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NO. 95109-8

SUPREME COURT OF THE STATE OF WASHINGTON

HEALTH PROS NORTHWEST, INC.,

Appellant/Cross-Respondent,

v.

STATE OF WASHINGTON et al.,

Respondent/Cross-Appellant.

**OPENING BRIEF OF THE
DEPARTMENT OF CORRECTIONS**

ROBERT W. FERGUSON
Attorney General

TIMOTHY J. FEULNER
WSBA #45396
Assistant Attorney General
Corrections Division
P.O. Box 40116
Olympia, WA 98504
(360) 586-1445

ORIGINAL

filed via
PORTAL

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I. INTRODUCTION

As this Court recognized in *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 327 P.3d 600 (2013), RCW 42.56.520 allows an agency who receives a public records request to notify the requester when the agency needs a “reasonable amount of time to determine [an] appropriate further response.” 177 Wn.2d at 432. In notifying the requester that additional time is needed, the agency must acknowledge the request and provide a reasonable estimate of the time that the agency “will require to respond to the request.” RCW 42.56.520(1)(c). By using the word “respond,” RCW 42.56.520(1)(c) recognizes that an agency can respond to a public records request in many different ways (i.e., denying records, producing records in a single production, producing records in installments, and informing the requester that no responsive records have been found), and it requires only that the agency give a reasonable estimate of the agency’s next response to the request. Agencies are permitted this additional time based on the practical reality that—for some requests—agencies may need more than five business days to determine the appropriate response to the request. RCW 42.56.520(2). In acknowledging Health Pros Northwest’s (HPNW) public records request, the Department of Corrections (Department or DOC) informed HPNW that Department staff were gathering records and that it

would respond further to the request by a certain date. This response complied with RCW 42.56.520(1)(c).

In concluding that the Department violated the Public Records Act (PRA) in its initial response, the trial court erroneously interpreted RCW 42.56.520(1)(c) to require an agency to provide an estimate of when the agency will begin to provide records. Meanwhile, HPNW proposes an interpretation of RCW 42.56.520(1)(c) that would require agencies to provide an estimated date of when the entire request will be completed in their initial five-day response. However, both interpretations should be rejected because they alter the plain language and would have negative, practical consequences on agencies and requesters. Both interpretations would require agencies to commit to providing something that is essentially impossible to know for some requests within five business days, and both would actually impede an agency's ability to communicate candidly with the requester.

Additionally, contrary to HPNW's argument, this Court does not need to adopt HPNW's interpretation to ensure judicial oversight over agencies. As the Department conceded below, a requester has the option to go to court and require the agency to show that its timelines for responding to a given request are reasonable. In fact, the trial court reviewed the Department's response in this case and concluded it was

reasonable. To the extent that HPNW challenges that ruling, the trial court correctly concluded that the Department was responding reasonably to HPNW's request. Therefore, this Court should reject the trial court's and HPNW's interpretation of RCW 42.56.520(1)(c).

Because the Department's initial response complied with RCW 42.56.520 and it was responding in a reasonably prompt manner to HPNW's request, the Department did not violate the PRA. To the extent that the trial court reached a different decision, it erred. This Court should reject HPNW's appeal from the trial court's decision in its favor, grant the Department's cross-appeal, reverse the trial court's decision to the extent it found a PRA violation, and remand for entry of a judgment in the Department's favor.

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

1. The trial court erred in concluding that the Department's initial response to HPNW's public records request violated RCW 42.56.520(1)(c).

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Does RCW 42.56.520(1)(c) require an agency to inform the requester when it is going to begin producing records as part of its initial five-day response?

2. Did the Department violate RCW 42.56.520(1)(c) when it informed HPNW that it had received the request, that staff were searching for and gathering records, and that the Department would provide further response by a certain date?

IV. STATEMENT OF THE CASE

The Department receives thousands of public records request each year. CP 114. The volume and complexity of the requests the Department receives has grown over time. CP 114. In 2016, the Department received 12,459 public records requests or an average of over 34 public records requests per day. CP 114. Of these 12,459 requests, the Department's centralized Public Records Unit, which is comprised of 20 people, handled 5,519 of these requests. CP 114. The remainder of the requests, which include offenders' requests to review their central files, are handled by other Department staff at the Department's facilities. CP 114; WAC 137-08-090(1) (explaining the process by which offenders request to review their central files).

On February 10, 2017, HPNW, through its attorney, submitted a public records request to the Department. CP 121-24. The request was three pages long and contained eighteen parts including multiple subparts.

CP 138-140; Appendix A.¹ One portion of the request sought “[a]ll emails, letter (sic), notes, and other documents received by” the Department from HPNW. CP 122; Appendix A. Another portion sought “[a]ll emails, letters, notes or other documents sent to” HPNW from any Washington DOC employee or contractor. CP 139; Appendix A. A third part of the request sought a variety of employment records for a list of seventy-eight named individuals. CP 139-40. In total, the Department will need to review at least 350,000 pages of records to determine whether they are responsive and to review any responsive records for exempt information that might need to be redacted or withheld. CP 135. Additionally, as part of the Department’s process, it needs to ensure that staff members affected by the request are provided with notification of the request. CP 118.

After reviewing the request, Department staff began working on it almost immediately by gathering records and then reviewing each potentially responsive record to determine if it needed to be redacted or withheld. This search ultimately spanned every one of the Department’s prison facilities and the Department’s Headquarters, and numerous employees had to search both hard copy files and electronic files as part of the Department’s response. CP 186-192.

¹ Because an understanding of the request’s complexity and scope is necessary to understand the Department’s response to the request, a copy of the initial request is provided in Appendix A.

When the Department received the request, the Department's Public Records Officer Denise Vaughan was initially assigned to process the request. CP 116. When Ms. Vaughan realized that the request had to do with the Department's health services staff, Ms. Vaughan set up a meeting to discuss the request to better understand the scope of the request and identify where to search. CP 116. Ms. Vaughan also began searching for responsive records by asking other Department staff to gather the contracts that were specifically mentioned in the request. CP 126. After Ms. Vaughan gained an understanding of HPNW's request through this process, she reassigned the request to Public Records Specialist Erin Skewis on February 15, 2017. CP 116, 126.

Due to the size of the request, Ms. Skewis knew that all responsive records could not be produced within five business days and that records would likely need to be produced in installments. CP 127. Because the Department had only begun to search for records, it was impossible to know how many installments there would be and the length of time that would be required to gather, review, and produce all responsive documents. CP 127.

On February 15, 2017, Ms. Skewis sent HPNW's attorney an email acknowledging the records request. CP 127. This email provided the Department's interpretation of the request, informed HPNW that the

Department was beginning to search for and gather responsive documents, and informed HPNW that the Department would respond further as to the status of HPNW's request by April 20, 2017. CP 146-48. The same day, Ms. Skewis emailed a Department health services employee to get information about the contracts that had been issued as a result of RFQQ11118. CP 127, 150.² In doing so, the Specialist was hoping to understand the history behind RFQQ11118 so that she could direct her searches to the appropriate locations. CP 127, 150.

Ms. Skewis received background information about RFQQ11118 the following day. CP 128. Ms. Skewis also received an email from HPNW's attorney with clarifications and corrections of the Department's interpretation of the request. CP 128. At that time, HPNW's attorney did not ask about the timeline for producing records or ask for clarification about when records would be provided. CP 21-23. Ms. Skewis acknowledged the clarifications provided by HPNW's attorney on the same day and provided a revised interpretation of HPNW's request. CP 19-21. Ms. Skewis sent HPNW's attorney another email on the same day asking for additional information related to a portion of the request. CP 19. Five business days later, HPNW's attorney responded and provided the requested information. CP 19. HPNW did not contact the Department

² RFQQ11118 was a request for qualifications and quotation related to nursing services. CP 150, 195.

further about this request until after the Department made the first installment of records available to HPNW.

