

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.

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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A. INTRODUCTION

There is nothing in Richard Eggleston's ("Eggleston") reply brief/cross-response which should dissuade this court from granting Asotin County's ("the County") cross-appeal. Rather, the factual concessions made by Eggleston require a reversal of the penalties and judgment against the County.

Moreover, Eggleston's reply/cross-response is confusing and replete with misdirection. For example, on page 30 Eggleston claims that the trial court properly analyzed the nature of the document without doing a *Telford*¹ analysis. This ignores that fact that in issuing its Findings of Fact and Conclusions of Law, the trial court found the private engineering firm TD&H with "specific, though limited agency." FF 3.12; CP 556. That finding certainly indicates the trial court was at least making TD&H a limited agency for PRA purposes.

The trial court removes any doubt that it was basing its liability decision on a finding that TD&H was a public agency, or the functional equivalent of a public employee, when it gratuitously, and improperly, did a retroactive *Telford* analysis in the penalty phase of the proceedings, specifically citing to *Telford* and *Cedar Grove Composting v. City of*

¹ *Telford v. Thurston County Bd. of Commissioners*, 95 Wn. App. 149, 974 P.2d 886, review denied, 138 Wn.2d 1015 (1999).

Marysville, 95 Wn. App. 149, 354 P.3d 249 (2015). Eggleston's reply/cross-response at 41-42 tries to justify the trial court's action. Yet in doing so, it ignores that the *Cedar Grove* opinion had not been issued when liability was determined and that in that case the City had stipulated the outside contractor was the functional equivalent of an employee for purposes of privilege. Obviously, the County made no such stipulation here and cannot be faulted for not complying with a decision that had not been issued.

More significant, is that recent authority from our Supreme Court in *Fortgang v. Woodland Park Zoo*, 1821 Wn.2d 509, 387 P.3d 690 (2017) vitiated the trial court's *Telford* analysis, as discussed in the County's opening brief at 34-36, and Eggleston's defense of it in his reply/cross-response. Tellingly, Eggleston fails to mention *Fortgang* at all in his response.

The misdirection continues when Eggleston claims that the County never addressed in its brief any reason for the liability and penalty decisions of the trial court, its judgment, or that aggravating factor 4 containing the *Telford* discussion (Assignments of Error 1-4 and 19) to be overturned.

For these and the other reasons discussed below, the County's cross-appeal should be granted.

B. REPLY ON STATEMENT OF THE CASE

Eggleston did not include a statement of the case in his reply/cross-response. Rather he chose to make various factual assertions by ostensibly arguing that substantial evidence supported the trial court's factual finding and legal conclusions. This does not obscure that in his response, Eggleston *concedes* the following facts relied upon by the County.

- Eggleston received the document sought in his July 17, 2012 PRA request at the Noble deposition on January 18, 2013.
- Eggleston, a sophisticated construction engineer, is familiar with construction claims. He was interested in the Project because of a personal interest involving the right-of-way he sold and rockeries that were going to be built on his property.
- The area where the Project was located was an area where significant Native American antiquities and burial sites were located. Having the evolving re-design plans would have allowed someone to potentially discover protected archeological sites.
- The project spanned a decade for design, funding, and construction. TD&H, a private firm, was hired on a fee

basis to perform the engineering and design of the Project.

- After construction began, an Indian burial site was encountered. This required the Project to be shut down. The contractor was paid thousands of dollars a month for standby fees, basically to do nothing to see if a redesign could be agreed upon by the necessary agencies: the County, WSDOT, the Washington Department of Archeology and Historic Preservation (“WSDAHP”), the Federal Highway Administration, and the Nez Perce Tribe. The contractor was paid between \$300,000 to \$400,000 for stand-by fees to do nothing.
- After construction began, the old bridge was no longer available for travel and the public was forced to use a temporary one lane bridge on a dangerous route.
- The negotiations were sensitive and the Tribe did not “trust” the County. Eggleston was interacting behind the scenes with the Tribe and never disclosed his secret role because the Tribe wanted him to “remain discrete.”
- If an agreement could not be worked out among the negotiating entities, the Project could not be completed.
- When Eggleston made his April 26 PRA request for the

plan sheets, he already had the document dated April 13 from the Nez Perce Tribe.

