

FILED
Court of Appeals
Division II
State of Washington
2/10/2020 4:30 PM
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.

BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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INTRODUCTION

The trial court imposed over \$2.6 million in PRA penalties against the City of Tacoma. These unprecedented penalties were based on two letters that the requestor (O'Dea's attorney) apparently mailed, but the trial court found the City never received. Many months passed before O'Dea finally served his PRA Complaint attaching his two letters. The City promptly denied receiving the two letters in its Answer, plainly signaling that it would not be producing anything. But the trial court later ruled that the City had to immediately respond to his complaint exhibits *as new PRA requests*.

Washington law does not permit this result. Our courts have held that where, as here, the status of a PRA request is legally ambiguous, the PRA is not triggered. Once O'Dea's counsel was informed that the City denied even receiving his requests, he could have triggered the PRA in the usual way: seeking a show-cause order. He could have refiled his requests. He could have called.

Instead, although he admittedly had never (over *many* PRA requests) seen the City not respond at all, he lay in wait. When the City eventually received interrogatory answers claiming the letters were mailed, it immediately asked O'Dea's counsel whether he

wished his unreceived (and thus denied) requests to now be treated as *new* requests. He did not respond.

The same day that the City finally extracted a response from O'Dea's counsel (at the end of a deposition of his paralegal), the City began production, claiming no exemptions and withholding no records. Yet the trial court imposed over \$2 million in PRA penalties, albeit while failing to address 16 of the 20 relevant factors promulgated by our Supreme Court, and yet erring on the four it did consider. And when more documents were produced after O'Dea clarified his requests, the trial court raised the penalties to over \$2.6 million, solely based on finding new records – yet another ruling directly contrary to controlling Washington law.

This Court should reverse and dismiss, holding that no penalties are necessary in these unprecedented circumstances. The trial court's rulings otherwise create perverse incentives for PRA requestors. If the Court nonetheless feels some penalty is in order here, it should reverse and impose far lower penalties. At the very least, the Court should reverse and remand for rehearing and for proper findings on all the relevant factors.

Either way, the Court should reverse the fee award to O'Dea and deny fees on appeal.

ASSIGNMENTS OF ERROR

1. The trial court erred in granting O'Dea's Motion for Summary Judgment and in entering its order doing so. CP 433-38.
2. The trial court erred in imposing PRA penalties on the City and in entering its "Trial Decision"¹ doing so. CP 583-85.
3. The trial court erred in denying reconsideration, and in refusing to consider relevant declarations submitted in support or reconsideration. CP 705.
4. The trial court erred in entering its Finding 8.² CP 1114.
5. The trial court erred in granting fees and costs to O'Dea. CP 1112-16.
6. The trial court erred in entering judgment against the City for over \$2.6 million in PRA fines, fees, and costs, based on two letters attached as exhibits³ to O'Dea's Complaint⁴ in this matter. CP 1117-19.

¹ The Trial Decision is attached as App. C.

² The Findings & Conclusions are attached as App. D.

³ The complaint exhibits are attached as App. B.

⁴ The relevant portion of O'Dea's Amended Complaint is attached as App. A.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where two PRA-request letters are not received by an agency, can they trigger any duty to respond under the PRA?
2. Where those two letters are attached as exhibits to a subsequent Complaint, and the agency promptly denies receiving them as PRA requests, can the exhibits themselves give the agency “fair notice” that they are now *new* PRA requests?
3. Under controlling Washington law holding that legally ambiguous requests are not PRA requests, did the trial court err in denying reconsideration and refusing to accept relevant evidence?
4. Is a PRA search unreasonable or inadequate solely because more documents are later discovered?
5. May a trial court impose over \$2.6 million in PRA penalties without entering findings regarding *any* of the “principal” factors delineated by our Supreme Court? May it do so while addressing only one of seven mitigators and only three of nine aggravators?
6. May a court impose penalties while the agency is responding?
7. May a court impose penalties for complying with the PRA?
8. May a court impose penalties based on 136 documents that were never produced and do not exist?

STATEMENT OF CASE

A. The City terminated Lt. David O’Dea after he improperly shot at someone outside of department policy.

Lt. David O’Dea worked for the Tacoma Police Department (TPD) from 1994 to 2017. CP 2. In August 2016, O’Dea shot at someone and was placed on administrative leave during an internal investigation. CP 2, 300, 303. O’Dea remained on administrative leave until TPD terminated him in June 2017. CP 306, 617, 621.⁵

B. The City and TPD have robust procedures for processing all PRA requests they receive.

The City and its departments have established processes for handling PRA requests. CP 348-56, 434. The City receives roughly 2,500 PRA requests per year. CP 354, 462. Processing requests may take anywhere from 24 hours to several years, depending on the volume of responsive materials. CP 354.

Requestors mostly submit PRA requests through the City’s online portal. CP 349, 354. Some go directly to the City Clerk’s Office. *Id.* When departments receive PRA requests, City staff is trained to forward them to the Public Records Office (PR Office). CP 349, 355. At TPD, PRA requests go to Deputy City Attorney Michael

⁵ The trial court recently dismissed O’Dea’s wrongful termination suit on summary judgment; his appeal is pending. See Wash. App. Ct. No. 54240-4-II; Pierce Cnty. Sup. Ct. No. 18-2-08048-2.

Smith, who forwards them to the PR Office. CP 349. Smith also responds to PRA requests, as described *infra. Id.*

All TPD staff is similarly trained. CP 350. The City's full-time Public Records Analyst (PR Analyst), Lisa Anderson, attends the Wash. Assoc. of Public Records Officer's biannual PRA training program, and also attends the City Attorney's additional triannual PRA trainings. CP 354. She conducts PRA trainings for the City's 17 departments and regularly updates them on PRA legal developments. *Id.* All City employees take a course in Records Management Basics, and the City's New Employee Orientation includes PRA training. *Id.*

Every PRA request is logged-in and assigned a unique identifying number, facilitating tracking. CP 349, 355. Once the PR Office receives a request, a PR Analyst contacts coordinators in all departments that may have responsive records. CP 349-51, 355. They discuss specifics and estimate how long it will take to identify, locate, collect, and transmit records. *Id.* The PR Analyst can then estimate a reasonable time to fulfill the PRA request. *Id.*

- C. Prior to this lawsuit, the City received and properly processed ten other PRA requests from O’Dea’s counsel, but prior to O’Dea’s filing this lawsuit, the City never received the two letters on which the trial court rulings are based.**

Prior to this lawsuit, O’Dea’s counsel had submitted (at least) ten PRA requests with the City. CP 356.⁶ They mailed three of those, submitted six electronically (through the portal), and sent one to South Sound 911, which was forwarded to the City. *Id.* All ten, the City received, properly logged-in, and processed. *Id.*

In this lawsuit, O’Dea alleges that his lawyer also mailed two letters containing PRA requests on March 24 & 28, 2017. *See, e.g.*, CP 4, 424-25. But the City never received them.

Specifically, Smith never saw the March 24 & 28 letters from O’Dea until this lawsuit. CP 351-52. “Because [O’Dea’s] PRA requests relate to a TPD employee who was the subject of an Internal Affairs investigation at the time, and who was subsequently terminated, [Smith] would remember having reviewed them and [he] would have taken care to ensure that [their] processes were followed.” CP 351. Smith has not seen a “previous instance where

⁶ O’Dea alleged making *many* more PRA requests. *See* CP 2-6. As to all but two of those, the trial court granted the City’s summary judgment motion, as they were obviously *not* PRA requests. *See, e.g.*, CP 439-42.

someone claims they sent a PRA request directly to the [TPD] and we have no record of receiving it.” CP 351-52.

Smith has “no doubt” “the requests would have come directly to [him] and have been logged and processed consistently with our usual practices and procedures.” CP 352. Smith’s goal “is to provide the documents sought by the requester.” *Id.* “This approach serves the interests of the requestor and the citizens of Tacoma as well as the Tacoma Police Department.” *Id.*

Similarly, PR Analyst Anderson found “no record of the City . . . having received the two letters . . . [O’Dea’s counsel] allegedly mailed to the” TPD. CP 356. Since they are clearly identified PRA requests, if Anderson had received them directly or through any channels, “they would have been logged and processed, consistent with the City’s established practices and procedures.” CP 356. Anderson “was unaware of these particular requests until after this lawsuit was filed and [she] was notified of the allegations by the attorney for the City in this matter.” *Id.*

As noted, the trial court ultimately found that although a presumption of receipt arises from mailing, the City proved via uncontradicted evidence that until the Complaint was filed, the City never received these two letters. CP 351-52, 356-57, 584.

D. O’Dea sued the City for PRA violations, burying the two letters among over two dozen other meritless claims, and attaching them as exhibits to his Complaint.

O’Dea filed a PRA Complaint on November 9, 2017, and filed his First Amended Complaint four days later, November 13, 2017. CP 1-12, 15-26. As noted, O’Dea alleged his lawyer had mailed two letters containing PRA requests to the TPD on March 24 & 28, 2017. See, e.g., CP 4, 18, 424-25. He attached those two letters as exhibits to his Complaints, but buried his allegations about the letters among a list of over two-dozen meritless claims that the trial court subsequently dismissed on summary judgment. See, e.g., CP 16-20 (App. A); 23-26 (App. B).

The City filed its answer to O’Dea’s Amended Complaint on December 22, 2018. CP 28-37. The City specifically denied it ever received the two letters. CP 33, 37. O’Dea’s counsel never attempted to discuss with the City its express denial of his PRA requests.

E. The City investigated, finding nothing, and later asked whether O’Dea wished his two complaint exhibits to be treated as *new* PRA requests, but it received no response.

The City proceeded to investigate and defend O’Dea’s lawsuit. The City propounded discovery and sought depositions and admissions. See, e.g., CP 76-152. It received responses to its interrogatories and requests for production (propounded May 24,

2018) on July 10, 2018, asserting that the letters were mailed. CP 319-20. The following day, the City sent an email to O’Dea’s counsel reiterating that it has no record of receiving his March 24 & 28 letters, and asking: “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.” CP 341. The City received no response. CP 320.

On August 24, 2018, the City deposed Lee Ann Mathews, a paralegal at O’Dea’s counsel’s office. CP 324-25. She acknowledged drafting the March 24 & 28 letters. CP 329-30. She claimed she sent them out by U.S. Mail. CP 330-31. But she has no independent recollection of mailing the letters, or whether she or another staff member actually did so. CP 331-32. She sent neither letter by certified mail. CP 331. She has no recollection of ever sending out a PRA request to the City to which she received no response. CP 329.

F. When O’Dea finally confirmed his two complaint exhibits should be treated as new PRA requests, the City immediately processed them in good faith.

At the end of Mathews’ deposition, the City’s counsel reminded O’Dea’s counsel that she had sent him an email on July 11, asking whether O’Dea wished the City to treat the exhibits to his Complaint as PRA requests, and asked him, “Do you want me to do

that now?" CP 332. O'Dea's counsel responded, "Well, I think it was incumbent upon you, once the complaint came in, to do that." *Id.* The City's counsel again asked, "So the answer is yes, you want me to go ahead and - - "; O'Dea's counsel said: "Yes, sure." *Id.* Counsel stated that she would now process the letters. CP 333.

That same day, the City's counsel forwarded the letters to PR Analyst Anderson. CP 343-47, 357. The City immediately began analyzing the request, providing a timeline, and producing documents. CP 357. It sent O'Dea's counsel an acknowledgment of his requests on August 31, 2018. CP 465. It anticipated sending documents responsive to the March 24 request by October 11, and to the March 28 request by October 21. CP 357.

On October 2, 2018, the City produced all records responsive to the March 28 request (training directives and special orders). CP 465. The City withheld nothing and claimed no exemptions. *Id.*

As to the March 24 request, the production was ongoing at the time of the penalty phase in this matter.⁷ CP 465. The enormous request consisted of five primary records groups (*id.*):

⁷ Arguments on penalties were heard January 7, 2019. See 1/7/2019 VRP. The trial court issued its Trial Decision on penalties February 6, 2019, while production was still ongoing. CP 583-85.

- (1) all documentation supporting Internal Affairs investigations from 2006-2017;
- (2) all Deadly Force Review Board incidents for 2006-2017;
- (3) all claims for damages relating to TPD the City received for 2006-2017;
- (4) TPD policies for applications of force; and
- (5) copies of policies for assisting officers and their families when use-of-force issues arise.

On the date the City estimated it would begin production, December 13, 2018, the City produced its first installment of records, including partial responses to items (1) and (2), and complete responses to items (4) and (5). CP 465, 481. The City anticipated providing complete responses to (1) and (2) by January 18, 2019. CP 465-66.

As to item (3), all claims for damages over an 11-year period, the City estimated (in late December 2018) that it would take between six and 12 months to complete that production. CP 466.

G. The trial court agreed that the City never received O’Dea’s two complaint exhibits as PRA requests, but nonetheless ruled that when he served his Complaint, the City should have immediately treated them as new PRA requests.

O’Dea moved for summary judgment on the two complaint exhibits on June 29, 2018. CP 41-50. On October 28, the trial court

granted O’Dea’s motion. CP 433-38.⁸ The trial court’s summary judgment order notes that on “October 5, 2018, at the time of [hearing] this motion, the City was compiling records to respond to Plaintiffs two PRA requests.” CP 435.

The trial court acknowledged that the City never received them by mail: “the City first became aware of the two letters when it received the Plaintiff’s complaint” on November 9, 2017. CP 434. It nonetheless concluded that, “at a minimum[,] the City was put on notice at the filing of the complaint that the two letters were public records requests.” CP 437. In the subsequent penalty phase, the trial court reaffirmed that the City did not receive the two letters until O’Dea served his Complaint (CP 584):

there was initially a delayed response by the City to both PRA requests because even though the Plaintiff proved that he mailed the PRA requests, the 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[s] handled.

⁸ The City also moved for summary judgment on O’Dea’s roughly two-dozen other alleged PRA requests. CP 51-72. The trial court granted the City’s motion on those meritless claims. CP 439-42. O’Dea has cross-appealed from this and another order. CP 1152-63.

H. The trial court awarded O’Dea over \$2.6 million in PRA fines, fees, and costs, based on two complaint exhibits.

The parties filed briefing on PRA fines and penalties. CP 475-87 (City); CP 488-93 (O’Dea); CP 524-31 (City Supplemental). The City pointed out the language of the PRA and caselaw barring the trial court from imposing penalties before the PRA requests are fully processed. CP 484 (citing RCW 42.56.550; **Hobbs v. Wash. State Auditor’s Office**, 183 Wn. App. 925, 335 P.3d 1004 (2014)); CP 524-25 (same).

For the March 28 letter, O’Dea sought a \$10-a-day per *document* penalty for 536 documents and 288 days, amounting to a “partial judgment” of over \$1.5 million. CP 490-91. For the March 24 letter, he sought a “partial judgment” of \$39,500 for the 10 documents the City had produced so far. CP 491. He also brought a “motion to compel” the balance of the documents under the March 28 letter, which turned out to be a motion to show cause why it would take a full year for the City to respond. CP 491-92. O’Dea’s total initial request was \$1,583,180. CP 493.

While the trial court accepted both O’Dea’s \$10-a-day figure and his \$39,500 request for the March 24 letter, it raised his requested penalty for the as-yet incomplete March 28 production to

\$1,731,280 (11/13/2017 to 10/2/2018 = 323 days x 536 documents x \$10 per day). CP 585. It did so despite the City's requests to group the two requests and to end the penalties as of August 24, 2018, when the City began processing his requests. CP 483-86, 486.

The trial court also ordered the City to conduct a further search and report the results in 30 days. CP 585. After a series of additional motions, the court found that the City's search after its February 6, 2019 Trial Decision was adequate. CP 1115. It nonetheless imposed over \$800,000 in penalties as to the remaining documents produced in response to the March 24 letter. *Id.* This was in addition to the \$39,500 imposed in the February 6, 2019 Trial Decision for the March 24 letter. CP 585, 1115. The trial court also imposed \$63,360 in penalties for documents produced in response to the March 28 letter. CP 1115. This was in addition to the \$1,731,280 imposed in the February 6 Trial Decision for the March 28 letter. CP 505, 1115-16. The trial court also awarded O'Dea \$36,051 in attorney fees and \$773.50 in costs. CP 1117.

The total judgment for the delayed response to the two complaint exhibits thus rose to \$2,608,713.50. *Id.*

The City timely appealed. CP 1125-44.

ARGUMENT

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

While this appeal arises from the trial court's summary judgment in favor of O'Dea, the City submitted below that the trial court had sufficient evidence to render a decision on the PRA case before it and to render a decision on the merits. CP 316. It asked the trial court to treat the cross-motions on summary judgment as a hearing authorized under RCW 42.56.550, and to decide the matter on affidavits submitted by the parties. *Id.*

RCW 42.56.550 expressly permits a hearing to determine issues in a PRA case, and the trial court may completely resolve PRA claims by way of a show-cause proceeding. ***West v. Gregoire***, 184 Wn. App. 164, 172, 336 P.3d 110 (2014); see also ***O'Neill v. City of Shoreline***, 170 Wn.2d 138, 153, 240 P.3d 1149 (2010) (show-cause hearings are the usual method of resolving litigation under the PRA). Such a hearing may settle the threshold issue of whether there is a public records act violation, and, if so, whether the government agency's actions amounted to bad faith under RCW 42.56.550. ***Gregoire***, 184 Wn. App. at 172. The trial court (and this Court) may conduct a show cause hearing and dismiss a PRA claim based solely on affidavits. ***O'Neill***, 170 Wn.2d at 153; ***Forbes v. City of Gold Bar***,

171 Wn. App. 857, 867, 288 P.3d 384 (2012). A decision based on affidavits is a decision on the merits and is ordinarily not treated as a summary judgment motion on appeal. **Brouillet v. Cowles Publ'g Co.**, 114 Wn.2d 788, 793-94, 791 P.2d 526 (1990).

But this Court still reviews PRA appeals *de novo*. **West v. Evergreen State Coll. Bd. of Trs.**, 3 Wn. App. 2d 112, 117, 414 P.3d 614 (2018); RCW 42.56.550(3). This Court stands in the place of a trial court in reviewing declarations, legal memoranda, and exhibits. **Spokane Police Guild v. Liquor Control Bd.**, 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989). “The PRA is a strongly-worded mandate for broad disclosure of public records.” **Rental Hous. Ass’n of Puget Sound v. City of Des Moines**, 165 Wn.2d 525, 535, 199 P.3d 393 (2009). The PRA’s purpose is to increase governmental transparency and accountability by making public records accessible to Washington residents. **John Doe A v. Wash. State Patrol**, 185 Wn.2d 363, 371, 374 P.3d 63 (2016). Consistent with this mandate, courts construe the PRA liberally to promote the public interest. **West v. City of Tacoma**, Wash. App. Ct. No. 51487-7-II, slip op. at 23 (Jan. 28, 2020) (“**West** slip op.”) (citing **Soter v. Cowles Publ'g Co.**, 162 Wn.2d 716, 731, 174 P.3d 60 (2007); RCW 42.56.030)).