Meanwhile, the Department continued to search for records. On February 17, 2017, Ms. Skewis sent an email to another DOC employee asking whether all HPNW email addresses ended with “@healthprosnw.” CP 128. This information was necessary to conduct an email search because a portion of HPNW’s request sought every email ever sent to HPNW or received by a DOC employee from HPNW. CP 128. Ms. Skewis received confirmation that all email addresses contained that sequence of letters and on the same day, she submitted a request to the Department’s IT Department to search all DOC live emails and submitted a request to another Department staff member to search all vaulted emails. CP 128-29. The Specialist focused on this portion of the request because she believed that such records could be reviewed and produced most quickly. CP 128.

On February 21, 2017, the Specialist received notice of the completion of the live email search. CP 129 A few weeks later, she received results from the vaulted email search. CP 129. Between February and April, Ms. Skewis began reviewing records from the email searches for redactions. CP 129. During this time, Ms. Skewis also had 90 other public records requests that she was handling. CP 117-18. On April 11,

2017, Ms. Skewis sent an email to HPNW's attorney with the cost for a first installment of 695 pages of records. CP 163. HPNW's attorney responded to the cost email and asked how many installments the Department expected to produce and when the Department expected to produce each installment. CP 165. Ms. Skewis responded the same day and told HPNW's attorney that she did not know exactly how many installments there would be. CP 165. However, Ms. Skewis told HPNW's attorney that there would likely be over 10 installments due to the size and complexity of the request. CP 165. Ms. Skewis also explained that the Department would provide a date when the next installment or response would be expected when it received payment for the first installment. CP 165. Ms. Skewis explained that this process would be continued until the request was fulfilled and all responsive records had been provided. CP 165.

HPNW's attorney responded to this email on the same day. CP 168. HPNW's attorney stated that the agency's response was not within the letter and spirit of the PRA and was not acceptable to HPNW or to HPNW's attorney. CP 168. HPNW's attorney demanded an estimate of when the Department would completely respond to the request and to the extent that the Department required more than 45 additional days to fully respond, he demanded "a full and complete explanation based in specific

evidentiary facts why such an extraordinary response time is required.” CP 170. Ms. Skewis responded and informed HPNW’s attorney that he could submit an appeal of the Department’s response through the Department’s internal appeal process. CP 168.³

After receiving payment, the Department mailed the first installment of records. CP 174. At the same time, the Department informed HPNW that staff were continuing to gather and review records and that the Department would follow up with a further response on or before June 12, 2017. CP 174. In response to receiving the first installment, HPNW’s attorney contacted Ms. Skewis and asked Ms. Skewis how the Department’s response complied with the obligation to provide a prompt response to public records requests. CP 38. Ms. Skewis explained that the Department continued to experience a high volume of requests and was asking requesters for patience. CP 37. She also explained that she could not stop working on all other requests in order to respond to HPNW’s sooner. CP 37.

Two weeks after receiving the first installment of records, HPNW filed the present lawsuit in Thurston County. In its complaint, HPNW asked that the Court find DOC violated the PRA in its initial five-day

³ HPNW complained both to the Department and to this Court that the internal appeals process only applied to the Department’s denial of a record. However, as Ms. Skewis explained to HPNW’s attorney, HPNW could submit an appeal and it would still have been reviewed by the Department’s appeal officer. CP 27.

response, determine if DOC's time estimate was reasonable, and require DOC to provide a reasonable estimate to the extent that the court determined the response was not reasonable. CP 9.

Meanwhile, the Department continued to review and produce records in response to HPNW's request. After receiving payment, the Department produced a second installment of 1,633 pages of records on May 30, 2017. CP 44. On June 27, 2017, the Department sent HPNW a cost letter for a third installment of 9,128 pages of records and also provided detailed information about the progress of the Department's response to the request. CP 54-56. In this email, the Department asked if HPNW wanted to prioritize any portion of its eighteen-part request and asked for clarification about portions of the request. CP 54-56. HPNW responded by indicating that it wanted DOC to prioritize the request in whatever order would allow DOC to most quickly respond to the entire request. CP 53-54. HPNW also provided additional clarifications to portions of the request. CP 53-54. After receiving payment, the Department mailed the third installment. CP 51.

On August 16, 2017, the Department sent HPNW a cost letter for 4,306 pages of records. CP 205. The Department was continuing to search for and review responsive records at the time of the hearing below. CP 118, 135. At that time, the Department had an additional 350,000 pages of

records that needed to be reviewed and additional searches to do. CP 118, 135

The trial court held a hearing on the merits on September 8, 2017. In its briefing and at the hearing, the Department conceded that the trial court had the authority to review the entirety of the Department's response to determine if the timeframes and manner in which the Department was responding to HPNW's request was reasonable. CP 228-29; RP 16-17, 24. After hearing argument, the trial court concluded that DOC violated the PRA in its five-day letter by not providing a date by which the agency would begin producing records. CP 248; RP 26. The trial court, however, concluded that the Department had been responding reasonably and promptly to the request so far. CP 249; RP 26-28. The trial court also rejected HPNW's argument that DOC was required to provide an estimate of the time that was required to complete the request. CP 248-49; RP 28. The trial court awarded HPNW \$10,000 in attorney's fees and \$212.50 in costs based on its finding that the Department violated the PRA in its five-day letter. CP 250.

HPNW appealed and sought direct review. DOC has filed a cross-appeal but opposes direct review.

V. ARGUMENT

Judicial review of an agency's actions in response to a PRA request are reviewed de novo. *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 344, 217 P.3d 1172 (2009). If a trial court bases its decision on whether there has been a PRA violation solely upon affidavits and documents without testimony, the appellate court engages in de novo review of the violations. *Ames v. City of Fircrest*, 71 Wn. App. 284, 292, 857 P.2d 1083 (1993).

A. **The Department Did Not Violate RCW 42.56.520 When It Acknowledged HPNW's Request, Informed HPNW That It Was Searching for and Gathering Records, and Indicated That It Would Respond Further Within 45 Days**

RCW 42.56.520 requires an agency to respond to a public records request within five business days of receipt by either (1) providing the record; (2) providing an internet address and link to the agency's website with the specific record; (3) denying the request; or (4) "Acknowledging that the agency...has received the request and providing a reasonable estimate of the time the agency...will require to respond to the request."⁴ RCW 42.56.520. The issue in this case is whether the Department's

⁴ In 2017, the legislature added a fifth option by which an agency can seek clarification of the request. RCW 42.56.520(1)(d). That amendment was made after the request at issue in this case and clarifies that agencies may also seek clarification in the initial five-day letter. This change does not impact this case.

response complied with this last option by providing a reasonable estimate of the time that it would take the Department to respond to the request.

The trial court, HPNW, and the Department all interpret the meaning of RCW 42.56.520(1)(c) differently. The trial court concluded that the agency must provide an estimate of the time by which the agency will begin to produce records. On the other hand, HPNW argues that it requires an agency to provide an estimate of the time by which the agency will complete its response to the request. However, the Court should reject both of those interpretations and should conclude that an agency complies with RCW 42.56.520(1)(c) when it acknowledges the request and provides a reasonable estimate of time that the agency needs to respond further to the request. Such a response complies both with the plain language of RCW 42.56.520(1)(c). It also serves the purpose of the PRA because it allows an agency to communicate candidly with the requester rather than requiring the agency to provide a misleading initial response to the requester when the agency does not yet know the full scope of the responsive records. Because the Department responded to the request in this manner, it did not violate the PRA and the trial court erred in concluding to the contrary.

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1. RCW 42.56.520(1)(c) Requires an Agency to Provide a Reasonable Estimate of Time That the Agency Needs to Respond Further to the Request

In interpreting a statute, courts look first to the plain meaning of the statute, which is determined not only by looking at the statutory language but also by examining the context of the statute, including related statutes and other provisions of the same act. *Fisher Broad.-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 527, 326 P.3d 688 (2014). When the statute's meaning is plain on its face, then courts give full effect to the plain meaning. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 437, 98 P.3d 463 (2004).

In the relevant portion, RCW 42.56.520 states:

Within five business days of receiving a public record request, an agency...must respond by...(c) acknowledging that the agency...has received the request and *providing a reasonable estimate of time the agency...will require to respond to the request...*(2) Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt.

