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Court of Appeals
Division III
State of Washington

No. 34340-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RICHARD EGGLESTON,

Appellant,

v.

ASOTIN COUNTY, a public agency,
ASOTIN COUNTY PUBLIC WORKS
DEPARTMENT, a public agency,

Respondents.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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A. INTRODUCTION

This is a Public Records Act, RCW 42.56, (“PRA”) case relating to three discrete documents representing a small number of documents out of the hundreds of pages Asotin County (“County”) produced pursuant to multiple requests by the appellant Richard Eggleston (“Eggleston”), an experienced construction manager and consultant. A portion of Eggleston’s property was acquired for a bridge/highway project (the “Project”) involving multiple entities managed by the County. Eggleston has other disputes with the County relating to rockeries and what he contends he was entitled to receive in the right of way purchase which are the subject of a separate lawsuit.

Here, Eggleston seeks further penalties and fees relating to what he claims are thirteen requests¹ spanning eight years for three documents. The first document, the subject of 9 of the 13 claimed requests, is an email between two private parties from January 11, 2002, that was never received by the County. If such an email ever existed, it is no longer available from Thomas, Dean, & Hoskins, Inc. (“TD&H”), an engineering firm with which the County contracted to provide engineering services on the Project *after* the date of the email. This was not a public document

¹ Eggleston’s action on another request was dismissed on direct verdict; Eggleston says it was abandoned.

subject to the PRA, as the trial court ruled, but, if it were, Eggleston's request for it is time-barred, as the trial court correctly ruled as to Eggleston's requests 1-5.

The other two documents are sets of plans for the Project: the April 2012 and July 2012 requests for "current sheets." These two documents were not public documents, contrary to the trial court's decision, because TD&H was not a *de facto* County agency. If they were public documents, the plans, marked preliminary, were changing works in progress, and were graphic recommendations for sensitive negotiations among the County, the Nez Perce Tribe, and state and federal authorities; they were preliminary drafts involving the County's deliberative process, and were therefore PRA-exempt. The trial court erred in its imposition of penalties against the County with respect to these latter two requests.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error/Issues Pertaining to Them

The County acknowledges Eggleston's assignment of error but believes the issues pertaining to them are more appropriately formulated as follows:

1. Was the trial court correct in concluding that Eggleston's PRA requests 1-9 relating to a January 11, 2002 email did not relate to a public record as defined under RCW 42.56.010(3) where it was not clear that the County ever received it, and it was in its consultant's possession?

2. Alternatively, was Eggleston's request for the email time-barred under RCW 42.56.550(6)?

3. Did the trial court abuse its discretion in awarding only reasonable costs incurred by Eggleston?

(2) Assignments of Error on Cross-Review

1. The trial court erred in entering its June 11, 2015 findings of fact and conclusions of law.

2. The trial court erred in its June 11, 2015 letter ruling supplemental to its findings and conclusions.

3. The trial court erred in its December 17, 2015 letter ruling regarding the penalty phase of the proceedings.

4. The trial court erred in entering the March 26, 2016 judgment.

5. The trial court erred in entering finding of fact 2.10.

6. The trial court erred in entering finding of fact 2.21.

7. The trial court erred in entering finding of fact 2.26.

8. The trial court erred in entering conclusion of law 3.4.

9. The trial court erred in entering conclusion of law 3.5.

10. The trial court erred in entering conclusion of law 3.6.

11. The trial court erred in entering conclusion of law 3.7.

12. The trial court erred in entering conclusion of law 3.8.

13. The trial court erred in entering conclusion of law 3.9.

14. The trial court erred in entering conclusion of law 3.10.

15. The trial court erred in entering conclusion of law 3.11.

16. The trial court erred in entering conclusion of law 3.12.

17. The trial court erred in entering mitigating factor 5 in that there was a response and referenced negotiations.

18. The trial court erred in entering its aggravating circumstance 2.

19. The trial court erred in entering its aggravating circumstance 4.

20. The trial court erred in entering its aggravating circumstance 5.

(3) Issues Relating to Assignments of Error on Cross-Review

1. Did the trial court err in concluding that the engineering consultant's records had to be produced where the engineering consultant was not a *de facto* County agency and the records were not public records under the PRA because they were never in the possession of the County, nor seen by County officials, and were in the possession of third parties? (Assignments of Error Numbers 1-20)

2. If the design plans in the possession of the engineering consultant were public records, were they exempt under the PRA? (Assignments of Error Numbers 1-20)

3. Did the trial court err in awarding excessive penalties and attorney fees under the PRA to Eggleston where it made errors of law, abused its discretion, and therefore failed to

properly follow the Supreme Court's *Yousoufian's* penalty protocol? (Assignments of Error Numbers 18-20)

C. STATEMENT OF THE CASE

(1) Parties and the Project

Asotin County is a small rural county located in the Southeastern corner of Washington. It has approximately 21,000 people and its county seat is Asotin. As a small county, the County has limited resources and staff.

Eggleston is a sophisticated construction manager. He received a degree in construction management from the University of Washington and has been involved with construction for over twenty years. He works with construction drawings on a daily basis. RP II:243.² Because of his expertise, he is familiar with construction claims and how to protect his personal interest.

Eggleston had a personal interest in the Project because it impacted his property and he sold some property in a right-of-way agreement to the Washington State Department of Transportation ("WSDOT") for well in excess of \$100,000. RP IV:549, 594.³ The area where the Project was

² The report of proceedings is referenced by volume number.

³ While Eggleston attempts to claim his interest was to promote "the protection of these archeologic resources" (Br. of Appellant at 4), in making the public disclosure requests at issue here, his interest was personal to determine if any changes in the project were going to affect rockery walls slated for his property. RP II:254.

located was known to be culturally significant and it was believed there were pre-historic graves of Indians in the area. RP II:281. Knowing that, and being sophisticated in construction, Eggleston obtained consulting party status from the federal government which allowed him to comment on the project and antiquities. RP II:244. Although he had consulting status, that did not mean that Eggleston's agreement was necessary when the Project needed to be redesigned, as is explained more fully *infra*. RP IV:536, 537.

The Project took a decade to come to fruition. The County had to replace an existing one-lane bridge on the Snake River Road with a two-lane bridge; this also impacted the road alignment. RP III:460-61. It was a very important project for the County and its residents as it was the biggest County project in about ten years; it involved in excess of \$4 million (the County budget was only \$6.9 million in 2014). RP III:489, 490, 529.

The County's design contract with TD&H was entered into on March 4, 2002. Ex. 23; CP 1026-61; Appendix F. In addition to the County, four other entities were formally involved in the project whose agreement was necessary: the Federal Highway Administration ("FHA"), WSDOT, the Nez Perce Tribe ("Tribe"), and the Washington State Department of Archeology and Historic Preservation ("WSDAHP"). RP

I:52-54.

After years of design, public meetings, and obtaining financing, the final design for the project was completed in the spring of 2010; Eggleston received a copy of those plans from the County and he reviewed them. RP II:244-45. Construction began in June 2010. *Id.* After construction started, the public had to use a temporary one-lane bridge on a much less safe road route. RP III:461.

Construction proceeded for a few months until Project managers encountered a Native American grave site in October 2010. As a result, the Project was shut down. RP III:460. This had huge financial and safety considerations for the County. The public still had to use the temporary one-lane bridge on a dangerous route. The contractor had to be paid “stand-by fees;” the County essentially was paying the contractor \$34,000 per month to be ready to re-start the project, even though no work was being performed in the meanwhile. *Id.*⁴ When Jim Bridges became the County Engineer in early 2012, the contractor had been paid \$300,000 to \$400,000 to do nothing. *Id.* More ominous was that if an agreement could not be reached about how to proceed, the entire project might be lost as had occurred with a project on the lower Elwa River in Western Washington. CP 419-21; RP II:380-81. The trial court found the financial

⁴ The trial court found the amount to be \$25,000 per month. CP 563.

and potential loss of the project concerns “legitimate.” CP 563.

Of necessity, all of the parties had to agree about a redesign and revised construction techniques to avoid or minimize any impacts to Native American antiquities. RP I:132. Negotiations among the parties took place from March 2002 until a final design and agreement was reached in October 2012. Ex. 102; CP 1076-82. Thereafter, construction recommenced with the Project being completed in 2013.

(2) Eggleston’s PRA Requests

The first nine Eggleston PRA requests predate the aforementioned negotiations and do not relate to antiquities. TD&H is a private company with offices throughout the Northwest that performs engineering services for all sorts of entities. CP 416-18. It was a fee for service contractor. CP 1028. While this was a big project for the County, it was not a big project for a major engineering firm like TD&H. The Project’s Phase 1 preliminary work and route study was only \$25,000. CP 1028. In order to perform its work, TD&H, like any private sector business, had to get its personnel and resources ready. To perform the contract a Cultural and Historical Preservation Study was required. CP 1056. That needed to be performed by a sub-consultant selected and hired by TD&H, although technically the County had final approval authority; TD&H contacted Kevin Cannell, the Tribe’s Cultural Resources Archeologist to perform the

study. CP 38. He formulated a scope of work that stated what work would be done and the charges for that work. CP 1017-18. It was a “proposal” to TD&H.

Eggleston apparently believed there was a written request for proposals from TD&H when it was preparing its statement of qualifications so that it could be qualified to provide engineering services for the Project. CP 1068. This is evidenced by his repeated references in his various PRA requests seeking the “solicitation to Cannell to perform Archeological services” or “original RFP for Archeological services.” CP 28, 42, 48, 60, 61, 64, 65. Eggleston repeatedly made these requests because he stated he believed Cannell informed the County in early 2002 there was an “extremely significant cultural resource at that location” and he was contending the County had an obligation to determine what that resource was before doing any engineering. CP 48.

Eggleston’s requests for this “Proposal” were all premised on the assumption that there was a written request for a proposal and response. Randy Noble, the TD&H’s Project manager, testified that TD&H did not send out written requests for proposals or qualifications; rather, sub-consultants were contacted telephonically to see if they were interested. CP 1069. Cannell was contacted in that way. Eggleston no longer contends to the contrary.

Apparently Cannell responded to TD&H by sending back the scope of work by email on January 11, 2004, before TD&H was under contract with the County.⁵ The only way this “undisclosed email” is “known,” is because of a reference to it in a June 5, 2002 letter from TD&H to Cannell when he was asked to perform a preliminary review and told to reference the scope of work send to TD&H by email on January 11. CP 1024. A copy of that letter was sent to the County. Both letters are in the Appendix.

The County produced the June 5 letter, along with the scope of work, Cannell’s report, and all other communications with Cannell in 2004. CP 903, 906, 996-1024. From that point, Eggleston had as much knowledge of a January 11, 2002 email as did the County.

(3) The Requests for the April and July Plans

In evaluating these disclosure requests, the Court should be aware that in today’s world, a design project such as this one is basically a set of data on a computer; that data then can be graphically displayed as a plan depending on printing options. RP I:107-08. When the design is finalized, a set of final plans is printed and stamped by the engineer. RP I:102-03. The Project had a set of plans finalized in 2010, which

⁵ The County uses the term “apparently” because there is no way to verify if such an email actually exists. There is no evidence it was ever sent to the County. TD&H has no emails prior to August 2003. CP 127.

Eggleston obtained. *Id.* By their nature, those plans would have had on them raw or basic data such as topography, elevations, etc.

Once the project was stopped and a new design agreed upon by the four agencies and the Tribe became necessary, it was clear that the project design was in flux as the parties considered different options and made suggestions. Any plans were properly marked “preliminary.” RP I:96-97. The preliminary plans were changing at the recommendations of all the parties to the negotiations. *Id.* at 129-30. The plans changed repeatedly with significant changes between June 2012 and the agreed upon final plans in September. *Id.* at 100-03. Once the plans were final, Eggleston was notified, and he came and picked them up. They had a signed sealed stamp of an engineer and were ready for construction; they were no longer marked “preliminary.” *Id.*

More significantly, the preliminary plans reflected options and contained opinions and recommendations. RP I:122. There was a lot more in them than data. RP II:201. Even Mr. Stermer, Eggleston’s witness from WSDAHP testified that the preliminary plans he reviewed and commented on were preliminary. He stated: “Recommendations that are design plans, yes, sir.” RP I:149. These preliminary plans reflected the deliberations of the parties. RP II:386.

