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

ALEXANDER FLEISCHMANN,
Appellant,
v.

CITY OF OLYMPIA,
Respondent,

BRIEF OF RESPONDENT CITY OF OLYMPIA

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I. INTRODUCTION

This Public Records Act case involves a plaintiff who failed to better an offer of judgment delivered to his attorney's office and left in the only conspicuous place available: the mailbox adjacent to the driveway. Both Appellant and his counsel admittedly received this offer, which was transmitted by e-mail in addition to delivery to counsel's office address and Appellant even introduced the unaccepted offer of judgment in pleadings filed in support of discovery motions. Appellant should not be permitted to evade the consequences of CR 68 by his attorney's willful refusal to accept delivery to his office or by alternative means. The trial court properly applied CR 68.

Similarly, the trial court correctly exercised its discretion in not conducting *in camera* review of documents requested in discovery that were identified as privileged in a privilege log. The court further did not err when it determined that these documents did not support a violation of the PRA because they were created after the request at issue was made to the City or were not responsive to that request. The Court should affirm.

II. ISSUES PRESENTED

- 1. An offer of judgment was served at counsel's office in a conspicuous place during regular business hours pursuant to CR 5. Did the trial court properly limit the aware of attorney's fees based on that offer of judgment.**

2. **Documents in question were created after the date of the public records request as issue in this case and were not responsive to the request as reasonably interpreted by the City. Appellant failed to initiate *in camera* review of those documents. Did the trial court correctly determine that those documents were not responsive, and that the City did not violate the PRA by failing to produce them?**

III. COUNTERSTATEMENT OF THE CASE

This case involves a single public records request made to the City of Olympia's Police Department by attorney Jackson Millikan, on behalf of his client, Alexander Fleischmann,¹ on February 23, 2018.² Supp. CP 1201 (Stipulation and Agreed Statement of Issues and Scheduling Order at 2). This request (No. W010837) related to the Olympia Police Department's investigation of a violent confrontation between protesters and counter-protesters outside of a Planned Parenthood facility in downtown Olympia, which occurred on February 9, 2018. CP 349-350 (Second Amended Complaint at 2-3). Mr. Fleischmann's vehicle was seized by Olympia Police as part of the investigation into this incident. *Id.*

¹ Appellant's brief incorrectly spells Appellant's name. Appellant's name is correctly spelled herein as "Alexander Fleischmann". See CP 1.

² In his Opening Brief, Plaintiff implies that there is another public records request at issue in this case. See, e.g., Opening Br. at 4, 19-23. But, as discussed in more detail below, any such argument is foreclosed by the Stipulation and Agreed Statement of Issues, Supp. CP 1201, which expressly identified one, and only one, public records request at issue in this case: "[t]he public records request at issue in this case (the PRA Request) was made by Mr. Millikan on February 26, 2018, and was assigned request No. W010837-022318)." *Id.*

at 351-53. Request No. W010837 was made in an effort to retrieve the seized vehicle.

A. REQUEST NO. W010837 (MADE FEBRUARY 23, 2018)

On February 23, 2018, Mr. Millikan made request No. W010837. CP 919 (Findings of Fact, Conclusions of Law Re Penalties at 2); Supp. CP 1205 (Declaration of Amy Iverson Decl. at 1; Ex. A). This request was made via the City's online "Records Request Center," through the "Police Department Records" portal.³ Supp. CP 1293 (Second Declaration of Amy Iverson at 2). That request sought:

All documents that relate to police incident 18-0-836, including but not limited to, incident reports, supplemental reports, CAD logs, video/audio/photographic, affidavits of probable cause, warrant applications, warrants, returns of warrants, tow/impound authorizations, inventories, property receipts, internal memoranda, or any other item that in any way relates to the foregoing incident number.

CP 919 (Findings of Fact, Conclusions of Law Re Penalties at 2); Supp. CP 1205 (Iverson Decl. at 1, Ex. A).

To respond to request No. W010837, Olympia Police Department records coordinator, Amy Iverson, searched for, located, and produced

³ The City's online Records Request Center allows requesters to make a request through one of several portals, including one for "General Public Records" and one for "Police Department Records." Supp. CP 1292-93 (Second Iverson Decl. at 1-2). Requests made through the Police Department Records portal are routed to Police Department records staff for response. *Id.* When requests are made through the Police Department Records portal, Police Department records staff limit their search to Police Department records; records held by other City departments are not searched. *Id.*

responsive records. CP 919 (Findings of Fact, Conclusions of Law Re Penalties at 2); Supp. CP 1293 (Iverson Decl. at 2). In searching for records responsive to request No. W010837, Ms. Iverson searched only within the Police Department's Records Management System (RMS), an electronic records management system utilized by the Police Department for storage of Police Department records. *Id.* Ms. Iverson confined her search to the RMS because "the request sought police records related to a specific police incident number, and those types of records are typically stored in the RMS. By policy, Olympia Police Officers are required to store all records related to a police incident in the RMS and my experience is that Police Officers routinely follow this policy." Supp. CP 1293 (Iverson Decl. at 2). In other words, Ms. Iverson understood based on how the request was made (through the Police Department records portal) and what the request sought (records related to a particular police investigation) that Mr. Millikan's request was for a specific type of records: police records, which were required to be kept in the RMS.

Through her search, Ms. Iverson located the following: the incident report (i.e. police report) for incident No. 2018-00836 and 16 photographs. Supp. CP 1293 (Iverson Decl. at 2). Ms. Iverson then transmitted all of these responsive records to Mr. Millikan by e-mail on February 26, 2018. *Id.* Ms. Iverson's transmitting message indicated that

with the records provided, the City's response to the request was complete and closed. *Id.*

Unbeknownst to Ms. Iverson, 11 videos related to incident 2018-00836 had been collected by Olympia Police Officer Rob Beckwell and were stored in his laptop. Due to an oversight by Officer Beckwell, and contrary to Police Department policy, they were not submitted into the evidence system and noted in the RMS at that time.⁴ CP 919 (Findings of Fact, Conclusions of Law Re Penalties at 2) Supp. CP 1295 (Second Iverson Decl. at 4); CP 188-190 (Declaration of Rob Beckwell; Ex. A. at 2-4). Because they were not submitted into the evidence system and noted in RMS as part of the evidence for incident 18-00836, these videos were not found by Ms. Iverson and were not produced to Mr. Millikan as part of the production of records to him on February 26, 2018. CP 919-920; Supp. CP 1206 (Iverson Decl. at 2); Supp. CP 1295 (Second Iverson Decl. at 4).