RCW 42.56.520 (emphasis added). In identifying the need for an agency to provide an estimate, the statute also identifies that the estimate must be of the time required to "respond." RCW 42.56.520(1)(c). This Court has recognized that RCW 42.56.520 is intended to allow an agency additional

time to determine how to respond to a public records request. *See Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 432, 327 P.3d 600 (2013). Under RCW 42.56.520(1)(c), an “agency must respond promptly but [it] can notify requester it needs a reasonable amount of time to determine appropriate further response.” *Id.*

The key word in the statutory provision is “respond” because the word “respond” identifies the nature of the estimate that the agency is required to provide. The word “respond” generally means to “to say something in return: make an answer.” *Webster’s Third New International Dictionary* 1935 (2002). However, the word “respond” is a term of art in the PRA context. *See Swinomish Indian Tribal Cmty. v. Wash. State Dep’t of Ecology*, 178 Wn.2d 571, 581, 311 P.3d 6 (2013) (stating general rule that terms of art should be interpreted according to their expected meaning). Under the PRA, an agency can “respond” to a request in a number of different ways, including but not limited to: providing records; denying records either in whole or part; providing an estimate; or informing the requester that the agency does not have records. Therefore, in light of these many options, “respond” does not refer to the time that all records are provided (as HPNW argues) or even when the first installment of records is provided (as the trial court concluded).

Indeed, RCW 42.56.520 itself uses the word “respond” three separate times, and it consistently uses the word in a broader sense than simply providing records. Additionally, the legislature clearly understood how to refer to an agency’s production of records because RCW 42.56.520(1)(a) refers to an agency “providing the records” within five business days. In contrast to a requirement that an agency provide a reasonable estimate of the time required to provide records, RCW 42.56.520(1)(c) requires a reasonable estimate of the time required to respond to the request. Therefore, an agency complies with RCW 42.56.520(1)(c) when it acknowledges a request, indicates that staff are searching for and gathering records, and provides an estimate of the time that the agency will require to provide a further response to the request.

Interpreting RCW 42.56.520(1)(c) to require an agency to provide an estimate of when it is going to provide a further response makes practical sense as well. The various options provided to agencies for responding to a request within five business are based on the recognition that not all public records requests are the same and that compliance with the PRA can take more than five business days. Because some public records requests are straightforward and small, the agency can simply provide the record or refer the requester to the agency’s website within five business days. RCW 42.56.520(1)(a), (b). For other requests,

additional time will be needed so the agency can locate records and/or determine whether records are exempt. RCW 42.56.520(2). The PRA requires an agency to conduct a reasonable search as part of the response. *Neighborhood Alliance of Spokane Cnty. v. Spokane Cnty.*, 172 Wn.2d 702, 719-21, 261 P.3d 119 (2011). In searching for records, an agency is instructed to search records in locations where the records are reasonably likely to found, *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011), and to follow up on any obvious leads that arise during the course of the agency's search. *Id.* For such larger requests, agencies are expressly permitted to respond to the request by providing installments of records while the agency gathers and responds to requests. RCW 42.56.080(2).

For these more complex requests, additional time is essential because agencies will likely not be able to search in all locations within five business days, and the agency may not know if it has responsive records or the precise nature or volume of those records in that short time period. In those circumstances, the agency must acknowledge the request and let the requester know when the requester is likely to receive further response to the request. By requiring an estimate of time to respond, RCW 42.56.520(1)(c) provides agencies flexibility while they determine the appropriate response but requires that the agency notify the requester

when the requester will next hear from the agency. Because the nature of the agency's response will depend on the specific request itself, agencies should have discretion and time to determine an appropriate response as long as the response is reasonable and consistent with the agency's obligation to provide the fullest assistance to the requester. *See, e.g., Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 653-54, 334 P.3d 94 (2014); *Ockerman v. King Cnty. Dep't of Dev. & Envtl. Servs.*, 102 Wn. App. 212, 219-20, 6 P.3d 1214 (2000). Moreover, if at any point, the requester believes the agency's estimate is unreasonable, the requester can always file an action and require the agency to demonstrate the reasonableness of the estimate to a court. RCW 42.56.550(2).

Here, the Department's initial response acknowledged HPNW's request, informed HPNW that the Department was gathering and searching for records, and that HPNW would receive further response to the request by a certain date. CP 148. This response complied with RCW 42.56.520(1)(c). Because the trial court concluded otherwise, this Court must reverse that portion of the trial court's ruling.

In concluding that the Department's five-day letter violated the PRA, the trial court erroneously concluded that RCW 42.56.520(1)(c) required that the agency provide an estimated date of when the agency will begin producing records. However, this interpretation is not supported by

the plain language because it equates the word “respond” with providing records. Again, the legislature clearly understood how to refer to an agency’s obligation to provide records because the legislature used such language in the exact same statutory provision. RCW 42.56.520(1)(a) (identifying “providing the records” as one of the options for agencies within five business days of receiving the request). The legislature did not use such language when it described the estimate required in RCW 42.56.520(1)(c), and this Court should consider that distinction to be meaningful.

The trial court’s interpretation also creates practical problems. Under the trial court’s interpretation, there is no good way for an agency to comply with the statute if it does not know whether or not it has responsive records. Because the trial court’s interpretation requires an agency to provide a date when the agency is going to begin providing records, an agency would presumably violate the PRA by acknowledging the request and indicating that staff need to determine whether there are any responsive records. In these circumstances, agencies would be forced to provide an estimated date of production and promise something (i.e. a date when records will be provided) that they agency may not be able to do at all. Then, the agency would have to go back to the requester after completing the agency’s search and inform the requester that the agency

actually does not have responsive records. This type of response to a requester will merely create confusion and mistrust among the agency and the requester. Instead, the Department's interpretation allows agencies to be candid with the requester by allowing an agency to tell the requester that it needs to do certain things in response to the request (for example, gather records or review records) and that further response to the request will be provided by a certain date.

Therefore, this Court should reject the trial court's interpretation that agencies must provide an estimate of time by which the agency will produce records and reverse the trial court's determination that the Department's five-day letter violated the PRA.

2. The Statute Does Not Require an Estimated Date of When the Agency Will Complete Its Response to the Request

HPNW argues that an agency should be required to provide within five business days an estimate of when the agency will completely respond to the request. HPNW's Brief, at 15 (arguing that trial court should have required the agency to provide an estimate of when the agency expects to fully respond to the request). The Court of Appeals has consistently rejected this interpretation of the statute. *Hikel v. City of Lynwood*, 197 Wn. App. 366, 375-76, 389 P.3d 677 (2016); *Hobbs v. State*, 183 Wn. App. 925, 941-42, 335 P.3d 1004 (2014).

In *Hobbs*, the requester submitted a public records request and filed suit two days after receiving the first installment. The requester argued that the agency violated the PRA in its five-day letter because it did not provide him an estimate for completing its entire response to the request. *Hobbs*, 183 Wn. App. at 941. Division Two of the Court of Appeals rejected that argument. In doing so, the Court of Appeals noted that the PRA allows an agency to produce records on a partial or installment basis. 183 Wn. App. at 942. The court also recognized that there are multiple ways for agencies to respond to a request, and RCW 42.56.520 only requires an estimate of time required to respond. *Id.* The court rejected the requester's proposed interpretation because the court would "not interpret RCW 42.56.520 to require agencies to provide an estimate of when it will fully respond to a public records request when the legislature declined to include such language in the statute." *Id.*

Two years later, Division One of the Court of Appeals revisited the five-day letter requirement in *Hikel v. City of Lynwood*, 197 Wn. App. 366, 389 P.3d 677 (2016). In that case, the agency's initial letter asked for "clarification" due to the large volume of responsive records and informed the requester that it would likely need to produce records in installments. 197 Wn. App. at 369. Division One concluded that the agency's request for clarification violated RCW 42.56.520 because asking for clarification

was not one of the options available to an agency in its initial five-day letter. 197 Wn. App. at 373-74.⁵ Following *Hobbs*, however, Division I rejected the argument that the agency violated the PRA by failing to provide a reasonable estimate of the amount of time required to fully or completely respond to the request. *Hikel*, 197 Wn. App. at 375-76. The Court of Appeals again indicated that the requester’s proposed interpretation (i.e. an interpretation that required an estimate of the time required to fully respond to the request) would add language to the statute that is not included in the plain language. *Id.*