- The County responded to the request stating the drawings were exempt because they were preliminary and cited the statutory exemption. It also stated that “due to artifacts found at the site, no drawings can be finalized without the consent” of the negotiating entities.
- When Eggleston made his July 17 PRA request, negotiations were ongoing. The County immediately provided him copies of all documents used by the County in its public presentation before the Board of Commissioners on July 16 known as the Nez Perce set.
- Both sets of drawings for the April and July requests were marked “preliminary.” They changed repeatedly until a final design was agreed upon. All of the plans were recommendations for potential designs depicted in graphic form.
- There is no evidence the County ever had in its possession the plans subject to the April and July requests.

In his reply/cross-response, Eggleston claims that the County “used” plans subject to the April and/or July PRA requests to obtain bids from

contractors, in an effort to justify the trial court's findings to that effect in FF 2.21, FF 2.26, CL 3.10, and CL 3.11. Eggleston cites to two pages in Exhibit 6 for that proposition. Reply br. at 18, 33. A bid is an offer to perform work for a specified price. Since the final design had not been finalized, there were no "bids" by the contractor. While it is true the contractor provided pricing information, there is *no evidence* it used the documents subject to the PRA requests to obtain that information, as was pointed out to the trial court on reconsideration. CP 753, 754-55, 768-69.

C. SUMMARY OF ARGUMENT ON CROSS-REPLY

The County followed proper appellate procedure in specifically challenging findings of fact and conclusions of law, making assignments of error, and arguing the identified issues. This Court may consider the County's exemption arguments on appeal.

Eggleston has conceded he received the design plans subject to the July PRA request on January 18, 2013. The trial court imposed penalties after that date until the first day of trial. On that basis alone the County's cross-appeal must be granted.

In addition, TD&H is not a *de facto* public agency. Eggleston failed to even address the applicable standard from *Fortgang* as to how that determination is made in a fee for service contract situation like that between the County and TD&H.

The trial court erred in concluding the design and plan documents were not subject to PRA exemptions, particularly the deliberative process and archeological sites exemptions.

Finally, Eggleston provided no basis to dissuade this Court that the trial court committed error in its penalty decision. His effort on reply/cross-response was not gauged to the cross-appeal, but an effort to increase penalties on untenable grounds. The County made a reasonable search, and made good faith responses to Eggleston's multiple requests. Eggleston exalts procedure over substance by making claims there was silent withholding and a withholding log had to be produced, intimating he did not know what document he was not receiving. His requests were only for one document, belying any contention he did not know what was withheld.

D. ARGUMENT ON CROSS-REPLY

(1) The County Properly Argued Its Assignments of Error

Eggleston attempts to argue that the County never made specific arguments as to specified error (1, 2, 3, 4, 17, 18, 19, and 20) and thus they need not be addressed. Reply br. at 31-32. Facially, the contention is misplaced since it would mean the County said nothing as to why the liability decisions, penalty decision, and judgment should not be reversed. Eggleston apparently makes his baseless assertion predicated upon the

misguided belief that the County needed to discuss each and every finding of fact, conclusion of law, or penalty factor from which appeal is taken or the assignments of error are abandoned. Eggleston ignores what the Rules of Appellate Procedure and case law provide for meaningful appellate review.

RAP 10.3(g) requires a separate assignment of error for each finding of fact a party contends was improperly made. This Court will only review a claimed error that is disclosed in a statement of error or clearly disclosed in the associated issue pertaining to it. *Lewis v. Estate of Lewis*, 45 Wn. App. 387, 389, 725 P.2d 644 (1986) (appellate review is allowed when it was disclosed in the associated issue pertaining to it); *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995) (appellate review is precluded only when an appellant "fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), and fails to present any argument on the issue or provide any legal citation."). The *Olson* court made clear that the letter and spirit of RAP 1.2(a) controls and any "technical flaws" should not prevent resolution on the merits, and discretion should be exercised to reach the merits of the case unless there were "compelling reasons not to do so." *Id.* at 323. *Accord, SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, n.4, 331 P.3d 40 (2014).

