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Division II
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No. 53613-7

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

DAVID O'DEA,

Respondent/Cross-appellant,

v.

CITY OF TACOMA, a public agency; and TACOMA POLICE
DEPARTMENT, a public agency,

Appellants/Cross-respondents.

REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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INTRODUCTION

The trial court erred as a matter of law in ruling that two Exhibits attached to a PRA Complaint – letters the City unequivocally denied ever receiving as PRA requests – somehow mutated from *denied* PRA requests into *new* PRA requests upon service of O’Dea’s Complaint. Controlling cases like **Lowe**, **Beal**, and **Germeau**, *infra*, hold that legally ambiguous inquiries do not provide fair notice of a PRA request. No case holds to the contrary.

O’Dea’s response does not deny any of this. Indeed, he never really engages on the key question: *are* his legally ambiguous Complaint Exhibits PRA requests? He does not even attempt to distinguish the controlling caselaw holding that they are not.

Instead, he mocks the City’s well supported legal arguments – and, unfortunately, its counsel. When he is not just jeering, he mischaracterizes the record and the City’s arguments. Scoffing at legitimate legal arguments cannot refute them.

The trial court’s legal errors led to unprecedented – and untenable – PRA fines. Again, O’Dea fails to engage, never denying that imposing fines *while production is ongoing* is untenable. And he again fails to truly grapple with **Yousoufian**, *infra*.

This Court should reverse and dismiss.

REPLY ARGUMENT ON APPEAL

A. The standard of review is *de novo*.

O'Dea agrees the standard of review is *de novo*. BR 12-13.

B. Where, as here, PRA requests are never received, they cannot trigger an agency's duty to respond, and Exhibits attached to a PRA complaint do not give an agency "fair notice" that the Exhibits themselves are *new* PRA requests, as a matter of law.

The City explained that since the Complaint Exhibits were never received as PRA requests – which the City denied ever receiving in its Answer – the Exhibits did not give the City “fair notice” of any *new* PRA requests, as a matter of law. BA 19-23. That is, when Exhibits are attached to a Complaint that the City expressly denies *ever* having received as *PRA requests*, the City's duty to respond within five days is not triggered. BA 19-21 (citing and discussing ***Beal v. City of Seattle***, 150 Wn. App. 865, 872 & n.9, 209 P.3d 872 (2009) (citing RCW 42.56.080; ***Wood v. Lowe***, 102 Wn. App. 872, 878, 10 P.3d 494 (2000) (legally ambiguous request insufficient to trigger PRA); ***Bonamy v. City of Seattle***, 92 Wn. App. 403, 409, 960 P.2d 447 (1998) (fair notice)). Such Exhibits are simply not legally unambiguous. *Id.* This Court should reverse.

O'Dea's most direct response comes at BR 19-24.¹ Citing alleged "common sense," he mocks the City's point that even clear PRA requests become legally ambiguous when attached as Exhibits to a Complaint, particularly where (as here) the City's Answer forthrightly denied receiving them. BR 19-20. He also tries to upend one of the City's key authorities, **Lowe**, 102 Wn. App. 872. *Compare* BR 16-24 (calling it **Wood**) *with*, e.g., BA 20-23. O'Dea is incorrect.

While O'Dea claims **Lowe** indicates what a *defendant* should do, he nonetheless admits that after *that* plaintiff sent a letter *that* defendant interpreted as *not* a PRA request, but a personnel request, *that* "plaintiff filed an ex parte motion to show cause why defendant had not produced the requested document" within two weeks; yet O'Dea fails to note this was the first time *that plaintiff* said she was making a PRA request. BR 16-17. Indeed, once *that* plaintiff had made a new, legally-unambiguous assertion that she was making a PRA request – only two weeks after sending her ambiguous letter – that defendant responded promptly. **Lowe**, 102 Wn. App. at 875-76.

¹ Under the heading PRA "LEGAL PRINCIPLES" O'Dea gives an argumentative procedural history (BR 14-16) that is largely unsupported by the record, plus what appears to be a disjointed summary of his argument (BR 16-19) that casts aspersions on the City's arguments but offers no legal citations that support him. This section of this Reply responds to all of O'Dea's unsupported legal claims regarding the City's primary argument.