After the *Hikel* decision, the legislature acted quickly to amend RCW 42.56.520 to allow an agency to seek clarification of a request in its initial five-day letter. Laws of 2017, ch. 303, § 3. However, the legislature did not amend the language to add a requirement that agencies must provide an estimate of when they will fully respond to the request. *Id.* The fact that the legislature amended the requirements governing an agency’s initial response but declined to impose a requirement that agencies provide an estimate of time to fully respond is an indication that the legislature did not intend to impose such a requirement and does not have objections to

⁵ The trial court’s written judgment in this case indicates that the *Hikel* court went on to hold that an agency must provide a date by which the agency would begin producing records. CP 248. However, that conclusion is not in *Hikel* itself. Instead, the *Hikel* court—consistent with the Department’s interpretation—indicated that the agency’s acknowledgement letter must include “a reasonable estimate of the time [the agency] needs to respond.” *Hikel*, 197 Wn. App. at 373.

the manner in which the courts have uniformly interpreted those provisions. *See City of Fed. Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009) (noting that legislature's failure to amend statute that has been interpreted by the courts indicates legislative acquiescence in that interpretation); *State v. Ervin*, 169 Wn.2d 815, 826, 239 P.3d 354 (2010) (concluding there was legislative acquiescence when legislature amended statutory provision multiple times but did not change the provision in a way that overruled prior case law). Indeed, many states have crafted provisions similar to that proposed by HPNW with clear statute language that requires an agency to provide an estimate of the time required for a complete response. *See, e.g.*, 2017 Or. Laws ch. 456, § 29 (requiring agency to acknowledge a request within ten days and provide "a reasonable estimated date by which the public body expects to complete its response based on the information currently available."); Del Code Ann. tit. 29, §10003(h) (requiring an agency to provide "a good-faith estimate of how much additional time is required to fulfill the request."). The Washington legislature has not provided such a requirement, despite recently amending RCW 42.56.520 to clarify other parts of its requirements. This Court should not create one.

HPNW relies heavily on the Attorney General Office's Model Rules. Of course, it is the Court's duty to determine the meaning of a

statute, not the Attorney General's Office. However, the legislature in providing the Washington Attorney General's Office with the authority to develop model rules specifically characterized them as model rules and did not require state agencies to adopt such rules.⁶ The Department has not adopted the Model Rules. Additionally, the Model Rules themselves recognize that the "model rules, and the comments accompanying them, are advisory only and do not bind any agency," WAC 44-14-00003, and the courts have also agreed that they are non-binding. *See, e.g., Mitchell v. Wash. State Dep't of Corr.*, 164 Wn. App. 597, 606-07, 277 P.3d 670 (2011). In other words, the non-binding model rules do not trump the plain language of the statute.

There are additional reasons to be cautious with the provision of the Model Rules cited by HPNW. First, it was adopted prior to the *Hikel* and *Hobbs* decisions interpreting RCW 42.56.520 and as a result, it does not address those more recent cases. Second, the current Model Rules suffer from the same defect of statutory interpretation as HPNW's argument because the Model Rules add the word "fully" to the plain language of the statute. WAC 44-14-04003(4)(b) (indicating that the agency should "provide a reasonable estimate of the time it will require to

⁶ In fact, the Attorney General's Office itself has not adopted the Model Rules in their entirety, and it has not adopted the provision in question here. *See* WAC 44-06-085(1)(b).

fully respond.”) (emphasis added)). The fact that the Model Rules needed to add the word “fully” to the statutory language undermines HPNW’s argument instead of strengthens it. If the statutory language clearly required an estimated date of completion, the Model Rules would not have needed to add words to the statute to get to the result HPNW advocates.

Third, the Model Rules’ gloss on the interpretation of RCW 42.56.520 is not adopted in other documents that the Attorney General’s Office has produced more recently related to the requirements in RCW 42.56.520. *See, e.g.*, Washington State Attorney General’s Office, *Obtaining Public Records: A Citizens’ Rights Publication*, at 2 (indicating that agency must “[a]cknowledge your request and give you a reasonable estimate of how long it will take to respond”).⁷ Indeed, the Attorney General’s Office has submitted a proposed rule to remove the language from the Model Rules that HPNW relies so heavily upon.⁸ All of this indicates that the Court should not give the outdated Model Rules weight with regard to this issue, let alone dispositive weight.

HPNW also cites the Washington Public Records Act Deskbook Guide. This guide, however, is merely a guide for practitioners of the

⁷ Available at http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/Office_Initiatives/Obtaining-Public-Records-Brochure-2017.pdf

⁸ Proposed Rule available at http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/About_the_Office/Open_Government/Public_Records/Official%20ModRulesFilingCombined.pdf

PRA. The Guide does not hold any legal authority and it does not bind the Courts (or agencies). As HPNW indicates, the guide supports agencies providing both an estimated date of completing the request and an estimated date of an initial installment. HPNW's brief is unclear if it is arguing that RCW 42.56.520(1)(c) requires both estimates. However, this Court should reject the interpretation that RCW 42.56.520(1)(c) requires two estimates because such an interpretation is contrary to language of the statute. RCW 42.56.520(1)(c) speaks only of a single estimate provided by the agency; imposing a requirement that the agency provide an estimate of both the initial installment date and the date of completion would amend the language to require two estimates instead of one. The legislature could have written the statute to require two estimates. It did not.

HPNW also claims that this Court should consider these resources and their impact on *Hobbs* because the *Hobbs* court was not aware of the Model Rules. This argument is incorrect. Like HPNW, the requester in *Hobbs* relied upon the Model Rules to make the same argument. Appendix B, Excerpts of Opening Brief of Appellant, *Hobbs v. State*, Cause No. 44284-1-II. Despite these arguments, the *Hobbs* court concluded that the plain statutory language did not require an initial estimate of when the request would be completed. *Id.* This Court should reach the same conclusion.

Finally, HPNW argues that a contrary interpretation will create some kind of jurisdictional gap in the PRA. In doing so, HPNW fails to adequately explain why that is the natural consequence of the Department's interpretation, especially in light of the trial court's decision in this case that reviewed the Department's entire response. When an agency provides an estimate of when it will provide a further response—as the Department did here—a requester has the ability to challenge that estimate under RCW 42.56.550(2) and the court has the ability to review such an estimate. And if the agency provides a new estimate, the requester always has the ability to challenge that second estimate. *See* RCW 42.56.550(2). There is no language in RCW 42.56.550(2) that limits a court to reviewing only the first estimate provided by an agency. Similarly, when an agency ignores a request for an extended period of time, the requester can seek review of the agency's action and attempt to get a court order requiring the agency to act. *See* RCW 42.56.550(2).⁹ In other words, requesters have many options at their disposal to require an agency to show that its response complies with the PRA. However, when an agency is communicating with the requester and providing records in a reasonably prompt and thorough manner—as the trial court determined the Department was for this request—the agency does not violate the PRA.

⁹ Additionally, it is possible that an agency's failure to properly respond could eventually constitute a denial of records that is reviewable under RCW 42.56.550(1).

Such a result does not undermine the purpose of the PRA and does not create any jurisdictional gap.

Therefore, the legislature could have required agencies to provide an estimate of the time that it would take to fully respond to a request. It did not, and this Court should reject HPNW's interpretation of RCW 42.56.520(1)(c).

3. The PRA's Purpose Is Better Served Better By the Department's Approach Because The Department's Interpretation Encourages Communication Between the Requester and the Agency

"[T]he purpose of the PRA is best served by communication between agencies and requesters." *Hobbs v. State*, 183 Wn. App. 925, 941 n.12, 335 P.3d 1004 (2014). Many requirements of the PRA are designed to foster that communication. For example, agencies must provide a brief explanation of the basis for any redaction or withholding of records, RCW 42.56.210(3), and agencies are expected to provide the fullest assistance to requesters. RCW 42.56.100.

