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Court of Appeals
Division III
State of Washington

No. 35091-6-III

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

RANDALL HOFFMAN,

Appellant,

v.

KITTITAS COUNTY, a local agency, and the KITTITAS COUNTY SHERIFF'S OFFICE, a local agency,

Respondents.

REPLY BRIEF OF RESPONDENTS

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INTRODUCTION AND SUMMARY

I. PROCEDURAL HISTORY:

A. STIPULATED BENCH TRIAL – NOT SUMMARY JUDGEMENT MOTION:

The Appellant (Hoffman) during these proceedings filed a motion for summary judgment. That motion was abandoned with the parties instead agreeing that there were material facts in contestation. The parties agreed to a stipulated facts/exhibits bench trial. While the evidence to be presented was agreed upon there was not an agreement as to what facts were more credible; what witnesses were more credible; or what evidence was more credible. Resolution of this case required the trial judge to exercise discretion; weigh the conflicting evidence; and determine the credibility of statements made by witnesses in depositions and affidavits.

B. MISCHARACTERIZATION OF CONCESSIONS BY COUNTY:

The County did make two concessions in this litigation. The County conceded that Hayes applied a records exemption that was to broad in redacting seven (7) face sheets that were provided to Hoffman in June of 2016. The County conceded that if the trial court were to find that Hoffman ***had not*** narrowed the scope of his request during the phone call, that the County would have violated the PRA.

Contrary to Hoffman's assertions, the facts, weight of the evidence and credibility of witnesses were all contested. Contrary to Hoffman's assertion in his brief at page 1, the County did not concede below or now that "Hayes's response was legally wrong." The parties in their arguments at trial did not concede that the underlying facts were agreed upon. The trial judge indicated his understanding of the proceedings and the limitations of the proceedings when discussing his role in making credibility determinations of the testimony of witnesses and evidence presented. *RP 64-65*

The characterization of the proceedings and facts as contested or uncontested is important as it relates to the amount of deference to be given to the trial court's resolution of this case, based upon his findings of fact and conclusions of law.

RESPONSE TO ASSIGNMENTS OF ERROR

I. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR:

It is the County's position that the trial court correctly weighed the evidence; determined the credibility of witness statements; reconciled the evidence; and determining what facts were proven. The County believes the trial court correctly applied the law to the facts that were determined.

The County believes that in awarding a penalty for the violation the trial court did not abuse its discretion. Because the County has reached this decision, the County disputes each alleged assignment of error. The County has made this decision based upon the standards of review that it believes are applicable to review by this Court.

II. RESPONSE TO DESIGNATED ISSUES RELATING TO APPELLANT'S ASSIGNMENTS OF ERROR:

1. Hoffman's characterization that Hayes did not follow standard practices is simply not supported by the evidence presented at trial. Seeking clarification of a request is consistent with the policies of the Kittitas County Sheriff's Office and authorized under the PRA. Based upon the phone call and Hayes' belief that Hoffman had narrowed his request, there was no need to search further for photos or videos to confirm or dispel their existence. Hoffman's assignments of error 1, 2, 3, 4, 5, 8, 9, and 10 are not supported on this basis.

2. It is a complete mischaracterization of the evidence and proceedings to claim that no party has attempted to defend the actions of Hayes. It is a complete mischaracterization of the evidence to claim that Hayes attempted to conceal the denial of records from her supervisor, the evidence is clear that the issue was brought to their attention and that she was candid in her explanation as to her actions. It is a complete

mischaracterization of the evidence to state that Hayes never corrected the denial despite being given opportunities to do so. There is no evidence that supports the contention that Hayes gave misleading testimony during the litigation of this issue. Hoffman had the burden to prove these issues at trial and he failed. Hoffman's assignments of error 1, 2, 3, 4, 5, 7, 8, 9, and 10 are not supported on this basis.

3. Hoffman confuses the difference between a timely response to a public disclosure request (a factor used in considering agency culpability under *Yousoufian*) and a delay in receiving documents. The trial court did not error in making the correct distinction under the PRA and associated case law. Because the trial court correctly applied the law to the facts in this case, Hoffman's assignments of error 6 and 8 are not supported.

4. The purpose for awarding attorney's fees is to level the playing field for non-governmental entities so that they are not handicapped in seeking the disclosure of records. In this case all records responsive to the Hoffman's records request were provided to Hoffman prior to the filing of this action. Given the trial court's ruling, Hoffman was entitled to an award for attorney fees and costs at the trial court level.

Hoffman was entitled to request the trial court to impose a penalty based upon the finding of a PRA violation. An award of a penalty is

within the very broad discretion of the trial court, regardless of the level of agency culpability in not providing records. The legislature has given trial courts a great degree of latitude in exercising their discretion in this regard. Where the sole issue on appeal is the challenge to the discretion of the trial court in setting penalties, an appellant should not be awarded attorney fees unless the trial court finds an abuse of discretion by the trial court in setting the penalty.

STATEMENT OF THE CASE

I. FACTS:

Hoffman's recitation of facts are claimed to be based upon the "…trial court's factual findings and on those portions of the record that are consistent with the trial court's factual findings." *Brief of Appellant at 8.* RAP 10.3(b) allows a respondent the choice to provide a statement of the case, or not, if satisfied with the statement in the brief of appellant. Hoffman's factual recitation mischaracterizes the evidence and is argumentative, which is frowned upon in RAP 10.3(a) (5).

However, the County agrees that utilizing the findings of fact made by the trial court, as delineated in the Judgment Order, *CP 890-895* and the Penalties Order, *CP 900-910* does make sense. The findings entered in

these documents by the trial court cover the most important facts necessary to determine whether a violation of the PRA occurred, and they cover the facts necessary to determine the level of culpability of the County in setting a penalty for violation of the PRA.

The County does not enthusiastically endorse the findings of fact and conclusions of law reached by the trial court in those documents. However, the County believes that the trial court properly exercised its discretion in reaching those findings and conclusions. Given the applicable standard of review that the County believes should be applied to this case, the County believes that:

> The findings of fact are based upon substantial evidence and the court's discretion should not be vacated; and
>
> The conclusions of law were correctly stated and applied and therefore should also stand.

Given this position, the County adopts by reference the findings of fact contained in the two orders of the trial court as the statement of the case for review purposes. The two referenced documents have been made a part of the record through designation and they have been attached as appendices to the Appellant's brief. For ease of reference, the two documents are attached as appendices to this brief as well.

II. PROCEDURAL HISTORY:

The County generally agrees with the statement of procedural history provided by Hoffman in his brief, with two important distinctions.

1. STIPULATED BENCH TRIAL NOT SUMMARY JUDGMENT:

Hoffman does not reference the fact that during the course of this litigation he submitted a Motion for Summary Judgment which was not argued. The parties, agreeing that there were disputed material facts, instead chose to conduct a stipulated bench trial. It is clear from the documents submitted by the parties that there was an agreement as to the evidence to be allowed to be considered, but that both parties submitted to the discretion of the trial court judge to determine the credibility of witnesses, testimony, and evidence, albeit without the actual in court questioning of witnesses. *RP 64-65* It is clear that both parties and the trial court recognized the role of discretion that was to be exercised by the judge in making these determinations and that findings of fact reflect a weighing of the different evidence as presented by the parties.

2. ALL RESPONSIVE DOCUMENTS PROVIDED BEFORE LEGAL ACTION COMMENCED:

Hoffman made his first public disclosure request to the KCSO on June 29, 2015. *CP 890 FF (1) Judgment Order* Hoffman returned to the

KCSO in February of 2016 and claimed that he should have received more documents, that he could sue, and that he wanted to possibly make another request. Hoffman left and returned on February 29, 2016 and made a new request and re-submitted his first request. Both requests were fulfilled and provided to Hoffman on March 1, 2016. *CP 894 FF 12 Judgment Order*

Hoffman has not challenged the timing or completeness of the response provided on March 1, 2016. The fulfillment of that request formed the basis for agreement as to the number of records at issue in this action - 126 items, and the time frame for consideration June 29, 2015 to March 1, 2016. *CP 895 FF 13 Judgment Order*. The commencement of this action was March 3, 2016, two days following the production of all responsive records to Mr. Hoffman.

STANDARDS OF REVIEW

I. VIOLATION OF PUBLIC RECORDS ACT:

The general rule is that where record both at trial and on appeal consists entirely of written and graphic material--documents, reports, maps, charts, official data and the like--and trial court ***has not seen*** nor heard testimony ***requiring it to assess credibility or competency of witnesses, and to weigh evidence, nor reconcile conflicting evidence,*** then on appeal court of review stands in same position as trial court in looking at facts of case and should review record de novo. *Progressive*

Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 247 (Wash. Nov. 22, 1994); (emphasis added) *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989).

When reviewing a summary judgment entered under the public records act (RCW 42.17.250 to .348), the appellate court must remand the case to the trial court to decide issues of material fact that require an evidentiary hearing to resolve. *Progressive Animal Welfare Soc'y v. Univ. of Wash*., 125 Wn.2d 243, 247 (Wash. Nov. 22, 1994).

When the trial court must assess credibility or competency of witnesses, and weigh evidence and reconcile conflicting evidence, then the appellate court reviews a trial courts' factual findings to determine whether substantial evidence supports them. *Progressive Animal Welfare Soc'y v. Univ. of Wash*., 125 Wn.2d 243, 247 (Wash. Nov. 22, 1994); *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989); *Robbins Geller Rudman & Dowd, LLP v. Office of Attorney Gen*., 179 Wn. App. 711, 716 (Wash. Ct. App. Mar. 4, 2014).

II. PENALTIES AND BAD FAITH:

A trial court's award of penalties for a PRA violation is reviewed for an abuse of discretion. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010)

> A court abuses its discretion only when it adopts a view "'that no reasonable person would take'" or when it bases its decision on "untenable grounds or reasons." Id. at 458-59 (internal quotation marks omitted) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). See also *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 277-280 (2016)

Both the legislature and the Courts have conferred great discretion on trial courts to determine the appropriate penalty for a PRA violation. *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 277-280 (2016)

III. TRIAL COURT BURDENS OF PROOF:

The burden of demonstrating bad faith in denying public records lies with the plaintiff seeking penalties. *Adams v. Dep't of Corr.*, 189 Wn. App. 925, 940 (Div. 3, 2015)

ARGUMENT

I. PRELIMINARY MATTERS:

A. WHAT THE CASE IS ABOUT:

This case was presented to the trial judge to address three overarching questions:

1. Did Kittitas County (County) violate the Public Records Act (PRA), codified at RCW 42.56, in responding to the request for public records submitted by Hoffman;
2. If the County violated the PRA, what level of culpability existed in terms of their response as it relates to an appropriate penalty to assess against the County for the violation and to assure future compliance with the PRA; and
3. If the County violated the PRA, what level of attorney fees and costs are owing to the Hoffman.

The first question must be answered in the affirmative to reach the second two questions. The second question relates to the conduct of the governmental agency in withholding records, and the penalty a court deems appropriate to penalize past conduct and assure future compliance with the PRA. As to the third question, generally, an award of reasonable attorney fees shall be awarded to a requestor who prevails in an action to compel a governmental agency to produce documents.

B. WHAT THE CASE IS NOT ABOUT:

1. PRODUCTION OF RECORDS:

This case is different from most PRA cases, in that a lawsuit was not required to obtain production of the documents requested. The legal action before this court was commenced after the production of all responsive records. Hoffman has not challenged the fulfillment of his request by Records Clerk Knudson (Knudson) in March of 2016. As a result, this action was unnecessary to accomplishing the goal of forcing

the County to produce records – it was solely about whether Hoffman was entitled to an award of a penalty based upon the alleged violation and withholding of records for a period of time.

2. DAMAGES SUFFERED BY HOFFMAN:

An action under the PRA may take into consideration any damages suffered by a requestor, but it does so as a factor in determining the culpability of a government agency in their failure to comply with the PRA. *Yousoufian v. Office of Ron Sims,* 168 Wn.2d 444, 229 P.3d 735 (2010). Hoffman claimed no actual damages and the trial judge ruled that no damages were proven. *CP 909 (Finding of Fact 14, aggravating factor (h) Order Determining Penalties and Ordering Attorney Fees.) ("Penalties Order")*

3. MOST EGREGIOUS VIOLATION OF THE PRA EVER:

Hoffman has at different times throughout this litigation argued that this is the most egregious violation of the PRA that exists and that no penalty short of $100.00 per record per day is sufficient to penalize the County for their actions. A quick perusal of the PRA cases that have been decided demonstrate that this is not the most egregious violation of the PRA.

Perhaps the characterizations of the evidence and posture of the case by Hoffman contributed to the trial court's determinations as to the credibility of witnesses and evidence presented. This repeated argument made by Hoffman resulted in the trial court specifically addressing this issue and finding and concluding that this was not the most egregious violation of the PRA. *CP 909 and CP 910 (Finding of Fact 14, aggravating factor (i); Conclusion of Law 3, Penalties Order.)*

4. PRIZE AWARD TO HOFFMAN:

There is an expression that is appropriate to this case: "It is about you, but it is not about you." Hoffman, as a requestor of records is a critical figure in this legal battle. However, an award of penalties under the PRA is focused upon past, current, and future behavior of the governmental entity and what is appropriate to penalize their past conduct to assure future compliance. The PRA was never designed to be a path for litigants to unjust financial enrichment at the detriment of their own government and fellow taxpayers.

II. THE LEGAL STANDARD OF REVIEW OF THE TRIAL COURT DECISION:

The standard of review is important, particularly to Hoffman, because he disagrees with the award of penalties assessed against the County. Hoffman is not concerned with the trial court's findings and

conclusions that supported a determination that the County had violated the PRA. Rather, he attempts to characterize the case as relying upon uncontested facts so that he can obtain a more deferential standard of review – in essence a standard where he is able to request that this Court give no deference to the trial court judge.

Hoffman requests that this Court find that this case was submitted to the trial court judge based upon agreed facts. Hoffman's desire, upon such a finding, is to argue that the trial court judge's findings are subject to no deference. To get the standard he is hopeful for, Hoffman must ignore the reality that most of the facts in this case were contested; that the trial judge had to assess the credibility of witnesses; had to weigh the conflicting evidence presented; and had to reconcile such conflicting evidence. Finally as to penalties to be assessed, Hoffman chooses to ignore the plain language of the statute and case law that has empowered trial court judges with a great degree of discretion in awarding penalties.

A. **Violation of Public Records Act – Contested Facts Presented:**

Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. *RCW 42.56.550*. The standard in essence is the legislature's method of asserting that

agencies are not given deference as it relates to public records, rule making surrounding public records, or their opinion as to whether exemptions apply or do not apply. This statement, however, applies to the review of agency action, but does not specifically speak to appellate review in these cases. The courts, in the silence of the statute, have had to fashion the rules for review of trial court decisions.

> The general rule is that where the record both at the trial and appellate court consists entirely of written and graphic material--documents, reports, maps, charts, official data and the like--***and the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses, and to weigh evidence, nor reconcile conflicting evidence***, then on appeal the court of review stands in the same position as the trial court in looking at the facts of the case and should review the record de novo. *Progressive Animal Welfare Soc'y* at 247.

This rule speaks to a motion for summary judgment where the facts are not contested and the only issue is how the law is applied to the facts which are agreed upon. If the facts are not contested, if the evidence is agreed upon, and the parties are merely arguing positions of law, then a reviewing court is in no different position as to the facts than was the trial court, and they are entitled to engage in de novo review of the application of the law to uncontested facts.

The corollary rule is that:

> When reviewing a summary judgment entered under the public records act (RCW 42.17.250 to .348), the appellate court must remand the case to the trial court to decide issues of material fact

> that require an evidentiary hearing to resolve. *Progressive Animal Welfare Soc'y* at 247.

When the trial court must assess the credibility or competency of witnesses, weigh and reconcile conflicting evidence, then the appellate courts review a trial courts' factual findings to determine whether substantial evidence support them. *Progressive Animal Welfare Soc'y* at 247.

Hoffman in seeking de novo review chooses to ignore the actual posture of this case in the context of the rule. This was a stipulated bench trial conducted by the trial court, not a summary judgment motion resolved upon agreed facts. It is true that the case was presented entirely by the introduction evidence that was written and graphic material--documents, reports, maps, charts, official data and the like, and it is true that such record is available for review on appeal.

The rule speaks to hearing and seeing of testimony, and the trial court made a point of making a record of its inability to hear and see witnesses in making credibility determinations between the conflicting "testimony" presented through affidavits and deposition testimony. However, there is a difference between seeing witnesses and seeing witness testimony. The court "saw" the testimony of the witnesses through the submitted affidavits and deposition testimony.

While a focus upon what is meant by hearing or seeing plays well to the argument that there is something different about a case involving presentation through documentary evidence alone, one must still disregard the rest of the rule to reach the conclusion sought by Hoffman. The cases suggest that de novo review by an appellate court is only appropriate if there are no material issues of fact – in essence, if the case is presented on agreed facts that are not contested by the parties.

The record does not support a finding that the facts in this case were uncontested. In addition, while arguing that the facts are uncontested, Hoffman has in his brief conceded that there were/are contested facts. *Brief of Appellant at 8* The County can also point to a number of factual issues wherein the trial court had to weigh conflicting testimony, determine the credibility of witnesses and exercise discretion in making findings of fact and conclusions of law, which suggest that the facts were in contention. Examples would include but are not limited to:

> A finding as to whether Hoffman narrowed his request as stated by Hayes or whether he did not narrow his request – Hoffman's position, during a phone call on June 29, 2015. *CP 891 Judgment Order FF 5; CP 895 Judgment Order CL 4*
>
> A finding that Hoffman told both Hayes and Knudson, in different phone calls in September of 2015, that he had received what he needed from the KCSO. The trial court resolved this issue against Hoffman based upon conflicting evidence – his denial as to Hayes and not contesting as to Knudson. *CP 893-894 Judgment Order FF 10 and 11*

> A finding that the Appellant did not return to the KCSO in July of 2015 to follow-up on his request. Court found based upon conflicting testimony that he had not returned. *CP 893 Judgment Order FF 9*

The proper standard of review requires this Court to provide deference to the findings of the trial court on the issue of a violation of the PRA. It is clear from the record that the parties and the trial judge were in agreement that the trial court had an obligation, based upon competing evidence, to weigh the credibility and competency of the witnesses; to weigh the evidence, and to reconcile conflicting evidence. Under the circumstances of this case, the proper standard of review then, is whether there is substantial evidence to support the findings and ruling of the trial court.

Because the County believes that this is the proper standard, the County has chosen not to challenge the trial court's findings of fact and conclusions of law. Because the County believes that this is the proper standard, the County does not challenge the trial court's determination that a violation of the PRA occurred. Because the County believes that the proper standard of review requires deference to the trial court, it requests that this Court adopt the standard as correct, and based upon the substantial evidence supporting the findings of fact and judgment of the

trial court, would ask that the findings, conclusions and orders of the trial court be upheld and not disturbed on appeal.

B. **Penalties and Bad Faith:**

Hoffman again misstates the posture of the case in an attempt to argue that de novo review is appropriate to ascertain whether the facts amounted to bad faith on the part of the County as opposed to negligence as found by the trial court. Because the facts of the case were at issue before the trial court, de novo review is not the correct standard to be applied in this case under *Faulkner v. Wash. Dep't of Corr.*, 183 Wn. App. 93, 332 P.3d 1136 (2014) or *Yousoufian* id.

The *Faulkner* case was focused upon inmate requests for public disclosure and a definition of bad faith imposed by the legislature under a relatively new statute that required a showing of bad faith before any award of penalties for a violation of the PRA. The *Faulkner* case revisited the *Yousoufian* cases in the context of discussing some limitations presented, but did not disagree that the factors were relevant to the trial court's exercise of discretion in awarding penalties.

> While a finding of bad faith is up to the discretion of the trial court judge, some framework is appropriate to adequately guide how such discretion should be exercised. *Faulkner* at 103, citing *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 465, 229 P.3d 735 (2010)

The court in *Faulkner*, building upon the holding in *Francis v. Dep't of Corr*., 178 Wn. App. 42, 51-52, 313 P.3d 457 (2013), *review denied*, 180 Wn.2d 1016 (2014) was seeking to focus upon and flush out the concept of bad faith in the context of the PRA and inmates. *Faulkner* at102-105. In their holding, they continued to indicate that "bad faith" remained a central focus of an award of penalties, and that "bad faith" was at the high end of the culpability spectrum. *Faulkner at 104-106.*

Importantly, the *Faulkner* court did not change the standard of review as expressed in Yousoufian (II), or other PRA cases, namely that:

> A trial court's award of penalties for a PRA violation is reviewed for abuse of discretion. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010) (Yousoufian II) A court abuses its discretion only when it adopts a view "'that no reasonable person would take'" or when it bases its decision on "untenable grounds or reasons." Id. at 458-59 (internal quotation marks omitted) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). See also, *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 277-280 (2016)

And the amount of deference to be provided to a trial court's award of a penalty was stated as such, following a reduction of the penalty range to $0:

> The plain language of the statute and our case law necessitate finding that trial courts have broad discretion to determine the appropriate method of calculating a PRA penalty. The plain language of the PRA confers great discretion on trial courts to determine the appropriate penalty for a PRA violation. *Wade's*

> *Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 277-280 (2016).

Appellant has cited to *Faulkner* and *Yousoufian* for the proposition that a trial court relying upon uncontested facts is not entitled to deference in their award of penalties for a violation of the PRA. As noted, the claim of uncontested fact is unsupported. The larger problem with this claim, however, is that it is not a correct statement of the legal standard. The holding in *Wade's* affirms that the legislature has given great discretion to trial court judge's is determining penalties to impose, which penalties should not be overturned absent an abuse of that discretion. Because an abuse of discretion in awarding penalties has not, and cannot been shown, this Court should affirm the award of penalties as imposed by the trial court.

III. VIOLATION OF PUBLIC RECORDS ACT FOUND:

While the County does not necessarily concur with the trial court's finding of a violation, the County believes that applying the correct legal standard would result in this Court upholding the findings of fact and conclusions of law in support of that finding, based upon the substantial evidence test. The County does not contest the finding of a violation on appeal.

IV. PENALTIES FOR PRA VIOLATIONS:

A trial court's award of penalties for a PRA violation is reviewed for an abuse of discretion. *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 277 (2016) *Yousoufian v. Office of Ron Sims, King County Executive*, 168 Wn.2d 444, 458-459 229 P.3d 735 (2010). An abuse of discretion **may only** be found by a reviewing court if the trial court adopted a view "that no reasonable person would take" or if the trial court bases its decision on "untenable grounds or reasons." *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 277 (2016) *Yousoufian v. Office of Ron Sims, King County Executive*, 168 Wn.2d 444, 458-459 229 P.3d 735 (2010). *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). (emphasis added)

The PRA's statutory language and case law have made clear that trial courts have great discretion to determine the appropriate penalty for a violation by an agency of the PRA – discretion that can be exercised from no award up to $100.00 per record. *Wade's* at 278-279.

The *Wade* court emphasized that while specific guidance has been provided in terms of what trial courts should consider in assessing penalties, the cases have made it clear that such guidance should not infringe upon the considerable discretion granted trial courts to determine

appropriate penalties. *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 279 (2016) *Yousoufian v. Office of Ron Sims, King County Executive*, 168 Wn.2d 444, 468, 229 P.3d 735 (2010). For a similar result as to discretion and guidance, see ***Faulkner v. Wash. Dep't of Corr.***, 183 Wn. App. 93, 332 P.3d 1136 (2014) (Bad faith prisoner request context).

The *Wade* case is instructive as to how expansive the Supreme Court was willing to go in providing discretion to trial courts. The Court definitively stated that a trial court has the discretion to calculate penalties on a per page basis by defining the term "record" to include a single page, or by grouping records together by subject matter, or presumably in any fashion the trial court deems is a just result. *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 278 (2016).

Appellant has claimed an abuse of discretion by the trial court in assessing a penalty of $.50 per page per item (page, photo, video) for each day they items were not produced. The case law is clear that the trial court would have been within its discretion to lump them into 7 distinct requests and assessed a penalty per day in that fashion. Alternatively, the trial court could have lumped the records into reports, photos, and videos and

assessed a per day penalty for that grouping – either appears acceptable under the discretion provided by the case law.

In *Wade* the trial court broke the penalty out into different time frames based upon the legitimacy of the action taken by the Department of Labor and Industries. (L & I)

1st phase – unreasonable reliance upon exemption:

the trial court assessed and the court affirmed a penalty of **$.02 per page per day**.

2nd phase – L & I knew the investigation was over, exemption not apply, failed to notify others of their right to seek a protective order, failed to turn records over:

the trial court ruled and the court affirmed a penalty of **$.25 per page per day.**

3rd phase – reasonable time for others to seek injunction

the trial court assessed and the court affirmed a penalty of **$.01 per page per day.**

4th phase – time provided to seek injunction passed, no filing for order, no disclosure by L & I

the trial court assessed and the court affirmed a penalty of **$1.00 per page per day.**

5th and final - period after the trial court ordered production and records not provided (possible contempt action pending)

the trial court assessed and the court affirmed a penalty of **$5.00 per page per day.**

A simple comparison of the cases indicates that the imposition of the trial court in this matter of $.50 per day per item is not unreasonable. The crux of the holding is that the County relied upon an exemption that they should have known was to broadly applied to the records requested by Hoffman and that the search by Hayes was not sufficient.

In *Wade*, L & I complained that a penalty of $.02 per item per day was an abuse of discretion. Appellant complains of an abuse of discretion for a penalty of $.50 per item per day for in essence the same type of violation. Neither L & I or Hoffman have demonstrated that the trial court has abused its discretion and the penalty imposed by the trial court was reasonable.

V. FINDING OF NEGLIGENCE, NOT "BAD FAITH":

The trial court judge concluded as a matter of law, after weighing the *Yousoufian* factors that the county was negligent in:

1) Failing to adequately search for requested reports, photographs and videos;
2) Misinforming Hoffman that he would not be entitled to the majority of the reports because he was not a party to the incident and privacy exemptions, and
3) Redacting based upon reliance upon an incorrect exemption. *CP 897 Order Granting Judgment, CL 11*

The burden of demonstrating bad faith on the part of an agency in denying public records lies with the plaintiff seeking penalties. *Adams v. Dep't of Corr.,* 189 Wn. App. 925, 940 (Div. 3, 2015) The trial court applied the correct legal standard in this regard in its determination of fault on the part of the county. *CP 897 Order Granting Judgment, CL 10*

Hoffman had argued at trial that this was the most egregious violation of the PRA that had ever been documented. Hoffman categorized all of the responses and actions of every involved member of the KCSO as being in bad faith. After weighing the competing evidence and credibility of witnesses, the trial court applied the proper standard and found that Hoffman had not met his burden. *CP 897 Order Granting Judgment, CL 12* The reasonableness of Hoffman's claims of bad faith can be measured against the evidence that was provided on the issue.

