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IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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DAVID O'DEA,

Respondent/Cross-Appellant,

vs.

CITY OF TACOMA, a public agency; and TACOMA POLICE

DEPARTMENT, a public agency,

Appellants/Cross-Respondents.

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APPEAL FROM THE SUPERIOR COURT  
OF PIERCE COUNTY  
Cause No. 17-2-13016-3

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BRIEF OF RESPONDENT/CROSS APPELLANT

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## Table of Contents

TABLE OF AUTHORITIES .....	iii
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR .....	2
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	3
IV. STATEMENT OF THE CASE.....	5
A. Procedural History .....	5
B. Facts .....	7
1. Background.....	7
2. Trial.....	10
3. Post Trial.....	11
V. ARGUMENT.....	12
A. STANDARD ON MOTION FOR SUMMARY JUDGMENT. ....	12
B. PUBLIC RECORDS ACT LEGAL PRINCIPLES.....	13
1. The City Received Fair Notice of Lt. O’Dea’s Public Records Requests.....	19
a. <i>Characteristics of the Request</i> .....	20
b. <i>Characteristics of Requested Records</i> .....	20
c. <i>Filing of the Lawsuit Gave the City Fair Notice of the Public Records Requested.</i> .....	20
d. <i>The City Received PRA Notices Yet Failed to Acknowledge and/or Respond To.</i> .....	22
C. THE TRIAL COURT’S DENIAL OF RECONSIDERATION WAS APPROPRIATE.....	24
D. THE TRIAL COURT PROPERLY AWARDED PENALTIES FOR THE CITY’S FAILURE TO RESPOND TO LT. O’DEA’S PUBLIC DISCLOSURE REQUESTS. ....	25
1. The Trial Court Appropriately Found that the City’s Later Searches Were Inadequate.....	26
2. This Court Should Affirm the Trial Court’s Penalty Award for the City’s PRA Violation.....	28
a. <i>Principal Factors</i> .....	32
i. Bad Faith.....	32
ii. Economic Loss.....	32
iii. Public Importance .....	33
iv. Deterrence .....	33
b. <i>Mitigating Factors.</i> .....	33

i.	Clarity of the March 24, 2017 and March 28, 2017 PRA Requests.....	34
ii.	The Agency Never Sought to Clarify the PRA Request or Act Promptly. ....	34
iii.	The City’s Strict Compliance with PRA Procedural Requirements and Exceptions. ....	35
iv.	The City Failed to Follow its Proper Training and Supervision.....	35
v.	The Reasonableness of the City’s Explanations. ....	35
vi.	“Helpfulness”.....	36
vii.	The City’s Track and Retrieve System. ....	36
c.	<i>Aggravating Factors</i> . ....	36
i.	Administrative Matter. ....	37
ii.	The City’s Unreasonable Explanation. ....	38
iii.	The City Was Negligent. ....	38
3.	The Trial Court’s Penalty Assessment While the City Was Producing Documents Was Proper.	39
4.	The Trial Court Properly Set the Penalty Period. ....	40
5.	The Trial Court Properly Ruled on the Number of Documents Produced.....	40
E.	THE TRIAL COURT ERRED IN GRANTING THE CITY’S SUMMARY JUDGMENT MOTION REGARDING LT. O’DEA’S REQUESTS MADE TO HIS TPD DESIGNATED POINTS OF CONTACT.....	41
1.	Lt. O’Dea’s Multiple Requests for the TPD’s Policies & Procedures Were Recognizable as Public Records Requests.....	41
2.	Lt. O’Dea’s Request for Material for the Upcoming Captain’s Assessment Process Was Recognizable as a Public Records Request.....	43
3.	Lt. O’Dea’s Request to the Finance Personnel Constitutes a Public Records Request That Went Unfulfilled.....	43
4.	Lt. O’Dea’s Oral Requests to Chief Ramsdell and Asst Chief Wade Constituted Public Records Requests.....	44
F.	THE TRIAL COURT ERRED WHEN IT DENIED LT. O’DEA’S MOTION TO COMPEL.....	44
G.	THIS COURT SHOULD AFFIRM THE ATTORNEY FEES AWARDED BY THE TRIAL COURT AND GRANT ATTORNEY FEES ON APPEAL. ....	46
VI.	CONCLUSION.....	47

**TABLE OF AUTHORITIES**

**Cases**

Beal v. City of Seattle, 150 Wn.App. 865, 209 P.3d 872 (2009)..... 23, 44  
Davies v. Holy Family Hospital, 144 Wn.App. 483, 183 P.2d 283 (2008) ..... 24  
Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 273 P.3d 965 (2012)..... 13  
Germeau v. Mason County, 166 Wn.App. 789, 271 P.3d 932 (2012)..... 13, 14, 20  
Hobbs v. Washington State Auditor’s Office, 183 Wn.App. 925, 335 P.3d 1004 (2014)..... 39  
Holaday v. Merceri, 49 Wn.App. 321, 324, 742 P.2d 127 (1987) ..... 24  
Keck v. Collins, 184 Wn.2d 358, 357 P.3d 1080 (2015) ..... 12, 30  
Kitsap County Prosecuting Attorney’s Guild v. Kitsap County, 156 Wn.App. 110, 231 P.3d 219 (2010) 14  
Lake Chelan Shores Homeowners Ass’n v. St. Paul Fire & Marine Ins. Co., 176 Wn.App. 168, 313 P.3d 408 (2013)..... 13  
Lee v. Metro Parks Tacoma, 183 Wn.App. 961, 335 P.3d 1014 (2014)..... 12  
Sutton v. Tacoma Sch. Dist. No. 10, 180 Wn.App. 859, 324 P.3d 763 (2014) ..... 12  
Wade’s East Side Gun Shop, Inc. v. Dept. of Labor & Industries, 185 Wn.2d 270, 372 P.3d 97 (2016) .. 28  
West v. City of Puyallup, 2 Wn.App.2d 586, 410 P.3d 1197 (2018)..... 13  
West v. City of Tacoma, \_\_\_ Wn.2d \_\_\_, 456 P.3d 894 (2020)..... 21, 26, 27, 28  
Wood v. Lowe, 102 Wn.App. 872, 10 P.3d 494 (2000) ..... passim  
Yakima County v. Yakima Herald-Republic, 170 Wn.2d 775, 246 P.3d 768 (2011) ..... 13  
Yousoufian v. the Office of Ron Sims, 168 Wn.2d 444, 458, 229 P.3d 735 (2010) ..... passim

**Statutes**

RCW 42.17.320 ..... 17  
RCW 42.56.520 ..... 14  
RCW 42.56.550 ..... 29, 39, 47

**Rules**

CR 56 ..... 12

## **I. INTRODUCTION**

The Public Records Act mandates broad disclosure of public records, and state or local agencies have an affirmative duty to disclose public records upon request. Here, the City of Tacoma failed in its responsibilities to provide broad disclosure and act affirmatively to disclose public records when requested by Lt. O'Dea's counsel. Based upon the City's multiple failures, with full notice of the public records requests, the Court imposed a penalty. The penalty was well within the trial court's discretion and should be affirmed.

The City of Tacoma claims various errors, yet fails to support the claims by well reasoned argument, based on facts in this case, or case law. Rather, the City focuses on the amount of the penalty the court imposed as opposed to why the court imposed the penalty. Respectfully, just as no person is above the law, neither is the City of Tacoma. Respectfully, this Court should uphold the trial court's decision and affirm its judgment against the City.

The only issues where the trial court erred was when it ruled that the multiple requests Lt. O'Dea made for public records while he was on administrative leave from the Tacoma Police Department (TPD) were not public records requests. Given that TPD, through its legal advisor, was well aware of all of the public records requests Lt. O'Dea made, this Court should reverse the trial court's decision granting summary judgment in favor of the City. Additionally, the trial court erred when it denied Lt. O'Dea's motion to compel production of additional documents that had been requested but were never produced. Aside from these erroneous decisions, the trial court's judgment should be affirmed as it relates to penalties imposed and the reasons therefore, but remanded for purposes of compelling the City to produce all records requested and to determine the additional penalties to be imposed against the City for its failure to acknowledge and respond to all of Lt. O'Dea's public records requests.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted the City's motion for partial summary judgment concerning Lt. O'Dea's multiple public records requests. CP 439-42. (Finding of Fact 1)

2. The trial court erred when it denied Lt. O'Dea's motion to compel documents related to public records requests that remained unfulfilled. CP 1161-1162. (Findings of Fact 9-10)

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether an oral request constitutes a public records request when it specifically describes the document requested?

(Assignment of Error #1)

2. Whether an email request constitutes a public records request when it specifically describes the document requested?

(Assignment of Error #1)

3. Whether a request for Tacoma Police Department (TPD) policies and procedures constitutes a public records request when such policies and procedures are not contained within a TPD employee's employment or personnel file?

(Assignment of Error #1)

4. Whether a request for Tacoma Police Department (TPD) firearm sign-in sheets and training directives constitutes a public records request when such documents are not contained within a TPD employee's employment or personnel file?

(Assignment of Error #1)

5. Whether a request for Tacoma Police Department (TPD) civil service test materials for police captain assessment test constitutes a public records request when such documents are not contained within a TPD employee's employment or personnel file?

(Assignment of Error #1)

6. Whether a request for Tacoma Police Department (TPD) Department and bureau goals constitutes a public records request when such records are not contained within a TPD employee's employment or personnel file?

(Assignment of Error #1)

7. Whether a request for Tacoma Police Department (TPD) personal time off reports constitutes a public records request when such documents are not contained within a TPD employee's employment or personnel file?