The Department's interpretation of RCW 42.56.520 gives agencies some flexibility, encourages communication between the requester and the agencies, and gives courts the ultimate check to ensure that the agency is responding properly to a request. This interpretation recognizes that many times agencies need more time to determine if there are responsive records

at all and what records can be produced if there are responsive records. And if the agency determines that it is going to produce records in installments, the agency must continue to provide the requester with a reasonable estimate of the next response date as the request progresses. This ensures that the agency is maintaining continual communication with the requester. Ultimately, if the requester believes that the agency is producing records in a timeframe that is unreasonable, the requester can go to court and ask the court to find that the agency has not produced records in a reasonable manner. *See* RCW 42.56.550(2). That is exactly what occurred here, and the trial concluded that the Department's timeframes and response was reasonable. CP 249, 251.

HPNW's exact interpretation of the statute is somewhat unclear, and its implications are unworkable. HPNW indicates that an agency must provide an estimate date of completion. But HPNW does not address what an agency is supposed to do if it is producing records in installments. Because RCW 42.56.520(1)(c) only speaks of one estimate, it appears that HPNW's interpretation is that an agency's initial estimate is simply the estimated date of completion and that an agency does not have an obligation to notify the requester of any estimate of when the next installment of records will be available. HPNW also appears to agree—as the Court of Appeals decisions that have addressed the issue have held—

that the agency is not bound by this initial estimate. *See, e.g., Rufin v. City of Seattle*, 199 Wn. App. 348, 357-58, 398 P.3d 1237 (2017). This means that an agency would provide one completely speculative estimated date of completion within five business days.¹⁰ Then, this estimate would be subject to repeated revision throughout the pendency of the request. Furthermore, the agency can then produce the records in installments but is under no obligation to tell the requester an estimated date of the next installment. A cautious agency might provide a fairly short “estimated date of completion” and then simply revise the estimate a number of times. Under this system, the requester will be provided less than candid and less overall information about the progress of the request, and the repeated need to revise dates will be frustrating for the requester.

Additionally, HPNW’s interpretation would also create less judicial oversight over agency responses to requests. For some large requests, the estimate of completion may involve a significant period of time. If the requester files a challenge right away and the agency prevails, there is no further recourse for the requester. Under the trial court’s interpretation, however, an agency faces a potential court challenge throughout the process and this incentivizes the agency to continue to respond reasonably throughout the pendency of the request.

¹⁰ Because the date would be completely speculative, it would be difficult for the requester and the courts to determine if this estimate was reasonable.

Therefore, the Court should adopt the Department's interpretation because it better serves the purposes of the PRA by encouraging candid and ongoing communication between a public agency and the requester.

B. The Trial Court Correctly Determined That the Department Was Responding Reasonably and Promptly to HPNW's Request

RCW 42.56.550(2) allows a requester who believes that the agency has not made a "reasonable estimate of time that the agency requires to respond" to a public records request to challenge an agency's estimate in court. RCW 42.56.550(2). When a requester brings such a proceeding, the burden falls on the agency to show that its estimate is reasonable. *Id.* In this case, the Department carried its burden, and the trial court correctly determined that the Department was responding to HPNW's request in a reasonable and diligent manner.

1. RCW 42.56.550(2) Requires Courts to Review the Reasonableness of the Agency's Response Timeframes

When a requester disagrees with an agency's timeframes for producing records, the requester is able to challenge the agency's response in court, and the agency then has to prove that it has provided a reasonable estimate of time to respond to the request. RCW 42.56.550(2). The Court of Appeals decisions have consistently determined that this provision—as it explicitly states—requires courts to determine the reasonableness of the

agency's timeframes. See *Rufin v. City of Seattle*, 199 Wn. App. 348, 357-58, 398 P.3d 1237 (2017) (applying reasonableness standard); *Hikel v. City of Lynnwood*, 197 Wn. App. 366, 372-76, 389 P.3d 677 (2016) (similar); *Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 651-54, 334 P.3d 94 (2014) (similar); *Hobbs v. State*, 183 Wn. App. 925, 939-40, 335 P.3d 1004 (2014) (similar); *West v. Dep't of Licensing*, 182 Wn. App. 500, 512-16, 331 P.3d 72 (2014) (similar); *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 859, 288 P.3d 384 (2012) (affirming trial court's ruling that city's response was reasonable); *Limstrom v. Ladenburg*, 98 Wn. App. 612, 618, 989 P.2d 1257 (1999) (similar). This Court has also recognized that an agency's estimate of time is evaluated under a reasonableness standard. See *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 289, 372 P.3d 97 (2016) (recognizing that agencies can provide a reasonable estimate of time to respond to a request and evaluating the claims under that standard). This well-established standard makes sense because RCW 42.56.550(2) itself uses the word "reasonable."

HPNW acknowledges this statutory language but then proceeds to argue that this Court should interpret the word "reasonable" in light of the requirement that agencies respond promptly to public records requests. HPNW's Opening Brief, at 14. HPNW reasons that "prompt" means "performed readily" or "immediately." HPNW's Brief, at 12-13.

Consequently, HPNW argues that this Court should conclude that an agency acts reasonably only if it provides “for that minimum time required to produce all records ‘immediately’ and ‘without delay.’” *Id.* However, this argument asks the Court to rewrite RCW 42.56.550(2). When the legislature uses different words, the legislature intends those words to have different meanings. *See State v. Keller*, 143 Wn.2d 267, 278-79, 19 P.3d 1030 (2001). Despite using “prompt” in other places in the PRA, the legislature used the word “reasonable”—as opposed to prompt—in RCW 42.56.550(2). This Court should reject HPNW’s invitation to substitute the word “promptly” into RCW 42.56.550(2) in place of the word “reasonable.”

HPNW’s argument also confuses the relevant provisions of the PRA and the PRA’s overall structure. HPNW correctly notes that RCW 42.56.520 requires an agency to promptly respond to a public records request. However, RCW 42.56.520 then identifies the five different ways by which an agency can comply with the prompt response requirement. *See* RCW 42.56.520(1)(a)-(e). If the legislature had intended that an agency could only comply with the prompt response requirement by producing all responsive records “immediately,” it could have done so. It did not.

Furthermore, in light of the remaining provisions of the PRA, HPNW's argument that an agency violates the PRA by not producing the records "immediately" is simply wrong. The PRA explicitly allows an agency to produce records in installments. RCW 42.56.080. If agencies were required to produce all records immediately, the legislature would not have permitted agencies to produce records in installments. Additionally, RCW 42.56.520(2) explicitly recognizes that an agency may require additional time to clarify the request, to locate and assemble records, to notify third persons or agencies affected by the request, and to determine if any of the information requested is exempt from disclosure. This provision would be meaningless if agencies were required to produce records immediately.

Nor is it necessary or desirable to require agencies to produce all records "immediately." The PRA is best served when an agency and a requester work together to get the information that the requester wants in reasonable manner, not "by playing a game of 'gotcha' with litigation." *Hobbs v. State*, 183 Wn. App. 925, 941 n.12, 335 P.3d 1004 (2014). In some cases, it would literally be impossible for the agency to produce records "immediately" because the request is so large and complex that agency staff would be required to review and produce a large amount of records or a portion of the request may need significant clarification. To

require agencies to produce records immediately would allow certain requesters to submit intentionally broad requests to overwhelm agencies and to cry foul when the agency is unable to do the impossible (i.e. produce all records immediately) in response to such requests. HPNW's request is a perfect example of a large request that would be impossible for an agency to fulfill within five business days. Appendix A. Because of the breadth of HPNW's request, Department staff needed to do a reasonable search, follow any leads produced by the search, and then review over 350,000 pages of records to determine if they were responsive or needed redactions. CP 135, 186-92. When faced with such a massive request, it would be impossible for an agency to produce records immediately.