As the City noted in its opening brief, “had O’Dea taken such a step” – or *any* step to notify the City of his counsel’s alleged *new* PRA requests – “within a reasonable time, the City would have been put on fair notice of his claim, and would have responded accordingly.” BA 21. And indeed, as soon as O’Dea did assert that his legally ambiguous Complaint Exhibits were *new* PRA requests, the City immediately processed them as PRA requests, meanwhile maintaining that it had never received O’Dea’s original requests – as the trial court agreed. See, e.g., BA 10-12.

O’Dea simply has no response to this point. He cites no case to the contrary. **Wood v. Lowe** is still against him. And it remains contrary to the trial court’s legally incorrect and untenable rulings.

Rather than straightforwardly address **Lowe** and the City’s actual argument, O’Dea repeatedly mischaracterizes both, and instead purports to address two broad “fair notice” “categories.” BR 19-20. He says the requests’ “characteristics” show they are PRA requests, but he ignores their most salient characteristics: they were never received *as requests*, but were attached as Exhibits to a Complaint, and their content in no way purports to notify the City that those Exhibits – which the City unequivocally denied receiving – must now be treated as *new* PRA requests; that is, his Exhibits are

legally ambiguous. BR 20. O’Dea also addresses the “characteristics of the requested records,” but those are irrelevant if Complaint Exhibits do not provide fair notice that they are somehow *new* PRA requests. *Id.* O’Dea just dodges the question.

O’Dea also claims that filing his lawsuit somehow gave the City fair notice of his PRA claims. BR 20-22 (citing “**West v. City of Tacoma**, ___ Wn.2d ___, 456 P.2d 894, 906 (2020)”)² **West** is inapposite. It begins by noting that “West made a request” under the PRA. 12 Wn. App. 2d at 49. The City thus produced documents, some redacted under a claimed exemption. *Id.* at 52. This Court held “the information redacted by the City does not meet the” claimed exemption, so summary judgment was incorrect. *Id.* at 49. It also held that West’s Complaint gave the City fair notice that he was seeking *additional* documents, under “notice pleading” principles. *Id.* at 64-65. **West** does not address whether Complaint Exhibits are legally unambiguous PRA requests, citing none of the cases pertinent to this issue. **West** is simply irrelevant.

² This incomplete citation is both incorrect and misleading. **West v. City of Tacoma**, 12 Wn. App. 2d 45, 456 P.3d 894 (2020) is a decision of *this Court*, not of the Supreme Court.

Finally, O’Dea argues that the City’s mere receipt of his Complaint Exhibits somehow triggered its duty to “acknowledge and/or respond to” to those denied requests. BR 22-24. To support this claim, he misstates the record. For instance, he claims – without citation – that Smith said the City *received PRA requests* when O’Dea filed his Complaint. BR 22-23. On the contrary, Smith’s entire point is that the City *never* received *any* PRA requests from O’Dea, just Exhibits attached to a Complaint. See, e.g., BA 7-8. After an investigation, the City thus properly denied receiving them. BA 7-9.

O’Dea further begs the question, arguing that instead of defending the City against his lawsuit, its counsel should have treated his Complaint Exhibits – whose requests the City expressly denied receiving – as *new* PRA requests. BR 23-24. O’Dea cites no legal authority for this claim. *Id.* There is none.

O’Dea again diverges from the record in arguing that the City took no action on his Complaint Exhibits until his lawyer clarified them after his paralegal’s August 24, 2018 deposition. *Id.* This is blatantly false. See, e.g., BA 9-10 (detailing the City’s repeated attempts to clarify the legally ambiguous Complaint Exhibits).

In sum, nothing in the record, and no legal authority, supports O’Dea’s claims. The trial court erred. This Court should reverse.

C. The trial court erred in denying the City's motion for reconsideration regarding *Beal, Lowe, and Germeau*.

The City explained that the trial court again erred in denying the City's motion for reconsideration regarding ***Beal, Lowe, and Germeau v. Mason Cnty.***, 166 Wn. App. 789, 271 P.3d 932 (2012). BA 24-25. The legal ambiguity of O'Dea's Complaint Exhibits – which the City properly denied ever receiving as PRA requests – prevents them from *ipso facto* becoming *new* PRA requests, as a matter of law. *Id.* While the trial court correctly applied these precedents to O'Dea's two-dozen-odd *other* legally ambiguous requests, it failed to apply them to his Complaint Exhibits. *Id.* Just as the letter demanding employment documents in ***Lowe***, and the similar request in ***Germeau***, were legally ambiguous (because they could have been for employment or union purposes, rather than PRA requests) O'Dea's counsel's letters attached to a Complaint were legally ambiguous, particularly where the City was *required* to Answer that those requests were – as a matter of fact – never received, so were denied. *Id.* The trial court placed the City's *trial counsel* – who was ethically bound to defend the City – in an impossible Catch-22. *Id.* Again, this Court should reverse.