Hoffman had the burden of proving bad faith at the trial court and the trial judge found as a matter of law that the evidence presented demonstrated negligence on the part of Hayes, but no negligence on the part of the other actors at the KCSO – their conduct was found to be reasonable. The Courts and legislature have both provided a standard for great deference to trial court decisions as to an award of penalties.

Because the facts of this matter were contested, because the trial court had to weigh the evidence, determine the credibility of witness and resolve competing evidence presented, de novo review is not the proper standard. *Faulkner at* 103; *Yousoufian* 465. The proper standard is to determine whether the findings and conclusions of the trial court are supported by substantial evidence and that the law was correctly applied.

A review of the evidence that was presented will support a finding that substantial evidence supported the findings of the trial court, and that the trial court correctly applied the law to the findings in reaching a conclusion that the level of culpability on behalf of the county was that of negligence, not bad faith.

VI. YOUSOUFIAN AND ALLEGED LEGAL ERRORS:

Hoffman is incorrect in stating that the existence or absence of bad faith is the principal factor in determining a penalty award under the PRA. Brief of Appellant at 18, quoting *Yousoufian* at 460. The County does not contest that his verbiage is used, but suggests that what the Court was actually doing was indicating that the culpability of an agency is an important consideration, but not the only consideration. This is based upon what follows that passage:

> "…[n]o showing of bad faith is necessary before a penalty is imposed on an agency and an agency's good faith reliance on an exemption does not insulate the agency from a penalty." *Yousoufian* at 460
>
> "There are other considerations that bear on the determination of a penalty in addition to good faith or bad faith. They are factors … relating to the basis for setting PRA penalties: agency culpability." *Yousoufian* at 460
>
> "…a strict and singular emphasis on good faith or bad faith is inadequate to fully consider a PRA penalty determination…." *Yousoufian* at 460-461
>
> It is appropriate to consider economic loss, if it was a foreseeable result of agency misconduct, as a factor in setting a penalty under the PRA. *Yousoufian* at 461-462
>
> Governmental intransigence on an issue of public importance is a relevant consideration in establishing a penalty, if the significance of the issue to which the request pertains was foreseeable. *Yousoufian* at 462
>
> Deterrence is also a factor in setting a penalty for a violation of the PRA because the purpose of the PRA is to deter improper governmental action, and such penalty must be an adequate incentive to an entity for future compliance. *Yousoufian* at 462-463 (Size of the entity seems to matter: comparing a penalty sufficient for a small school district versus what is necessary to incentivize the largest county in the state)
>
> Rejecting a straight culpability analysis as being inadequate given the complexity of the PRA penalty analysis. *Yousoufian* at 463

Ultimately the court rejected the models proposed by any of the parties but did incorporate some of the factors that were suggested, and then adopted what have come to be called the *Yousoufian* factors to be

considered in determining an appropriate penalty for a violation of the PRA:

MITIGATING FACTORS – <u>MAY</u> DECREASE THE PENALTY:

1. A lack of clarity in the PRA request;
2. The agency's prompt response or legitimate follow-up inquiry for clarification;
3. The agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions;
4. Proper training and supervision of the agency's personnel;
5. The reasonableness of any explanation for noncompliance by the agency;
6. The helpfulness of the agency to the requestor; and
7. The existence of agency systems to track and retrieve public records.

AGGRAVATING FACTORS – MAY INCREASE THE PENALTY:

1. A delayed response by the agency, especially in circumstances making time of the essence;
2. A lack of strict compliance by the agency with all the PRA procedural requirements and exceptions;
3. Lack of proper training and supervision of the agency's personnel;
4. Unreasonableness of any explanation for noncompliance by the agency;
5. ***Negligent, reckless, wanton, bad faith, or intentional noncompliance*** with the PRA by the agency;
6. Agency dishonesty;
7. The public importance of the issue to which the request is related, where the importance was foreseeable to the agency;
8. Any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency; and

9. A penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

Yousoufian at 467 – 468 (emphasis added)

It is clear from the Court's discussion that "bad faith" is no longer the principal factor, but only one factor for consideration in determining an appropriate penalty for a violation of the PRA. It is still true, however, that the more culpable an agency is in violating the PRA the more appropriate it is for a higher penalty to be considered under the factors enunciated. The Court also made clear that this is not an exhaustive list of appropriate factors, that they may overlap, that they may not apply equally or at all in every case, and that they should not infringe upon the considerable discretion vested in the trial courts to determine appropriate penalties. *Yousoufian* at 468

A. ANALYSIS OF YOUSOUFIAN FACTORS IN DETERMINING PENALTY:

The County submitted a brief in support of its position at the contested bench trial. Rather than regurgitate that work and create more reading for this Court, the County respectfully requests that this document be reviewed for the County's position on how the factors should be weighed based upon the facts presented. *(CP 353-496) (Attached as an*

appendix for ease of reference) The County will address a few of the issues presented specifically in Appellant's brief.

B. SELECT RESPONSES TO APPELLANT'S ARGUMENTS:

1. Focus upon totality of County's actions, not just Hayes' actions was not in error:

The trial court is told to consider the actions of "the agency" not just an individual, although many times the action of the agency transpires through the acts of a single individual. Under the *Yousoufian* mitigating factors, only the first does not contain the term "agency" in weighing the factors. Under the Yousoufian aggravating factors, all contain the term "agency" in weighing the factors. Most of the provisions of the PRA speak to agency actions, requirements, responsibilities. And the case law has made clear that a driving purpose of the penalty to be imposed under the PRA is to deter future violations by an agency/entity.

While Hoffman desires this Court not to consider the actions of all members of the KCSO who were involved in some fashion in determining culpability, that request is not supported by the case law. There is no case law that supports Hoffman's contentions as to a limitation of whose actions within an entity shall be considered in determining the culpability of an entities violation of the PRA. Contrary to that position is the clear statement in *Yousoufian* as to the factors to consider in determining a

penalty – all of which reference "agency" as opposed to "individual", and reflect that many of the factors are not about individuals, but about policies, and training, and supervision, and to future deterrence of agency non-compliance.

2. Trial court applied proper standard – motive and intent are properly considered:

Hoffman is incorrect in stating that motive and intent were not properly considered in determining the penalty to be imposed for a violation of the PRA. The *Yousoufian* factors are not exclusive factors as noted, however, the question of intent is one of the levels of culpability to be considered under aggravating factor 5. And certainly, motive comes into play in determining between reckless conduct or wanton conduct, as an example. It can be a consideration in deciding whether an agency had foreseeability about potential damages or the importance of an issue to the community that is reflected in records. Hoffman maintains that Hays reliance upon the exemption was unreasonable and therefore demonstrates her bad faith. Yet in *Wade* and *Yousoufian*, similar incorrect reliance upon exemptions were not found to be bad faith, implying that more than incorrect reliance upon an exemption is required to find a higher level of culpability. The considerations of the evidence as to the motivations and actions of the participants involved in this case were legally acceptable

and the determinations by the trial court were reasonable and supported by substantial evidence.

3. The finding that the search for records by Hayes was unreasonable does not necessarily equate with bad faith:

The County contends that the trial court got this wrong, but again, because of the deference to be given to the trial court, the County has not contested the determination. The County does contend that the ***initial*** search, when put into context, does not equate to bad faith, and further when put into context, explains the subsequent actions of Hayes as not being in bad faith. The testimony provided by Hayes and Knudson is the only basis for a determination of the KCSO policies and the upshot of that was that the policies adopted by the KCSO mirrored the PRA.

To the extent that implementation of the policies were in evidence it was also through Knudson and Hayes. And both indicated that the starting point was the Spillman system. They each described the fields that were available and that at times photos or videos might not be indicated in a field but might be indicated in the reports. But Hayes' testimony was that she began her search and identified records involving Schnebly as requested, but she did not see photos or videos and did not see a connection to the Appellant. Because she was worried that she was not

looking or finding documents that were responsive to the request should contacted the appellant by phone to confirm with him what she was seeing and to confirm with him what he desired. *CP at 891 – 894 FF 4-12 Judgement Order*

At the conclusion of her conversation with Hoffman, Hayes believed that he had narrowed his request and specifically described her understanding on multiple occasions as to what she believed he was interested in obtaining. *CP at 891 FF 4 Judgment Order*

The trial court found that Hoffman had narrowed his search, albeit because of faulty information (Hayes credibility higher, reasonable, and believable per trial court judge finding/conclusion). But the trial court's finding, which is supported by the evidence, also supports the position that while the exemption relied upon was incorrect, the evidence was sufficient to convince the court that the request had been narrowed. *CP 896 Judgement Order CL 4*

In so many ways this case is about how the parties and the court chose to characterize the differing and competing evidence. Hoffman has viewed every action by Hayes and the County as in bad faith and the most egregious violation of the PRA ever. The trial court found the actions to support a finding of negligence. But from Hayes' perspective she was

acting according to her belief of following the law and the policies of the KCSO.

If Hayes believed that Hoffman had narrowed his request as she testified and as found by the trial court, there would be no reason for her to search further for photos or videos – the narrowed request did not seek them. Based upon the narrowed request, there was no need to check further in Spillman, no need to cross reference reports for photos or videos, and not need to go to the evidence room to double check for videos. The lack of need to follow these procedures flows from a belief that the request had been narrowed. The trial court found her belief credible, but that it was still in error because the court felt her initial search was incomplete before calling Hoffman.

The point being, however, is that the focus of Hoffman is upon not following procedures and not looking in other locations per policy. But Hayes was consistent with policies, even if she made mistakes. Given her belief that the request was narrowed, it would be illogical for her to complete the other tasks that Hoffman suggests demonstrate bad faith.

4. Hayes did not conceal the request or her response to the request, nor did she provide misleading testimony.

The evidence does not support Hoffman's contentions that Hayes concealed the request and her response to the request. Hayes' response

was provided with two sets of watching eyes, one of whom, Knudson, immediately began to ask questions about the response provided by Hayes. If Hayes was attempting to conceal her response she would not have completed the forms related to fulfillment of the request which indicated the exemption relied upon. And it is not believable, nor did the trial court in its findings believe that Hayes' supervisors were not fully apprised of the concerns raised by Knudson. Is it reasonable that when Knudson went to her supervisors in September that she did not express her concerns?

Further, it would be fair to say that Hayes in speaking with her supervisors would have been confronted with the information provided by Knudson and that Hayes continued to believe that the request had been narrowed. The direction to both was to contact Hoffman and discover if he had received what he wanted from his request. This was not an unreasonable direction to take and the trial court so found. *CP 893-894 Judgment Order FF 10-11*.

Hoffman in hindsight claims that the inquiry was in error because they did not tell him that they believed he was entitled to more records, and he claimed that he had told Hayes that in July and September. However, the trial court did not find him credible, perhaps because there

were records reflecting all contact from the KCSO with Hoffman except his supposed visit to the KCSO in July. *CP 892 Judgment Order FF 9.*

Hoffman's contentions as to bad faith based upon the concept of concealment are not logical, are not supported by the evidence, and cannot be supported by inferences to the evidence that was produced at trial. There was not attempt to conceal and therefore concealment does not support the argument of bad faith.

5. The trial court's finding on the issue of a timely response was legally correct.

A timely response is a factor enunciated by Yousoufian, and is reflected with the terms "prompt" and "timely" under two mitigating factors and on the flip side, by the term "delayed response" as an aggravating factor. The trial court correctly applied this factor in reaching its findings and conclusions. Hoffman is mistaken that timeliness cannot be found even if it turns out the request is inaccurate. The PRA has a requirement for timely responses. The PRA has a requirement for correct responses. The PRA provides narrow exemptions that allow the non-production or redaction of records. They are different requirements and under *Yousoufian* they are different factors for consideration.

A responder to a request for public records can absolutely nail the request in terms of responsive documents, correct reliance upon

exemptions and proper redactions, and yet if the time it took to provide the response if found to be untimely, they can be found to have violated the PRA. (Think *Wade* – no claim records provided were not responsive or overly redacted, just that their disclosure was untimely). Similarly, a responder can be timely in their response (as was the case here) but have a court later determine that their reliance upon an exemption was incorrect. Or one can have a case where the response was neither timely or correct.

A person who serves a steak to a customer can be timely, they can be friendly, they can be professional, and they can still get the order incorrect. The person can be upset with the meal, but would have to concede that the waiter met the other criterion that they look for in a restaurant. It is true that an attorney can be timely in filing a document and mess up other requirements for said document which can land them in hot water. However, the Court will not ding them for not being timely.

Timeliness is a separate enunciated factor under *Yousoufian*. The trial court's determination that the County was timely in every response to the appellant was supported by the evidence and the application of the law in making that conclusion and weighing the factor was a correct application of the law.

VII. PENALTY AWARDED WAS REASONABLE:

Did the trial court abuse its discretion in awarding a penalty of $.50 per record per day? Did the trial court adopt a view that no reasonable person would take? Did the trial court base its decision on untenable grounds or reasons? A review of how the trial court reached its conclusions as to an appropriate penalty demonstrate that the factors were appropriately considered and applied and that there was not an abuse of discretion. While Hoffman has maintained that this is the most egregious example of a violation of the PRA in comparison to other cases, an actual review demonstrates that is not true.

In this case Hoffman had all records before the case was even filed. In *Yousoufian*, the requestor spent three years attempting to get the records before filing suit to compel disclosure. In *Wade's* the Department of L & I delayed providing the records even after the court had indicated their ruling and ordered the records to be produced, coming close to holding a contempt action before they provided the documents. This is not the most egregious PRA case of all time and the penalty award was reasonable and based upon a proper exercise of discretion.

A comparison of *Wade's* is instructive of reasonableness. The court in that case found that L & I relied upon an inaccurate exemption.

The Department most assuredly handles as many requests for public disclosure as the KCSO, and they have available to them as legal counsel the folks who drafted the model PRA rules. Their reliance upon an incorrect exemption, also tangentially related to privacy and investigative records was held to be in error. A review of the penalties per page assessed in that case (see above) demonstrates the reasonableness of the trial court's order of penalties here.

To prevail in this court, the Appellant has to demonstrate that the trial court abused its discretion in entering the penalty award that they did. Put differently, the Appellant must demonstrate that the trial court entered an award based upon untenable grounds or reasons and that no reasonable person would impose such a penalty. The trial court was required to consider the full spectrum of the penalty scale. The trial court had great discretion to treat the items as individual records, to group the records in categories, or to fashion any similar remedy and the court is allowed great deference in so doing under our case law.

Because the trial court is granted great discretion in setting a penalty, the award rendered in this case should not be disturbed on appeal. There is no evidence presented that the award was based upon untenable grounds or reasons. Even if this Court were to concur with every

argument made by Hoffman, and find that Hayes and or others acted in bad faith, that would still not be sufficient to say that this award was not reasonable. Here, all actions of the County were pre-litigation. In *Wade's* a mistake in use of an exemption was held reasonable at $.02 per page per day. At the time that L & I should have known the exemption was clearly not applicable, it went to $.25 per page per day. It was not until L & I was clearly ignoring the court that penalties rose to $1.00 and then $5.00 after a failure following a direct order of the court. The trial court's order here of $.50 reflects a reasonable penalty for relying upon an incorrect exemption, and factoring in the court's conclusion as to a negligent search.

VIII. ATTORNEY FEES ON APPEAL:

The PRA provides for an award of attorney fees and costs to a requestor who has shown a violation of the PRA by a governmental agency. Attorney fees and costs are based upon the public policy of levelling the playing field. If a private party seeks and receives an order to prevent disclosure when the governmental agency was willing to provide the records to a requestor, then the requestor is not entitled to attorney fees. In this case, the legal action was commenced after all requested records were provided without objection as to the completion of the request. The only basis for this legal action was to obtain an award of a

penalty for the Appellant. Because the Appellant was successful in demonstrating a violation of the PRA and obtaining a penalty, he was entitled to attorney fees and costs.

On appeal, it is the County's position that Hoffman can only be awarded attorney's fees and costs if he meets his burden of showing an abuse of discretion. Absent a finding of an abuse of discretion, the penalty award entered at the trial court level must be sustained. If the penalty award is sustained, Hoffman will not be a prevailing party and is not entitled to attorney fees. The awards of fees on appeal are granted because a party successfully litigated a better result following the trial court proceedings. In cases where a person requesting records or alleging a violation is unsuccessful in meeting their burden, the courts have not entered an award for attorney fees and costs. That same principle applies to this action. Because the County believes that Hoffman has not met his burden in demonstrating an abuse of discretion, we request that this Court not enter an order for attorney fees and costs.

CONCLUSION

The trial court was presented with a stipulated facts bench trial. While the evidence and testimony was presented through documentary

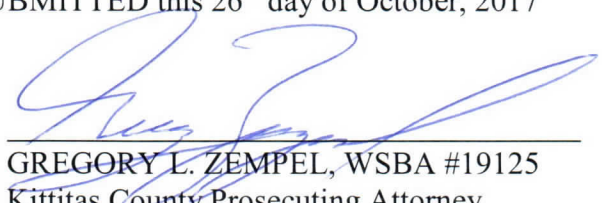
evidence, the trial court was still required to weigh the credibility of witnesses, resolve conflicting evidence, and exercise discretion in determining what facts had been proven. Because this was not a summary judgment motion, because the facts were contested, de novo review is not the appropriate standard. Because the trial court's findings of fact were supported by substantial evidence, this court should not disturb those findings. Because the trial court properly applied the law to the facts found, they have not abused their discretion.

Hoffman may have expected and desired a larger penalty to be assessed by the trial court. Because Hoffman was not content with the award granted by the trial court as a penalty, this appeal has followed. The primary contested issue on review is the appropriateness of the penalty imposed by the trial court for a violation by the County of the PRA. The County in accepting what it believed to be the correct standard of review as removed the correctness of the finding of a violation from the table, believing the evidence supports the holdings of the trial court.

The trial court is granted great discretion in fashioning an award that penalizes the county for the violation while also finding an appropriate level of a penalty for deterrence of future violations. The correct standard is an abuse of discretion. The trial court entered a penalty

that was supported by the evidence, the award was reasonable as compared to how other courts have arrived at such decisions, and the decision was not reached on untenable grounds. For these reasons, the award entered by the trial court should be affirmed. If the trial court affirms the award of penalties as entered, then Hoffman should be denied attorney's fees and costs in this appeal.

RESPECTFULLY SUBMITTED this 26th day of October, 2017



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee of the Kittitas County Prosecutor's Office, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney of record by the method(s) noted:

☒ Via email only (by consent), postage prepaid, to the following:

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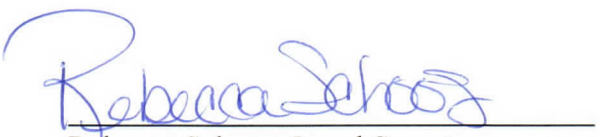

Rebecca Schoos, Legal Secretary

APPENDIX 1

JUDGMENT ORDER

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

RANDALL HOFFMAN, Plaintiff, vs. **KITTITAS COUNTY, a local agency and the KITTITAS COUNTY SHERIFF'S OFFICE, a local agency,** Defendants.	No. 16-2-00063-3 **ORDER GRANTING JUDGMENT PENALTIES, AND ATTORNEY FEES IN FAVOR OF RANDALL HOFFMAN**

I. ORDER GRANTING JUDGMENT TO PLAINTIFF RANDALL HOFFMAN:

This case came before the Court by agreement of the parties to resolve the issues based upon stipulated facts; agreed upon affidavits, exhibits, declarations, and deposition testimony. Briefs were submitted by the parties and oral argument was held before the Court on January 27, 2017.

The Court considered the following evidence:

1. The Declaration of Harry Williams IV and its attachments which were agreed upon for admittance by Kittitas County without objection or reservation;
2. The Joint Stipulation of Facts submitted by the parties including concessions;
3. The transcripts of depositions of Carolyn Hayes and Kallee Knudson;
4. The training record of Carolyn Hayes; and

The Court makes the following Findings of Fact:

1. Plaintiff Randall Hoffman submitted a public records request on June 29, 2015 to the Kittitas County Sheriff's Office.

2. The request asked for all police reports, including photos and videos, referencing Erin Schnebly. The request was on the County's form for public record requests.

3. The request was plain on its face and was subject to completion without clarification. The request was delivered to Carolyn Hayes, the designated Public Records Clerk for the Kittitas County Sheriff's Office.

4. Hayes conducted an initial search for records identifying seven (7) incident reports. She did not locate within the KCSO Spillman system a reference that photos and videos existed for any of the records. A thorough review of the police reports in the Spillman system, would have revealed the existence of photographs and two videos. A subsequent search of a box where it was possible that videos might be located turned up two (2) videos for one of the incident reports.

5. Carolyn Hayes, an employee of the Kittitas County Sheriff's Office, contacted Hoffman on June 29, 2015 regarding the request. She was concerned that she was missing something about the request because she was finding no involvements with Hoffman in any of the incidents and had not located photos or videos as requested. Hayes informed Hoffman that due to not being a party involved, she could not provide him the majority of the documents requested. She discussed with him her ability to provide copies of face sheets of the incidents which would provide him with the type of incident, date and location. Hayes testified Hoffman agreed to limit the request to face sheets only. Hoffman denied limiting the request. Hayes made a notation on the Request for Public Records, "2009-2015 face sheets only." Hayes sent copies of the incident face sheets to Hoffman in response to his Public Records request.

6. Hayes incorrectly relied upon an RCW related to privacy interests to inform Hoffman that because he was not a party he would not be allowed all of the police reports. Hayes, incorrectly relying upon RCW 42.56.050, over redacted the seven (7) face sheets in providing a response to Hoffman.

7. Kallee Knudson was a KCSO Clerk who had been training with Hayes for about a month. She heard parts of the conversation between Hoffman and Hayes, nothing that Hoffman said, but was confused by Hayes handling of the request. Knudson inquired as to the response, but then dropped the conversation. Hayes did not change her response to the request because of the conversation with Knudson. The next day Knudson assisted in uploading the finished request into the County's PRA request tracking system known as DART.

8. Hayes has maintained that Hoffman narrowed his request during their phone conversation and the evidence supports this position

   a. There was nothing about the reports that would cause embarrassment to the Sheriff's Office;

   b. There was nothing in the reports that would cause liability on the part of the Sheriff's Office;

   c. There was no evidence that Hayes had anything to gain by withholding the records as requested.

   d. There was no evidence that Hayes had a relationship with Schnebly that would bias her in favor of Schnebly and against Hoffman.

e. The evidence supports that when asked by Hayes and Knudson in September whether he had received what he needed that Hoffman answered that he had received what he needed.

f. There is no evidence that Knudson had anything to gain by withholding any records from Hoffman. And given that it was Knudson who was still curious as to the handling of the request, who went to her superiors to raise those concerns, and who made the first call to Hoffman, the evidence suggests that had Hoffman said he did not get the records he requested, that Knudson would have processed his request at that point in time.

9. Hoffman testified by declaration that he returned to KCSO in July, 2015 and was told no further documents were available. Hoffman does not state what date he returned or the identity of the person he spoke with in the Sheriff's office. KCSO has no records of the contact with Hoffman in July but, has records of contacts with him on subsequent dates. KCSO denies any contact with Hoffman in July, 2015. The court finds from the preponderance of the evidence that no contact occurred in July, 2015.

10. Knudson was cleaning the desk of Hayes in early September of 2015 to prepare it for the next clerk. She observed the paper copy of the Hoffman request and was still troubled by how it was handled. She brought it to the attention of her supervisors, Kim Dawson and Sgt. Panattoni, explaining her concerns. They instructed her to reach out to Hoffman and let him know that she was reviewing past requests and doing follow up. During that phone call in September 2015, Hoffman informed Knudson that he did get his request and the phone call ended.

Knudson did not explain to Hoffman her concerns about how the request was fulfilled or her belief that he was entitled to more documents.

11. Hayes had a similar conversation with Dawson and Panattoni about September 14, 2015. As a result, Hayes also contacted Hoffman to confirm he had received what he needed. Hayes maintains that Hoffman answered that he had received what he needed, but was curious about incidents that he believed existed but were not reflected. While Hoffman was on the phone with Hayes, she searched her system to attempt to find this additional information, discussing the fact that incidents may have occurred but may not have been reported. Hoffman maintains that he informed Hayes that he had not received all the documents he wanted and Hayes spent about one half hour telling him about privacy rights preventing disclosure of the documents he requested. This is inconsistent with the conversation he had with Knudson and that conversation is not disputed by Hoffman.

12. Hoffman returned to the Sheriff's Office in February of 2016 and told Knudson he should have gotten more documents, that he could sue, and that he wanted to possibly make another request. Hoffman informed Knudson that Hayes and the person who he was obtaining information about were drinking buddies and that is why he did not get the documents he was entitled to before. Hoffman left with a blank request form indicating he needed to talk to some folks. Hoffman returned on February 29, 2016 and made a new request and re-submitted his first request. Both requests were fulfilled and provided to Hoffman without charge on March 1, 2016.

13. There is no complaint as to the legality of the response in March of 2016. The final production related to the request made June 29, 2015 consisted of 126 items: 29 pages of reports; 2 videos; and 95 photos. The additional request in February increased the numbers of documents produced, but are not subject to any calculation as there is no claim that there was an error in filling that 2nd request for an incident involving a DUI with Schnebly as a defendant that transpired in early February of 2016, as it was not available to be disclosed or produced in June of 2015.

The Court makes the following Conclusions of Law:

1. The Kittitas County Sheriff's Office is an agency subject to the Public Disclosure Act. As an agency under the act, the Sheriff's Office has an obligation to disclose and produce documents that are responsive to a public disclosure request that is made.
2. Hoffman's public records request was clear on its face and was not overly burdensome, although it did involve multiple records. While the request could have been completed without the need for clarification, neither the act nor case law provides an impediment to an agency making contact to confer with a requester about their request.
3. Hayes conducted a preliminary search of the Sheriff's records in their case management system, Spillman. This is the location that the evidence indicates would have been the most logical location to search for responsive records. It is

clear that Hayes did not see a reference to photos and videos if they existed in the system at the time, and that she did not examine the individual investigative reports or look in additional locations to see if they might exist. Based upon this, Hayes erroneously informed Hoffman that records that did exist did not.