Eggleston’s other PRA requests of April 26, 2012, and July 17,

2012 relate to the project negotiations. On approximately April 23 or 24, 2012, the County, the Tribe, and some others met at Lapwai to review the project in their effort to move forward. Jim Bridges, the County engineer and Craig Miller, the County's Project Manager, were present. *Id.* at 356. Both Bridges and Miller testified that the County did not ask for a complete set of project plans to be prepared for the meeting and they had no knowledge about a full set of plans being distributed. RP III:430-32. It was their understanding the Tribe did not want the meeting to be all that technical. RP II:360-64. The County put into the record the correspondence relating to the meeting and what documentation was to be provided, none of which mentioned a full set of plans. Exs. 109-16; *id.* at 368-75. Bridges testified the County never ordered a full set of plans until August 2012, after the Eggleston April and July PRA requests. RP II:372.

As it turned out, TD&H printed out a set of plans as of April 13, 2012. Noble testified it was possible TD&H brought those documents to the meeting and could have distributed them. RP I:169. It is certainly possible that the consultant had the document at the meeting and gave it to someone who requested it, without the County knowing about it. RP III:425. What is definitely known is that Eggleston had a complete set of the April 13 preliminary drawings from the Tribe *before* he ever requested

a set from the County in his request 10 on April 26, 2012. RP II:267.⁶

Eggleston was meeting secretly with the Tribe, before, during, and after the April 26 request. RP II:291. He knew the Tribe was in negotiations with the County. He never disclosed his secret role with the Tribe because they wanted him to “remain discreet.” RP II:250. Eggleston was pursuing his self interest in ascertaining how the changing plans would affect his property rockery walls. *Id.* at 254.

When he filed his PRA request, Eggleston was aware of the sensitivity of the negotiations. He knew the Tribe did not “trust” the County. *Id.* at 299. When asked if the negotiations among all the parties was sensitive, he testified “Absolutely.” *Id.* at 304. He referred to the negotiations with the Tribe as a “sticky wicket.” *Id.* at 282.

Eggleston’s April requests were first made orally when Eggleston dropped by the County offices, saw a sheet on Miller’s desk, and asked for a copy, which was provided. That was one page of plans that the County had used with the Tribe. The next day, Eggleston sent his April 26 email requesting the “plan sheets.” CP 1073. Although the County had no reason to believe at that point that there was a full set of April plans, it responded to the PRA request in a timely manner. On May 16, 2012, after

⁶ Thus, this entire exercise has been about compelling production and obtaining compensation from the County for a document Eggleston already possessed.

consulting with legal counsel, the County wrote Eggleston and informed him of the negotiations. CP 1073, 1075. It told him no agreements had been reached and the drawings were still preliminary. It then asserted the preliminary drafts exception pursuant to RCW 42.56.280, quoting the statute. CP 1075. After the design was complete and the agreements with all the parties executed, the County provided Eggleston the April plans on December 20, 2012, which Eggleston does not dispute.

While the negotiations were on-going, and after he had filed the underlying lawsuit relating to the first nine requests, Eggleston made another request for plan documents in July, 2012. This resulted from a presentation County Engineer Bridges made to the County Commissioners in which he was optimistic about reaching an agreement with the Tribe. In that presentation, he mentioned a presentation to the Tribe on June 5. Eggleston orally requested a copy of those materials. He followed up with an email the following day. CP 69. The County, believing Eggleston was requesting the documents presented to the Tribe, provided him a copy on July 19. CP 1074, 70. Nothing was withheld. This came to be known as the Nez Perce set. Ex. 3.

Eggleston asserts that he made another request (number 12) by a letter from his counsel on August 2, 2012. CP 71-72. The letter does not clearly indicate it is a new or renewed document request. Rather, it

references the “response that was given” in an apparent reference to the Nez Perce set that had been provided before the letter. It asserts the response was “incomplete” and there was no “withholding log,” but the County provided the complete Nez Perce set. The letter merely asks the oversight to be corrected. The final claim of a new document request (number 14) is the demand letter of Eggleston counsel of September 7, 2012. CP 76-77. It asserts the County is in breach of the April and July requests, and claims that if full disclosure is not made, counsel will take further action. The County did not respond to this letter. Eggleston counsel was allowed to amend his complaint to assert PRA violations relating to the April and July plans.

There is no evidence that the County ever received or used any plans from the June/July 2012 period, other than the Nez Perce set. Apparently TD&H did have a copy of such plans which were given to Eggleston’s counsel at the Randy Noble deposition on January 18, 2013. CP 125.

(4) Proceedings Below

Eggleston filed the present action in the Walla Walla County Superior Court on June 18, 2012. CP 549. The case was assigned to the Honorable John W. Lohrmann. The trial court then addressed PRA liability and penalties in a series of hearings described in detail in the trial

court's May 10, 2013 letter ruling. CP 549-50. Ultimately, the trial court conducted a bench trial in the case on liability on April 1-2, 2012, and entered findings of fact and conclusions of law on June 11, 2015. CP 552-57. *See also*, CP 558-60. The court ruled on PRA penalties in a December 17, 2015 letter ruling, awarding Eggleston \$49,385 in per diem penalties and fees and costs of \$50,133.67. CP 561-66. The trial court entered a judgment against the County on March 16, 2016. CP 544-46. The County satisfied that judgment. Eggleston filed his notice of appeal to this Court on April 13, 2016, CP 849-75, and the County timely cross-appealed. CP 876-82.

D. SUMMARY OF ARGUMENT

Eggleston's present PRA claim relates essentially to three documents despite his multiple requests. The trial court correctly ruled that a January 11, 2002 email was not a public record under the PRA. That email was referenced in another document. It was never received by the County, nor was it ever used by it.

With regard to two other documents, preliminary plans exchanged by participants in an effort to address the re-routing of a key County road project to avoid Native American remains, the trial court erred in concluding they should be produced. The County's engineering consultant was not a *de facto* County agency. Moreover, the plans were

subject to PRA exemptions relating to the deliberative process and to disclosure of materials causing financial loss to the County; Eggleston's requests for the plan were also time-barred.

Finally, the trial court erred in assessing PRA penalties at all against the County. The County made a reasonable, good faith response to Eggleston's multiple requests. If penalties are appropriate (and they are not), the trial court abused its discretion by making its penalty decision under the *Yousoufian* factors based on its misreading of the PRA.

E. ARGUMENT⁷

(1) PRA Policy Considerations

The County recognizes the PRA is a broad public mandate that allows citizens access to public records.⁸ While the PRA is a broad mandate for disclosure, it is not unlimited. In recognition of its PRA responsibilities, the County made timely responses to Eggleston's multiple requests, complied with the procedural requirements of the PRA, consulted counsel about requests, adequately trained its personnel, and had

⁷ Challenges to agency actions under the PRA are reviewed *de novo*. RCW 42.56.550(3); *Zink v. City of Mesa*, 162 Wn. App. 688, 703, 256 P.3d 384 (2011), review denied, 173 Wn.2d 1010 (2012). Penalty decisions are entrusted to the discretion of the trial court and reviewed for abuse of discretion. *Yousoufian v. Office of King County Exec.* 152 Wn.2d 421, 430-31, 98 P.3d 463 (2004).

⁸ RCW 42.56.070(1); *Belenski v. Jefferson County*, 186 Wn.2d 452, 456, 378 P.3d 176 (2016); *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 535, 199 P.3d 393 (2009) (citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). Courts must construe the PRA liberally to further the public interest in broad disclosure. *Id.* at 791.

adequate systems in place to respond to PRA requests, as the trial court found. CP 562. It also answered numerous other requests from Eggleston, providing him with hundreds of pages of documents.

Critically, the PRA has exemptions which are provided for the express purpose of protecting privacy rights or vital governmental interests that sometimes outweigh the PRA's broad policy in favor of disclosing public records. *Wash. Dep't of Transportation v. Mendoza*, 182 Wn. App. 588, 596, 330 P.3d 209 (2014) (citing *Resident Action Council v. Seattle*, 177 Wn.2d 417, 432, 300 P.3d 376 (2013)).⁹

Of particular salience here are the expressed PRA policies against disclosure embodied in various exemptions. For instance, RCW 42.56.270 ("Financial, Commercial and Proprietary Information") exempts from disclosure "designs" and "drawings" when disclosure "would produce private gain and public loss." In his April and July PRA requests for the Project's "current sheets" which are designs and drawings, Eggleston was acting for his own benefit so as to interject himself into sensitive negotiations that could have resulted in severe public financial loss and benefitted Eggleston personally.

⁹ Specific PRA exemptions embody the recognition that there are certain areas where disclosure is not favored and government should not be placed at a disadvantage because of disclosure responsibilities. For instance, RCW 42.56.260, pertaining to "Real Estate Transactions," exempts from disclosure documents which could affect prices being negotiated. RCW 42.56.290, pertaining to "Agency Party to Controversy," protects information when an agency is in a dispute that is in litigation or could be litigated.

The entire negotiation process was triggered because the construction process had unearthed Native American graves and archeological sites. RCW 42.56.300 specifically prohibits disclosure of documents that would reveal the location of such sites. It was public knowledge that the Project had been stopped because of the encounter with Native American remains. The Project's design plans were changed to minimize or eliminate those impacts, and while not specifically identifying sites, tracking changes could reveal where sites were located since the area was being avoided or not excavated.

RCW 42.56.280 "Preliminary Drafts, Notes, Recommendations, and Intra-Agency Memorandums" is also significant here. That exemption was designed and has been interpreted to protect from disclosure the drawings the County did not produce. The County cited this statute as a basis for not producing them. CP 1075.

There can also be no doubt that vital government interests were involved here. The Project had been shut down for months. As a result, the travelling public was forced onto a temporary one lane bridge on the Snake River on a dangerous route. A contractor was being paid to do nothing and hundreds of thousands of dollars had been spent that way. The entire project could be lost if an agreement among five separate entities could not be reached and the process had gone on for over a year

and a half with no resolution. The Tribe did not “trust” the County. Eggleston, with his personal agenda to benefit his own property, wanted disclosure so he could start raising issues while, as he described them, “sensitive” or “sticky wicket,” negotiations were going on. It was a recipe for disaster. Yet the trial court blithely brushed aside the public interest involved here by essentially saying the County had to prove the impossible to justify its claim that the records were exempt: what some other agency would or would not have done if a particular document had gotten into the public domain. CP 560. Such a requirement does not fit either the letter or the spirit of the PRA.

(2) The Documents at Issue Were Not Public Records under the PRA

(a) The Trial Court Correctly Ruled That the January 11, 2002 Email Is Not a Public Record

In this appeal, Eggleston effectively seeks to obtain thousands of dollars in penalties from a poor rural county by asserting it failed to provide one inconsequential email between TD&H and Kevin Cannell that predated the County’s contract with TD&H.¹⁰ The trial court correctly

¹⁰ Eggleston does this by claiming he should be allowed to collect penalties going back to 2004 for five requests made years before he brought his lawsuit in June 2012. He also requests penalties for four more requests within the limitations period. All these requests sought “the Proposal,” a misnomer based upon Eggleston’s erroneous belief TD&H had issued a written request for sub-consultant qualifications when no such thing happened. CP 1069. Eggleston continuously calls the existence of this email “undisclosed.” Yet the only reason it is thought such an email ever existed is because of

ruled that the January 11, 2002 email was not a public record. CP 549-51. There is no evidence in the record that the County ever possessed the email. There is no dispute that to the extent this document existed, it was possessed by TD&H, the County's private engineering consultant on the Project.

RCW 42.56.010(3) defines a public record as:

[A]ny writing containing information relating to the conduct of government or any governmental or proprietary function *prepared, owned, used, or retained by any state or local agency* regardless of physical form or characteristics.

(emphasis added). Under that definition, the email cannot be a public record. There is no doubt Cannell was a Tribal employee, so it was not prepared by a public agency. The other statutory bases are also not present here.

The County did not "own" the record. The contract with TD&H provides: "All such material used in the project shall become and remain the property of the Agency." CP 1042. However, the same provision defines "such material" that shall be owned by the County as a list of documents TD&H is to furnish. None of the listed documents would cover the email. Similarly, the agreements General Requirements, relied

a reference to it when Cannell transmitted his scope of work in a June 5, 2002 letter (CP 1024), which was provided to Eggleston in 2004 (CP 903, 906) along with the scope of work. Eggleston does not dispute that he was aware of the June 5 letter in 2008, years before he filed suit. CP 31.

upon by Eggleston (Br. of Appellant at 18), do not provide for County ownership. Using a bit of artifice, Eggleston deletes what the General Requirements actually say. They provide for ownership by the County of:

All designs, drawings, specifications, documents, and other work products *prepared by the Consultant* prior to completion or termination of the AGREEMENT are instruments of service for this PROJECT and are property of the AGENCY.

CP 1029. Cannell was not even a sub-consultant when the email was prepared. Thus, even under the contract, the County would not own the email.