Officer Beckwell's portion of the incident report for incident 2018-00836 (which was produced to Mr. Millikan as part of the production on

⁴ Officer Beckwell's failure to place the videos into evidence would be investigated by Olympia Police Department's Office of Professional Standards and Officer Beckwell would be found to have engaged in "unsatisfactory performance" related to his failure to follow Department records management policy in handling the videos. *See* CP at 413-418 (Declaration of Rich Allen, Exhibit 1); CP 920-21 (Findings of Fact, Conclusions of Law Re Penalties at 3).

February 26, 2018) referenced videos Officer Beckwell collected: “I logged the videos into evidence at OPD.” CP 125 (Declaration of Jackson Millikan with Merits Brief Exhibits, Ex. F at 4). However, because Ms. Iverson did not read the report (she only scanned it looking for information that might need to be redacted), CP 919 (Findings of Fact, Conclusions of Law Re Penalties at 2); Supp. CP 1206(Iverson Decl. at 2), Ms. Iverson was not aware of this reference, nor was she aware of the existence of the videos. CP 919 (Findings of Fact, Conclusions of Law Re Penalties at 2); Supp. CP 1206 (Iverson Decl. at 2); Supp. CP 1295 (Second Iverson Decl. at 4).

B. REQUEST NO. W012267 (MADE JUNE 29, 2018)

Months later, on June 29, 2018, Mr. Millikan made another public records request to the City, in follow up to his February 23, 2018, request.⁵

⁵ Mr. Millikan had made yet another public records request in the intervening months. Supp. CP at 1295-96 (Second Iverson Decl. at 4-5). That request, made March 19, 2018, and denominated request No. W011082-031918, sought the following:

Any communication in any format and sent or received by any privately owned or government owned device, containing the words, "Planned Parenthood, Alex Fleischmann, Alexander Fleischmann, Proud Boys, Patriot Prayer, Antifa, or Millikan," and/or concerning the impound and detention of Alexander Fleischmann's vehicle, Toyota pickup truck with Oregon license number 148JHC and/or the protest that occurred near Planned Parenthood on February [sic] 9, 2018. Records officer is encouraged to omit any records produced previously.

Id. Unlike requests Nos. W010837 and W012267, request No. W011082 was made through the General Public Records portal, not the Police Department Records portal. *Id.* That request is not at issue in this case.

CP 920 (Findings of Fact, Conclusions of Law Re Penalties at 3); Supp. CP 1206-07 (Iverson Decl. at 2-3). This second request (No. W012267), also made through the Police Department records portal, sought any additional records related to incident 2018-00836 that had not already been provided in response to his first request (request No. W010837). Supp. CP 1206-07 (Iverson Decl. at 2-3); Supp. CP 1294 (Second Iverson Decl. at 3). In particular, request W012267 sought:

From the date of 2/26/2018 to present [June 29, 2018]: All documents that relate to police incident 18-0-836, including but not limited to, incident reports, supplemental reports, CAD logs, video/audio/photographic, affidavits of probable cause, warrant applications, warrants, returns of warrants, tow/impound authorizations, inventories, property receipts, internal memoranda, or any other item that in any way relates to the foregoing incident number.

Supp. CP 1206-07 (Iverson Decl. at 2-3, Ex. C).

This second request was a follow-up to request No. W010837 and was made to aid prosecution of a separate federal civil rights lawsuit filed by Mr. Fleischmann (represented by Mr. Millikan) against the City related to the seizure of Mr. Fleischmann's vehicle in the course of the City's investigation into the February 9 disturbance outside Planned Parenthood. *See* CP 348-360 (Second Amended Complaint).

In response to this second request, Ms. Iverson again conducted a search, located responsive records, and provided them to Mr. Millikan by

e-mail later on June 29, 2018. Supp. CP 1207 (Iverson Decl. at 3). Ms. Iverson's search for records responsive to request No. W012267 again focused exclusively on the Police Department's RMS: "In searching [for records responsive to request No. W012267], I again focused on the RMS because the request sought police records related to a specific police incident number, and those types of records are routinely stored in the RMS, as required by Police Department Policy." Supp. CP 1207 (Iverson Decl. at 3).

Ms. Iverson's search located three potentially responsive records. Supp. CP 1207 (Iverson Decl. at 3). These records were transmitted to Mr. Millikan via a link provided in a message from Ms. Iverson to Mr. Millikan, sent later on June 29, 2018. *Id.* Ms. Iverson's transmitting message indicated that with the records provided, the City's response to this second request was complete and closed. *Id.*

Over two months later, on September 7, 2018, Mr. Millikan e-mailed Ms. Iverson regarding the City's response to his June 29 request (request No. W012267). CP 920 (Findings of Fact, Conclusions of Law Re Penalties at 3); Supp. CP 1207-08 (Iverson Decl. at 3-4). In this e-mail, Mr. Millikan, for the first time, specifically asked about videos of the incident, pointing out that the videos were referenced in the incident report for incident 2018-00836 (which he had received on February 26, 2018, in

response to his first request (No. W010837)), but that the videos had not been produced. CP 920 (Findings of Fact, Conclusions of Law Re Penalties at 3); Supp. CP 1207-08 (Iverson Decl. at 3-4). After receiving this e-mail specifically inquiring about the videos, Ms. Iverson conducted additional searches to locate them, contacting the evidence technician to determine whether any videos were logged into evidence. CP 920 (Findings of Fact, Conclusions of Law Re Penalties at 3); Supp. CP 1208-09 (Iverson Decl. at 4-5). This additional searching did not result in the videos being located, and on September 7, 2018, Ms. Iverson informed Mr. Millikan that the evidence technician had confirmed that there were no videos placed into the evidence system. Supp. CP 1208 (Iverson Decl. at 4).