If the Court were to require agencies to respond to requests immediately, large requests would interfere with the ability of public agencies to carry out their essential functions because it might require agencies to move other agency employees from their daily functions to help respond to public records requests immediately. But the PRA was not intended to interfere with essential agency functions. *See* RCW 42.56.100 (allowing agencies to enact rules and regulations to prevent excessive interference with other essential functions of the agency). Although the PRA is intended to serve as a check on an agency's performance of its

essential duties, the legislature made clear that it did not want agencies to abandon their duties in favor of responding to public records requests. *Id.* This is particularly true for a large agency, like the Department, that receives thousands of public records requests every year. The Court should not interpret the PRA in a manner that would require agencies to designate correctional officers, police officers, and doctors as temporary public records specialists whenever the agency receives a large request or a large volume of requests. The public would be ill served by such a result.

Nor will the public's right to know suffer from rejecting a requirement that agencies produce records immediately. Courts will continue to serve as a check on agencies allegedly delaying response to requests because a court can still review an agency's timeframes and response to a specific request to determine if the agency is producing records in a reasonable manner. Furthermore, a requirement that agencies drop everything to handle large requests would harm other requesters who have submitted requests to the same agency. A single requester who submits large requests should not be treated differently than other requesters or be allowed to monopolize the agency's time at the expense of other requesters.

Ultimately, the public records requester is the master of his or her own request. If the requester only wants a single document, the requester

can simply submit a request for that document. Or if the requester wants many documents but some are more important than others, the requester can ask to prioritize items in the request. Or if in the course of receiving records, the requester realizes that the request could be narrowed or altered, the agency and the requester can discuss how the request can be altered so that the requester gets the desired records in the most efficient manner. The only thing that requesters cannot do—and should not be allowed to do—is submit an incredibly large request and then sue when the agency fails to produce all responsive records immediately. Rather, as long as the agency produces records in a reasonable timeframe, it complies with the PRA. This Court should reject HPNW’s argument that records must be produced immediately.

2. The Trial Court Explicitly Reviewed the Reasonableness of the Department’s Entire Response; the Unchallenged Finding That the Department’s Response Was Reasonable Is a Verity on Appeal

When an appellant does not assign error to a trial court’s factual findings, those findings are verities on appeal. *Francis v. Wash. State Dep’t of Corr.*, 178 Wn. App. 42, 52, 313 P.3d 457 (2013); *see also State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The trial court explicitly found that the Department had acted with diligence in responding to the request. CP 249. The trial court also declared that the

Department had, “thus far, acted with reasonable diligence in response to Health Pros Northwest, Inc.’s public records request.” CP 251.

HPNW did not assign error to these findings. HPNW’s Opening Brief, at 3-4. As such, they are verities on appeal. Even if they were challenged, the findings are adequately supported by both the trial court’s oral ruling and the evidence in the record. The record demonstrates that HPNW’s request was a massive, eighteen-part request. CP 138-41. Just one portion of HPNW’s request sought “[a]ll emails, letters, notes or other documents sent to Health Pros Northwest from any Washington DOC employee or contractor.” CP 139. The Department had gathered over 350,000 pages of records in response to the request, and it needed time to review the records to determine if they were responsive or needed redaction. CP 135. The Department also continued to contact staff that might have records responsive to the request. CP 135, 186-92. This search spanned all twelve of the Department’s prison facilities. CP 117, 186-92. However, while reviewing these records, the Department continued to make regular installments of records available to HPNW and had provided over 15,000 pages of records by the time of the hearing in the trial court. CP 219.

Meanwhile, the Department had to continue to provide records to other requesters and handle other public records requests. *See Forbes v.*

City of Gold Bar, 171 Wn. App. 857, 864-65, 288 P.3d 384 (2012) (considering the reasonableness of the agency's response in light of the request and the agency's resources). Even though the Department is a larger agency, it receives a large number of requests. CP 114, 117. The trial court considered all of the evidence and all of these factors and determined that the Department's response had been reasonable up until the date of the hearing. RP 27-28. HPNW failed to assign error to those findings or to otherwise show that such findings were erroneous. Therefore, the Court should affirm the trial court's finding that the Department had responded reasonably and diligently to HPNW's request.

3. HPNW's Self-Created "Jurisdiction" Argument Misconstrues the Trial Court's Decision and Is Barred by the Doctrine of Invited Error

HPNW's sole assignment of error focuses on the use of the word "jurisdiction" in the trial court's written order. HPNW's Opening Brief, at 3-4. HPNW argues that the trial court improperly viewed its jurisdiction as limited to reviewing the reasonableness of the Department's first estimate. *Id.* This argument, however, both mischaracterizes the trial court's ruling and focuses on language that HPNW itself inserted into the trial court's judgment. Although the written judgment states that a court "has no jurisdiction to compel the agency" to provide an estimated date of completion, CP 251, this language must be construed in light of the

remainder of the trial court's ruling. In light of the remaining portions of the trial court's judgment and oral ruling, the trial court's decision was not based on "jurisdiction" and any error created by the use of the word of "jurisdiction" in that judgment was caused by HPNW's own conduct.

HPNW claims that the trial court ruled that it lacked jurisdiction to review anything other than the Department's initial estimate of when it would produce the first installment of records. HPNW's Opening Brief, at 3-4. Although courts typically look to the written order to determine a court's decision, courts have looked to the trial court's oral ruling to interpret the meaning of a judgment and determine the nature of the trial court's decision. *See City of Lakewood v. Pierce Cnty.*, 144 Wn.2d 118, 127, 30 P.3d 446 (2001). When viewing the trial court's written order and oral ruling, HPNW's argument that the trial court made any "jurisdictional" ruling is unavailing. The trial court never used the word "jurisdiction" in its oral ruling. RP 26-28. In fact, the only person to use the word "jurisdiction" at the hearing was HPNW's counsel who claimed that the Department was making a "jurisdictional" argument and that the *Hobbs* decision was based on a "jurisdictional" question. RP 23-24.

Furthermore, in the trial court's oral ruling and its written order, the trial court actually considered the Department's entire response, including the Department's actions after the first installment. CP 249, 251;

RP 27. Indeed, the trial court's order recognized that the Department had conceded that the court could review the entire response to determine whether the agency was responding reasonably. CP 249. After reviewing the entirety of the Department's response, the trial court determined that the Department was responding reasonably to the request up until the date of the hearing. CP 249. Such a ruling would not have occurred if the trial court had determined that it lacked jurisdiction to review the agency's response after the first installment. By making this ruling, the trial court clearly understood that it had jurisdiction to review the entirety of the Department's response.

Instead of deciding any issue based on "jurisdiction," the trial court did determine that an agency is not required to provide an estimate date of when it would complete its response to a request in its initial five-day letter. For the reasons discussed above, the trial court ruled correctly on this issue. This ruling, however, was not based on "jurisdiction." Instead, the trial court's ruling was appropriately a ruling based on the trial court's interpretation of RCW 42.56.520(1)(c). In arguing that this issue is jurisdictional, HPNW confuses the requirements related to the five-day letter and the requirements related to the agency's overall obligation to respond in a reasonable manner and also confuses the nature of the trial court's ruling.

HPNW's argument based on the use of the word "jurisdiction" in the written order is problematic for another reason. HPNW itself inserted the word "jurisdiction" into the proceedings and into the trial court's written order. Under the doctrine of invited error, a party may not set up an error at trial and then complain of it on appeal. *In re Personal Restraint of Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000); *Kenneth W. Brooks Trust v. Pacific Media LLC*, 111 Wn. App. 393, 399, 44 P.3d 938 (2002) (indicating that a party would be inviting error by convincing a trial court to enter an erroneous decision and then assigning error to that decision). "The doctrine of invited error prevents parties from receiving a windfall by misleading trial courts." *State v. Ford*, 190 Wn. App. 202, 227, 360 P.3d 820 (2015). The party must have affirmatively assented to the error, materially contributed to the error, or benefitted from the error. *In re Personal Restraint Petition of Salinas*, --- Wn.2d ---, 408 P.3d 344, 347-48 (2018). For reasons discussed above, the Department disagrees that the trial court's ruling should be interpreted as "jurisdictional" in nature. But if the Court does attach significance to the written order's use of the word "jurisdiction," HPNW is barred from raising any argument based on this issue because HPNW materially contributed to any error by inserting that language into the trial court's order.