The County complied with RAP 10.3(g). The County's opening

brief assigned error to the findings and conclusions. Br. of Appellant at 3-5. Moreover, County's opening brief stated the "Issues Pertaining to Assignments of Error" with specific reference to each assigned error. *Id.* at 4-5. The County's brief specifically discussed each of those issues, including whether TD&H was a *de facto* public agency, whether any PRA exemptions applied, and the appropriateness of the penalties imposed. Eggleston's contention of failure to comply with RAP 10.3(g) should be rejected.

(2) Standard of Review

Eggleston has attempted to muddle the standard of review by asserting no other applicable exemption can be asserted on appeal. Reply br. at 44. That is incorrect. RCW 42.56.550(3) provides that judicial review in a PRA case is *de novo*. Case law makes a distinction as to factual finding on whether a case is resolved on summary judgment or after trial. If the case is decided on the written record, then appellate review is totally *de novo*. If the decision follows after a hearing with witnesses, then a substantial evidence applies to the trial court's *factual findings*. *Cowles Pub. Co. v. Wash. State Patrol*, 44 Wn. App. 882, 889, 724 P.2d 379 (1986). Here, the determination of the first nine PRA requests (the email) were made on summary judgment; the balance of the PRA requests was decided after hearing.

Cowles makes clear that even after hearing and accepting factual determination, the Court of Appeals “must engage in an independent determination as to the intended scope of the disclosure and exemption provisions of the Act.” *Id.* No case law precludes an agency from arguing additional exemptions in the judicial process, even on appeal. Whether an exemption applies is legal and is not a factual determination. Allowing the assertion of additional exemptions comports with the *de novo* review standard specified for judicial review as the Supreme Court found in *Sanders v. State*, 169 Wn. 2d 827, 847, 240 P. 3d 120 (2010). There, the Court reaffirmed that an agency could argue different explanations “during litigation,” citing *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 256, 884 P.2d 592 (1994) (“*PAWS II*”). Neither *Sanders* nor *PAWS II*, the decisions relied upon by Eggleston, support his position that no exemption can be raised on appeal. To do so would undermine the statutory *de novo* mandate for all judicial review.

(3) The Daily Penalties Were Improperly Calculated

Eggleston *concedes* that he received a copy of the plans subject to his July PRA request at the Noble deposition on January 18, 2013. CP 125. The trial court even found that. FF 2.30; CP 555. Yet the trial court based its penalty for the July request, not from the request date of July 17, 2012 until the document was received, but to the first day of trial October

13, 2015, a period of 1183 days. CP 564. That is a difference of 998 days.²

RCW 42.46.550(4) makes daily penalties applicable only for the time the requestor was “denied the right to inspect or copy said public record.” Penalties will not continue to accrue after a document is produced. *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 725, 261 P.3d 119 (2011). On that basis alone, the County’s cross-appeal must be granted. At the penalty amount of \$35.00 per day, the difference is \$34,930.00.

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

As noted in the Introduction *infra.*, Eggleston’s response is contradictory, first claiming the trial court made a document, not a *de facto* agency, analysis. That ignores that the trial court made a specific finding of “limited agency” in CL 3.12 and then a retroactive full-scale *Telford* analysis in the penalty phase to somehow justify an aggravating factor that the County’s explanation that it did not ask its contractor to provide it documents the County did not know existed and that it did not believe TD&H was a public agency was unreasonable. In finding that the

² The County’s brief mistakenly stated the time between request and the first day of trial was 1411 days. That was true for both the April and July periods the trial court used. However, it properly calculated the difference of 998 days as it relates to the July 17 request. Counsel apologizes for any confusion.