On September 28, 2018, Mr. Millikan e-mailed Ms. Iverson, again inquiring about the videos and this time pointing Ms. Iverson to the reference to videos in Officer Beckwell's police report. CP 920 (FOFCOL at 3); Supp. CP 1208 (Iverson Decl. at 4). After receiving that message, Ms. Iverson directly contacted Officer Beckwell to inquire about the videos. CP 920 (FOFCOL at 3); Supp. CP 1208 (Iverson Decl. at 4). Officer Beckwell then located the videos in question (11 in total) and placed them in the evidence system, where Ms. Iverson was able to

retrieve them on October 4, 2018. CP 920 (FOFCOL at 3); Supp. CP 1208-09 (Iverson Decl. at 4-5); CP 1296 (Second Iverson Decl. at 5)

On October 8, 2018, Ms. Iverson communicated by e-mail to Mr. Millikan that the videos had been located and were available, once the fee for providing the videos (\$1.30) was paid. Supp. CP 1209(Iverson Decl. at 5). On October 9, Mr. Millikan paid the \$1.30 fee and on October 10, 2018, the videos were made available to him, via a link by which he could download them. *Id.*

C. THE CITY’S TRANSMITTAL OF AN OFFER OF JUDGMENT TO MR. FLEISCHMANN

Early in this case, the City made an offer of judgment to Mr. Fleischmann. This offer of judgment was served on Friday, June 7, 2019, during regular business hours, by delivery to the property of the office of Mr. Fleischmann’s attorney, Mr. Millikan, and leaving it in a conspicuous place on that property. CP 1146-1152. As described in the Declaration of Blake Myers, CP 1146-1152, and on Mr. Millikan’s law firm webpage, Mr. Millikan’s office is not an office in the traditional sense, but is located on a rural property off of a two-lane country road.⁶ Mr. Millikan himself describes it as a “country law firm.” CP 1025. When Blake Myers went to the address of Mr. Millikan’s office, he encountered “a gate that was

⁶ According to Mr. Millikan’s law office website, www.millikanlawfirm.com (last visited August 7, 2020), Mr. Millikan’s “office is on a private vineyard.”

chained and pad locked shut.” CP 1146-47. What Mr. Myers encountered when he arrived at Mr. Millikan’s office to serve the offer of judgment is depicted in Appendix A (a copy of CP 1150).

In attempting to deliver the offer of judgment to Mr. Millikan’s office, Mr. Myers telephoned Mr. Millikan’s office. *Id.* Receiving no answer, Mr. Myers left a voice-mail for Mr. Millikan. *Id.* Because the gate leading into the interior of Mr. Millikan’s office property was chained, and because Mr. Millikan did not pick up his telephone call, Mr. Myers left the offer of judgment in a conspicuous place on Mr. Millikan’s office property: inside the mailbox adjacent to the driveway. *Id.*

According to Mr. Myers:

I looked around the entrance to the property and the only conspicuous place that I could put the documents was the black mailbox. If I tried to place it anywhere else, it would have blown away and would not have been received by Mr. Millikan. Seeing no other option, I deposited the documents in the mailbox

Id. Delivery of the offer of judgment occurred on a weekday (June 17, 2019 was a Friday) during business hours: the delivery occurred between 2:47 and 3:05 PM. *Id.* Mr. Millikan was informed by an e-mail from the City’s attorney, Jeffrey Myers, that the offer of judgment had been delivered to the mailbox at his law office property. CP 1026.

Mr. Millikan actually received the offer of judgment. CP 1025-26. By his own admission, he also received a copy via e-mail on June 7, 2019. CP 1025. Significantly, Mr. Fleischmann testified that he received and reviewed the offer of judgment on or around June 7, 2019, confirming at his deposition that he received, reviewed and considered it, and made the determination not to accept it within the ten day period to do so. CP 1130.

D. PROCEEDINGS BEFORE THE TRIAL COURT

This case was filed February 5, 2019. Soon after it was filed, and prior to the Local Court Rule (LCR) 16(c)(1)(E) status hearing, the parties stipulated to an Agreed Statement Of Issues, which identified the single public records request at issue in this case and the issues presented. *See* Supp. CP 1201 (Stipulation and Agreed Statement of Issues and Scheduling Order). This stipulation was presented to the Court at the status hearing (mandated by Thurston County Local Rule 15), held March 22, 2019. This Agreed Statement of Issues identified only one public records request at issue in this case: request No. W010837, made by Mr. Millikan on February 23, 2018. *Id.* The stipulation also indicated that *in camera* review of records was not, at that time, considered necessary. Supp. CP 1201 (Stipulation and Agreed Statement of Issues and Scheduling Order).

The parties engaged in discovery, with Mr. Fleischmann submitting interrogatories and request for production and taking four depositions. Mr. Fleischmann requested records in discovery beyond those sought in his February 26, 2019 PRA request. Specifically, he asked for any communications from various city personnel, their claims manager, and defense counsel “regarding the Videos, the Incident or the Lawsuit.” CP 334-337 (Millikan Decl. Ex. R). In responding to Mr. Fleischmann’s broad discovery requests, the City produced hundreds of pages of records, but withheld 47 records (e-mails) under a claim of attorney-client privilege or attorney work product (or both). CP 177-181 (Millikan Decl., Ex. I.). Included among those 47 records were the eight records identified by Mr. Fleischmann in his Opening Brief as not being timely disclosed to him. These eight records are communications with the City’s risk manager and outside legal counsel defending Fleischmann’s civil rights lawsuit and were not responsive to his February 26, 2019 PRA Request, but were only provided in response to Fleischmann’s discovery requests which were considerably broader than the PRA request at issue. Those eight records are identified at CP 180 and 181 and shown on Appendix B.

After receiving the City’s responses to these discovery responses, Mr. Fleischmann twice sought *in camera* review of those 47 e-mails in order to resolve a discovery dispute over whether the City had properly

redacted and withheld records responsive to Mr. Fleischmann's discovery requests. *See* Supp. CP 1203 (Order Denying Plaintiff's Motion for In Camera Review and Trial Schedule Modification); Supp. CP 1304 (Order Denying Plaintiff's Renewed Motion for In Camera Review). In support of his renewed motion, Appellant submitted the City's offer of judgment, dated June 7, 2019, to support an imagined conspiracy by the City's counsel to suppress the disclosure of the videos.⁷ Supp. CP 1237.

The trial court denied both of Mr. Fleischmann's motions for *in camera* review. *See* Supp. CP 1203 (Order on Motion for In Camera Review and Trial Schedule Modification); Supp. CP 1304 (Order Denying Motion for In Camera Review). Mr. Fleischmann did not assign error to either of those orders of the trial court and they are not at issue.

While he sought *in camera* review to resolve a discovery dispute, Mr. Fleischmann did not seek *in camera* review of records through the Thurston County Superior Court's established *in camera* review procedure for Public Records Act cases to determine either the propriety of a claimed exemption or their responsiveness to the underlying request. A Thurston County Local Rule, Thurston County LCR 16(c)(2), establishes the procedure by which a party may seek *in camera* review of records in the

⁷ Plaintiff offered no explanation why he submitted the offer of judgment given the restrictions of CR 68 providing that an offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

course of a public records lawsuit. Through this process, the trial court is given the opportunity to review records that were redacted or withheld by an agency in responding to a public records request to determine whether any PRA violation occurred as to those records. LCR 16(c)(2)(a) provides that “[i]n a Public Records Act case, in camera review will occur only if the assigned judge enters an order requiring such review.”