More significantly, at the time the email was sent (January), the County had not entered into the contract with TD&H, which did not occur until March. CP 1028. Eggleston's argument (Br. of Appellant at 17) that the selection of TD&H as consulting engineer for the Project in November 2001 (not legally effective until a contract was entered into) somehow confers ownership of documents on the County, is entirely misplaced. Not only was there no contract, under that contract, the email was not owned by the County.

Nor did the County "use" the email it never saw. The seminal case on the "use" by a government agency of materials making such materials a public record under the PRA is *Concerned Ratepayers Ass'n v. Public Utility District No. 1 of Clark County, Wash.*, 138 Wn.2d 950, 983 P.2d

635 (1999). There, the PUD reviewed, evaluated, and referenced a technical document relating to the design specifications for a turbine generator to be installed in a proposed power plant in Vancouver prepared by the contractor selected by the PUD to provide the plant's turbine generators. Despite reviewing the document to determine the necessary contract requirements, the PUD did not retain the document in question. Our Supreme Court approved of a definition of "use" that looked to whether the agency applied the document to a given purpose or the document was instrumental to a governmental end or purpose. *Id.* at 959.

The Court stated:

Whether information has been "used," should not turn on whether the information is applied to an agency's final work product. Rather, the critical inquiry is whether the requested information bears a nexus with the agency's decision-making process. A nexus between the information at issue and an agency's decision-making process exists where the information relates not only to the conduct or performance of the agency or its proprietary functions, but is also a relevant factor in the agency's action. That is, certain data may still be relevant and an important consideration in an agency's decision-making process even if it is not a part of the agency's final work product. Thus, mere reference to a document that has no relevance to an agency's conduct or performance may not constitute "use," but information that is reviewed, evaluated, or referred to and has an impact on an agency's decision-making process would be within the parameters of the Act.

Id. at 960-61 (citations omitted). The document *must be used in the*

government's decisionmaking process. That did not occur here.¹¹

Eggleston's claim that the undisputed evidence before the trial court was that TD&H reviewed and referred to the email as part of decisionmaking process (Br. of Appellant at 19) is, at best, legal sophistry. There is *no evidence* that the email was relied upon by anyone at the County in the decisionmaking process. Since the area's antiquities involved the Tribe, hiring the Tribal archeologist as the sub-consultant is what made sense no matter what any email may have stated. Moreover, the letter relied upon by Eggleston to assert reliance and use proves that Cannell's scope of work is what was relied upon, not any email. The letter tells Cannell "Please refer to your Cultural Resource Compliance Scope of Work submitted to our office via email on January 11, 2002." CP 1024. The same document was produced to Eggleston in 2004, and is attached to Eggleston's brief (Appendix F at 29-31). It contains a mere reference to a document that has no relevance to an agency's conduct or performance, which *Concerned Ratepayers* makes clear is not "use." 138 Wn.2d at 960-61.

Nor was the email "retained" by the County. Obviously, it did not

¹¹ The decision in *West v. Thurston County*, 168 Wn. App. 162, 275 P.3d 1200 (2012), relating to attorney billing invoices, is also instructive. There, Division II carefully examined the attorney billings at issue in light of RCW 42.56.010(3) and concluded that attorney invoices for services over the County's deductible limit of \$250,000 were not public records because the records were not used by the agency as required by *Concerned Ratepayers* where it never received them. *Id.* at 185-86.

retain something it never had. There is no evidence TD&H retained it either. Nor was there any reason to do so. Eggleston's contention that the email had to be retained because of litigation (Br. of Appellant at 19, citing to the contract, Ex. 23, Section D) is again misleading. The contract's Section D (CP 1046) requires "cost records and accounts pertaining to this AGREEMENT" to be retained. A transmittal email of an archeological scope of work prior to the contract cannot be a cost record or account. In sum, the January 11, 2002 email is not a public record.

(b) Even If the Email Were a Public Record, Eggleston's Request for It Is Time-Barred

Even if the email is found to be a public record (and the trial court correctly ruled it was not), the PRA statute of limitations bars requests 1-5. RCW 42.56.550(6) bars PRA actions unless filed within a year of the "agency's claim of exemption or the last production of a record on a partial or installment basis." The trigger in the statute is explicit.¹²

Eggleston's position regarding the statute of limitations is curious in any event. He admits that all nine requests are *for the same thing*: the Proposal. Eggleston then *concedes* that the County's answer to the fourth

¹² *E.g., Belenski, supra* (statute triggered by County's denial of the existence of records responsive to request, emphasizing that the final, definitive response of the public agency is key).

request¹³ “was a final answer triggering the statute of limitations.” Br. of Appellant at 26. Since by his own admission Eggleston agrees that the answer to the fourth request was sufficient to trigger the one-year limitation period, and it specifically referenced the prior requests for the exact same document, that should time-bar his PRA claim here. Eggleston had a final answer as to the first four requests and he failed to act.¹⁴

On appeal, Eggleston quibbles about the County’s responses, claiming the statute of limitations was not triggered. Br. of Appellant at 25-26. This is expressly what the *Belenski* court said is not allowed. There, the Court expressly stated the PRA’s one-year statute of limitations begins on “an agency’s final, definitive response” to a request. Moreover, “This theme of finality should apply to begin the statute of limitations for

¹³ The County’s response specifically referenced the prior requests and stated:

As in our previous correspondence to you on this request, we again respond that the best of our knowledge, no such documents are maintained by this office. Moreover, to the best of our knowledge, no such documents were used or referred to by us in our decision-making process for this project.

CP 56.

¹⁴ He also got a final answer to his fifth request when the County provided him 784 pages of documents indicating that was what it had responsive to his request. At that point, it would be obvious to any reasonable person and should have been obvious to Eggleston, who had previously been told the County did not have such documents, it would send him what they had, it did send him what it had, and he was referred to TD&H since the solicitation to perform archeological services would have occurred prior to the contract with the County, that the documents would not be forthcoming from the County. CP 39, 44, 49. He had a final answer years before he filed litigation.

all possible responses under the PRA, ...” To conclude otherwise “would lead to absurd results -leaving no statute of limitation or a different statute of limitations to apply based on how the agency responded.” (emphasis added). 186 Wn.2d at 460-61. Eggleston’s attempt to claim the statute of limitations has not run on a response to a 2004 PRA request would only lead to an absurd result the *Belenski* court decried.

Eggleston also tries to avoid the statute of limitations claiming it must be “equitably tolled.” Br. of Appellant at 26-29. He provides no basis for doing so. Washington law applies the doctrine of equitable tolling of a statute of limitations where the Legislature has stated the limitations period.¹⁵ If a plaintiff fails to diligently pursue her/his rights, as was true of Eggleston here, equitable tolling is inappropriate. *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 811-12, 818 P.2d 1362 (1991).

The Legislature specifically provided for only a one-year statute of limitations indicating PRA cases must be brought promptly because

¹⁵ A court may toll the statute of limitation when justice requires; however, it should permit equitable tolling sparingly. *State v. Duvall*, 86 Wn. App. 871, 875, 940 P.2d 671 (1997), *review denied*, 134 Wn.2d 1012 (1998). “The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.” *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791, 797 (1998). In Washington, equitable tolling must also be considered as consistent with the statute providing the cause of action and the purpose of the statute of limitations. *Id.* The party asserting equitable tolling bears the burden of proof. *City of Bellevue v. Benyaminov*, 144 Wn. App. 755, 767, 183 P.3d 1127 (2008), *review denied*, 165 Wn.2d 1020 (2009).

agencies are entitled to finality. Moreover, because of the expense to taxpayers of per diem penalties, the Legislature foreclosed the accrual of years of penalties before litigation is brought, which is exactly what Eggleston is attempting to do here. In *Belenski*, our Supreme Court made clear that equitable tolling is allowed in a PRA case only when the agency gives a “dishonest response” so not to incentivize agencies to intentionally withhold information and then avoid liability with the expiration of the statute of limitations. 186 Wn.2d at 461.

In regard to Eggleston’s PRA requests, the County made no “dishonest” response. Eggleston was told the County did not have what he was requesting, which was true, and if it was anywhere it was with TD&H.¹⁶ The County produced hundreds of pages of documents to him, including the scope of work, hardly evidencing “bad faith.” Eggleston tries to mix apples and oranges by claiming that his relationship with the County was “toxic” and the County acted badly. This argument, unsupported generally, does not even relate to the appropriate time period of his request.¹⁷

¹⁶ In that time frame, Eggleston was getting documents directly from TD&H. He then refused to pay for them, and was consequently sued for his non-payment. CP 28.

¹⁷ The PRA correspondence from the applicable time period is cordial and informal. CP 38-45, 49. Whatever may have happened subsequently can hardly be applied to requests made years before. The trial court specifically made it clear the findings Eggleston relies upon for his tolling arguments do not relate to the earlier

Eggleston cannot show due diligence on his own part. Ironically, Eggleston admits to having specific knowledge of the “undisclosed” email as of October 2008, years before he filed suit. He testified that prior to that date, Cannell told him that Cannell had sent “it” in an email. Eggleston said the “it” was what he now calls “the Proposal.” The “it” Cannell sent was the scope of work Eggleston had been provided years ago. Eggleston also admits he was specifically aware of the June 5, 2002, letter that mentions the email by that date having obtained it from a “friend” who had made a PRA request similar to his. CP 31. But Eggleston did not ever specifically identify that he was seeking that email in any request, nor did he ask for it in 2008. From the June 5 letter he knew the email went to TD&H, but Eggleston filed a request for emails between the County and Cannell. CP 57. Under these circumstances, Eggleston cannot meet his burden for equitable tolling. RCW 42.56.550(6) bars his claim.

(c) TD&H Was Not a *De Facto* Public Agency

The trial court ruled that because TD&H was a limited public agency, the PRA applied to its records. CP 556 (CL 3.12). According to the trial court, this made the plans requested in April and July public

requests. CP 559.

records. But TD&H does not qualify as a *de facto* County agency, and the trial court erred in so ruling.

In deciding liability for the plan requests, the trial court confusingly concluded that TD&H “is not a public agency but was a contractor with specific, though limited agency...even though the records were stored on TD&H computers, Asotin County retained them.” CP 556 (CL 3.12). The record at that point is devoid of any analysis of *de facto* agency law required to determine if TD&H was a public agency.

When the County pointed out to the trial court that the decision had gone beyond established law as to what constitutes a *de facto* public agency, the court appears to have *retroactively* tried to justify its liability decision in its order in the penalty phase of the trial, determining the County’s reliance on legal advice was “unreasonable.” CP 563. Tellingly, in doing so, the trial court never mentioned its earlier “limited agency” conclusion. CP 556 (CL 3.12). It relied upon *Cedar Grove Composting v. City of Marysville*, 188 Wn. App. 695, 354 P.3d 249 (2015), a decision that had not been issued as of the date of its earlier liability decision.¹⁸

RCW 42.56.010(1) defines a public agency under the PRA as "all state agencies and all local agencies." A "local agency" includes "every

¹⁸ The trial court’s liability decision was June 11, 2015. The *Cedar Grove* decision was issued July 6, 2015. As of the time of the trial court’s PRA liability decision, there were three cases relating to *de facto* public agencies under the PRA, and *none* supported the trial court’s view that TD&H was a *de facto* County agency.

county, city, town, municipal corporation, quasi-municipal corporation or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." *Nowhere* in that statutory definition is there a reference to consultants or contractors with public agencies. In certain rare circumstances, Washington courts have concluded that the records of private contractors doing business with the government are subject to the PRA. But merely because a private consultant or contractor does business with a government agency does not transform such a firm into a public entity whose records are subject to the PRA. By applying the PRA to records held by a contractor, based upon the notion that it is the equivalent of a City agency (which is exactly what the trial court did here), it erroneously treats TD&H as the equivalent of a County agency, which it is not. Instead, the PRA only applies to public records that are "proposed, owned, used or retained" by an "agency," not records from an agency's contractor that are never provided to the agency, that the agency does not even know exists, or were prepared for other clients or, as here in regard to the email, for its own purposes such as obtaining the services of sub-consultant.¹⁹

Beginning in *Telford v. Thurston County Bd. of Commissioners*, 95

¹⁹ As for the plans, it is not clear that the County ever possessed them. The County's witnesses stated that the County was unaware of the plans at the time and never possessed them. RP II:416, 432. TD&H "believed," but never documented, that it sent the April plans to the County. RP I:169.