The Department's briefing before the trial court never used the word "jurisdiction." CP 208-30. The Department's brief explicitly recognized that the trial court could review DOC's response to determine if DOC was responding diligently and promptly to HPNW's request. CP 228. Although HPNW's opening brief in the trial court made a passing reference to jurisdiction, CP 87, HPNW's reply brief began to focus on this issue and repeatedly made arguments using the word "jurisdiction." CP 238-40. However, in this same reply brief, HPNW recognized that the Department had "conced[ed] that the Court has, at a minimum, jurisdiction to determine if the agency is 'promptly responding to the PRA request by providing 'the fullest assistance to the requester and taking the most timely possible action on the PRA request.'" CP 240. Oddly, HPNW then went on to claim that DOC's interpretation of the statute would result in the court lacking jurisdiction over reviewing the agency's response at all. CP 239.

At the hearing, HPNW's attorney was the only party to invoke the word "jurisdiction." RP 3, 23-24. The Court pointedly asked the Department's counsel whether a court could review an agency's action after the first installment, and the Department again conceded that courts could do so. RP 24. In issuing its oral ruling, the trial court did not mention the word "jurisdiction" and explicitly reviewed the entirety of the

Department's response. RP 26-28. Despite this, HPNW drafted an order that used the word "jurisdiction" and that appeared to suggest that the trial court lacked jurisdiction over reviewing anything other than the first installment. This language was inserted even though the trial court actually reviewed the entirety of the Department's response. CP 251.

On appeal, HPNW's argument hinges on the issue of the word "jurisdiction," and HPNW's only assignment of error relies upon that language in the order. But this error—if it was error—was set up by HPNW. The Court should not allow a party to create a "jurisdictional" ruling not made by the trial court and then challenge that ruling on appeal. The Court should apply the doctrine of invited error and reject such an argument.

C. Because the Trial Court Erred in Concluding That the Department Violated the PRA, It Erred in Awarding HPNW Attorney's Fees and Costs

The PRA allows for a requester to recover reasonable costs and attorney's fees if the requester prevails against an agency in an action seeking the right to receive a response to a public records request within a reasonable amount of time. RCW 42.56.550(4). The trial court in this case awarded \$10,000 in attorney's fees and \$212.50 in costs based on its finding that the Department violated RCW 42.56.520 in its five-day response. For the reasons discussed above, this decision was in error, and

the Department did not violate the PRA in its response to HPNW's request. Because the Department did not violate the PRA, HPNW did not prevail in this action and HPNW is not entitled to attorney's fees and costs either at the trial level or on appeal.

VI. CONCLUSION

The Department respectfully requests that the Court reverse the trial court's conclusion that the Department violated the PRA. This Court should also reverse the award of costs and attorney's fees to HPNW. The Court should affirm in all other respects and remand for the trial court to dismiss HPNW's complaint and enter judgment in the Department's favor.

RESPECTFULLY SUBMITTED this 21st day of February, 2018.

ROBERT W. FERGUSON
Attorney General

s/ Timothy J. Feulner
TIMOTHY J. FEULNER, WSBA #45396
Assistant Attorney General
Corrections Division OID #91025
PO Box 40116, Olympia WA 98504-0116
(360) 586-1445
TimF1@atg.wa.gov

CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of OPENING BRIEF OF THE DEPARTMENT OF CORRECTIONS' by US Mail Postage Prepaid to the following addresses:

MATTHEW BRYAN EDWARDS
OWENS DAVIES PS
1115 W BAY DRIVE NW
SUITE 302
OLYMPIA WA 98502-4658

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

DATED this 21st day of February, 2018, at Olympia, Washington.

s/ Cherrie Melby
CHERRIE MELBY
Legal Assistant
Corrections Division, OID #91025
P.O. Box 40116
Olympia, WA 98504-0116
(360) 586-1445
CherrieK@atg.wa.gov

APPENIDX A

OWENS  DAVIES
ATTORNEYS AT LAW

Matthew B. Edwards
medwards@owensdavies.com

1115 West Bay Drive, Suite 302
Olympia, Washington 98502

Phone (360) 943-8320
Facsimile (360) 943-6150
www.owensdavies.com

February 10, 2017

VIA Email & USPS

Department of Corrections
Public Records Officer
P.O. Box 41118
Olympia, WA 98504
publicdisclosureunit@doc1.wa.gov

Re: Health Pros Northwest

Dear Department of Corrections Public Record Officer:

I request that the department produce the following records pursuant to the Washington State Freedom of Information Act. I provide the following information in support of this request.

- A. The name of the person requesting the record and their contact information:
Matthew B. Edwards
Owens Davies, P.S.
1115 West Bay Dr., Ste. 302
Olympia, WA 98502
360-943-8320
medwards@owensdavies.com
- B. The calendar date on which the request is made:
February 10, 2017
- C. The records requested:
- All emails, letters, notes and other documents containing information on scheduling, requesting of HPNW staff, Facility Work Orders, and Last Minute Needs, sent in relation to any contractors involved with contracts K10580, K10904 and K10701, including any amendments to any of the above contracts.
 - All phone records of calls, including date and time, made to Health Pros Northwest.
 - All text messaging records, including content, date and time, sent from Washington DOC on-call managers to the Health Pros Northwest on-call phone.
 - All emails, letters, notes and other documents containing DOC's responses, discussions or conversations in relation to contract questions or concerns brought forth by either the Washington DOC or Health Pros Northwest.

A Legacy of Wisdom Shared

EXHIBIT 1

APPENDIX A

- All emails, letters, notes and other documents in relation to any discipline, demotion or reprimands from May 1, 2014-present, whether verbally or in writing, formal or informal, that specifically involved any of the following DOC Staff members: Susan Williamson, Eric Hernandez, Cynthia Ray Anderson, Debra Elsen, Kevin Bovenkamp, Barbara Braid, Nancy Fernellus, Nancy Manlapid, Patricia Paterson, Norman Goodenough, Danny Straub, Julie Workman, Billy Heinsöhn, Ronna Cole and Mary Jo Currey.
- All emails, letters, notes or other documents sent to Health Pros Northwest from any Washington DOC employee or contractor.
- All emails, letter, notes or other documents received by Washington DOC from Health Pros Northwest.
- All emails, letters, notes and other documents from March 1, 2014-Present that include any of the following names: Health Pros Northwest, Matt Noren, Nick Barner, Stephanie Eang, Bethany Stout or Wendie Dotson.
- All emails, letters, notes, records or other documents sent by DOC staff or contractors, in regards to bullying, harassment or complaints at the hands of Susan Williamson.
- All emails sent by or received from Susan Williamson that include complaints, remarks or statements with content regarding Health Pros Northwest, any staff member or contractor of Health Pros Northwest.
- All emails, letters, notes and other documents containing information in relation to the development, planning, meetings, and discussion in relation to RFQQ11118.
- Dates of signatures for the contract awarded from RFQQ 11118.
- All emails, letters, notes and other documents between Washington DOC personnel and other companies who offer similar or same services at Health Pros Northwest between March 1, 2014 and September 1, 2016.
- All emails, letters, notes and other documents containing information on the non-extension of Health Pros Northwest contract for an additional two-year period.
- All emails, letters, notes and other documents containing information on the extension of Health Pros Northwest contract for two additional two month periods, ultimately ending on August 30, 2016.
- All emails, letters, notes and other documents dealing with the RFQQ writing process, proposal review process, appeal process, and award process for RFQQ11118.
- All emails, letters, notes and other documents containing information regarding one or more current vendors not holding a current Washington Department of Health Nursing Pool license after contract start date, for contract award resulting from RFQQ11118.
- All emails, letters, notes and other documents containing information regarding the permanent hiring and/or employment offers, including date of first contact from DOC hiring personnel, to any current or past Health Pros Northwest employees or applicants including:

- Yvonne Duncan	- Susan Leon
- Pamela Woods	- Kim Wond
- Melanie Ogburn	- Roberta Lucas
- Gloria Almero	- Cindy Walsh
- Vickie Reza	- Marilyn Baker
- John Sordetto	- Clinton Fridley
- Jasmin Barahona	- Luella Hutto
- Nick Tansil	- Mary Weber
- Lisa Murphy	- Leo Castonguway
- Anne Gaetz	- Leza Taverniti
- Shamra Kimbrel	- Debra Moore
- Heidi Hanson	- Lutricia Cisco

- Delaena Anderson	- Kathleen Waybrant
- Heidi Stein	- Joe Power-Drufts
- Kerl Delbridge	- Maria Contreas
- Rebecca Messinger	- Mary Richards
- Ronni Ruiz	- Tracie Adams
- Lorraine Goodrich	- Jodi Homan
- Laurie Kingfolk	- Heidi Johnson
- Jillian Nestell	- Mary Tipton
- Marjorie Hinga	- Maria Rigolo
- Aaron Thompkins	- Rachel Bates
- Bridget Sippel	- Lynne Barnes
- Kathryn Riley	- Teresa Ledbetter
- Brandi Brown	- David Celmer
- Florence Ngugi	- Christie Kimberlin
- Dawn Tate	- Jolie Hanke
- Sabrina Bright	- Vivienne Green
- Christina Asimwe	- Melanie Blakesley
- Gina Cain	- Kimberlee Cunningham
- Fatima Doelling	- Ken Dyer
- Vitoria Ferrelra	- Andrea Franse
- Autumn Hamilton	- Ashley Harrington
- Margaret Hooley	- Betsy Johnson
- Sarah Kamau	- Robln Law
- Noella Masengesho	- Charles Mason
- Mia Mehline	- Donna Miles
- Mikelaen Miller	- Jeanne Moore
- Willette Morrison	- Colleen Murphy
- Melody Nelms	- Kathy Nurkowski
- Charlene Pike	- Jeff Powell
- Maria Rader	- Susan Rhoads
- Michele Rodgers	- Keith Schafer
- Kendra Scott	- Magdalena Smith
- Mikaba Snowden	- Audrey Snyder
- Cheryl St.Sauver	- Ashley Tang
- Sharon Thomas	- Jada Thompson
- Fran Vetter	- Kim Williams
- Sharon Gallher	- Victoria Anderson (Hall)
- Mercy Wainaina	

I request that a copy of all documents requested herein be produced in electronic format. To the extent the department may conveniently so organize the documents produced, I request that the documents be produced in chronological order. Protected health information contained in any document may be redacted.

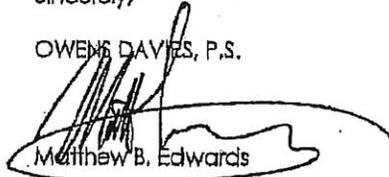
If the department expects the cost of producing these documents to exceed \$100.00, please provide me an advance estimate of the costs the department expects to incur in producing these documents, together with an explanation of how the department arrived at its estimate.

Washington Department of Corrections
Public Records Officer
February 10, 2017
Page 4

Please let me know if there is anything I can do to facilitate your prompt and complete response to this request.

Sincerely,

OWENS DAVIES, P.S.



Matthew B. Edwards

MBE/jt

Cc: Client

APPENIDX B

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STATE OF WASHINGTON

Court of Appeals No. 44284-1^BII

[Signature]
DEPUTY

IN THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

MICHAEL HOBBS,
Appellant,

v.

STATE OF WASHINGTON, STATE AUDITOR'S OFFICE,
Respondent.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Lisa Sutton

BRIEF OF APPELLANT

Christopher W. Bawn, WSBA #13417
1700 Cooper Pt. Rd. SW, #A-3
Olympia, WA 98502
voice: (360) 357-8907
cwbawn@justwashington.com

i

APPENDIX B

recover and disclose. In December 2011, the requestor filed a lawsuit and in February 2012, the requestor filed a declaration in anticipation of *in camera* review, demonstrating for the trial court some of the technical aspects of the missing metadata. There agency in this case introduced no credible evidence to justify a “free pass” from the trial court for its failure to disclose the requested metadata until compelled to do so in this lawsuit, just before the court conducted *in camera* review related to the Appellant’s claims. As noted previously, the Supreme Court in Soter established a bright line rule, once a court determines that a requestor was entitled to inspect public records that were withheld, the court is *required* to impose a penalty within the statutory range for each day records were withheld, regardless of the fact that the “penalty period” was short, or whether the requester could have filed suit against the agency sooner than it did. Quick lawsuits, resulting in disclosure may “curb” but do not eliminate the accumulation of the per diem penalties. Soter.

ISSUE #3. Failure to Estimate a Date for Completing the

Disclosure. Whether an estimated date for completing disclosure

could be expressly withheld, and not identified until six weeks after the request was submitted, based upon an open-ended agreement to confer with another agency?

RCW 42.56.520 provides that "within five business days of receiving a public record request, an agency, ... must respond by either (1) providing the record; (2) providing an internet address...; (3) acknowledging that the agency, has received the request and providing a reasonable estimate of the time the agency... will require to respond to the request; or (4) denying the public record request." When challenging the "estimate" in the 5-day letter, RCW 42.56.550(2) requires a trial court to determine whether the estimate the agency provided was reasonable.

Statutes should be construed to determine the Legislature's intent. Dep't of Ecology v. Campbell & Gwynn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10. "When an agency fails to respond as provided in RCW 42.17.320 (42.56.520), it violates the act and the individual requesting the public record is entitled to a statutory penalty." Smith v. Okanogan County, 100

Wn. App. 7, 13, 994 P.2d 857 (2000). In Smith, the court reviewed numerous requests and responses of various County departments. The court determined that Smith had submitted a valid public record request for "a copy of each judge's oath" on September 4, 1996, and the Okanogan County Superior Court Administrator's Office acknowledged the request on September 9th by indicating that the letter had been filed with the Court. Although the response was timely, the Court of Appeals explained that the response did not comply with the statutory requirement to provide the record, provide a reasonable time in which the requested records will be provided, or deny the request. The court concluded that the inadequate response violated the public records act. As the model rules explain, the burden of proof is on an agency to prove its estimate of time to provide a full response, (RCW 42.17.340(2), 42.56.550(2)) and an agency should be prepared to explain how it arrived at its estimate of time and why the estimate is reasonable. See WAC 44-14-04003.

The trial court rejected the plain reading of the statute, as well as the common-sense interpretation of the 5-day requirement contained in the model rules at WAC 44-14-04003 (4)(c):

"Acknowledge that the agency has received the request and provide a reasonable estimate of the time it will require to fully respond."

Instead, the trial court upheld a new option, allowing a 5-day letter to identify the existence of a "data sharing" agreement that allows the responding agency to expressly refuse to provide an estimated response date, until it consults at some point in the future with another agency. The trial court apparently believed the involvement of a second agency justified the six-week delay of the 5-day letter in this case, until January 2012, when an estimate of a future date for disclosure of the records was first disclosed. This sort of non-responsiveness by an agency was rejected in Doe I v. Washington State Patrol, 80 Wn.App. 296, 304, 908 P.2d 914 (1996)(untimely response by State Patrol, which it tried to blame the delay on the fact that the records were still awaiting a review by a Puerto Rico prosecutor, the court held that this was a violation of the act). See also McGehee v. CIA, 697 F.2d 1095, 1110 (D.C.Cir), *vacated in part on other grounds upon panel reh'g*, 711 F.2d 1076 (D.C. Cir. 1983)("[W]hen an agency receives a FOIA request for 'agency records' in its possession, it must take

CORRECTIONS DIVISION ATTORNEY GENERAL'S OFFICE

February 21, 2018 - 4:09 PM

Transmittal Information

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