O'Dea largely rests on the abuse of discretion standard, claiming no abuse. BR 24-25. But he again ignores the City's real point: the trial court *legally erred* under the controlling precedents. *Compare id. with* BA 24-25. Legal errors like this one – which are reviewed *de novo* – are *always* an abuse of discretion. *See, e.g., Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 775, 275 P.3d 339 (2012) (“abuse occurs when the trial court . . . applies the wrong legal standard”) (citing *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000), 22 P.3d 791 (2001)). The trial court erred. This Court should reverse and dismiss.

D. The trial court abused its discretion in the penalty phase.

The trial court abused its discretion in the penalty phase. BA 26-46. It erred in (1) relying on an unlikely discovery of additional documents to impose additional penalties; (2) ignoring or misapplying the *Yousoufian*³ factors; (3) imposing penalties while production was ongoing; (4) running penalties from service of the Complaint Exhibits, and otherwise miscalculating them; and (5) miscounting the documents. BA 27-28. Each and all of these errors provide sufficient grounds to reverse. *Id.*

³ *Yousoufian v. Office of King Cnty. Exec.*, 168 Wn.2d 444, 460-63, 467-68, 229 P.3d 735 (2010).

1. **The trial court erred as a matter of law in finding the City's later searches inadequate solely because more documents were discovered after the Trial Decision.**

The trial court erred in adding substantial penalties simply because additional documents were found. BA 27-29; ***Kozol v. Dep't of Corr.***, 192 Wn. App. 1, 8, 366 P.3d 933 (2015) (search not inadequate because additional documents are found). O'Dea's speculative claims about imagined other documents cannot overcome agency affidavits. ***Neighborhood Alliance v. Spokane Cnty.***, 172 Wn.2d 702, 721, 261 P.3d 119 (2011). Rather, the City's reasonably detailed, nonconclusory affidavits submitted in good faith are sufficient. ***Neighborhood***, 172 Wn.2d at 721. Indeed, they are "accorded a presumption of good faith." ***Forbes v. City of Gold Bar***, 171 Wn. App. 857, 867, 288 P.3d 384 (2012).

The trial court gave the City's affidavits on the additional production *no* presumption of good faith. *Compare, e.g.*, CP 754-59, 787-89, 847-50, 852-54, 856-60, 862-67, 883-86, 888-90 *with* CP 1114. They explain that *very* extensive – and more than adequate – searches were conducted and that the additional documents were due to technical glitches. See CP 859-60, 867, 884-86, 888-90. The

lone Finding 8 says nothing about this evidence, much less giving it a presumption of good faith. CP 1114.

O'Dea tacitly concedes that Finding 8 is the *only* finding that the City's search was inadequate. BR 26-28.⁴ Aside from that, he again relies on the inapposite *West* decision, distinguished *supra. Id.* As fully explained in the opening brief, the trial court's Finding 8 is inadequate to overcome the City's detailed, good-faith affidavits demonstrating that it conducted reasonable searches. BA 27-29.

2. The *Yousoufian* factors do not support a more than \$2.6 million PRA penalty in this case.

The *Yousoufian* factors militate against imposing penalties in this matter. BA 29-42. The principal factors contradict the trial court's penalties, many mitigators exist, and no aggravators apply. *Id.* These unprecedented penalties are unwarranted.

O'Dea over-relies on abuse of discretion review and repeats his false assertions that the City "agreed" to \$10 a day. *Compare* BR 28-32 *with* CP 477-83, 486, 524-25 (arguing no penalties should be imposed). He is simply wrong.

⁴ In a sort of preamble to his penalty response, O'Dea falsely claims the City "agreed" with \$10 a day. BR 26. On the contrary, the City *unequivocally repeatedly* argued *no* penalty is justified, but if the trial court disagreed, a minimal penalty would suffice. *See, e.g.,* CP 477-83, 486, 524-25.

a. The principal factors contradict the trial court's more than \$2.6 million in penalties.