4. The evidence supports that Hoffman narrowed his request based upon the conversation with Hayes in June of 2016, only wanting information about the nature of the incidents, dates and location. However, this was not confirmed in writing by either Hoffman or Hayes. Further, Hoffman was misinformed by Hayes that if he were not a party to the incidents investigated by KCSO, he would not be able to obtain the majority of the documents pursuant to statute, RCW 42.56.050. Hoffman limited his request for information to the face sheets based upon this misinformation.

5. Hayes agreed to send the face sheets to Hoffman. However, Hayes then incorrectly relied upon RCW 42.56.050 to overly redact the records that were provided to Hoffman – seven (7) incident face sheets.

6. The burden is upon the County under the PRA to prove that they did not fail to properly disclose and produce documents or that the exemption relied upon to withhold disclosure or production was correct. The County also has the burden of showing that their search was reasonable.

7. The County's search was not reasonable in that the responsive records should have been located in the Spillman system, and the system should have referenced the existence of photos and videos. The search was unreasonable because a

review of the incident reports would have disclosed the existence of numerous photographs and two videos related to the requested information.

8. The actual error was limited to two (2) of the seven (7) requests as the photos were only found as to two incidents (DUI and Gang graffiti) and the videos were only associated with a DUI investigation.

9. The county concedes the statute relied upon by Hayes to deny producing a majority of the documents requested by Hoffman is incorrect and does not prevent their release.

10. The County has conceded that Hayes over redacted the face sheets, utilizing an incorrect exemption citation. The burden of showing that this error was done in bad faith rested with Hoffman.

11. The weighing of the factors enunciated in *Yousoufian* favor finding fault on the part of the County, for negligence in: 1) failing to adequately search for requested reports, photographs and videos; 2) misinforming Hoffman that he would not be entitled to the majority of the reports because he was not a party to the incident and privacy exemptions, and: 3) redacting based upon reliance upon an incorrect exemption.

12. Hoffman has not met his burden of showing bad faith on the part of the County.

ORDER

It is ORDERED that judgment is entered in favor of Plaintiff Randall Hoffman for the County's negligence is responding to Hoffman's PRA request filed June 29, 2015. It is further

ordered that penalties and attorney's fees are appropriate and will be determined by a separate order.

Done in open court February 7, 2017.

RICHARD H. BARTHELD
Yakima County Superior Court Judge
(Sitting as a visiting Judge of the Kittitas County Superior Court)

APPENDIX 2

PENALTIES ORDER

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

RANDALL HOFFMAN, Plaintiff, vs. **KITTITAS COUNTY, a local agency and the KITTITAS COUNTY SHERIFF'S OFFICE, a local agency,** Defendants.	No. 16-2-00063-3 **ORDER DETERMINING PENALTIES AND ORDERING ATTORNEY FEES IN FAVOR OF RANDALL HOFFMAN**

I. ORDER ON PENALTIES:

This case came before the Court by agreement of the parties to resolve the issues based upon stipulated facts; agreed upon affidavits, exhibits, declarations, and deposition testimony. Briefs were submitted by the parties and oral argument was held before the Court on January 27, 2017.

For purposes of determining the proper penalties and attorney fees in this matter, the Court considered the same evidence as referenced in the Order Granting Judgment to Plaintiff Randall Hoffman.

A. FINDINGS OF FACT:

The Court incorporates by reference all findings of fact as contained in the Order Granting Judgment to Plaintiff Randall Hoffman. The Court makes the following ADDITIONAL Findings of Fact related to an appropriate penalty and attorneys' fees:

1. There is no evidence that Sheriff's Clerk Hayes had a motive to improperly disclose or withhold records from Hoffman. Specifically, the Court finds:

a. There was no evidence presented of a relationship between Hayes and Schnebly that would have biased Hayes in favor of Schnebly.

b. There was no evidence presented of any animosity on the part of Hayes towards Hoffman.

c. There is no evidence that the disclosure and production of records to Hoffman would have embarrassed or harmed Hayes or the Sheriff's Office in any fashion.

d. There is no evidence presented that the failure to disclose and produce the requested records to Hoffman would have benefitted Hayes or the Sheriff's Office in any fashion.

e. There is no evidence that the response by Hayes during the phone call to Hoffman on June 30, 2015 was knowingly false. There is evidence that the response by Hayes during the phone call to Hoffman was inaccurate. Hayes' telephone call to Hoffman was to clarify whether or not he was a party to any of the incidents reported. There is no evidence of an attempt by Hayes to deliberately modify Hoffman's request for documents.

2. There is no evidence that Sheriff's Clerk Knudson had a motive to improperly disclose or withhold records from Hoffman. Specifically, the Court finds:

a. There was no evidence presented of a relationship between Knudson and Schnebly that would have biased Knudson in favor of Schnebly.

b. There was no evidence presented of any animosity on the part of Knudson towards Hoffman.

c. There is no evidence that the disclosure and production of records to Hoffman would have embarrassed or harmed Knudson or the Sheriff's Office in any fashion.

d. There is no evidence presented that the failure to disclose and produce the requested records to Hoffman would have benefitted Knudson or the Sheriff's Office in any fashion.

3. There is no evidence that Sgt. Panattoni or Administrative Assistant Dawson had a relationship with any of the parties that would provide a motive to improperly withhold the records requested by Hoffman.

4. The only evidence as to Panattoni and Dawson is that they were confronted with an atypical response by a veteran public records officer, and concerns presented by a relatively new records Clerk Knudson. They responded by requesting both Hayes and Knudson separately contact Hoffman to determine if he received what he requested.

5. There is no evidence that Panattoni or Dawson failed to properly supervise Hayes or Knudson. The evidence supports the finding that the response by Panattoni to direct first Knudson and then Hayes to contact Hoffman and ascertain if "he got what he needed from the request" was a proper course of action to take based upon the information that was presented to them.

6. The evidence supports the course of action taken by Panattoni based upon the follow-up communications with Hoffman. He was entitled to rely upon the representations of his employees relative to the responses provided by Hoffman.

7. There is evidence that Clerk Hayes should have followed up the June 29, 2015 telephone conversation with Hoffman with a writing setting forth the specific modifications to his Request for Public Records. A writing would have memorialized the agreement between Hayes and Hoffman or allowed the parties to follow up if the writing was not the agreement of the parties.

8. There is no evidence that the Sheriff's Office acted in bad faith in their actions surrounding the initial response or subsequent handling of Hoffman's request.

9. The evidence supports that the County timely responded to the initial request although conceded that Clerk Hayes overlooked photographs and videos, cited improper statutes which prevented release of reports for privacy reasons and applied the wrong exemption resulting in over redacted face sheets.

10. The evidence support that the County timely responded to the subsequent request by Hoffman, and there is no claim that the fulfillment of the subsequent request was in any way untimely or improper.

11. The evidence supports a finding that the County diligently investigated the matter in September 2015 and determined that Hoffman had received the information he had requested, not objecting to investigative police reports, photos and videos that were withheld.

12. The evidence supports a finding that Clerk Knudson, who replaced Clerk Hayes was properly instructed to follow up conversations concerning requests for documents by written communication.

13. The evidence supports a finding that the processing of Hoffman's request was not indicative of systemic problems in the processing of public disclosure requests by the County.

14. The Court has considered the *Yousoufian* mitigating factors and determined that there are mitigating factors:

YOUSOUFIAN MITIGATING FACTORS:

(a) A lack of clarity in the PRA request;

This is not a mitigating factor as the initial request was clear, unambiguous and not burdensome

(b) the agency's prompt response or legitimate follow-up inquiry for clarification;

This mitigating factor relates to the timeliness of the response. The evidence supports this as a mitigating factor given that both the initial response and subsequent response were processed within 5 working days. When the issue arose to the level of concern in September, again, the response was timely: Knudson immediately placed a phone call following the conversation with Panattoni and Dawson. Hayes immediately placed a phone call following the conversation with Panattoni and Dawson. The issue of correctness of the response is to be considered under other criteria.

(c) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions;

The evidence supports Hoffman's contentions that the county's initial search was inadequate. Clerk Hayes received the request and reviewed case notes in Spillman concerning Schnebly. When she could not locate Hoffman as a party to these incidents, it prompted her to contact Hoffman to inquire about his request. Because she had not carefully examined the

incident reports before the telephone call, she misinformed Hoffman about the existence of photographs and videos relating to two of the seven incidents. She also misinformed Hoffman by telling him the incident reports would not be available to him because of a parties right of privacy. The evidence supports a finding that Hoffman modified his request, indicating the incident face sheets were sufficient for his inquiry. However, this was not memorialized by a writing. Further, it is doubtful Hoffman could have make an informed decision to modify his request when he was misinformed about the existence of photographs, videos or exemptions to disclosure for privacy concerns.

The evidence does not support a finding that the County acted in bad faith. The county had a duty to make an adequate investigation and respond to the request, strictly complying with the request in a timely manner. They breached that duty by inadequately searching the records and misinforming Hoffman that reports would be subject to a privacy exemption. Errors were made. However, the errors made were the result of negligence, not bad faith.

This is not a mitigating factor.

(d) proper training and supervision of the agency's personnel;

The evidence supports a finding of this as a mitigating factor as well. The evidence demonstrates an on-going and consistent process of education, supervision, and access to legal counsel to seek assistance. The evidence supports both internal and external training available to employees. While Hoffman contends the evidence shows malice on the part of Panattoni and Dawson, the Court believes that the evidence shows that there was proper supervision and checks and balances in place to attempt to comply with the PRA. The court cannot conclude the failure to inform Hoffman in September that other documents were available supports a finding

of malice or bad faith because both Hayes and Knudson contacted him to determine if he had in fact received what he had requested. He responded that he had received what he requested. The evidence also supports a finding that the county has implemented a procedure to follow up with a writing anytime requests are modified. When this procedure was implemented is unknown. Clerk Knudson testified in her deposition that she has been trained to do this in every instant.

(e) the reasonableness of any explanation for noncompliance by the agency;

The court has addressed reasons for the county's noncompliance, finding it arises out of negligence and resulted in misinformation to Hoffman and delay of 246 days in production of the information. This is not a mitigating factor.

(f) the helpfulness of the agency to the requestor; and

The evidence is this regards is neither mitigating or aggravating. The evidence is clear that errors were made. The evidence supports a finding that County personnel were attempting to be helpful. There responses were prompt, they answered questions about what they thought was available, they made attempts to ascertain if Hoffman got what he needed, they spent time with him answering additional questions and performing additional searches in September, and then promptly responded to his subsequent request in February of 2016 and responding to the errors made by Hayes, they did not charge him for fulfilling his request. Because of the errors however, Hoffman did not get the information originally requested, and so the helpfulness extended was thwarted by the failure.

(g) the existence of agency systems to track and retrieve public records.

The evidence is clear that the County IT department created an internal system geared to assisting with compliance with public disclosure requests. This independent system, separate and apart from the case management systems demonstrates a commitment on the part of the county to successfully providing proper responses in a timely fashion to public disclosure requests. This is a mitigating factor in this case because the error was human error, not a function of the agency systems.

***YOUSOUFIAN* AGGRAVATING FACTORS:**

(a) a delayed response by the agency, especially in circumstances making time of the essence;

The county responded timely to the request but was negligent in the adequacy of their search, misinformation concerning a privacy exemption that would prevent disclosure of incident reports and redacting more than they should have redacted from the incident face sheets. This led to a delay of 246 days releasing the information originally requested. There are no facts presented by Hoffman about the circumstances of his request that would make time of the essence.

(b) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions;

This aggravating factor is supported by the evidence. Errors were made and Hoffman's request for information was not fully complied with until March 1, 2016, a delay of 246 days. The court will not engage in speculation whether or not Hoffman would have modified his request if he had been properly informed about the extent of information available and properly applied exemptions and redactions. Procedurally, the County complied with the procedural

requirements of the PRA when Hoffman filed his second request for information on February 29, 2016.

(c) lack of proper training and supervision of the agency's personnel;

This aggravating factor is not supported by the evidence. The County produced evidence of a commitment to proper training and supervision of employees processing public disclosure requests, and the evidence from their internal audit of Hayes over the preceding one year indicated no systemic failures. (2 errors discovered in a years' worth of Hayes' work where 80% of her time was spent responding to PRA requests).

(d) unreasonableness of any explanation for noncompliance by the agency;

As noted above, the evidence does support this as an aggravating factor as it relates to the errors made by Clerk Hayes.

(e) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency;

The evidence supports negligent noncompliance with the PRA by Kittitas County because of the duties owed by Clerk Hayes and the breach of those duties, as discussed above. However, the evidence does not support a higher level of culpability. There was no evidence that she was reckless in her actions or that her actions were borne from animosity or disregard for the request of Hoffman.

As to the actions of other members of the Sheriff's office, it cannot be said that Knudson acted in even a negligent fashion. She continued to act appropriately in raising concerns and was entitled to rely upon Hoffman's response to her phone call. As to the involvement of Sgt. Panattoni and Ms. Dawson, internal deliberations about a non-standard response demonstrate

proper concern and supervision, especially coupled with reaching out to the requestor to ascertain if they got what he needed.

(f) agency dishonesty;

There is no evidence that supports a finding that the County acted dishonestly. There is no evidence that the agency or Hayes intentionally misled Hoffman as to the availability of records that it was aware of possessing. Hayes contacted him and let him know what she had and what she believed she did not have. Hayes negligent failure to adequately search and identify photos and videos resulted in misinformation to Mr. Hoffman, but there is no evidence that this was done dishonestly. The negligence of Hayes is imputed to the county.

(g) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency;

The evidence does not support finding this as an aggravating factor and the plaintiff failed to address this aggravating factor.

(h) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency; and

This is also a factor not addressed by the plaintiff. There is no evidence to support this as an aggravating factor.

(i) a penalty amount necessary to deter future misconduct by the agency.

The evidence does not support a finding that this is an egregious violation of the public records act. The evidence indicates that any award should be proportionate for purposes of deterrence with both the nature of the violation and the size of the agency.

Comparisons to results in reported cases in Washington are instructive in this regard, both as to the severity of the violation, the duration of the violation, the number of records in question, and the awards made by the Courts.

15. The Court believes for purposes of awarding a penalty of $0.50 per page per day for a period of 246 days is appropriate. By stipulation, the parties agree the responsive documents total 126 comprised of 29 pages of written material; 95 photos; and 2 videos.

B. CONCLUSIONS OF LAW:

The Court makes the following Conclusions of Law:

1. Every analysis of penalties for violation of the PRA are required to be made considering the whole spectrum of the scale, from no award of penalties to the maximum of $100.00 per day per record.
2. The Court must weigh and consider each of the *Yousoufian* factors in reaching a decision, but courts are given discretion to determine whether the factors are supported by the evidence or not, and must recognize that the aggravating and mitigating factors may overlap. These factors are not conclusive and there is no set result based upon adding the number of aggravating and mitigating factors – the factors simply help to focus the discretion of the court in determining the level of culpability of an agency, and primarily whether the agency acted in bad faith.
3. This is not the most egregious violation of the PRA. This is restated as it can be construed as a mixed finding and conclusion.
4. A weighing of the evidence supports that the County was negligent in the manner it responded to the public records request of Mr. Hoffman.
5. The Court is authorized to find that the County violated the PRA and enter a penalty, including a penalty of $0.00.

6. The Court is required, if it finds any violation of the act, to make an award of reasonable attorneys' fees for litigating the action. This is a mechanism established by the legislature to level the playing field and to assist litigants in enforcing disclosure by agencies, regardless of their level of culpability in their failure. If there is no error found, there is no award of attorneys' fees. If any error is found, reasonable attorneys' fees must be awarded.

7. "Bad faith" in the PRA context requires more than simple or casual negligence and is associated with the most culpable acts by an agency. *Adams* at 936. Bad faith requires a showing of wanton or willful act or omission by an agency. Id. Citing to Black's Law Dictionary 1719-20 (9th ed. 2009) the wanton is described as "unreasonably or maliciously risking harm while being utterly indifferent to the consequences. It differs from reckless both as to the actual state of mind and as to the degree of culpability. One who is acting recklessly is fully aware of the unreasonable risk he is creating, but may be trying and hoping to avoid any harm. One acting wantonly may be creating no greater risk of harm, but he is not trying to avoid it and is indifferent to whether harm results or not." Id.

8. Based upon the Findings and Conclusions, Washington case law is both instructive and dispositive on appropriate measures employed to establish an appropriate penalty.

C. ORDER AS TO PENALTY:

The Court has found that 126 records were not produced and/or overly redacted in violation of the PRA. The Court has found that records were not produced correctly for a period

of 246 days. The Court believes that an appropriate penalty for the county's negligence, is an amount of $.50 per document per day. The Court enters a judgment in favor of Hoffman in the amount of $15,498.00

The Court enters this Judgment fully cognizant that a penalty award is supposed to provide deterrence to future violations by an agency, in this case the County. The Court, in reviewing the evidence in this case believes that the deterrence necessary to deter the County from future wrong doing is minimal. This is based upon the evidence of adequate protocols and policies, training, supervision, and an independent system created to assist the County in responding to PRA requests. Further, the Court recognizes that the actor at the crux of the mistake in this case has retired from County employment and the employees who remain in charge of responding to public disclosure requests acted appropriately in their respective roles in this case, especially given that the plaintiff points to no errors in the processing of the subsequent requests handled by Knudson who is not the lead Public Record Officer for the Sheriff's Office.

II. ATTORNEY FEES TO PREVAILING PARTY:

Because the Court has found error on the part of the County and awarded a penalty to Hoffman, the Court is required to impose reasonable attorney fees in this matter. The parties shall exchange information as to the request for attorney fees and attempt to reach an agreement as to whether the fees are reasonable. Should the parties fail to reach an agreement, the plaintiff shall submit a motion for attorneys' fees and costs not later than April 1, 2017. The defendant shall have until April 12, 2017 to respond in writing, and a hearing shall be noted for a hearing on April 21, 2017, or as soon thereafter as practical given the schedules of the Kittitas County

and Yakima County Courts. The Kittitas County Court Administrator will work with both Courts to establish a date as near as practical to April 21, 2017 if necessary.

Done in open court February 7, 2017.

RICHARD H. BARTHELD
Yakima County Superior Court Judge
(Sitting as a visiting Judge of the Kittitas County Superior Court)

APPENDIX 3

TRIAL BRIEF OF COUNTY

FILED
JAN 18 2017
VAL BARSCHAW, CLERK
KITTITAS COUNTY WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

RANDALL HOFFMAN, Plaintiff, vs. **KITTITAS COUNTY, a local agency and the KITTITAS COUNTY SHERIFF'S OFFICE, a local agency,** Defendants.	No. 16-2-00063-3 **BRIEF IN SUPPORT OF POSITION OF KITTITAS COUNTY IN STIPULATED BENCH TRIAL WITH RANDALL HOFFMAN**

I. ISSUES PRESENTED TO THE COURT FOR DETERMINATION:

a. Did the Sheriff's Office, as an entity or through their agent, fail to produce all relevant documents to Mr. Hoffman under his Public Disclosure Request of June 29, 2015?

b. If the Sheriff's Office, as an entity or through their agent, failed to produce all relevant documents to Mr. Hoffman under that request, with or without bad faith, what is the penalty to be assessed for such violation of the Public Records Act?

c. If it is found that the Sheriff's Office, as an entity or through their agent, wrongfully withheld documents, with or without bad faith, what is the amount of attorney fees to be awarded?

II. BURDENS OF PROOF:

a. In a civil case, it is axiomatic that the burden of proof lies with the plaintiff. The preponderance of the evidence standard requires that the evidence establish the proposition at issue is more probably true than not true. *Mohr. V. Grant,* 153 Wn2d 812, 822, 108 P.3d 768 (2005); WPI 21.01 (When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case (bearing on the question), that the proposition on which that party has the burden of proof is more probably true than not true.);

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b. The general burden of proof rules require the plaintiff to prove all elements of the cause of action. Statutory schemes may change the burden of production, but the burden of persuasion remains upon the plaintiff. *Baldwin v. Sisters of Providence,* 112 Wn.2d 127, 135 (Wash. 1989). See also, *Adams v. Dep't of Corr.,* 189 Wn. App. 925, 940 (Div. 3, 2015)

c. The burden of proving that an exemption to public disclosure lies with the agency asserting the exemption. *Adams v. Dep't of Corr.,* 189 Wn. App. 925 (Div. 3, 2015)

d. The burden of demonstrating bad faith on the part of an agency in denying public records lies with the plaintiff seeking penalties. *Adams v. Dep't of Corr.,* 189 Wn. App. 925, 940 (Div. 3, 2015)

III. FACTS:

This Court is being requested to address the issues presented in this case based upon declarations, stipulations, and documents submitted in a motion for summary judgment which was not heard, and the documents filed with the briefs of the parties. The Court is being asked to resolve both legal and factual issues, the latter being perhaps more problematic. As with many cases, the issues presented herein have become focused by the parties based upon competing characterizations of the evidence. At the crux of the matter is a conversation between the requestor, Randall Hoffman (Hoffman) and the Public Records Officer for the Kittitas County Sheriff's Office who handled the request from Mr. Hoffman, one Carolyn Hayes (Hayes).

Randall Hoffman submitted a Request for Public Records (PDR) on the form provided by the Kittitas County Sheriff's Office on June 29, 2015 (Declaration of Harry Williams in support of Judgment, Penalties and Attorney's Fees, Exhibit #1 – **Will reference to the documents already on file to avoid additional duplication and confusion where possible, although recognizing difficulty of moving between documents**). The parties by agreement believe that the records that were produced by Knudson upon re-submittal of the June 2015 records request can be characterized as:

7 INCIDENTS/CALLS RELATED TO LAW ENFORCEMENT INVOLVEMENTS:

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S07-12709; S09-00236; S12-10231; S13-13065; K13-0837(This is an agency assist report related to Sheriff's investigation under S13-13065); S14-05352; and S15-00257

SEPARATE DOCUMENTS/ITEMS

126 records that include: 95 photos; 29 pages of reports; and 2 videos

These figures are derived per stipulation of the parties after review.

The parties agree that absent an intervening phone conversation on June 30, 2015, between Hoffman and Hayes, Hoffman was entitled to these records with only minor redactions.

Concerning the phone call placed by Hayes to Hoffman on June 30, 2015(Possibly June 29, 2015 – some differences noted), three individuals have provided declarations or deposition testimony related to the substance of that phone call: Hayes (1 Declaration - Exhibit 5 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees; and a transcript of her deposition – **Exhibit one(1) attached**); Hoffman (2 Declarations – Exhibit 13 and 16 to Declaration of Harry Williams in support of Judgment, Penalties and Attorney's Fees); and Kallee Knudson (2 Declarations – Exhibits 2 and 6 to Declaration of Harry Williams in support of Judgment, Penalties and Attorney's Fees; and a transcript of her deposition – **Exhibit two(2) attached**). A fourth individual working with the Sheriff's Office, Vanessa Toner overheard the conversation, but was not requested to submit a declaration nor was she deposed.

It is clear that all three individuals did not reach a similar understanding of where the request stood at the end of the conversation. Hayes has maintained that she called Hoffman to clarify his request as he was not mentioned in any of the records and she wanted to make sure she was not missing anything (Deposition page 26). She had looked up the name Erin Schnebly and saw the reports in the system and did not locate a reference to photos or videos. This information was relayed to Hoffman (Deposition pages 26 – 27). Hayes says after telling

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Hoffman what she had and the nature of the reports, that she asked if he wanted the reports or just the nature to which he replied – per questioning: "The nature is fine."; "I just want the nature."; and "I just need the nature." (Deposition page 27) Based upon these responses, Hayes determined that providing the face sheets with appropriate redactions would suffice. (Deposition pages 27-28- exhibit one (1) attached; Declaration page 1 - Exhibit 5 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees). Hayes, in response to questioning indicated that had Hoffman stated the he wanted the reports he would have gotten the reports with redactions (Deposition page 28, exhibit one (1) attached.

Hoffman for his part has and continues to maintain that he never agreed to modify the scope of his request for public records. Hoffman claims that after submitting his request that he received a call from Hayes. Hoffman states that Hayes told him Erin Schnebly had a right to privacy that prevented her from releasing records to him and because he was not mentioned in any of the records he had no right to them. Hoffman stated that Hayes told him there were no photos or videos. (Declaration of Hoffman, Exhibit 13 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees).

On June 29, 2015, Kallee Knudson, a Law Enforcement Records Clerk with the Kittitas County Sheriff's Office was training with Ms. Hayes to take over responsibilities for handling public disclosure requests. Ms. Knudson's training commenced at the beginning of June 2015 with Ms. Hayes. Ms. Hayes was close to retirement and working only one or two days a week at that time. Ms. Knudson was present during the phone conversation between Ms. Hayes and Mr. Hoffman, although she only heard one part of the conversation. The conversation and processing of the request did not make sense to Ms. Knudson based upon the training that Ms. Hayes had already provided her, but Ms. Hayes explained her decision as being based upon what Mr.

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Hoffman clarified during the phone conversation. Ms. Knudson assisted in a limited fashion in completing the PDR on June 30, 2015 (Stipulated facts of the parties).

In her declaration of March 17, 2016, Knudson indicates that the request stood out in her mind as different. Knudson indicated that she recalled Hayes calling Hoffman and asking if he was a party involved in any of the incidents. Knudson recalls Hayes saying that due to not being a party involved that the KCSO would not be able to provide the majority of documents per a specific RCW, but that Hayes could provide face sheets, providing him with the type of incident per report, date and location. Knudson recalls that Hayes referenced an RCW (which she believes was used on the exemption log) which she thought was very broad. Knudson did not understand how the RCW applied and recalled that the processing of this request was different than how Hayes had trained her. Given that Hayes had done the work much longer than Knudson, Knudson eventually stopped asking questions, and participated only to upload documents into the County's system which tracks public disclosure requests (DART). (Declaration of Knudson pages 1-2 - Exhibit 2 Declaration of Harry Williams in support of Judgment, Penalties and Attorney's Fees)

In her deposition, Knudson was asked about the events of the phone call in June 2015. She indicated that she could not hear any statements made by Hoffman. Knudson was asked if Hayes ever informed Hoffman "We have records that are available. Do you want them all?" which Knudson could not confirm or deny hearing. Knudson confirmed that Hayes indicated there was no video available but could not recall if Hayes stated there were no photos. Knudson confirmed hearing words from Hayes to the effect of "The Sheriff's Office would not be able to provide the majority of documents per specific RCW's." Knudson indicated that she had not heard Hayes provide that type of a response to someone before or after this conversation. Upon

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further question Knudson was able to provide examples of when photos or videos might not be provided and when heavy redaction of documents might occur. (Deposition of Knudson pages 8 – 10 Exhibit 2)

Hoffman maintains that he had another conversation with Hayes in early July of 2015 wherein he informed her that he could sue if he was not getting all the information he was entitled to, and indicated that Hayes told him he had received everything the Sheriff's Office could give him. (Declaration of Hoffman, Exhibit 13 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees). Hoffman is the only individual who believes this conversation took place. Hayes was asked in her deposition about contacts with Hoffman and indicated her only contacts were in June of 2015 and September of 2015. (Transcript of Hayes deposition pages 26 - 30 – Exhibit one (1) attached) Hayes was not asked directly if she had a conversation with him in July of 2015, but perhaps indirectly when asked if she remembered any conversation she had prior to her conversation in September with Hoffman that people were concerned about how she completed the request. Hayes asked if counsel meant prior to talking with Hoffman, and with clarification of that, she responded no to the question. (Transcript of Hayes deposition page 34– Exhibit one (1) attached)

Knudson was cleaning the desk of Hayes in early September of 2015 to prepare it for the next clerk. She observed the paper copy of the Hoffman request and she was still troubled by how it was handled. She brought it to the attention of her supervisors Kim Dawson and Sgt. Panattoni and explained her concerns. They instructed her to reach out to Hoffman and let Hoffman know that she was reviewing past requests and doing follow up. During that phone call in September 2015 Hoffman informed Knudson that he did get his request and the phone call ended. Knudson did not explain to Mr. Hoffman her concerns about how the request was

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fulfilled or her belief that he was entitled to more documents. (Stipulated Facts) Knudson in her declaration of March 17, 2016 did not provide much more details other than asking the question she was directed to ask by Sgt. Panattoni (Declaration of Knudson pages 3 - Exhibit 2 Declaration of Harry Williams in support of Judgment, Penalties and Attorney's Fees) Sgt. Panattoni directed Knudson to contact Hoffman and ask if he had received everything he needed from his request, which called was made promptly, with the response from Knudson being that Hoffman indicated he had received his request. (Declaration of Panattoni pages 1 - Exhibit 4 Declaration of Harry Williams in support of Judgment, Penalties and Attorney's Fees) It is interesting to note that Hoffman does not mention this conversation in his declarations.

Hayes had a similar conversation with Dawson and Panattoni on September 14, 2015. As a result, Clerk Hayes also contacted Mr. Hoffman to confirm he had received what he needed. Hayes related that Mr. Hoffman indicated that he had received what he wanted and then wanted to discuss a different incident that she searched for but could not find. Hoffman has indicated that he informed Hayes that he had not received all of the documents he wanted and that she spent about a half hour telling him about the privacy rights of an individual preventing the Sheriff's Office from giving him the documents he had requested. (Stipulated Facts; (Declaration of Hayes page2 - Exhibit 5 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees; (Declaration of Hoffman, page 2 - Exhibit 13 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees).

Hoffman returned to the Sheriff's Office on February 25, 2016. Knudson met with Hoffman who indicated that he was wanting to request new information. There was a conversation about the new request and the old request and Hoffman informed Knudson that he had spoken with an attorney and knew he should have received more documents. Hoffman also

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indicated that he knew that Hayes and the person whom he was obtaining information about were drinking buddies and that is why he did not get the documents he was entitled to before. Mr. Hoffman left with a blank request form indicating he need to talk to some folks. (Stipulated Facts; (Declaration of Knudson page 3 - Exhibit 2 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees; Declaration of Hoffman, page 2 - Exhibit 13 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees).

Hoffman returned on February 29, 2016 and asked for a copy of his original request and provided a new request. The two request forms were stapled together to be processed. Knudson processed the requests obtaining the information and provided the completed requests to Mr. Hoffman on March 1, 2016. (Stipulated Facts; Declaration of Knudson pages 3-4 - Exhibit 2 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees; Declaration of Hoffman, pages 2 -3 - Exhibit 13 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees).

Hoffman filed his lawsuit on March 3, 2016. Given the allegations made by Hoffman, the KCSO sought to engage Hayes who was no longer an employee. She was requested to come in and speak with them about this issue. At the same time, Knudson was tasked with reviewing public disclosure requests that had been completed by Hayes within the last year. On March 16, 2016 Knudson reported to Panattoni that she had a hand written confirmation of notes from Hayes concerning Hayes' conversation with Hoffman on September 14, 2015. The notes were consistent with Hayes' entry into the DART system on that same date. (Declaration of Panattoni page 2 - Exhibit 4 and DART system notes - Exhibit 15 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees). Panattoni directed Kim Dawson, Sheriff's Office Administrative Assistant and Knudson to write up summaries of their

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recollections of the events that they had been involved with since the original Hoffman request. (Declaration of Panattoni page 2 - Exhibit 4 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees).

On March 16, Panattoni, Hayes, Dawson, and Knudson met to discuss the original public disclosure request submitted by Hoffman and Hayes handling of that request. Per Panattoni, Carolyn said the information that she released is all that Hoffman wanted. Carolyn stated that she called Hoffman on September 14 to make sure he received what he wanted, and that she searched for additional information that he was inquiring about. (Declaration of Panattoni page 3 - Exhibit 4 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees).

Dawson did not complete a second declaration related to the meeting with Hayes, covering the period up to completion of the request on March 1, 2016 and then discussing the training of Hayes and her responsibilities as a records custodian. Dawson also provided a copy of Hayes' training records. (Declaration of Dawson - Exhibit 10 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees).

Knudson completed a second declaration that focused upon the meeting of the four individuals on March 16, 2016. She opined Hayes seemed very comfortable and confident that she had handled the request by Hoffman in a fashion that represented what he wanted from the public documents – no details, just date, time, location of what Erin Schnebly was involved in, a response consistent in her questioning during the deposition and her DART entry. (Declaration of Knudson - Exhibit 6 Declaration of Harry Williams in support of Judgment, Penalties and Attorney's Fees) This line of questioning was asked several different ways during the Hayes

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deposition, and at the very end, Hayes believed that she had responded correctly to the public disclosure request based upon Hoffman's statements as to what he desired.)Transcript of Hayes deposition page 45– Exhibit one(1) attached)

Knudson's second declaration reflects the fact that the issue of her relationship with the Schnebly family was broached. Hayes response was that she was aware of the name and thought they were farmers but did not indicate that she knew them. (Declaration of Knudson - Exhibit 6 Declaration of Harry Williams in support of Judgment, Penalties and Attorney's Fees) Hayes was again asked about any relationship with the Schnebly family during her deposition with the same negative results. (Transcript of Hayes deposition pages 35-36 – Exhibit one(1) attached)

A final comment in this fairly lengthy section on facts: The declarations of Panattoni, Dawson, Hayes, and two from Knudson were voluntarily undertaken by the Kittitas County Sheriff's Office as they explored what happened with this request. And while the County could have protected these items as work product, they were provided to Hoffman's counsel without request or claim of privilege. Additionally, during the examination of Knudson under oath, Counsel for the County did not object into the inquiry related to review of Hayes responses to public disclosure undertaken by the Sheriff's Office, resulting in a response that the review turned up only two instances of responses to public disclosure requests that appeared to have been handled incorrectly: One relating to an exemption log and one relating to not providing a report. (Deposition of Knudson pages 22-23 Exhibit two(2) attached).

IV. ARGUMENT:

a. Did the Sheriff's Office, as an entity or through their agent, fail to produce all relevant documents to Mr. Hoffman under his Public Disclosure Request of June 29, 2015?

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Kittitas County concedes that standing alone, without the phone call from Hayes to Hoffman, that the withholding of documents was not authorized by the RCW cited by Hayes in the exemption log. Put another way, had Hayes completed the exemption log as she did and simply emailed the face sheets, there would be no defense to withholding of records as transpired in this case. The County bears the burden of proving that one of the narrow exemptions to public disclosure existed, and under the facts of this case we could not meet that burden.

So what is the import of the conversation that was had between Hayes and Hoffman. Hayes indicated that she contacted Hoffman to clarify and see if she was missing something as he was not indicated in any of the reports. Hayes claims that based upon this conversation that they reached an understanding that all he wanted was: "no details, just date, time, and location of what Erin Schnebly was involved in", which she indicated could be provided with the face sheets maintained by the Sheriff's Office. Hoffman in a Declaration submitted on November 10, 2016 claims that he made no agreement to accept less than what he was entitled to, and that he was told by Hayes that he was not entitled to any records and that the Sheriff's Office had no videos or photos with the cases that were identified.

While the parties have cooperated during the litigation of this matter, and our choosing the path of presenting information by declarations; exhibits; deposition testimony, etc., this court is still required to make factual findings and conclusions of law in this case. *O'Neill v. City of Shoreline*, 10 Wn.2d 138, 240 P.3d 1149 (Wash. 2010). The discrepancy of the two positions as to the content of the conversation is a factual determination that must be resolved by the court. Case law is clear that if the County were relying upon an exemption, the burden of proving the validity of that exemption as to these records would fall upon the County.

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In this instance, however, when the issue is conflicting testimony as to the contents of a phone call, it is the Plaintiff that has the burden in a civil case as to production and persuasion and that burden is typically a preponderance of the evidence standard. *Mohr. v. Grant,* 153 Wn2d 812, 822, 108 P.3d 768 (2005); *Baldwin v. Sisters of Providence*, 112 Wn.2d 127, 135 (Wash. 1989). See also, *Adams v. Dep't of Corr.,* 189 Wn. App. 925, 940 (Div. 3, 2015). See also, WPI 21.01.

1. Compliance with Public Disclosure Act as it relates to Veracity:

It is perhaps because the credibility of the evidence and witnesses is a concept to be addressed by the Court that petitioner spends time on several different veins, including the use of inflammatory characterizations such as the "county lied and denied, but let's look at a few of the issues raised, starting with the concept of the argument that Hayes was not entitled to seek clarification of the request.

Plaintiff cites to no case law to support his argument. Plaintiff cites to RCW 42.56.520 the statute itself is related to prompt responses being required. Plaintiff attempts to boot strap the citation to the Attorney General Model Rules WAC 44-14.040. However, 42.56.520, speaking of prompt responses cannot truly be relevant to the question at hand, as the response to the Hoffman was made within 24 hours of receipt of his request. The statute does speak to the notion of an "unclear request" but that term is not defined in statute or case law. Nor is there a provision stating that an entity cannot contact a requestor on a multiple volume request to determine if they truly want all that is available. In many instances a requestor may have no concept of how large an amount of information it is that they might be seeking, and entities routinely assist requestors in focusing in on what they specifically desire. There is nothing in the statute or Model rules that prohibits this. At best, the Model Rules caution against clarification

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requests as they can delay access to public records – a timing issue. The citation to the Sheriff's Policy provides no further guidance than the statute, as it simply paraphrases the wording of the statute.

Division One had the opportunity to address this question recently but chose not to do so given that the petitioner had not raised it at the trial court. *Hikel v City of Lynnwood,* 74536-1-I, December 27, 2016. And, the city in that case acknowledged that it requested clarification only to reduce the number of records it had to provide Hikel. *Id.* at 8. In this case, Hayes testified that she called Hoffman because she was not seeing his name in any of the reports and she wondered if she was missing something. And while Hoffman in his declaration and trial brief speak to needing information about the recklessness of Schnebly, Hayes was able to identify the documents that were implicated and shared her findings with Hoffman:

S07-12709: Schnebly requested law enforcement assistance because a Black Lab and a German Shepherd had attacked a calf and it was injured.

S09-00236: Schnebly contacted LE as an ex-boyfriend with an active restraining order obtained by her against him was attempting to contact her in violation of the order.

S12-10231: This incident type was categorized as a Mental Health Referral. An MHP was on the phone with Erin Schnebly's Mother and he heard a dispute in the background and the phone went dead. LE contacted the residence and learned that an argument had taken place and Erin punched a wall and threatened suicide because no one cared about her. She told LE the threats were hollow with no intent, an opinion apparently expressed by the MHP who arrived and spoke with Erin. The parents did not want to press charges for the hole in the wall and everyone agreed to part until the next day. It is possible to consider Schnebly a possible defendant in this case at the initial reporting.

S13-13065: A motor vehicle accident on December 8, 2013 involving a DUI wherein one Robert Lee Haberman was the defendant. Schnebly was a witness as she was a bartender at the establishment where defendant had been drinking;

K13-0837: An agency assist report from the City of Kittitas Officer assisting county with DUI accident in S13-13065

S14-05352: A malicious mischief incident where Erin Schnebly was listed as the victim but was perhaps simply the reporting party of gang graffiti on a

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building believed to be a Grange – Fairview Hall. Unrelated individuals involved with gang ties were found responsible for the actions; and

S15-00257: Schnebly requested law enforcement assistance because a black dog with a white chest was in her field and she was calving. There were no injuries yet, but she was worried about injuries and stress for the calves and mothers and asked if LE could request the neighbor to corral the dog during the calving. This was accomplished and the neighbor agreed.

S16-01703 This did involve Ms. Schnebly in a DUI where she was the defendant. **However, it is conceded by the parties that this incident was not available for location on June 29, 2015 as it did not occur until February 15, 2016 and was the incident that prompted Hoffman's 2nd request in February of 2015. This document is not the subject of this lawsuit as its disclosure was timely and there to not appear to be any arguments about the Sheriff's response to this second request.**

Given the nature of these reports, (not including S16-01703 which Hayes never saw) it is not unreasonable for Hayes to have called Hoffman to discuss what she had found to make sure that he wanted these type of reports, that she was focused upon the correct Erin Schnebly, or to confirm that he might have more pertinent information about what he might be looking for with his request. Such a phone call might save both Hayes and Hoffman time, and it did not delay the processing of records. And, it is not unreasonable, given the nature of these reports that Hoffman would have agreed to accepting: "no details, just date, time, and location of what Erin Schnebly was involved in", which could be reflected with the face sheets.

Plaintiff has sort of tossed the issue of adequacy of a search by Hayes into the mix under both the veracity prong as well as the damages prong, and spends more time under the damages prong of his analysis. Both Knudson and Hayes spoke about the Sheriff's Data/Case Management system, Spillman. There appears to be no claim that the search of the data base and identification of reports relative to Schnebly failed to produce records of her involvement with the Sheriff's Office. It appears from the statements of Hayes in her declaration and in the

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deposition that she did not locate photos or videos assigned to these reports in Spillman, which was a second point of discussion for her call to Hoffman in June of 2015.

In her deposition, Hayes responded to questions as to the search. She indicated that she received the request and searched Spillman for responsive records. She indicated that she looked at each IR number/report and did not locate pictures or videos. She indicated that she did not look in other locations other than the case management system. Hayes also explained her understanding that they did not routinely store video and that if it was not in Spillman based upon a request within 90 days they would not have the video. This was apparently based upon information received from "IT". She further explained that just because 90 days had passed that did not mean she would not search to see if it had been downloaded in Spillman. (Transcript of Hayes deposition pages 26-27; 30-32; and 36 – Exhibit one(1) attached)

In Knudson's deposition she was also asked about videos and pictures. She also explained that the Sheriff's office only keeps videos that are criminal investigation or if something isn't deemed normal. Knudson indicated that in responding in February of 2016 she did locate two videos related to the DUI investigation of Haberman, S13-13065, but she could not recall if they were noted in Spillman as existing or whether it was simply because she went and checked a video box in the records room, indicating that is where videos are stored. Knudson was asked about her training on videos being retained on the server for 90 days and confirmed that referred to the 911 upload. She confirmed that she was trained to look in the other area for videos and for older cases in hard copy files (paper). (Deposition of Knudson pages 18 – 19; 26 Exhibit two(2) attached)(It is worth noting that Knudson was trained by Hayes and that Hayes was never asked directly about the box of videos, but also never mentioned same).

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The County concurs that a search must be reasonable and more than perfunctory, and that we bear the burden of showing that the search was adequate. It is a mischaracterization to say that Hayes conducted no search, as that is not true as she could not have had a conversation with Hoffman without searching. Hayes also could not have had an idea of what was or was not available (even if incorrect) if she had not done a search. Hayes might not have contacted Hoffman if she had located photos and videos, and Hayes might not have contacted Hoffman if she was not concerned that she was missing something in her search. We also do not know whether the search resulting in the phone call was as extensive a search that might have been completed had Hoffman indicated that he wanted all of the reports (Hayes indicated that she would have provided them if requested Transcript of Hayes deposition page 28 – Exhibit 1).

There is nothing that suggests that an initial inquiry into records is not permissible. We know that based upon a relatively quick search in Spillman that Hayes identified that she might not have everything that Hoffman was requesting, (photos and videos) as she did not see them noted with the files, which led to her contacting Hoffman. And we know that based upon the understanding of Hayes, her conversation led to Hoffman indicating that he did not want all of the details. We also know that only 2 of the 7 individual or related Incidents actually contained photos, and only one contained the two videos that were located in a box (although it is unknown if the existence of videos was noted in Spillman).

An agency is required to make an adequate search for the records requested, but is not required to conduct an unbridled search of every piece of information it or its employees holds in order to find records the requester believes are responsive. Good Faith, however, is the required standard. *Nissen v. Pierce County,* 183 Wn.2d 863 (Wash. 2015). Plaintiff has cited to *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702 (Wash. 2011) in

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support of its contention that the County's search herein was unreasonable. In that case, the records search were conducted on the only computer most unlikely to contain the records sought – an employee's brand new computer. In that case, it acknowledged that the Public Records Act was silent as to what constitutes an adequate search. Id at 719. The Court of Appeals adopted the standards governing the adequacy of a search as delineated under the Freedom of Information Act, the focus of which is not whether responsive documents do in fact exist, but whether the search itself was adequate. Id at 719-720. The adequacy of the search is a reasonableness standard, in that the search must be reasonably calculated to uncover all relevant documents. With what is reasonable being judged on the facts and circumstances of the case. Id at 720.

There are distinct differences here, in that the County of Spokane was looking for a multitude of records that could be discovered on a multitude of different computers, and the employees recognized the futility of the search conducted. Id. at 722. In this case, the one and only central repository of records is the Sheriff's Spillman system for cases newer than 1985 per both Knudson and Hayes. In this case Hayes searched in the locations where the responsive records should be stored. There was an additional location where two videos were discovered, but this was described as a last chance look by Knudson. Hayes was not asked nor did she mention looking there. Hayes did indicate that she looked in the one and only system where the records should be stored. She identified numerous records that might be responsive, but failed to identify that photos were actually identified to be in the system for two of the records out of seven, despite her testimony that she looked for photos and videos in each of the records.

Hayes search was reasonable under the facts and circumstances of this case. She looked and identified records in the location where such records should be located. We do not have

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facts identified/questions asked, to know if her search would have been expanded had Hoffman indicated to her that he wanted more than what he indicated in the telephone conversation in June of 2015. The fact that photos were later discovered in the very system she searched does not negate the reasonableness of her search, nor does the fact that two videos were found in a box in a records room alter the reasonableness, particularly since Knudson could not say that the existence of these videos was recorded in the Spillman system.

2. Credibility of competing interpretations of conversation of June 2015:

What we know about this conversation comes from declarations submitted months after the event, and in the case of Hoffman, more than a year after the event (with the benefit of declarations from County employees in hand). We know that Knudson recalled the event primarily because it seemed odd in how it was handled, and based upon the exemption discussed by Hayes with Hoffman. Hoffman has stated that Knudson's version of events supports his perception of what transpired relative to the statements about the rights of privacy of Schnebly. However, we also know that Knudson could not hear what Hoffman said in response to Hayes' statements, and we lack any context from Knudson as to the timing of the conversation.

By way of example, we know from the Declaration and Deposition of Hayes that she called Hoffman because she did not locate photos or videos and because she was concerned she was missing something because he was not referenced in any of the reports. (Declaration of Hayes page 1 Exhibit 5 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees) . If we rely upon that document, the conversation started with an explanation of what the reports were and the fact that he was not mentioned in them and progressed to the fact that she did not locate videos or photos. This progression is similar to Hoffman's declaration but

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he adds what Hayes did not her in declaration – Schnebly's privacy rights. (Declaration of Hoffman, page 2 - Exhibit 13 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees). This is the point of agreement that Hoffman claims Knudson supports him over Hayes, as Knudson references the privacy issue as confusing to her in her declaration. (Declaration of Knudson pages 1-2 - Exhibit 2 Declaration of Harry Williams in support of Judgment, Penalties and Attorney's Fees)

We know that Hayes, while not referencing privacy in her declaration, did in fact cite to an exemption related to privacy on the exemption log simultaneously with completing the request. (Exhibit 1 Declaration of Harry Williams in support of Judgement, Penalties and Attorney's Fees). Is Knudson less credible in her recollection because she mentioned nothing about photos or videos in her first declaration concerning the conversation between Hayes and Hoffman? If she was spot on for Hoffman (or Hayes), would she not have mentioned that fact? Knudson's first mention of the lack of photos and video is in her second declaration that simply is a narrative of the conversation between Hayes, Knudson, Panattoni, and Dawson (and an opinion as to the credibility of Hayes. (Declaration of Knudson pages 1-2 - Exhibit 6 Declaration of Harry Williams in support of Judgment, Penalties and Attorney's Fees) And we know from the deposition that she could not recall whether Hayes indicated photos were not available but did recall her telling him that videos were not available. (Deposition of Knudson pages 9 Exhibit two(2) attached) The point is that recollections removed in time are more clouded than those closer in time absent a strange circumstance.

We also have additional information that impacts the reasonableness of Hayes interpretation of the conversation. And it relates to follow-up communications concerning this

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request. Hoffman in his declaration says that after the initial phone call and not getting records, that he went to the Sheriff's office in early July 2015 and met with Hays in person and told her that he could sue if he was not getting all the information he was entitled to. Per Hoffman, Hayes told him he had everything the Sheriff's Office could give her. (Declaration of Hoffman, page 2- Exhibit 13 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees). This seems a bit odd. At the time Hayes was working one day a week and Hoffman managed to connect on the day of the week that she was present, and was able to identify her even though they had never met. Another oddity is that there is no reflection of Hoffman coming to the Sheriff's Office other than on June 29, 2015 and the two visits in February which were recorded with forms and in declarations. The strangest part of this statement by Hoffman is that County employees when they hear a "threat of a lawsuit" tend to make sure that their supervisors are informed of such statements and they record such statements.

Certainly the actions of the Sheriff's Office during this case demonstrate a concern that they handle matters correctly and document such statements. By way of example, Knudson in discovering the written request in September went to her supervisors to inform them that she still had concerns on how it was processed leading Sgt. Panattoni to direct her and later Hayes to contact Hoffman and "inquire if he received everything he needed from his request". (Declaration of Panattoni page1 Exhibit 4 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees) Knudson called Hoffman and he said that he had received his request.

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Again, it is a bit strange that per his declaration, Hoffman started out his inquiries with the City of Ellensburg and received much more. And that he supposedly had, in July an in person conversation with Hayes expressing that he did not think he was getting all of the information and that he could sue. It is possible that Mr. Hoffman had given up at that point, but his declaration does not reflect that to be the case as he indicated he returned in February and still wanted the records. What his declaration does not reveal is that a phone conversation with Knudson ever took place – perhaps the memory slipped a bit there. (Declaration of Hoffman Exhibit 13 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees). Hoffman did recall a conversation with Hayes in September, and again, the recollections of the two individuals vary greatly. Hayes indicated that she called and inquired whether he received what he needed, per Panattoni' s directive, and his response was that he had. Hayes made reference to the fact that at that time Hoffman was inquiring about information concerning a Stephanie Crowdy being run over by Schnebly, but no mention concerning a discussion about the privacy rights of Schnebly. (Declaration of Hayes, page 2 - Exhibit 5 to Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees)(This conversation was noted in the DART system (Exhibit 15 Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees), with elaboration during the deposition of Hays and a confirmation of handwritten notes consistent with the DART entry of September 14, 2015 found by Knudson with the paper file on March 16, 2016 during the review requested by Panattoni of Public Records requests (Declaration of Panattoni, page 2 – Exhibit 4 of Declaration of Harry Williams in support of Judgment, Penalties, and Attorney's Fees).

As noted, the issue under consideration is a factual determination as to whether the County through Hayes denied production of documents to Hoffman or whether based upon the

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conversation in June 2015, Hoffman reached an agreement as indicated by Hayes that he agreed to: "no details, just date, time, and location of what Erin Schnebly was involved in". It is the County's position that based upon the phone conversation between Hayes and Hoffman that it was reasonable for Hayes to believe that she had reached an agreement to provide Hoffman with what he sought from the records maintained by the Sheriff's Office as amended by their phone conversation.

A final piece on the credibility of competing recollections and allegations. From at least February of 2016 to the filing of these documents, Hoffman has indicated that he believes the records were withheld and the actions of Hayes were motivated by a desire on the part of Hayes to protect Schnebly because "Hayes and Schnebly were drinking buddies. This was an issue explored in the conversation with Panattoni, Dawson, Knudson, and Hayes, with negative results. It was an issue that was explored during the depositions of Knudson and Hayes, with negative results. This is simply another example of Hoffman grabbing hold of an idea and refusing to let go regardless of the evidence presented.

As to the issue of whether the failure to locate the photos and videos equates to an unreasonable search, the County has already staked out its position that the search was reasonable within the legal standards presented. Because the search was reasonable, the fact that such documents existed and were later discovered and produced should not result in an award of penalties and attorneys' fees.

The County does make a concession, however at this point as it relates to the seven independent and related incident report face sheets. It is clear from all parties that the issue of Schnebly's privacy rights came up during the phone conversation. The County believes that

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none of the statements have put this in context completely, but the evidence perhaps sheds light on this subject. We know that Hayes searched the Spillman records and identified responsive documents and that she shared this information with Hoffman. We also know from the exhibits that Hayes completed an exemption log for the face sheets and that she cited to the general privacy right exemption as to these documents when completing the public disclosure request. And the County concedes that the redactions made to those documents were overbroad and that the exemption cited does not support the redaction of those 7 documents as provided to Hoffman.

Based upon these concessions, the County concedes that it is liable to Hoffman for the wrongful disclosure of those documents. These seven documents were wrongfully withheld for a period of 246 days. Thus the proper calculation is for a penalty for these 7 documents for a period of 246 days in an amount to be determined under the guidance of *Yousoufian v. Office of Ron Simms*, 168 Wn.2d 444 (Wash. 2010). The County recognizes by this concession that it is also subject to an award of reasonable attorneys' fees.

b. If the Sheriff's Office, as an entity or through their agent, failed to produce all relevant documents to Mr. Hoffman under that request, did the Sheriff's Office, as an entity or their agent, act in bad faith in withholding the documents?

Hoffman has proposed using a daily penalty for each photo, each video, and each page of records wrongfully withheld under *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 278 (2016) (holding that "nothing prohibits" a trial court from assessing "a per page" penalty under the PRA). The County does not disagree that such an approach would be unreasonable for the trial court. However, while *Wade* is an approved method of computing a penalty for wrongfully withholding public records, it is certainly not the only approved method of computing a penalty.

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A trial court has discretion not to impose penalties for each wrongfully withheld document. Grouping of documents together for purposes of assessing a penalty is appropriate. This was also approved of in *Yousoufian* 2004, 152 Wn.2d at 435, where it was stated that the purpose of the PRA is better served by increasing the penalty based upon the agency's culpability rather than by basing the penalty on the size of the record request. *Zink v. City of Mesa,* 162 Wn. App. 688 (Div. 3, 2011). Using a grouping methodology, a court could reasonably assess a penalty for each individual incident, which in this case would result in a method where a penalty would be assessed for 6 groupings of documents:

1. S07-12709;
2. S09-00236;
3. S12-10231;
4. S13-13065 combined with the agency assist for this Single DUI Motor Vehicle Accident under K13-0837;
5. S14-05352; and
6. S15-00257.

The practical difference is determining a penalty to be applied to 126 different documents (95 photos; 29 pages of reports; and 2 videos, from $0 - $100 per day or assessing the same penalty range to 6 bundles consisting of separate and distinct incident reports. A court could theoretically reach the same practical result by adjusting the penalty accordingly, but as noted, the primary consideration is finding the correct level of culpability for wrongful withholding. An equal assessment required by the penalty assessed is a determination of what level of penalty is required to deter future wrongful withholding by an agency.

It is fair to say that the County adamantly disagrees with the statements made by Plaintiff relative to bad faith. The pleadings show again the overreach that is made with arguments by the plaintiff. Does the plaintiff truly belief that the actions of the Sheriff's office, if found to be wrongful, are truly "the most outrageous conduct in any reported PRA case"? I can think of

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several cases right away that deflate this statement. One need only look at the facts and circumstances of: *Wade*(unreasonable delays and withholding despite court orders to release identified documents that had been inspected by the court); *Yousoufian* (years spent asking the wrong questions, looking in the wrong locations and denying the existence of documents, with a total of 9 years taken to resolve the case in an issue that was of great importance to the citizens of the County, resulting in the Supremes not remanding but simply entering an award to bring the matter to a conclusion); *Zink* (multiple violations over multiple years); *Neighborhood Alliance* (looking in the only location where responsive records were most likely not to be, even though knowing perfectly well that the records would not be located, and then not participating in meaningful discovery and being obstructionist when they did participate); or *Adams v. Dep't of Corr.,* 189 Wn. App. 925 (refusal to reach their own determination on application of exemption, disregarding the decision of those they relied upon who had changed their position on the disclosure issue, and ignoring a court decision that made their decision mute).

1. YOUSOUFIAN MITIGATING FACTORS:

(a) A lack of clarity in the PRA request;

This is not a mitigating factor. While the request involved multiple records, the request itself was fairly straightforward.

(b) the agency's prompt response or legitimate follow-up inquiry for clarification;

The public disclosure request was received, clarification sought, and records produced in less than 24 hours. The County believes that the clarification was legitimate and in compliance with the PRA and was geared to assist the requestor. The County disputes the characterization of its actions following the initial response. The County believed that they should honor the concern expressed by one of their employees, trusting them to bring an issue to them for

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addressing. The County sought to ask the correct question: Did you get everything that you needed. The County was entitled to rely upon the answers provided by Hoffman and their employees Knudson and Hayes. And the County promptly addressed the second request within days without charge.

(c) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions;

The County believes the evidence support a finding that the County complied with the PRA procedural requirements save the incorrect citation to an exemption as to the face sheets that were provided. Our response was timely. We identified the substance of the records that were held (save for photos and videos that were missed, perhaps because of trying to address the response in a rapid fashion). The County conducted a reasonable search of their data base where responsive records would be expected to be found. We provided adequate, albeit incorrect descriptions in the exemption log. We have demonstrated that we attempted to act in good faith and honestly. There is no indication that we fudged on our responses or that we attempted to change the facts through testimony. If the County had acted in bad faith we would not have provided the declarations that we did, would not have produced them to the plaintiff when we did, would not have participated in discovery as we did. This should be considered a mitigating factor.

(d) proper training and supervision of the agency's personnel;

The evidence supports a finding of this mitigating factor as well. Knudson was just beginning her training with Hayes at the commencement of this action. She discussed how she was brought along, how she was able to ask questions, to commence to perform the work and that support in her office and from the legal department was readily available. It is clear from Exhibit 3 attached hereto and the deposition of Hayes that the County invested in both in house

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training and training put on by outside agencies. By the time of the deposition, Knudson was also able to reference the multiple trainings that she had attended within that 8 month period of time. The County had adopted policies on public disclosure, and the evidence suggested that supervision of staff was on-going and that they sought to make sure that the tasks were performed correctly.

(e) the reasonableness of any explanation for noncompliance by the agency;

This is an ultimate determination of a factual and legal question for this court, but we believe that we have set forth the evidence to show that any actions deemed in noncompliance were reasonable and simply the result of a good faith error. This should be considered a mitigating factor.

(f) the helpfulness of the agency to the requestor; and

While the plaintiff disagrees, the County believes that our prompt responses demonstrated a willingness to be helpful. The willingness of Hayes to answer questions and search for records while Hoffman was on the phone in September demonstrate a helping attitude. Explaining that many of the concerns that he was voicing as to Schnebly were not reported was also of assistance. Contrary to hiding the ball, the County sought to ascertain if Hoffman had received what he needed from his request. If the County was indifferent to his needs, and if they desired to attempt to hide from any potential issues, the County would not have directed both staff members to independently contact Hoffman in September to determine if he got what he needed. This should be considered a mitigating factor.

(g) the existence of agency systems to track and retrieve public records.

The testimony demonstrates that the County IT department created an internal system geared to assisting with compliance with public disclosure requests. This independent system,

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separate and apart from the case management systems demonstrates a commitment on the part of the county to successfully providing proper responses in a timely fashion to public disclosure requests. This should be considered a mitigating factor.

2. AGGRAVATING FACTORS:

(a) a delayed response by the agency, especially in circumstances making time of the essence;

This should not be considered an aggravating factor as no response by the County was delayed. The only misleading factor is that Hayes did not locate photos and videos in her search, but the essence of the reports at hand was relayed to Hoffman, and the search was reasonable. There have been no facts presented by Hoffman about the circumstances of his request that would make time of the essence.

(b) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions;

There is no case law that supports plaintiff's position that seeking clarification of Hoffman's request was a violation of the PRA. The County acknowledged the incorrect citation as to the face sheets but believes that this is the only procedural violation as the failure to locate the photos and videos is excused based upon a reasonable search. The County believes that the evidence indicates that Hayes provided Hoffman with information as to the records that she believed were available based upon her search. And in September spent additional time with him looking for records that he thought might exist, but which to this day have not been shown to exist. This should not be considered an aggravating factor.

(c) lack of proper training and supervision of the agency's personnel;

For the reasons expressed under (d) related to training and supervision as a mitigating factor, this should not be considered an aggravating factor. The County objects to the

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characterization of Hayes' conduct in training Knudson and the general characterization of her willfully violating the PRA. Her conduct in this case and the review conducted by the Sheriff's Office demonstrate an on-going ethical and compliant approach to responding to Public Disclosure request (acknowledging that no one can always get it correct 100% of the time – 2 errors discovered in a years' worth of work where 80% of her time was spent responding to PDRs is not bad)

(d) unreasonableness of any explanation for noncompliance by the agency;

As noted above, we believe that this is a mitigating factor as opposed to an aggravating factor with the noted exception as to face sheets that we have conceded was in error and not reasonable.

(e) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency;

The plaintiff is correct that the conduct here was intentional. Any response to a request will require an intentional act to respond. But the levels of culpability addressed here require negligent, reckless, wanton, bad faith, or intentional **noncompliance with the PRA**. It is not enough to state that the actions were intentional. A non-standard response does not equate to error, let alone negligence or a higher form of culpability. Internal deliberations about a non-standard response demonstrate proper concern and supervision, especially coupled with reaching out to the requestor to ascertain if they got what they needed. And when the requestor responded that he had, having had the opportunity to discuss with Hayes what she knew to exist, this was not culpable behavior. It has been said that "bad faith" in the PRA context requires more than simple or casual negligence and is associated with the most culpable acts by an agency. *Adams at 936.* Bad faith requires a showing of wanton or willful act or omission by an agency. Id.

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Citing to Black's Law Dictionary 1719-20 (9th ed. 2009) the wanton is described as "unreasonably or maliciously risking harm while being utterly indifferent to the consequences. It differs from reckless both as to the actual state of mind and as to the degree of culpability. One who is acting recklessly is fully aware of the unreasonable risk he is creating, but may be trying and hoping to avoid any harm. One acting wantonly may be creating no greater risk of harm, but he is not trying to avoid it and is indifferent to whether harm results or not." Id.

There are not set of facts presented herein that demonstrate a heightened level of culpability with the possible exception of negligence related to the citation of an exemption for the face sheets that was inaccurate. But even this does not appear to rise to the level thus defined above. Hayes should have known better, but she did not act in a fashion intended to create harm or in a fashion where she callously chose to ignore the possibility of harm. In most of the cases surrounding incorrect citation to exemptions, absent more evidence of a higher level of culpability, the courts have assessed a penalty (at least until the penalty range moved to a low end of no award, and we have yet to see what might happen with that scale now allowing now award even if the PRA is not strictly complied with – perhaps we can test that out in this case. This should not be considered an aggravating factor

(f) agency dishonesty;

The agency did not mislead Hoffman as to the availability of records that it was aware of possessing. Hayes contacted him and let him know what she had and what she believed she did not have. Hayes' reasonable search failed to identify photos and videos, but there is no evidence that this was done dishonestly. One can make an error, such as objecting to testimony in a trial based upon an incorrect evidence rule, or citing an incorrect exemption, without such error rising to the level of dishonesty. This should not be considered an aggravating factor

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(g) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency;

The plaintiff did not even both to address this aggravating factor, which would appear to be a concession that there are not facts that support this as an aggravating factor. This concession would be consistent with the evidence as there is nothing in the record that shows that any issue reflected in his request dealt with an issue of public importance and clearly no evidence that demonstrates that such importance was foreseeable to the Sheriff's Office. This should not be considered an aggravating factor

(h) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency; and

This is also a factor not addressed by the plaintiff and thus should be considered conceded as not a factor. This also is a proper concession as there is no evidence to support this as an aggravating factor.

(i) a penalty amount necessary to deter future misconduct by the agency.

The plaintiff makes a bold statement, that because the conduct here was intentional, the maximum penalty should be assessed. This is akin to the opening statement that this is the most egregious violation of the PRA that exists under the case law. Neither is factually accurate or supported by the facts of this case. At the outset it should be noted that the cases cited by the plaintiff for the proposition that the Courts have rejected agency arguments that no penalty should be imposed even when an agency acted reasonably or attempted to do the right thing are all cases that predated the current penalty scale that commences with a legislatively determine no range of $0 - $100 per day penalty. They also predate the amendment that took the range from a minimum of $25.00 per day to $5.00 per day.

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By the definitions provided relative to the term "bad faith", there are no facts that are presented by this case that meet the definitions. Courts are cognizant of the prior decisions, and it is interesting to note that under the exceedingly more egregious facts of *Yousoufian* (9 years of delays, searches in locations where records would not be found, years of effort on the part of the plaintiff to work with the County and even years after litigation commenced to reach a resolution) the Court of Appeals labelled the County's conduct as grossly negligent (a label the Supreme Court did not disagree with).

The trial court initially imposed the minimum penalty of $5.00 per day that was allowed at that time. The Court of appeals disagreed and remanded indicating the gross negligence could not sustain a minimum penalty. The trial court then entered an order of $15.00 per day and the Court of Appeals again remanded. The Supreme Court then accepted review and produced the factors for guidance in setting penalties for violation of the PRA, the purpose of which is still to determine levels of culpability and still considers the need for deterrence in determining an award of penalties.

The Court stated that a penalty must be an adequate incentive to induce future compliance. The Court in speaking to the comparison of a penalty sufficient for a small school district versus the most populous county in the state indicated that what was sufficient to deter future wrongful conduct by a small school district would not suffice to defer future wrongful conduct by the larges county, and the penalty should reflect that deterrent impact. *Yousoufian* at 462-463. The lack of guidance on this question is exactly what the aggravating and mitigating factors were developed.

In approaching the issue of a penalty, the *Yousoufian* Court indicated that in every case, at the outset of the penalty determination, a trial court must consider the entire penalty range

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established by the legislature (then $5.00 - $100.00). Id at 466. The Court indicated that the factors are for guidance that they may overlap and may not apply equally or at all in every case and are not designed to be an exclusive list, or to take away from the discretion of the trial court in setting a penalty. Id at 467-468.

The Supreme Court then took the unusual step to end the case without remand given its tortured history and tenure in the Court system. It then set the penalty at $45.00 per day for 8,252 days and entered and penalty award in the amount of $371.340. The plaintiff is requesting a penalty in the amount of $3,099,600 (126 records withheld for 246 days times $100.00 per day) The plaintiff charitably indicates that he is willing to settle for $774,900 as a sign of good faith and because such a penalty would provide sufficient deterrence.

3. POSITION OF KITTITAS COUNTY:

It is fair to say that the County's comparisons of cases and conduct demonstrate the absurdity of the request made. The plaintiff is requesting an amount almost 10 times in excess of that set in *Yousoufian* for almost a decade of effort to produce records. In *Wade's* the Court found 5 separate and distinct violations of the PRA by the Department of Labor and Industries. Id at 295. The Court also broke the penalty assessment categorization into five different Time Periods based upon the conduct of the Department in violating the PRA and then in ignoring the orders of the court. Period one was from the date of the request January 31, 2013 until the L & I investigation ended, March 22, 2013. The Court assessed a penalty per page of documents in this case. For the first time period where it determined that L & I had violated that act based upon an improper exemption, it assessed a $.02 per page daily penalty resulting in a penalty of $5,431.00 (50 days x 5,431 documents x $.02).

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The second period was set from the date the investigation concluded per the trial court March 22, 2013 to the date when the Department notified the investigated entities of the request and notice of possible disclosure if they did not act, July 25, 2013. For this 125 day delay the superior court imposed a $.25 per page per day penalty for a total of $169,718.75 (125 x 5,431 x $.25)

The third time period related to the time between when the Department notified the companies of the PRA request July 25, 2013 and the deadline the Department gave them to obtain protective orders August 9, 2013. For this delay the court entered a penalty of $.01 penalty per page per day or $814.65 (15 days x 5,431 x $.01)

The fourth time period related to the time after the Department gave companies to obtain a protective order August 9, 2013 and the date the court ordered the Department to produce all requested records September 12, 2013. 34 days elapsed during that time with no protective order entered by any court. For this delay the court ordered a $1 per page per day penalty resulting in a penalty of $184,654 (34 x 5,431 x $1.00)

The Fifth time period ran from when the superior court ordered the Department to produce all records September 12, 2013 and the date they finally produced all of the records, September 13, 2013. On September 12, 2013 the Superior Court ruled that the Department had violated the PRA in five distinct ways. After the ruling the Department released records in two installments September 13, 1,968 pages were released. The Department claimed it could not release the balance until reviewing for redactions and released the final installment of records, 3,445 records on September 20, 2013, although they did not redact any records.

For the one day delay to produce 1,968 documents the court imposed a $5 per page per day penalty or $9,840 dollars. A similar rate was assigned to the 3,445 records held for 9

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additional days for a penalty of $137,800.00. The Court opined that the Department only relented because of a threat of contempt of court. The last awards equated to an award for "bad faith". The total amount of the award, relative to 5,431 documents over a period of just shy of 9 months including ignoring court orders was $508,258.40.

In the present case, there is no evidence to support 5 distinct violations of the PRA. There are no court orders that were violated. There are only 126 documents that if wrongfully withheld were withheld for 246 days or just shy of 9 months. By way of example, if the County were assessed a $5.00 per page per day rate for "bad faith" the penalty award would equate to: $154,980 (126 x 246 x $5.00). If we used the "gross negligence standard of *Yousoufian* at $45.00 (a penalty amount that resulted from multiple refusals and violations over the period of almost a decade) per day the amount would equal $1,394,820 still significantly lower than what is requested by plaintiff.

In addition, the Court in assessing these penalties against the largest County in the State and an agency of the State of Washington, was cognizant that it was to also consider the need for deterrence of future conduct. Kittitas County as a smaller medium sized County with a pittance of the resources of King County or the State of Washington, cannot be said to need the same or greater level of deterrence for much less egregious conduct.

Deterrence is also a factor that relates to the policies, procedures, practices and personnel that are employed by an agency. The factors when considered would dictate a much smaller award as there is no evidence of a wide spread disregard of the requirement of the PRA. And while no case as specifically discussed the impact that the actions of an employee have versus the actions of an entity, we do know that the *Hikel* case addressed this somewhat in passing. In that case the City of Lynnwood was continuing to process the petitioner's rather large request.

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The plaintiff had been told an installment would be ready and available on a certain date. The person he was working with on the request was not present, and the person he spoke with did not have an idea as to where his documents might be. The trial court in the action noted that the employee made a mistake in saying no records were available. And continued, with apparent agreement by the Court of Appeals, stating: A single employee's mistake is not evidence that the City did not diligently respond to Hikel's request. *Hikel* at 14.

For Kittitas County, all of the proper procedures are in place: training, a dedicated system to track requests, adequate supervision. The employee who is alleged to have acted in bad faith is no longer employed by the Sheriff's Office, and absent mischaracterizations as to those who attempted to ascertain that the request had met the needs of Hoffman, the need for deterrence is small, and the ability to absorb a large penalty for future deterrence is much less than the capabilities of King County or the State of Washington.

If this Court should find that the County erred in withholding records based upon an erroneous exemption, then it would seem that a similar penalty or less that was applied to the Department of Labor and Industries should be applied, as that was one of the violations found. And for such violation, the Court imposed a penalty of $.02 per page per day per document. The County has conceded that there was an error in the claimed exemption for the 7 face sheets, and concedes that a penalty in the amount of $34.44 ($.02 x 7 x 246) is appropriate, but the Court, if it felt necessary for deterrent effect, could exercise its discretion to award a larger amount, but it should remain consistent to prior case holdings relative to amounts to impose. Should this court find that the County unlawfully withheld 126 records, then an award of $619.92 ($.02 x 126 x 246) would be appropriate with the same caveat.

c. ATTORNEY FEES TO PREVAILING PARTY:

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The County has conceded that an error occurred when Hayes incorrectly applied an exemption to the face sheets resulting in redactions that were not permitted under that exemption. The case law would suggest that this simple fact would allow this court to award reasonable attorney fees. Reasonable attorney fees should also be awarded if this Court finds that the County erred in withholding the other records. The Courts have determined the proper mechanism for determining whether a claim of attorneys' fees is reasonable. Because the County has not figures presented as to what the plaintiff believes reasonable attorneys' fees should be, we will have to wait to determine if the reasonableness of the request comports with case law.

IV. **CONCLUSION:**

The plaintiff bears the burden of proof in proving a violation of the PRA based upon the facts and circumstances presented by this case, based upon the facts as determined by this Court. The plaintiff bears the burden of proving the level of culpability of the County as to any alleged violation of the PRA. The plaintiff also bears the burden of proof as to issues of credibility of the witnesses and evidence. The County does not believe that it violated the PRA with the exception of applying the incorrect exemption and over redactions to the 7 face sheets.

The County believes that the evidence supports that the County responded in good faith based upon the interactions of the parties. There is no support for the claim that Hayes could not seek clarification from Hoffman. The evidence supports that the County conducted a reasonable search for records, even though not all were initially located. The evidence does not support a finding of bad faith in any actions on the part of the County. And the evidence, in comparison to other cases decided under the PRA, certainly does not support the request of a penalty as requested by the plaintiff.

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The County requests that this Court enter Findings of Fact and Conclusions of Law consistent with the evidence and to be provided by the County in concurrence with the positions advocated by the County The County requests that an Order be entered awarding the plaintiff $34.44 for citing an incorrect exemption for the face sheets provided together with reasonable attorneys' fees for the petition for litigating this issue.

DATED: 1-18-17

GREGORY L. ZEMPEL
Kittitas County Prosecuting Attorney/Defendant
WSBA #19125

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Exhibit 1

DEPOSITION OF CAROLYN HAYES

1 SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

2 RANDALL HOFFMAN,)
)
3 Plaintiff,)
)
4 vs.) NO. 16-2-00063-3
)
5 KITTITAS COUNTY, a local agency and the)
KITTITAS COUNTY SHERIFF'S OFFICE, a)
6 local agency,)
)
7 Defendants.)

8

9 DEPOSITION OF CAROLYN HAYES,

10 Taken at the instance of the Plaintiff

11

12 September 20, 2016

13 10:30 a.m.

14 Kittitas County Courthouse
205 West 5th, Suite 213
15 Ellensburg, WA

16

17

18 BRIDGES REPORTING & LEGAL VIDEO
Certified Shorthand Reporters
19 1030 North Center Parkway
Kennewick, Washington 99336
20 (509) 735-2400 - (800) 358-2345

21

22

23

24

25

BE IT REMEMBERED that the deposition of CAROLYN HAYES was taken in behalf of the Plaintiff pursuant to the Washington Rules of Civil Procedure before Alison J. Sosa, Certified Shorthand Reporter for Washington on the 20th day of September, 2016, at Kittitas County Courthouse, 204 West 5th, Suite 213, Ellensburg, Washington, commencing at the hour of 10:30 a.m.

APPEARANCES:

For the Plaintiff:

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1 I N D E X

2 RANDALL HOFFMAN vs. KITTITAS COUNTY

3 No. 16-2-00063-3

4 September 20, 2016

5

6 TESTIMONY

7 CAROLYN HAYES	PAGE NO.
8 Examination by Mr. Williams	4, 46
9 Examination by Mr. Zempel	46

10

11

12 PRODUCTION REQUESTS:

13 (None)

14

15 E X H I B I T S

	MARKED	IDENTIFIED
17 NUMBER 1	24	35
18 NUMBER 2	28	28
19 NUMBER 3	32	32
20 NUMBER 4	37	37
21 NUMBER 5	42	42
22 NUMBER 6	43	43

23

24

25

1 (CAROLYN HAYES, called as a witness by the
2 Plaintiff, being first duly sworn to tell the truth, the whole
3 truth and nothing but the truth, was examined and testified as
4 follows:)
5 EXAMINATION
6 BY MR. WILLIAMS:
7 Q Good morning. Can you please state your name for the record.
8 A Carolyn Hayes.
9 Q And do you understand that you're under oath this morning?
10 A Yes.
11 Q Have you ever had your deposition taken before?
12 A Yes.
13 Q All right. And you understand that this is a depositions?
14 A (Nods.)
15 Q Do you recall about how long ago that deposition was?
16 A Oh, probably 37 -- maybe 35 years ago.
17 Q So it's been a while.
18 A It's been a while.
19 Q And did that have anything to do with your employment --
20 A No.
21 Q -- for Kittitas County?
22 Okay. Thank you. Basically you know you're under
23 oath. Are you represented by Mr. Zempel today?
24 MR. ZEMPEL: Yes.
25 MR. WILLIAMS: Yes.

1 Q (By Mr. Williams) Okay. So if you have questions, you should
2 ask your lawyer, not me.
3 A Okay.
4 Q And I will ask you, if I've asked you a question, to try to
5 answer the question before talking to your lawyer.
6 But, you know, if you feel like you need to talk with
7 your lawyer about something before you can answer, you know,
8 just let us know. If you need a break for any reason, let me
9 know. I don't think this is going to go on very long, but it
10 can still be tiring. And you're in control of everything
11 except the questions I answer.
12 A Okay.
13 Q Did you work for the Kittitas County Sheriff's Office in June
14 2013?
15 A Yes.
16 Q Are you still employed there?
17 A No.
18 Q When did you leave?
19 A October 14th of 2015.
20 Q And that was a planned retirement; is that correct?
21 A Yes.
22 Q Was part of your responsibilities when you were employed at
23 the Sheriff's Office to respond to Public Records Act
24 requests?
25 A Yes.

1 Q And how long had the Public Records Act been part of your job
2 responsibilities?
3 A Oh, I didn't do it when I first started, so probably ten
4 years.
5 Q And could you estimate about how much of your job was
6 responding to requests. Say, as a percentage of your time,
7 how much of your time -- let me -- this is getting to be a
8 complex question.
9 In the five years before you retired, about what
10 percentage of your time was spent responding to Public
11 Records Act requests?
12 A It started out at probably a third of my time, and it
13 gradually increased to probably 60 to 70 percent of my time.
14 Near the tailend, many more requests came in.
15 Q And you've been trained on how to respond to Public Records
16 Act requests; is that correct?
17 A Yes.
18 Q And did -- some of that training was done within the County,
19 correct?
20 A Yes.
21 Q And you also had training from outside agencies; is that
22 correct?
23 A Yes.
24 Q Did you get any training on the Public Records Act requests
25 that wasn't through the County? I'm asking only because I

1 have a sheet of your various trainings that the County has.
2 And I assume that that reflects all of your training --
3 A Yes.
4 Q -- but I just wanted to make sure that you didn't --
5 A Well, in Wenatchee is -- that wasn't County, was it? I don't
6 think so.
7 MR. ZEMPEL: Probably not.
8 Q Well, I can -- I'll get the sheet out later and we can just
9 doublecheck. But probably you told your employer, but I just
10 wanted to make sure.
11 And --
12 MR. ZEMPEL: Could I -- maybe I can clarify it.
13 MR. WILLIAMS: Yeah.
14 MR. ZEMPEL: So you had training that was done
15 in-house --
16 THE WITNESS: Yes.
17 MR. ZEMPEL: -- by like Human Resources or
18 Prosecutor's Office?
19 THE WITNESS: Correct.
20 MR. ZEMPEL: But you were also sent outside of
21 the County to attend trainings that were put on by other
22 individuals?
23 THE WITNESS: Correct.
24 MR. ZEMPEL: Does that clarify it somewhat?
25 MR. WILLIAMS: Yes.

1 Q (By Mr. Williams) But other than the Public Records Act
2 training you did through the County, either because the
3 County sent you somewhere or because they did it themselves,
4 you didn't independently --
5 A That's correct. I did not independently.
6 Q And in your time -- let's talk about these last five years of
7 your Public Records request work, did members of the public
8 request police reports?
9 A Yes.
10 Q Is that a frequent occurrence?
11 A Yes.
12 Q Was that the most common request that you got?
13 A Yes, I think so.
14 Q A common request? That would be fair?
15 A I would say accident reports, but I think most police reports
16 were more.
17 Q And since I'm not sure how long it takes to respond to each
18 request, if you were doing half or two-thirds of your time on
19 Public Records Act requests, how long would it generally take
20 you to process a request for a police report, if you can
21 estimate that?
22 A It varies drastically.
23 Q And can you tell me some of the factors that cause it to
24 vary?
25 A A theft report doesn't take long. An assault report where

1 there are multiple witnesses, long time.
2 Q When you say a long time, do you have an estimate for how
3 long that might take?
4 A Oh, probably maybe up to three hours.
5 Q And a theft report, how long might that take?
6 A Just "Somebody stole my tires," five minutes. If they stole
7 lots of property, it goes on.
8 Q And you'd been trained on how to respond to requests for
9 police records, correct?
10 A Yes.
11 Q And did you have a standard way that you responded to those
12 requests?
13 A Yes.
14 Q And can you explain what that standard response was?
15 A I would get the request. I would look -- if they gave me a
16 case number, I'd go right to the case number. If they gave
17 me their name, I would go -- if they gave me the number, I go
18 right to that number. If they didn't know the number but
19 they said "I was the driver," I would go to their name.
20 Q And then after you located the report, what would you do?
21 A Review it. Redact the information that needed to be
22 redacted. Write a log. And after it was prepared, call them
23 up and tell them that it was ready and the cost if there was
24 a cost. And if it was something that could be e-mailed, it
25 was e-mailed.

1 Q And when you say a log, what log are you referring to?
2 A An exemption log.
3 Q And did you also log it in the DaRT system?
4 A Yes.
5 Q I'm going to try to break this down even further. So you get
6 a request for a police report?
7 A Uh-huh.
8 Q And is the first thing you do to put it in the DaRT system,
9 or does someone first put it in the DaRT system?
10 A Usually what I did was I would look at it and estimate how --
11 you know, if it's going to be complex or simple. Simple, I
12 would prepare the whole thing and then do the DaRT.
13 If it looked like it was not going to be simple, I'd
14 put it in DaRT or someone else would put it in DaRT.
15 Q And were you the person who did the redactions on these?
16 A Yes.
17 Q Was that always true or just mostly true? Did sometimes
18 other people do redactions for you?
19 A Sometime other people did a case, but they would be solely
20 responsible for that one. They didn't really do it for me.
21 They carried the whole thing through.
22 Q And you said that you'd been in the Sheriff's Office awhile.
23 I'm wondering has the Sheriff's Office used video for the
24 last ten years?
25 A Are you -- car video?

1 Q Car video or other video that's associated with their work.
2 A The detectives use video. And the deputies have video, but I
3 don't -- I don't think it's ten years old.
4 Q What about five? Do you think that it's been around for five
5 years?
6 A I would think so, yes.
7 Q And did you ever get requests for video?
8 A Yes.
9 Q And how did you respond to those?
10 A Gosh, I only had -- I think -- I would call the Prosecutor's
11 Office. Tell them what I had. "Can I get the video? Send
12 the video." Sometimes they said "yes, no problem." Other
13 times have them get the request -- request it from us. And
14 it was usually an attorney requesting it. And they say "They
15 need to do that under discovery."
16 Q So I guess the first question is: So you get a request in
17 for video. How do you go about determining whether there's a
18 video?
19 A Oh, I open up the case and I look in the involvements to see
20 if there's something that might say "photos." I also look at
21 the -- I want to say the top. And to look and see if there's
22 pictures. And if there's pictures, there might be a video.
23 Q And when you say you open up the case, is there an electronic
24 case management system that you're opening?
25 THE WITNESS: Is that Spillman?

1 A I would say it's Spillman. I'd open up Spillman and --
2 Q And Spillman is what?
3 THE WITNESS: What do you call Spillman?
4 MR. ZEMPEL: It's a case management system.
5 MR. WILLIAMS: Okay.
6 Q (By Mr. Williams) And so -- so you get a request. If you got
7 requests for video, you would open that up and look to see.
8 Would there be a link to the video there? Or how would you
9 determine if there was a video associated with it?
10 A Yes, there would be a link.
11 Q And would the link be an actual link to the video, or a link
12 to a location where the video was being stored?
13 A A link to where the video is stored.
14 Q Okay.
15 A I think once in a while depending on the deputy you could get
16 it right -- right at that part there. You wouldn't have to
17 go to another area.
18 Q And had you been trained on responding to requests for video?
19 A I can't say specifically that I had.
20 Q Was there -- is there anything that you can recall that's
21 different about responding to requests for video than
22 responding to requests for, say, police records, incident
23 reports and so forth?
24 A Well, are there other people in that video? You know, the
25 officer and the victim, but if there's a bunch of kids or

1 something, that's kind of touchy.
2 Q Okay. Can you spell that out a little bit? So if there --
3 you said if there are other people in the video. What --
4 what impact does that have on your analysis as to whether the
5 record can be disclosed?
6 A Well, if it's children, you have to find -- I think children
7 I just can't disclose it. I call the Prosecutor. If there's
8 any questions, I just call the Prosecutor's Office.
9 Q And if there aren't kids in the video, but there are officers
10 in the video --
11 A Okay.
12 Q -- then it can be disclosed?
13 A (Nods.)
14 THE REPORTER: Is that "yes"?
15 THE WITNESS: Yes. Sorry.
16 Q If there are officers in the video who are not being charged,
17 or were not charged with a crime, does that change whether
18 the video can be disclosed?
19 A Witnesses.
20 Q They could be witnesses.
21 A Yeah. I probably would call the Prosecutor, but probably
22 they would get it. I mean, it would -- there would be no
23 issue.
24 Q Did you ever redact videos before you released them?
25 A I have not done that.

1 Q And can you tell me one more time the name of your record
2 management system?
3 A Spillman.
4 Q Spillman. Other than Spillman, is there anywhere that you
5 looked for videos if there was a request for video?
6 A There's a box in the records room that I can look.
7 Q And did you look through that sometimes for videos?
8 A Yes.
9 Q And that box contained DVD's or something?
10 A Yes.
11 Q Anywhere else?
12 A Did I look for videos anywhere else?
13 Q Yes.
14 A Other than Spillman?
15 Q Other than Spillman and in that box?
16 A No.
17 Q What about police records like incident reports and so forth.
18 Did you first look in Spillman for those?
19 A Yes.
20 Q Is there anywhere else that you looked for those records?
21 A I'm a little confused on the question. I looked in Spillman
22 to see if there is a record.
23 Q Uh-huh.
24 A The ones that have not been scanned, then I would go
25 sometimes into the records room and sometimes into storage to

1 find a hard copy of it.
2 Q Okay. So that -- that helps me.
3 So I'm understanding now from what you said -- and
4 please tell me if I'm off course -- Spillman mostly has
5 information that there was a case?
6 A Yes.
7 Q And then the actual documents aren't scanned and attached to
8 the computer record? They're kept physically somewhere else?
9 A No. They are now -- that used to be true, yes.
10 Q Uh-huh.
11 A They are now scanned and attached to the Spillman report.
12 But we do have a hard copy of that case.
13 Q And how long have they been scanned, if you recall?
14 A Well, I generally scan them after -- after I've entered them,
15 they're scanned.
16 Q So when you say "I did that," is that for cases that ended up
17 as Public Records Act requests, or is that your general --
18 did you have another job responsibility where it was your job
19 to scan records as they came in?
20 A That second.
21 Q Okay. So you -- also part of your job was to electronify
22 records? Scan them and get them into the system that way?
23 A Yes.
24 MR. ZORETIC: Electronify? I like it.
25 MR. WILLIAMS: Yeah. I'm as old as I look.

1 Q (By Mr. Williams) And so you -- if you got a request for a
2 police record, you'd look in Spillman. And would there be
3 anywhere else that you would look?
4 A If it's a current -- oh, let's see how do I say it? If
5 they're asking for a current date, within the last seven
6 years probably, that would tell me where to go and look. If
7 they were asking for a 1995 case -- or let's see. Not 19 --
8 an outdated case, I would look to see if we had a paper copy
9 somewhere.
10 But I have to look in Spillman first to kind of figure
11 out what direction to go.
12 Q So if you look in Spillman and there was no record of
13 something, that for you was a complete search? Is that fair?
14 For -- let's say someone came in -- let me give you a --
15 A Yeah.
16 Q -- there are so many different variables -- looking for a
17 2013 police report --
18 A Yes.
19 Q -- and you looked in Spillman and there was no such record.
20 You'd look under the name, under the incident report. You
21 don't find it.
22 Is that a complete search for you in response?
23 A Then I -- then I would also look to see if there was an entry
24 which would tell me that Dispatch put something in. And at
25 that point I would tell whoever, the person, that you need to

1 file a request through KitCom because no formal report was
2 made. There's a notation in KitCom.
3 Q And KitCom, explain to me what that is.
4 A It's the dispatch. It's 911 dispatch.
5 Q Okay.
6 A Kittitas County Communications Center.
7 Q And are you able in the Spillman system to see Dispatch
8 notes?
9 A Some. Not the -- a little bit of them. Not -- not the whole
10 thing.
11 Q And what determines whether it's in the Spillman system or
12 not?
13 A Do you mean are we talking just --
14 Q KitCom.
15 A -- Dispatch?
16 Q Yeah.
17 A I have no clue what -- you know, how -- how -- their
18 operation.
19 Q Okay. But in your experience, sometimes the KitCom records
20 are in there but maybe sometimes not? Is that fair?
21 A Yes. I would say most of the time they are there.
22 Q And have you had any training about the KitCom system?
23 A No. Well, no, I -- not -- I mean, they train us -- I think
24 I've gone up to KitCom a couple of times. But only to kind
25 of view the operation. But as for sitting down and training,

1 I have not had any training.
2 Q And did you receive any training about whether the status of
3 a person as a party to a record changes in availability of a
4 record?
5 A I -- oh, gosh. I don't --
6 Q Let me give you a hypothetical. Someone walks in and looks
7 for a record.
8 A Uh-huh.
9 Q If that person is not a party to the incident that they're --
10 A Right.
11 Q -- wondering about, does that have any difference in how you
12 respond in a Public Records Request?
13 A All they -- all the identifying information would be taken
14 out of the parties. So you would get time, the date. You
15 wouldn't get the specific location. You would get an address
16 minus the street numbers. You wouldn't get telephone
17 numbers, dates of birth.
18 Q Would you get narratives?
19 A With all the names taken out.
20 Q Would you get photos?
21 A If photos were in there, I would look at the photos. If
22 there was nothing identifying people, then yes. I mean,
23 pictures of -- if there was a car in there with their
24 driver's -- with their license on it, I would take that
25 license. You know, I'd make sure that that license was

1 not -- the license would be redacted.
2 Q And what about for videos? Would those be available?
3 A But I don't -- I didn't redact video. That has to go -- that
4 goes -- I don't do it. Never redacted a video.
5 Q Did you ever release a video to a nonparty?
6 A No.
7 Q Was one ever requested?
8 A By -- was a video ever requested by a noninvolved party?
9 Q Right.
10 A Yes.
11 Q And did you release the videos?
12 A I didn't have one.
13 Q And there's a system that you used for public records called
14 DaRT; is that correct?
15 A Yes.
16 Q What is the role of the DaRT system?
17 A I always thought it was to make sure we respond within five
18 days either with a letter to tell them we can't do it, or we
19 have released the information requested.
20 Q So how did that work? If you upload a request --
21 A Uh-huh.
22 Q -- do you scan the actual physical request into the system?
23 A Uh-huh.
24 Q And then do you also put a summary in through text?
25 A I scan the request.

1 Q Uh-huh.
2 A I scan the documents that are going to be released to the
3 person, but I didn't write in a summary of what I released.
4 I said "released attached documents."
5 Q And did you write a summary of what the request was?
6 A I wrote what they said. I didn't summarize it. I just wrote
7 what --
8 Q Verbatim?
9 A Yeah.
10 Q And does the DaRT system have a calendar attached that then
11 alerts you if something is due? How does it help you manage
12 the deadlines for PRA requests?
13 A Well, I -- did it have a calendar? I do not know the answer
14 to that.
15 Q And other than being the place where you could scan the
16 requests and upload the responsive documents, what did you
17 use DaRT for?
18 A That's all I used it for.
19 Q Did you do -- if you responded with a letter, was that also
20 uploaded into DaRT?
21 A Correct. Correct.
22 Q And if you couldn't fulfill a request within five days, was
23 it your standard practice to send a letter out?
24 A I would call -- I'd call them first and tell them that I, you
25 know, couldn't. And then I would send a letter, and scan it

1 in. Outside of that DaRT I would I have a tickler where I
2 knew "These are the ones I'm working on." And if I sent, you
3 know, I will have an installment -- first installment within
4 two weeks. Then I would -- you know, I would be working on
5 that.
6 As soon as I got everything together for the first
7 installment, I would send them a letter that told them
8 that -- how much money they needed to send me, and I would
9 send them that information. Then I'd wait until I had -- had
10 the check. Send that along with the receipt. Then I'd work
11 on installment two and do the same process.
12 Q And did you sometimes -- it sounds like you sometimes got
13 requests that were relatively large; is that correct?
14 A Yes.
15 Q And how did you determine whether a request was large enough
16 that you needed to do it in installments?
17 A Just looking at the involvements of the person that -- "I
18 want any and all reports from 2000," let's say, "2 -- I want
19 any and all reports of Joe Schmuck that the Kittitas County
20 Sheriff has." I would look at Joe Schmuck's involvement.
21 Look to see, you know, how many there are. And just quickly
22 stay "Oh, there's more than -- there's a lot more than 10.
23 This is going to take a while." And that's what I tell them.
24 I tell them "I have 30 involvements. I will break this
25 down."

1 Q And what -- and so you sent them update letters then? First
2 a letter saying "we have gotten your request." And then a
3 letter saying "We're going to need to do it in installments."
4 Did you ever talk with them whether they had
5 priorities as to which documents they wanted first?
6 A Before I sent a letter, I would talk to the person. And,
7 yes, I -- and they generally would -- a lot of times they
8 would say "Oh, I only want the last two years." Well, that
9 shortened it completely.
10 Q And then what would you do after they told you that they only
11 wanted the last two years?
12 A I would write it on their request. I'd put the date I talked
13 to them, the time I talked to them, and "Decided only wanted
14 the last two years."
15 Q Did you send them a confirming letter?
16 A No, I don't think I did.
17 Q And it looks like there came a time when you started to train
18 Kallee. That's K-A-L-E-E?
19 A Kallee.
20 Q Kallee. Knutson, K-N-U-D-S-O-N; is that correct?
21 A I don't know if the spelling is correct, but yes.
22 Q Yes. Fair enough. I was trying to do that for the court
23 reporter.
24 And do you recall when that was?
25 A When she was employed. I don't know when she started

1 employment, but I don't -- as for the date, no, I don't know
2 the date.
3 Q Was it soon after she started?
4 A Yes.
5 Q And how did you go about training her?
6 A Showed her what I did. Showed her "This is how I did it.
7 This is an example of an exemption log. And, you know, make
8 sure you take out this." And she just started with the
9 real -- the simple ones; an accident report from the
10 insurance company. Those are pretty simple to do. So that's
11 how she was started out.
12 Q Did you use any materials to help train her?
13 A Do you mean the books? Well, the books that I received in my
14 training.
15 Q So how did you use those to help train her?
16 A Just showed her the books. And there are certain -- showed
17 her the books. "This is where it's at. Here are my notes.
18 And feel free to use them."
19 Q And the -- by "books," do you have specific books in mind?
20 A Books I received at trainings.
21 Q So were they like PowerPoint presentations, that kind of
22 thing that we're talking about?
23 A Well, it was a PowerPoint at the training, but we had a book.
24 Q A booklet of the PowerPoint?
25 A Uh-huh.

1 Q Did you have any hardcover books?
2 A No.
3 Q And you don't remember -- I would imagine you don't remember
4 which PowerPoint presentation you had that you gave her?
5 A No.
6 Q And did you consult those materials before you filled
7 reports?
8 A Sometimes, yes.
9 Q What would determine whether you consulted the materials?
10 A If I wasn't sure if I needed to redact that.
11 Q And in your training, did you learn anything about whether it
12 was proper to inquire about the reasons behind a request?
13 A Yes. They told us "If you don't understand the request, to
14 call them up for clarification."
15 Q And what were you supposed to clarify?
16 A Their request.
17 Q And when you say "their request," the words of their request?
18 A Yes.
19 MR. WILLIAMS: I am going to mark this as Exhibit
20 1.
21 (Exhibit No. 1 marked.)
22 Q (By Mr. Williams) Can you review that document, please.
23 Do you recognize this document?
24 A Yes.
25 Q Is that your signature on page 2?

1 A Yes.
2 Q And you've just had a chance to review this. Reviewing it
3 today, do you see anything that's inaccurate in this
4 document?
5 A On No. 6 we do not have any video. The photos I don't think
6 should be there due to the passage of 90 days and lack of
7 server room I -- would be more correct.
8 Q Okay. So I think I understand that. We'll go back through
9 that in a little bit. Anything else?
10 A No.
11 Q Do you recall this June 29 Public Records Request from
12 Randall Hoffman?
13 A I guess I do, yes.
14 Q Okay. And this quotes that request is "All police reports
15 and other info available for Erin Schnebly. Pictures,
16 videos, reports."
17 Is there anything ambiguous about that request?
18 Requesting all police reports and other --
19 A I don't understand what you're asking.
20 Q Sure. I'm asking if there's -- if there's something you
21 don't understand about that request that starts out "All
22 police reports..." and ends also with the word "reports."
23 A Well, reports two times in there? Is that what you mean?
24 Q No. I'm asking --
25 A I don't know.

1 Q Okay. So I'm asking is there something about this request
2 that required a clarification?
3 A When I looked up this Erin Schnebly, I saw the reports that
4 we had. I looked at each individual one. There were no
5 photos. There were no pictures on each one. So I called him
6 and told him that we had reports. There were no videos.
7 There were no pictures.
8 Q And when you say you looked it up, did you look it up in
9 Spillman?
10 A Yes.
11 Q And did you look anywhere else?
12 A No.
13 Q Then in Paragraph 5 you say on or about June 30th you
14 contacted him to clarify his request.
15 A Uh-huh.
16 Q Then you write "because he wasn't involved in any of the
17 reports."
18 A That's correct.
19 Q What significance does that have?
20 A When I did not find his name in there, I thought that I was
21 missing something, a report, because he wasn't involved in
22 any of these.
23 Q Is that it?
24 A Yes.
25 Q And then did you ask him to clarify what he meant by "all

1 police reports"?
2 A I told him what I had.
3 Q And you told him that you had no videos?
4 A Correct.
5 Q You told him that you had no pictures?
6 A Correct.
7 Q Did you also tell him that you couldn't provide him with the
8 full police reports?
9 A I told him -- I asked him -- I told him the nature, and I
10 said "Do you want the report or do you want just the nature?"
11 "The nature is fine."
12 Q So your testimony is that he said "I don't want pictures,
13 videos, and reports. I just want the nature"?
14 A I told him I didn't have any photos or videos. I did have
15 reports. Does he want the full report or just the nature.
16 "I just want the nature."
17 Q And that was his quote?
18 A Yes. "I just need the nature."
19 Q And then Paragraph 8 you redacted some documents. I'm not
20 going to make an exhibit right now, but I just want to know
21 is that a face sheet?
22 A That's the face sheet.
23 Q Okay.
24 MR. ZEMPEL: You want to make a copy of it so you
25 can make it an exhibit?

1 MR. WILLIAMS: I -- I don't think so. I mean, we
2 can talk about it after the break. Thank you.
3 Q (By Mr. Williams) And was it your practice to only provide
4 face sheets to people who asked for reports, videos, and
5 photos?
6 A No.
7 Q So in general you were providing more information?
8 A I asked -- yes, if they -- if he would have said to me "No, I
9 want the report," he would have gotten the report with
10 redactions.
11 Q Was it you that suggested that he get less than the full
12 report?
13 A No. I asked him "Do you just want" -- well, he told me he
14 wanted the nature of the report. I provided him with the
15 nature of the report. But I can't say that I am the one that
16 suggested that.
17 Q And you didn't send any written confirmation of that call; is
18 that correct?
19 A I noted it on his report request.
20 MR. WILLIAMS: Make this Exhibit 2.
21 (Exhibit No. 2 marked.)
22 Q (By Mr. Williams) Is this the -- his request?
23 A I think so.
24 Q And are these your notes --
25 A Yes.

1 Q -- underneath "2009 to 2015, face sheets only."
2 A Uh-huh.
3 Q And also your notes on the lower, left corner of the case
4 numbers?
5 A Correct.
6 Q Did the four cases that came up, did that seem like a
7 burdensome request?
8 A No. No.
9 Q Would that have been an expensive request for Mr. Hoffman?
10 A No. Well -- no.
11 Q I'm trying to understand what your practice was. So if
12 somebody asks for all police reports, including pictures,
13 videos, and reports, do you normally call them up and ask
14 them "Do you really want the police report?"
15 A No.
16 Q So what made -- why would you do that in Mr. Hoffman's case?
17 A Because I -- I didn't have videos. I didn't have photos. I
18 didn't have photos and I didn't have video. So I called him
19 to let him know that I don't have these things. I do have
20 reports. I do have four reports, and they are -- I told him
21 basically what they were.
22 Q And do you recall after -- do you recall anyone listening to
23 your conversation with Mr. Hoffman?
24 A No, I don't think so.
25 Q Do you recall having a conversation after getting off the

1 phone with Mr. Hoffman with Ms. Knudson?
2 A I do not recall.
3 Q And then it says Paragraph -- well, it says Paragraph 7, but
4 it goes 8, 7, 8. So it's the Paragraph 7 that's on page 2.
5 A Okay.
6 Q It says "I contacted Mr. Hoffman to follow up on his request
7 and confirm he had received what he needed, and he indicated
8 he had." And that conversation happened on or about
9 September 14th, 2015; is that correct?
10 A That is correct.
11 Q What do you recall about that conversation?
12 A What's written down there in No. 7. And he said he was
13 actually looking for an accident report.
14 Q An accident report about Stephanie Crowdy?
15 A And then he did elaborate, yes, that name. I think that's --
16 I don't remember her name, but I remember he elaborated a
17 person.
18 Q Do you remember how long that conversation took on
19 September 14th?
20 A No, I don't recall because I kept him on the phone as I
21 looked for this report.
22 Q For the Stephanie Crowdy report?
23 A Correct.
24 Q Was it your intent to just give him a face sheet on that
25 report as well?

1 A No. I mean, I had to look and see what was going -- what --
2 I had no intent at that time because I didn't have an
3 accident report and I thought that is unusual. And then I
4 thought "Well, maybe the monetary value was under $1,000 or
5 it happened on private property and they chose not to report
6 it." Because there was no involvements with Stephanie that I
7 could find.
8 Q When you look on the Spillman system, can you tell how long a
9 police report is, how many pages?
10 A Not until I open it up.
11 Q Okay. So did you have any idea when you talked to
12 Mr. Hoffman on June 30th how many pages were involved in
13 these reports?
14 A No.
15 Q And I may have been over this, but I just want to make sure
16 that I've asked you this.
17 Did you look for photos anywhere other than in the
18 Spillman system?
19 A On these four reports?
20 Q Correct.
21 A No.
22 Q And did you reach out to anyone in the Sheriff's Office about
23 whether there might be video or if there were photos of any
24 of these incidents?
25 A No.

1 Q And did you ever -- not just on June 30th, but ever while you
2 were employed there reach out to see if there were videos or
3 photos of these incidents?
4 A These four incidents, correct?
5 Q Correct.
6 A I can't say -- no.
7 MR. WILLIAMS: Go off the record for just a
8 second.
9 (Discussion held off the record.)
10 (Exhibit No. 3 marked.)
11 MR. ZEMPEL: This is the -- maybe this on the
12 record. This is the statement of Ms. Knudson to Sergeant
13 Panattoni?
14 THE WITNESS: Yes.
15 MR. WILLIAMS: Yeah.
16 Q (By Mr. Williams) I have handed you what has been marked as
17 Exhibit 3. It's a statement dated March 17th, 2016, from
18 Kallee Knudson to Sergeant Panattoni. It is signed and
19 executed on March 21st on its last page.
20 There are a couple of markings in the margins of a
21 little star and a couple of lines on the first, second, and
22 third pages. Those are my markings and I apologize for not
23 having a clean copy. Nothing to do with what she wrote or
24 what you did.
25 If you'd take a minute, I'm going to ask you some

1 questions about this document. So if you could read it
2 please.
3 A Uh-huh.
4 Q You had a chance to read this?
5 A Uh-huh.
6 Q Reading this document, does that refresh your recollection at
7 all about a conversation you might had have with Ms. Knudson
8 after your phone call with Mr. Hoffman on or about June 30th?
9 A Vaguely.
10 Q And when you say "vaguely," what -- did you just now remember
11 that it might have happened?
12 A No.
13 Q Do you remember details?
14 A No, I don't remember details, but I remember the fact that,
15 yes, she asked me questions.
16 Q Do you have any recollection at this time about details that
17 would be different than what she has written down? You may
18 not remember the details, but I'm wondering if you do
19 remember anything that's different than what she's written
20 down.
21 MR. ZEMPEL: And is that comparing what else
22 you've put in front of her, like Exhibit 1 and Exhibit 2,
23 or -- or just the conversation?
24 MR. WILLIAMS: Just -- just the conversation.
25 Just --

1 Q (By Mr. Williams) I'm just looking for this, if it happened,
2 conversation with --
3 A Yes, it happened.
4 Q Okay. And other than the fact that it happened, it sounds
5 like maybe you don't remember anything else. I'm just trying
6 to clarifying if that's the case.
7 A That is correct.
8 Q Okay. Thank you. And then she talks at the bottom of page 2
9 and starting on page 3 about some followup in early
10 September.
11 And do you remember any conversations you had in
12 September prior to your conversation with Mr. Hoffman that
13 people were concerned about how this was completed or had
14 questions about how it was completed?
15 A Prior to my talking to him the second time?
16 Q Yes.
17 A No.
18 Q And what prompted your call, then, if you recall why you
19 called him in September?
20 A Steve asked me to call him.
21 Q And did he explain why -- Steve is Sergeant Panattoni?
22 A Panattoni. Yes.
23 Q Panattoni. And did Sergeant Panattoni explain why he wanted
24 you to call Hoffman?
25 A To see if the information I had provided him was what he was

1 looking for and was he satisfied.
2 Q At any point did you suggest that you might have further
3 records that you could provide him?
4 A Not then, no. I -- no. I did not indicate I had further
5 records. I didn't think I did.
6 Q Let's go back to Exhibit 1, which is your statement.
7 A Yep.
8 Q Paragraph 10 you say "I've been informed that Mr. Hoffman
9 claims I know Erin Schnebly and her immediate family. I
10 recognize the name as a prominent one in the area, but I do
11 not know her or her immediate family."
12 Did I read that correctly?
13 A That is correct.
14 Q Do you know if your kids are friends with Erin?
15 A No, I do not know if my children --
16 Q So you don't have any -- as you sit here now, you didn't
17 handle -- well, let me just ask you. Did you handle
18 Hoffman's request differently because Erin Schnebly was the
19 subject of that request?
20 A No.
21 Q Did you handle Mr. Hoffman's request in any special way
22 because of who Mr. Hoffman was?
23 A No.
24 Q Did you handle Mr. Hoffman's request according to your
25 training?

1 A Yes.
2 Q Did you handle Mr. Hoffman's request in the same way you
3 handled similar requests throughout your time at the
4 Sheriff's Office?
5 A I believe, yes.
6 Q And is it your understanding that if a request is clear, a
7 Public Records Act request is clear, it should be fulfilled
8 as submitted?
9 A If it's clear, yes.
10 Q Where did you get the information that videos are only
11 maintained for 90 days?
12 A From IT.
13 Q And do you recall whether there were any exceptions to that
14 policy?
15 A If it's currently being prosecuted.
16 Q Is that the only exception you know of?
17 A Yes.
18 Q And so was it your policy that if -- if someone asked for
19 videos that were older than 90 days, you did not search for
20 them?
21 A Oh, no. I'd search for them.
22 Q Where would you search for them?
23 A I would look in Spillman to see if we had downloaded it. If
24 we had downloaded it, I have a disk.
25 Q And did you explain to Sergeant Panattoni what search you had

1 done to look for videos and photos for Mr. Hoffman's request?
2 A No.
3 MR. WILLIAMS: Let's go off the record for a
4 minute.
5 (Exhibit No. 4 marked.)
6 MR. WILLIAMS: We're back on record.
7 Q (By Mr. Williams) The court reporter has handed you what has
8 been labeled Exhibit 4. Would you look at that, please. Let
9 me know when you have had a chance to review it.
10 A Uh-huh.
11 Q Are you ready?
12 A Uh-huh.
13 Q So the -- on the very first page there is what looks to me
14 like a Post-It. Do you recognize that handwriting?
15 A It's not mine.
16 Q Okay. And on the second page there are -- there's some
17 marking on the middle of the page. I think it says "Make the
18 A-D-D" --
19 A "...additional two copies of report when picked up."
20 Q Is that your writing?
21 A Correct.
22 Q And why did you want two additional copies of report made?
23 And this is in response to the Hoffman request; is that
24 correct?
25 A No, I don't know.

1 Q You're not sure if it is? Do you recall --
2 A That is correct. I'm not sure if that's part of his original
3 request, correct.
4 Q And do you recall making a note that two additional copies of
5 the report should be made?
6 A No.
7 Q And do you have any idea why you would have made that note?
8 A No, I do not -- I do not know unless -- no, I don't know.
9 MR. ZEMPEL: Can we maybe put it in context. Do
10 we know if this was in the Hoffman file or --
11 MR. WILLIAMS: I believe it was. I don't want to
12 jump up on the table and say -- I think that these things
13 were together in somebody's file because this is the
14 exemption log. This is the request. And I think these two
15 things were placed on it. But the way I got the documents,
16 it wasn't -- it wasn't always crystal clear to me so --
17 MR. ZEMPEL: The reason I just asked this kind of
18 looks like a stand-alone type page. But I wasn't recalling
19 it but -- I'm sorry. I didn't --
20 MR. WILLIAMS: That's all right. Let's go off
21 just a second.
22 (Discussion held off record.)
23 Q (By Mr. Williams) And do you recognize the handwriting --
24 A Uh-huh.
25 Q -- of this note in the middle that says -- starts "Videos"?

1 A Uh-huh.
2 Q Whose handwriting is that?
3 A Mine.
4 Q And -- but you're not sure if that -- this involves the
5 Hoffman --
6 A That's correct.
7 MR. ZEMPEL: Is that your writing at the bottom?
8 THE WITNESS: Yeah.
9 Q And on the third page that's the Hoffman request again,
10 correct?
11 A Correct.
12 Q And the fourth page is the redaction log. Did you make this
13 redaction log for the Hoffman request?
14 A I don't -- I would say no, I didn't. The way it's identified
15 at the bottom, Christie --
16 Q Yes.
17 A -- there's nothing in here to indicate to me that -- Christie
18 is not -- how do I say that? I might have called it "Erin."
19 But there's no reason I would have called it "Christie." I
20 don't know -- I don't recall a Christie being involved in
21 anything. It -- it seems an -- well, I -- if I would have
22 been -- if this would have been mine and this is Hoffman's
23 request, I would have put "Hoffman."
24 Q And would it have been your normal procedure to do the
25 exemption log for a request that you were fulfilling?

1 A Yes.
2 Q If we look at the first column it says -- it's got a set of
3 numbers and it says "violate court order."
4 A Uh-huh.
5 Q Do you know what that means?
6 A That was the reason they invest -- that they investigated
7 this case. She must have violated a court order.
8 Q That involves one case number?
9 A Yes.
10 Q That's the --
11 A The incident.
12 Q The incident. And then your exemption is --
13 A The way I did it.
14 Q -- so that the --
15 A Yes.
16 Q -- exemption claim is RCW 42.56.050?
17 A Yes.
18 Q And that's the only exemption claimed, correct?
19 A Correct.
20 MR. ZEMPEL: Before we move on, can I ask you a
21 question?
22 MR. WILLIAMS: Absolutely.
23 MR. ZEMPEL: So I'm looking at Exhibit 4, which
24 has the original request. It has -- which is perhaps
25 duplicate -- a duplicate too in some ways, it looks like.

1 But it has what I would call "IR numbers" down
2 there.
3 THE WITNESS: Uh-huh.
4 MR. ZEMPEL: There's four IR numbers.
5 THE WITNESS: Uh-huh.
6 MR. ZEMPEL: Do we know if those four IR
7 numbers -- and I'm asking this because of the issue of the
8 "Christie" at the bottom. Do we know if this document
9 type -- that looks like a Superior Court number that's listed
10 there, SO9-00236.
11 THE WITNESS: Yeah.
12 MR. ZEMPEL: Does that -- that number correspond
13 with any of the incident numbers that are on the Hoffman
14 request?
15 THE WITNESS: Yes.
16 MR. WILLIAMS: Yeah. I don't understand it.
17 MR. ZEMPEL: Okay.
18 MR. WILLIAMS: I agree. But, yes. So that's why
19 I'm asking the questions. And, again, I can say this on the
20 record. While I appreciate your question, there are so many
21 papers and they were together, and sometimes it's not --
22 wasn't clear to me which thing was which.
23 Is this going to be 5?
24 THE REPORTER: Yes.
25 Q (By Mr. Williams) I'm going to give you what's marked as

1 Exhibit 5.
2 (Exhibit No. 5 marked.)
3 Q Have you had a chance to look at the document?
4 A Yeah.
5 Q Do you recognize what kind of document it is?
6 A It's that printout from DaRT.
7 Q Okay. And I realize you may not have seen this exact
8 document before. Have you seen documents like this before?
9 A Gosh, I haven't -- no.
10 Q Do you know how it was created?
11 A Yes.
12 Q How was it created?
13 A I think you just print out the DaRT history, I think.
14 Q Okay. And so starting at the top, the very first thing on
15 the first page says "Police Reports." Is that -- is that
16 like a pull-down field in DaRT, or do you write that in each
17 time?
18 A Write in it.
19 Q Okay. And I guess the same with all of these. Are these --
20 do you write these in or -- do you know what I mean by
21 pull-down menu where you click it and you have four or five
22 choices? Are these all just you writing or some of the
23 things you click and you fill in?
24 A The dark one is kind of a -- is just automatically filled
25 because of the date requested. But everything else I think

1 you have to add.
2 Q Okay. Thank you. And if you look on page 2, it looks like
3 you entered a note about the phone call with Mr. Hoffman on
4 September 14th?
5 A That's correct.
6 Q And then under that it says at 12:05 "Internal communication
7 from Sheriff to lead PDO has been added to DaRT."
8 What does that refer to?
9 A I don't know what that refers to. I don't know what that
10 refers to. Unless it -- well, I don't know.
11 Q And that would -- would there be anywhere else to look to
12 explain that? Anywhere else that note might be other than in
13 the DaRT system?
14 A Well, the only thing I can think of is, oh, that it refers to
15 this, just saying that I put internal -- that I put internal
16 information in there.
17 Q I'm going to hand you --
18 (Exhibit No. 6 marked.)
19 Q I'd just like to ask you a couple of questions about it. Are
20 you ready?
21 A Uh-huh.
22 Q Does it look like a relatively, at least, complete list of
23 your training?
24 A Well, I was very derelict in not putting everything in, but,
25 yes, this is pretty good.

1 Q Are there any trainings you had on public disclosure work
2 that sticks out in your mind that are not on here?
3 A I have had two trainings with Ramsey Ramerman. I know that
4 for sure.
5 Q And is that --
6 A So one of them is not on here.
7 Q And Ramsey Ramerman is the person -- there's the 2/18/2009?
8 A That is correct, yes.
9 Q Do you think the other training was before that one or after
10 that one?
11 A After that one.
12 Q And the very last one on here, 10/29 --
13 A Uh-huh.
14 Q -- NIBRS, does that have anything to do with public records?
15 A NIBRS? Gosh, that's -- in a roundabout way it could.
16 Q Well, I don't want to belabor it if it's not very relevant.
17 But when you say "roundabout way," was it about how to
18 respond to public records?
19 A No.
20 Q And the same with the one above it, LEI --
21 A LEIIRA. That's -- they discuss everything.
22 Q Discuss everything means?
23 A Well, there could be there -- could be public records. There
24 could be gun safety, sexual assault, Spanish -- Spanish --
25 conversational Spanish. It could be a wide variety.

1 Q So you don't remember exactly what was in that training?
2 A Nope.
3 Q Fair enough. And what is -- what does that stand for then,
4 if you recall? Or what kind of training -- is it training
5 for people that worked in --
6 A Records.
7 Q -- records? Okay.
8 And then looks like you've got -- what's WCIA? Looks
9 like the last training on here that is specifically focused
10 just on PRA. Do you remember what organization that is?
11 A No.
12 Q But Washington counties, is that --
13 A Could be.
14 Q Okay.
15 A I do not know. These acronyms I --
16 Q Yep. Fair enough.
17 As you sit here today, do you feel that the Hoffman
18 request that was initially fulfilled in June 2015 was
19 properly filled, properly responded to?
20 A Yes, after talking to him.
21 MR. WILLIAMS: That's all I have.
22 THE WITNESS: On this statement --
23 THE REPORTER: Off the record?
24 MR. WILLIAMS: Yeah.
25 (Discussion held off the record.)

1 EXAMINATION
2 BY MR. ZEMPEL:
3 Q So the only thing I guess I'd ask on this -- and just to
4 clarify the question I was asking in your testimony -- you
5 were not entirely certain that page 2 of that document is
6 actually related to the Hoffman matter; is that correct?
7 A That's correct.
8 Q And page 4 of Exhibit 4, which is the exemption log, you're
9 not entirely certain that's an exemption log that you created
10 for the Hoffman case?
11 A Is that the one that says "Christie" at the bottom?
12 Q Uh-huh.
13 A Correct.
14 MR. WILLIAMS: I beg your indulgence. Let me
15 just look to see if I actually have an exemption log.
16 MR. ZEMPEL: Okay. Go off record for a second.
17 (Discussion held off the record.)
18 MR. WILLIAMS: I just have one other question.
19 FURTHER EXAMINATION
20 BY MR. WILLIAMS:
21 Q Does this just mean that your system creates an e-mail when
22 an entry is made?
23 A Yes.
24 Q Okay. That's all I wanted to know because I have some of
25 these. And I didn't know why I had them.

MR. ZEMPEL: Yeah.

MR. WILLIAMS: That's it. Thank you.

(Concluded at 12:10 p.m., signature reserved.)

CERTIFICATE OF WITNESS

STATE OF WASHINGTON)
COUNTY OF CHELAN)

I, CAROLYN HAYES, declare under penalty of perjury under the laws of the State of Washington, that I am the witness named in the foregoing deposition and that I have read the questions and answers thereon as contained in the foregoing deposition, consisting of pages 4 through 47; that the answers are true and correct as given by me at the time of taking the deposition, except as indicated on the correction sheet.

_____
CAROLYN HAYES

Executed on the _____ day of _____ 2016, at _____, _____.
(City) (State)

HOFFMAN, vs. KITTITAS COUNTY
September 20, 2016

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REPORTER'S CERTIFICATE

I, ALISON J. SOSA, Certified Shorthand Reporter, do hereby certify:

That the foregoing proceedings were taken before me at the times and place therein set forth, at which time any witnesses were placed under oath;

That the testimony and all objections made were recorded stenographically by me and were thereafter transcribed by me or under my direction;

That the foregoing is a true and correct record of all testimony given, to the best of my ability;

That I am not a relative or employee of any attorney or of any of the parties, nor am I financially interested in the action;

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 30th day of September, 2016.

_____
ALISON J. SOSA, CCR
CCR # 2575
Notary Public in and for the State of Washington, residing at Wenatchee.

My commission expires on October 31, 2016.

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Exhibit 2

DEPOSITION OF KALLEE KNUDSON

1 SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

2 RANDALL HOFFMAN,)
3 Plaintiff,)
4 vs.) NO. 16-2-00063-3
5 KITTITAS COUNTY, a local agency and the)
KITTITAS COUNTY SHERIFF'S OFFICE, a)
6 local agency,)
7 Defendants.)

8

9 DEPOSITION OF KALLEE KNUDSON,

10 Taken at the instance of the Plaintiff

11

12 September 20, 2016

13 12:52 p.m.

14 Kittitas County Courthouse
205 West 5th, Suite 213
15 Ellensburg, WA

16

17

18 BRIDGES REPORTING & LEGAL VIDEO
Certified Shorthand Reporters
19 1030 North Center Parkway
Kennewick, Washington 99336
20 (509) 735-2400 - (800) 358-2345

21

22

23

24

25

BE IT REMEMBERED that the deposition of KALLEE KNUDSON was taken in behalf of the Plaintiff pursuant to the Washington Rules of Civil Procedure before Alison J. Sosa, Certified Shorthand Reporter for Washington on the 20th day of September, 2016, at Kittitas County Courthouse, 204 West 5th, Suite 213, Ellensburg, Washington, commencing at the hour of 12:52 p.m.

APPEARANCES:

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1 I N D E X

2 RANDALL HOFFMAN vs. KITTITAS COUNTY

3 No. 16-2-00063-3

4 September 20, 2016

5

6 TESTIMONY

7 PAGE NO.

8 KALLEE KNUDSON

9 Examination by Mr. Williams 11, 33

10 Examination by Mr. Zempel 29

11

12

13 PRODUCTION REQUESTS:

14 (None)

15

16 E X H I B I T S

17 MARKED IDENTIFIED REFERRED TO

18 NUMBER 2 (Hayes) 11

19 NUMBER 3 (Hayes) 5

20 NUMBER 4 (Hayes) 11, 24, 29

21 NUMBER 5 (Hayes) 12

22 NUMBER 7 17 17

23

24

25

1 (KALLEE KNUDSON, called as a witness by the
2 Plaintiff, being first duly sworn to tell the truth, the whole
3 truth and nothing but the truth, was examined and testified as
4 follows:)
5 EXAMINATION
6 BY MR. WILLIAMS:
7 Q Good morning. Can you please state your name for the record?
8 A It's Kallee Knudson.
9 Q And you are being deposed; do you understand that?
10 A I do.
11 Q You understand that you're under oath?
12 A Yep.
13 Q Have you ever done a deposition before?
14 A I have not.
15 Q So it's -- this testimony could be used in court just like
16 you were in court. So answer your questions as you would if
17 you were in court.
18 And, you know, if you have questions about whether you
19 can or should answer something, ask your attorney, not me.
20 A Okay.
21 Q He's here to protect your rights. If you need a break for
22 any reason, let me know. I don't anticipate this going on
23 for -- I know that you've got a 3:00 o'clock and we'll be
24 done by then. But, you know, if you need a break before
25 then, just ask and I'm happy to accommodate you. One thing

1 I'd ask is that if I've asked you a question, if you'd answer
2 it before you leave the room.
3 A Okay.
4 Q Okay. That would be great.
5 So we're here because my understanding is you work in
6 the Sheriff's Office?
7 A Correct.
8 Q And you work on the Public Record Act?
9 A Correct.
10 Q And you started training in about June of 2015?
11 A Yes, for public records.
12 Q For public records.
13 Have you done any public records work before you
14 started working for the Sheriff's Office?
15 A No.
16 Q And at the time you started training on public records, was
17 that with -- was that with Carolyn Hayes?
18 A Yes.
19 Q Was anyone else training you at that time?
20 A Not on public records.
21 Q I have a couple of statements that I believe that you made.
22 The first one has been marked as Exhibit 3 to the Hayes
23 deposition. There are some markings on it. They were done
24 by someone in my office. They are not, as far as I know, on
25 the original document. They're not Carolyn Hayes's. They're

1 not your attorneys.
2 A Okay.
3 Q To the extent you can, you can ignore them. But if you
4 would, please review that statement.
5 So on that last page of this, page 4, is that your
6 signature?
7 A Yes.
8 Q And it says that you signed it under penalty of perjury.
9 As you read it now, is there anything in here that you
10 think is not accurate?
11 A I don't believe so. It looks like the one I made.
12 Q And your recollection of these events has not changed since
13 you signed this?
14 A No.
15 Q So when the Hoffman request was submitted on -- we think June
16 29th. I think, that's the accurate date -- how long had you
17 been training; do you recall? Was it like a week or was it
18 all of June?
19 A I really don't know the exact dates.
20 Q And do you recall how Ms. Hayes was training you? Were you
21 just -- I'll give you some examples. Were you just sort of
22 trailing her? Did she give you books to study? What were
23 the methods by which you were trained?
24 A I was shadowing her for the most part of it. And then I was
25 given some, as we would state, easier, basic requests. And

then I would complete some of those. And she would look over them. Then I was getting to know our DaRT system, which we upload all our requests in. So mainly shadowing and just observing what she was doing.

Q Do you recall whether you were given any written documents to study about how to respond to Public Records Act requests?

A At that point for when Mr. Hoffman made his, I don't believe that I had anything other than just my own research of some RCW's and then I had questions.

Q Okay. And when you say "your own research," would you -- what do you mean by that?

A Reaching out to our Legal, asking them questions on RCW's, if there was exemption logs for specific request such as a car accident, I would just look them up under the RCW's and see if I could find appropriate ones.

Q And when you looked them up, was that just like on the Internet?

A Uh-huh. Yeah.

Q And I'd like to kind of go over this statement with you. I may have a few questions.

So you write -- and this is on the second full paragraph at the fourth line down it says "This request particularly stood out in my mind because of the process in which it was completed."

So I want to ask you what you meant by that. And I

1 want to start that process by saying had you seen Ms. Hayes
2 complete requests for police records prior to this?
3 A Yes.
4 Q And had she ever called anyone and asked them if they really
5 wanted the records?
6 A Not that I had seen.
7 Q And had -- at that time, if you recall, had anyone requested
8 video that you'd seen?
9 A I can't tell you for certain or not.
10 Q And what about photos? Do you have any recollections as to
11 whether anyone had --
12 A People -- yes, we had some for photos at that time.
13 Q And was the way that Ms. Hayes responded to the request for
14 photos different than what you'd seen her do in other
15 situations?
16 A Comparative to Hoffman's?
17 Q Yes.
18 A Yes.
19 Q And how was it different?
20 A We had supplied photos to requesters unless they were under a
21 specific exemption.
22 Q And -- and then you go on to talk about a phone call. My
23 first question is: Did you ever hear what Mr. Hoffman was
24 saying in this call?
25 A I did not, no.

1 Q You just heard Carolyn's half of the --
2 A Yes.
3 Q -- Carolyn Hayes.
4 And do you remember did she ever ask Mr. Hoffman or
5 did she ever -- start over.
6 Did she ever inform Mr. Hoffman "We have records that
7 are available. Do you want them all?"
8 A I don't know that she said that specifically. I could not
9 say yes or no to that.
10 Q Did she say -- did she tell him that there were no videos
11 available?
12 A Yes, she did.
13 Q Did she tell him that there were no photos available?
14 A I don't recall if she said there were no photos.
15 Q Did she tell him that the photos were not available to him?
16 A I can't say specifically.
17 Q And then -- but she did say -- and I'm going to read from
18 this -- that "The Sheriff's Office would not be able to
19 provide the majority of documents per specific RCW's."
20 Do you recall her saying words close to that effect?
21 A I do.
22 Q And you'd not heard her tell other requesters that about that
23 kind of document; is that correct?
24 A No, I had not at that time.
25 Q Had you -- did you subsequently hear her tell anyone that

1 about police reports?
2 A Other than Hoffman?
3 Q Yes.
4 A Not any that I had dealt with at that time, no.
5 Q Have you ever told someone that a police report isn't
6 available because they weren't a party to the police report?
7 A Only in specific situations such as sexual crimes that the
8 victim -- for pictures, example. For example, we couldn't
9 supply pictures of a sexual nature or postmortem if they were
10 not a party or a family member to a request.
11 Reports, I don't think I've ever told someone they
12 couldn't have the entire report. I've informed them that the
13 majority of it was going to be redacted because they -- they
14 weren't a party involved or they weren't a relative. So
15 under certain RCW's, I would be redacting a lot of it.
16 Q And for the -- to go back to the allegations or crimes of a
17 sexual nature, are there specific RCW's that cover those
18 requests?
19 A To redact, yeah. Yes, there are.
20 Q And so I'm on page 2 of this report now.
21 A Uh-huh.
22 Q You said you "asked Carolyn specifically what RCW covered her
23 reasoning for not providing the reports and why she would
24 only supply him with the face sheet. This conversation went
25 on for at least 15 minutes because I was having a hard time

1 understanding why she was doing this particular request So
2 differently than what I had been trained on."
3 My question here is: As you sit here now, do you
4 understand what RCW she was applying?
5 A No.
6 Q And if this request came to you now -- well, let me change
7 gears just a little bit.
8 There is an Exhibit 2 here, which is the original
9 request. Well, it's also in Exhibit 4.
10 So in Exhibit 4 that, I believe, is Hoffman's original
11 request from June. If you got that request, is there
12 anything that you feel is ambiguous about that request?
13 A What do you mean exactly?
14 Q So he requested all police reports and other info available
15 regarding an individual --
16 A Uh-huh.
17 Q -- pictures, videos, and reports.
18 Is that an ambiguous request?
19 A No.
20 Q We'll go back to your statement.
21 Did you say -- I think that there was -- was there
22 another individual around during that initial conversation?
23 A There was a -- I believe she's -- her title was a corrections
24 officer that was down helping us with office work at the
25 time.

1 Q Sorry. I found the name. Vanessa.
2 A Yeah, Vanessa.
3 Q And did she -- did she express to you that she understood
4 what Ms. Hayes was saying?
5 A No.
6 Q Did she express to you that she didn't understand what
7 Ms. Hayes was saying?
8 A Yeah. She expressed she didn't, and she also has no training
9 in public records.
10 Q And then the next paragraph says on June 30th you uploaded
11 the request to DaRT or processed it in DaRT?
12 A Correct.
13 Q And there is in Exhibit 5, Which is, I believe, a printout of
14 DaRT. Have you ever seen a DaRT printout in that form
15 before?
16 A Yes.
17 Q And so starting on the first page, that's just like the
18 initial information; is that fair, and then the request is
19 uploaded as a PDF?
20 A Correct. Yep.
21 Q And then starting on page 2 there are some entries that have
22 your name under them. Do you believe that you did those
23 entries?
24 A Yeah. If I uploaded them and my name is under them, yes.
25 Q So I just have a question. There are whole bunch of 1:20

1 entries. Did you see how that kind of goes on and they all
2 say 1:20 p.m. or 1:21 p.m.?
3 A Uh-huh.
4 Q How does that work? Is it every time you save something in
5 DaRT, does it create a new thing so --
6 A Yep.
7 Q Okay.
8 A Yeah. I can upload one document and click save really quick.
9 Upload another, click save. Anything individually uploaded,
10 it just records the time, the date, and what I had put in as
11 the title.
12 Q When you were working on the Hoffman report, did you do any
13 independent search for a video?
14 A No, I didn't.
15 Q Did you do any independent search for --
16 A Well, are -- are we talking about the first report? Because
17 I completed the second so --
18 Q Thank you. Yes. In June of 2015.
19 A Okay. No, I didn't.
20 Q And in June of 2015 did you do any independent search for
21 photos?
22 A No.
23 Q And did you in June of 2015 do any search for police records?
24 A No.
25 Q And then on page -- probably on -- there are several pages,

1 but on page 3 it says "Exemption Log."
2 Did you write the exemption log for this matter?
3 A No.
4 Q Do you know who did?
5 A I believe Carolyn did.
6 Q Okay.
7 A But I couldn't -- you know, I didn't watch her do it so --
8 Q But you uploaded one to the DaRT system; is that what this
9 indicates?
10 A Correct. Yep. I just uploaded the document into it because
11 you don't create it in DaRT.
12 Q Thank you. And then on the bottom of page 2 we skip ahead
13 from June to September.
14 MR. ZEMPEL: Two of the declarations.
15 MR. WILLIAMS: Yeah. Thank you.
16 Q (By Mr. Williams) It says that you were cleaning out a desk.
17 Do you remember why you were cleaning out the desk?
18 A We just cleaned it out for when we got a new clerk in there.
19 Q And you say you came across a stack of public record
20 requests. Was that unusual to see a paper stack of requests?
21 A The majority of our requests come in paper, so it's not
22 unusual to see them in a paper form like that.
23 Q And then it says one of the requests was Mr. Hoffman's
24 request that he had made in June 2015.
25 And then on page 2 of 3 you say that you brought it

1 to, I believe, Ms. Dawson because you didn't feel it was
2 completed correctly.
3 Do you recall what you thought was not completed
4 correctly about it?
5 A I'm sorry. Trying to find where I said Ms. Dawson in there.
6 Q It's the second line of page 3.
7 A Oh, up here. Okay. Okay. So, yes, I brought it to Kim
8 Dawson and Sergeant Panattoni.
9 Q And so do you recall why you thought it was not completed
10 correctly at that time in September?
11 A At that time in September I thought that it was completed
12 incorrectly because I had not seen any other requests
13 completed that way. And for my training at that point I had
14 never completed a request that way, so it wasn't like any
15 other request I'd seen.
16 Q And then so do you recall whether it was Ms. Dawson or
17 Sergeant Panattoni who asked you to call Mr. Hoffman?
18 A I believe it was Mr. Panattoni.
19 Q And do you recall how long your conversation was with
20 Mr. Hoffman?
21 A It was very short.
22 Q Okay. And do you recall any specifics that are not reflected
23 in this?
24 A No, not -- not about that at all.
25 Q And then so how did this next meeting -- and I'm in the

1 middle of the first paragraph on page 3 of your declaration
2 here. It says approximately a week or so after Carolyn came
3 into Sergeant Panattoni's office and you and Kim Dawson were
4 already there to discuss this request.
5 Do you recall how that meeting came about?
6 A Yeah. Mr. Panattoni asked me -- or Sergeant Panattoni asked
7 me to make a phone call to Hoffman approximately a week
8 before. And that we -- I guess I didn't add that. I guess
9 he had said we would ask Carolyn when she came in. Because I
10 believe at that point she was only coming in on Mondays. So
11 we had to wait until she came in to discuss it with her.
12 Q And then this conversation with Carolyn referred -- or that
13 Carolyn told you about, was that conversation from June or a
14 more recent conversation if you recall?
15 A Which part are you on?
16 Q So the bottom of that first paragraph on page 3. It says
17 "Carolyn had told us that she spoke with Mr. Hoffman on the
18 phone."
19 A I believe she -- I believe -- I took it that that was the
20 previous conversation from when he originally requested it.
21 Q Okay. And then it sounds like he came back in February of
22 2016 and you remembered the request; is that fair?
23 A Yes.
24 Q And then it was eventually fulfilled.
25 I think you made one -- and if I may ask --

1 MR. WILLIAMS: And you can object if this is
2 improper.
3 Q -- did you -- who asked you to make this statement; do you
4 recall?
5 A Yeah. Sergeant Panattoni had asked me to write a
6 declaration.
7 MR. WILLIAMS: And we're going to be up to, I
8 think, 7.
9 (Exhibit No. 7 marked.)
10 Q (By Mr. Williams) If you could review that.
11 And is that your signature on the bottom of page 2?
12 A Yes.
13 Q And this was also signed under penalty of perjury so you
14 tried to be as truthful and accurate as you could be?
15 A Yes.
16 Q So this is a -- looks like it was signed the same day as the
17 other one, but involves events after the request had been
18 fulfilled. And you had -- was it a phone call with Carolyn
19 Hayes?
20 A No. We sat down in an office.
21 Q Okay. And had she been called in specifically to talk about
22 this request?
23 A Yes.
24 Q And so when she explained that she contacted Mr. Hoffman via
25 phone call, is it your understanding that that is still the

1 June phone call?
2 A Yes.
3 Q And did you -- did you help fulfill the request the second
4 time in -- at the end of February 2016 and early March 2016?
5 A Yes. I was the only one that did the public records.
6 Q And did you locate any videos that were responsive?
7 A Yes, I did.
8 Q Where did you locate those?
9 A I located them in a video box in the records room that we
10 store all of the videos.
11 Q And were those marked on the Stillman system?
12 A Spillman.
13 Q Spillman.
14 A Spillman. So we only keep videos that are either a criminal
15 investigation or something that isn't deemed normal, I guess,
16 of an incident. We will -- we will make copies and store
17 them in case future records.
18 Q But in that -- that Spillman --
19 A Spillman.
20 Q -- Spillman, if you looked at -- or when you looked at the
21 Spillman screen when responding to his requests in 2016, did
22 it say that there were videos?
23 A I don't know that incident said that there was a video marked
24 on it. There could have been on some of the documents, but I
25 would have to look at it to be able to say for certain. DUI

1 cases is that -- is that video that this was involving, and
2 normally there's videos of DUI cases.
3 Q What about photos? Were you able to locate any photos in
4 response to Mr. Hoffman's request in 2016?
5 A Yes.
6 Q Where were those located?
7 A Those were in Spillman.
8 Q And I guess can you tell me, you know -- well, I'll just
9 direct your attention. On page 1 it says "Carolyn seemed
10 very comfortable -- seemed comfortable and very honest
11 informing us that Mr. Hoffman told us that he was trying to
12 locate the date, time, location, and what Erin Schnebly was
13 involved in."
14 I guess -- I mean, this is -- having trouble coming up
15 with a reasonable question that you could answer.
16 But do you have any idea why -- as you sit here today,
17 why this request was fulfilled in the way it was?
18 A Not really. Not the first request. I fulfilled the second
19 request.
20 Q And the first one, you don't know of any personal connection
21 that Ms. Hayes has with anyone involved in these incidents?
22 A I don't really know Carolyn on a personal basis.
23 Q And you don't know whether any of her kids might be friends
24 with the Schneblys or --
25 A I don't know.

1 Q Have you -- has anyone told you that is the case, other than
2 Mr. Hoffman?
3 A Saying that they are friends or not friends?
4 Q Yeah.
5 A No.
6 Q Sounds like you've talked to Mr. Hoffman at least twice; once
7 when you had a short phone conversation in September; once
8 when he came in to make the request the second time, the
9 February 2016 request.
10 Have you talked to him at any other times?
11 A I believe I called him to let him know his request was
12 complete for the second one.
13 Q Was that a long conversation?
14 A I don't believe so. It was just "You can come and pick it up
15 at this time and there's no fee for it."
16 Q Have you -- are you now regularly responding to Public
17 Records Act requests?
18 A Yes.
19 Q About how much of your work time is taken up with Public
20 Records stuff?
21 A Right now probably at least 80 percent of it.
22 Q Does it sometimes -- is it sometimes less?
23 A Yeah. Depending on what kind of requests we get.
24 Q Is it ever more?
25 A Sometimes -- I mean, it just depends on what type of request.

1 Sometimes I'll spend, you know, an entire day doing only
2 requests and then spend the next day with partial requests
3 and some other duties that I have. So it just really
4 depends.
5 Q And it sounds like since June 2015 you've had some formal
6 training on Public Records Act requests?
7 A I have, yes.
8 Q I probably have this written somewhere, but did you get it
9 in-house through the County or did you go somewhere else?
10 A I've gone to a couple of trainings outside.
11 Q Do you recall where?
12 A I went to one at the Spokane -- I think it was the police
13 station. And I've gone to some on the West Side at the
14 training center.
15 Q In those trainings were -- just in the trainings you've
16 gotten at the Sheriff's Office, have you ever been trained
17 about whether it's proper to inquire into the purpose behind
18 the request?
19 A Yes.
20 Q And what training have you received on that?
21 A I've -- we've gone over material that has stated that unless
22 it is a type of incident that we need to find out if the
23 attorney is representing someone, we could give them more
24 information. If it's of an explicit nature, sometimes we
25 will -- we need to ask if they are a family member or

1 something of that sort. And I usually ask people if they are
2 -- "I can give you more" and if not, because of these RCWs,
3 I'll have to redact but, otherwise, not why you're requesting
4 it or anything of that sort. They've said it's inappropriate
5 and we don't need a legal reason why.
6 Q Have you had other meetings with Sergeant Panattoni about
7 requests that you thought were wrongly fulfilled?
8 A Yes.
9 Q And I don't want to -- I'm not looking for a bunch of details
10 because it's none of my business. But do you recall about
11 how many of those meetings you've have?
12 A I think I have had two -- maybe two meetings.
13 Q And were those also requests that Ms. Hayes had filled?
14 A Yes.
15 Q Were they -- were the issues in those cases similar to the
16 ones here that she didn't provide? I don't want to put words
17 in your mouth, but were they similar to the problems that you
18 saw here?
19 A Not really, no.
20 Q Can you give me a general description of what you think the
21 problems were with those?
22 A I believe one was an exemption log that was incorrect. And
23 then I think one was we had not provided one of the reports.
24 Q Was it a police report?
25 A Yeah.

1 Q Do you remember how many police reports had been requested in
2 that request?
3 A I don't. No, I don't.
4 Q Was it several?
5 A No. It was a small request.
6 Q Do you ever have in your work in -- as a public records
7 officer, at the Sheriff's Office, do you ever have times when
8 you need to call someone because a request is going to take a
9 long time to fulfill?
10 A Yes. Yes.
11 Q And what is your procedure when that happens?
12 A I normally don't actually call, but I will contact them via
13 e-mail or a letter letting them know due to the large amount
14 of documents to compile and my other daily duties, it could
15 take me such and such days. If we have ones that are
16 extremely large, we'll put the date out and then do
17 installments to get it to the person. Sometimes I will call
18 them and follow up with an e-mail or a letter just stating
19 what we discussed and how long it will take.
20 Q Is it your practice to write confirming letters when you talk
21 with someone about the scope of their request?
22 A Yes.
23 Q And were you trained to do that?
24 A Yes.
25 Q And who trained you to do that?

1 A Kim Dawson.
2 Q And I may have asked this, but as you sit here today, do you
3 think that Mr. Hoffman's June request was filled correctly?
4 A I think it was filled differently than I would have done it.
5 Q And why would you have done it differently?
6 A Well, I mean, I did do it differently. I provided them the
7 second round. I -- I had different RCW's that showed
8 different exemptions and had asked questions to do things
9 differently and I --
10 Q Who did you ask the questions of?
11 A I would reach out to our Legal. I would speak with Doug
12 Mitchell sometimes or reference some of the training material
13 or just look at the RCWs on my own and interpret them of
14 previous requests that I had completed.
15 Q It is your standard practice when someone asks for video to
16 go look in that box where you found the videos for Hoffman?
17 A Yes, it is.
18 Q I want to show you what has been marked as Exhibit 4. Do you
19 recognize the note on page 1? It's very dark.
20 A I think this is a sticky note.
21 Q And is that your writing?
22 A Yes.
23 Q And do you know was that attached to the Hoffman request?
24 A I don't recall what that was attached to.
25 Q Okay. Do you know if it was regarding the Hoffman request?

1 A I believe -- yeah, I believe it was. I believe it was
2 attached to a request that -- the request that he made.
3 Q In June or in 2016?
4 A I want to say in 2015 when he made his original one based on
5 the date here. And I'm trying to remember why I wrote that.
6 Q If you look at the next page, there are some -- there's -- do
7 you recognize this page?
8 A Yeah. It's one of our public records request pages. I think
9 it's maybe the back of one.
10 Q Uh-huh. And do you -- do you know if this was the back of
11 Hoffman's request?
12 A I believe so. I recall these notes.
13 Q And so that the note in -- the handwritten note in the
14 middle, I think what it says is "Make the additional, Add'l,
15 two copies of the report when picked up."
16 A Correct.
17 Q Do you recognize whose writing that is?
18 A I would -- I believe that's Carolyn's.
19 Q And do you know why that was there?
20 A I could not tell you.
21 Q Was that unusual?
22 A To have notes?
23 Q To -- to make additional copies of a report.
24 A Unless someone asked for two copies of the report.
25 Q And do you recall whether Mr. Hoffman had asked whether

1 the -- for the documents in e-mail or not?
2 A I do not know.
3 Q And then the note in the middle, is that your writing?
4 A No, it is not.
5 Q Do you know whose writing that is?
6 A I believe that that's Carolyn's as well. She has kind of
7 different handwriting at different times.
8 Q Uh-huh. So were you trained that videos are retained on the
9 server for 90 days?
10 A On the 911 upload, yes.
11 Q But you were also trained to look in this other area for
12 videos?
13 A Correct.
14 Q Is there any other place that you're trained to look for
15 videos?
16 A The files and -- our hard copies files.
17 Q Hard copies files. And those are available to you as a
18 Sheriff's Office employee?
19 A Yep.
20 Q And then the -- oh, that's -- I thought one more page. So
21 that's, I believe, his -- his request. And if you look in
22 the middle, it says "e-mail to" and then it has an e-mail
23 address.
24 A Okay. Yep.
25 Q But does that refresh your recollection as to whether he

1 wanted it by e-mail?
2 A Well, I would take that as he wanted it by e-mail unless he
3 stated otherwise.
4 Q I want to go back to your conversation with Mr. Hoffman in
5 September 2015.
6 A Yeah.
7 Q You said you had a short conversation with him?
8 A Yeah.
9 Q Were you instructed or did you ask him if he wanted other
10 documents?
11 A Than what he received?
12 Q Yeah.
13 A No.
14 MR. WILLIAMS: Let's go off the record for a
15 minute.
16 (Discussion held off the record.)
17 Q (By Mr. Williams) So this, I think, is at the back of Exhibit
18 4. It's the last --
19 MR. ZEMPEL: Last page or the fourth page?
20 MR. WILLIAMS: Fourth page. This is the same
21 one, isn't it?
22 Q (By Mr. Williams) So this is an exemption log, right?
23 A Uh-huh.
24 Q And it's got what I believe to be the RCW that Ms. Hayes
25 referred to in initially responding to Hoffman's request.

However, it doesn't have the case numbers that are at the bottom of Exhibit 2. And I'm wondering is this -- do you have any idea if this is the right exemption log?

A That -- the right --

Q For the Hoffman --

A -- the one that she provided?

Q Yeah.

A I -- I don't know.

Q Yeah. That's fine. We -- we lawyers can figure that out.

Do you know Erin Schnebly or anyone in her family?

A I know who Erin is, yes.

Q Do you know her as a friend?

A Just a local acquaintance. I don't --

Q Would you --

A Around town.

Q Would you know her to, like, say "Hi" or is she someone that you might share a group of friends with?

A She knows some people that I know, yeah. I mean, I've said "Hi" to her before.

Q Okay. But do you -- this is an ambiguous term, but do you consider her a friend?

A No.

Q An acquaintance?

A Yes.

Q What about anyone else in her family?

1 A I don't really know who Erin's family is actually.
2 Q Okay. And is there any reason -- is there any reason that
3 you would have treated a request for information about Erin
4 differently than other requests because of your relationship
5 with Erin?
6 A No.
7 MR. WILLIAMS: That's all I have.
8 MR. ZEMPEL: I might ask just a couple of
9 questions.
10 EXAMINATION
11 BY MR. ZEMPEL:
12 Q Looking at Exhibit 4, the exemption log, you complete these
13 exemption logs --
14 A Yeah.
15 Q -- on a standard, routine basis, right?
16 At the bottom here it says "Pubic Disclosure Exemption
17 Log" and it has quotations "Christie." Just looking at that,
18 what -- what would that suggest to you?
19 A This is a form that Carolyn uses. I actually don't use the
20 same format on my exemption logs. And I believe that
21 normally down here as a footer in these were the person that
22 requested, the requestor.
23 Q Okay. So if this was Hoffman and it was completed the way
24 you believe Carolyn completed it, normally "Hoffman" would be
25 down here?

1 A I would assume so if it got changed.
2 Q And is it possible since it's a footer, she completed this
3 and didn't change the footer?
4 A Yeah.
5 Q Okay. So when we're talking about the videos and the photos
6 in the Hoffman matter, you indicated that you were able to
7 find them.
8 Did you look in Spillman and see whether videos were
9 referenced in Spillman?
10 A I don't believe on -- on the part that I fulfilled, the
11 second request, I believe I looked at it and that was a DUI.
12 And that triggers me to think that we probably had a
13 recording of the video, if there was a video. And I went and
14 looked in our video box in the back.
15 Q Okay. And I think you mentioned in your original response
16 something about it could have been mentioned in reports.
17 So is it possible that in the Spillman log if the
18 deputy doesn't click the box saying there's video, but you
19 see it mentioned in a report, that you might go look for
20 video based upon that?
21 A Uh-huh. Yeah. Yes.
22 Q Does that happen?
23 A Occasionally it will happen that the deputy doesn't put the
24 video number on our cover sheet. But sometimes there will be
25 a reference to a video in the narrative or supplemental.

1 Q Okay. Is it possible when deputies are doing their reports
2 and they have taken photos, do they always upload those to
3 Spillman consistently as they're doing their report into
4 Spillman, or do sometimes they forget and upload them later?
5 A I mean, I think there's always the possibility that they
6 upload them later.
7 Q Because the photos are on cameras. What do they take photos
8 with? Cameras?
9 A With their cameras, yeah.
10 Q So as they're doing their reports, unless they have
11 downloaded the photos to their computer and then uploaded to
12 Spillman, they could forget about doing that?
13 A Yeah, they could forget about it. It's all Bates stamped in,
14 so I don't know. I would have to look at the dates on that
15 one.
16 Q Do you know when the photos -- when you went and looked and
17 you found photos, do you know if they were referenced in
18 Spillman or referenced in the reports?
19 A They were in the attachment in Spillman.
20 Q Okay. Do you know if they were put into Spillman at the same
21 time the reports were put in?
22 A I believe these were.
23 Q Okay. The next one -- the next one -- was it Carolyn that
24 told you if it's a DUI to go and look in the box for video or
25 was that also Dawson?

1 A I think that's just, I guess, something -- I don't think
2 anyone told me to go look there. I think I just know that
3 that's where we keep them. All of us clerks, we know that
4 that's where the videos are.
5 Q Okay. So what you're saying is that there's possible on, at
6 least DUI's, that it's your practice to go see if there's a
7 video sitting in the box?
8 A Yes.
9 Q Why would those videos not be uploaded to Spillman?
10 A We don't normally upload the videos to Spillman.
11 Q Okay. Is that because of limitations in the space in
12 Spillman?
13 A A lot of the time, yeah. A lot of the time it's just larger
14 videos we -- are noted on our cover sheet so we know they're
15 back there, or DUIs or assault cases or anything significant
16 we'll go look in the box back there.
17 Q Okay. Do you know if the Hoffman case that you were looking
18 at, were you able to tell that there was video from the
19 Spillman data system, or was it just the nature of the case
20 that made you go look in the box?
21 A I don't remember if they -- if it saw -- if there was a
22 coversheet that indicated there was a video. I just went and
23 looked because I knew it was a DUI accident and I knew there
24 was a lot of deputies that had gone to it.
25 Q Okay. When you talk about the phone call that Carolyn

1 referenced that was referenced in Exhibit 7, so there's a
2 phone call to Mr. Hoffman. And I think you were asked the
3 question whether or not you believed it was the same phone
4 conversation you heard, do you know for certain that -- that
5 those were one in the same phone conversation or could Ms.
6 Hayes have had a separate phone conversation with Mr. Hoffman
7 that you were not aware of?
8 A I don't know that they are the same phone conversation. That
9 would just be my assumption.
10 Q Okay. And if Ms. Hayes had a conversation with Mr. Hoffman
11 where she discussed what he wanted or didn't want based upon
12 what she was saying to him that was available, is it possible
13 that -- that she had, in fact, had a conversation with him
14 that was different from what you overheard?
15 A Yeah, she could have had a conversation I didn't overhear.
16 MR. ZEMPEL: Okay. I don't think I have anything
17 else.
18 MR. WILLIAMS: Just follow up on a couple of
19 things.
20 EXAMINATION
21 BY MR. WILLIAMS:
22 Q So it sounds likes you read the police reports when you get a
23 public record request about them; is that fair?
24 A Uh-huh. Yes.
25 Q And then I think you said about the basket of CD's, that all

the clerks know they're back there?

A Uh-huh.

Q And are they mostly DUI DVD's or they're a mix.

A There's a mixture of them, yes.

MR. WILLIAMS: That's all I have.

MR. ZEMPEL: Okay.

(Concluded at 1:49 p.m., signature reserved.)

CERTIFICATE OF WITNESS

STATE OF WASHINGTON)
COUNTY OF CHELAN)

I, KALLEE KNUDSON, declare under penalty of perjury under the laws of the State of Washington, that I am the witness named in the foregoing deposition and that I have read the questions and answers thereon as contained in the foregoing deposition, consisting of pages 4 through 34; that the answers are true and correct as given by me at the time of taking the deposition, except as indicated on the correction sheet.

_____
KALLEE KNUDSON

Executed on the _____ day of _____ 2016, at _____, _____.
(City) (State)

HOFFMAN, vs. KITTITAS COUNTY
September 20, 2016

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REPORTER'S CERTIFICATE

I, ALISON J. SOSA, Certified Shorthand Reporter, do hereby certify:

That the foregoing proceedings were taken before me at the times and place therein set forth, at which time any witnesses were placed under oath;

That the testimony and all objections made were recorded stenographically by me and were thereafter transcribed by me or under my direction;

That the foregoing is a true and correct record of all testimony given, to the best of my ability;

That I am not a relative or employee of any attorney or of any of the parties, nor am I financially interested in the action;

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 30th day of September, 2016.

_____
ALISON J. SOSA, CCR
CCR # 2575
Notary Public in and for the State of Washington, residing at Wenatchee.

My commission expires on October 31, 2016.

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Exhibit 3

CAROLYN HAYES
TRAINING SCHEDULE

KITTITAS COUNTY TRAINING LOG - SUPPORT SERVICES DIVISION

DEPUTY: CAROLYN HAYES
EMPLOYEE ID: H1285
HIRE DATE: 09/01/1999

DATE	TRAINING COURSE TITLE	INSTRUCTOR	HOURS
04/01/2001	LEIRA (INTRO TO DISCLOSURE, IBR, DISCLOSURE WORKSHOP	WASPC	
07/25/2002	WSP ACCESS AUDIT PROCEDURES & POLICE REPORTS	WSP	
09/26/2002	UNIFORM CRIME REPORTS	WASPC	6
10/11/2002	LEIRA FALL CONFERENCE	LEIRA	23
07/23/2003	PUBLIC/CRIMINAL HISTORY DISCLOSURE	LEIRA	8
10/01/2003	LEIRA (DISCLOSURE WORKSHOP & INTRO TO DISCLOSURE)	LEIRA	16
11/05/2003	ACCESS	WSP	
05/01/2004	FIRST AID & CPR/AED	KCSO - CHUCK BERG	8
09/15/2004	UNIFORM CRIME REPORTS	WASPC	6
08/10/2005	ELECTRONIC RECORDS MANAGEMENT	ST ARCHIVES	6
09/12/2005	UNIFORM CRIME REPORTS	WASPC	6
09/20/2005	CRIMINAL RECORDS CONFERENCE	WSP	11
03/08/2006	PERSONNEL/ADMINISTRATIVE FILES	LEIRA	4
05/31/2006	SUSPICIOUS PACKAGES	KITTITAS COUNTY EM MGMT	1
07/19/2006	PERSONNEL/ADMINISTRATIVE FILES	LEIRA	7
08/22/2006	FIRST AID & CPR/AED	KCSO - CHUCK BERG	5
09/14/2006	UNIFORM CRIME REPORTS	WASPC	6
09/18/2006	ACCESS	WSP	6
11/07/2006	EMOTIONAL SURVIVAL FOR LE	WSLEA	4
04/23/2007	EVOC	KCSO	2
05/02/2007	HARASSMENT TRAINING	KITTITAS COUNTY	2
06/27/2007	PUBLIC DISCLOSURE	KCSO	1.5
08/02/2007	EXCEL	FRED PRYOR SEMINARS	16
09/26/2007	2007 CRD CONFERENCE	WSP	16
10/17/2007	LEIRA	LEIRA	16
10/29/2007	DEAL WITH DIFFICULT PEOPLE	CAREER TRACK	7
03/07/2008	MANAGIN THE PHYSIOLOGY OF FEAR WHILE LIVING IN CHAOS	CHAPLAIN BILL HUNT	4
03/31/2008	ACCESS Level 2	WSP	
05/13/2008	SUCCESSFUL SOLUTIONS FOR UNACCEPTABLE EMPLOYEE BEH	FRED PRYOR SEMINARS	6
08/26/2008	2008 RECORDS MANAGEMENT WORKSHOP	WA STATE ARCHIVES	8
09/28/2008	CRD CONFERENCE	WSP	16
02/01/2009	FIRST AID & CPR/AED	KCSO - CHUCK BERG	8
02/12/2009	NIBRS	NEALAND, LILA	8
02/18/2009	PUBLIC RECORDS ACT & E-RECORDS	RAMERMAN, RAMSEY	8
02/24/2009	FIRST AID AND CPR	DEPUTY CHUCK BERG	4
04/08/2009	RECORD PROTECTION & DISASTER PREPARDNESS	WA STATE ARCHIVES	4
04/09/2009	INCIDENT BASED REPORTING	WASPC	8
07/20/2011	PUBLIC RECORDS DISCLOSURE FOR LAW ENFORCEMENT	SPOKANE COUNTY SHERIFF	8
08/25/2011	FIRST AID	KCSO - BERG	8
01/05/2012	ACCESS	WSP	8
03/14/2012	SEXUAL HARASSMENT TRAINING	KCSO	8
05/22/2012	DEFENSIVE DRIVING	WCRP	8
04/29/2013	GIVE YOUR PRA POLICIES A TUNE UP	WCIA	6
04/17/2014	LEIRA	WASPC	7
10/29/2014	NIBRS	WASPC	2.5

KITTITAS COUNTY PROSECUTOR'S OFFICE

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