Wn. App. 149, 974 P.2d 886, *review denied*, 138 Wn.2d 1015 (1999), Washington courts have applied the PRA to private entities if they are the "functional equivalent" of a public agency.²⁰ Under that test, courts must evaluate if a private entity is essentially acting as a de facto public agency by looking to (1) the entity's governmental function; (2) the entity's government funding; (3) government control over the entity; and (4) the entity's origin. *Id.* at 162-63. There, the court found that the Washington State Association of Counties ("WSAC") and the Washington Association of County Officials ("WACO") were subject to the campaign funding portions of the Public Disclosure Act (of which the PRA was then also a part). The court noted both organizations were authorized by the Legislature to act in certain areas, were made up exclusively of elected officials, were funded largely by those officials, and were formed by county officials to further county business. *Id.* at 165-66.²¹

In *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 181 P.3d 881 (2008), this Court determined that a contractor providing animal control services by contract for the cities of Richland,

²⁰ The unfairness of applying *Telford's* functional equivalency test to private businesses is articulated in Jeffrey A. Ware, *Clarke v. Tri-Cities Animal Care & Control Shelter: How Did Private Businesses Become Government "Agencies" under the Washington Public Records Act?*, 33 Seattle U. Law Rev. 741 (2010).

²¹ See also, *West v. State*, 162 Wn. App. 120, 252 P.3d 406 (2011) (WACO subject to Open Public Meetings Act as it was a public agency given powers entrusted to it by the Legislature, its membership of public officials, and its public financing).

Pasco, and Kennewick was subject to the former public records provisions of the Public Disclosure Act because it was providing essential government services under substantial government control. The contractor was primarily government-funded. The court determined that the contractor was effectively a stand-in for a public agency, unlike the situation here where TD&H work with, but did not supplant, the agency.

By contrast, in *Spokane Research & Defense Fund v. West Central Community Development Association*, 133 Wn. App. 602, 137 P.3d 120 (2006), *review denied*, 160 Wn.2d 106 (2007), this Court concluded that a community development association was not a public agency although it contracted with the City of Spokane to administer certain grants, with 25% of its funding being private, particularly where the City had nothing to do with the Association's day-to-day operations. *Id.* at 609. The court pointedly observed:

The Association is incorporated as a conventional *Internal Revenue Code 503(c)(3)* charity. The Association does not fall within the City's park department as asserted. The City aptly argues "private vendors at Riverfront Park are not 'agencies' just because they sell burritos at the park." City's Resp. Br. at 11. Unlike the *Telford* entities, the Association was not created to fulfill a legislative mandate. The Association does not make policy or legislate. The Association does not execute law or regulate law. The Association does not adjudicate disputes. The Association is not controlled by elected or appointed county officials, is not government audited, and its employees are not paid by a government or enjoy government health or retirement

benefits. In short, the Association possesses no material governmental attributes or characteristics. The Association simply rents space from the City, administers public and private grants, subleases space for its own benefit, and operates apart from government control.

Id. at 608.²²

Our Supreme Court has now established the law on *de facto* public agencies. In *Fortgang v. Woodland Park Zoo*, ___ Wn.2d ___, ___ P.3d ___, 2017 WL 121589 (2017), the Court specifically adopted the *Telford* test to determine if a *de facto* public agency was present for PRA purposes, holding that the private organization operating Seattle’s Woodland Park Zoo was *not* a public agency.

Applying the *Telford* test here, TD&H is not a *de facto* County agency. First, as for TD&H’s function, the Supreme Court noted in *Fortgang* that the entity must be performing “core” government functions, inherently “governmental” in nature. The entity has to:

have effectively assumed the role of government -not to erode the privacy of any entity that contracts with government to further the public interest.

Id. at *7. Here, TD&H did not effectively assume the role of a government agency. The County Engineer retained his legal duties

²² Although the subsequent *Cedar Grove* case did treat a contractor as a public agency, it is easily distinguishable. There, the City stipulated for purposes of attorney-client privilege that the consultant was “the functional equivalent of a city employee” allowing the Court to treat them in that fashion.

relative to road construction. TD&H merely assisted in design and engineering work which is something the private sector often does. This factor weighs against PRA coverage.

Second, merely because the entity receives government funds, that does not meet the second *Telford* factor pertaining to the extent of its government funding. The trial court found that since TD&H was paid by government funds, this factor was satisfied. CP 563. But *Fortgang* makes clear that is not the case. There, the Court made clear that an ordinary fee-for-services agreement, as here, weighs against functional equivalency. *Id.* at *9. Moreover, the *Fortgang* court rejected a bright line rule on the percentage of funds going to an entity, focusing instead on the nature of the funds the entity receives. *Id.* TD&H did not rely exclusively on County funding to exist.²³ The second factor weighs against PRA coverage.

As for government control, the third *Telford* factor, the trial court ruled that just because the County had “control” of the ultimate work product, this test was met. CP 563. The Supreme Court has rejected such a proposition. In *Fortgang*, this factor requires the government to control

²³ While the record here does not reveal the percentage of its revenue TD&H received from the Project, it is doubtful it would be a majority of revenue for a large regional firm. Although big for Asotin County, a \$4 million project is not much for TD&H in this day and age. The maximum amount payable was approximately \$900,000 (Ex. 23) for a contract stretching over a decade.

the “day-to-day operations” of the entity. The County plainly did not control the day-to-day operations of a major engineering firm with numerous offices in different states working for a host of clients. The TD&H Project design engineer actually worked in Great Falls, Montana. RP I:180. The contract with the County specifically provides TD&H was an “independent contractor.” CP 1033. The third *Telford* factor is not met.

As for the fourth *Telford* factor, even the trial court found TD&H was always and remains, a private entity. This factor weights against PRA coverage.

The trial court’s liability decision based upon its *de facto* agency analysis was prejudicial error.²⁴

(d) The Plans Requested by Eggleston Were Exempt from Disclosure under the PRA

The trial court found the County violated the PRA by failing to produce the plans requested in Eggleston’s April and July requests (Requests 10 and 11), CP 556-57, but the court’s ruling is *devoid* of any analysis of whether the two documents²⁵ requested were covered by PRA

²⁴ Moreover, its determination of an aggravating factor based upon an error of law is an abuse of discretion and its penalty decision must be reversed.

²⁵ The April (request 10) and June plans (covered by the July, request 11) were 29 pages but constitute one document. Eggleston knew that because he already had the April plans when the request was made. No withholding log would be necessary since

exemptions. That was reversible error, and since the record is undisputed, on this *de novo* review, this Court can apply the exemptions as a matter of law.²⁶

The primary exemption applicable here is in RCW 42.56.280, also known as the deliberative process exemption, which states:

Preliminary drafts, notes recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this chapter, except that a specific record is not exempt when publically cited by an agency in connection with agency action.

In responding to the April request (and the July request would be no different), the County specifically noted the drawing sheets were preliminary, relate to artifacts, and involved the need to get agreement from the negotiating parties; it specifically referenced RCW 42.56.280. CP 1075 (attached as an appendix).

The purpose of the exemption is to protect the give and take of deliberations that are necessary to formulate agency policy. To invoke this exemption:

An agency must show that [1] the records contain predecisional opinions or recommendations of subordinates

each request only covered one document which was obviously not being produced. Listing each page is not necessary.

²⁶ Under the PRA, when in litigation an agency may argue different explanations to uphold its claim of exemption. *State v. Sanders*, 169 Wn.2d 827, 847, 240 P.3d 120 (2010).

expressed as part of a deliberative process; [2] that disclosure would be injurious to the deliberative or consultative function of the process; [3] that disclosure would inhibit the flow of recommendations, observations, and opinions; and [4] ..that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which is decision is based.

Progressive Animal Welfare Soc’y v. Univ. of Wash. (PAWS), 125 Wn.2d 243, 256, 884 P.2d 592 (1994).

Every one of those elements is present here. Every drawing was stamped “Preliminary.” Exs. 2, 4; RP I:96-98, 101. Each one contained opinions and recommendations as the parties negotiated and deliberated. RP I:122; II:386. They contained a lot more than data. *Id.* at 201. Eggleston’s own witness, WSDAHP’s Stermer, testified the drawings were “Recommendations that are design plans, yes, sir.” *Id.* at 149. Eggleston knew these were recommendations that could result in a policy decision. That is why he wanted them so he could see how they might affect his property.

Clearly, disclosure by the County would have been injurious to the sensitive, multi-cornered deliberative process over the project and could inhibit the flow of information. The negotiations were “sensitive.” The Tribe was distrustful and it did not want what the proposals were disclosed publically. It told Eggleston this when it secretly gave him the April plans telling him to be “discrete” and not say he had them. Eggleston was

already suing the County and pursuing his own agenda. Yet the trial court ignored the County's need for the ability to conduct negotiations without its negotiating recommendations and positions going into the public domain and jeopardizing the negotiations. That court seemingly limited its analysis to just Eggleston as this exchange between the Court and County Engineer Bridges illustrates:

Q. Well, I guess my question is, why would disclosure of a full set of documents, for example, to Mr. Eggleston, throw a monkey wrench into the whole thing?

A. You know, I, again, my best reasoning behind that would be that it was an ongoing negotiation between all these parties because of the sensitive nature, and because there were, it may have led to outside opinion, we were under, from several County Commissioners meetings, being asked by the public what's going on, you know, the County is the driver, and the bus, they should be taking the lead, you know, were [why] are we waiting on the Tribe, it's our project, it's our road, and these types of comments were coming out. And we were trying to be at the same time respectful to the Tribe, in what they were asking us to do, which was to make accommodation for their cultural remains. And so trying keep those two factions separate, if you will.

RP III:426.

This situation is akin to whether the City of Seattle had to disclose lists of negotiation issues the City and police guild exchanged in labor negotiations. *American Civil Liberties Union of Washington (ACLU) v. City of Seattle*, 121 Wn. App. 544, 89 P.3d 295 (2004). There, Division I

utilized the *PAWS* test, found that the PRA does not limit the exemption to intra-agency documents but also applies to documents from other parties in the negotiating process, and does not require the exempt documents be prepared by subordinates. *Id.* at 549-53. Most significantly, Division I rejected what the trial court did here -- requiring the County to prove what would have happened if the documents became public, an impossible task, stating:

The ACLU argues that the City has not met its burden because although it provides evidence that the disclosure would affect the flow of information in negotiations between the City and the Guild, it fails to show that disclosing the lists would inhibit the flow of recommendations, observations, and opinions among City's *policymakers*. This distinction is not persuasive. The negotiations themselves are an integral part of a deliberative process that culminates in the policies the City decides to adopt concerning the police department. The lists are only a starting point for a complex and delicate policy-making process. If the negotiations are negatively impacted, then so would be the City's deliberative policy-making process.

Id. at 553. As in *ACLU*, the recommendations here expressed as design plans were pre-decisional opinions on what the parties were discussing. They are exempt under RCW 42.56.280.

These plans are also exempt under RCW 42.56.300 prohibiting the disclosure of archeological sites. Tracking the plans and how they are changing to avoid impacting those sites would give someone a pretty good

indication of where archeological sites are likely located, even if not specifically noted on the drawing. This is exactly the type of disclosure this exemption is there to protect.

Finally, RCW 42.56.270(1) which exempts “designs and drawings” when disclosure “would produce private gain and public loss” is also applicable. There is no doubt Eggleston was pursuing his own interest for personal gain.²⁷ Allowing him to do so and potentially up-end the negotiations resulting in delay and cost (in excess of \$25,000 a month to a contractor to do nothing) and potentially lose the whole project would result in public loss. The trial court erred in failing to address the PRA exemptions.

(3) The Court Abused Its Discretion in Awarding Penalties

While no penalties at all should have been awarded here as the County did not violate the PRA, if this Court concludes otherwise, the trial court also abused its discretion in making its penalty decision.

The trial court properly recognized that in determining penalties it was required to make an analysis of the *Yousoufian* factors, but the core question on PRA penalties, however, is the degree of agency culpability in withholding the records. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d

²⁷ Eggleston is also suing the County over the rockeries on his property and other claimed injuries from the final design, as the trial court noted. CP 564.

444, 459-60, 229 P.3d 735 (2010).²⁸ Eggleston appeals here without ascribing error to *any individual finding*. Rather, he argues that certain findings are “inconsistent” with each other. Br. of Appellant at 34-46. Eggleston’s inconsistency argument is misplaced. Any inconsistency results from the legal errors the court made as already noted herein.²⁹

There is no substantial evidence to support a finding of County bad faith or intentional violation. Indeed, in an analogous setting this Court has held that to establish bad faith in withholding inmate records, the requester must prove the agency engaged in a wanton or willful withholding or omission from disclosure. *Faulkner v. Wash. Dep’t of Corrections*, 183 Wn. App. 93, 103-04, 332 P.3d 1136 (2014), *review denied*, 182 Wn.2d 1004 (2015). The County provided hundreds of pages

²⁸ In *Cornu-Labat v. Hosp., District No. 2 of Grant County*, 177 Wn.2d 221, 298 P.3d 741 (2013), for example, our Supreme Court held that sanctions at the low end of the scale were appropriate where the agency acted in good faith. *See also, West*, 168 Wn. App. at 188-92 (trial court properly applied *Yousoufian* analysis and justified daily penalty of \$30 per day based upon mitigating factors).