O'Dea provides an inadequate analysis of the *Yousoufian* factors, much as he did in the trial court, and much as the trial court did as a result. *Compare* BR 32-38 *with* BA 29-42. On the principal factors, he concedes that the trial court found no bad faith on the City's part; no economic loss on his part; and no public harm or importance. BR 32-33. He claims deterrence is important, but never grapples with the simple fact that whether Complaint Exhibits *are* new PRA requests is a question of first impression. BR 33. Once that issue is resolved in this Court, no "deterrence" will be necessary.

b. Many mitigators exist.

On the mitigating factors, O'Dea claims – without citing any authority – that "the trial court is not required to address any factors before setting an award." *Id.* This is a startling assertion in light of our Supreme Court's *detailed* explications of the kind of factors that a trial court *should* consider. Contrary to O'Dea's false claims, the City nowhere argued that the trial court "was required to address all potentially mitigating factors." *Id.* But where (as here) the trial court found one mitigating factor (the reasonableness of the City's explanation) persuasive (CP 584), addressing *any* of the other six mitigators would have been fairer – and much more tenable.

Although the trial court did not address them, O’Dea tries. BR 33-36. On the “clarity” of his Complaint Exhibits, he again fails to confront the central issue in this appeal: are Complaint Exhibits that purport to be PRA requests never received by the City *legally ambiguous*? O’Dea tacitly concedes the point. BR 34.

O’Dea gaslightingly claims that *the City* “Never Sought to Clarify the PRA Request.” BR 34. On the contrary, as soon as it received O’Dea’s responses to its discovery saying the letters were mailed, the City asked his counsel via email (CP 341):

Do you wish me to forward these two documents to the City’s Public Records staff so they can be logged in and the City can respond to these requests[?] Please advise.

O’Dea’s counsel never responded – that is, *he* never clarified his *previously denied* requests. When O’Dea’s counsel finally asserted that he wanted the Complaint Exhibits processed as *new* PRA requests, the City did so *the same day*. BA 10-11.

O’Dea’s argument on this mitigator implies the City was not entitled to defend itself against his *litigation*. BR 34-35. Both parties engaged in discovery and otherwise proceeded with his *litigation*. CP 467-70. O’Dea never responded to the City’s initial denial that it *ever* received his alleged PRA requests. CP 469-70. When the City’s counsel finally cornered his lawyer, he finally clarified the ambiguity

of his Complaint Exhibits, and yet later claimed millions in penalties. The injustice of such gamesmanship is transparent.

On good faith, honesty, timeliness, strict compliance with PRA procedures, and training and supervision, O'Dea frankly proves the City's key point: the City *obviously* has excellent PRA training, and it *strictly* complied with the PRA, once O'Dea claimed his Complaint Exhibits should be treated as new PRA requests. Compare BR 35 with BA 5-8, 35-36. Their legal ambiguity – which O'Dea's counsel failed to clarify for months – caused the City primarily to react to his litigation, rather than to his timely-denied PRA requests. Indeed, once the City had denied them, there was no point in responding to them. Yet the City – in good faith – inquired about them after O'Dea *finally* claimed he had mailed them. The trial court's utter failure to address these strongly mitigating factors is untenable.

In perhaps the nadir of O'Dea's misleading briefing, he claims the trial court did not find the City's explanations reasonable. BR 35-36. The truth is at CP 584:

[T]he City showed that the PRA requests were not received and therefore the response requirement of the PRA was not triggered. The reasonableness of this explanation for noncompliance is persuasive given the size of the government agency and the volume of PRA request handled. This is a mitigating factor that warrants decreasing the penalty for the period of March 24, and March 28, 2017 to the

November 9, 2017 date. Therefore, no penalty is awarded for this time-period.

But in cutting off its mitigation when the City received the Complaint and its Exhibits, the trial court reached a wholly untenable conclusion: *properly denied* PRA requests somehow mutate into *new* PRA requests simply by being attached to a PRA Complaint. O'Dea has no response to this crucial point.

O'Dea also fails to respond to the City's point that the "helpfulness" mitigator exposes the impropriety of the trial court's ruling. *Compare* BA 36 *with* BR 36. A City Attorney owes duties to her client, not to her opposing counsel. This Catch-22 militates against the \$2.6 million penalty imposed on the City.