County provided an unreasonable explanation, the trial court ignored that no prior decision had found an entity like TD&H a public agency in this type of circumstance. The opinion in *Cedar Grove Composting v. City of Marysville*, 188 Wn. App. 695, 354 P.3d 249 (2015) *had not been issued*.

Eggleston provides no basis to sustain the trial court's flawed reasoning. His brief merely restates what the trial court found. Reply br. at 42. Totally ignored is the applicable standard set forth in *Fortgang*, discussed in the County's opening brief at 34-36. Doubtless the controlling authority is ignored because Eggleston cannot establish that this case meets its criteria. Eggleston did not prove day-to-day control of the operations of an independent multi-state engineering firm by the County, nor did he establish that TD&H was dependent on County funds for its survival, being paid less than \$1 million dollars over a decade, and was a private entity. While it is true that for a fee, TD&H provided design services that the County could have done in-house if it had the staff and expertise to do so, which it did not, that does not turn TD&H into the "functional equivalent of an employee." If that is the test, almost every entity that contracts with government would fit that description. That is exactly the result our Supreme Court wanted to foreclose in *Fortgang* when it held that traditional fee for service contracts do not have that effect.

Eggleston attempts to sidestep the public agency determination by suggesting that the County was attempting to contract around its PRA responsibilities. Reply br. at 32. There is no basis for such a suggestion. The County produced hundreds of pages of records, including its interactions with TD&H, final drawings, and even preliminary drawings if they were used in the decision-making process of the County, such as the Nez Perce set was. That is hardly contracting your way out of the PRA.

Since TD&H is not a public agency, the liability decision predicated upon the basis that it is one, as well as Aggravating Factor 4 (Assignment 19), must be reversed.

(5) The Plans Subject to the April and July Requests Are Not Public Records

Although the trial court based its analysis on a public agency analysis, Eggleston argues the trial court's decision should be sustained because regardless of TD&H's status, the two sets of plans are public records. Eggleston's argument is meritless.

The undisputed situation is that evidently TD&H did prepare two sets of plans for the project, one in April and another in June. The problem that arose was that TD&H never gave full sets of those plans to the County and County personnel did not know they existed. Portions of plans were given to the County and were used in the negotiating process.

RCW 42.56.010(3) defines a public record as any writing containing information relating to the conduct of government or any governmental funds “prepared, owned, used, or retained by any state or local agency.” The plans were not prepared by the County, but by TD&H. The County did have a contract with TD&H that said certain documents, including designs, drawings, and specifications prepared by the consultant prior to the completion, were the property of the County. CP 1029. Clearly, final plans, or those used by the County, fit that definition. However, internal preliminary work-ups by the consultant do not fit that definition because they were not finalized. But even if the County had technical “ownership” of the plans, they were TD&H’s, in fact, because the County never had possession of them – the critical aspect of ownership. Since they remained in the TD&H computer, the County never retained them either.

Nor did the County “use” those full sets of plans. As discussed above, there is no evidence they were used for pricing information. Nor were they “used” in the sense that they were given to the County, reviewed, evaluated, or referred to, impacting the County’s decision-making process. This critical nexus required by *Concerned Ratepayers Ass’n v Public Utility District No. 1 of Clark County*, 138 Wn.2d 950, 960-61, 983 P.2d 635 (1999) is missing here. Documents that were used,

such as the one sheet from April 26 that Eggleston took from Mr. Miller's desk when he dropped in, were provided along with the Nez Perce set. CP 1071-74. The full plans subject to the April and July requests were not public documents.

(6) If They Were Public Records, the Plans Are Exempt from Production

If it is determined that the plans subject to the April and July PRA requests are public records, they are exempt from production. The principal exemption is the "Preliminary Drafts, Notes, Recommendations, and Intra-Agency Memorandums" exemption contained in RCW 42.56.280. The trial court recognized that for this or any other exemption to be applicable, the records sought had to either (1) violate someone's personal privacy or (2) protect a "vital governmental interest." RCW 42.56.210. CP 562.

Yet the trial court, like Eggleston, simply disregarded the vital governmental interest in obtaining an agreement among the negotiating parties so that the Project could be completed. Apparently having the public travel on a temporary one-lane bridge on a dangerous route, thousands of taxpayer dollars being spent for nothing, and protecting Native American grave sites and artifacts means nothing. As the County made clear in its opening brief at 10-11, 37-40, a vital public interest was

present here and the claimed exemption is applicable and need not be repeated here.

Like the trial court, Eggleston tries to obviate the applicability of the exemption by saying that there was no proof that disclosure of the preliminary drafts being used for negotiations would have jeopardized any negotiations or approvals of the other agencies involved. In other words, the County had to prove in the context of multi-party negotiations what would have happened if something that did not happen happened. That by definition is mere speculation. It is the sort of standard rejected in *American Civil Liberties Union of Washington v. City of Seattle*, 121 Wn. App. 544, 553, 89 P.3d 295 (2004) (“*ACLU*”) in the context of negotiations with a party outside the agency. In *ACLU*, the Court noted “The negotiations themselves are an integral part of the deliberative process that culminates in the policies the City decides to adopt concerning the police department.” *Id.* The same is true here. The negotiations were integral in coming up with a new design that would protect Tribal artifacts and get the Project completed at a doable financial cost that was ultimately approved by all the agencies and adopted by the County.

There can be little doubt that in these circumstances, releasing preliminary drafts could have, and in all likelihood would have,

jeopardized the negotiations. The Tribe did not “trust” the County. Due to the artifacts found at the site, no drawings could be finalized without the agreement of all parties. CP 1075. The public was getting frustrated with the wasted money, danger, and inconvenience to the traveling public and wanted the County to act. Eggleston was pursuing his own interest, acting behind the scenes, and was pursuing the April plans he already had through the PRA so as to be able to publically interject himself in the negotiating process. This alone is sufficient to find the applicability of the exemption. The trial court’s impossible speculation standard should be rejected.

Eggleston then tries to make an artificial distinction between policy formulation and policy implementation. Reply br. at 25-26, relying on *Cowles*. The reliance is misplaced since that case never dealt with this exemption. As *ACLU* discussed above makes clear, in the negotiating context the artificial construct advanced by Eggleston is not viable. *PAWS II*, also relied upon by Eggleston, makes a distinction between a “deliberative” or “policy-making process.” It held that if disclosure would reveal or expose the deliberative process, the exemption applied. *Id.* at 256.

Nor is there any substance to the argument that “raw data” could have been redacted. Eggleston had the raw data for the overall site. He

had the original Project plans as well as the April plans. As WSDAHP's Mr. Stermer testified, the drawings were "Recommendations that are design plans, yes, sir." RP I:149. Thus, plan drawing showing elevations and that sort of thing are implicit in the recommendation, not raw data that can just be redacted. The records are exempt from production.

In addition to the deliberative process exemption, the records are also exempt under RCW 42.56.300 relating to protection of archeological sites. Eggleston appears to dispute that this exemption was raised below, but if so, that is no bar. The trial court recognized that the County seemed to have implicated the exemption at trial. CP 562. However, it gave it no consideration in the liability phase of the proceedings, only during the penalty phase to assert "personal privacy" was not involved in finding Aggravating Factor 2 (Assignment 18). The trial court rejected the privacy concern by simply saying that "if the location of particular graves of Native Americans were identified" they could be redacted "if keeping the location secret were a concern to the County or the Nez Perce tribe." CP 562. While once an individual grave had been identified, as happened when the project was shut down, its location might have been able to be redacted. But that ignores that the negotiations were then about where other artifacts were likely located and the various designs were being formulated to avoid potential archeological sites. Thus, the plans probably

could not be redacted except in almost their entirety. The County had no expertise in the location of these sites. The Tribe and its archeology staff did. The County would have no way of redacting. There is no authority for the County to outsource its PRA responsibility to a third party to make redactions to public records. The Court's refusal to apply the archeological exemption and predicating an aggravating factor of failing to comply with PRA requirements cannot be sustained.

Eggleston's intimation that the exemption should not really be applicable to him because he was a Section 106 Consulting Party, and he could even have helped identify sites, reply br. at 31, is baseless and should be given no credence because of his personal, not altruistic, motivations here. In any event, what is being considered here is *public* disclosure. There cannot be one set of rules for certain types of requestors and different rules for other types of requestors. But his status did obviate the need to inform him of WSDAHP under RCW 42.56.300(4).

(7) There Is No Basis to Find the Penalties Inadequate

Eggleston's reply brief is confusing as to penalties. Instead of responding to the discrete penalty issues raised in the cross-appeal by the County, he essentially argues that the trial court abused its discretion in not awarding him larger penalties. None of his contentions have merit.

Eggleston claims, as did the trial court, that the County conducted

an inadequate search by not asking TD&H for the plans when the April and July requests were made. Like the trial court, he asserts the County's burden here was "beyond a material doubt" as to the adequacy of the search. Yet that standard is only applicable on summary judgment. *Neighborhood Alliance* at 721. That standard would only be applicable to the one email which was the subject of nine separate requests. As discussed in the County's opening brief, that email has never been found by anyone and it is undisputed that the email predated any contractual relationship between TD&H and the County; it was not a public record. Therefore, the adequacy of the search is irrelevant as to the email.

As for the April and July requests, there is no dispute that the County searched in all the relevant places within the County where such plans would be located; none were found. CP 902-03. At that point, the County was not aware that TD&H had such records. There is no duty to create a record. There was no basis to believe TD&H would be a public agency under the Act so that its internal records had to be searched. Eggleston's assertion that penalties should be increased because of an inadequate search should be rejected.

Eggleston then tries to claim the County should be penalized for "silent withholding" because it never produced a "withholding log" of what it was producing. The argument is a glorification of procedure over

substance. There really is no such thing as a withholding log. There are privilege logs that list documents that are being withheld because of a claim of privilege. Nothing in the Act requires a “withholding log.” In any event, Eggleston was making claim to three discrete documents: the email and two sets of plans. When the documents were not produced, Eggleston knew perfectly well what documents he was not receiving from the County. His point might be more persuasive if multiple documents were involved, but that is not the case here. There is no basis for the County to have to describe back to him the one document he requested that he was not receiving, especially since he knew exactly what he was not receiving in regard to the April plans because he already had them. In any event, as to the April request, the County did specifically reference the request and cite a specific statutory exemption. CP 1075.

Nor do his claims of bad faith have substance or support in the record. Eggleston’s requests received timely responses from the County. CP 402-03, 424-30. Hundreds of pages of documents were produced. For plan requests, a proper exemption was asserted. Mr. Sterner’s opinion that the relationship between the County and Eggleston was “toxic” has no substantiating support as to what time period is involved, what County personnel gave him that impression, and on what basis he drew that conclusion. The testimony can also be considered as evidence of enmity

by Eggleston against the County. Even the trial court did not find bad faith. There is no basis for this Court to do so.

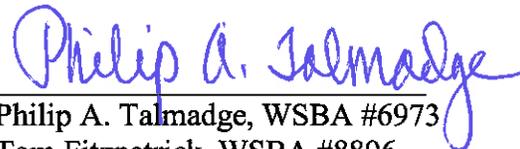
E. CONCLUSION

Eggleston has conceded he received the plans subject to the July request in January 2013. On that basis alone, the County's cross-appeal must be granted. He has provided no basis to sustain the trial court's liability and penalty decision.

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 PRA requests 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 17th day of May, 2017.

Respectfully submitted,



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DECLARATION OF SERVICE

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

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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: May 17, 2017 at Seattle, Washington.



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