²⁹ For example, the trial court’s legal error in finding TD&H to be a public agency undermines the court’s finding of an aggravating factor that the explanation for noncompliance was “unreasonable.” The court’s failure to perceive that a “vital government interest” was involved and disclosure could have jeopardized the negotiating process undermines its finding of an aggravating factor of a lack of strict compliance with all PRA procedural requirements and exemptions.

Most importantly, the trial court’s total lack of consideration of PRA exemptions, particularly the deliberative process exemption, was an abuse of discretion. It was impossible for the trial court to find the County’s concerns about the disclosure of negotiation recommendations to be “legitimate” but then say “they do not provide justification for withholding” when it never considered the deliberative process exemption. CP 563. Having failed to do so, the court could not as a matter of law find the County acted negligently, in bad faith, or that it intentionally violated the PRA.

of documents. It produced the Tribal documents referenced in a public meeting. Ex. 3; CP 1073-74. It consulted legal counsel who properly advised TD&H was not an agency and the deliberate process exemption was properly asserted. Reliance upon Stermer's "personal perception" that the County's relationship with Eggleston was "toxic," RP I:143, for a finding of bad faith is not substantial evidence.³⁰ County Engineer Bridges, who responded to the PRA requests, did not enter County service until February 2012, so there was no history of bad relations with Eggleston. He testified:

And I believed that part of my job was to reach out to Mr. Eggleston, to understand what his concerns were and issues that he may have had with the County. I wouldn't describe it as toxic.

RP III:423. While the County may have had its differences with Eggleston, there is no substantial evidence to support that it responded to the PRA as it did out of animus.

Eggleston's suspicions of the County are understandable from the standpoint that the County was telling him the plans he was asking for did not exist when he had the April plans. But the reason why the County said that was because *its personnel did not know TD&H had printed such plans*

³⁰ The trial court properly sustained objections that the testimony was based upon and recited hearsay. RP I:140-41. The court then essentially reversed itself and over objection and let in hearsay of disparaging comments about Eggleston made by unnamed persons with context as to time or place. *Id.* at 142-44.

and never gave them to the County. Below, the Court apparently believed that the County had some duty to ask TD&H create plans to give to Eggleston. This ignores that the PRA does not require an agency to create a document. *Smith v. Okanogan County*, 100 Wn. App. 7, 18, 994 P.2d 857 (2000). A government has an obligation to conduct a reasonable search for documents.³¹ The County did so here.

The trial court also abused its discretion in regard to two other matters in the penalty phase. It is undisputed Eggleston had the April plans. Litigation was not required for him to obtain them. By having them, Eggleston was not prejudiced by any failure of the County to disclose them. Heavy PRA penalties should be improper where the requestor has the document. A penalty of \$35 per day in these circumstances for that request is excessive. The trial court also awarded penalties for the July request to the day of the penalty trial, October 13, 2015. CP 564. It is undisputed Eggleston obtained the plans subject to the July request at the Noble deposition on January 18, 2013. CP 125. The

³¹ The trial court also employed the wrong legal standard in regard to the County's obligation to search for documents. It held that once a *prima facie* case for an inadequate search had been made, the burden shifted to the County that had to prove "beyond a material doubt," the propriety of its search. CP 555, 558 (CL 3.4). The legal standard is that agencies have a duty to conduct a reasonable search. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011). "A search need not be perfect." *Id.* at 720. An agency does not have "to go outside its own records and resources to try to identify or locate the records requested." *Lindstrom v. Ladenburg*, 136 Wn.2d 595, 604 n.3, 963 P.2d 869 (1988).

court imposed the penalty for 1411 days. It should be reduced by 998 days to when the plans were actually provided to Eggleston.³²

Eggleston cross-appeals from two penalty-related decisions. First, Eggleston asserts the trial court had no discretion to combine what he asserts were two “separate” requests for the plans made by his counsel in August and September 2012. Whether these actually are separate requests can be disputed on the basis of their content, but even if they are separate requests there was no abuse of discretion in combining them with the April and July requests and only assessing penalties for those two requests. In *Zink v. City of Mesa*, 162 Wn. App. 688, 256 P.3d 384 (2011), *review denied*, 173 Wn.2d 1010 (2012), this Court held that combining requests for purposes of penalties is within the trial court’s discretion. It upheld the exercise of discretion in combining requests as “reasonable” when, as here, the subsequent requests were for the same documents. *Id.* at 713. The trial court here did not abuse its discretion.

Eggleston also appeals the decision of the trial court not to award him “all” of his costs. He asserts the PRA does not allow any discretion in regard to the awarding of costs. That is wrong. While RCW 42.56.550(4) allows the requesting party to be awarded “all costs” if it is the prevailing

³² The County paid TD&H for the deposition and producing the document. Ex. 107.

party, the statute gives no definition as to what constitutes “all costs.” While the PRA allows a more liberal recovery of costs than allowed under RCW 4.84.010, PRA costs must still be “reasonable.” *American Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 502 (ACLU II)*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999). *See also, Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App 803, 829-30, 225 P.3d 280 (2009) (trial court properly applied its discretion to reduce a cost request, confining costs to costs reasonably incurred). A reasonableness standard by its nature invests discretion in the trial court.³³ Here, the expense of the original filing fee, ex parte fees, fees for service of process, witness fees/mileage, and deposition fees were all awarded. CP 565-66. It is also known the original filing fee related just to the first nine requests for the email, for which Eggleston did not prevail. Where Eggleston failed to make a showing that the disallowed costs were reasonable, the trial court did not abuse its discretion in confining the recovery of costs to its award.

F. CONCLUSION

The trial court correctly found the Cannell email, the subject of requests 1-9, was not a public record, but it incorrectly made TD&H a *de facto* County agency so that plans, the subject of requests 10-14, had to be

³³ The reasonableness standard comports with the requirement in RPC 1.5 (a) that a lawyer shall not make an agreement for, charge, or collect for “an unreasonable amount for expenses.”

disclosed under the PRA. That decision was wrong under *Telford/Fortgang*. It was also wrong because the court never considered whether the design drawings were PRA-exempt. It even employed the wrong legal standard for the County's PRA record search duty. As a result, both its liability decision and penalty decision are legally untenable.

This Court should affirm the trial court's May 10, 2013 decision, but reverse its June 11, 2015 liability decision, its December 17, 2015 penalty decision, in part, and its March 16, 2016 judgment. This Court should find the design and plan documents requested in 10-14 are exempt from disclosure and order on remand that Eggleston's complaint be dismissed and judgment entered on behalf of the County. Costs on appeal should be awarded to the County.

DATED this 20 day of February, 2017.

Respectfully submitted,



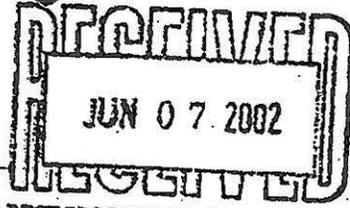
Philip A. Talmadge, WSBA #6973
Tom Fitzpatrick, WSBA #8894
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Jane Risley, WSBA #20791
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Asotin County Prosecuting
Attorney Office
PO Box 864
Asotin, WA 99402
(509) 243-2061
Attorneys for Respondents/
Cross-Appellants

APPENDIX

Thomas, Dean & Hoskins, Inc.

TD&H
Engineering Consultants



June 5, 2002

Kevin Cannell, Tribal Archaeologist
Nez Perce Tribe Cultural Resource Program
P.O. Box 365
Lapwai, ID 83540

FAXED

JUN 06 2002

THOMAS, DEAN & HOSKINS
SPOKANE

Re: Ten Mile Project; Asotin County, Washington
Cultural Resource Compliance

Dear Kevin:

Thomas, Dean & Hoskins, Inc. would like the Nez Perce Tribe Cultural Resource Program to perform a preliminary archaeological and cultural review of the proposed roadway realignment and bridge relocation work for the referenced project. Please refer to your Cultural Resource Compliance Scope of Work submitted to our office via email on January 11, 2002.

As I indicated in my email to you today, by June 13th, we need a very brief (1-2 pages max) preliminary narrative from you summarizing the possible effects of our alignment on cultural resources, including your very preliminary opinion on which of the four alternatives would have the least impact on archaeological and cultural resources. Once the County has approved an alignment, we will then authorize you to perform a full cultural resources study as a part of the design contract with the County.

We agree to pay your costs for the survey report based on an hourly rate of \$25/hour, and subsequent work in accordance with a contract prepared following the Scope of Work submitted to us on January 11th.

I trust this letter is what you need to proceed. If not, please let me know. Thank you in advance for your help with this project.

Sincerely,

THOMAS, DEAN & HOSKINS, INC.

Clifton W. Morey, P.E.
Principal/Regional Manager

cc: S02-009(2)
Dick Gahagan

0-000001024



Asotin County
PUBLIC WORKS DEPARTMENT
P.O. Box 160
Asotin, Washington 99402-0160
Phone: (509) 243-2074
Fax: (509) 243-2003

County Roads

Solid Waste Department

May 16, 2012

Mr. Rich Eggleston
7357 Snake River Road
Asotin, WA 99402

RE: Public Disclosure Request # 12-13

Mr. Eggleston:

You made a public records request on April 26, 2012 by e-mail requesting the "current drawing sheets of the Ten Mile project"

Those drawings are exempt under the public disclosure act because they are preliminary. As you are aware, due to the artifacts found at the site, no drawings can be finalized without the consent of the Federal Highway Administration, the Washington State Department of Transportation, the Washington State Department of Archaeology and Historic Preservation, the Nez Perce Tribe, the Asotin County Public Works Director, and the Asotin County Board of County Commissioners. Since no agreement has been reached yet, the documents are still preliminary.

The statutory reference for withholding the documents at this time is

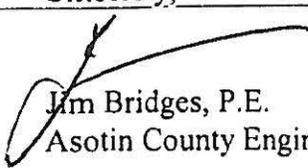
RCW 42.56.280

Preliminary drafts, notes, recommendations, intra-agency memorandums.

Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this chapter, except that a specific record is not exempt when publicly cited by an agency in connection with any agency action.

This public disclosure request is now closed.

Sincerely,


Jim Bridges, P.E.
Asotin County Engineer

C: Jane Bremner Risley, Chief Deputy Prosecuting Attorney
Vivian Bly, Public Disclosure Officer
File

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0-000001075



WALLA WALLA COUNTY SUPERIOR COURT

Judge John W. Lohrmann
315 West Main Street Fl 3
PO Box 836

Phone: (509) 524-2790

Walla Walla, Washington 99362

Fax: (509) 524-2777

May 10, 2013

Ms. Jane Bremner Risley, Esq.
Deputy Prosecuting Attorney, Asotin County
PO Box 864
Asotin, WA 99402

✓ Mr. Todd S. Richardson, Esq.
Law Office of Todd S. Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403

Re: Eggleston v. Asotin County
Walla Walla County Superior Court Cause No: 12-2-00459-6

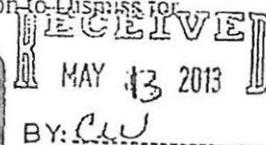
Counsel:

The Plaintiff's Second Amended Complaint for Disclosure of Public Records complains of fourteen violations of the Public Disclosure Act, RCW Chapter 42.56. The requests for public records that give rise to the alleged violations are listed as follows by date:

1. February 2, 2004
2. April 3, 2007
3. September 29, 2007
4. November 7, 2007
5. October 30, 2008
6. July 25, 2011
7. August 8, 2011
8. October 6, 2011
9. November 22, 2011
10. April 26, 2012
11. July 17, 2012
12. August 2, 2012
13. August 24, 2012
14. September 7, 2012

This lawsuit was filed on June 18, 2012, originally asserting claims relating to the first nine requests. The County responded on July 11, 2012, with a CR 12(b)(6) Motion to Dismiss for

1



Failure to State a Claim. Thereafter the Plaintiff sought to obtain, and by order filed October 29, 2013, did obtain, permission to file a Second Amended Complaint incorporating claims related to the last five requests.

In the October 29th order the Court also ruled that the County's motion would be treated as one for summary judgment, inasmuch as it relied on an accompanying declaration of an employee, Barbara Cook. On January 7, 2013, the Plaintiff filed a cross-motion motion for summary judgment, asking the court to find that the County violated the public disclosure act on each request as a matter of law. Both motions were argued on March 5, 2013, after which the Court took the matters under advisement.