So, a party seeking *in camera* review of records redacted or withheld by an agency in responding to a public records request, in order to determine whether those records were improperly redacted or withheld, must seek an order allowing for such review. Mr. Fleischmann did not seek such an order from the court under LCR 16(c)(2) (instead, he asked the trial court to conduct in camera review to resolve a discovery dispute which he did not appeal from).⁸ Therefore, the trial court was never given the opportunity to consider whether those records were responsive to the public records request at issue in this case.

The trial court considered the merits of Mr. Fleischmann’s Public Records Act claim at a hearing held on August 23, 2018. CP 455-56; 918. The trial court ruled that the City had violated the Public Records Act by

⁸ As noted above, the Stipulation and Agreed Statement of Issues and Scheduling Order, Supp. CP 1201, indicated that at the time of the filing, “in camera review [was] not necessary . . .” Mr. Fleischmann did not seek to amend the Stipulation and Agreed Statement of Issues and Scheduling Order to provide for in camera review, or otherwise make arrangements for in camera review as required by LCR 16(c)(2).

failing to timely provide the 11 videos. CP 455-56; 921-23. But the trial court rejected Mr. Fleischmann's other claims of violations by the City. The trial furthered decided that the 11 videos should be grouped into one group for purposes of calculating the penalty and that the 11 videos were improperly withheld for 224 days. *Id.*

On November 23, 2018, the trial court held a hearing to consider the issue of imposition of penalties for the City's Public Records Act violation. CP 918-923. At the conclusion of that hearing, the trial court imposed a per-record/per-day penalty day of \$25, for a total penalty of \$5,600 (the 11 videos grouped into one group, multiplied by 224 penalty days, multiplied by \$25). CP 923.

Later, on February 14, 2020, the trial court considered Mr. Fleischmann's request for attorney's fees and costs. CP 1173. In ruling on the request for attorney's fees and costs, the trial court considered Mr. Fleischmann's arguments that the City's offer of judgment, delivered on June 7, 2019, was not properly served and therefore was of no effect. CP 1174. The trial court rejected that argument and gave effect to the offer of judgment. *Id.* Accordingly, the trial court awarded Mr. Fleischmann \$9190.40 for attorney's fees and costs awarded prior to June 7, 2018, the date the offer of judgment was served. CP 1175.

IV. ARGUMENT

A. STANDARD OF REVIEW

1. Offer of Judgment

Issues involving construction of an offer of judgment are reviewed de novo, while disputed factual findings concerning the circumstances under which the offer was made are usually reviewed for clear error. *Seaborn Pile Driving Co., Inc. v. Glew* 132 Wn.App. 261, 131 P.3d 910 (2006), review denied 158 Wn.2d 1027, 152 P.3d 347.

2. Public Records Act

“Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo.” *Health Pros Nw., Inc. v. State*, 10 Wn.App. 2d 605, 611, 449 P.3d 303 (2019), review denied, 194 Wn.2d 1025, 456 P.3d 396 (2020). However, review of a decision awarding PRA penalties “is meaningful only if appellate courts review the trial court’s imposition of that penalty under an abuse of discretion standard of review.” *Yousoufian v. Sims, (Yousoufian I)*, 152 Wn.2d 421, 431, 98 P.3d 463 (2004); *Hoffman v. Kittitas Cty.*, 194 Wn.2d 217, 227, 449 P.3d 277 (2019).

The Superior Court’s determination whether or not to conduct *in camera* review of records identified as privileged in discovery, is reviewed for an abuse of discretion. A decision determining whether an *in camera*

review of *documents* is necessary is reviewed only for abuse of discretion. *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn.App. 319, 328, 890 P.2d 544 (1995); *Overlake Fund v. Bellevue*, 70 Wn.App. 789, 796–97, 855 P.2d 706 (1993), *review denied*, 123 Wn.2d 1009, 869 P.2d 1084 (1994).

B. THE CITY’S SERVICE OF THE OFFER OF JUDGMENT COMPLIED WITH CR 5.

The City’s offer of judgment to Mr. Fleischmann was properly served on his attorney, Mr. Millikan, because it was placed in a conspicuous place in the property that is Millikan’s office, during regular business hours. But even if service was technically deficient, the City substantially complied with the service rule, ensuring that Mr. Millikan actually received the offer of judgment and his client, Mr. Fleischmann was able to timely review it, consider it and decide to reject the offer prior to its expiration.

1. The Offer of Judgment Was Served on Mr. Millikan as Provided in CR 5.

Service of an offer of judgment is governed by Civil Rule (CR) 5.

CR 5(b)(1) provides, in relevant part:

Service upon the attorney or upon a party shall be made by delivering a copy to the party or the party's attorney or by mailing it to the party's or the party's attorney's last known address. . . . Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the party's or the attorney's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a

conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

The City properly served the offer of judgment on Mr. Fleischmann's attorney by leaving it in a conspicuous place at Mr. Millikan's office during regular business hours.

The record reflects that Mr. Millikan's law office is not a traditional office in an office building. CP 1146-1150 (Decl. of Blake Myers at 1-2, ex. 1). Instead, Millikan's "country office," CP 1025, is a rural property, with a driveway blocked by a locked gate. CP 1146-1150; *see also* <https://millikanlawfirm.com/> ("Our office is a private vineyard."). No building that might house a traditional "office" is visible from in front of the locked gate. CP 1146-1150.

Upon arriving at the address for Mr. Millikan's office, Blake Myers saw no obvious way to access the interior of the property to deliver the offer of judgment to Millikan. CP 1146-1150. See CP 1150, Appendix A, (photograph depicting Mr. Millikan's office address). In attempting to deliver the documents, Mr. Myers' called Mr. Millikan. CP 1146-47. But these calls went unanswered. *Id.* Given these circumstances and seeing no other suitable conspicuous place where the document would be likely to

actually be received, Mr. Myers' placed the offer of judgment in the mailbox at Mr. Millikan's property. *Id.*

Under the circumstances, this method of delivering the documents to Mr. Millikan complied with CR 5. As noted above, CR 5(b) allows delivery to an attorney by "leaving it at . . . the attorney's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein." Mr. Millikan's office is not a particular building, room, or suite of rooms, but (according to him) his rural property generally. The mailbox located at his property is a "conspicuous place" in that office. After all, it is natural for persons to look in their mailbox for documents. This is especially so given the fact that Mr. Millikan was told in an e-mail that the offer of judgment has been placed in his mailbox. CP 1026.

Mr. Fleischmann argues that the City's service was not effective because Mr. Millikan's office was "closed" at the time of service (despite the delivery of the document being made on a weekday, during regular business hours) because the gate to Mr. Millikan's office property was chained shut. If Mr. Fleischmann's argument is accepted, then a lawyer can effectively re-write CR 5(b) and defeat the ability of his or her opponent to serve him or her by delivery. The rule specifically contemplates that in the course of litigation, one party can serve the opposing party by delivery,

including delivery to the office of the attorney for that other party during regular business hours. But under Mr. Fleischmann's theory, a lawyer can prevent CR 5 service by delivery by simply "raising the drawbridge" and preventing anyone from accessing his or her office for purposes of effecting service by delivery. This Court should decline to apply CR 5 in such a way as to effectively re-write the rule and allow opposing counsel to effectively dodge service at his designated office address.

In fact, many lawyers practice from non-traditional offices, such as Mr. Millikan's. In light of this fact of the modern practice of law, courts should apply CR 5(b) pragmatically, in light of the purpose of that rule (to insure parties receive actual notice of important happenings in the course of litigation) and in light of the facts and circumstances in each case. Applying CR 5 pragmatically in this case, the City's service of the offer of judgment on Mr. Millikan was fully in compliance with the rule.

2. The cases cited by Mr. Fleischmann are inapposite

Mr. Fleischmann cites no Washington case holding that service of an offer of judgment was improper under facts and circumstances similar to this case. Instead, Mr. Fleischmann cites cases that present very different facts. Given those different facts, those cases are inapposite to this case.

First, *Rohr v. Baker*, 53 Wn.2d 6, 7, 329 P.2d 848 (1958), is not applicable to this case because *Rohr* involved purported service of a motion

for default made at the defendants' attorney's office *on a Saturday*. In that case, the State Supreme Court held that where purported service was made by "push[ing] the motion for default through the mail slot in the office of defendants' attorneys on Saturday," the service did not meet the requirements of CR 5, and so was ineffective. Unlike in *Rohr*, service in this case was made on a Friday, during regular business hours. The holding in *Rohr* reflects that a party cannot reasonably expect to accomplish service by delivery to a lawyer's office outside of regular business hours, especially on weekends. The opposite is true here: the City served Mr. Fleischmann by delivering the offer of judgment to Mr. Millikan's office property during regular business hours and leaving it in a conspicuous place in the property: the mailbox.

Also inapplicable to this case are *O'Neil v. Jacobs*, 77 Wn.App. 366, 369, 890 P.2d 1092 (1995) and *Wallace v. Kuehner*, 111 Wn.App. 809, 824, 46 P.3d 823 (2002), both of which involved purported service *by fax*. In *O'Neil*, a party purported to serve a post-arbitration trial de novo demand on the other party by fax. The court in *O'Neil* observed that "[s]ervice by facsimile is not a method of delivery provided for in [CR 5]." The court thus held that the purported service by fax was ineffective. In *Wallace*, the court reached the same conclusion in a case involving purported service by fax of an offer of judgment: "absent the parties' written stipulation agreeing

to service of documents by fax, service of an offer of judgment by fax is ineffective. *Wallace*, 111 Wn.App. at 824. In this case, service was not by fax but by delivery to Mr. Millikan's office property and leaving the offer in the mailbox (a conspicuous place) on the property. Thus, the cases involving service by fax are not applicable to this case.

Finally, the federal cases cited by Fleischmann are similarly distinguishable from this case as each involves very different facts. In *Sinett, Inc. v. Blairex Laboratories, Inc.*, 909 F.2d 253, 253-254 (7th Cir. 1990), Judge Posner observed that "the only attempt at service [of a request for a trial de novo] within the ten days was by slipping a copy of the motion for new trial under the door of the law office of the defendants' counsel, *after hours*, when no one was there." (Emphasis added). Here, the offer of judgment was not delivered "after hours"; it was delivered during regular business hours, when it was reasonable to expect a law office to be open for business, and was left in a conspicuous place there, as contemplated by the rule.

Each of the (non-precedential) federal district court cases cited by Mr. Fleischmann are similarly inapposite: *Ortiz-Moss v. N.Y. City DOT*, 623 F. Supp. 2d 404, 408, (S.D.N.Y. 2008), involved purported service of an acceptance of an offer of judgment by e-mail, by fax, and by delivery after

hours (at 9:00 pm). The delivery after hours was deemed received the next business day, after the time period for acceptance had elapsed.

Davis v. Elec. Arts Inc., 2017 U.S. Dist. LEXIS 147621, *2 (N.D. Cal. 2017)(unpublished), involved “attempted service by sliding the discovery under the door of defense counsel's office *after regular business hours.*” (Emphasis added). Neither of those cases present facts similar to this case, where the delivery was made during regular business hours to the delivery address specified by Appellant’s counsel, and so neither case has any bearing on this one.

3. Even if service of the offer of judgment was not technically sufficient, the City substantially complied with the service requirement and so service was effective

Service of the offer of judgment on Mr. Millikan satisfied CR 5 for the reasons discussed in the preceding sections. But even if delivery of the offer of judgment to Mr. Millikan’s office property did not technically satisfy CR 5, the City substantially complied with the service rule and, critically, Mr. Millikan, by his own admission, actually received the offer and Mr. Fleischmann, by his own admission, had actual notice of the offer of judgment and had a full opportunity to consider it and decide to reject it. Therefore, the offer of judgment was effective.

A party may satisfy the requirements of CR 5(b) by substantial compliance if the party being served receives “actual notice” or the service

is completed “in a manner reasonably calculated to reach the party on whom the statute requires service.”⁹ *In re Marriage of Chai v. Kong*, 122 Wn.App. 247, 253, 93 P.3d 936 (2004) (citing *Petta v. Dep’t of Labor & Industries*, 68 Wn.App. 406, 409, 842 P.2d 1006 (1992)). The substantial compliance doctrine applies to service under CR 5(b) of pleadings and other such documents in the course of litigation because “the purpose of the civil rules is to place substance over form,” *Crosby v. Spokane County*, 137 Wn.2d 296, 303, 971 P.2d 32 (1999), and because “[t]he principle of liberal construction applies to CR 5.”¹⁰ *Tacoma Pierce County Small Bus.*

⁹ The court of appeals in *Marriage of Chai* incorrectly recited the test for substantial compliance as requiring actual notice *and* service in a manner reasonably calculated to reach the party to be served. *Marriage of Chai*, 122 Wn.App. at 253. In fact, substantial compliance can be established by *either* actual notice *or* service in a manner reasonably calculated to reach the party to be served. The court in *Marriage of Chai* cited *Petta*, 68 Wn.App. at 409, for the proposition that substantial compliance requires actual notice *and* service in a manner reasonably calculated to reach the party to be served. *Marriage of Chai*, 122 Wn.App. at 253. But *Petta* actually says that a party can establish substantial compliance with service requirements by showing actual notice *or* service in a manner reasonably calculated to reach the party to be served. *Petta*, 68 Wn.App. at 409 (“Substantial compliance occurs when the Director of the Department (1) receives actual notice of the appeal to the superior court *or* (2) the notice of appeal was served in a manner reasonably calculated to give notice to the Director.” (Emphasis in original.)). But here, the City satisfies both criteria, so the City can establish substantial compliance under either articulation of the test.

¹⁰ While the substantial compliance doctrine generally applies to service under CR 5(b) of pleadings and other such documents in the course of litigation, it does not apply to certain specific kinds of statutorily require, “mandatory” notices, such as a request for trial de novo following an arbitration award. *See, e.g., Nevers v. Fireside*, 133 Wn.2d 804, 811-12; 947 P.2d 721, (1997); *see also* Douglas J. Ende, 15 Wn. Practice: Civil Procedure, § 50:5 (3d ed.). This is so because strict service of such mandatory notices is a statutory prerequisite, which must be strictly complied with. *Nevers*, 133 Wn.3d at 811-12. No case holds that an offer of judgment is subject to the kind of strict compliance requirements as a notice of trial de novo following an arbitration.

Incubator v. Jaguar Sec., Inc., 4 Wn.App. 2d 935, 940, 424 P.3d 1247 (2018).

In *Marriage of Chai*, the court of appeals found that the serving party, Mu Chai, did not substantially comply with CR 5(b) in attempting to serve the opposing party, Yi Kong, because neither of the two criteria for substantial compliance were not met:

It was undisputed that Yi Kong did not receive actual notice of Mu Chai's motion. The method Mu Chai used was not reasonably likely to result in notice to Yi Kong, who never resided at that address and had no reason to anticipate that documents might be left for her there after the separation decree was entered. And because the envelope hand-delivered by Mu Chai did not carry postage or (apparently) list a return address, the likely result was its destruction.

Id.

In this case, the opposite is true, based on the undisputed facts. First, Mr. Fleischman, through his attorney, received actual notice of the City's offer of judgment. Mr. Millikan received the offer of judgment via e-mail and was told in an e-mail that it was being left at his office property. CP 102526. And both Mr. Millikan and Mr. Fleischmann actually knew of the offer of judgment. CP 1025, 1130. Second, by leaving the offer of judgment in the mailbox at Mr. Millikan's law office property during regular business hours and leaving him telephone messages informing him that the document had been so delivered, the City served the offer "in a

manner reasonably calculated to reach” Mr. Millikan and thus Mr. Fleischmann. Thus, unlike the service in *Marriage of Chai*, the City’s service of the offer of judgment substantially complied with CR 5(b).

Mr. Fleischmann argues that substantial compliance is not applicable here, citing *Nevers v. Fireside*, 133 Wn.2d 804, 947 P.2d 721 (1997). Opening Br. at 17. But *Nevers* does not hold that a party cannot substantially comply the requirement for service of an offer of judgment (in fact, Mr. Fleischmann points to no case that so holds). Instead, the Court in *Nevers* held that a party cannot substantially comply with the statutory service requirements applicable in the context of mandatory arbitration, which is governed by a statutory scheme that includes service requirements. *Nevers*, 133 Wn.2d at 811-14. According to the Court in *Nevers*, only strict compliance with those statutory service requirements triggers the superior courts authority to conduct a trial de novo following an arbitration award. *Id.* *Nevers* addressed strict compliance with the requirement to file both the request for trial de novo and proof of service upon completion of a mandatory arbitration. *Id.* The rationale was that strict compliance was needed to prevent subverting the Legislature's intent by contributing to increased delays in arbitration proceedings. *Nevers*, 133 Wn.2d at 815. Contrary to Mr. Fleischmann’s claim, *Nevers* never held substantial

compliance is inapplicable to service of an offer of judgment or the manner in which service is carried out.

In this case, even if the City did not strictly comply with the service requirements of CR 5(b), it substantially complied, and substantial compliance is sufficient for service of an offer of judgment. Mr. Millikan and Mr. Fleischmann actually received the offer of judgment on the day of service and the offer of judgment was delivered to Mr. Millikan in a manner reasonably calculated to reach him. Service of the offer of judgment was thus sufficient and the offer of judgment as valid and operable and the trial court's enforcement of the offer should be upheld.

4. Appellant's affirmative use of the CR 68 Offer of Judgment waives or estops any claim of improper service.

Appellant's submittal of the City's CR 68 Offer of Judgment in support of his discovery motions, without noting any objections as to its service, also operates as an affirmative reliance on this document in seeking relief from the Court. By attaching the Offer to his declaration supporting his discovery motions to demand *in camera* review of privileged documents, despite limitations on its admissibility of the offer in CR 68, Appellant sought to use the offer as a sword to support his own ends. He cannot equitably use the offer for his own purposes while denying the validity of its service. His affirmative use of the Offer of Judgment to

support his motion should be deemed a waiver of any claim that it was invalid or defectively served.

C. THE TRIAL COURT CORRECTLY FOUND THAT THE CITY DID NOT VIOLATE THE PRA IN RESPECT TO EIGHT DOCUMENTS IDENTIFIED IN THE MAY 28, 2019 PRIVILEGE LOG.

In this appeal, Mr. Fleischmann claims that the eight particular records that were identified in a privilege log, provided to him by the City in the course of discovery in this case, should have been disclosed to him earlier. Opening Br. at 18-23.

Mr. Fleischmann's argument is without merit. The trial court correctly rejected Mr. Fleischmann's claim that the City violated the PRA by not timely disclosing documents identified in a May 28, 2018, privilege log, which was provided as part of discovery in this case. The trial court's finding on this issue should be affirmed for three reasons: First, each of those eight records were created *after* the date of the one and only public records request at issue in this case: request No. W010837. Because those eight records were created after the date of the request, they are categorically not responsive to that request. Second, even if Mr. Millikan's other public records request to the City, request No. W012267, is considered to also be at issue in this lawsuit (it is not) the eight records were not responsive to either of Mr. Millikan's requests as reasonably interpreted by

the City. Finally, failed to give the trial court the opportunity to review those eight records *in camera* to determine whether they were, in fact, responsive to his request. Having failed to do so, Mr. Fleischmann has forfeited his opportunity to establish any PRA violation as to those eight records.