Finally on the mitigators, O'Dea doubles-down on his gamesmanship, claiming that because his ambiguous Complaint Exhibits – which the City had *properly denied* as never received – did not thereafter trigger a PRA response, the City's *undisputedly* robust system for tracking and receiving public records is somehow irrelevant here. BR 36. On the contrary, it is mitigating. BA 36-37.

c. No aggravators apply.

The City explained in detail that the trial court's three (out of a possible nine) aggravators each were founded upon a legal error. BA 37-42. The trial court *itself* recognized its first aggravator was

factually incorrect, but changed it in an unexplained fashion that is legally and factually unsupported – indeed, even O’Dea cannot explain it. *Compare* BA 38-40 *with* BR 37-38. On its second aggravator, the entire point of this appeal is that the City’s explanation for not treating unreceived and thus properly denied PRA requests as *new* PRA requests is reasonable: the Complaint Exhibits were *legally ambiguous*. *Compare* BA 40-41 *with* BR 38. On the third aggravator, the trial court again legally erred by finding the City’s proper attempt to defend itself against O’Dea’s suit *because it never received his allegedly mailed PRA requests* was somehow “negligent.” *Compare* BA 41-42 *with* BR 38-39. Again, O’Dea has no response to these points. BR 36-38.

In sum, the principal ***Yousoufian*** factors contradict the trial court’s unprecedented penalties, many mitigators that the trial court ignored properly applied, and no aggravators properly applied. This Court should reverse and dismiss, or at the very least, remand for a recalculation of the penalties to a rational amount.

3. The trial court’s imposition of penalties while the City was still producing documents was improper.

It is black letter law that a court may not impose penalties in the midst of an agency’s production. BA 14, 42-43 (citing RCW

42.56.550; **Hobbs v. Wash. State Auditor's Office**, 183 Wn. App. 925, 936, 335 P.3d 1004 (2014)). O'Dea asserts that **Hobbs** does not say what it says. BR 39-40. But he does not dispute that the City was in the midst of its production when the trial court imposed penalties on it. *Id.* The trial court again legally erred.

4. The trial court failed to properly limit the penalty period.

The City explained that the trial court erred in running the penalties from when O'Dea served his Complaint, rather than from when he finally clarified its legally ambiguous Exhibits. BA 43-45. Properly denied PRA requests cannot trigger penalties. *Id.* And while no penalties should have been imposed, certainly these unprecedented amounts are contrary to law. *Id.*

O'Dea again relies on his successful attempt to game the system by attaching alleged (but unreceived) PRA requests to his Complaint and standing mute until forced to alleviate their ambiguity. BR 40. He cites no law permitting – much less encouraging – such behavior. This Court should not encourage it.

5. The trial court erred in ruling that 536 documents were produced in response to the March 28 letter, where the evidence showed the PR Officer produced only 400 documents.

The point here is that O'Dea did not *prove* that the City produced 536 documents, rather than the 400 it did in fact produce. BA 46. He does not even attempt to do so here. BR 40-41. He cites CP 494-507, 99% of which is speculation about *other* documents that the trial court correctly rejected, plus an unsupported, conclusory assertion at the end that he received "536 documents for the March 28, 2017 request." CP 507. He also cites CP 508-23, all of which is argumentative speculation that the trial court correctly rejected, with literally *no reference* to the alleged 536 documents. O'Dea's broad citations are misleading. His claim is unsupported.

The trial court erred.

6. This Court should reverse the fee award.

Finally, the City pointed out that O'Dea and his counsel should not prevail, so they should not receive fees. BA 46. While he fails to respond to the argument, as part of his cross appeal O'Dea claims he should prevail. BR 46-47. If he is wrong – and certainly he should be – this Court should reverse the fee award.

RESPONSE TO CROSS APPEAL: INTRODUCTION

Although he raises *nine* issues (BR 3-4), O'Dea purports to argue his entire cross appeal in five pages. BR 41-46. And those inadequate pages are bereft of even *one* citation to authority. *Id.* These failures are sufficient grounds in themselves to deny his cross appeal. See, e.g., RAP 10.3(a)(6); **Cowiche Canyon Conserv. v. Bosley**, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (courts do not consider assignments of error or arguments unsupported by citation to authority – or arguments first raised in a Reply).