For purposes of the pending motions, these public record requests can be divided into three categories. Asotin County argues in its motion that any causes of action relating to the first group, requests 1 through 5, are barred by RCW 42.56.550(6), which sets up a one year statute of limitations on such claims. The County further argues that while claims on relating to the second group, requests 6 through 9, are not barred by the statute of limitations, nevertheless these requests -- duplicative of the first five requests -- ask for production of a document or documents not in the possession of the county, and that they also do not come within the meaning of a public record as described in RCW 42.50 6.010(2). Specifically, the document sought to be produced is one that is referred to in a letter dated June 5, 2002, and faxed June 6, 2002, from Clifton W. Morey, a manager with Thomas, Dean & Hoskins, Inc. (TD&H) to Kevin Cannell, tribe archaeologist for the Nez Perce cultural Resource Program. The letter appears to be copied to Dick Gahagan, an Asotin County Public Works Department engineer. In this letter, Mr. Morey asks Mr. Cannell to "Please refer to your Cultural Resource Compliance Scope of Work submitted to our office via email on January 11, 2002." This email, "in its entirety and including attachments" is consistently referred to by the Plaintiff as the "Proposal," which the Plaintiff describes as "the document at the heart of all the requests in this matter and at the heart of this case." Second Amended Complaint, paragraphs 11 and 12.

As to claims based on requests 1 through 5, the court finds that there are no genuine issues of material fact and finds that these claims are barred by the one-year statute of limitations. RCW 42.56.550(6).

As to requests 6 through 9, the court finds that there are no genuine issues as to any material fact. "The Proposal" is clearly identified and there is no disagreement about what was sought although there is a question as to whether the Proposal exists, at least as described. There is, however, disagreement about whether the Proposal falls within the definition of a "Public record" as defined by RCW 42.56.010 (3), which includes "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." The bolded language highlights the legal issue here. The Plaintiff contends that the communication between Mr. Cannell and TD&H is a public record because the author

was acting as the agent of the County and in any event the County must have owned and/or used the Proposal in the course of developing the project. The County argues that it had no contractual relationship with TD&H at the time; that in any event a contracted private company is not an agency whose documents are automatically deemed "prepared, owned, used, or retained by" the County; and that in fact the County neither prepared, owned, used or retained the documents sought, if it ever possessed it or them at all.

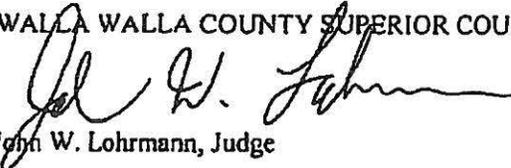
While there is no substantial dispute as to the facts, there is substantial disagreement as to whether on these facts the Proposal constitutes a public record under the statute and relevant case law. Having reviewed the facts of this case in light of the statute and case law cited by the parties, the Court finds as a matter of law that the Proposal is not a public record, and that the County has not withheld any documents in contravention of the law as to requests 1 through 9. Furthermore, the County had no obligation to provide a withholding log under these circumstances, and the statute of limitations was not tolled. The Plaintiff's motion for summary judgment is denied, and of the County's motion for summary judgment of dismissal is granted as to requests 1 through 9.

The third group of claims, based on requests 10 through 14, involve responses by the County indicating that the items requested were exempt because the documents in question were preliminary in nature to the construction project at issue and were therefore exempt. The County also contends that request 14 was not truly a request but instead was simply a demand letter following up on the prior requests. While the Plaintiff concedes that he now has the requested plans both from April and July, 2012, although the latter was obtained by discovery deposition, the claim of a Public Disclosure Act violation remains.

As to requests 10 through 14, viewing the facts in the light most favorable to the nonmoving party, the court finds that there are genuine issues of material fact as to whether the plans asked for in these duplicate requests fall within the preliminary draft exemption; whether the County had the preliminary plans in their possession or control; and whether a withholding log should have been prepared as part of the County's response to these requests. The court has reviewed the record herein files and believes there is a lack of clarity on these and related facts. The Plaintiff's motion for summary judgment as to these requests is therefore denied.

Sincerely,

WALLA WALLA COUNTY SUPERIOR COURT


John W. Lohrmann, Judge

Cc: Clerk's file

FILED

JUN 11 2015

KATHY MARTIN
WALLA COUNTY CLERK

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

<p>RICHARD EGGLESTON, an individual, PLAINTIFF</p> <p>vs.</p> <p>ASOTIN COUNTY, a public agency; and ASOTIN COUNTY PUBLIC WORKS DEPARTMENT, a public agency, DEFENDANTS</p>	<p>No. 12-2-00459-6</p> <p>FINDINGS OF FACT AND CONCLUSIONS OF LAW</p>
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I. TRIAL

This matter having come before the Court by way of a bench trial held in Asotin County, Washington, on April 1 - 2, 2012;

The Plaintiff personally appeared and was represented by his attorney of record, Todd S. Richardson, and the Defendant being represented by their attorneys of record, Jane Risley and Benjamin Nichols;

The Court heard testimony from: James Bridges, County Engineer for Asotin County; Randy Noble, former Project Manager for TD&H, the consulting engineer for Asotin County on the 10 Mile Project; Matthew Sterner, Washington State Department of Archeology and Historic Preservation; Matthew Albrecht, attorney; Richard Eggleston, plaintiff; James Ayers, County Road Administration Board, State of Washington; Craig Miller, Project Manager, Asotin County.

The Court accepted exhibits numbered: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 21, 23, 24, 25, 102, 108, 109, 110, 111, 112, 113, 114, 115, 116, and 117.

The Court has reviewed the pleadings in the file, including the Trial Memoranda of both Plaintiff and Defendants, Defendants' Memorandum Mr. Albrecht, Closing Arguments and



Memorandum from Plaintiff and Defendant, and Plaintiff's Reply.

The Court being advised in the premises hereby finds as follows:

The issue before the Court is whether Asotin County violated the Public Records Act.

The conclusion of the Court is that Asotin County did violate the Public Records Act in the manner set forth below, and the penalty phase of the trial is to be scheduled hereafter.

II. FINDINGS

The Court finds, as a matter of fact:

- 2.1) This is an action brought under the Public Records Act;
- 2.2) Plaintiff Richard Eggleston is a resident of Asotin County, Washington;
- 2.3) Asotin County is a public agency as defined by RCW 42.56.010(1);
- 2.4) Asotin County Public Works is an agency as defined by RCW 42.56.010(1);
- 2.5) The 10 Mile project is a bridge replacement and road modification project in Asotin County;
- 2.6) other public agencies involved in the 10 Mile project included the Federal Highway Administration; Washington Department of Transportation; Nez Perce Tribe; and Washington Department of Archeology and Historic Preservation;
- 2.7) Asotin County had a contract with Thomas Dean & Hoskins (TD&H) as consulting engineers on the project (Exhibit 23), the contract provides that "[a]ll designs, drawings, specifications, documents, and other products prepared by the CONSULTANT prior to completion or termination of the AGREEMENT are instruments of service for this PROJECT and are property of the AGENCY....," TD&H testified that if Asotin County requested a document they would provide it to them;
- 2.8) Mr. Eggleston made a request for public records on April 26, 2012, seeking the "current sheets" of the plans for the 10 Mile project (the April Plans) (Exhibit 9)
- 2.9) Mr. Eggleston made a request for public records on July 17, 2012, for the "current project plans" for the 10 Mile project (the July Plans) (Exhibit 11);
- 2.10) Mr. Eggleston, through his attorney, made a request for public records on August 2, 2012, seeking either the plans requested by Mr. Eggleston on April 26, 2012

and July 17, 2012, or a withholding log (Exhibit 13);

- 2.11) The County timely responded to each of the three foregoing requests;
- 2.12) Mr. Eggleston, through his attorney, made a demand on August 24, 2012 for a withholding log (Exhibit 17); in his Second Amended Complaint he characterizes this as another public records request;
- 2.13) The County did not respond to this August 24, 2012 demand;
- 2.14) Mr. Eggleston, through his attorney, made another demand on September 7, 2012, for the April Plans and the July Plans (Exhibit 18); in his Second Amended Complaint he characterizes this as another public records request;
- 2.15) The County did not initially respond to the September 7, 2012 demand;
- 2.16) Mr. Eggleston sought and received permission from this Court to amend his complaint in this matter to add these 5 requests, and the Second Amended Complaint was filed on November 13, 2012;
- 2.17) On December 10, 2012, the County provided the April Plans to Mr. Eggleston.
- 2.18) In response to the April 26, 2012, request, the County sent a letter to Mr. Eggleston on May 16, 2012, stating that the requested documents were exempt pursuant to RCW 42.56.280, and further stating that these plans were "preliminary" "[s]ince no agreement has been reached yet" by the various agencies involved in the project (Exhibit 10);
- 2.19) The County did not provide a withholding log for this claimed exemption (Exhibit 10);
- 2.20) TD&H had a current set of plans saved as a portable document file (.pdf) dated April 13, 2012;
- 2.21) TD&H gave those April Plans to the other agencies involved in the 10 Mile project on April 23 or 24, Asotin County used these plans by providing them to their contractor for use in obtaining bids on portions of the work;
- 2.22) Asotin County denies knowing of the existence of the April plans, but admitted knowing that if any current plans existed TD&H would have them;
- 2.23) Asotin County did not ask TD&H whether the April plans existed nor for a copy of the April plans, the County's search in response to the request was to ask Craig

Miller if any responsive documents existed;

- 2.24) Asotin County, in response to the July 17, 2012, request provided the "Nez Perce Submittals" an incomplete set of plans put together in May for a presentation to the Nez Perce Tribe;
- 2.25) No withholding log was generated relating to the July 17, 2012, request;
- 2.26) TD&H had a current set of plans saved as a portable document file (.pdf) dated June 21, 2012, these plans were used by Asotin County by providing them to their contractor for use in obtaining bids for portions of the work;
- 2.27) Asotin County denies knowing of the existence of the July plans, but admitted knowing that if any current plans existed TD&H would have them;
- 2.28) Asotin County did not ask TD&H whether the June plans existed nor for a copy of the June plans, the County's search in response to the request was to speak to their attorney, Jane Risley;
- 2.29) In response to the August 2, 2012, request, the County sent a letter to Mr. Eggleston's attorney, although no documents were produced;
- 2.30) In January, as part of the litigation in this matter, Eggleston took the deposition of Randy Noble, then the project manager for TD&H, at that deposition both the April and June plans were obtained;

III. CONCLUSIONS

- 3.1 This Court has jurisdiction over this matter;
- 3.2 Venue has been properly established with this Court;
- 3.3 In this action, the Plaintiff bears the burden of demonstrating that a request was made for an identifiable document. After such a request, the County must respond within 5 business days, the initial burden of proving the lack of response is on the Plaintiff. The Plaintiff bears the burden of establishing a prima facie case that the Defendant failed to conduct an adequate search, silently withheld a document, failed to produce a document and the defendant claimed the wrong exemption. Once such a prima facie case has been met, if the Defendant is to rebut the lack of adequate search, the Defendant must do so by proof beyond a material doubt, the standard on the other claims is preponderance of the evidence.

- 3.4 The County must prove beyond a material doubt that it conducted an adequate search for records after receiving a request, and adequate search is one that covers every place a record is reasonably likely to be found; the County knew the plans were reasonably likely to be found at TD&H and did not search there in violation of the duty to conduct an adequate search.
- 3.5 In response to the July 17, 2012, request, the County provided the "Ncz Perce Submittal" but due to the inadequate search did not produce or identify the responsive document which was withheld, resulting in a silent withholding and a violation of the PRA;
- 3.6 The April 26, 2012, request sought the production of the April Plans; these plans were wrongfully withheld until December 10, 2012, in violation of the Public Records Act;
- 3.7 The July 17, 2012, request sought production of the July Plans, these plans were not provided to Plaintiff by the Defendants in violation of the PRA;
- 3.8 Asotin County asserted an exemption to the April 26, 2012, request for which they did not offer adequate justification at trial;
- 3.9 Asotin County had a contract with TD&H that specifically gave the County ownership of the records, the documents were produced using public funds, they were produced using public funds. Asotin County owned the records in question;
- 3.10 The April plans were used by Asotin County when they were provided to the other interested agencies at the April 23 or 24 meeting, they were further used when they were provided to Asotin County's contractor for purposes of obtaining bids for some of the work;
- 3.11 The July plans were used by Asotin County when they were provided to Asotin County's contractor for purposes of obtaining bids for some of the work;
- 3.12 TD&H is not a public agency but was a contractor with specific, though limited agency, and a public agency may not contract their way around the Public Records Act and avoid the duties imposed therein; therefore, even though the records were stored on TD&H computers, Asotin County retained them;
- 3.13 The subject records were owned, retained, and used by Asotin County and were

public records.