(Assignment of Error #1)

8. Whether the trial court erred by denying Lt. O'Dea's motion to compel production of documents when the City's search for the requested documents was not adequate?

(Assignment of Error #2)

9. Whether the trial court erred when it failed to address the City's destruction of documents after it had notice of Lt. O'Dea's public records requests and litigation was ongoing?

(Assignment of Error #2)

#### **IV. STATEMENT OF THE CASE**

##### **A. Procedural History**

On November 9, 2017, the plaintiff, Lt. David O’Dea, filed a complaint for disclosure of public records against the City of Tacoma and City of Tacoma Police Department (TPD). CP 1-12. Attached to the complaint as exhibits were two public disclosure request letters, authored by Lt. O’Dea’s lawyer, dated March 24, 2017 and March 28, 2017, both of which had been mailed to TPD. CP 9-12, 330-31. On November 13, 2017, Lt. O’Dea filed a first amended complaint for disclosure of public records with the two exhibits again attached. Both complaints alleged multiple PRA violations related to various public records requests Lt. O’Dea made to individuals at the TPD and City of Tacoma as well as two specific violations related to the two public records request letters attached as exhibits. CP 15-26. The City filed its answer to the first amended complaint on December 22, 2017. CP 27-40.

On May 24, 2018, the City served discovery requests on Lt. O’Dea. CP 73-146. On June 29, 2018, Lt. O’Dea filed a motion for partial summary judgment, CP 41, a memorandum in support, CP 47-50, and declaration in support. CP 42-46. On July 3, 2018, the City moved for a continuance of the summary judgment motion asserting it could not respond to the motion because discovery requests were outstanding. CP 1167-1173, 1174-1188.

On September 6, 2018, the City of Tacoma filed a motion for summary judgment related to all of Lt. O’Dea’s PRA allegations except for the two PRA allegations related to the March 24 and March 28, 2017 letters. CP 51-72, 73-185, 186-289, 290-298, 299-301, 305-307, 302-304.

On September 24, 2018, the City responded to Lt. O’Dea’s motion for partial summary judgment. CP 308-318, 319-347, 348-352, 353-357. Lt. O’Dea responded to the City’s summary judgment motion on September 25, 2018. CP 358-361, 362-391, 392-403. On

October 1, 2018, both parties filed reply briefs to the respective motions. CP 404-410, 411-141, 415-420, 421-426, 427-428, 429-430.

On October 29, 2018, the court granted both party's summary judgment motions. CP 433-438, 439-442. In the order granting Lt. O'Dea's motion for summary judgment, the court held that based upon the City's receipt of the March 24, 2017 and March 28, 2017 letters attached to the November 9, 2017 complaint, the City had received notice, as of that date, of Lt. O'Dea's public records requests, and that by not responding to the requests the City violated the PRA. CP 437-439. In the court's order granting the City's motion, the court held that Lt. O'Dea's multiple requests made while he was on administrative leave were not for identifiable public records that would have mandated a response from the City pursuant to the PRA. CP 439-42.

On January 7, 2019, trial on penalties was held, 1/7/19 RP 1-58, for which both parties provided briefing. CP 475-487, 488-493, 494-507, 508-523, 524-531 . On February 6, 2019, the court entered its trial decision on the penalty to be assessed for the City's PRA violations. CP 583-585. On February 15, 2019, the City of Tacoma filed a motion for reconsideration with supporting documentation, which the court denied on March 5, 2019. CP 598-610, 611-678, 705.

On April 3, 2019, Lt. O'Dea filed a motion to compel and for additional sanctions for the City's failure to comply with the court's February 6, 2019 order requiring the City to produce additional documents and for a supplemental judgment. CP 713-715, 716-719. The City responded to Lt. O'Dea's motion to compel and for supplemental judgment on April 23, 2019. CP 741-753, 766-777. On June 28, 2019, the court denied Lt. O'Dea's motion to compel and entered findings of fact, conclusions of law, and a judgment in the amount of \$2,607,940.00. CP

1112-1116, 1117-1119. On July 23, 2019, the City filed its notice of appeal. CP 1125-1144. On July 30, 2019, Lt. O’Dea filed a notice of cross-appeal to the Court of Appeals. CP 1152-1163.

## **B. Facts**

### 1. Background

David O’Dea worked for TPD from 1994 through 2017. CP 16. In August 2016, Lt. O’Dea was involved in an officer involved shooting and was subsequently placed on administrative leave, pursuant to police policy. TPD took his Department issued computer, denied him entry to Department facilities, and ordered that he not access any Department records. Id. After being placed on leave, Lt. O’Dea individually, and also through counsel, made numerous public records requests for records related to his employment and for records after the investigation had been completed.

Between September 28, 2016 through July 31, 2017, Lt. O’Dea made numerous public records requests for TPD policies and procedures, firearms qualification sign-in sheets, testing material for the TPD police captain assessment process, TPD and bureau goals, a 911 call related to his officer involved shooting, a video and photographs related to the officer involved shooting, the power point presentation used at the Deadly Force Review Board, and documents surrounding Lt. O’Dea’s personal time off and sick leave. CP 16-20. Additionally, Lt. O’Dea’s counsel sent to the Tacoma Police Department, two public disclosure request letters dated March 24, 2017 and March 28, 2017. CP 23-26. None of Lt. O’Dea’s public records requests nor those made by his counsel were answered. CP 20. On November 9, 2017, Lt. O’Dea filed a complaint for disclosure of public records against the City of Tacoma and Tacoma Police Department, which complaint was amended on November 13, 2017. CP 1-12, 15-26.

The City answered Lt. O’Dea’s amended complaint on December 22, 2017. CP 27-40. Throughout the City’s answer, the City admitted that Lt. O’Dea made regular requests for records to various police individuals, but denied that the requests were recognizable as public records requests. CP 28-37. Additionally, although the City denied that it received the March 24 and March 28, 2017 letters attached to the complaint as Exhibits “A” and “B”, it admitted that the March 24 and March 28 letters referenced public records requests. CP 33. With respect to the various allegations concerning the numerous public records requests, the City did not claim that Lt. O’Dea filed a frivolous action or seek sanctions for filing a frivolous complaint. CP 38-39.

Although the City received the complaint on November 9, 2017, the City did not serve discovery requests until May 24, 2018, approximately 6 ½ asmonths later. CP 73, 75-249. Additionally, the City was fully aware of the public records requests detailed in the March 24 and March 28, 2017 letters received by the City as of November 9, 2017, as both the City of Tacoma’s legal counsel and TPD’s Chief Legal Advisor, Mike Smith, acknowledged such. CP 313, 348-352. Mr. Smith, who has represented TPD for twelve years, is primarily responsible to address all public records requests or any request that could conceivably be considered a public records request. CP 348-349. In a declaration dated September 24, 2018, he declared “[o]ur administrative staff is trained that any communication that could even conceivably construed as a PRA request is placed in my inbox (hard copy) for review.” CP 348-49. Additionally, Mr. Smith states “I review the language of any potential PRA request to confirm it is in fact a PRA request. If it is a PRA request, I immediately forward it to the Public Records Office for processing.” CP 349. Lisa Anderson is the Public Disclosure Analyst for the City of Tacoma, and has held that position for nine years. CP 359. Mr. Smith understands that if he receives a

public records request, he is required to forward it to Ms. Anderson so she can log it into the PRA system. CP 355-356.

Mr. Smith acknowledged that he saw the PRA requests dated March 24, 2017 and March 28, 2017 once the lawsuit was filed in November 2017. CP 351. Although Mr. Smith states that “[t]he City does not ignore PRA requests”, CP 352, he clearly ignored the March 24 and March 28, 2017 public records requests as set forth within the complaint and attached as exhibits, as he never forwarded the letters to Ms. Anderson. His purported “goal in responding to all requests for public records is to provide the documents sought by the requestor”, CP 352, did not occur in this case.

Additionally, the City acknowledged that once the complaint was filed, it reviewed the two public disclosure request letters. CP 351-352. For unknown and unexplained reasons, however, neither litigation counsel nor Mr. Smith, the TPD’s public records request expert, sent the March 24, 2017 and March 28, 2017 public disclosure requests to Lisa Anderson until August 24, 2018. CP 357.

Contrary to Mr. Smith’s declaration dated September 13, 2018, wherein he claims that the “City does not ignore PRA requests”, the City wholly ignored all of Lt. O’Dea’s PRA requests generally and specifically as set forth in the March 24, 2017 and March 28, 2017 letters. As noted by Ms. Anderson, she trains all City employees on the Public Records Act, yet at no time were any of the emails or text messages Lt. O’Dea sent to his TPD designated Points of Contact, which requests were acknowledged by his TPD designated Points Of Contact, ever forwarded to Ms. Anderson. CP 186-188, 290-291, 299-301, 302-304, 305-307. Although Lt. O’Dea’s various TPD designated Points of Contact acknowledged receipt of his multiple requests, they were largely ignored. CP 362-375. The City suggests Lt. O’Dea had access to

much of what he requested, but such suggestion is incorrect as Lt. O'Dea's access to any Department related material ended when Chief Ramsdell ordered Lt. O'Dea to surrender his Department issued computer which eliminated his access to the Department's internal website known as Cobweb. CP 362.

## 2. Trial

After the trial court ruled on the competing summary judgment motions, the court heard the penalty trial on January 7, 2019. RP 1-58. On February 6, 2019, the court entered its penalty decision for the City's PRA violations. CP 583-585. The court order awarded Lt. O'Dea \$39,500.00 in penalties for the PRA violation related to the March 24, 2017 public records request, and \$1,731,280.00 in penalties for the PRA violation for the March 28, 2017 public records request. CP 583-85. The court held as follows regarding the penalty:

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. Aggravating factors that warrant a penalty amount being imposed are that the Plaintiff had an administrative matter involving his employment where time was of 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.