And in any event, this Court also reviews orders granting summary judgment *de novo*. **West** slip op. at 24 (citing **Greenhalgh v. Dep't of Corr.**, 160 Wn. App. 706, 714, 248 P.3d 150 (2011)). Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.* at 23-24. The Court views the evidence in the light most favorable to the nonmoving party. *Id.* at 24. Mere allegations, argumentative assertions, and conclusive statements are insufficient to raise genuine issues of material fact precluding summary judgment. *Id.*

And this Court reviews evidentiary rulings on summary judgment *de novo*. **Johnson v. Lake Cushman Maint. Co.**, 5 Wn. App. 2d 765, 786, 425 P.3d 560 (2018) (citing **Folsom v. Burger King**, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); **Simmons v. City of Othello**, 199 Wn. App. 384, 390-91, 399 P.3d 546 (2017) (evidentiary rulings on summary judgment motions to strike reviewed *de novo*)). “Applying *de novo* review ‘is consistent with the requirement that the appellate court conduct the same inquiry as the trial court.’” *Id.* (quoting **Folsom**, 135 Wn.2d at 663).

- B. Where, as here, PRA requests are not 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 had no duty to respond to the March 24 and 28 letters that it never received. Under the PRA, agencies who *have* received a PRA request must respond within five business days, either providing records; providing a link to records; or sending an acknowledgment letter either containing a reasonable estimate of the time the agency needs to respond to the request, or seeking clarification, or denying the request. RCW 42.56.520(1). The PRA’s plain language supports this interpretation (*id.*, emphasis added):

Responses to requests for public records shall be made promptly by agencies. . . . Within five business days of receiving a public record request, an agency . . . must respond in one of the ways provided in this subsection. . . .

See *also* RCW 42.56.080(2) (emphasis added):

Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available . . .

The agency’s duty to respond to a PRA request thus is not triggered until the agency has fair notice that it has received a legally unambiguous PRA request. See, e.g., ***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)).

In ***Beal***, citizens meeting with a city department director made oral requests for written information about the city's plans to mitigate certain environmental damage. 150 Wn. App. at 866-67. ***Beal*** held that while oral requests may be sufficient and requestors are not required to cite to the PRA, they nonetheless must give an agency "fair notice" that it is receiving a legally unambiguous request for a public record. *Id.* at 872-73 & n.12 (citing ***Lowe***, 102 Wn. App. at 878 (citing ***Bonamy***, 92 Wn. App. at 410)). Those citizens' requests were too legally ambiguous to trigger the PRA. *Id.* at 875 ("ambiguous oral requests made during the course of meetings puts 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").

In ***Lowe***, an agency employee sent a letter to her boss (an agency director) requesting her personnel file and other information and documentation related to her employment. 102 Wn. App. at 874-75. ***Lowe*** held that her request for a personnel file did not put the

agency on fair notice that she was submitting a PRA request because her legally-ambiguous request could have been made under another statute requiring employers to give employees their personnel files. *Id.* at 880. That is, her “letter demanding information and documents related to her impending termination was ambiguous as to whether it was a public records request . . . or a personnel action,” so it did not give fair notice to the agency. *Id.* at 874. Thus, “the prompt ‘response’ options of [Former] RCW 42.17.320 [now RCW 42.56.520] do not apply absent clear notice that the requester was seeking an identifiable public record.” *Id.* at 881 (citing **Bonamy**, 92 Wn. App. at 409-12).

Somewhat ironically, O’Dea *relied on* **Lowe** below. CP 416-17, 420. As explained *supra*, the holding in **Lowe** was that the legal import of the employee’s letter was ambiguous, so it was not a request for an identifiable public record. 102 Wn. App. at 880. O’Dea nonetheless notes that *when the employee brought a show-cause motion under the PRA within roughly two weeks after her ambiguous request letter*, the agency gave her the employee file. CP 417; see **Lowe**, 102 Wn. App. at 875-76. Suffice it to say that had O’Dea taken such a step within a reasonable time, the City would have been put on fair notice of his claim, and would have responded accordingly.

Otherwise, O’Dea cited no case supporting his “gotcha” claim that he could lay in wait *without bringing a show-cause motion*, never giving the City fair notice of his claim. On the contrary, while the “PRA does not require written requests, . . . it does require that requests be recognizable as PRA requests.” **Beal**, 150 Wn. App. at 876 (citing **Lowe**, 102 Wn. App. at 878). Here, while the letters are plainly PRA requests on their faces, the City never received them in a context recognizable as PRA requests.

That is, the City never received them by mail, certified mail, through the portal, in person, over the phone, through a show-cause motion, or in any other form that could give the City fair notice of a new PRA request. Rather, the City first received them attached as exhibits to a complaint. The City properly and fairly treated them not as *new* PRA requests, but rather as what they legally were: *evidence purportedly supporting more of O’Dea’s meritless PRA claims that the City denied because it never received them*.

Indeed, it was incumbent upon the City’s attorney – who after all was *defending the City against O’Dea’s meritless claims* – to conduct due diligence into those claims. In that process, the City first denied O’Dea’s PRA requests: that is, the City told O’Dea, in no uncertain terms, that it had *never* received his letters. CP 33.

At that point, it was quite clear that the City, in good faith, was denying O'Dea's PRA requests because it never received them. It was thus incumbent upon O'Dea to make some effort – whether a phone call or a show-cause motion – *something* to give the City fair notice that the letters were not to be treated as what they were – evidence of a past PRA claim the City never received and properly denied – but rather as *new* PRA requests. Since the old ones were properly denied in the City's Answer to O'Dea's Amended Complaint, O'Dea had no legal right to rely on them as new requests. CP 33.

And since the letters' status was at best legally ambiguous, O'Dea had the responsibility to clarify the ambiguity because his lawyer had not yet given the City any unambiguous fair notice of a *current* PRA request. See ***Beal and Lowe***, *supra*. Under the existing caselaw, the City acted in good faith in treating the legally ambiguous complaint exhibits as evidence of a prior PRA claim – which it denied – rather than as new PRA requests. The City's attorney would have been acting in a conflict of interest had she done anything other than defend the City's denial. The trial court erred in ruling otherwise.

This Court should reverse and remand for dismissal of O'Dea's PRA claims.

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

In seeking reconsideration, the City pointed out to the trial court that its two summary judgment rulings – granting each party's motions – were irreconcilable. CP 599. On the one hand, the trial court granted the City's motion that O'Dea's over two-dozen other requests were not legally unambiguous PRA requests, but rather reasonably could be interpreted by the City as falling under other legal or procedural rubrics (e.g., employment litigation). CP 440-42. On the other hand, the trial court granted O'Dea's motion regarding his complaint exhibits, whose legal status was *at least* as ambiguous as his other requests (e.g., litigation exhibits regarding his denied PRA requests, or new PRA requests?). CP 437-38. Although the trial court cited both *Beal* and *Lowe* in the order granting O'Dea's motion (see CP 437 nn. 23 & 24) it failed to apply them to the letters.

Simply put, ruling that a litigant may attach an unreceived PRA request to a PRA complaint, or perhaps just make an allegation in that complaint, and thereby immediately trigger an agency's obligations under RCW 42.56 by filing that complaint, flies in the face of *Beal*, *Lowe*, and other cases, such as *Germeau v. Mason Cnty.*, 166 Wn. App. 789, 271 P.3d 932 (2012). As relevant here, *Germeau*

holds that where it was reasonable to believe that the request was received for other legal purposes (there, under collective bargaining procedures; here, as evidence of a prior, unreceived and therefore properly denied PRA request) the PRA does not apply. 166 Wn. App. at 807-08. Just as in **Germeau** the requestor and the employer both had rights, here O’Dea had a right to file his Complaint, and the City had a right to defend itself. Suggesting that the City’s attorney should have instead focused on responding to PRA requests the City never received, and denied, is not only awkward (the term used in **Beal**), but it places the City attorney on the horns of an ethical dilemma.

The City was entitled to a defense. O’Dea could have brought a PRA show-cause motion immediately, or at any time before the parties conducted discovery or sought “summary judgment.” Requiring City attorneys to interpret PRA complaint exhibits that were unreceived and therefore properly denied as instead *new* PRA requests is procedurally untenable and contrary to law. As the City put it below (CP 601):

Ever triggering the PRA in these circumstances is a troubling precedent contrary to existing law. *Instantly* triggering the PRA upon receipt of a *complaint* is a grossly unjust and impractical “gotcha” contrary to existing law.

The trial court erred in denying reconsideration on this ground.

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

While this Court should reverse and dismiss for the reasons stated above, the trial court nonetheless imposed over \$2.6 million in fines or penalties, so the City must address them. It is worth noting, however, that since no precedent exists holding that alleged PRA requests attached to a complaint may constitute new PRA requests – and indeed, **Beal**, **Lowe**, and **Germeau** are quite to the contrary – imposing such enormous penalties is unprecedented in every sense. Moreover, the trial court erred in the penalty phase for numerous other independent and highly prejudicial reasons.

Of course, once the trial court found a PRA violation, it could then determine whether fines or penalties were appropriate. **West v. Dep't. of Natural Res.**, 163 Wn. App. 235, 244, 258 P.3d 78 (2011). A court may award between \$0 and \$100 per day the requestor was denied access to public records. RCW 42.56.550(4). Appropriate penalties are within the trial court's discretion. **Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.**, 185 Wn.2d 270, 372 P.3d 97 (2016); see also **Yousoufian v. Office of King Cnty. Exec.**, 168 Wn.2d 444, 458, 229 P.3d 735 (2010) (**Yousoufian**). Trial courts also have discretion to group records together or separate them. **Zink v. City of Mesa**, 162 Wn. App. 688, 712, 256 P.3d 384 (2011).

The purpose of penalties is to “discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute.” *Yousoufian* at 459.

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.**

Not content with over \$2 million in sanctions, O’Dea sought yet more penalties after the Trial Decision, apparently based on speculation that there *could or should be* more documents if the City had read his mind. CP 494-507. The trial court’s Finding 8 states:

That additional documents were found after the Court’s February 6, 2019 order supports a finding that the City’s prior search in response to the March 28, 2017 request was inadequate.

CP 1114. This finding is contrary to law.

A search for records pursuant to a PRA request must be “reasonably calculated to uncover all relevant documents.” *Neighborhood Alliance v. Spokane Cnty.*, 172 Wn.2d 702, 720, 724, 261 P.3d 119 (2011). Reasonableness is dependent on the facts of each case. *Id.* An agency need not “search every possible place a record may conceivably be stored, but only those places where it is *reasonably likely* to be found.” *Id.* The issue of whether a search was reasonably calculated, and therefore adequate, is

separate and apart from whether additional responsive documents exist but are not found. *Id.* at 720. Thus – and most importantly here – the mere fact that a record is eventually found does not itself establish the inadequacy of an agency’s search. ***Kozol v. Dep’t of Corr.***, 192 Wn. App. 1, 8, 366 P.3d 933 (2015).

On the contrary, “a search need not be perfect, only adequate.” ***Block v. City of Gold Bar***, 189 Wn. App. 262, 276, 355 P.3d 266 (2015) (quoting ***Neighborhood***, 172 Wn.2d at 720). To prove that its search was adequate, the agency may rely on reasonably detailed, nonconclusory affidavits from its employees submitted in good faith. ***Neighborhood***, 172 Wn.2d at 721. The affidavits “should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched.” *Id.* “Purely speculative claims about the existence and discoverability of other documents will not overcome an agency affidavit, which is accorded a presumption of good faith.” ***Forbes***, 171 Wn. App. at 867 (emphasis added).

Despite this well-established law cited to the trial court, its erroneous Finding 8 is the *only* finding it made that the City’s exhaustive searches were inadequate. The City provided detailed declarations explaining its efforts based on the specific language of

the requests. See, e.g., CP 553-59, 568-75. O'Dea provided only speculation. "The PRA does not 'require public agencies to be mind readers.'" **Levy v. Snohomish Cnty.**, 167 Wn. App. 94, 98, 272 P.3d 874 (2012) (quoting **Bonamy**, 92 Wn. App. at 409). The trial court legally erred in failing to afford the City's declarations any presumption of good faith simply because more documents turned up.

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

In ***Yousoufian***, our Supreme Court set forth a taxonomic classification of relevant penalty factors: (1) "principal" factors, (2) "mitigating" factors, and (3) "aggravating" factors, each with subfactors discussed *infra*. ***Yousoufian*** at 460-63, 467-68. These nonexclusive factors may overlap, and no one factor controls the outcome. *Id.* at 468; see also ***Sargent v. Seattle Police Dep't***, 179 Wn.2d 376, 398, 314 P.3d 1093 (2013) (no one factor is determinative; some factors may be irrelevant). The ***Yousoufian*** factors militate against imposing penalties in this matter.

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

Moving down from the genus "principal," ***Yousoufian*** identified four species of principal factors:

- (1) existence or absence of a public agency's bad faith;
- (2) economic loss to the requestor;
- (3) public importance of the underlying issues to which the request relates, and whether any alleged significance was "foreseeable to the agency"; and
- (4) the degree to which the penalty is an "adequate incentive to induce further compliance."

West v. Thurston Cnty., 168 Wn. App. 162, 189, 275 P.3d 1200 (2012) (quoting **Yousoufian** at 460-63). None of these factors supports the trial court's onerous penalties in this case.

i. The trial court found no bad faith.

The trial court made no finding regarding any alleged bad faith of the City. CP 583-85, 1112-16. Absent such a finding, this Court should presume that no bad faith existed. See, e.g., **Yakima Police Patrolmen's Ass'n v. City of Yakima**, 153 Wn. App. 541, 562, 222 P.3d 1217 (2009) (citing **Ellerman v. Centerpoint Prepress, Inc.**, 143 Wn.2d 514, 524, 22 P.3d 795 (2001); **City of Spokane v. Dep't of Labor & Indus.**, 34 Wn. App. 581, 589, 663 P.2d 843 (1983)). O'Dea failed to obtain a bad-faith finding.

In any event, no bad faith exists. O'Dea failed to provide any evidence of bad faith. And the City straightforwardly showed that it was acting in good faith in handling his claims. First, O'Dea failed to prove that the City received the two letters. Second, it is not bad faith

for an attorney representing the City to conduct due diligence, investigate allegations, and pursue good-faith defenses in litigation. Third, since the City's investigation revealed that it never received the letters, it promptly and straightforwardly denied them. CP 33. Fourth, since the status of the rejected PRA requests was then at best ambiguous, when the City received O'Dea's interrogatory answers asserting mailing, it immediately asked O'Dea's counsel whether he wished the City to process the rejected PRA requests as new PRA requests. CP 341. He failed to respond.⁹ CP 320. And when the City finally extracted an affirmative response during a deposition, it immediately began processing the letters as new PRA requests. CP 332, 343. The City fully responded, albeit over time due to the breadth of the requests. There is no bad faith in any of this.¹⁰

⁹ In light of O'Dea's and his counsel's failures to ever clarify the status of their denied letter requests, even when asked, their claim that the City was "intransigent" (CP 490) seems like projection, at best. In any event, the trial court did not find the City "intransigent."

¹⁰ Indeed, an agency that simply makes a mistake "should be sanctioned less severely than an agency that intentionally withheld known records and then lied in its response to avoid embarrassment." *Neighborhood*, 172 Wn.2d at 718. There is nothing "less severe" about \$2.6 million in penalties.

- ii. O'Dea's counsel suffered no economic loss, and neither did O'Dea.

O'Dea's counsel was the requestor here. See App. B. He plainly could not and did not suffer any economic loss due to the delays in production in this case. This factor stands against penalties.

O'Dea did not address *Yousoufian* before the court rendered its Trial Decision. See CP 488-93. There is no evidence that O'Dea suffered any economic losses here – only a windfall.

The Trial Decision simply skips over the principal factors, cutting straight to aggravating and mitigating factors. CP 583-84. Nor do the Findings & Conclusion address the principal factors. CP 1112-16. Absent any findings on economic losses, this Court should simply presume none exist. This factor weighs against penalties.

- iii. No public importance was found or exists.

Again, the trial court never addressed the public importance of the underlying action. CP 583-84, 1112-16. And while the public may have been concerned by O'Dea's dangerous misconduct, the records O'Dea's counsel sought dealt largely with policies and procedures, or previous internal affairs investigations, or other people's claims for damages. See App. B. None of this would further any interest the public might have in O'Dea's reckless decision to shoot at someone. This factor cannot support penalties here.

- iv. No penalty is necessary to “incentivize” the City regarding this issue of first impression.

Again, the trial court failed to address this principal factor. CP 583-84, 1112-14. There is no need to penalize the City because its counsel straightforwardly faced an unprecedented situation on which the only existing legal authority suggests that letters attached as exhibits to a complaint are not unambiguously PRA requests. While the City’s litigation department is unlikely to ever be fooled by such a ruse again, that fact militates against imposing penalties here. The City established – as the trial court apparently accepted – that it has a robust program for complying with the PRA. No evidence remotely suggested that the trial court needed to impose an unprecedented penalty to “incentivize” the City to avoid the next “gotcha.”

b. Many mitigators exist.

The trial court did mention the mitigators (CP 584):

- (1) a lack of clarity in the PRA request;
- (2) the agency’s prompt response or legitimate follow-up inquiry for clarification;
- (3) the agency’s good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions;
- (4) proper training and supervision of the agency’s personnel;
- (5) the reasonableness of any explanation for noncompliance by the agency;

(6) the helpfulness of the agency to the requestor, and

(7) the existence of an agency system to track and retrieve public records.

See **Yousoufian** at 467. Indeed, the trial court apparently agreed that (5) the City's explanation for noncompliance is reasonable and "persuasive." CP 584. Yet the trial court failed to address the remaining factors. CP 584, 1112-14.

- i. The lack of clarity in the PRA request should have mitigated this penalty to \$0.

As explained at length *supra*, cases like **Beal**, **Lowe**, and **Germeau** hold that lack of clarity (a/k/a ambiguity) in a PRA request not only mitigates a penalty, it precludes application of the PRA. Even if the trial court did not so find, it should have addressed this factor and mitigated the penalties. In light of the law and the facts here, the trial court's failure to address all but one of the mitigating factors was an abuse of its discretion. This factor is mitigating.

- ii. The agency's attempts to clarify and prompt responses once the letters were clarified are mitigating.

Again, the trial court said nothing about this factor. But as explained at length *supra*, the City promptly notified O'Dea's counsel that the letters were never received and therefore denied, defended O'Dea's litigation in good faith, inquired when O'Dea asserted

mailing, and insisted on an answer in a deposition. The day it obtained clarification, it began producing. This factor is mitigating.

- iii. The City's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions are mitigating.

The trial court also ignored this factor. But as explained in detail *infra*, the City acted in good faith, honestly, and (once the ambiguous status of the letters was resolved) timely and strictly in compliance with the PRA. The trial court made no bad faith finding, and nowhere suggested that the City was less than honest. The trial court also acknowledged that no PRA requests were originally received, but apparently held it against the City that after it *denied* the PRA request letters, it proceeded to defend O'Dea's litigation. The trial court never specified what other actions it thought the City's counsel could have or should have taken, but expecting the City's attorney to do anything but defend the City is problematic. This factor mitigates penalties.

- iv. The City's proper training and supervision of its personnel is mitigating.

While the trial court again did not directly address this mitigator, it did note that the "City has established procedures for processing any PRA requests it receives." CP 434. The copious

evidence supporting this statement is uncontradicted. See, e.g., Fact § B, *supra*. This factor is mitigating.

- v. The reasonableness of the City’s explanations for any noncompliance are mitigating.

As noted, the trial court agreed that this factor is mitigating. CP 584. But it only mitigated as to the time before the City received O’Dea’s Complaint. *Id.* This factor should wholly mitigate penalties.

- vi. Testing the City’s “helpfulness” to O’Dea’s lawyer (the requestor) after litigation has begun makes no sense.

This mitigator makes little sense in the context of a litigation. While fairness and candor to an opposing party and attorney are certainly required, “helpfulness” is not. This mitigator is either irrelevant here, or it militates in favor of the City, where *during the litigation* – once O’Dea’s counsel clarified the status of his request – the City was indeed “helpful” (*i.e.*, complied with all PRA requirements).

- vii. The existence of the City’s system to track and retrieve public records is mitigating.

As with subfactor iv., *supra*, the City’s evidence that it has a robust system for tracking and retrieving public records is mitigating.

The trial court’s failure to address six of the seven mitigation factors was an abuse of its discretion. It is impossible to know from its decision whether it thought these factors did not apply, or just

thought it did not need to address them. They heavily weigh against any penalty at all – and certainly against a \$2.6 million penalty.

c. No aggravators apply.

Again, the trial court did mention the aggravators (CP 584):

(1) a delayed response by the agency, especially in circumstances making time of the essence;

(2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions;

(3) lack of proper training and supervision of the agency's personnel;

(4) unreasonableness of any explanation for noncompliance by the agency;

(5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency;

(6) agency dishonesty;

(7) public importance of the issue to which the request is related, where the importance was foreseeable to the agency;

(8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency; and

(9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

See *Yousoufian* at 467. The trial court found as aggravators that (1) time was of the essence due to O'Dea's ongoing "administrative matter"; (4) the City's explanations for noncompliance were unreasonable because the complaint exhibit letters were marked as

PRA requests; and (5) the City was “at a minimum negligent” because it “prepared to defend the allegations made in the complaint” *instead of* “verifying if the records were received.” CP 584-85. None of these conclusions is correct.¹¹

- i. The trial court contradicted its own ruling on aggravator (1).

The trial court ruled that O’Dea “had an administrative matter involving his employment where time was of the essence in receiving the requested documents.” CP 584-85. The City moved for reconsideration, explaining that notwithstanding O’Dea’s 11th-hour claim that the records he sought were critical to his defense of his out-of-policy shooting incident (CP 614), the City did not withhold any documents that would have had any bearing on his administrative proceeding or his disciplinary process, but rather O’Dea received all investigative materials relating to the IA investigation prior to his termination, including all the records the disciplinary authority relied upon. CP 601-03, 611-78, 679-82.¹²

¹¹ The trial court did not find any other aggravators, so no response is required as to those. Moreover, many of the aggravators are mirror-images of the mitigators, so arguments on the mitigators reflect arguments on the aggravators, in reverse; they need not be repeated here.

¹² The trial court denied the City’s request to accept these declarations. On *de novo* review, this Court should consider them. O’Dea raised this claim very late, so reconsideration was the City’s first opportunity to address them. They plainly contradict the trial court’s earlier finding.

The Deadly Force Review Board held O'Dea used deadly force outside of policy. CP 615. The ensuing IA investigation upheld this determination, also finding Unsatisfactory Performance (for poor decision making) and Equipment Violations (for carrying a backup handgun for which he had not qualified in two years). CP 617. The Assistant Chief recommended termination because O'Dea had previously been suspended in 2015 for Unsatisfactory Performance and Violation of the Department's Vehicular Pursuit Policy, resulting in a multicar collision that led to numerous civilian injuries. *Id.*

On May 12, 2017, O'Dea received a complete copy of the investigative binder and a **Loudermill** notice. CP 618. The materials exceeded 500 pages, including all relevant documentation. CP 618-19. By the time of his disciplinary hearing, O'Dea had received "all of the materials and documents which were relied upon by the Chief in rendering his decision to terminate." CP 619. O'Dea was terminated on June 23, 2017. CP 364, 619.

Thereafter, O'Dea again requested all the same materials, and he was again provided with them. CP 620. The Discipline Review Board upheld the Chief's decision. CP 621. O'Dea was so informed in July 2017. *Id.*

O'Dea did not even *file* this PRA action until November 9, 2017. CP 1. Thus, time could not possibly have been “of the essence” in his completed administrative proceeding, as the trial court ruled. CP 584-85. Time was up for O'Dea long before that.

Apparently seeing the error, the trial court subsequently retracted its February 6 ruling, as follows (CP 1114):

With regards to the Court's analysis of the Yousoufian factors as set forth in the order dated February 6, 2019, the Court was not referring to plaintiff's past administrative matters with the Police Department, as argued by the City. Plaintiff's need for the records were necessary to assess his future legal options and this was one of the Yousoufian factors considered.

While the retraction is clear enough, it is not clear what the court meant by its *post-hoc* ruling that O'Dea's “need for the records were necessary to assess his future legal options.” *Id.* The trial court did not specify which **Yousoufian** factor this confusing statement proves. It cannot support a ruling that time was of the essence, as one might well imagine that *any* PRA requestor needs the documents to “assess his future legal options.” The first aggravator fails.

ii. The City's explanations are not unreasonable.

The trial court apparently ruled that simply because the complaint exhibits were marked as PRA requests, the City had to treat them as such, on pain of over \$2.6 million in penalties. For all the reasons detailed at length above, that is incorrect under **Beal**,

Lowe, and **Germeau**, and under the PRA. A legally ambiguous PRA request is not a PRA request at all.

iii. The City was not negligent.

The trial court's final aggravator was that the City was negligent because it "prepared to defend the allegations made in the complaint" *instead of* "verifying if the records were received." CP 584-85. No evidence supports this assertion. On the contrary, immediately upon receiving O'Dea's Complaint, the City began investigating his allegations. Within roughly a month, the City had confirmed that it never received the complaint exhibit letters. It promptly communicated that to O'Dea and his counsel in its Answer, unequivocally denying that it had ever received the letters. CP 33. In short, it prepared to defend his allegations *by* confirming that the letters were never received.

The context suggest that this is what the court meant, even though it used the word "records." But perhaps it is plausible the trial court meant that the City had to verify whether *PRA* records were *produced*. CP 584-85. If that was the court's meaning, however, it again flies in the face of **Beal**, **Lowe**, **Germeau**, and the PRA. A legally ambiguous request is not a PRA request. The City was entitled to treat the letters as denied, where it unequivocally told

O'Dea it was doing so. Since they were denied as unreceived, no duty to verify whether any records were produced ever arose. And of course, the City *knew* no records were produced because the City never received a PRA request from O'Dea or his counsel.

In sum, no aggravators apply. Even if this Court disagreed as to one of them, the mitigators far outweigh the aggravators. This Court should reverse these extreme penalties.

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

The PRA expressly authorizes agencies to disclose documents in installments. RCW 42.56.080(2). The PRA also does not permit a requestor to initiate a lawsuit prior to an agency's denial and closure of a PRA request. *Hobbs*, 183 Wn. App. at 936. A cause of action does not even accrue until the City has completed its last production or withheld records pursuant to a claimed exemption. RCW 42.56.550(6). Thus, imposition of penalties on an open request is premature and improper.

Under RCW 42.56.550(1), a PRA cause of action accrues when an agency denies access or takes final action on a request for records. *Hobbs*, 183 Wn. App. at 936. A requestor may seek relief only when he or she has "been denied an opportunity to inspect or

copy a public record.” *Id.* at 936 (quoting RCW 42.56.550(1)). “Although the statute does not specifically define ‘denial’ of a public record, considering the PRA as a whole, we conclude that a denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records.” *Id.* Thus, the cause of action for damages accrues when the request is closed. *Id.* If the cause of action cannot even accrue until the request has been closed, then certainly penalties cannot be imposed before then.

The trial court erred in imposing penalties at all, in imposing penalties during the time the City was complying with the PRA, and in imposing penalties before the City closed out its PRA production. This Court should reverse on this independently sufficient ground.

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

The “determination of the number of days a public record request was wrongfully denied or delayed is a question of fact.” *Zink*, 162 Wn. App. at 707 (cites omitted). The Trial Decision ran the penalty period for the March 24 letter from November 13, 2017 (when the City was served with O’Dea’s Complaint) to December 13, 2018 (when the City produced some documents). CP 585. Thus, 395 x 10 documents x \$10/day = \$39,500. *Id.* The Trial Decision ran the

penalty period for the March 28 letter from November 13, 2017 (again, service of the Complaint) to October 2, 2018 (when the City produced all responsive documents). *Id.* Thus, 323 days x 536 documents x \$10 per day = \$1,731,280. *Id.*

For all the reasons explained above, the trial court erred in running penalties from service of the Complaint. On December 22, 2017, the City denied that it received the letters, putting O’Dea and his counsel on notice that they were denied. CP 27, 33. Since O’Dea never notified the City – despite the City’s notice and inquiries – that he wished the City to treat the denied requests as new requests until August 24, 2019, no penalties should accrue during that 18-month period. And since the City immediately began the production process that day, no penalties should accrue thereafter.

Otherwise, the trial court is penalizing the City for *complying* with the PRA, whose flexible approach focusing on the thoroughness and diligence of an agency’s response is most consistent with the concept of “fullest assistance.” ***Andrews v. Wash. State Patrol***, 183 Wn. App. 644, 334 P.3d 94, (2014) (no PRA violation where the agency acted diligently in responding to the request; no PRA violation whenever timelines were missed). There is no basis on which to penalize the City for complying with the PRA.

But if the Court believes that any penalties are appropriate, they should only accrue between August 24 and October 2, 2018 (for the March 28 letter) and December 13 (for the March 24 letter). This would result in penalties of 34 days x 10 documents x \$10/day = \$3,400 (for the March 24 letter) and 111 days x 536 documents x \$10/day = \$594,960 (for the March 28 letter). This \$598,360 total penalty is still far too large, but at least it is slightly more reasonable.

The trial court compounded its error in its Findings & Conclusions dated June 28, 2019, wherein it imposed more than \$800,000 in additional penalties by running them as late as February 21, 2019 (for the March 24 letter) and April 25, 2019 (for the March 28 letter). CP 1112-16. The resulting penalties of over \$2.6 million for two unreceived PRA requests attached to a complaint is grossly excessive and unjust. This Court should hold either that no penalties are required because the City had no fair notice that the letters were alleged to be new PRA requests, which it responded to in good faith as soon as the ambiguity was alleviated; or that far lower penalties would more than suffice in these unprecedented circumstances.

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.

O'Dea asked, and the trial court agreed, to impose \$10/day per document for what O'Dea contended were 536 documents in response to the March 28 letter. But the City produced only 400 documents in response to that letter. CP 579-80. O'Dea did not prove otherwise. This Court should reverse this incorrect ruling because, applying the trial court's penalty rate to the corrected number of documents equals \$1,292,000, not \$1,731,280. The roughly \$440,000 difference is certainly significant to Tacoma taxpayers. And the shorter period that should apply lowers it more.

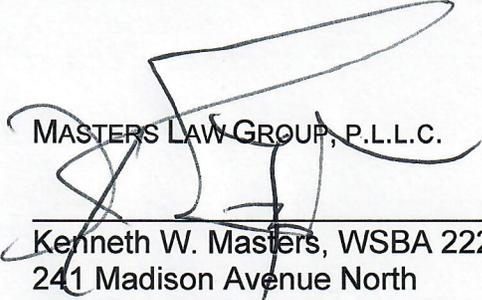
E. This Court should reverse the fee award.

While fee awards are permitted to a prevailing plaintiff under the PRA, O'Dea and his counsel should not prevail. The Court should therefore reverse the fee award.

CONCLUSION

For the reasons stated, this Court should reverse and dismiss because imposing any PRA penalties here is contrary to justice. If not, it should reverse and reduce the penalties to a much lower amount. If not, it should reverse and remand for rehearing and for proper findings on any alleged violation, penalties, or fees and costs.

RESPECTFULLY SUBMITTED on the 10th day of February
2020.


MASTERS LAW GROUP, P.L.L.C.

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241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

ken@appeal-law.com

Attorneys for Appellants/Cross-respondents

APPENDIX A

CP 16-20
Amended Complaint
Excerpt

1 **B. Defendants**

2 1.3 Defendant City of Tacoma is an agency as defined in RCW
3 42.56.010(1).

4 1.4 Defendant Tacoma Police Department (hereinafter TPD) is an agency
5 as defined in RCW 42.56.010(1). (Defendants will collectively be referred to as
6 ("Tacoma".)

7 1.5 Tacoma is subject to the Public Records Act, Ch. 42.56 RCW.

8 **II. VENUE AND JURISDICTION**

9 2.1 This Court has jurisdiction pursuant to RCW 42.56.550.

10 2.2. Venue is appropriate in Pierce County.

11 **III. FACTS**

12 **A. Background**

13 3.1 David O'Dea worked for the City of Tacoma Police Department from
14 1994-2017.

15 3.2 In August, 2016, Mr. O'Dea, then a police lieutenant, was involved in
16 an officer-involved shooting.

17 3.3 As a result of the shooting incident, Lt. O'Dea was placed on
18 administrative leave, pursuant to police policy.

19 3.4 After being placed on leave, Lt. O'Dea (hereinafter O'Dea), individually,
20 and through his attorney, made numerous public disclosure requests for records
21 related to his employment and for information related to the shooting investigation.

22 **B. Public Records Act Request**

23 O'Dea and/or his counsel made the following records request:

24 3.5 September 28, 2016, Lt. O'Dea called Captain Shawn Gustason of
25 TPD and asked for a copy of the TPD policies and procedures. No documents were
produced.

1 3.6 November 14, 2016, O'Dea sent an email to Lieutenant LeRoy
2 Standifer of TPD asking for copies of the TPD policies and procedures. No
3 documents were provided. Only a December 14, 2016 Table of Contents was
4 received.

5 3.7 November 17, 2016, O'Dea sent a second email to Lieutenant LeRoy
6 Standifer and Lieutenant Allan Roberts of TPD asking for copies of the TPD policies.
7 No records were produced.

8 3.8 November 30, 2016, O'Dea sent an email to LeRoy Standifer of TPD
9 asking for copies of the TPD policies and procedures. No records were produced.

10 3.9 December 1, 2016, O'Dea received an email from LeRoy Standifer of
11 TPD asking for clarification of his request for policies and procedures. O'Dea replied
12 on December 2, 2016 asking for copies of all the TPD policies and procedures. On
13 December 5, 2016 O'Dea received an email from LeRoy Standifer saying he is
14 working on O'Dea's request. No records were produced.

15 3.10 December 15, 2016, O'Dea sent an email to LeRoy Standifer of TPD
16 asking for copies of the TPD policies and procedures. No records were produced.

17 3.11 December 28, 2016, O'Dea called Lieutenant LeRoy Standifer of TPD
18 and asked for copies of the TPD policies and procedures. Standifer stated that
19 TPD's computer access to these documents was currently down, but was expected
20 to be fixed soon and he provide copies. No records were ever produced.

21 3.12 January 6, 2017, O'Dea texted Captain Shawn Stringer of TPD on his
22 department cell phone asking about getting copies of the TPD policies and
23 procedures. Stringer initially replied that he needed to check with TPD Assistant
24 Chief Gustason. No records were produced.

25 3.13 On January 6, 2017, O'Dea received an email from Lieutenant LeRoy
Standifer that contained five individual policies and one procedure; not all as
requested.

1 3.14 January 13, 2017, O'Dea asked Captain Ed Wade of TPD for copies of
2 TPD firearms training sign-in sheets and Training Directives for the Spring of 2015
3 when O'Dea was at the police range for his firearms training. O'Dea never received
4 copies of the requested records.

5 3.15 February 1, 2017, O'Dea sent an email to Lieutenant LeRoy Standifer
6 of TPD saying that he asked Captain Shawn Gustason for a copy of the TPD
7 policies and procedures in September, 2016, which O'Dea never received. The
8 email also stated that O'Dea asked Captain Shawn Stringer for copies of the TPD
9 policies and procedures in January 2017. No records were produced.

10 3.16 February 2, 2017, O'Dea sent an email to Captain Shawn Stringer of
11 TPD asking for copies of the TPD policies and procedures. He never replied to
12 O'Dea's request.

13 3.17 March 24, 2017, Counsel for Mr. O'Dea, Brett Purtzer, mailed a Public
14 Disclosure Request to the Tacoma Police Department attached hereto as Exhibit
15 "A". No response was ever received from the Tacoma Police Department.

16 3.18 March 28, 201, Counsel for Mr. O'Dea, Brett Purtzer, mailed a Public
17 Disclosure Request to the Tacoma Police Department attached hereto as Exhibit
18 "B". No response was ever received from the Tacoma Police Department.

19 3.19 April 13, 2017, O'Dea sent an email to Captain Shawn Stringer of TPD
20 making a formal complaint about the 2017 Police Captain Assessment process. He
21 also requested the relevant test material listed in the announcement.

22 3.20 April 14, 2017, O'Dea received a reply from Captain Shawn Stringer
23 directing him to complete the application in order to take the test. O'Dea replied
24 asking for a copy of the intra-department memo announcing the process.

25 3.21 April 17, 2017, Captain Shawn Stringer sent O'Dea an email with the
intra-department memo containing the announcement of the assessment.

1 3.22 April 28, 2017, after not receiving a reply to O'Dea's complaint, he
2 forwarded O'Dea's complaint to Chief Don Ramsdell by email. Chief Don Ramsdell
3 replied on April 30, 2017 indicating that he was forwarding the complaint to the
4 department's Human Resources representative.

5 3.23 On May 1, 2017, O'Dea sent an email to Captain Shawn Stringer
6 specifically asking for copies of the Department and Bureau Goals as stated in the
7 Police Captain testing announcement. Stringer replied on May 3, 2017, sending
8 O'Dea copies of only the department goals. O'Dea did not receive copies of any of
9 the other relevant test materials he had asked for initially on April 14, 2017.

10 3.24 May 11, 2017, O'Dea received an email from Lynn Stehr advising that
11 the Police Captain test had been moved to June 2017 and that Human Resource
12 Analyst Lynn Stehr would be contacting O'Dea to coordinate two alternate dates for
13 the test. She never contacted him to coordinate alternate test dates.

14 3.25 May 12, 2017. O'Dea sent an email to Joy St. Germain of the City of
15 Tacoma Human Resources Department requesting copies of relevant Captain test
16 material as well as Tacoma Police Department policies and procedures. He
17 indicated in the email that he had asked repeatedly since September 2016 but never
18 received a reply.

19 3.26 May 12, 2017, O'Dea received a call from Lynn Stehr, Human
20 Resource Analyst for the City of Tacoma. She advised that she had copies of the
21 TPD policies and procedures and asked how she could get them to him. He told her
22 that he had been trying to get copies since September. She replied, "I heard that."
23 O'Dea asked her if she could give them to LT Fred Scruggs, O'Dea's union point of
24 contact who would be contacting O'Dea later that same day.

25 3.27 May 12, 2017, O'Dea received an email from Lynn Stehr, Human
Resource Analyst for the City of Tacoma. She advised that she provided a copy of
the Tacoma Police Department policies and procedures to Lieutenant Fred Scruggs,

1 O'Dea's union point of contact to give them to O'Dea later that evening. May 12,
2 2017. O'Dea received a compact disk with the department policies and procedures
3 from Lieutenant Fred Scruggs.

4 3.28 June 9, 2017, O'Dea verbally advised Chief Don Ramsdell that he did
5 not receive a copy of the audio file of Mr. Mendoza-Davalo's 911 phone call. O'Dea
6 also advised that he did not receive copies of the other audio files from 911 phone
7 calls and radio transmissions. O'Dea further advised that he did not get copies of the
8 Facebook video and photographs that the department collected from Mr. Villas as
9 well as a copy of the PowerPoint presentation used at the Deadly Force Review
10 Board.

11 3.29 June 26, 2017, O'Dea requested information from TPD related to
12 O'Dea's Personal Time Off (PTO) accrual he lost as a result of reaching his
13 maximum balance. Although the TPD timekeeper, Jamie Bostain, stated she would
14 run a report through SAP, and provide this information to O'Dea, no documents were
15 ever provided.

16 3.30 June 26, 2017, O'Dea spoke with TPD Finance Manager Francesca
17 Heard, and asked about city policy with respect to cashing out of sick leave. Ms.
18 Heard said that she was referencing a form that she had reviewed that stated O'Dea
19 was not entitled to any cash out of sick leave. O'Dea requested a copy of the form,
20 but never received any document.

21 3.31 July 3, 2017, O'Dea again called Jamie Bostain requesting the
22 Personal Time Off report she was going to run for him. No document was ever
23 provided.

24 3.32 Defendants violated the PRA by withholding all documents requested
25 as set forth above and by failing to cite an exemption to allow the withholding.

**

APPENDIX B

CP 9-12

Complaint Exhibits

HESTER LAW GROUP, INC., P.S.

Principals:
Monte E. Hester
Wayne C. Fricke
Brett A. Purtzer
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Tacoma, Washington 98405
253-272-2157
Fax: 253-572-1441
www.hesterlawgroup.com

Reply to: Brett A. Purtzer
brett@hesterlawgroup.com

March 24, 2017

Tacoma Police Department
Attn: Records
3701 South Pine Street
Tacoma, WA 98409

RE: PUBLIC RECORDS REQUEST

To whom it may concern:

Please provide this office with copies of the following:

1. Documentation concerning the information contained in the IA tracking log, or contained in any other tracking device, tool, electronic tracking mechanism (e.g., software or program) or hand-written/typed document encompassing the period January 1, 2006 through March 17, 2017. This requests includes the following information for each incident identified, whether fully investigated or sent to another department/division/bureau for investigation:

- a) Incident type;
- b) Associated CAD number, if applicable;
- c) Name of the officer(s) involved;
- d) Investigating supervisor, department and/or division;
- e) Date of incident;
- f) Date IA or bureau investigation commenced;
- g) Date IA or bureau investigation completed;
- h) IA Investigator(s);
- i) Interview date of involved officer(s) (primary officer involved who is the subject of investigation, not witnesses);
- j) Supervisor Rendering Decision;
- k) Copy of the 48-Hour Notice for each incident;
- l) Date decision rendered;
- m) Conclusion rendered;



- n) Copy of Findings;
- o) Corrective action/punishment administered (if any);
- p) Copy of Loudermill Notice, if applicable.

2. Information concerning Deadly Force Review Board (DFRB) incidents for the period January 1, 2006 through March 17, 2017, to include:

- a) CAD number of incident focus;
- b) Copies of Incident Summaries provided to Review Panel Members;
- c) Copy of IA Case Summary contained in DFRB case file;
- d) Copy of decisions rendered as provided to the Chief by DFRB Chair, or his/her designee;
- e) Copy of decisions rendered as provided to the Officer involved;
- f) Copies of all comment forms rendered by citizen panelists serving on the DFRB;
- g) List of names of all citizens who have served on DFRB panels.

3. Copies of any and all Claims for Damages filed against the Tacoma Police Department for the period January 1, 2006 – March 17, 2017 concerning:

- a) Use of Force (any type);
- b) Personal Injury;
- c) Civil Rights Violations;
- d) Racial Discrimination;
- e) Harassment; and
- f) Bias.

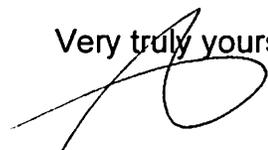
4. Policies and Procedures for the notifications of Officer involved applications of force to department members, members of the department command staff, and family members.

5. Concerning Use of Force issues, provide copies of any and all Policies and Procedures related to notifications and or assistance to or for officer and/or family assistance and notifications, including, but not limited to:

- a) CISM/CISD;
- b) EAP;
- c) Chaplain;
- d) Critical Incident Liaison Officer.

Thank you for your attention to the aforementioned.

Very truly yours,



Brett A. Purtzer

BAP:lam

HESTER LAW GROUP, INC., P.S.

Principals:
Monte E. Hester
Wayne C. Fricke
Brett A. Purtzer
Lance M. Hester
Casey M. Arbenz

1008 S. Yakima Avenue
Suite 302
Tacoma, Washington 98405
253-272-2157
Fax: 253-572-1441
www.hesterlawgroup.com

Reply to: Brett A. Purtzer
brett@hesterlawgroup.com

March 28, 2017

Tacoma Police Department
Attn: Records
3701 South Pine Street
Tacoma, WA 98409

RE: PUBLIC RECORDS REQUEST

To whom it may concern:

Please provide this office with copies of the following:

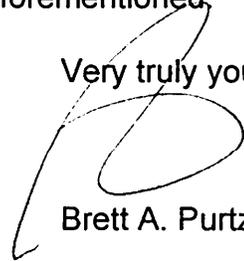
1. Copies of any and all Training Directives and Special Orders during the period January 1, 2006 through March 17, 2017, for any member of the Tacoma Police Department, including specialty teams (e.g., SWAT, DRT/SRT, and Lab Team/HEAT, etc.), regardless of hosting agency, at which TPD personnel attended for which the topic included training or information related to *application of force of any type or manner*. Data requested shall include:
 - a) Dates;
 - b) Times;
 - c) Locations;
 - d) Personnel attending;
 - e) Topics covered in the training.
2. Personnel Rosters or any other documents or reports to support the assignments of personnel within the various bureaus of the Department from January 1, 1995 to March 17, 2017.



3. Any and all Department records including, but not limited to: memorandums, notifications, emails, and/or text messages concerning Assistant Chief McAlpine's various interviews outside of the Tacoma Police Department for any position, in any location, for which internal communications existed between department members. This request does not include financial-related or retirement planning documentation with retirement personnel or financial institutions.

Thank you for your attention to the aforementioned.

Very truly yours,

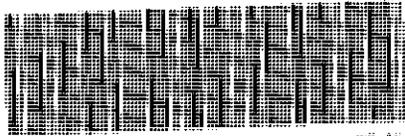
A handwritten signature in black ink, appearing to be "Brett A. Purtzer", written over a large, stylized, circular scribble.

Brett A. Purtzer

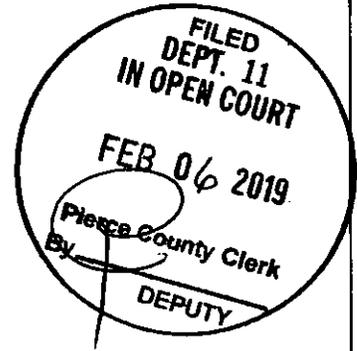
BAP:lam

APPENDIX C

CP 583-85
Trial Decision



17-2-13016-3 52803588 CTD 02-11-19



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

DAVID ODEA,

Plaintiff(s),

vs.

CITY OF TACOMA,

Defendant(s).

Cause No: 17-2-13016-3

TRIAL DECISION

(OR)

THIS MATTER having come on regularly before the above-entitled court for Trial on January 7, 2018 and this court having reviewed its October 29, 2019 Order Granting Plaintiff's Motion for Summary Judgment in Part¹ and all pleadings submitted.

DECISION

The PRA gives the court discretion to award a party who prevails against an agency in an action seeking a public record "an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record." RCW 42.56.550(4).

Determination of a PRA per diem penalty involves two steps: (1) determining the amount of days the party was denied access to the public record and (2) determining the appropriate amount of the penalty.² Although the existence or absence of an agency's bad faith is the principal factor for consideration, no showing of bad faith is necessary before a penalty may be imposed on an agency.³

In *Yousoufian*, the court set forth guidelines for determining appropriate PRA violation

¹ This Court's October 29, 2019 Order granting Plaintiff's Motion for summary Judgment is incorporated into this decision.

² *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459, 229 P.3d 735 (2010).

³ *Amren v. City of Kalama*, 131 Wn.2d 25, 36-38, 929 P.2d 389 (1997).

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penalties. Aggravating factors that may increase the penalty are: (1) a delayed response by the agency, especially in circumstances making time of the essence, (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions, (3) lack of proper training and supervision of the agency's personnel, (4) unreasonableness of any explanation for noncompliance by the agency, (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency, (6) agency dishonesty, (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency, (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency, and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case⁴.

Mitigating factors that may decrease the penalty are (1) a lack of clarity in the PRA request, (2) the agency's prompt response or legitimate follow-up inquiry for clarification, (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exemptions, (4) proper training and supervision of the agency's personnel, (5) the reasonableness of any explanation for noncompliance by the agency, (6) the helpfulness of the agency to the requestor, and (7) the existence of agency systems to track and retrieve public records⁵.

In the present case there was initially a delayed response by the City to both PRA requests because even though the Plaintiff proved that he mailed the PRA requests, the 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.

The City has acknowledged receipt of the Plaintiff's complaint with the attached PRA requests on November 9, 2017 and does not dispute that the letters, on their face, state that they are requests for public records." The City also admits that it "has established procedures on how to process any PRA requests."⁶ Aggravating factors that warrant a penalty amount being imposed are that the Plaintiff had an administrative matter involving his employment where time was of

⁴ *Id* at 168 Wn.2d at 467-68 (footnotes omitted).
⁵ *Id* at 168 Wn.2d at 467 (footnotes omitted).
⁶ City of Tacoma's Response to Plaintiff's Motion for Partial Summary Judgment, page 2 of 10, line 11-12.

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the essence in receiving the requested documents. The City's explanation for noncompliance is unreasonable as the letters were clearly marked as PRA requests and the reasons for the filing of the complaint was because of the City's failure to respond to the request. Instead of verifying if the records were received the City prepared to defend the allegations made in the complaint. This course of action resulted in additional months of the requests not being complied with and was at a minimum negligent as it should have been the first questioned answered upon receiving the complaint.

Therefore, the Penalty for the PRA violation period for the March 24, 2017 letter (11/13/2017 to 12/13/2018 for a total of 395 days) is 395 x 10 documents x \$10/day for a total of \$39,500.00. The Penalty for the PRA violation period for the March 28, 2017 letter (11/13/2017 to 10/2/2018 for a total of 323 days) is 323 x 536 documents x \$10 per day for a total of \$1,731,280.00. These amounts are necessary to deter future misconduct when considering the agency's size and the facts of this case.

COURT ORDER

The Court being otherwise fully advised herein, and incorporating its October 29, 2018 orders on Plaintiff's Motion for Summary Judgement it is hereby ORDERED:

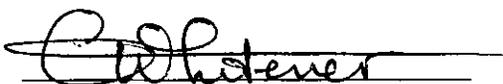
Plaintiff be awarded \$39,500.00 for the violation of the PRA pertaining to the March 24, 2017 request.

Plaintiff be awarded \$1,731,280.00 for the violation of the PRA pertaining to the March 28, 2017 request.

It is also further ORDERED that

Defendant shall identify and produce to Plaintiffs all results of the further search within 30 days of the date of this Order and any penalties for additional documents identified in the search will be determined later upon completion of the search.

DATED this 6th day of February 2019.


JUDGE G. HELEN WHITENER

APPENDIX D

CP 1112-16

Findings & Conclusions

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7/5/2019

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17-2-13016-3 53513481 FNFL 07-03-19



Honorable G. Helen Whitener

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

DAVID O'DEA, an individual,)
)
 Plaintiff,)
)
 vs.)
)
 CITY OF TACOMA, a public agency; and the)
 TACOMA POLICE DEPARTMENT, a public)
 agency,)
)
 Defendants.)

NO. 17-2-13016-3
FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
PLAINTIFF'S MOTION TO
COMPEL AND FOR
ADDITIONAL PENALTIES

THIS MATTER having come on before the Honorable G. Helen Whitener, Judge of the above-entitled court, on plaintiff's motion to compel and for sanctions (additional penalties), the plaintiff, having been present and represented by his attorney, Brett A. Purtzer of the Hester Law Group, Inc., P.S., and the defendants being represented by their attorney, Jennifer J. Taylor, and the Court having considered argument from the parties and having considered the evidence presented, and deeming itself fully advised in the premises, does hereby make the following findings of fact and conclusions of law in support of the plaintiff's motion to compel and for sanctions:

ORIGINAL

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1428

7/5/2019

FINDINGS OF FACT

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1. This matter was initiated by the plaintiff in November 2017. The Court heard cross-motions for partial summary judgment on October 5, 2018. On October 29, 2018, the Court issued its orders on the parties' respective motions for partial summary judgment and the orders are hereby incorporated by reference, as if fully set forth herein.

2. On February 6, 2019, this Court issued its "Trial Decision" dated February 6, 2019. The Court's Trial Decision is hereby incorporated by referenced as if fully set forth herein.

3. This Court determined that the City had violated the Public Records Act as it related to the letters dated March 24, 2017 and March 28, 2017, the public records requests attached to plaintiff's complaint in this matter. At the time of the Trial Decision, the City was still producing responsive documents to the ~~March 27, 2017~~ ^{March 28} request. With regards to the March 28, 2017 request, the City had indicated that it had produced all responsive documents.

4. That pursuant to the Court's Trial Decision dated February 6, 2019, the Court issued penalties for the violation relating to the March 24, 2017 request in the amount of \$39,500.00, for records produced in December 2018. The Court also issued penalties in the amount of \$1,731,280.00 for the violation relating to the March 28, 2017 request. Additionally, Court ordered that the City complete its response to the March 24, 2017 letter within thirty (30) days of the date of its order. ^{and March 28}

5. The City completed its response to the March 24, 2017 request. ^{and March 28}

JST FH

6. On April 3, 2019, plaintiff filed this motion to compel and motion for additional penalties (which plaintiff identified as a motion for sanctions and supplemental judgment) relating to the documents produced in response to the March 24, 2017 request, as well as March 28, 2017 JST BY

7. Following the filing of plaintiff's motions, the City located additional documents responsive to the March 28, 2017 request, which had already been closed. Those records were produced on April 25, 2019 in the form of twelve (12) additional files.

8. That additional documents were found after the Court's February 6, 2019 order supports a finding that the City's prior search in response to the March 28, 2017 request was inadequate

9. That a search does not need to be exhaustive, but must be reasonably calculated to uncover all the documents. The City has done such a search since the Court's order.

10. The Court finds that at this time the City's search was adequately done to uncover all relevant documents.

11. With regards to the Court's analysis of the Yousoufian factors as set forth in the order dated February 6, 2019, the Court was not referring to plaintiff's past administrative matters with the Police Department, as argued by the City. Plaintiff's need for the records were necessary to assess his future legal options and this was one of the Yousoufian factors considered.

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CONCLUSIONS OF LAW

1. As outlined above, the Court's previous orders of October 29, 2018 and February 6, 2019 are incorporated herein, including any conclusions of law set forth.

2. The Court denies plaintiff's motion to compel documents as the City has conducted an adequate search since this Court's order dated February 6, 2019, and has produced records pursuant to the search.

3. The Court concludes that the following penalties shall be imposed against the City relating to the March 24, 2017 request. for records produced since February 6, 2019. This amount is intended to include the \$39,500.00 already ordered by the Court in its February 6, 2019 Trial Decision for the records that had been produced by the City up to that point in the March 24, 2017 request.

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Date Produced	Number of Files Produced	Total Days	Amount
12/13/18	7	395	\$ 27,650.00
12/18/18	2	400	\$ 8,000.00
01/18/19	130	431	\$ 560,300.00
02/01/19	3	445	\$ 13,350.00
02/15/19	10	459	\$ 45,900.00
02/21/19	34	465	\$ 158,100.00
04/16/19	1	0	\$ 0.00

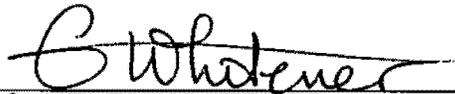
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4. Additionally, this Court imposes additional penalties in the amount of \$63,360.00 for the 12 additional files that were produced by the City on April 25, 2019 in response to the March 28, 2017 request. This is in addition to the

1 \$1,731,280.00 already imposed by the Court in its February 6, 2019 Trial Decision
2 for the March 28, 2017 request.

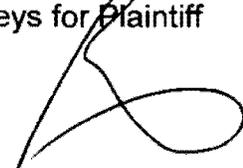
3 5. These Findings and Conclusions, with the incorporated previous
4 orders, shall be the Court's final judgment in this matter for purposes of any
5 appeal.

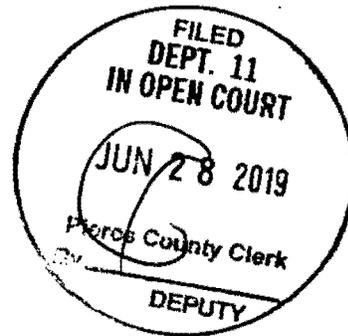
6 DONE IN OPEN COURT this 28th day of June, 2019.

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8 
9 G. HELEN WHITENER, Judge

10 Presented by:

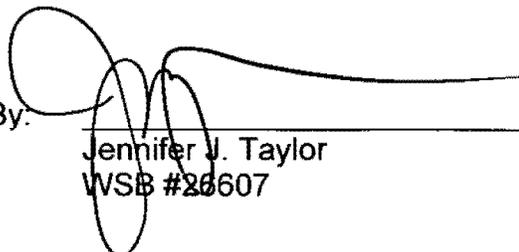
11 HESTER LAW GROUP, INC., P.S.
12 Attorneys for Plaintiff

13
14 By: 
15 Brett A. Purtzer
WSB #17283



16 Approved as to form and notice
17 of presentment waived:

18 WILLIAM C. FOSBRE, City Attorney
19 Attorneys for Defendants

20
21 By: 
22 Jennifer J. Taylor
23 WSB #20607
24
25

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **BRIEF OF APPELLANTS/CROSS-RESPONDENTS** on the 10th day of February 2020 as follows:

Co-counsel for Appellants/Cross-respondents

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Kenneth W. Masters, WSBA 22278
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MASTERS LAW GROUP

February 10, 2020 - 4:30 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53613-7
Appellate Court Case Title: David Odea, Resp/Cross App v. City of Tacoma, et al, Apps/Cross Resps
Superior Court Case Number: 17-2-13016-3

The following documents have been uploaded:

- 536137_Briefs_20200210162950D2803865_8959.pdf
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- jtaylor@cityoftacoma.org

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