And O'Dea is wrong. The trial court expressly followed **Lowe**, which O'Dea cannot convincingly refute is on point and controlling here. Indeed, he does not even *mention* the trial court's actual ruling. That unchallenged ruling is dispositive.

On his various so-called "requests," O'Dea provides only conclusory generalities, and leaves out much more than half the story. Bald assertions that his inquiries were "crystal clear" – without even mentioning what they were – are grossly insufficient. They certainly do not require reversal here. And as to several of his inquiries, *he received the documents before he filed suit.*

O'Dea's unsupported and cursory cross appeal is meritless. This Court should affirm as to all of O'Dea's meritless arguments.

RESPONSE TO CROSS-APPEAL STATEMENT OF THE CASE

O'Dea fails to set forth a Statement of the Case for his cross appeal – without argument. BR 41-46; *but see* RAP 10.3(a)(5). His approach leaves the City with nothing to which it can respond. As explained *infra*, O'Dea's claims ultimately find no support in the record or – more importantly – in the law.

If O'Dea intended the "Background" in his Statement of the Case (in response to the City's appeal) to apply to his cross appeal, it is grossly inadequate. See BR 7-10. Most of it is repetitive procedural history, and only one paragraph even arguably pertains to the merits of his cross appeal. See BR 7 ("Background," 2nd full para.). Yet that paragraph cites *solely* to his Complaints and Exhibits. *Id.* (citing CP 1-26). A party responding to summary judgment may not rely on citation to his complaints or argumentative assertions of unresolved factual issues. See, e.g., **Seven Gables Corp. v. MGM/UA Entm't Co.**, 106 Wn.2d. 1, 12-13, 721 P.2d 1 (1986).

In sum, O'Dea provides no fair statement of the facts, without argument. RAP 10.3(a)(5). His utter failure to comply with this Court's Rules (even his *margins* are wrong) is sufficient ground to refuse to address his inadequately briefed cross appeal. RAP 18.9(a).

RESPONSE TO CROSS-APPEAL ARGUMENTS

A. The trial court correctly applied the controlling legal authorities (including *Lowe* and *Germeau*) to dismiss O’Dea’s other meritless claims.

In his response to the City’s appeal, O’Dea concedes that whether a requestor provided “fair notice” of a PRA request is measured by examining two broad categories: (1) the characteristics of the alleged request; and (2) the characteristics of the allegedly requested documents. BR 19-20 (quoting *Germeau*, 166 Wn. App. at 805). Yet O’Dea does not clearly examine these categories in his cross appeal. BR 41-46. A fair examination of them (*infra*) shows that O’Dea never provided fair notice to the City.

Applying these controlling legal authorities, the trial court correctly granted partial summary judgment on all of O’Dea’s other meritless claims. CP 439-42. Specifically, the trial court ruled that, even taking his false assertions that he had “no alternative manner” to access documents “as true,”

the various requests he made during his administrative leave would not have put any of his various “point contact” from TPD, his Union[,] or the various City administrative personnel on notice that his requests were anything more than part of his administrative leave and his Internal Affairs Review.

CP 441. The indisputable fact is that when he made his numerous inquiries, “he was a current TPD employee who after an officer

involved shooting was placed on administrative leave pending an Internal Affairs Investigation.” *Id.* “None of his requests pertinent to this summary judgment motion clearly stated they were PRA requests and not general requests that he was seeking access to his own file information given his administrative leave circumstance.” CP 441-42.

Thus, like “the Plaintiff in **Wood [v. Lowe]**, his requests were not requests for **identifiable public record** that would have triggered the mandated response from the City pursuant to the PRA.” CP 442 (emphasis in original). Rather, as in **Lowe**, “where an independent, non-PRA authority, namely RCW 49.12.250(1) existed under the circumstance[s of] this case, the agency ‘would not have been in error in thinking the employee . . . had made a request under RCW 49.12[.250(1)],’ and not under the PRA.” *Id.* (quoting **Lowe**, 102 Wn. App. at 881). “Looking at the facts in the light most favorable to the Plaintiff, there are no materially disputed facts and therefore the City did not violate the PRA as to the discussed claims.” *Id.*

The trial court’s ruling is unremarkably correct under controlling law. Yet O’Dea never even mentions it – or that law – much less challenging it. BR 41-46. His cross appeal is unsupported by law or facts. This Court should summarily reject it.

