II, for the State of Washington via electronic filing.

A copy of the same is being filed and emailed to:

1. COURT OF APPEALS, DIVISION II
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EXECUTED this 3rd day of April, 2019, at Tacoma, WA.

/s/ Margaret Elofson
MARGARET ELOFSON

CITY OF TACOMA

April 03, 2019 - 3:39 PM

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