CP 584-85. The court order also required the City to identify and produce additional records identified in the order:

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.

CP 585.

### 3. Post Trial

Although the court ordered the City to comply with the order of production within 30 days of its trial decision, the City failed to do so. Significantly, but at that time unknown, Lt. O'Dea subsequently learned that the City had been systematically destroying records that were relevant to the March 24 and March 28, 2017 records requests.

On March 12, 2019, Lt. O'Dea's wife, Beverly O'Dea, filed two separate public disclosure requests through the City's portal requesting copies of all annual reports filed by the City seeking the public records request log and also for copies of the City's and TPD's records retention log and associated disposition authority number. CP 910-911, 959-960. After reviewing the documentation received in response to these public disclosure requests, Lt. O'Dea learned that documents that had been previously requested had been destroyed based on instructions from, and with approval by, City Attorney Mike Smith, the TPD records retention coordinator. CP 911-912. Additionally, these records were also authorized to be destroyed by one of Lt. O'Dea's union representatives during his internal affairs investigation, Lt. Christopher Karl. CP 912.

Lt. O'Dea also recognized that numerous documents that had been requested still had not been produced, and aside from some of the records that had been destroyed, the City never explained where the other records were located or what efforts had been taken to locate these records. CP 720-740.

Part of the public disclosure requests that Lt. O'Dea sought were for training records. Upon review of the disposition numbers, it became clear that records that Lt. O'Dea sought had been destroyed during the period of time that the litigation ensued. CP 921-935.

When this matter was brought to the attention of the trial judge during the motion to compel and for additional sanctions, Lt. O’Dea’s counsel argued this finding to the court. Clearly there was a basis for the motion to compel which the court failed to grant.

Although the trial court properly awarded penalties for the City’s delay in producing documents, the trial court erred by not requiring the City to continue to search for documents based upon evidence provided by Lt. O’Dea.

**V. ARGUMENT**

**A. STANDARD ON MOTION FOR SUMMARY JUDGMENT.**

This Court reviews summary judgment orders de novo. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). On summary judgment, the appellate court construes all evidence and reasonable inferences in favor of the nonmoving party. Id. Summary judgment is appropriate when the record shows "no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law." CR 56(c); see Keck, 184 Wn.2d at 370.

A fact is material if it affects the outcome of a case. Keck, 184 Wn.2d at 370 n.8. A genuine issue of material fact exists if the evidence would be sufficient for a reasonable jury to find in favor of the nonmoving party. Id. at 370. "If reasonable minds can reach only one conclusion on an issue of fact, that issue may be determined on summary judgment." Sutton v. Tacoma Sch. Dist. No. 10, 180 Wn.App. 859, 865, 324 P.3d 763 (2014).

The party moving for summary judgment has the initial burden to show there is no genuine issue of material fact. Lee v. Metro Parks Tacoma, 183 Wn.App. 961, 964, 335 P.3d 1014 (2014). A moving party can meet this burden by showing that there is an absence of evidence to support the responding party’s claim. Id. Once the moving party has made such a showing, the burden shifts to the responding party to set forth specific facts that show a genuine

issue of material fact. See Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 169, 273 P.3d 965 (2012). Summary judgment is appropriate if the responding party fails to show sufficient evidence to establish the existence of an element essential on which he or she will have the burden of proof at trial. Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn.App. 168, 179, 313 P.3d 408 (2013).

#### B. PUBLIC RECORDS ACT LEGAL PRINCIPLES.

“The PRA presents a mandate for the broad disclosure of public records.” West v. City of Puyallup, 2 Wn.App.2d 586, 592, 410 P.3d 1197 (2018). “RCW 42.56.030 directs that the PRA be liberally construed in favor of disclosure.” Id. Further, a “state or local agency has an affirmative duty to disclose public records upon request unless the PRA or another statute exempts the records from disclosure.” Id.

RCW 42.56.010(3) defines a " public record" as consisting of three elements: (1) " any writing" (2) " containing information relating to the conduct of government or the performance of any governmental or proprietary function" (3) " prepared, owned, used, or retained by any state or local agency." See Nissen v. Pierce County, 183 Wn.2d 863, 879, 357 P.3d 45 (2015). All three elements must be present for information to constitute a public record.

Id.

“The PRA must be ‘liberally construed and its exemptions narrowly construed’ to ensure that the public’s interest is protected.” Germeau v. Mason County, 166 Wn.App. 789, 802, 271 P.3d 932 (2012). “In construing the PRA, [the court looks] at the act in its entirety in order to enforce the law’s overall purpose.” Id. “The PRA is a ‘strongly worded mandate for broad disclosure of public records.’” Yakima County v. Yakima Herald-Republic, 170 Wn.2d 775, 791, 246 P.3d 768 (2011). “The purpose of the PRA is to ‘ensure the sovereignty of the people and the accountability of the governmental agencies that serve them’ by providing full access to

information concerning the conduct of government.” Kitsap County Prosecuting Attorney’s Guild v. Kitsap County, 156 Wn.App. 110, 118, 231 P.3d 219 (2010).

“Under the PRA, all state and local agencies must disclose any public record upon request unless the record falls under a statutory exemption.” Germeau, supra, at, 803. An agency must respond within five business days of receiving a public records request. See RCW 42.56.520. The PRA “only applies when public records have been requested. In other words, public disclosure is not necessary until and unless there has been a specific request for public records.” Wood v. Lowe, 102 Wn.App. 872, 876-77, 10 P.3d 494 (2000).

On June 29, 2018, Lt. O’Dea moved the court for partial summary judgment related to the March 24, 2017 and March 28, 2017 public records requests letters that had been previously submitted to the TPD. Although clearly the City had received the documents as of November 9, 2017, as they were attached as exhibits to the complaint, the City never responded. CP 41, 42-46, 47-50.

In its summary judgment response, the City argued that because Lt. O’Dea could not establish that the City had received the requests, the obligations under the PRA were not triggered. CP 308-317. In support, the City submitted affidavits of Lisa Anderson and Michael Smith. CP 353-357, 348-352. In the City’s response, the City details that it had no record of the PRA requests being received and/or logged by the City. Unfortunately, such claim is difficult to refute based on the self report by those in charge of acknowledging receipt.

Importantly, however, the City, in its responding materials, stated as follows “the first time that either the City’s Public Records Office or the Tacoma Police Department became aware of the two letters that are the focus of this motion was when Plaintiff filed the instant lawsuit, and the letters were attached as exhibits thereto.” CP 3110.

Clearly, the City received the requests. While ignoring its responsibilities under the PRA, the City details the discovery requests to Lt. O’Dea, the first of which began on May 24, 2018, and then again on August 24, 2018, when the City deposed Lt. O’Dea’s counsel’s paralegal who mailed the letters. After the deposition concluded, the City “formally” acknowledged receipt of the public records requests and submitted them to the Public Records Officer, Lisa Anderson. CP 312. The City has never provided any rational explanation as to why it waited 9 ½ months before tendering these documents to Ms. Anderson for responses, particularly given the City’s claimed proficiency of addressing all potential public records requests.

The City does not, and cannot, dispute that the letters, on their face, are public records requests but claims that “had they been actually received by the City prior to this action being initiated, the City’s obligation to promptly respond under RCW 42.56.520 would have been triggered.” CP 313-314. The City seeks to justify its failure to respond to these requests, arguing “no credible evidence to establish the City received the requests at issue.” CP 314. The City outlines the case law and statutory mandates that impose a duty on an agency to “promptly respond” to requests once they are received. CP 314. Yet, the City rationalizes its noncompliance by arguing that filing “the complaint itself is not a request for identifiable public records under RCW 42.56.080 and it did not request identifiable public records.” The City cites no authority for this claim. CP 315.

The City’s argument that the March 24 and 28, 2017 letters “did not request identifiable public records” or as it now argues on appeal, that the public records requests were “ambiguous”, lacks credulity. Its further assertion that “[t]he 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” is unpersuasive. See City’s brief at 19. Given the “strongly worded mandate for broad disclosure of public records” and given the City’s pronouncement, per Mike Smith, that the TPD “staff is trained that *any* communication that could even conceivably be construed as a PRA request is placed in his inbox” and is treated as a PRA request, the City’s failure to respond to these letters after receipt on November 9, 2017, and even later when Lt. O’Dea’s summary judgment motion was filed on June 18, 2018, related to the letters, is nonsensical. CP 349. What also lacks explanation is why Mr. Smith failed to forward these requests to Ms. Anderson when he first saw the letters when the complaint was filed in November 2017.

Lisa Anderson, Public Disclosure Analyst for the City of Tacoma, outlines the City’s robust system for responding to PRA requests. Unfortunately, such robust system wasn’t used in this case because two separate individuals, trial counsel and Mike Smith, the TPD legal advisor and PRA specialist, had notice of the letters when the lawsuit was filed, yet failed to forward to Ms. Anderson. The City fails to explain why service of the complaint with the letters attached, on two separate occasions, did not constitute sufficient notice to the City of Lt. O’Dea’s public records requests or why it was necessary to wait 9 ½ months before these letters were submitted to Lisa Anderson as public records requests. Respectfully, the City’s unsupported claim that the City never received these letters nor received fair notice of the PRA requests is without merit. Further, the City’s claim that the City had to “conduct due diligence into these claims” before treating them as public records requests is also without merit as the City failed to exercise any diligence in this matter, which, in fact contradicts their own policy.

As this Court is aware, case law mandates broad disclosure of public records and a liberal construction of the PRA. The actions of defense counsel in Wood v. Lowe, supra, is instructive.