- 1. The eight records were created after the date of request No. W010837 (February 23, 2018) are categorically not responsive to that request; Request No. W010837 is the only Request At Issue in this Case.**

Mr. Fleischmann's argument fails primarily because the eight records he claims were silently withheld were created *after* request No. W100837 –the only request at issue in this case– was made. Request No. W100837 was made February 23, 2018. CP 919; Supp. CP 1205 (Iverson Decl. at 1). The eight records in question were created between April 1, 2018 and May 10, 2018. CP 180-81. Thus, these records did not exist when Appellant's request No. W100837 was made and therefore could not have been responsive to the request because records created after a public records request is made are *categorically* not responsive to that request.

It is well-established that (1) records created after the date of a public records request are not responsive to that request, (2) an agency is not obligated to provide records created after the date of the request, and (3) an agency does not violate the PRA by not providing such after-created

records. See, e.g., *Sargent v. Seattle Police Dep't*, 167 Wn.App. 1, 12, 260 P.3d 1006 (2011) (aff'd in part, rev'd in part on other grounds by *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 387, 314 P.3d 1093 (2013) (“ The PRA does not provide for standing records requests. An agency is not required to monitor whether newly created or newly nonexempt documents fall within a request to which it has already responded.”); Washington State Bar Association Public Records Act Deskbook: *Washington's Public Disclosure and Open Meetings Laws Second Edition* (Ramsey Ramerman and Eric M. Stahl, eds., 2014) at §5.1(4) (“only records existing at the time of the request must be provided.”); WAC 44-14-04002(2) (Attorney General's Office Model Rules) (“The [PRA] does not allow a requestor to make ‘future’ or ‘standing’ (ongoing) requests for records not in existence; nonexistent records are not "identifiable.").

These holdings were recently confirmed by the Supreme Court in *Gipson v. Snohomish Cty.*, 194 Wn.2d 365, 449 P.3d 1055 (2019).

As noted above, the one and only request at issue in this case – request No. W010837– was made February 23, 2018. Supp. CP 1206 (Iverson Decl. at 2, Ex. A). Thus, only records created on or before February 23, 2018, could be responsive to request No. W010837. Records created after that date are categorically not responsive to request No. W010837 and the City was under no obligation to disclose or provide

them. Therefore, there can be no PRA violations found in this case as to records created after February 23, 2018.

Critically, in his Opening Brief, Mr. Fleischmann fails to acknowledge the fact that the eight records he claims were not timely disclosed were all created *after* February 23, 2018, the date request No. W010837 was made. And he fails to make any argument as to why records created after the date of the request could possibly be responsive to his request, in spite of the clear case law to the contrary. In his Reply Brief, Mr. Fleischmann may attempt to argue that those records are responsive to his later request, request No. W012267, made June 29, 2018. But any such argument is foreclosed by the fact that Mr. Fleischmann stipulated to an agreed order that identified one and only one public records request at issue in this case: request No. W010837, made February 23, 2018. Having made such a stipulation, Mr. Fleischmann may not now argue to the contrary.

In summary, all of the records identified by Mr. Fleischmann as being “silently withheld” were created after February 23, 2018, the date of request No. W010837; those records are categorically not responsive to request No. W010837. As to all such after-created records, there can be no PRA violations.

2. E-mails are beyond the scope of request No. W010837 as reasonably interpreted (and beyond the scope of request No. W012267 as reasonably interpreted) and so are not responsive.

Even if the eight records were not categorically nonresponsive to the request at issue in this case (request No. W010837), and even if Mr. Fleischmann's later request (request No. W012267) is considered to be at issue in this case, the trial court correctly found no PRA violation as to those eight records because it is apparent from the privilege log that they are e-mails, and e-mails were not responsive to either request as reasonably interpreted by the City.

As discussed above, based on how it was submitted and how it was worded, Ms. Iverson interpreted request No. W010837 to be seeking "police records" –that class of records created or gathered by law enforcement officers in the course of responding to or investigating a police incident. Supp. CP 1293 Second Iverson Decl. at 2. Ms. Iverson does not consider e-mails to be "police records" and so she did not consider e-mails to be responsive to request No. W010837. *Id.* (The same is true for request No. W012267.)

The records request to the Olympia Police Department was not made for general city records, but through the Police Records Portal on the City website. CP 1292, Second Declaration of Iverson at 1. As such, it only requested police department records, not those of other departments.

Thus, there was no obligation to obtain records from other departments. *Koenig v. Pierce Cty.*, 151 Wn.App. 221, 211 P.3d 423 (2009) (prosecutor had no duty to inquire with other county departments concerning record request it received).

This interpretation of request No. W010837 (and of request No. W012267) was and is entirely reasonable, given the circumstances of the request. And since e-mails are beyond the scope of the request and are thus not responsive to request No. W010837 as reasonably interpreted, it is not a violation of the PRA for the City to have not provided the eight e-mails Mr. Fleischmann claims the City failed to timely disclose. The same is true for request No. W012267. If Mr. Millikan had sought e-mails, he could have followed up with the City after receiving responsive records to specifically request e-mails. He did not, indicating that he, himself, did not intend his request(s) to include e-mails.¹¹ The City should not be expected to read Mr. Millikan's mind as to what records he sought. *Hobbs*, 183 Wn.App. at 944 (“Agencies are not required to be mind readers.”).

¹¹ Mr. Millikan did make another request for records, request No. W011082, on March 19, 2018, which expressly sought “any communications in any format” containing a number of terms, related to the February 9, 2018 incident and the City’s seizure of Mr. Fleischmann’s truck. Supp. CP 1295-96 (Second Iverson Decl. at 4-5). By this request, Mr. Millikan clearly sought e-mails. The fact that he made this request, whereby he expressly sought “communications,” including e-mails, shows when he wanted e-mails, he knew how to request them, and that that he did not seek e-mails through request No. W010837 or W012267.

3. Appellant has made no showing that the records identified on the privilege log provided in discovery are responsive to request No. W010837

Finally, the trial court could not have found any violation as to the eight e-mails because Mr. Fleischmann failed to make any showing as to the contents of these records, and so could not establish that they were actually responsive to request No. W010837 (or to request No. W012267, should that request be considered). Simply put, Mr. Fleischmann merely speculates that those records are responsive to his request but did not give the trial court an opportunity to establish they actually *were* responsive through the *in camera* review process. And Mr. Fleischmann's failure to initiate *in camera* review deprives this Court of the opportunity to evaluate his claims as to those eight records. He has thus forfeited the opportunity to now argue any PRA violation as to those eight records.

As noted above, a Thurston County Superior Court local rule, LCR 16(c)(2), establishes the procedure by which a party seeking the court's *in camera* review in a public records case may initiate such review. Under LCR 16(c)(2), "[i]n a Public Records Act case, *in camera* review will occur only if the assigned judge enters an order requiring such review." When the *in camera* review process is properly initiated as provided in LCR 16(c)(2), the trial court is given the opportunity to review records that were redacted or withheld as part of an agency's public records

response to determine whether any violation of the PRA occurred as to those redacted or withheld records.

Mr. Fleischmann did not initiate the LCR 16(c)(2) *in camera* review process in this case. He never sought an order from the trial court pursuant to LCR 16(c)(2) initiating *in camera* review under that rule, and never made arrangements with the court for *in camera* review. In fact, the parties' Stipulation and Agreed Statement of Issues and Scheduling Order, Supp. CP 1201, indicated that *in camera* review was not required, and Mr. Fleischmann never sought to leave to amend that agreement.

Mr. Fleischmann *did* twice seek *in camera* review as part of the discovery process in this case, in order to resolve a discovery dispute: whether the City had, as part of its discovery responses, properly withheld 47 e-mails, identified on a privilege log provided to him as part of the City's discovery response. But seeking a court's *in camera* review to resolve a discovery dispute is distinct from seeking *in camera* review under LCR 16(c)(2) of records withheld or redacted in an agency's response to a public records request. In any event, Mr. Fleischmann's two motions for *in camera* review to resolve that discovery dispute were both denied, Supp. CP 1203; 1304 and Mr. Fleischmann did not assign error to those decision by the trial court. His brief on the merits below conceded that the records identified on the log were properly claimed as privileged.

CP 85. So those decisions to deny *in camera* review in the discovery process are not before this Court.

Because Mr. Fleischmann failed to initiate the *in camera* review process provided for in Thurston County LCR 16(c)(2), and the trial court did not have the opportunity to review those eight records that Mr. Fleischmann claims were not timely disclosed, he forfeited the opportunity to claim any violation as to those records. The record does not reflect the contents of those e-mails, and so there was no basis for the trial court to find any violations as to those e-mails, and there is no basis for this Court to review the trial court's decision. Accordingly, this court should reject Mr. Fleischmann's arguments with respect to those eight e-mails and affirm the trial court's finding that no PRA violation occurred vis-à-vis those eight records.

V. CONCLUSION

The Superior Court correctly found that the City properly served its CR 68 offer of judgment to Appellant's counsel and determined attorney's fees based upon Appellant's failure to exceed the amount of the offer. The Superior Court correctly rejected Appellant's arguments that a violation was shown by creation of a privilege log during discovery, showing documents created after the Appellants' requests were submitted. Such documents are not responsive to the request and there is no duty to

produce documents that did not exist when the request was submitted.

The Superior Court did not err and should be affirmed.

Respectfully submitted this 11th day of August, 2020.



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APPENDIX A



APPENDIX B

Appendix A

#	Creation Date	Type	Subject	From	To	Responsive?
	2/23/2018		Request no. W010837 made by Mr. Millikan			
1	4/5/2018	Email	Alexander Fleischmann	John Justice, Outside Counsel	Connie Cobb, Claims Manager	No. Created after request no. W010837. Outside the scope of request no. W012267, which was reasonably interpreted to be limited to police records concerning a specific incident, and thus to not be seeking emails with the risk manager or outside counsel concerning litigation..
2	4/6/2018	Email	Alexander Fleischmann	Connie Cobb, Claims Manager	John Justice, Outside Counsel	No. Created after request no. W010837. Outside the scope of request no. W012267, which was reasonably interpreted to be limited to police records concerning a specific incident, and thus to not be seeking emails with the risk manager or outside counsel concerning litigation..
3	4/12/2018	Email	ATTORNEY CLIENT PRIVILEGE - Supplemental to Claim: Alexander Fleischman DOL 2-9-18	Connie Cobb, Claims Manager	Drew Brien, WCIA Claims Adjuster John Justice, Outside Counsel	No. Created after request no. W010837. Outside the scope of request no. W012267, which was reasonably interpreted to be limited to police records concerning a specific incident, and thus to not be seeking emails with the risk manager or outside counsel concerning litigation..

Appendix A

4	4/12/2018	Email	ATTORNEY CLIENT PRIVILEGE – Supplemental to Claim: Alexander Fleischmann DOL 2-9-18	John Justice, Outside Counsel	Connie Cobb, Claims Manager Drew Brien, WCIA Claims Adjuster	No. Created after request no. W010837. Outside the scope of request no. W012267, which was reasonably interpreted to be limited to police records concerning a specific incident, and thus to not be seeking emails with the risk manager or outside counsel concerning litigation..
5	4/18/2018	Email	FW: ATTORNEY CLIENT PRIVILEGE – Supplemental to Claim: Alexander Fleischmann DOL 2-19-18	Connie Cobb, Claims Manager	Jeffrey Herbig, Detective Sergeant	No. Created after request no. W010837. Outside the scope of request no. W012267, which was reasonably interpreted to be limited to police records concerning a specific incident, and thus to not be seeking emails with the risk manager or outside counsel concerning litigation..
6	4/18/2018	Email	ATTORNEY CLIENT PRIVILEGE – Supplemental to Claim: Alexander Fleischmann DOL 2-19-18	Jeffrey Herbig, Detective Sergeant	Connie Cobb, Claims Manager	No. Created after request no. W010837. Outside the scope of request no. W012267, which was reasonably interpreted to be limited to police records concerning a specific incident, and thus to not be seeking emails with the risk manager or outside counsel concerning litigation..
7	5/10/2018	Email with Attachments	Alexander Fleischmann GC047965	Drew Brien, WCIA Claims Adjuster	Connie Cobb, Claims Manager	No. Created after request no. W010837. Outside the scope of request no. W012267, which was reasonably interpreted to be limited to police records concerning a specific incident, and thus to not be seeking emails with the risk manager or outside counsel concerning litigation..

Appendix A

8	5/10/2018	Email	Alexander Fleischmann GC047965	Drew Brien, WCIA Claims Adjuster	Connie Cobb, Claims Manager	No. Created after request no. W010837. Outside the scope of request no. W012267, which was reasonably interpreted to be limited to police records concerning a specific incident, and thus to not be seeking emails with the risk manager or outside counsel concerning litigation..
	6/29/2018	Request no. W012267 made by Mr. Millikan				

LAW LYMAN DANIEL KAMERRER & BOGDANOVICH

August 11, 2020 - 4:50 PM

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