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NO. 53990-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ARTHUR WEST,

Appellant,

v.

OFFICE OF THE GOVERNOR,

Respondent.

RESPONDENT'S OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES2

III. STATEMENT OF THE CASE2

 A. Mr. West’s Public Record Request.....3

 B. The Governor’s Office Learned of Its Oversight and
 Provided Additional Records Four Business Days Later5

 C. Procedural History—A Continuance, Discovery Dispute,
 and Resolution7

IV. ARGUMENT13

 A. Standard of Review.....13

 B. The Trial Court Appropriately Determined that the Office
 of the Governor Conducted an Adequate Search for
 Records Responsive to Mr. West’s Public Records
 Request.....14

 1. Like the trial court, this Court should hold that the
 Office conducted a search reasonably calculated to
 locate all responsive records.....14

 2. The PRA does not require the Office to search
 beyond its own records.....16

 C. The Court Appropriately Exercised its Discretion in
 Entering a Protective Order Limiting Discovery to
 Relevant Information22

 D. The Trial Court Appropriately Exercised its Broad
 Discretion in Applying the *Yousoufian* Factors and
 Awarding Mr. West \$14 in Penalties.....25

V. CONCLUSION28

TABLE OF AUTHORITIES

Cases

<i>Ames v. City of Fircrest</i> , 71 Wn. App. 284, 857 P.2d 1083 (1993).....	13
<i>Bricker v. State, Dep't of Labor & Industries</i> , 164 Wn. App. 16, 262 P.3d 121 (2011).....	27
<i>City of Fed. Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009).....	13
<i>Clarke v. State Atty. General's Office</i> , 133 Wn. App. 767, 138 P.3d 144 (2006).....	13
<i>Defs. of Wildlife v. U.S. Dep't of Interior</i> , 314 F. Supp. 2d 1 (D.D.C. 2004).....	18, 19
<i>Diaz v. Washington State Migrant Council</i> , 165 Wn. App. 59, 265 P.3d 956 (2011).....	13
<i>Double H, L.P. v. Wash. Dep't of Ecology</i> , 166 Wn. App. 707, 271 P.3d 322 (2012).....	27
<i>Hoffman v. Kittitas County</i> , 194 Wn.2d 217, 449 P.3d 277 (2019).....	13, 28
<i>Koenig v. Pierce County</i> , 151 Wn. App. 221, 211 P.3d 423 (2009).....	17
<i>Kramer v. J.I. Case Mfg. Co.</i> , 62 Wn. App. 544, 815 P.2d 798 (1991).....	22
<i>Limstrom v. Ladenburg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998).....	17
<i>Mossman v. Rowley</i> , 154 Wn. App. 735, 229 P.3d 812 (2009).....	13

<i>Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane,</i> 172 Wn.2d 702, 261 P.3d 119 (2011).....	14
<i>Sanders v. State,</i> 169 Wn.2d 827, 240 P.3d 120 (2010).....	27
<i>Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.,</i> 185 Wn.2d 270, 372 P.3d 97 (2016).....	25
<i>Yousoufian v. Office of Ron Sims,</i> 152 Wn.2d 421, 98 P.3d 463 (2004).....	27
<i>Yousoufian v. Office of Ron Sims,</i> 168 Wn. 2d 444, 229 P.3d 735 (2010).....	2, 25, 26, 27

Constitutional Provisions

Wash. Const. Art. III.....	16
Wash. Const, Art. III, Secs. 1, 3, 5	20
Wash. Const. Art. III § 5.....	19, 20

Statutes

RCW 42.56.550(4).....	26
RCW 43.06	16
RCW 43.10	16

Regulations

43 C.F.R. § 2.22(a)(1).....	19
WAC 240-06-030.....	16

Rules

CR 26	22
-------------	----

CR 26(b)(1)..... 22
CR 26(c)..... 22

Unpublished Opinions

Anderson v. Walla Walla Police Dep't,
194 Wn. App. 1047 (2016)..... 18
Cortland v. Lewis Cty.,
No. 52066-4-II, 2020 WL 902555 (Feb. 25, 2020) 17

I. INTRODUCTION

Mr. West sought public records regarding the Governor's emergency powers to address homelessness, so he submitted a public records request to the Office of the Governor (Office). His request had two parts: first, Mr. West asked for any demands for the Governor to declare an emergency or to use his emergency powers to address homelessness; and, second, Mr. West asked for any responses to or records about those demands. The Office provided records two weeks later. The next week, Mr. West filed suit claiming the Office was silently withholding records.

When the Office received Mr. West's Complaint, it realized it had inadvertently failed to search for records responsive to the second part of Mr. West's request. The Office immediately took steps to address the error: it performed a thorough search, and provided additional records to Mr. West 14 days after the initial records were provided. After full briefing by both parties and limiting discovery to the relevant issues, the trial court found a violation based on the Office's concession that it overlooked the second part of the request and awarded Mr. West a small penalty for this violation.

This court should affirm the trial court in all respects. First, the court correctly exercised its discretion in limiting discovery. Second, it properly determined that the Office had no obligation to search for and provide records of a third-party agency. Finally, the court correctly considered the

relevant legal standard and exercised its discretion in setting the penalty. This Court should affirm.

II. COUNTERSTATEMENT OF THE ISSUES

A. Whether the Office's second search was an adequate search in light of the Public Records Act's (PRA) requirement that agencies need only search and provide their own records in response to record requests.

B. Whether the trial court properly limited discovery to the adequacy of the Office's search and existence of the Purcell email after Mr. West failed to comply with the court-ordered briefing schedule.

C. Whether the court's careful consideration of the *Yousoufian* factors as applied to the Office's concession of an initial oversight and prompt follow-up was an appropriate exercise of discretion in awarding Mr. West a small penalty.

III. STATEMENT OF THE CASE

In late 2016 and early 2017, the Office of the Governor received a number of inquiries from local governments regarding the growing concern about regional homelessness. CP 98. In considering the inquiries, the Office of the Governor discussed the issue internally and sought advice from its counsel. CP 98, 108-113.

A. Mr. West's Public Record Request

On December 24, 2018, the Office of the Governor received a public record request from Arthur West seeking disclosure of the following records: "1. Any records of requests for a declaration of emergency or the use of the governor's emergency powers to address homelessness, 2015 to present. 2. Any responses thereto, or communications concerning such requests." CP 115-117. The Office acknowledged Mr. West's request. CP 119.

In reviewing and processing Mr. West's request, however, Mr. Wonhoff, who handles public records requests for the Office, inadvertently focused entirely on the first part of the request. That is, instead of reading the two part request as seeking two distinct sets of records, Mr. Wonhoff internalized only the first part of the request, which sought third-party demands for the Governor to take emergency action to address homelessness. CP 99. Mr. Wonhoff overlooked the second part of the request, which asked for internal communications regarding these demands.

Mr. Wonhoff then routed Mr. West's request to Jim Baumgart, Senior Policy Advisor on Human Services, and Jeanne Blackburn, Director of Constituent Services, and asked them to search for potentially responsive records. CP 121. Mr. Baumgart is the Office's policy point person on matters of both homelessness and emergency management, so

he was most likely to have the records Mr. West requested. CP 99-100. Ms. Blackburn, who receives and addresses constituent communications, was also likely to have responsive records if any existed. *Id.*

Mr. Baumgart and Ms. Blackburn both searched thoroughly for the records Mr. West requested. CP 100. Mr. Baumgart searched his hard copy and electronic files, text messages on his state-issued phone, voicemails, and notes. He found five emails with potentially responsive attachments, and forwarded them to Mr. Wonhoff. CP 100. These records were provided to Mr. West in the Office's initial response on January 8, 2019. CP 100.

Ms. Blackburn searched her IQ database system (which tracks constituent and stakeholder contacts), the AskGov database (which is an internal messaging system that the constituent relations team uses to conduct constituent casework), and her unit's "Scan" folder (which is a database where scanned hard copy correspondence is saved). CP 100-101. After searching, Ms. Blackburn identified four potentially responsive records and saved them to a shared folder. These records were also provided to Mr. West in the initial production on January 8, 2019. CP 101.

B. The Governor's Office Learned of Its Oversight and Provided Additional Records Four Business Days Later

Mr. West filed suit. The Office learned of the suit on January 15, 2019, when it received this lawsuit. CP 101. Mr. West had not previously notified the Office that he believed that additional responsive records had not been provided. CP 101. After reviewing Mr. West's complaint, Mr. Wonhoff reviewed Mr. West's request and realized that he had overlooked the second part of Mr. West's request. CP 101. The Office then took immediate steps to search for documents potentially responsive to the second part of Mr. West's request. CP 101.

As part of this second search, Mr. Wonhoff searched the entirety of the Office's archived Outlook email vault for all potentially responsive emails sent between January 1, 2015 and December 24, 2018. CP 101-102. This search included the vaults for all current and former staff members. CP 101-102. Specifically, Mr. Wonhoff searched for any emails/calendar invites using Discovery Accelerator (DA) with the following search terms: "declaration of emergency" (the language provided in the original request) OR "state of emergency" (the language used in the Governor's Office to invoke his emergency powers authority) AND "homeless" OR "homelessness." CP 101-102. After careful review for responsiveness and removal of any duplicate emails, Mr. Wonhoff determined that 176 email records were ultimately responsive to

Mr. West's request. These records were provided to Mr. West on January 22, 2019. CP 102.

Mr. Wonhoff also consulted the Governor's executive team about other potential record custodians. CP 102. As a result, Mr. Wonhoff was able to identify seven other current and former staff members who could have potentially responsive records: 1) Andi Smith, former Sr. Policy Advisor, Human Services and later Executive Director of External Affairs; 2) Nick Brown, former General Counsel; 3) David Postman, Chief of Staff and former Executive Director of Communications; 4) Lacey Harper, former Northwest Regional Representative (counties west of Cascade crest, north of King County); 5) Julia Terlinchamp, former Northwest Regional Representative (counties west of Cascade crest, north of King County); 6) Stephen Uy, former King County Regional Representative; and 7) David Westbrook, former South Sound Regional Representative (Pierce/Thurston Counties, and the Olympic Peninsula south to Grays Harbor County). CP 102-103. Mr. Wonhoff searched these individual non-email electronic records, including at least one box of hardcopy records. CP 102-103.

After these searches, Mr. Wonhoff provided a second installment of records. This was provided only four business days after the Office of the Governor first learned of its initial oversight and 14 days after it initially provided records to Mr. West. CP 100-101; 126-127.

Included in this second installment of records were six pages of emails between the Office and its counsel at the Attorney General's Office (AGO), with limited redactions. CP 108-113. Through these emails, the Office had consulted Senior Counsel Brian Bucholz for legal advice on March 3 and 4, 2016. CP 108-113. It appears that Mr. Bucholz also forwarded this email to other members in the Attorney General's Office, including Solicitor General Noah Purcell. CP 143-145. Neither these emails between AGO staff nor the Purcell emails came up in the Office's email search. However, Mr. West received these emails through a separate public record request to the Attorney General's Office. CP 142-145; 171-173. Even a subsequent targeted email search to see whether these emails existed within the Office's records did not locate these emails or any other related emails. CP 171-173.

C. Procedural History—A Continuance, Discovery Dispute, and Resolution

On January 15, 2019, Mr. West filed this action in Thurston County Superior Court challenging the Office's response to his records request. *See* CP 4-6. Shortly thereafter, the Office became aware of its oversight and provided additional records to Mr. West. CP 103-105. This was 14 days after the initial closure of Mr. West's request. *See* CP 123-24, 126-27.

The parties appeared before the court at the Scheduling Conference on February 8, 2019. *See* CP _____. The court ordered Mr. West to serve and file his opening brief by April 12, 2019, so the parties could proceed on a 28-day schedule for a May 10, 2019, final hearing. CP _____. This schedule was consistent with the parties' statement that they "mutually agree that a prompt hearing and resolution of this matter is in the parties' best interests" while also allowing time for any necessary discovery. *See* CP _____.

Mr. West failed to file his opening brief by the court-imposed deadline. *See* CP 86-88; 177. Nonetheless, Defendant submitted its brief asking that the hearing proceed as scheduled. CP 80-95. The Office also asked the court to find that it violated the PRA only insofar as it delayed the second installment of records by 14 days and asked the court to impose a \$14 penalty. CP 80-95. In response, Mr. West filed a motion seeking penalties under the PRA, an extension of the hearing date, and an in camera review of unredacted copies of the Noah Purcell emails that he received through a subsequent public record request to the Attorney General's Office—records that the Office of the Governor did not have. CP _____.

On May 10, 2019, the parties appeared at the scheduled hearing. The court granted Mr. West's extension and allowed for supplemental briefing. *See* CP 175-176. Based on counsel's concern that Mr. West

should not benefit from his failure to comply with the court’s deadline, the court limited discovery to Mr. Wonhoff’s second declaration, which outlined the Office’s search for the Noah Purcell emails. *See* VRP 28-32; CP 175-176. Mr. West had explicitly represented that he needed “limited discovery ... involving the issues of a second declaration of Mr. Wonhoff... the records the Governor maintains it does not possess.” VRP 31:6-12.

At the hearing, the court asked: “Mr. West, you had sort of described that as limited discovery. What is the discovery that you would be requesting?” VRP 31:13-15. Mr. West again described his discovery needs as “a little bit more discovery” and described it as follows:

It would go towards whether the record was retained, whether Mr. Wonhoff made a reasonable search, whether the other recipients of the -- of those e-mails accounts were searched, whether the reasonable search might have included the Attorney General's Office and whether -- the -- the -- the Office of the Governor -- and the attorney general from the corrections department now is attempting to assert that the Office of the Governor and the Attorney General are completely separate agencies. I don't really see it quite like that. The Office of the Governor is the chief executive officer...

VRP 31:13-22:8. The Court ultimately allowed “discovery regarding the second Taylor Wonhoff declaration, that limited discovery Mr. West had mentioned.” *Id.* at 25:8-10.

The court also denied Mr. West's request for an in camera review of the Noah Purcell emails because it had "no authority to order a non-party to produce records [referencing the AGO] or order a party [referencing the Office] to produce records which it does not have." CP 175-176. In reaching this conclusion, the court noted that the Office of the Governor and the Attorney General's Office were "all different." "Yes," Mr. West responded. VRP 32: 23-25. Court: "And I understand there's a portion of you that's trying to paint with this broad brush, but these are all different and distinct offices." Mr. West: "They are different and distinct offices." VRP 32:18-33:4.

A few days after the hearing, counsel for the Office received a second set of discovery from Mr. West. CP 220. Contrary to the "little bit" or "limited discovery" the parties discussed with the Court a few days earlier, the second set of discovery included 20 interrogatories and 20 requests for production. CP 295-318. It had far exceeded the spirit of the parties' discussion and the court's order.

Further, many of these interrogatories and requests for production duplicated information requested in the first set of discovery, focused on issues outside of the discovery needs Mr. West identified at the hearing, and were so confusing or required legal analysis such that the Office could not respond. CP 295-318.

Many of these discovery requests focused on Mr. Wonhoff's duties and the legal authority underpinning his position in the Office of the Governor. For example, interrogatories 1-4 and their correlating requests for production seek information regarding Mr. Wonhoff's duties. CP 295-297 (E.g., Interrogatory No. 3: "Is the Governor's General Counsel, and/or Deputy General Counsel (Taylor Wonhoff) an Assistant Attorney General as required by in Article III section 21 of the Constitution of the State of Washington and RCW 43.10.040 and RCW 43.10.067.>"). Another request seeks legal analysis regarding whether the law requires the Office of the Governor to contact the Attorney General's Office as part of a reasonable search under the PRA. CP 302. The Office responded to the discovery requests that it believed were proper and clear enough for it to provide a response and stood on its objections to the others. *See* CP 295-316.

After a discovery conference, the Office moved for a protective order based on several arguments. One of these arguments was that Mr. West's discovery requests regarding Mr. Wonhoff's authority to serve as the Governor's Deputy Counsel were irrelevant because the issue was entirely unrelated to the records search Mr. Wonhoff conducted or his understanding of Mr. West's request. *See* CP 207-218; 337-38. Mr. West then moved to compel discovery. CP 205-206; 207-218.

After hearing oral argument, the court granted the Office's motion for a protective order because Mr. West's discovery went beyond the scope of the court's order and the parties' discussions at the hearing. *See* CP 337-38. But the court also noted that the Office was entitled to a protective order for each of the independent grounds outlined in its motion, including irrelevance. *See* CP 337-38. Thus, the court agreed that discovery into Mr. Wonhoff's duties exceeded the scope of the court's discovery ruling and caused undue burden and annoyance. *See* CP 207-218; 337-38.

Consistent with its May 10 order continuing the hearing, on June 28, 2019, the court heard argument as to whether the Office had violated the Public Records Act, and, if so, what, if any, penalty would be appropriate. At the hearing, the Office acknowledged that it had violated the PRA based on its initial misunderstanding of Mr. West's request. CP 342-348. The court accepted this acknowledgement. CP 342-348.

With respect to the Noah Purcell emails, the court held that "the Office did not have the March 4, 2016, Noah Purcell email in its records at the time of Mr. West's request" and that the PRA "does not require the Office of the Governor to search the records of all state agencies, nor the records of the Attorney General's Office." CP 342-348. After considering Mr. West's request for penalties, the court awarded him \$1 in daily penalties for 14 days, for a total award of \$14. CP 342-348.

IV. ARGUMENT

A. Standard of Review

An agency's actions in response to a PRA request are reviewed de novo. *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 344, 217 P.3d 1172 (2009). And if a trial court refers only to affidavits and documents without testimony when deciding whether the PRA has been violated, the appellate court engages in de novo review of the violations. *Ames v. City of Fircrest*, 71 Wn. App. 284, 292, 857 P.2d 1083 (1993). But distinct from its determination as to whether the PRA was violated, a trial court's decision regarding penalties is entitled to more deference. Thus, the standard of review for the trial court's overall PRA penalty assessment is abuse of discretion. *Hoffman v. Kittitas County*, 194 Wn.2d 217, 224, 449 P.3d 277 (2019).

A trial court's denial of a motion to compel or entry of a discovery protective order is also reviewed for abuse of discretion. *See Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 265 P.3d 956 (2011); *Mossman v. Rowley*, 154 Wn. App. 735, 742, 229 P.3d 812 (2009). "A court abuses its discretion when it bases its decision on unreasonable or untenable grounds." *Clarke v. State Atty. General's Office*, 133 Wn. App. 767, 777, 138 P.3d 144 (2006) (citing *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999)).

B. The Trial Court Appropriately Determined that the Office of the Governor Conducted an Adequate Search for Records Responsive to Mr. West’s Public Records Request

In evaluating the adequacy of an agency’s response to a PRA request, the inquiry is not whether responsive documents exist, but whether the search itself was adequate under a standard of reasonableness. *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 719-20, 261 P.3d 119 (2011). This Court must therefore determine whether the Office’s search was “reasonably calculated to uncover all relevant documents.” *Id.* This does not mean that an agency must search every potential location a record may conceivably be stored; the requirement is that the agency search only those places where a record is reasonably likely to be found. *Neighborhood Alliance*, 172 Wn.2d at 720. To demonstrate an adequate search, “the agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith” that “include the search terms and the type of search performed, and . . . establish that all places likely to contain responsive materials were searched.” *Id.* at 721.

1. Like the trial court, this Court should hold that the Office conducted a search reasonably calculated to locate all responsive records

The Office’s search for records responsive to Mr. West’s request was exhaustive. The Office ran an email search that was broad to ensure that all responsive records were captured (CP 101-102); Mr. Wonhoff

reviewed the nearly 2,000 email results (CP 101-102); the Office routed the request to the individuals who oversaw human services and constituent services (CP 99-100); the Office searched the AskGov and IQ constituent communication databases (CP 99-100); and the Office searched its shared drives and scan folders (CP 101-102). In addition, the Office searched the records—including hardcopy records—of seven other individuals who could have addressed the issue of homelessness or emergency powers. CP 97-103. In contrast, Mr. West provided no evidence or argument before the trial court that the Office’s search was inadequate. Nor has Mr. West done so here.

Mr. West assigns error to the trial court finding that the Office did not have the Purcell email in its records at the time of the request. But he provides no argument in support of this assignment of error and no evidence to support his assertion. In contrast to this hollow allegation, the record amply supports the trial court’s finding. The Office conducted two email searches that would have located the email if it existed within its records. First, the Office conducted a broad email search for emails with the terms “declaration of emergency” or “state of emergency” and “homeless” or “homelessness.” CP. 172. A second targeted search was conducted of the historical email vaults of the two recipients for the Purcell email. CP 172. Neither of these searches retrieved the Purcell email. Under such

circumstances and in the absence of argument or evidence to the contrary, Mr. West cannot reasonably challenge this factual finding. Instead, he incorrectly argues that the Office was obligated to contact another agency to gather records it did not have.

2. The PRA does not require the Office to search beyond its own records

Mr. West argues that the Office should have contacted the Attorney General's Office to locate the Noah Purcell emails. This argument fails both factually and legally.

First, Mr. West has acknowledged that the Attorney General's Office and the Office of the Governor are two separate agencies. VRP 32:23-25 (Court: "... but of course these are all different." West: "Yes."); VRP 32:18-33:4 (Court: "...but these are all different and distinct offices." Mr. West: "They are different and distinct offices."). For good reason. The Office of the Governor is "an administrative and staff support agency consisting of the governor and the governor's personal professional staff..." *See* WAC 240-06-030. *Compare generally* RCW 43.06 (chapter addressing office of the Governor); RCW 43.10 (chapter addressing Attorney General); *See also* Wash. Const. Art. III (identifying separate executive offices of governor and attorney general, among others).

And the uncontroverted evidence before the Court is that the Office of the Governor did not have the Noah Purcell emails in its records. CP 171-174. Moreover, even assuming that the Office had a duty to contact the Attorney General’s Office for the Noah Purcell emails—which, as explained below, it did not—there is no factual support that the Office knew or had any reason to be aware of the Noah Purcell emails. It therefore would not have known to contact the Attorney General’s Office. The Office produced the advice it had received and had no indication that there was more to the email chain. *See* CP 369-373.

Mr. West’s assertion that the Office should have contacted the Attorney General’s Office to gather the Purcell emails is also legally incorrect. The Public Records Act does not place this obligation on the Office. That is, the Act does not require an agency to go beyond its own records and resources to identify or locate the requested record. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 604 n. 3, 963 P.2d 869 (1998) (plurality opinion) (“On its face the Act does not require, and we do not interpret it to require, an agency to go outside its own records and resources to try to identify or locate the record requested.”); *Koenig v. Pierce County*, 151 Wn. App. 221, 211 P.3d 423 (2009) (prosecutor had no duty to inquire with other county departments concerning record request it received); *Cortland v. Lewis Cty.*, No. 52066-4-II, 2020 WL 902555 (Feb. 25, 2020) (unpublished)

(the county clerk did not violate the PRA by failing to produce records that only the superior court possessed); *Anderson v. Walla Walla Police Dep't*, 194 Wn. App. 1047 (2016) (unpublished) (the police department held no obligation to produce a record that did not exist or to gather records kept by another agency). As such, the Public Records Act requires only that agencies search its own records in response to public record requests. Mr. West cites no relevant authority that would place such a burden on the Office.

Nor does the non-controlling federal case interpreting the Federal Freedom of Information Act (FOIA), upon which Mr. West relies, place such an obligation on the Office. *See* West Br. at 7-8 (citing *Defenders of Wildlife v. U.S Department of the Interior*, 314 F. Supp. 2d 1, 13 (D.D.C. 2004)). Rather, the legal and factual distinctions between that case and Mr. West's show that it has no application here. In *Defenders of Wildlife v. U.S Department of the Interior*, the Department of the Interior (DOI) was faulted for not referring the request to another office that "has or is likely to have" responsive records. But the court's ruling there hinged on a federal regulation that specifically placed this burden on DOI. Specifically, the court noted "the regulations currently in effect also require an agency that receives a request for materials 'not in its possession, but which it knows another bureau has or is likely to have,' to "refer the request to that bureau(s)

for response.” 43 C.F.R. § 2.22(a)(1).” *Defs. of Wildlife v. U.S. Dep’t of Interior*, 314 F. Supp. 2d 1, 13 (D.D.C. 2004). There is no such regulation or requirement here.

In addition, and equally important, Mr. West confuses the factual circumstances of the DOI case. There, the Department of the Interior was faulted for limiting its search to one area of the agency, not for its failure to expand its request to an entirely separate agency. *Id.* The court rejected DOI’s argument that it need only search the Office of the Secretary as opposed to the other DOI offices of the Solicitor’s Office and the Office of the Inspector General. *Id.* But each of these offices are part of the same agency—DOI— not separate agencies unto themselves. To the extent that this FOIA case may be instructive on PRA principles, any value is hollow because there is no similar regulation in the PRA or Washington law and the agency was faulted for not searching adequately within its own records. The case is therefore irrelevant here and Mr. West’s reliance on it is faulty.

Likewise, despite Mr. West’s arguments to the contrary, the state constitutional provision allowing the Governor to request information from “officers of the state” does not require the Office to search other agencies’ records to find records responsive to a public records request. Article III, section 5 of the state constitution states: “SECTION 5 GENERAL DUTIES OF GOVERNOR. The governor may require information in writing from

the officers of the state upon any subject relating to the duties of their respective offices, and shall see that the laws are faithfully executed.” Wash. Const. Art. III § 5. But this section does not mean the Office was obligated to exercise this power as part of an adequate record search under the Public Records Act. CP 180. Nor does this section support West’s contention that the Governor and Attorney General should be considered the same “agency” for PRA purposes. Quite the opposite. This section reemphasizes the constitutional structure of the executive power of the state, in that it recognizes separate executive offices of the Governor, Attorney General, Secretary of State, Auditor, and other executive offices. Wash. Const, Article III, Secs. 1, 3, 5.

Second, even assuming that this provision would have any relevance in a PRA context, the statutory language uses the term *may*, which is permissive, not mandatory. This permissive language does not suggest that the Office was *required* to exercise this power and contact a separately elected office to gather records in response to a public record request.

Third, imposing an obligation upon the Office of the Governor to search the records of separately elected agencies in response to a public record request, as Mr. West suggests, would lead to absurd results. Indeed, under Mr. West’s interpretation of Article III, section 5, every public record request to the Office of the Governor would require the Office to also search

the records of the Attorney General's Office, Secretary of State, Auditor's Office, Commissioner of Public Lands, among others, and, by logical extension, to every state agency. This Court should decline Mr. West's invitation to reach such an absurd result.

The weight of authority holding otherwise, the constitutional provision's permissive language, the lack of authority expanding this provision to impose an obligation on the Office to search other agencies' records, and the absurd results of such a conclusion, all counsel against finding such an obligation now. And without an obligation to do so, the Office cannot be faulted for not searching beyond its own records for the Purcell email. Accordingly, this Court should affirm.

Finally, and perhaps most important, Mr. West has not—either below or now—taken issue with the Office's search of its own records. Nor could he reasonably do so as the search was both thorough and exhaustive. Indeed, the evidence demonstrates that the Office conducted a search that was reasonably calculated to locate responsive records.

Mr. West has provided no evidence or argument supporting the conclusion that the Office should have searched elsewhere in their records and the PRA does not require an agency to search outside of its own records. Thus, again, this court should affirm.

C. The Court Appropriately Exercised its Discretion in Entering a Protective Order Limiting Discovery to Relevant Information

A trial court should manage the discovery process in a fashion that promotes “full disclosure of relevant information while protecting against harmful side effects.” *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 556, 815 P.2d 798 (1991). The Civil Rules permit parties to seek relief from discovery for good cause shown. CR 26(c). Specifically, the court may grant a protective order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...” CR 26. In addition, “The frequency or extent of use of the discovery methods ... shall be limited by the court if it determines that... (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.” CR 26(b)(1). Below, the trial court properly limited discovery and issued a protective order after Mr. West violated the discovery limit.

The discovery limit the court imposed at the May 10, 2019 hearing was appropriate. Mr. West does not challenge this initial limitation on discovery. The Office is entitled to affirming the protective order on this basis alone. Nonetheless, when the court continued the dispositive hearing and limited discovery, the Office had fully briefed the case and was ready

to proceed with the final hearing as ordered by the court. But Mr. West had missed his opening brief deadline. The Office had acknowledged its oversight in misreading the request and had provided evidence of its robust search and Mr. Wonhoff's targeted search for the Noah Purcell emails. CP 96-105; 172-173. Mr. West told the court he needed discovery regarding whether the Noah Purcell email was retained and whether Mr. Wonhoff had conducted an adequate search. *See* VRP 31:13-22:8. According to Mr. West, this is all he would need. VRP 31:6-12. The court then granted Mr. West leave to conduct "limited discovery" as to the "second declaration of Taylor Wonhoff"—which focused on the targeted email search for the Noah Purcell email. CP 171-176. Again, Mr. West does not claim error with respect to the trial court's initial limitation upon discovery.

Despite his representations and the court's order, Mr. West proceeded to submit a number of discovery requests focused on the propriety of Mr. Wonhoff's job. According to Mr. West, Mr. Wonhoff is not "lawfully employed" as the Governor's Deputy General Counsel because the law requires the Attorney General's Office to provide all legal services. *See* Opening Br. at 18-20. Mr. West then draws the implausible conclusion that the legal status or propriety of Mr. Wonhoff's position affects the scope of the records search and the credibility of Mr. Wonhoff's declaration. *Id.* Mr. West does not explain how this is so.

Nor could he. The legal status of Mr. Wonhoff's position within the Office of the Governor does not impact the search required by the PRA. Rather, as outlined above, the scope of the search is defined by the agency to which the request was submitted. *See Supra* Section B. There simply is no authority to suggest that the legal propriety of the job position of the individual processing a public record request impacts the search in any way.

Mr. West's numerous interrogatories and requests for production exceeded the trial court's May 10, 2019 order in both number and scope. The court was allowing Mr. West to conduct limited discovery into a specific, targeted search; it was not giving Mr. West free reign to explore issues wholly unrelated to the issues before the court. The trial court therefore correctly ruled that Mr. West's discovery requests about Mr. Wonhoff's position exceeded its ruling.

Because Mr. West disregarded the court's order limiting discovery, the court acted correctly in entering a protective order. To do otherwise would force the Office to respond to numerous discovery requests that have no bearing on the adequacy of the Office's search or whether the Noah Purcell email actually exists in its records. Such an exercise in futility is, by definition, unduly burdensome and annoying.

Finally, this Court has an independent ground upon which it can affirm the protective order. The trial court also based its protective order on

the alternative grounds that Mr. West's discovery requests called for legal conclusions or were so vague and confusing such that they were not capable of a response. CP 337-338. Mr. West does not assign error to these findings or conclusions, so this court can affirm on that basis alone.

The record here is clear. Mr. West submitted the request to the Office of the Governor, Mr. Wonhoff searched for records on behalf of that office, and the Office then responded to Mr. West's request. Under such circumstances, Mr. West's request for discovery regarding the propriety of Mr. Wonhoff's job is beyond the scope of the court's order, beyond Mr. West's stated discovery needs, seeks entirely irrelevant information, and calls for legal conclusions. It is therefore inherently unduly burdensome and annoying and this Court should affirm.

D. The Trial Court Appropriately Exercised its Broad Discretion in Applying the *Yousoufian* Factors and Awarding Mr. West \$14 in Penalties

In a PRA case, trial courts have "great discretion" "to determine the appropriate penalty for a PRA violation." *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 278, 372 P.3d 97 (2016). Determining a penalty under the PRA involves two steps. *Yousoufian v. Office of Ron Sims*, 168 Wn. 2d 444, 459, 229 P.3d 735 (2010) (*Yousoufian V*). First, the court must determine the number of days the party was denied

access to the public records. *Id.* The court must then determine the per-day penalty by considering a range of factors. *Id.*

As an initial matter, Mr. West does not assign error to the trial court's \$14 penalty determination, nor does he argue that the trial court erred in any of its analysis of the *Yousoufian* factors. Instead, he argues only that the trial court erred in making a penalty determination absent discovery or consideration of his argument that Mr. Wonhoff's position was not legal. *See* Opening Brief at 9-10. For the reasons discussed above, Mr. West is wrong and the Court should affirm the trial court's decision on those issues. Because Mr. West does not provide any other grounds for finding error, this Court should affirm the penalty determination on this basis alone

Even if the Court independently examines the trial court's penalty decision without adequate briefing from Mr. West, this Court should also uphold the trial court's penalty determination because Mr. West has not shown that the court abused its discretion in awarding \$14.

The PRA allows for penalties for every day that an individual was denied the right to inspect or copy a record. RCW 42.56.550(4). The trial court correctly determined that Mr. West was denied the records for a total of 14 days. The request here was originally closed on January 8, 2019, when records responsive to the Office's original misinterpretation of the request were provided. CP 123-24. Upon learning of the oversight on January 15,

2019, the Office produced additional records fourteen days later, on January 22, 2019. CP 126-127. Thus, the trial court's calculation was appropriate.

The court below also properly exercised its discretion in grouping the second set of records into one group. Courts have discretion to group records for purposes of a penalty determination. *Sanders v. State*, 169 Wn.2d 827, 864, 240 P.3d 120 (2010); *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 435-36, 98 P.3d 463 (2004) (*Yousoufian I*). Courts can use subject matter and/or production date to group records. *See Double H, L.P. v. Wash. Dep't of Ecology*, 166 Wn. App. 707, 714-15, 271 P.3d 322 (2012); *Bricker v. State, Dep't of Labor & Industries*, 164 Wn. App. 16, 23-24, 262 P.3d 121 (2011). Here, the trial court properly grouped the second set of records into one group because these records were all part of a single request, they were produced in response to the second part of Mr. West's original request, they were all belatedly produced as a result of the same oversight, and they were all produced on the same date. *See* CP 96-105. Hence, the trial court's grouping for penalty purposes was appropriate. Again, Mr. West does not allege the court erred in doing so.

Additionally, the trial court, using its broad discretion, correctly applied the *Yousoufian* factors in awarding the \$1 daily penalty. CP 342-48. Appellate courts do not engage in "piecemeal de novo review of individual

Yousoufian II factors.” *Hoffman*, 194 Wn.2d at 218. Instead appellate courts review the trial court’s overall penalty assessment for abuse of discretion. *Id.* In reaching its conclusion, the court considered the entire penalty range and the arguments of the parties in the context of the appropriate legal standard. *Id.* While acknowledging that the penalty amount was on the low end of the range, the court noted that it was “appropriate given the factual circumstances of the violation, the fact that the violation in question was the result of an oversight, the fact that the agency otherwise responded reasonably and promptly to the request, and the fact that the agency promptly cured the oversight when it was caught.” CP 347.

The trial court’s careful consideration of the relevant legal standard and application of those factors to the facts of this case demonstrates an appropriate exercise of discretion. In consideration of this, and the absence of Mr. West’s assignment of error, this Court should affirm the trial court’s exercise \$14 penalty award.

V. CONCLUSION

This court should affirm the trial court’s ruling in all respects. First, the Office of the Governor respectfully requests that the Court affirm the trial court’s conclusion that it conducted an adequate search and was not required to gather records from a separate agency. Second, this Court should also affirm the trial court’s exercise of discretion in entering a protective

order preventing discovery broader than the Court's prior ruling into issues not relevant to this matter. Finally, this Court should affirm the trial court's \$14 penalty award.

RESPECTFULLY SUBMITTED this 24th day of April, 2020.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the foregoing RESPONDENT’S OPENING BRIEF with the Clerk of the Court using the electronic filing system and which will serve the following electronic filing participant as follows:

Via email to: awestaa@gmail.com

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

EXECUTED this 24th day of April, 2020, at Olympia, Washington.

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