Plaintiff Wood received a letter from the County on April 2, 1999, placing her on administrative leave and informing her that she would be terminated if she did not resign before the termination date. Ms. Wood, through her attorney, requested her personnel file by letter on April 14, 1999. The letter, which was hand delivered, included Ms. Wood's authorization to provide "all records, opinions, photostatic copies, abstracts or excerpts of any records or any other information or document to her attorney." Wood, 102 Wn.App. at 875. Neither the letter nor the authorization, however, indicated that Ms. Wood was making the request pursuant to the Public Records Act.

Defendant believed that plaintiff was requesting her personnel file pursuant to RCW 49.12.250, which states that an employer must provide an employee with access to his or her personnel file "within a reasonable period of time" of the employee's request. This provision contrasts with the PRA which requires an agency to "respond" within five business days of receiving a request for public records. See RCW 42.17.320.

On April 26, 1999, plaintiff filed an ex parte motion to show cause why defendant had not produced the requested documents. The first time the defendant and his attorney realized Ms. Wood was making a PRA request was when they received the court's show cause order. The next day, on April 27, 1999, the file was made available to plaintiff. After a hearing, the trial court denied Ms. Wood's claim for attorney's fees and costs and sanctions under the PRA ruling that Ms. Wood's request was ambiguous and it was not clear her request was pursuant to the PRA rather than a less time-sensitive personnel request pursuant to RCW 49.12.250. Wood, supra, at 876.

Upon affirming the trial court, the Court of Appeals nevertheless stated that "[m]indful of the PDA's broad mandate favoring disclosure, we will not require requests to specifically cite the

act.” Wood at 878. The court noted that Wood authorized release of the generally privileged information to effectuate her receiving her file and as such, her request for her personnel file was not a request for an identifiable public record as contemplated under the PDA. Id. at 880.

The significance of Wood is that it illustrates that after the request was made, and the lawsuit and show cause motion were filed, the lawyer representing the defendant recognized that the plaintiff believed the letter was a public records request. Although the Wood court ruled that the letter was not a valid PRA request because of the nature of the letter and the authorization accompanying it, the prompt action by the defendant in Wood illustrates the proper action to take when even a questionable request might be a public records request.

Here, the City argues that once the City denied it had received the PRA letters in its answer to the complaint, it was incumbent upon Lt. “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 that the City never received and properly denied -- but rather as *new* PRA requests.” City’s brief at 23. The City goes on to claim that since the old requests were properly denied, they had no legal right to rely upon them as new requests.

Respectfully, the City’s argument makes no sense. First, the letters are clearly public records requests. They were not ambiguous requests as referenced by any of the cases cited by the City. Second, the lawsuit clearly made a claim against the City for the City’s failure to respond to all public records requests set forth in the complaint, and specifically for the two letters attached as exhibits. To suggest that the letters were buried in the complaint is absurd. Third, Lt. O’Dea brought a summary judgment motion in June 2018 related to the City’s failure to produce records. Given that all three circumstances gave the City fair notice, to suggest the

City had no legal duty to rely on these letters is completely nonsensical given the broad and liberal disclosure requirements set forth by the PRA. The prudent and logical response would have been to log these requests immediately upon their receipt in November 2017, particularly given the claimed superior knowledge and information that the TPD Legal Advisor, Mike Smith, possessed with respect to PRA requests. To simply ignore these letters for 9 ½ months makes no sense and such inaction completely frustrates the Public Records Act's open disclosure purposes. Respectfully, the letters' status was not legally ambiguous, and nothing within the letters suggests any ambiguity. As such, this Court should affirm the trial court's ruling granting Lt. O'Dea's motion for partial summary judgment related to the March 24 and March 28, 2017 letters.

1. The City Received Fair Notice of Lt. O'Dea's Public Records Requests.

As referenced above, the City argues that it did not receive "fair notice" of Lt. O'Dea's public records requests. Such claim is inconsistent with the court's summary judgment ruling, and inconsistent with common sense, because the City acknowledged that "[t]he first time that either the City's Public Records Office or the Tacoma Police Department became aware of the two letters . . . was when Plaintiff filed the instant lawsuit, and the letters were attached as exhibits thereto." CP 311. Based upon the undisputed "receipt" of the letters in November 2017, the City of Tacoma clearly received these documents as did Ms. Anderson and the City's Public Records Office, which falls within the City Legal Department. That they failed to log the request into their PRA system is an error of their own making, not something chargeable to Lt. O'Dea. Further, the City clearly received "fair notice".

There is no single, comprehensive definition of " fair notice" for PRA purposes. Wood, 102 Wn.App. at 878, 10 P.3d 494. Cases from our Supreme Court and Divisions One and Three of our court have advanced factors that comprise " fair notice." These factors fall under two broad categories: (1) characteristics of the request itself, and (2) characteristics

of the requested records. We examine each category and their accompanying factors in turn.

Germeau, 166 Wn.App. at 805. Lt. O’Dea’s requests satisfy both broad “fair notice” categories.

*a. Characteristics of the Request*

The first group of "fair notice" factors concerns the characteristics of the request itself which involves (1) the request’s language, (2) it’s format, and (3) the recipient of the request. “Although ‘fair notice’ does not require the requestor to cite the PRA in his request, the request must state with sufficient clarity that it is a request for a public record and ‘give the agency fair notice that it has received’ a PRA request.” Germeau, at 806. Here, the City acknowledged that the March 24 and March 28, 2017 letters on their face were public records requests, which they clearly received.

*b. Characteristics of Requested Records*

The second group of “fair notice” factors concerns the characteristics of the requested records themselves: (1) whether the request was for specific records, as opposed to information about or contained in the records, (2) whether the requested records were actually public records, and (3) whether it was reasonable for the agency to believe that the requestor was requesting documents under an independent non-PRA authority. Germeau, at 807.

Again, the PRA requests dated March 24 and 28, 2017, are for specific public records and there was nothing ambiguous about the requests. Accordingly, based upon either set of “fair notice” factors, the City not only had fair notice, but ample notice, of Lt. O’Dea’s public records requests.

*c. Filing of the Lawsuit Gave the City Fair Notice of the Public Records Requested.*

The gravamen of the City’s appeal is that it did not “receive” identifiable public records requests even though the letters were attached to Lt. O’Dea’s complaint and amended complaint

in November 2017. Respectfully, such claim lacks merit because of Washington's notice pleading standard and also because, clearly, the City received these public records requests.

Washington is a notice pleading state, meaning that a simple, concise statement of the claim and relief sought is sufficient." CR 8(a). Pleadings are to be liberally construed to allow for a decision on the merits. . . . Complaints that fail to give the opposing party fair notice of the claims are insufficient . . . Unclear pleadings may be clarified during the course of summary judgment proceedings.

West v. City of Tacoma, \_\_\_ Wn.2d \_\_\_, 456 P.3d 894, 906 (2020).

In West, the requestor sought various documents from the City of Tacoma alleging that the City had failed to produce records, failed to conduct a reasonable search, and failed to assert valid exemptions and a valid privilege log. The court, in finding West had provided fair notice held as follows:

We hold that West's complaint gave the City fair notice that the lawsuit asserted claims regarding records in addition to those identified as redacted in the 2014 privilege log. West not only alleged that the City wrongfully failed to meet expectations, he also alleged the City denied disclosure of records, failed to produce records, and failed to reasonably search for records. West's complaint was not limited to the redacted records identified in the 2014 privilege log. Further, West's filings at the summary judgment stage clarified the records he sought the trial court to resolve.

Id. at 906.

Lt. O'Dea filed his Public Records Act lawsuit on November 9, 2017. CP 1-12. The City proudly boasts that all City employees have training in the Public Records Act, yet no acknowledgment was ever made by the City, even though trial counsel and Mr. Smith acknowledged receipt of the PRA letters attached to the complaint and amended complaint. Clearly the City received the letters and understood the lawsuit surrounded the City's failure to respond to all of Lt. O'Dea's public records requests, including, among others, the March 24, 2017 and March 28, 2017 letters attached to the complaint. For the City to argue that no public records requests were made, which forms the basis of the lawsuit and were specifically designated in the March 24, 2017 and March 28, 2017 letters, is disingenuous. In the prayer for

relief, a specific request was made asking the trial court to order production of all records requested, none of which had been produced. How such request for relief can be construed as “ambiguous” defies logic or common sense.

The Public Records Act codified at RCW 42.56 in no way suggests that the City, once documents have been specifically requested, regardless of how they are received, and of which the City has direct notice and upon which is the basis of the lawsuit, can ignore such requests.

In addition to filing the lawsuit, the City received subsequent notice that Lt. O’Dea claimed a Public Records Act violation upon filing the June 29, 2018 motion for partial summary judgment, yet throughout, the City ignored its responsibility to respond. Given that the City failed to timely respond to Lt. O’Dea’s request, this Court should affirm the trial court’s decision.

*d. The City Received PRA Notices Yet Failed to Acknowledge and/or Respond To.*

The City asserts that it had no duty to respond to any of Lt. O’Dea’s public records requests, including those contained in the March 24, 2017 and March 28, 2017 letters attached to Lt. O’Dea’s complaint, which clearly alleged violations of the Public Records Act. The declaration signed by TPD Legal Advisor, Mike Smith, illustrates the lack of merit of the City’s claim.

Within his declaration, Mr. Smith acknowledged that he was aware of the lawsuit and the two public records requests set forth within the March 24 and March 28, 2017 letters when the case was filed. CP 351. Although the City, in its answer, generally denied that it received the letters, the City clearly received the March 24 and March 28 letters, at the latest, as of the date they received the complaint. Additionally, when Lt. O’Dea filed his June 2018, summary

judgment motion based, in part, upon these letters, the City's claim that it did not realize that such letters constituted a PRA request becomes even weaker.