3.14 Because Asotin County violated the Public Records Act, a trial on the penalty phase shall be scheduled hereafter.

DONE IN OPEN COURT, this 11th day of June, 2015.

JOHN W. LOHRMAN

JUDGE

Presented by:

Approved as to form,
Notice of presentment waived

Todd S. Richardson
WSBA 30237
Attorney for Plaintiff

Benjamin Nichols
WSBA
Attorney for Defendant

WALLA WALLA COUNTY SUPERIOR COURT

Judge John W. Lohrmann
315 West Main Street Fl 3
PO Box 836

FILED

JUN 11 2015

Phone: (509) 524-2790

Walla Walla, Washington 99362

June 11, 2015

KATHY MARTIN
WALLA WALLA COUNTY CLERK fax: (509) 524-2777

Ms. Jane Bremner Risley, Esq.
Deputy Prosecuting Attorney, Asotin County
Mr. Benjamin Nichols, Prosecuting Attorney
PO Box 864
Asotin, WA 99402

Mr. Todd S. Richardson, Esq.
Law Office of Todd S. Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403

Re: Eggleston v. Asotin County
Walla Walla County Superior Court Cause No: 12-2-00459-6

Counsel:

This letter is supplemental to the Court's Findings of Fact and Conclusions of Law entered and filed this day with the Walla Walla County Clerk. Conformed copies are enclosed to counsel.

The bone of contention in this case between the Plaintiff and Asotin County was the County's ongoing refusal to provide the Plaintiff with access to the project drawings. Transparency in government is the primary goal of the Public Disclosure Act (PDA), and it was the Plaintiff's desire and right to know what was going on as the project proceeded unless there was a valid reason under the statute for him not to know what was going on. While this Court was struggling to find the words adequately to summarize the law and to describe the competing interests of the Plaintiff and Asotin County in regards to necessary disclosures under the PDA, it found assistance in a summary provided recently by the Washington Supreme Court:

The PRA requires that agencies "shall make available for public inspection and copying all public records," subject only to a handful of statutory exemptions. RCW 42.56.070(1); *see also Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wash.2d 243, 260, 884 P.2d 592 (1994) (*PAWS II*). The PRA ensures the sovereignty of the people and the accountability of the governmental agencies that serve them by providing full access to information concerning the conduct of government. *PAWS II*, 125 Wash.2d at 251, 884 P.2d 592. To effectuate that policy, we start with the presumption that all public records are subject to disclosure. Agencies can withhold a record only if it falls within one of the PRA's specific, limited exemptions. RCW 42.56.070(1). These exemptions are narrow,

and we apply them in favor of partial disclosure where possible since “the PRA's purpose of open government remains paramount.” *Resident Action Council v. Seattle Hous. Auth.*, 177 Wash.2d 417, 432, 327 P.3d 600 (2013); *see also* RCW 42.56.070(1) (requiring that agencies redact records only “[t]o the extent required to prevent an unreasonable invasion of personal privacy interests protected by [the PRA]” and produce the remainder of the record). Similarly, the PRA reminds us “that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3).

Predisik v. Spokane School District, 182 Wn.2d 896, 902-03 (2015). In discussing the public interest involved in that case, Justice Yu writing for the majority was very explicit:

The PRA is meant to engender the people's trust in their government. The recent unrest in Ferguson, Missouri, is an extreme example of how that trust is eroded when the public suspects the government is withholding information. . . . [Citations omitted.]

But secrecy can breed suspicion in more subtle ways, too. For example, if we accepted Predisik's ... position, the public would never learn about an investigation unless and until the underlying allegations are substantiated at some point in the future. There would be no opportunity for the public to discover the District's ongoing three-year investigation, much less question the effectiveness of what some might consider an awfully long process. Government cannot be held accountable for actions it shields from the public's eye.

Id. at 907. The public interest in having transparency in government is similarly at stake in this case. It is apparent from the testimony that there were “current plans” in existence by April 2012. It is true that the “current plans” were in some ways a “moving target” and a work-in-progress. Nevertheless, the testimony was that TD&H occasionally made “pdf” copies and that at any given time – and certainly upon request by the contracting agency which expressly owned the documents -- the current plans were fully accessible by the County and by the other agencies involved. In this context, one might ask: How might a person such as the Plaintiff ever find out about the status, plans and changes in the project so that he can stay timely informed and not simply be kept in the dark until final or “as built” plans were completed? As demonstrated in *Predesik*, the public is entitled to full access to information concerning the conduct of government. The Court therefore concludes that the County breached its duty to provide copies of the current plans in response to the two clear requests made by the plaintiff to obtain them.

The Court previously ruled that the initial diagrams referred to as “the Proposal” were indeed preliminary and were not owned or possessed by the County but was instead owned by TD&H which had not yet contracted with Asotin County. See decision letter dated May 10, 2015 (Clerk's No. 84). The testimony at trial did not alter the Court's decision in that regard. However -- and notwithstanding the earlier requests and demands that were dismissed by the Court -- in 2012 the Plaintiff legitimately exercised his right to access the current plans. He made a proper request on April 26, 2012, a few days after he witnessed that a meeting of the agencies was occurring on-site. While one page that was immediately available was provided to him in

response, the County made no effort to provide him a set of the plans that had been provided to the tribe or other agencies involved. Another request was made on July 17, 2012.

Under RCW 42.56.210, even if an exemption is claimed, it is inapplicable unless the information either (1) violates someone's personal privacy or (2) protects a "vital governmental interest." As to the first consideration, there are no particular privacy interests involved; it was clear from the testimony that even if the location of particular graves of Native Americans were identified such information could have been redacted if keeping the location secret were a concern to the County or to the Nez Perce tribe. As to the second consideration, while the negotiations over the road right-of-way were described as sensitive, there was no testimony that that any disclosure of preliminary or "work in progress" drafts to the public or to the plaintiff would have put in jeopardy any approvals or would have jeopardize any negotiations with the other agencies involved.

In this context it was not a satisfactory response to say that the documents were still in flux; or that the County never had an occasion to ask TD&H for a current set of documents; and therefore on the basis of these facts to say that the documents were never in the possession of, owned by, or used by the County. Against the plaintiff's consistent and persistent efforts to obtain copies of the current diagrams, the County's refusal to provide the diagrams on the pretext that they were a work in progress is inexplicable. They had only to make request of its contractor, TD&H, to obtain a copy of the plans at any fixed point in time.

On the basis of the facts contained in the findings signed by the Court today and upon the legal principles set forth in case and statutory law, the Court concludes that the County violated its duty of disclosure under the PDA and is liable in damages and attorney fees to the Plaintiff.

The case may be noted for trial on the issue of Plaintiff's damages and attorney fees.

Sincerely,

WALLA WALLA COUNTY SUPERIOR COURT



John W. Lohrmann, Judge

WALLA WALLA COUNTY SUPERIOR COURT

Judge John W. Lohrmann
315 West Main Street Fl 3
PO Box 836

Phone: (509) 524-2790

Walla Walla, Washington 99362

Fax: (509) 524-2777

December 17, 2015

Ms. Jane Bremner Risley, Esq.
Deputy Prosecuting Attorney, Asotin County
Mr. Benjamin Nichols, Prosecuting Attorney
PO Box 864
Asotin, WA 99402

Mr. Todd S. Richardson, Esq.
Law Office of Todd S. Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403

Re: Eggleston v. Asotin County
Walla Walla County Superior Court Cause No: 12-2-00459-6

Counsel:

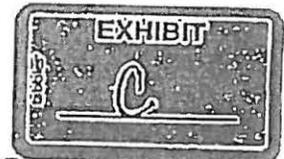
Please accept this letter as the decision of the Court regarding the statutory penalty to be awarded to the Plaintiff in this case arising from the Defendant's violation of the Public Disclosure Act.

While there were a total of five communications from the Plaintiff to the Defendants which the Plaintiff characterizes as public records requests, the Court in its Findings found that the request dated August 2, 2012, was another iteration of requests made on April 26, 2012, and July 17, 2012. See Findings 2.8, 2.9 and 2.10. While the Court found that further demands were made on August 24, 2012 and on September 7, 2012 (Findings 2.12, and 2.14), the Court did not treat these latter two requests as new public records requests. Instead, in its Conclusions the Court found that the County violated the PRA by not producing the documents requested on April 26, 2012, and the documents requested on July 17, 2012. These are the two violations of the PRA for which the County must pay a penalty pursuant to RCW 42.56.550.

The case of *Yousoufian v. Office of Ron Sim*, 168 Wn.2d 444, 467-68 (2010), provides a procedural framework for the trial courts within which to exercise their "considerable discretion under the PRA's penalty provisions." *Id.* at 466-67. The factors, both mitigating and aggravating ones, are analyzed by the Court in this case as follows:

MITIGATING FACTORS

1. A lack of clarity in the PRA request. The County conceded in its Trial Brief that the requests were clear.



2. The agency's prompt response or legitimate follow-up inquiry for clarification. Timely responses were provided to the requests dated April 26, 2012, and July 17, 2012.
3. The agency's good faith, honest, timely, and a strict compliance with all PRA procedural requirements and exceptions. The County's compliance with the procedural requirements of the PRA was satisfactory and did not appear to be in bad faith. The County relied on its attorneys' interpretation of case law and the applicable statutes.
4. Proper training and supervision of staff. The Public Works Office of the County was adequately trained as shown in its compliance, and it consulted with the County Prosecuting Attorney about the requests at issue.
5. The reasonableness of any explanation for noncompliance by the agency. While denying the existence of the record sought, the County claimed that it was exempt as preliminary, although such explanation would have been more reasonable if documents had been identified. The County also claimed that the request involved sensitive negotiation with a native tribe, although that excuse was not set out in any response nor was there any attempt to redact any documents to reduce their sensitivity.
6. The existence of agency systems to track and receive public records. The County's systems in place to respond to PRA requests appeared to be adequate. The County simply did not see a duty to retrieve a public record from its contractor.

AGGRAVATING CIRCUMSTANCES

1. A delayed response by the agency, especially in circumstances making time of the essence. The responses were timely and without delay disregarding the failure to produce the documents themselves.
2. Lack of strict compliance by the agency with all the PRA procedural requirements and exceptions. The County's initial response claimed the "preliminary draft" exemption, but did not otherwise describe why it qualified as such. It did not explain what existed that was "preliminary." The County also seemed to express concern regarding its sensitive negotiations with the Nez Perce tribe as to the location of burial sites, seeming to implicate an exemption under RCW 42.56.210(1). As stated in the Court's letter of June 11, 2015, under RCW 42.56.210, even if an exemption is claimed, it is inapplicable unless the information either (1) violates someone's personal privacy or (2) protects a "vital governmental interest." As to the first consideration, there are no particular privacy interests involved; it was clear from the testimony that even if the location of particular graves of Native Americans were identified such information could have been redacted if keeping the location secret were a concern to the County or to the Nez Perce tribe. RCW 42.56.210(1). As to the second consideration, while the negotiations over the road right-of-way were described as sensitive, there was no testimony that that any disclosure of preliminary or "work in progress" drafts to the public or to the plaintiff would have put in jeopardized any negotiations or approvals with the other agencies involved.
3. Lack of proper training and supervision of the agency's personnel. There is no evidence the Public Works staff was not adequately trained or supervised.
4. The unreasonableness of any explanation for noncompliance by the agency. The County argues that it relied on the law at the time the request was made and because it did not know the plans had been made public. There was testimony that the County's relationship with the Plaintiff had deteriorated and over time had become antagonistic and even

"toxic." In reality, its excuse was that it did not own or possess the plans because they were the property of TD&H, a private for-profit corporation with whom it contracted. See the second and third pages of the Court's decision letter of June 11, 2015, and Conclusions 3.9, 3.10, 3.11 and 3.13. It is not adequate for the County to say that the law changed; in terms of the work performed by TD&H this case is similar to *Clarke v. Tri-Cities Animal Care*, 144 Wn. App. 185 (2008), in that the contractor was retained to shoulder what was otherwise the County Engineer's responsibility and *function*; that is, to provide engineering and design services for the County. *Funding* for these clearly identifiable and contracted services was provided through the County. TD&H's work was at the direction and under the *control* of the County as set out in its contract with that entity. As in *Clarke*, the only factor weighing against PDA application is that TD&H's *origin* was as a private corporation. *Balancing* all four factors highlighted above leads to the conclusion that TD&H acted as the functional equivalent of a public employee performing a governmental function. See also *Cedar Grove Composting v. City of Marysville*, 188 Wn. App. 695, 718-21 (2015); *Telford v. Thurston County Board of Commissioners*, 95 Wn. App. 149, 161-63 (1999). As summarized in *Cedar Grove Composting*:

The PRA defines a "public record" as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." This definition does not limit the term to documents prepared by government officials. Courts have construed it as referring to "nearly any conceivable government record related to the conduct of government." Public records may include records of a for-profit corporation acting as the functional equivalent of a public agency.