B. O’Dea’s requests for policies and procedures were legally ambiguous and provided no fair notice.

Despite the unassailable logic of the trial court’s actual ruling, O’Dea argues he did give fair notice regarding his requests for TPD policies and procedures. BR 41-43. His “argument” is purely factual, although he nowhere claims there are genuine issues of material fact. *Id.* As noted in the City’s opening brief, the trial court could and did decide this matter on affidavits, so it plainly rejected his factual arguments. BA 16-17. This too disposes of his cross appeal.

1. The characteristics of O’Dea’s inquiries did not give the City fair notice.

O’Dea baldly asserts that his “request was crystal clear.” BR 42 (citing nothing). Indeed, his briefing *nowhere* specifies what he is talking about. There are the insufficient citations to his complaints mentioned *supra*, but no evidence. Vague allusions are insufficient.

By contrast, the City put on extensive and detailed evidence showing that the characteristics of his inquires gave no hint of a PRA request. See, e.g., CP 53-56, 73-185, 186-289, 290-98, 299-301, 302-04, 305-07. Moreover, O’Dea *admitted that he received a CD rom (or thumb drive) containing all the TPD policies and procedures he initially discussed with Lt. Standifer in May 2017, long before he filed this lawsuit.* CP 370, 372, 405. His claim is meritless.

2. The characteristics of the documents O’Dea sought do not give the City fair notice.

The second group of fair-notice factors concerns the characteristics of the requested records themselves. *Germeau*, 166 Wn. App. at 807-08. As the trial court correctly ruled, the third factor of this analysis is dispositive here, just as it was in *Germeau*: O’Dea’s inquiries were allegedly made during an ongoing dialogue between O’Dea and his union point of contact, so it was reasonable for Lt. Standifer to believe O’Dea was laboring under an independent, non-PRA authority, such as his CBA, or his preparation for his IIA interview. See, e.g., CP 154-185, 299-301.

O’Dea nonetheless argues that the documents he was seeking were public records. BR 41-42. But that does not challenge the trial court’s ruling that *Germaeu* is controlling because non-PRA authority existed for his requests. His silence has salience.⁵

C. O’Dea gave the City no fair notice regarding materials related to the upcoming Captains assessment process.

O’Dea makes a bald and unsupported claim that he gave the City fair notice of a PRA request when communicating with Captain

⁵ O’Dea falsely claims he *never* received documents he admitted receiving: “Mr. Scruggs did provide to me a single CD with copies of the department policies and procedures on the evening of May 12, 2017.” *Compare* BR 41-42 *with* CP 370. Again, that disposes of his claim filed in *November 2017*.

Stringer and HR Analyst Lynn Stehr regarding an upcoming Captains assessment process. BR 43. Although there are roughly 100 pages of emails with Captain Stringer (see CP 189-289) O'Dea fails to even attempt to identify anything that remotely suggests a PRA request. BR 43. Captain Stringer was O'Dea's assigned TPD contact while he was on administrative leave, had extensive contact with him (mostly by email), and plainly was communicating about administrative matters having nothing to do with his claims here. CP 186-289. Stehr *gave him the materials he requested in May 2017 – again months before he filed this lawsuit.* CP 306. She never perceived his inquiry about taking the Captains exam as a PRA request. CP 307.

This claim is frivolous.

D. O'Dea gave no fair notice regarding his request for cashing out his accrued leave balances.

In June 2017, O'Dea left a voicemail for Jaimie Bostain, one of TPD Finance Manager Francesca Heard's direct reports. CP 290-91. Heard called O'Dea, who inquired about cashing out remaining accrued leave as part of his final payout. CP 291. Heard emailed him the information he requested. *Id.* She also sent him the relevant Tacoma Muni. Code provisions and a blank Request for One-Time Pay Out on June 27, 2017. *Id.*; CP 291, 293-98. This was a routine

inquiry for payroll information from an employee leaving the City, not a PRA request. CP 291.

O'Dea again baldly asserts that his request for *information* was a PRA request. BR 43. But requests for information, even if they are about information that might be contained in a public record, are not requests for identifiable public records. See **Lowe**, 102 Wn. App at 880; see also **Bonamy**, 92 Wn. App. 403. It was reasonable for Finance to believe that this request for information was not a public records request, but was based on O'Dea's leaving the City, simply a request for information under Ch. 1.12 of the Tacoma Muni. Code (the City's codified compensation plan addressing leave accruals, payouts, etc.).⁶ O'Dea's ambiguous inquiries did not provide the City with fair notice.

E. O'Dea gave no fair notice to Chief Ramsdell or Assistant Chief Wade.

O'Dea finally claims that conversations he had with Chief Ramsdell and Assistant Chief Wade were PRA requests. BR 44. But ambiguous oral requests in the context of other meetings puts

⁶ To the extent O'Dea asserts a PRA violation based on Bostain not creating a public record and giving him a printout of his accrued leave balance based on his voicemail, his claim is meritless: the PRA does not require agencies to create new documents. **Smith v. Okanagan Cnty.**, 100 Wn. App. 7, 994 P.2d 857 (2000).

agencies in the awkward position of contemporaneously parsing the difference between a request to collaboratively share information and a request that potentially triggers a duty to produce records or pay fines and attorney fees under the PRA. **Beal**, 150 Wn. App. at 874-75. O'Dea offers no evidence supporting his contention that these were identifiable public records requests. BR 44. This failure renders this claim frivolous. The trial court was correct.

F. The trial court did not abuse its discretion in denying O'Dea's fallacious motion to compel.

An order denying a motion to compel discovery is reviewed for an abuse of discretion. **Hertog v. City of Seattle**, 88 Wn. App. 41, 47, 943 P.2d 1153 (1997) (citing **Barfield v. City of Seattle**, 100 Wn.2d 878, 886-87, 676 P.2d 438 (1984)), *aff'd* 138 Wn.2d 265 (1999). Ignoring the standard of review, O'Dea does not even attempt to argue that the trial court abused its broad discretion in denying his motion to compel. BR 44-46. It did not.

O'Dea's one-sided claims about what happened here are highly misleading. *Id.* His motion to compel was two pages (and two sentences) long. CP 713-15. It cited only RCW 42.56.550. *Id.* It was so grossly inadequate as to itself justify the trial court's denial.

His motion was entirely based on his affidavit. CP 720-40. That affidavit is filled with speculation, not evidence. *Id.* He lists massive amounts of documents *that the City produced*, but *argues* without evidence that more may exist. *Id.* Speculation is insufficient.

The City's response spelled out that in its two rounds of searches, it produced close to 20,000 pages. CP 741-42, 754-59. Its painstaking searches produced all documents the City possessed responsive to his requests. CP 743-52, 754-59, 778-846, 847-50, 852-54, 856-60, 862-82, 883-86, 888-90, 892-93, 895-904. O'Dea's cross appeal does not even attempt to address this massive effort and evidence – much less candidly disclose that he *admitted* receiving massive numbers of documents. BR 41-46. And it was not until his *reply* that he raised the claims on which he focuses on appeal regarding alleged destruction of documents. CP 905-1005. Arguments first raised in reply come too late. **Cowiche Canyon**, 118 Wn.2d at 809. That alone was sufficient to deny his motion

In any event, his *nearly 50 pages in reply* amounted to only *six documents* that were inadvertently purged from a database in November 2018. CP 1010-11, 1016-20, 1021-29. Again, O'Dea fails to even mention this, much less challenge it on appeal. His hysterical speculations about countless other documents are not only false, but

frivolous. The trial court did not abuse its discretion in rejecting his motion to compel.

G. The Court should deny O’Dea fees.

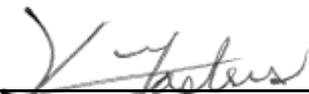
O’Dea should not prevail, so no fees are warranted. Moreover, his briefing is *grossly* inadequate, so even if he could have prevailed on any claim – which he cannot – the Court should deny any fee award.

CONCLUSION

This Court should reverse and dismiss. If not, it should reverse and remand for recalculation of fees down to an amount within the realm of reason. These unprecedented penalties are grossly unjust and totally unwarranted.

RESPECTFULLY SUBMITTED on the 8th day of September 2020.

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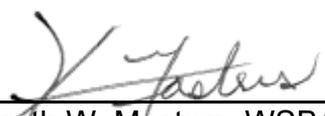
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