Additionally, there was nothing "legally ambiguous" about the PRA requests set forth in the March 24 and 28 letters. The letters were not oral requests as set forth within Beal v. City of Seattle, 150 Wn.App. 865, 209 P.3d 872 (2009), nor were the letters sent to a former boss requesting a personnel file as discussed in Wood v. Lowe, supra. Here, the letters were clearly titled as Public Records Requests, were unambiguous, and set forth a list of documents requested on behalf of Lt. O'Dea. TPD's Chief Legal Advisor, Mike Smith, who claims to treat every potentially cognizable request as a public records request, had personal notice of two valid, recognizable public records requests that were attached to the complaint and amended complaint, yet took no action. Additionally, the City Attorney defending the case never suggested any ambiguity as to whether the letters constituted a public records request. The City's defense was that it never received the March 24 and March 28, 2017 letters, contrary to the evidence substantiating otherwise. But once the City undeniably received these letters on November 9, 2017, the City was on notice of the content of the public records requests and had an obligation to respond. The lawsuit's focus was the City's failure to respond to the public records requests and nothing ambiguous existed in the records requested. Respectfully, the City simply ignored these unambiguous records requests in direct violation of RCW 42.56.520 and 42.56.080(2).

The City also suggests that it was "incumbent upon the City's attorney . . . who after all was defending the City against Lt. O'Dea's meritless claims . . . to conduct due diligence into those claims." City's brief at 22. The City's "due diligence", however, consisted of no action for over six months until the City forwarded discovery requests in May 2018, and also consisted of no action after Lt. O'Dea's June 2018 partial summary judgment motion against the City for

its failure to respond to the public records requests. Not until after the August 24, 2018 deposition of counsel's paralegal did the City take any action to treat the letters as the public records requests that they were. How the City can claim that it "acted in good faith" with "due diligence" and also claim it never received the public records requests is unsupported.

Additionally, there is no law to support the City's claim that it "acted in good faith" in treating the "legally ambiguous complaint exhibits" as evidence of a prior PRA claim. Further, to suggest that the City's attorney defending the case had a conflict of interest had she done anything other than defend the City's position is unsupportable. Had the City's legal counsel or Mike Smith, the PRA expert, forwarded the letters, upon receipt, to Ms. Anderson, such action would have eliminated the problems they now complain about. Their collective failure to do so increased, substantially, the financial damage they now claim. The City's failure to respond and act appropriately exacerbated the issue. Respectfully, the trial court's ruling that the City had fair notice of the public records requests in November 2017, was appropriate, and this Court should affirm the trial court's decision.

#### C. THE TRIAL COURT'S DENIAL OF RECONSIDERATION WAS APPROPRIATE.

The City raises as error the court's denial of the City's motion for reconsideration. Respectfully, the City's claim is without merit.

This Court "review[s] a trial court's denial of a motion for reconsideration for abuse of discretion." Davies v. Holy Family Hospital, 144 Wn.App. 483, 497, 183 P.2d 283 (2008). "A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons." Id. "An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court." Holaday v. Merceri, 49 Wn.App. 321, 742 P.2d 127 (1987).

CR 59(a) sets forth grounds on which a court may grant a motion for reconsideration. Aside from citing, generally, to CR 59, the City did not set forth what, if any, grounds support its motion.

Throughout its appeal, the City claims the March 24 and March 28, 2017 public request letters were “ambiguous” and “lacked clarity”, and further asserts that the City did not receive the PRA requests. The City’s claim relies on semantics. Without question, the City received the PRA requests with the filing of the complaint in November 2017. The City’s assertion that it treats *any request* as a public records request, and acknowledges that the letters, themselves, constituted public records requests, establishes that the City’s claim that the requests were ambiguous is unfounded. Further, given the court’s discretion on motions to reconsider, and given that the City failed to submit new or additional information that could not have been submitted in response to the summary judgment motions, the trial court did not abuse its discretion by denying the City’s motion for reconsideration.

**D. THE TRIAL COURT PROPERLY AWARDED PENALTIES FOR THE CITY’S FAILURE TO RESPOND TO LT. O’DEA’S PUBLIC DISCLOSURE REQUESTS.**

The City argues that this Court should reverse the trial court’s penalty assessment because Beal, Lowe and Germeau, supra, contradict what the trial court did. Respectfully, the trial court’s ruling did not conflict with any of those cases.

The trial court granted the City’s summary judgment motion with respect to the various requests Lt. O’Dea made through his TPD Designated points-of-contact while on administrative leave, which ruling is further addressed in the cross-appeal in this matter. The trial court did not run afoul of the rulings in the aforementioned cases because no ambiguity exists as to the public records requests in the March 24 and March 28, 2017 letters. Once the City received the requests, as of November 9, 2017, the City was required to act appropriately, particularly given

the City's purported practice in how it addresses public records requests. The trial court was well within its discretion in awarding penalties in this case. The City now expresses concern over the amount of the penalties but fails to recognize that both the City and Lt. O'Dea agreed that a \$10.00 per day per document penalty was appropriate, which recommendation the court followed. CP 589. That the penalty totaled \$2.6 million was a result that was completely within the City's control as it failed to appropriately address the PRA requests. Given that the per day amount is at the low end of the scale, was based on the City's own recommendation, and is the same recommendation the City has made in past PRA cases, supports the conclusion that there is nothing abusive in the manner in which the court addressed the penalties. The City's request for a penalty of \$10.00 per day is consistent with its requests in other comparable cases. See West v. City of Tacoma, supra (City recommended \$10.00 per day penalty for PRA violations).

1. The Trial Court Appropriately Found that the City's Later Searches Were Inadequate.

The City takes issue with the court awarding additional penalties for the City's failure to conduct an adequate search for the records requested and also takes issue with the trial court's Finding of Fact 8 which supports the City's inadequate search. CP 1114. Lt. O'Dea's declaration was submitted for the court's consideration at the trial to be held on January 6, 2019 and in response to the City's assertion that it satisfied the March 28, 2017 public records request. CP 494-507. In Lt. O'Dea's declaration, he reviewed the materials that had been provided by the City and then detailed what had not been provided although duly requested in the March 28, 2017 request. That the court ordered an additional search for and production of records, and that additional records were produced supports the court's finding that the City was liable for additional penalties, and such finding was not an abuse of discretion, particularly since the City's initial search was not adequate as it alleged. In fact, the opposite is true.

This is not the first time the adequacy of the City's public records search has been questioned as noted in West v. City of Tacoma, *supra*. There, the plaintiff made a request under the Public Records Act to the City of Tacoma. Deputy City Attorney Michael Smith, the same individual in this case, also conducted a search for West's requests. This Court, in assessing the search conducted by Mr. Smith, stated as follows: "The PRA requires an adequate search to properly disclose responsive documents." *Id.* at 914. "The lack of an adequate search prevents adequate response and production." "Accordingly, because the PRA considers the failure to properly respond is a violation, the failure to adequately search is also considered a violation."

Id.

The failure to adequately search for responsive documents is a violation of the PRA. Neighborhood All. v. County of Spokane, 172 Wn.2d 702, 721, 724, 261 P.3d 119 (2011). A search for records pursuant to a PRA request must be "reasonably calculated to uncover all relevant documents." Neighborhood All., 172 Wn.2d at 720, 261 P.3d 119. Reasonableness is dependent on the facts of each case. Neighborhood All., 172 Wn.2d at 720, 261 P.3d 119. An agency must search more than one place if there are additional sources for requested information. Neighborhood All., 172 Wn.2d at 720, 261 P.3d 119. However, 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." Neighborhood All., 172 Wn.2d at 720, 261 P.3d 119 (alteration in original). Further, 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).

We conduct a fact-specific inquiry to determine if a search is reasonable. Neighborhood All., 172 Wn.2d at 720, 261 P.3d 119. We review the scope of the agency's search as a whole and whether that search was reasonable, not whether the requester has presented alternatives that he believes would have more accurately produced the records he requested. Hobbs v. State, 183 Wn.App. 925, 944, 335 P.3d 1004 (2014). 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. Neighborhood All., 172 Wn.2d at 720, 261 P.3d 119. An agency does not have a duty under the PRA to produce records that do not exist at the time of the public records request. Zink v. City of Mesa, 162 Wn.App. 688, 718, 256 P.3d 384 (2011).

Id. at 913-14.

In finding the search inadequate, the court stated as follows:

The City's search was not adequate beyond a material doubt. Smith's belief that asking for a "record" instead of a "communication" prevented an adequate search of City e-mails. A record is any writing, and any writing includes e-mail communications. Former RCW 42.56.010(3)-(4) (2010). A request for "records" necessarily includes e-mails. Further, Smith's interpretation of West's 2014 request was that it did not include the City's coordinated responses to reporters seeking CSS information because West only requested records about the "acquisition, use, or operation" of CSS technology. However, Smith's interpretation of West's 2014 request was narrower than its language. West requested records "concerning any agreements, policies, procedures, or understandings related to the acquisition, use, or operation of stingray technology." CP at 9. Because Smith's failure to conduct an e-mail search in response to West's 2014 request and because Smith restricted West's 2014 request to less than its actual wording, we hold that the City's search was not adequate beyond a material doubt.

West v. City of Tacoma, 456 P.3d at 914-915.

Here, the trial court held that the City's search, and contrary to its claim that the searches were exhaustive, was not adequate. Although, the City submitted declarations explaining its effort, simply stated, it did not conduct a reasonable search for the documents requested, and Lt. O'Dea pointed out this fact to the court, which the court accepted. Accordingly, the court's Finding of Fact 8 is not erroneous, and the court did not err in failing to afford the City's declarations "any presumption of good faith." The court provided the City's declarations the merit they deserved. Respectfully, the court did not err.

Given that the trial court properly found a PRA violation, the next phase is to determine the appropriate penalties. Respectfully, as this Court is aware, penalties are within the trial court's discretion. Wade's East Side Gun Shop, Inc. v. Dept. of Labor & Industries, 185 Wn.2d 270, 372 P.3d 97 (2016). The trial court's imposition of all penalties against the City were clearly within the trial court's discretion, and this Court should affirm.

2. This Court Should Affirm the Trial Court's Penalty Award for the City's PRA Violation.

"Determining a PRA penalty involves two steps: '(1) determine the amount of days the party was denied access and (2) determine the appropriate per day penalty . . . depending on the

agency's actions.” Yousoufian v. the Office of Ron Sims, 168 Wn.2d 444, 229 P.3d 735 (2010).

The trial court retains discretion to award attorney's fees and costs as well as a penalty up to “one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.” See RCW 42.56.550(4). As this Court is aware, “the PRA penalty is designed to ‘discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute.’” Yousoufian, 168 Wn.2d at 459.

[T]he PRA provides no specific indication of how a penalty is to be calculated. It does, however, provide a “strongly worded mandate for broad disclosure of public records.” Hearst Corp., 90 Wn.2d at 127, 580 P.2d 246. The PRA directs us to liberally construe it “to assure that the public interest will be fully protected.” RCW 42.56.030. Its command is unequivocal: “Responses to requests for public records *shall be made promptly by agencies* ....” RCW 42.56.520 (emphasis added). Additionally, where the PRA is violated, trial courts must award penalties . . .” Yousoufian II, 152 Wn.2d at 433, 98 P.3d 463.

The PRA is a forceful reminder that agencies remain accountable to the people of the State of Washington:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

...

At the outset of any penalty determination, a trial court must consider the entire penalty range established by the legislature. . . . This eliminates the perception of bias associated with presuming any “starting point” within the statutory range for penalty determinations. Such a presumption is unsupported by the PRA because its penalty provision does not prescribe how trial courts are to determine a penalty; it merely sets the minimum and maximum per day amounts. See RCW 42.56.550(4). . . . Trial courts may exercise their considerable discretion under the PRA's penalty provisions in deciding where to begin a penalty determination. RCW 42.56.550(4).

Yousoufian, 168 Wn.2d at 465-66.

“When determining the amount of the penalty to be imposed ‘the existence or absence of [an] agency’s bad faith is the principal factor which the trial court must consider.’”

Yousoufian, 168 Wn.2d at 460. “However, no showing of bad faith is necessary before a penalty is imposed on an agency . . .” Id. at 461.

“[A] strict and singular emphasis on good faith or bad faith is inadequate to fully consider a PRA penalty determination.” Yousoufian, 168 Wn.2d at 461.

The Supreme Court has also stated economic loss to the requesting party and public importance of the underlying issue to which the request relates can be relevant factors to increase penalties. Yousoufian, 168 Wn.2d at 461-62. “[I]t is appropriate to increase penalties as a deterrent where an agency’s misconduct causes a requestor to sustain actual personal economic loss.” Id. at 461.

“[G]overnmental intransigence on an issue of public importance is a relevant consideration in establishing the penalty for a PRA violation.” Yousoufian, 168 Wn.2d at 462. “An agency should not be penalized under this factor, however, unless the significance of the issue to which the request is related was foreseeable to the agency.” Id. “[The lack of actual public harm resulting from [an agency’s] misconduct is irrelevant to its penalty.” Id. Finally, “the purpose of the PRA’s penalty provisions is to deter improper denials of access to public records. . . . The penalty must be an adequate incentive to induce future compliance.” Id. 168 Wn.2d at 462-63.

In our view, mitigating factors that may serve to 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 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 agency systems to track and retrieve public records.

Conversely, aggravating factors that may support increasing 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 case.

Yousoufian, 168 Wn.2d at 467-68.

“The trial court’s determination of appropriate daily penalties is properly reviewed for an abuse of discretion.” Yousoufian at 458. “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons.” Id. “A trial ‘court’s decision is “manifestly unreasonable” if “the court, despite applying the correct legal standard to the supported facts adopts a view ‘that no reasonable person would take.’” Id. at 458-59.

Here, the trial court, in its decision, set forth the factors it determined supported the penalty award. Significantly, the court had the discretion to award between \$0.00 and \$100.00 per day per document in penalties. Largely, the court’s role of setting the per day penalty amount was eliminated as both parties agreed that a \$10.00 per day penalty was appropriate. CP 486. As such, the City’s argument that the \$10.00 per day per document penalty the court imposed was inappropriate is a curious argument when the City advocated for that amount. CP 486. Given that the parties agreed on the daily amount, the only question is whether the trial court abused its discretion in setting the award. Again, giving great deference to the trial court’s decision, the trial court did not abuse its discretion.

The City criticizes the trial court’s decision because the sanctions exceed \$2.6 million. Aside from the amount, the City fails to cogently explain why this penalty signifies an abuse of

the trial court's discretion. As this court is well aware, Yousoufian held as follows when reviewing a trial court's decision.

Our multifactor analysis is consistent with the PRA and our precedents and provides guidance to trial courts, more predictability to parties, and a framework for meaningful appellate review. We emphasize that the factors may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate considerations. Additionally, no one factor should control. These factors should not infringe upon the considerable discretion of trial courts to determine PRA penalties.

Yousoufian, supra, at 468. Respectfully, this Court should affirm the trial court's order.

*a. Principal Factors*

As set forth above, this Court affords great deference to the trial court when setting a penalty, and both parties agreed that the penalty the court should set would be at \$10.00 per day per document. CP 486, 491. Although the City argues that the court was required to consider all of the principal factors set forth by Yousoufian, they are merely advisory. Although Lt. O'Dea respectfully urges this Court to affirm the trial court's decision, he addresses the various principle factors raised by the City.

*i. Bad Faith*

Although it is true that the court found no bad faith, the lack of a finding of bad faith does not preclude the court from imposing a penalty. As Yousoufian stated, "no showing of bad faith is necessary before a penalty is imposed on an agency." Yousoufian, 168 Wn.2d at 460. As such, that the court did not find bad faith is irrelevant to its penalty imposition.

*ii. Economic Loss*

The City misunderstands the purposes of the PRA penalty. No requirement exists that there be a showing of economic loss before a penalty can be imposed. A PRA penalty is properly imposed to prevent a failure of disclosure of records and to "encourage adherence to the

goals and procedures dictated by the statute.” Yousoufian, 168 Wn.2d at 459. Again, economic loss is not necessary for the court to impose a penalty.

iii. Public Importance

As Yousoufian states, “the lack of actual public harm resulting from the county’s misconduct is irrelevant to its penalty.” Yousoufian, 168 Wn.2d at 462. Here, the court noted that the materials were significant to Lt. O’Dea. Per Yousoufian, lack of actual public harm is irrelevant to its penalty.

iv. Deterrence

Clearly, this penalty was meant to deter the City from further misconduct. As opposed to accepting responsibility for its inactions, the City suggests it was fooled by a “ruse” and that this “ruse” “militates against imposing penalties.” City’s brief at 33. It is unclear what “ruse” the City refers to as the PRA letters were clear in what they sought, and the complaint clearly sought relief for the City’s failure to act. Although the City boasts about its robust program for complying with PRA requests, no evidence supports any finding that this robust program became active until the court ruled that the letters were valid PRA requests and issued a penalty. That the City effectively sat on its hands for 9 ½ months before the court ruled does not mitigate against the penalties. As such, deterrence was an appropriate factor for the trial court to consider.

b. *Mitigating Factors.*

Yousoufian also listed mitigating and aggravating factors a court might consider to decrease a penalty. Although the City argues that the court was required to address all potentially mitigating factors, the City fails to recognize that the trial court is not required to address any factors before setting an award, or explain why these factors should reduce the

penalty the court imposed when the City suggested that a \$10.00 per day per document penalty, which is at the lower end of the range, was appropriate.

Although Lt. O’Dea asserts this Court should affirm the trial court’s decision, he addresses the purported mitigation issues only because they are raised by the City.

i. Clarity of the March 24, 2017 and March 28, 2017 PRA Requests.

Without explanation, the City argues that the March 24 and March 28, 2017, letters lacked clarity because they were ambiguous, yet fails to explain what part of each letter was unclear or ambiguous. The City acknowledged receipt of both letters and acknowledged that both letters were titled as public records requests. Respectfully, no ambiguity exists and the letters do not lack clarity. The only unclear question is why the City failed to respond to the letters upon receipt. Lack of clarity is not an issue as neither letter is ambiguous.

ii. The Agency Never Sought to Clarify the PRA Request or Act Promptly.

The City argues that because it did not receive the March 24 and March 28, 2017 letters when they were mailed, but ultimately logged the requests into the PRA system 9 ½ months after receipt of the letters, such conduct mitigates their behavior because of the prompt response. Nothing could be further from the truth, and the City did not act promptly at any time. Additionally, it is unclear as to what “good faith” defense litigation the City engaged in when it simply served standard discovery requests six months after the lawsuit was filed and deposed Lt. O’Dea’s counsel’s paralegal nine months after the lawsuit was filed, yet still failed to acknowledge receipt of the letters until August 24, 2018. CP 357.

Further, how a 9 ½ month delay corresponds to a “prompt response” is also not explained since the City had notice of the public records request in November 2017. As such, the claim that the City’s “attempt to clarify and prompt response” mitigating factor is non-existent.

iii. The City's Strict Compliance with PRA Procedural Requirements and Exceptions.

The City blames the trial court for not clarifying what actions the City's legal counsel could have or should have taken once the PRA requests were received. The problem with such accusation is that in addition to the City's legal counsel receiving the PRA requests, the TPD legal advisor, Mike Smith, the PRA expert, and Lisa Anderson, the City's Public Disclosure Analyst and PRA trainer, also acknowledged receipt of the letters in November, 2017 at the time the lawsuit was filed. Given all of the extensive training and experience these three individuals possess with public disclosure requests, their collective inaction is unfathomable as to why no action was taken for 9 ½ months after receiving both letters. Respectfully, this factor does not mitigate penalties. Rather, such inaction should aggravate penalties because the City failed to follow and implement the training it so proudly claims.

iv. The City Failed to Follow its Proper Training and Supervision.

The court noted that "the City has established procedures for processing PRA requests". CP 434. Based upon the declarations submitted by the City, the City's conduct of ignoring the requests does not support mitigation when it failed to follow its claimed training. Again, nothing happened for over 9 ½ months. Respectfully, the City's blatantly late response is not a mitigating factor.

v. The Reasonableness of the City's Explanations.

The City piecemeals what the trial court ruled when stating that the City acted "reasonably" in response to the PRA requests. The court did not state that the City acted reasonably after it received the letters in November 2017, and there was nothing "reasonable" about the City's inactivity in responding to the letters for 9 ½ months. The City remained silent

as to why it did not provide the requested documents and offers no explanation as to why. Accordingly, this is not a mitigating factor.

vi. “Helpfulness”.

The court did not find that this mitigating factor applied.

vii. The City’s Track and Retrieve System.

Although the City claims a “robust system for tracking and retrieving public records”, nothing regarding this “robust system” is mitigating as applied to Lt. O’Dea’s case. The head of the City’s robust system, Mike Smith, did nothing to address the public records requests once he received notice of the requests in November 2017. Although the City may have a “robust system”, it needs to be implemented before it can be considered a mitigating factor.

Again, the City is critical of the judge for not identifying, specifically, any mitigating factors and claims that such failure was an abuse of discretion. As set forth in Yousoufian, supra, the court is not required to “find” mitigating factors before imposing a penalty. As such, the penalty ordered by the judge is appropriate given the City’s conduct.

c. *Aggravating Factors*.

In addition to mitigating factors, Yousoufian listed aggravating factors that may support increasing a penalty. Yousoufian, 168 Wn.2d at 467. Importantly, the trial court listed some aggravating factors that supported its penalty determination:

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. Aggravating factors that warrant a penalty amount being imposed are that the Plaintiff had an administrative matter involving his employment where time was of 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.

CP 584:14-585:6

As set forth by Yousoufian, the court is not required to list all aggravating factors before setting forth a penalty. Again, although not necessary to explain the court's reasoning, Lt. O'Dea addresses the aggravators the City raises.

i. Administrative Matter.

The trial court properly ruled that Lt. O'Dea had an administrative matter involving his employment where time was of the essence in receiving the documents. CP 584-85. The City blames the court for its failure to recognize the significance of Lt. O'Dea's request when, in fact, Lt. O'Dea, in his December 24, 2018 declaration submitted for trial, set forth his need for all of the documents requested to allow him to prepare for his employment issue with the TPD. CP 494. How Lt. O'Dea's need for this material became classified as an 11<sup>th</sup> hour claim is unclear, and the City is not in any position to determine what documents will or will not have any bearing on Lt. O'Dea's administrative proceeding or disciplinary processes unless those were predetermined by the City and TPD before they occurred. Additionally, Lt. O'Dea had not received all the investigative materials related to the IA investigation before his termination. CP 936-937. All Lt. O'Dea indicated was that he had received *a copy* of the internal affairs investigation prior to his hearing, not that he had received *all of the documents* he had requested,

which was also set forth in the complaint allegations. CP 624, 936-937. The records requested by Lt. O'Dea in the complaint went well beyond the internal affairs investigation material, and again the City fails to take responsibility for its inactivity. The court clarified this aggravating factor when it entered findings of fact and conclusions of law on June 28, 2019:

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.

CP 1114. Respectfully, this aggravator is supported.

- ii. The City's Unreasonable Explanation.

The court correctly found that the City did not have a reasonable explanation as to why it ignored the public records requests after its receipt in November 2017. Further, the City has not offered any rational argument as to why it ignored the public records requests upon receipt or why it waited over 9 ½ months before it took any actions to log in and respond to these requests. As such, the City's response was unreasonable then and continues to be unreasonable on appeal.

See Wood v. Lowe, supra.

- iii. The City Was Negligent.

Without question, the court found that the City was, at a minimum, negligent for its failure to respond to Lt. O'Dea's requests. Clearly, the City had a duty to respond to these PRA requests once they were received given the broad interpretation under the Public Records Act. Again, the City seeks to blame the court for its failures. This Court should refuse to do so. The City seeks to suggest that no aggravators apply when, in fact, they do apply and the court found such. Given that no mitigators exist, and that the court's decision is clear as to why the penalty at the low end of the range was imposed, this court should affirm the trial court's decision.

3. The Trial Court's Penalty Assessment While the City Was Producing Documents Was Proper.

The City argues that the PRA does not permit a requestor to initiate a lawsuit prior to an agency's denial and closure of a PRA request, citing Hobbs v. Washington State Auditor's Office, 183 Wn.App. 925, 335 P.3d 1004 (2014). The City further argues that a cause of action does not accrue until the City has completed its last production of withheld records pursuant to a valid exception, pursuant to RCW 42.56.550(6), and concludes that the imposition of penalties on an open request is premature and improper. Respectfully, the City is in error.

RCW 42.56.550(1) states as follows:

Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

Here, the City seeks to bootstrap its failure to respond to the public records requests as attached to the March 24 and March 28, 2017 requests by suggesting that they were never received, never denied and never closed. Respectfully, the letters were received, but not fulfilled.

After the lawsuit was filed in November 2017, and the City had received full notice of all public records requests, the City did nothing for 9 ½ months. Lt. O'Dea, at any time after five days of not receiving a response to these requests, was entitled to take action, which is exactly what occurred in Wood v. Lowe, supra.

Further, Hobbs is not supportive of the City's claim as in Hobbs, the auditor acknowledged the PRA requests and was complying with the requests. Here, the City did nothing, which constitutes a denial when the City failed to acknowledge the requests or respond

to the requests. The City was completely non-compliant with any requests even after the June 2018 motion for partial summary judgment was filed. Respectfully, the court did not err in imposing penalties before the City closed out its PRA production.

4. The Trial Court Properly Set the Penalty Period.

The court's factual determination of the penalty period calculation was accurate and appropriate based upon the testimony the court considered. To accept the City's argument grants the City an inexcusable and unexplained pass as to why it failed to respond to the requests until August 24, 2019. Despite the City's argument to the contrary, the City never complied with the PRA requests after receiving notice. Further, the court did not compound any error in its findings and conclusions when it imposed additional penalties when the court ordered the City to produce additional records as referenced in its trial decision and a significant number of additional documents were located and produced after a more appropriate search. Accordingly, the penalty period the court set was appropriate, and this Court should find that the trial court did not abuse its discretion.

5. The Trial Court Properly Ruled on the Number of Documents Produced.

Contrary to the City's argument, both Lt. O'Dea and the City asked the court to impose a \$10.00 per day per document penalty. CP 486, 491. Further, Lt. O'Dea testified that 536 documents were produced in response to the March 28 letter. CP 494-507, 508-523. Respectfully, the trial court's ruling about the number of documents produced was based on a factual statement, and the court accepted Lt. O'Dea's testimony. The \$10.00 per day per document penalty, which both parties asked the court to impose, was appropriate. The City should have considered the potential penalty when it failed to take any actions in response to Lt.

O'Dea's public records requests. To modify the penalty, merely based on the amount, would wholly undermine the judicial process and the significance of the PRA.

E. THE TRIAL COURT ERRED IN GRANTING THE CITY'S SUMMARY JUDGMENT MOTION REGARDING LT. O'DEA'S REQUESTS MADE TO HIS TPD DESIGNATED POINTS OF CONTACT.

As set forth within Lt. O'Dea's response to the City's motion for partial summary judgment, the trial court erred in granting the City's motion as to all of Lt. O'Dea's requests to TPD as noted in his complaint as such requests were recognizable as public records requests. Accordingly, Lt. O'Dea urges this Court to reverse the trial court's summary judgment order in favor of the City and remand to the trial court for further proceedings.

1. Lt. O'Dea's Multiple Requests for the TPD's Policies & Procedures Were Recognizable as Public Records Requests.

The City's sole contention was whether Lt. O'Dea's communications to his TPD designated Points of Contact gave fair notice that his requests for documents were reasonably recognizable as a public records request, which would trigger an obligation by the City to comply. The City asserts that Lt. O'Dea's multiple requests did not provide "fair notice". Respectfully, the City's position is not supportable based upon what occurred in this case.

What constitutes "fair notice" is set forth in Section B(1) of this brief.

Lt. O'Dea's requests to his TPD designated Points of Contact were for specific records as opposed to information about or contained in the records. CP 362-391. Further, no question exists that the TPD Policies & Procedures are public records and no independent non-PRA authority existed for Lt. O'Dea to obtain these records as TPD removed his ability to access these records when he was placed on administrative leave and ordered that he have no access to any Department records. CP 362. As such, the characteristics of the requested records was

definitive, and Lt. O'Dea's request for these documents was repetitive, as acknowledged by Lt. Standifer. CP 367-370.

The City made no showing that Lt. O'Dea had an alternative manner in which he could obtain these records, and, further, based upon Lt. O'Dea's declaration, and Mr. Smith's declaration, all command staff and all City staff are required to consider a request for documents to be a public records request because of the ramifications to TPD and the City if a command staff fails to do so. CP 363, 358-61. Cpt. Shawn Gustason, Lt. Leroy Standifer and Lt. Alan Roberts are all part of the command staff, but they completely ignored their responsibilities, and some of the documents Lt. O'Dea requested were not produced until May, 2017 by Lynn Stehr who had "heard" Lt. O'Dea had been repeatedly requesting these documents. CP 372.

Additionally, the statements of Lt. Standifer that Captain (formerly Lt.) Scruggs produced DVDs containing the Policies and Procedures is false. CP 301. No Policies and Procedures were *ever* produced to Lt. O'Dea by any of these individuals and the City has failed to provide proof that such occurred. CP 369-370.

Respectfully, the language of Lt. O'Dea's request was crystal clear: Lt. O'Dea, as an individual, was asking for the TPD Policies and Procedures. Unlike the individuals in Germeau and Wood, the requestor was Lt. O'Dea, not a guild representative or attorney. Lt. O'Dea did not sign a release authorizing the release of these materials to be sent to him as said documents were not contained within nor part of his personnel file. Rather, he was requesting public records through his TPD designated Points of Contact as he had no other ability to obtain these documents. As such, the characteristics of the request were clear as Lt. O'Dea was seeking the TPD Policies and Procedures for purposes of identifying the general timelines, policies, and procedures that were in place and which he would have to follow in defending himself in the

shooting investigation. As such, fair notice was provided to the City of what documents Lt. O'Dea sought.

2. Lt. O'Dea's Request for Material for the Upcoming Captain's Assessment Process Was Recognizable as a Public Records Request.

Again, and as set forth by the above case law, Lt. O'Dea's repeated requests for the documents surrounding the captain's test were clear as a public records request. With respect to the captain's promotional testing material, Lt. O'Dea became aware of the testing on April 13, 2017, when he first discovered the posting on the Human Resources website. CP 370-71. He requested the documentation surrounding the test, but no material was timely provided. CP 372. As such, the trial court erred when it granted the City's summary judgment motion.

3. Lt. O'Dea's Request to the Finance Personnel Constitutes a Public Records Request That Went Unfulfilled.

Lt. O'Dea's request to the finance office constituted a public records request under the Public Records Act. As set forth by Lt. O'Dea, he spoke with Ms. Heard on June 26, 2017 wherein she told him that she would provide him a complete accounting of his payouts showing the accounting of his various leave balances and payouts. CP 366-367. Rather than providing this information, however, she provided him an arbitrary and blank form, but not the accounting information and calculations that she stated she would provide.

Again, this request was clear: Lt. O'Dea was seeking a specific document or a specific record that contained his financial information. That request was not fulfilled. Rather, all that was produced was an irrelevant form, as opposed to the completed accounting of his time payouts, which Lt. O'Dea requested.

Again, the City failed to provide basic and relevant information and the document to be provided was specifically identified. As such, the court erred in granting the City's motion.

4. Lt. O’Dea’s Oral Requests to Chief Ramsdell and Asst Chief Wade Constituted Public Records Requests.

As this Court is aware, a public records request does not need to be written. Rather, an oral request can constitute a public records request. See Beal, supra, at 867.

Here, Lt. O’Dea requested from Cpt. Ed Wade, copies of the TPD department wide firearm training sign-in sheets and training directives for the Spring of 2015. CP 18. These records were never provided. Further, Lt. O’Dea asked Chief Don Ramsdell for a copy of a 911 call, a Facebook video and photographs the TPD had collected from a witness on scene during the shooting, and a Power Point presentation the TPD used at the Deadly Force Review Board that Lt. O’Dea was not allowed to attend. CP 20. None of these documents were ever provided. CP 20.

The City in response, provided no evidence from either Cpt. Ed Wade or Chief Ramsdell to refute Lt. O’Dea requests. As such, and as this Court has instructed, oral requests for public records, which were clearly requested, constitute a public records request that must be addressed. Respectfully, this Court should reverse the court’s order granting the City’s motion for summary judgment as none of the requested documents were provided.

F. THE TRIAL COURT ERRED WHEN IT DENIED LT. O’DEA’S MOTION TO COMPEL.

In the court’s decision on February 6, 2019, the court ordered the City to “identify and produce to Lt. O’Dea all results of the further search within thirty days of this order.” CP 585. In April 2019, Lt. O’Dea filed a motion to compel along with a supporting declaration surrounding the City’s failure to produce all documents ordered by the court. CP 713-715, 720-740.

In the declaration setting forth the facts surrounding the motion to compel, Lt. O’Dea outlined the documents that had been ordered to be produced but had yet to be produced. CP 721-740. Throughout this representation, Lt. O’Dea estimated that in excess of 1,000 documents had yet to be produced.

In response, the City outlined the efforts it took to search for the various documents surrounding the motion to compel as well as the court’s order requesting that the City provide documentation. Part of its response was from Mike Smith, the PRA expert, wherein he discussed the City’s retention guidelines as outlined by the State, a file that he had missed from the Deadly Force Review Board file, and outlining the City’s records retention guidelines. CP 847-850.

Significantly, the declaration submitted by Mr. Smith failed to acknowledge that many of the documents that had been requested in the records request had been authorized to be destroyed by Mr. Smith. This came to light when Beverly O’Dea, Lt. O’Dea’s wife, filed two public disclosure requests with the City in March 2019. At that time, Lt. O’Dea learned that various documents had been destroyed by TDP, and such destruction was authorized by Mike Smith. As such, Lt. O’Dea discovered that TPD and Mike Smith not only failed to provide documents previously requested, but intentionally destroyed them during the timeframe of November 27, 2018 through December 5, 2018. CP 910-1005. It is incomprehensible that rather than provide documents that were requested, the City would, after the filing of a lawsuit and in the time period immediately before the trial, destroy responsive documents. The City states it “has established procedures on how to process any PRA requests”. Although the City makes this claim, the evidence produced demonstrates that those established procedures were not followed, and in fact, were blatantly ignored and resulted in records being destroyed.

The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. Not until after the trial court compelled the City to provide documents did the City refrain from silent withholding and silent editing. They simply failed to produce documents and provided no reason why they did not provide the requested documents.

The significance of Lt. O’Dea’s motion to compel was that the court, in its decision, did not find bad faith. Significantly, the court’s failure to grant Lt. O’Dea’s motion to compel precluded Lt. O’Dea from establishing bad faith on the part of the City because documents were destroyed during the time that they were being requested and during the time this case was in litigation. As set forth above, the court, in its decision, found that, at a minimum, the City was negligent in its response to Lt. O’Dea’s requests. CP 584-585. Respectfully, granting the motion to compel would allow the court to make a bad faith finding, because the City, in fact, engaged in bad faith in its search for records.

Although this Court should affirm the judgment that has been entered thus far, this Court should remand this case back to the trial court with instructions to conduct further proceedings to address the City’s blatant disregard for the requirements to produce documents pursuant to the Public Disclosure Act and for purposes of determining what additional documents the City has yet to produce.

**G. THIS COURT SHOULD AFFIRM THE ATTORNEY FEES AWARDED BY THE TRIAL COURT AND GRANT ATTORNEY FEES ON APPEAL.**

RCW 42.56.550(4) entitles a person who prevails in a public records request action to “be awarded all costs, including reasonable attorney fees, incurred in connection with such legal

action.” RCW 42.56.550(4). Here, the trial court awarded fees and costs to Lt. O’Dea under the PRA. As such, this court should affirm that fee award. Additionally, and pursuant to RAP 18.1(a) and (b), RCW 42.56.550(4) and Yousoufian v. Office of Ron Simms, supra, Lt. O’Dea respectfully requests attorney fees and costs incurred in connection with this appeal.

**VI. CONCLUSION**

As set forth above, the trial court maintains considerable discretion with respect to public records requests determinations and awarding penalties when agencies fail to comply. Accordingly, this Court should affirm the trial court’s decision with respect to the PRA violations. Both the purpose of the Public Records Act and the case law supporting and interpreting that Act are sound reasons for this Court’s affirmance of the trial court’s actions.

Additionally, however, the trial court erred when it granted the City’s motion for summary judgment related to the multitude of other requests that Lt. O’Dea made while on administrative leave and erred when it denied Lt. O’Dea’s motion to compel. The material he requested was necessary for purposes of defending himself in his administrative action and the City failed to respond to any of his requests. Accordingly, Lt. O’Dea respectfully urges this Court to reverse the trial court’s order granting the City’s motion for partial summary judgment and denying Lt. O’Dea’s motion to compel and remand this matter to the trial court for further proceedings.

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Finally, Lt. O'Dea urges this Court to affirm the trial court's award of attorney fees and costs and urges this Court to grant him attorney fees and costs on appeal.

DATED THIS 11<sup>th</sup> day of May, 2020.

HESTER LAW GROUP, INC., P.S.  
Attorneys for Respondent/Cross-Appellant

By: /s/ Brett A. Purtzer  
Brett A. Purtzer  
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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of the document to which this certificate is attached to be served on the following in the manner indicated below:

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Signed at Tacoma, Washington this 11<sup>th</sup> day of May, 2020.

/s/ Kathy Herbstler  
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**May 11, 2020 - 4:29 PM**

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