Cedar Grove Composting, 188 Wn. App. at 717. Contrary to the County's position, the Court's decision in this case did not create new decisional law. It was apparent to the Court in this case from the testimony at trial that the County had an ulterior motive to withhold the design documents from the Plaintiff because of ongoing issues with him. In this context the reasons given, while plausible, were not entirely reasonable. The County had serious concerns about completing the project in light of the already-substantial delays costing the County \$25,000 per month, and was fearful about what might happen if the Nez Perce tribe or other agencies raised additional archaeological or other concerns. While the concerns were legitimate they do not provide justification for withholding.

5. Negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency. While the Court is reluctant to characterize the County's nondisclosure as bad faith, as stated above the failure by the County to identify and provide the documents requested was not entirely in good faith and was at least willful negligence. As stated by the Court in its previous letter, "Against the Plaintiff's consistent and persistent efforts to obtain copies of the current diagrams, the County's refusal to provide the diagrams on the pretext that they were a work in progress is inexplicable. They had only to make request of its contractor, TD&H, to obtain a copy of the plans at any fixed point in time."

6. Agency dishonesty. The Court finds no agency dishonesty.
7. The public importance of the issue to which the request is related, where the importance was foreseeable to the agency. The Court does not find this to be a significant factor. The Plaintiff claimed an altruistic motive and a public interest in minimizing the disturbance of Native American grave sites. These interests were certainly foreseeable by the County; in fact, these were the identical concerns already being addressed by the other interested parties and they were nothing new to either the interested parties to the project or to the public. The Plaintiff also had significant personal reasons for the requests because of his agreement with the County as to the design and construction of the improvements crossing his property.
8. Any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency. Scant actual personal economic loss has been shown to be incurred by the Plaintiff resulting from the County's failure to disclose the document, except for attorney fees and costs. The Plaintiff introduced evidence of – and the Court takes judicial notice of – a separate lawsuit against the County filed in Walla Walla County Superior Court asserting breach of contract damages relating to the agreement whereby the County acquired the right-of-way; however, any damages, if any, found in that case do not relate to PDR violations and would be separately determined.
9. A penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case. As observed in *Yousoufian*, 168 Wn.2d at 463, "The penalty needed to deter a small school district and that necessary to deter a large county may not be the same." The Court is aware of the size of Asotin County and its annual budget. Exhibit 62.

PENALTY CALCULATION AND AWARD

The applicable statute requires that a penalty be imposed for any violation of the PRA. The award is "not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record." RCW 42.56.550(4).

As summarized above, the Court in this case found that there were two violations of the PRA for which the Plaintiff is entitled to compensation. For the request of April 26, 2012, Plaintiff calculates the number of penalty days as being 228 days. For the request of July 17, 2012, Plaintiff calculates the number of days (to October 13, 2015, the day of trial) as being 1183 days. The Court has considered all of the mitigating and aggravating factors as discussed above, and finds that the appropriate penalty under the circumstances of this case is \$35 per day, applied to a total of 1411 days, for a total penalty of \$49,385. Under the circumstances of this case the Court does not find that the penalty needs to be enlarged to deter future misconduct.

ATTORNEY FEES AND COSTS

In addition to the penalty, RCW 42.56.550(4) also provides that a successful plaintiff in a PRA case "shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action." When awarding attorney fees to a prevailing PRA petitioner, the trial court is required to use the lodestar method; that is, to multiply a reasonable number of hours worked on

the case by a reasonable hourly fee in order to calculate the award amount. *Sanders v. State*, 169 Wn.2d 827, 869 (2010). After the lodestar is calculated, the trial court then has discretion in rare instances to adjust the resulting amount upward or downward. *Id.* In making its decision the trial court "must articulate the grounds for the award, making a record sufficient to permit meaningful review." *White v. Clark County*, 188 Wn. App. 622, 639 (2015).

In this case the Plaintiff did not fully prevail; indeed, nine of fourteen claims -- those set forth in his original complaint -- were dismissed on summary judgment. See decision letter of May 10, 2013 (Clerk's No. 57). The Plaintiff also did not prevail on his cross-motion for summary judgment.

Nevertheless, the Plaintiff did prevail on his remaining claims of PRA violations. The Court understands the Plaintiff's argument that each of the five alleged violations considered at trial constitute distinct violations for which individual penalties should be calculated. While the Court did not consider the last three as distinct violations, they were follow-up inquiries relating to the two record requests for which the Court did expressly find violations of the PRA, and -- so that the record is clear -- in setting the penalty award the Court took into consideration the totality of the circumstances as to the five alleged violations.

In determining the lodestar the Court has spent considerable time examining Exhibit 66, the "History Bill" introduced by the Plaintiff. It consists of a listing of time spent on the case. It does not represent an actual billing because counsel took the case on a contingency fee basis. Plaintiff's counsel is identified in Exhibit 66 as "TSR" (Todd S. Richardson), and his time was itemized at \$190 per hour. The time spent by other office staff, presumably clerks, paralegals, and/or legal assistants, identified by initials as DAB, CEW, AB, DH, MSK, L JL, and STF, was itemized at \$95 per hour. The training and qualifications of these staff are unclear. Some apparent clerical time by HAM and WWS was listed without expense.

Because of the dismissal of the original claims the Court largely disregarded time spent prior to the second amended complaint and time spent on the Plaintiff's failed motion for summary judgment. For similar reasons the Court considered but did not deem it appropriate to include the subcontracted invoices from the Overstreet Law Firm submitted as Exhibit 65. The Court also disregarded a number of entries in Exhibit 66 that appeared to relate to other litigation. Also, without being necessarily critical of counsel, the Court made adjustments for what it perceived to be duplicative or excessive time entries, although the Court recognizes Plaintiff counsel's energetic and determined approach to the issues and trial presentation. The overall briefing and exhibit preparation was extensive; the Clerk's file alone -- apart from the exhibits -- consists of 5 volumes.

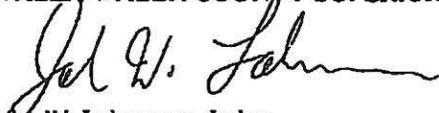
By reason of the above analysis the Court has determined that, as to the aspects of the case on which the Plaintiff prevailed, 233.3 hours of attorney time were reasonably incurred at a reasonable rate of \$190 per hour for a total of \$44,327. Also, 122.8 hours of office staff time was reasonably incurred; however because of the lack of evidence as to the training and qualifications of such staff the reimbursement for such time will be adjusted to \$25 per hour for a total of \$3,070. From the costs that were itemized the Court will allow the original filing fee, *ex parte* fees, fees for service of process, witness fees/mileage, and deposition fees, for a total of

\$2,736.67. Thus the total to be awarded for attorney fees and costs under the statute is 50,133.67.
There is no basis upon which to further adjust the attorney fees upwards or downwards.

Additional findings and a form of judgment consistent with this decision may be prepared and presented per WWCSCLR 13.

Sincerely,

WALLA WALLA COUNTY SUPERIOR COURT


John W. Lohrmann, Judge

FILED
KATHY MARTIN
COUNTY CLERK

2016 MAR 16 P 3:48

WALLA WALLA COUNTY
WASHINGTON

BY _____

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

RICHARD EGGLESTON, an individual,

PLAINTIFF

vs.

ASOTIN COUNTY, a public agency; and
ASOTIN COUNTY PUBLIC WORKS
DEPARTMENT, a public agency,

DEFENDANTS

No. 12-2-00459-6

JUDGMENT

JUDGMENT # 16 9 00185 4

I.

JUDGMENT SUMMARY

- 145
1. Judgment Creditor: Richard Eggleston
 2. Judgment Creditor's Attorney: Todd S. Richardson
 3. Judgment Debtor: Asotin County /
Asotin County Public Works Dept.
 4. Judgment Debtor's Attorney: Jane Bremmer Risley

JUDGMENT

I

Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

5. Judgment Amount:		
	Penalty Award	\$ 49,385.00
	Attorney Fees	\$ 44,327.00
	Staff Fees	\$ 3,070.00
	Costs	<u>\$ 2,736.67</u>
	TOTAL JUDGMENT:	\$ 99,518.67

II.

JUDGMENT

The Summary Judgment was heard on March 5, 2013. The violation phase of this matter was tried by the Court without a jury on April 1 - 2, 2015, the Honorable John W. Lohrmann presiding. The penalty phase was heard on October 13 - 14, 2015. Plaintiff, Richard Eggleston, appeared personally at the above hearings, and through his attorney of record, Todd S. Richardson of the Law Offices of Todd S. Richardson, PLLC. Defendants appeared through their attorney of record, Jane Bremner Risley of the Asotin County Prosecutor's Office.

The Court received the evidence and testimony offered by the parties, considered the pleadings filed in this action, and heard the oral argument of the parties' counsel.

The Court entered its letter ruling on the Motion for Summary Judgment on May 10, 2013, a copy of which is attached hereto as Exhibit "A". The Court made findings of fact and conclusions of law, which were entered on June 11, 2015, as part of the violation phase, a copy of which is attached hereto as Exhibit "B". The court also entered its letter ruling on the penalty phase on December 17, 2015, a copy of which is attached hereto as Exhibit "C".

JUDGMENT

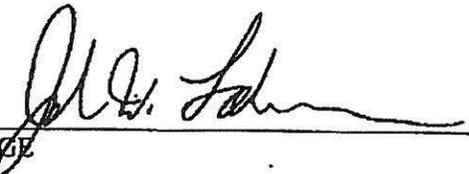
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Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

Consistent with its letter rulings and the findings of fact and conclusions of law, as set forth above, the Court enters final judgment in this matter as follows:

- 1) Plaintiff's claims 1 through 9 are dismissed with prejudice, as set forth in the Court's ruling on Summary Judgment (the letter ruling of 5/10/13, Exhibit "A").
- 2) Plaintiff's claims 10 and 11 are granted in favor of Plaintiff, as set forth in the Court's letter rulings and Findings of Fact and Conclusions of Law (Exhibits "B" and "C").
- 3) Plaintiff's claims 12 through 14 are hereby dismissed, as set forth in the Court's letter ruling of December 17, 2015 (Exhibit "C").
- 4) Plaintiff, Richard Eggleston is hereby granted judgment against Asotin County and Asotin County Public Works Department in the amount of Forty-Nine Thousand, Three Hundred and Eighty-five Dollars (\$49,385.00) .
- 5) Plaintiff, Richard Eggleston is hereby granted attorney fees and costs against Asotin County and Asotin County Public Works Department in the amount of Fifty Thousand, One Hundred and Thirty-Three and 67/100 Dollars (\$50,133.67).

DATED this 16th day of March, 2016.



JUDGE

Presented by:



Todd S. Richardson, WSBA# 30237
Attorney for Plaintiff

Approved as to Form
Notice of Presentment Waived

Jane Bremner Risley, WSBA#
Attorney for Defendant

JUDGMENT

4

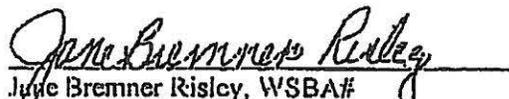
Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

Presented by:



Todd S. Richardson, WSBA# 30237
Attorney for Plaintiff

Approved as to Form
Notice of Presentment Waived


Julie Bremner Risley, WSBA#
Attorney for Defendant 20791

JUDGMENT

4

Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarksston, WA 99403
509/758-3397, phone
509/758-3399, fax

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the Brief of Respondents/Cross-Appellants in Court of Appeals, Division III, Cause No. 34340-5-III to the following:

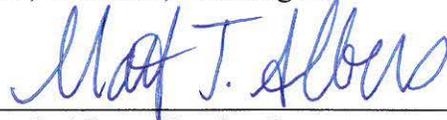
Jane Risley, Deputy Prosecuting Attorney
Benjamin Nichols, Prosecuting Attorney
Asotin County
PO Box 864
Asotin, WA 99402-0864

Todd S. Richardson
Law Office of Todd S. Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403

Original e-filed to:
Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99201

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 2, 2017, at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe