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No. 35720-1

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ASOTIN COUNTY,

Respondent,

v.

RICHARD EGGLESTON,

Appellant.

BRIEF OF RESPONDENT
ASOTIN COUNTY

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A. INTRODUCTION

This appeal is but another facet of appellant Richard Eggleston's battle with Asotin County ("Asotin") over the Ten Mile Bridge project. *See Eggleston v. Asotin County*, 1 Wn. App. 2d 1045, 2017 WL 6388976 (2017), *review denied*, 414 P.3d 576 (2018) ("*Eggleston I*").

Here, Eggleston made a July 24, 2017 Public Records Act, RCW 42.56 ("PRA") request for the invoices of the County's attorneys in the cases relating to the project. Upon the request's receipt, the County promptly filed an August 8, 2017 motion under RCW 42.56.540 for a protective order as to the scope of what it needed to turn over to Eggleston because some of the materials were privileged. Eggleston never filed an action under RCW 42.56.550 seeking judicial review. The County turned all pertinent records over to the court for its *in camera* review, and the trial court agreed with the County that parts of the records were protected and it ordered them redacted accordingly. That court denied penalties and fees to Eggleston under RCW 42.56.550(4) because he did not prevail in the RCW 42.56.540 proceeding, the County did, and Eggleston never filed an RCW 42.56.550(1) or (2) motion.

Eggleston does not contest the correctness of the trial court's decision on the RCW 42.56.540 motion and fails to show how penalties or fees are merited under RCW 42.56.550(4), given that ruling and the fact

that he received the redacted documents in early October, 2017.

B. STATEMENT OF THE CASE

Richard Eggleston owned property near a significant Asotin County (“County”) highway/bridge project, the Ten Mile Bridge project, that was critically needed for safety reasons. The project transversed Nez Perce Tribe lands. The project was delayed when builders encountered archaeological materials. Eggleston made multiple PRA requests of the County as to documents pertaining to the project. The County provided extensive responses to those multiple requests, but withheld some. Eggleston sued the County under RCW 42.56.550 in the Walla Walla County Superior Court. The trial court ruled that the County properly withheld certain documents but should have provided others, and awarded Eggleston PRA penalties and fees. Dissatisfied, Eggleston appealed to this Court, and this Court affirmed in *Eggleston I*. Eggleston petitioned the Supreme Court for review seeking added penalties and fees, and the Court denied review. *See Appendix*.

Still wishing to keep this controversy alive, Eggleston made a PRA request to the County on July 24, 2017 for the invoices of its outside counsel. CP 89. Believing that at least a portion of those invoices¹ were

¹ Although Division II ruled in *West v. Thurston County*, 168 Wn. App. 162, 275 P.3d 1200 (2012) that attorney invoices sent to the counties risk pool were not public

attorney-client or work product privileged under RCW 42.56.290, the County filed a motion on August 8, 2017 under RCW 42.56.540 seeking their protection; the County sought protection of the records entirely or, in the alternative, redaction of the invoices to avoid any waiver of privilege in the then-pending Walla Walla County litigation in *Eggleston I* and a damages action involving the Ten Mile Bridge. CP 1-6.

After an initial *in camera* review of the records and a hearing on the County's motion, the trial court, the Honorable Scott Gallina, agreed with the County that the records merited protection, entering a preliminary order on September 26 in which the court stated:

This matter came before the court on September 19, 2017.
The issue at hand is whether or not the County could

records of that county, the Legislature overrode that interpretation of the PRA. Below, the County recognized the applicability of RCW 42.56.904 which states:

It is the intent of the legislature to clarify that no reasonable construction of chapter 42.56 RCW has ever allowed attorney invoices to be withheld in their entirety by any public entity in a request for documents under that chapter. It is further the intent of the legislature that specific descriptions of work performed be redacted only if they would reveal an attorney's mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt under chapter 391. Laws of 2007 or other laws, with the burden upon the public entity to justify each redaction and narrowly construe any exception to full disclosure. The legislature intends to clarify that the public's interest in open, accountable government includes an accounting of any expenditure of public resources, including through liability insurance, upon private legal counsel or private consultants.

CP 5. Thus, Eggleston's contention that the County was primarily seeking to foreclose his access to the invoices in their entirety rather than their appropriate redaction, br. of appellant at 8, is wrong.

preclude production of invoices generated by attorneys representing the County in various legal actions. The County produced its records for in camera review of the court. Having reviewed those documents, the Court finds that the records are subject to a valid exception under RCW 42.56.290. Having so determined, it is incumbent upon the county to provide the Court its requested redactions so that a determination can be made as to whether or not they are justified as work product or privileged information. In the alternative, the County may waive redaction and authorize the disclosure in its entirety.

CP 42. The court ordered the County to make any redactions by 5 p.m. on September 28. *Id.* The County did so. CP 43.

The trial court entered a comprehensive ruling on September 29, with findings of fact. CP 44-46. The court found:

1. The County brought this action pursuant to RCW 42.56.540 seeking permission to either withhold attorney invoices or to redact certain privileged or work production information prior to releasing the records.
2. Pursuant to this Court's order, the County timely produced an original set of invoices as well as a proposed redacted set of invoices.
3. Following an in depth review, this Court finds that the County's redactions are very narrowly tailored to prevent the disclosure of only those minimal references from which one could conceivably deduce an attorney's mental impressions, legal advice, theories, or opinions.

CP 45. The court also denied Eggleston's demand for penalties and fees where he did not commence an action under RCW 42.56.550 for judicial review, and the County, not, Eggleston, prevailed on the RCW 42.56.540

motion:

4. As noted, the County brought this action seeking court protection of public records under RCW 42.56.540. Respondent asked for an award of fees and costs pursuant to RCW 42.56.550 governing judicial review of agency actions.
5. Respondents asserts entitlement to an award as prevailing party. Respondent did not have any motion for affirmative relief before the court seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time. Rather, Respondent opposed exemption or redaction.
6. Plaintiff has prevailed with respect to the request to selectively redact.

*Id.*² The County provided the redacted materials to Eggleston in early October 2017. CP 87.

Eggleston moved for reconsideration of the court's fees/penalty decision only. CP 90-100. The court denied that motion, stating:

This matter recently came back before the court on Defendant's Motion for Reconsideration. After further review of the file and *Soter v. Cowles Pub. Co.*, 131 Wash. App. 882 (2006), no grounds are found to justify reopening this matter.

All the documents here are protected under the work product doctrine as being prepared in anticipation of litigation. Additionally, the attorney-client privilege applies to any information generated by a request for legal advice.

² Eggleston only assigns error to 2 of the trial court's factual findings, numbers 5 and 6. Br. of Appellant at 2. The remainder of the trial court's unappealed findings are verities on appeal. *Cowich Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

See, e.g., Dietz v. Doe, 131 Wash.2d 835, 846, 935 P.2d 611 (1997). In accord with *Soter*, this court has endeavored to harmonize the public disclosure act with the court rules, giving full effect to both. The Plaintiff established that a valid exception to the PRA existed. Defendant was prevented from obtaining un-redacted copies as requested. Reconsideration is denied.

CP 103.

Eggleston appealed to this Court. CP 104-09.

C. SUMMARY OF ARGUMENT

RCW 42.56.540 provides a procedure by which a government agency like the County can obtain a speedy determination from a court as to whether records that are the subject of a PRA request are protected. Here, it is now undisputed that certain attorney invoices were subject to attorney-client or work product privileges and the trial court appropriately ordered them redacted where Eggleston was in litigation with the County over the Ten Mile Bridge project.

The trial court was within its discretion under RCW 42.56.550(4) to deny penalties to Eggleston, particularly where he received the records expeditiously.

Moreover, the County, not Eggleston, prevailed in the RCW 42.56.540 proceeding and he was not entitled to an RCW 42.56.550(4) attorney fee award for that reason. Eggleston never filed an action for judicial review under RCW 42.56.550 to invoke an entitlement to fees, but,

even had he done so, he was not entitled to fees because the County did not wrongfully withhold documents to which he was entitled, given the RCW 42.56.540 proceeding here. Eggleston obtained the documents to which he was legally entitled by his PRA request after that proceeding concluded.

D. ARGUMENT³

Of critical importance here is the fact that Eggleston is only appealing the trial court's decision denying him penalties and fees under RCW 42.56.550(4). He is not seeking review of the trial court's decision on RCW 42.56.540. Br. of Appellant at 2-3. Thus, the trial court's findings that the records at issue were subject to attorney-client or work product privilege stand as verities on appeal. *Cowiche Canyon Conservancy, supra*.

(1) Background on RCW 42.56.540

Eggleston's brief is devoid of any discussion of RCW 42.56.540. This is not surprising as that statute undercuts his contention that he was the prevailing party under RCW 42.56.550(4).

While the PRA is a strongly worded mandate for disclosure of public records, *City of Federal Way v. Koenig*, 167 Wn.2d 341, 344-45, 217

³ Eggleston does not fully discuss the applicable standard of review. Br. of Appellant at 8-9. PRA penalty decisions are entrusted to the discretion of the trial court and reviewed for abuse of that discretion. *Yousoufian v. Office of King County Exec.*, 152 Wn.2d 421, 430-31, 98 P.3d 463 (2004). An abuse of discretion occurs if the decision is manifestly unreasonable or based on untenable grounds or reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

P.3d 1172 (2009), that statute makes clear which records are subject to its provisions and affords certain statutory exemptions. “The PRAs mandate for broad disclosure is not absolute. The PRA contains numerous exemptions that protect certain information or records from disclosure, and the PRA incorporates any ‘other statute’ that prohibits disclosure of information or records.” *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 432, 327 P.3d 600 (2013). “The PRA’s exemptions are provided solely to protect relevant privacy rights or vital governmental interests that sometimes outweigh the PRA’s broad policy in favor of disclosing public records.” *Id.* Courts interpret the disclosure of provisions of the PRA liberally and its exemptions narrowly, *Livingston v. Cedenno*, 164 Wn.2d 46, 50, 186 P.3d 1055 (2008), but that liberal construction imperative does not permit courts to ignore the plain language of other provisions of the PRA.⁴

RCW 42.56.540 states:⁵

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for

⁴ The touchstone for the courts’ statutory interpretation is the language of the statute. Where, as here, the statute’s language is clear, the Court need go no farther than to apply it. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

⁵ RCW 42.56.540 does not provide for an award of attorney fees in connection with proceedings under it.

the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. An agency has the option of notifying person named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice.

The purpose of this provision is plain in the context of attorney invoices. It is designed to allow an agency to invoke attorney-client and work product privileges where appropriate. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 745, 174 P.3d 60 (2007). There, our Supreme Court expressly noted that an agency may invoke the provisions of RCW 42.56.540. *Id.* at 749-56. A party seeking to prevent production of all or a part of records sought by a requestor has the burden of proving the applicability of any exemption to disclosure. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407-08, 259 P.3d 190 (2011).

The PRA contains specific exemptions from disclosure. For example, RCW 42.56.290,⁶ applicable here, forbids disclosure of materials

⁶ RCW 42.56.290 states:

Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.

otherwise unavailable to a party in discovery. Work product qualifies under this statute because CR 26(b)(4) prevents disclosure in discovery of work product materials. *Dawson v. Daly*, 120 Wn.2d 782, 790, 845 P.2d 995 (1993); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 609, 963 P.2d 869 (1998); *Soter*, 162 Wn.2d at 732 (work product is RCW 42.56.290 exception); *Kittitas County v. Allphin*, __ Wn.2d __, __ P.3d ___, 2018 WL 2250076 (2018) at *3.

The privilege pertaining to work performed by an attorney in anticipation of litigation also has a long pedigree in Washington. *See Heidebrink v. Moriwaki*, 104 Wn.2d 392, 706 P.2d 212 (1985). Classically, the privilege extends to work performed by an attorney in anticipation of litigation;⁷ the privilege is designed to protect the adversarial process by “insuring that neither party pirates the trial preparation of another party.” *Harris v. Drake*, 116 Wn. App. 261, 269, 65 P.3d 350 (2003), *aff’d*, 152 Wn.2d 480 (2004).⁸ It is inapplicable to records created in the ordinary

⁷ The Supreme Court in *Kittitas County* discussed work product principles at length, 2018 WL 2250076 at *3-6. Generally, work product includes “documents and other tangible things that (1) show legal research and opinions, mental impressions, theories, or conclusions of attorney or other representatives of a party; (2) are an attorney’s written notes or memoranda of factual statements or investigation; and (3) are formal or written statements of fact, or other tangible facts, gathered by an attorney in preparation for or in anticipation of litigation.” *Limstrom*, 136 Wn.2d at 611. The documents need not be prepared personally by counsel; they may be prepared by or for the party or the party’s representative as long as they are prepared in anticipation of litigation. CR 26(b)(4).

⁸ The Court is certainly aware that counsel in actions against government agencies use the PRA as a tool to secure considerable information in support of their cases. Here,

course of business. *Heidebrink*, 104 Wn.2d at 396-97. That is, of course, not the case here.

Furthermore, the PRA provides that where other statutes exempt materials from disclosure, that non-disclosure imperative carries forward that non-disclosure policy into the PRA. In specific, the PRA's disclosure policy is inapplicable if a "record falls within the specific exemptions of ... [an]other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1); *Ameriquest Mortgage Co. v. Wash. State Office of Attorney Gen.*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010); *White v. Clark County*, 188 Wn. App. 622, 631-32, 354 P.3d 38 (2015), *review denied*, 185 Wn.2d 1009 (2016) (other statute exemption extends to constitutional provisions). RCW 5.60.060 embodies the attorney-client privilege in Washington, and it qualifies as one of those "other statutes." *Hangartner v. City of Seattle*, 151 Wn.2d 439, 450-54, 90 P.3d 26 (2004).

The attorney-client privilege is one of the oldest and most widely-recognized principles in our jurisprudence and constitutes a basic foundation for an effective relationship between an attorney and client. It is predicated upon full, frank and open communications between counsel

Eggleston was in litigation with the County over the Ten Mile Bridge project, as Eggleston acknowledged. Br. of Appellant at 4.

and client. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108, 130 S. Ct. 599, 606, 175 L. Ed. 2d 458 (2009).

Washington courts have rigorously safeguarded the confidential communications between attorney and client for the same reasons. Numerous cases hold that the privilege promotes the free, full, open communication between the attorney and client and warn against dire consequences if that communication is chilled. *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611, 615 (1997); *In re Disciplinary Proceeding Against Schafer*, 149 Wn.2d 148, 161-62, 66 P.3d 1036 (2003).

Thus, the trial court's procedurally unassailable (because Eggleston did not assign error to it) determination in finding number 3 that the County's claim of work product or attorney-client privilege as to the materials at issue was also amply supported in Washington law. The County, not Eggleston, prevailed in the RCW 42.56.540 proceeding on the substance of what needed to be disclosed.

(2) Penalties/Fees under the PRA

RCW 42.56.550 is the section of the PRA dealing with court proceedings initiated by a requestor to obtain public records when a government agency refuses to provide them. RCW 42.56.550(1) requires that a requestor denied records must take certain procedural steps to obtain them ("Upon the motion of any person having been denied an opportunity

to inspect or copy a public record by the agency...”).⁹

RCW 42.56.550(4) authorizes the imposition of *per diem* penalties and awards of attorney fees in the appropriate case where an agency has wrongfully withheld public documents from a requestor. RCW 42.56.550(4) states:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

First, RCW 42.56.550(4)’s remedies are limited to situations where the requestor commences an action “in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time.” Eggleston never filed such an action as the trial court found: “Respondent did not have any motion for affirmative relief before the court seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time. *Rather, Respondent opposed*

⁹ RCW 42.56.550(2) provides for an analogous motion by a requestor if the agency’s time estimate for a records response is flawed. There is no issue in this case that the County’s estimate of time necessary to respond to Eggleston’s PRA request was inaccurate.

exemption or redaction.” CP 45 (emphasis added).

Second, it is within a court’s discretion to deny the imposition of penalties. Here, where the County prevailed under RCW 42.56.540 in securing redactions in the invoices, and Eggleston received the requested materials within roughly 60 days of his request, the trial court did not abuse its discretion in denying penalties. CP 46 (denying penalties).

Given the procedures in RCW 42.56.540 for protecting a government agency from the disclosure of sensitive materials, the penalty provisions of RCW 42.56.550(4) appropriately apply only in a limited fashion.¹⁰ It would be anomalous for the Legislature to create a process in RCW 42.56.540 by which an agency can swiftly adjudicate its obligation to turn over what might be sensitive or otherwise statutorily-protected documents, only to face penalties for expeditiously invoking that procedure.

Eggleston tacitly acknowledges that the trial court did not err in denying him penalties by devoting a mere two paragraphs to the issue, without citation of any authorities. Br. of Appellant at 18. This Court need not reach the issue. *Cowiche Canyon Conservancy*, 118 Wn.2d at 809

¹⁰ While the *Soter* court indicated that an agency may not be “spared” *per diem* penalties merely by filing an action under .540, 163 Wn.2d at 756, in order to qualify for a fee award, the requestor still must file an action for judicial review under RCW 42.56.550 after the government agency wrongfully withholds requested documents. In *Soter*, the school district denied access to documents by a newspaper and the paper filed the requisite show cause motion for judicial review, *id.* at 728-29, neither of which occurred here.

(appellate court will refuse to consider issues unsupported by citation to authority, record references, or meaningful analysis). Indeed, where a party fails to cite authorities, this Court may assume that Eggleston's counsel, after a diligent search, could not find any to support his position. *State v. Arredondo*, 188 Wn.2d 244, 262, 394 P.3d 348 (2017).

Ultimately, the trial court was correct in concluding that Eggleston was not entitled to penalties or fees under RCW 42.56.550(4) because he did not prevail in the RCW 42.56.540 proceeding and he failed to properly initiate a judicial review proceeding under RCW 42.56.550(1).

(3) Eggleston Did Not Prevail and He Is Not Entitled to a Fee Award

Were the Court to even reach the issue of whether Eggleston prevailed under RCW 42.56.550(4) (and it need no do so), Eggleston did not prevail under RCW 42.56.550(4). The trial court specifically, and correctly, found that Eggleston was not the prevailing party under RCW 42.56.550(4) because he did not meet the definition of a prevailing party – he lost under RCW 42.56.540. County records were redacted after the trial court's *in camera* assessment of them. Eggleston does not challenge the correctness of the trial court's specific withholding/redaction decision under RCW 42.56.540, nor does he deny that he received the records in response to his PRA request, *as soon as the trial court's decision was made*. The

County did not “wrongfully withhold” anything when the trial court properly ruled under RCW 42.56.540 that documents were properly withheld or redacted. Substantial evidence supports findings numbers 5 and 6 that Eggleston did not prevail.

Eggleston’s discussion of the standard for a prevailing party under RCW 42.56.550(4) is woefully incomplete and simply ignores the critical fact of the RCW 42.56.540 proceeding the County commenced. Br. of Appellant at 9-17. Indeed, Eggleston seems to assume that merely because he received the redacted records from the County he “prevailed.” That simplistic analysis is wrong.¹¹

RCW 42.56.550(4)’s remedies are available only if a requestor has invoked judicial review of a government agency’s denial of access to records or a flawed estimate of response time by a motion under RCW 42.56.550(1) or (2). Here, Eggleston never filed such a motion. Moreover, he could not do so because the County’s legitimate employment of the procedures of RCW 42.56.540 did not constitute a denial of access under

¹¹ In numerous cases, Washington courts have held that a government agency is not obligated to pay a requestor’s fees although the requestor obtained the documents. Classically, where a third party brings an action under RCW 42.56.540 to enjoin the agency from disclosing exempted records to a requestor and that the requestor prevails in such a proceeding, the requestor prevails as against the third party, *not the government*, and fees under RCW 42.56.550(4) are not available to the requestor. *Doe ex rel. Roe v. Wash. State Patrol*, 185 Wn.2d 363, 386-87, 374 P.3d 63 (2016); *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 757, 958 P.2d 260 (1998); *Belo Mgmt. Servs., Inc. v. Click! Network*, 184 Wn. App. 649, 663, 343 P.3d 370 (2014).

RCW 42.56.550(1) or a flawed time estimate to respond under RCW 42.56.550(2).

The general standard for a party to prevail under RCW 42.56.550(4) is that the agency must have *wrongfully* withheld documents or otherwise violated the PRA. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2008); *White*, 188 Wn. App. at 640; *Robbins, Geller, Rudman & Dowd, LLP v. Office of Attorney General*, 179 Wn. App. 711, 737, 328 P.3d 905 (2014). Stated another way, a party substantially prevails if it has an affirmative judgment rendered in its favor. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 114 Wn.2d 677, 684, 790 P.2d 604 (1990); *Overlake Fund v. City of Bellevue*, 70 Wn. App. 789, 795, 855 P.2d 706 (1993). Where the trial court here entered an affirmative judgment in the County’s favor that the invoices were exempt in part from disclosure in the RCW 42.56.540 proceeding, Eggleston has not substantially prevailed.

More to the point, as noted by our Supreme Court in *Spokane Research & Defense Fund*, the test for wrongfulness is whether the records should have been disclosed upon their request. 155 Wn.2d at 103. Plainly, given the trial court’s now unassailable RCW 42.56.540 ruling, significant aspects of the requested records *should not have been disclosed* upon Eggleston’s request.

By contrast, a requestor prevails under RCW 42.56.550(4) if the government agency improperly redacts the requested public records and the requestor is compelled to initiate a court action to obtain them. *See, e.g., West v. Port of Olympia*, 183 Wn. App. 306, 317-18, 333 P.3d 488 (2014); *Robbins, Geller, Rudman & Dowd, LLP*, 179 Wn. App. at 737-38; *Gronquist v. Wash. State Dep't of Corrs.*, 175 Wn. App. 729, 309 P.3d 538 (2013); *Freedom Foundation v. Wash. State Dep't of Transp.*, 168 Wn. App. 278, 276 P.3d 341 (2012). That did not occur here.

Here, not only did Eggleston fail to procedurally invoke RCW 42.56.550(4) by failing to file a motion under RCW 42.56.550(1) or (2), he failed to establish any wrongful withholding of records by the County given the trial court's ruling in the RCW 42.56.540 proceeding. *See King County Sheriff's Office v. Parmelee*, 162 Wn. App. 1028, 2011 WL 4375364 (2011), *review denied*, 174 Wn.2d 1001 (2012) (inmate was not prevailing party under RCW 42.56.550(4) where he did not prevail in injunctive proceedings under RCW 42.56.540 and RCW 42.56.565 for harassing use of PRA).¹²

¹² This result is entirely consistent with numerous cases establishing a rule of reason in assessing whether a government agency has, in fact, even violated the PRA at all. For example, there cannot be a cause of action under RCW 42.56.550 *at all* until a government has actually definitively denied a requestor access to records. *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014). *See also, Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 334 P.3d 94 (2014), *review denied*, 182 Wn.2d 1011 (2015) (this Court held that agency did not violate PRA when it missed self-imposed response date for legitimate

The County here never stated that it was denying *any* access by Eggleston to the fee billings he requested. Rather, the County legitimately invoked the provisions of RCW 42.56.540 to secure an early court ruling on privilege within roughly 2 weeks of Eggleston's initial request. CP 1-6. Where documents are, in fact, statutorily exempt from disclosure, as here, a requestor like Eggleston does not prevail. *Overlake Fund*, 70 Wn. App. at 795-96. The trial court here correctly denied Eggleston a fee award.

E. CONCLUSION

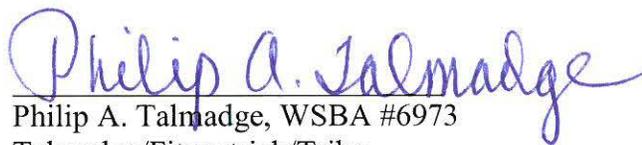
The County, not Eggleston, prevailed in the RCW 42.56.540 action at issue here; moreover, the County promptly provided Eggleston all the records to which he was entitled by his PRA request. The trial court was within its discretion to deny him *per diem* penalties under RCW 42.56.550(4). Eggleston was not a prevailing party under RCW 42.56.550(4), and he is not entitled to a fee award.

This Court should affirm the trial court's September 29, 2017 order and its order denying reconsideration of same. Costs on appeal should be awarded to the County.

reasons and it acted diligently to respond to records request).

DATED this 18~~th~~ day of May, 2018.

Respectfully submitted,



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Asotin County

APPENDIX

FILED

2017 SEP 26 PM 2: 13

MCKENZIE A. KELLEY
COUNTY CLERK
ASOTIN COUNTY, WA



SUPERIOR COURT OF WASHINGTON
COUNTY OF ASOTIN

ASOTIN COUNTY

PLAINTIFF,

v.

RICHARD EGGLESTON

DEFENDANT.

No. 17-2-00196-02

INTERIM RULING ON
PRODUCTION/REDACTION
OF INVOICES

This matter came before the court on September 19, 2017. The issue at hand is whether or not the County could preclude production of invoices generated by attorneys representing the County in various legal actions. The County produced its records for in camera review of the court. Having reviewed those documents, the Court finds that the records are subject to a valid exception under RCW 42.56.290. Having so determined, it is incumbent upon the county to provide the Court its requested redactions so that a determination can be made as to whether or not they are justified as work product or privileged information. In the alternative, the County may waive redaction and authorize the disclosure in its entirety.

The requested redactions must be submitted by 5:00 p.m. on September 28, 2017.

Dated: Tuesday, September 26, 2017

Judge

INTERIM RULING - 1

JB

FILED

2017 SEP 27 PM 3: 04

MCKENZIE A. KELLEY
COUNTY CLERK
ASOTIN COUNTY, WA

SUPERIOR COURT OF WASHINGTON
COUNTY OF ASOTIN

ASOTIN COUNTY
Plaintiff,

v.

RICHARD EGGLESTON
Defendant.

DOCKET NO: 17-2-00196-02

ATTORNEY'S CERTIFICATE OF
DELIVERY

I certify that I delivered redacted copies of the documents reviewed *in camera* by the Court to the Office of the County Clerk, pursuant to the Interim Order on Production/Redaction of Invoices at the Asotin County Courthouse on Wednesday, September 27, 2017 by 3:10 pm. I further certify that I e-mailed the Court Administrator and Defendant's Counsel a copy of this Certificate after delivery of the documents to the Clerk's Office.


Jane Bremner Risley, WSBA# 20791
Deputy Prosecuting Attorney, Asotin County

7
C

ATTORNEY'S CERTIFICATE OF DELIVERY

BENJAMIN C. NICHOLS
ASOTIN COUNTY PROSECUTING ATTORNEY
P.O. BOX 864, 135 2ND ST, STE 210
ASOTIN, WA 99402
(509)243-2065

Page 1

FILED

2017 SEP 29 AM 11:39

MCKENZIE A. KELLEY
COUNTY CLERK
ASOTIN COUNTY, WA

 SUPERIOR COURT OF WASHINGTON COUNTY OF ASOTIN	
ASOTIN COUNTY v. RICHARD EGGLESTON	PLAINTIFF, DEFENDANT.
No. 17-2-00196-02 RULING ON PRODUCTION/REDACTION OF INVOICES	

This matter came before the court on September 19, 2017. The issue at hand is whether or not the County could preclude production of invoices generated by attorneys representing the County in various legal actions. The County produced its records for in camera review of the court. The County also provided the Court its requested redactions.

A
C

Findings

Based upon the foregoing this Court now finds:

1. The County brought this action pursuant to RCW 42.56.540 seeking permission to either withhold attorney invoices or to redact certain privileged or work product information prior to releasing the records.
2. Pursuant to this Court's order, the County timely produced an original set of invoices as well as a proposed redacted set of invoices.
3. Following an in depth review, this Court finds that the County's redactions are very narrowly tailored to prevent the disclosure of only those minimal references from which one could conceivably deduce an attorney's mental impressions, legal advice, theories, or opinions.
4. As noted, the County brought this action seeking court protection of public records under RCW 42.56.540. Respondent asked for an award of fees and costs pursuant to RCW 42.56.550 governing judicial review of agency actions.
5. Respondent asserts entitlement to an award as prevailing party. Respondent did not have any motion for affirmative relief before the court seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time. Rather, Respondent opposed exemption or redaction.
6. Plaintiff has prevailed with respect to the request to selectively redact.

ORDER

IT IS NOW ORDERED:

1. That the requested invoices, as redacted, be provided to Respondent.
2. That no costs fees or penalties are imposed at this time.

Dated: Friday, September 29, 2017



Judge

FILED

2017 NOV -9 PM 3: 19

MCKENZIE A. KELLEY
COUNTY CLERK
ASOTIN COUNTY, WA

 Superior Court of Washington County of Asotin	
ASOTIN COUNTY PLAINTIFF, v. RICHARD EGGLESTON DEFENDANT.	No. 17-2-00196-02 DECISION ON RECONSIDERATION

This matter recently came back before the court on Defendant's Motion for Reconsideration. After further review of the file and Soter v. Cowles Pub. Co., 131 Wash.App. 882 (2006), no grounds are found to justify reopening this matter.

All the documents here are protected under the work product doctrine as being prepared in anticipation of litigation. Additionally, the attorney-client privilege applies to any information generated by a request for legal advice. *See, e.g., Dietz v. Doe*, 131 Wash.2d 835, 846, 935 P.2d 611 (1997). In accord with *Soter*, this court has endeavored to harmonize the public disclosure act with the court rules, giving full effect to both. The Plaintiff established that a valid exception to the PRA existed. Defendant was prevented from obtaining un-redacted copies as requested. Reconsideration is denied.

14
MK

Dated: September 27, 2017



Scott D. Gallina, Judge

WESTLAW

1 Wash.App.2d 1045

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,

[Eggleston v. Asotin County](#)

Court of Appeals of Washington, Division 3. December 14, 2017. Not Reported in P.3d 1 Wash.App.2d 1045 2017 WL 6388976 (Approx. 7 pages)

[Richard EGGLESTON](#), an individual, Appellant/Cross Respondent,

v.

ASOTIN COUNTY, a public agency; and **Asotin County Public Works Department**, a public agency, Respondents/Cross Appellants.

No. 34340-5-III

FILED DECEMBER 14, 2017

Appeal from Walla Walla Superior Court, 12-2-00459-6, Honorable [John W. Lohrmann](#), Judge**Attorneys and Law Firms**[Todd Samuel Richardson](#), Law Offices of Todd S. Richardson PLLC, 604 6th St., Clarkston, WA, 99403-2011, for Appellant/Cross-Respondent.[Benjamin Curler Nichols](#), Asotin County Prosecutors Office, P.O. Box 220, Asotin, WA, 99402-0220, [Jane Bremner Risley](#), Asotin County, P.O. Box 864, Asotin, WA, 99402-0864, [Philip Albert Talmadge](#), Talmadge/ Fitzpatrick/Tribe, 2775 Harbor Ave. Sw., Third Floor Ste. C., Seattle, WA, 98126-2138, for Respondents/Cross-Appellants.

UNPUBLISHED OPINION

[Pennell, J.](#)

*1 [Richard Eggleston](#) submitted several public records requests to **Asotin County** related to work on the Ten Mile Creek Bridge Project (the Project). After failing to receive copies of three specific documents, Mr. [Eggleston](#) filed a lawsuit against the County alleging violations of the Public Records Act (PRA), chapter 42.56 RCW. Mr. [Eggleston's](#) claims as to the first document were dismissed through summary judgment. He later prevailed at a bench trial as to the remaining two documents and was awarded \$49,385.00 in penalties and \$50,133.67 in attorney fees, staff fees and costs. The parties cross appeal the trial court's rulings. We affirm.

FACTS

This case concerns [Richard Eggleston's](#) multiple public records requests for three specific records from the County. The initial record sought is a January 2002 e-mail written by archeologist [Kevin Cannell](#) to [Thomas Dean & Hoskins \(TD & H\)](#), an engineering firm hired by the County. The other two records consist of preliminary Project drawing sets, referred to as "the April Plans" and "the July Plans." Clerk's Papers (CP) at 553.

Background

In 2001, **Asotin County** decided to replace the Ten Mile Creek Bridge. In November 2001, TD & H received a letter from the County confirming it had been selected to provide engineering services for the Project. The contract was entered into on March 4, 2002, and provided that: "[a]ll designs, drawings, specifications, documents, and other work products prepared by the CONSULTANT [TD & H] prior to completion or termination of this AGREEMENT are instruments of service for this PROJECT and are property of the AGENCY [**Asotin County**]." CP at 1029.

TD & H was concerned about possible archaeological sites in the Project area and retained the services of [Kevin Cannell](#) to perform a "preliminary archaeological and cultural review of the proposed roadway" for the Project. CP at 276. In its June 5, 2002, retention letter to Mr.

SELECTED TOPICS

Records

General Statutory Disclosure Requirements
Requestor Resubmission of Freedom of Information Act

Secondary Sources

CR 26. General Provisions Governing Discovery

3A Wash. Prac., Rules Practice CR 26 (6th ed.)

...History. Although discovery devices have existed in Washington since territorial days, the early devices were rudimentary and not extensively used. After the promulgation of the federal rules of discov...

Proof Supporting Disclosure Under State Freedom of Information Acts

132 Am. Jur. Proof of Facts 3d 1 (Originally published in 2013)

..."Each state has its own freedom of information laws. To various degrees, the state laws are modeled after the federal FOIA." "[T]he right to access to public records is not of constitutional dimension ...

Construction and Application of State Freedom of Information Act Provisions Concerning Award of Attorney's Fees and Other Litigation Costs

118 A.L.R.5th 1 (Originally published in 2004)

...This annotation collects and discusses all of the cases that have considered the construction and application of state Freedom of Information statute provisions concerning an award of attorney's fees a...

[See More Secondary Sources](#)

Briefs

Reply Brief of Appellant1996 WL 33683425
Nora AMREN, Appellant, v. CITY OF KALAMA, Respondent.
Supreme Court of Washington
Sep. 12, 1996

...Despite the Appellant's full quote of RCW 41.06.450 in her Brief, Kalama refuses to acknowledge the actual language of that section: "[T]he Washington personnel resources board shall adopt rules applica...

Brief of Respondent2008 WL 8204380
NEIGHBORHOOD ALLIANCE OF SPOKANE COUNTY a nonprofit corporation, Petitioner, v. COUNTY OF SPOKANE, a political subdivision of the State of Washington, Respondent.
Supreme Court of Washington
Dec. 16, 2008

...On May 16, 2005, the NASC provided two Public Record Requests to Spokane County, to wit: "[T]he complete electronic file information logs for the undated county planning division seating chart provided ...

Brief of Petitioner2008 WL 8204389
NEIGHBORHOOD ALLIANCE OF SPOKANE COUNTY, a non-profit corporation, Petitioner, v. COUNTY OF SPOKANE, a political subdivision of the State of Washington,

Cannell, TD & H referenced a "Cultural Resource Compliance Scope of Work" that Mr. Cannell had sent to TD & H via e-mail on January 11, 2002. CP at 276, 1024.

Requests regarding TD & H's agreement with archeologist Kevin Cannell

Richard Eggleston is a resident of Asotin County. Mr. Eggleston made several requests, spanning 2004–2011, for correspondence between TD & H and Mr. Cannell. Of particular concern to Mr. Eggleston was the original solicitation for Mr. Cannell to perform archeological services on the Project and Mr. Cannell's response to the solicitation. See CP at 38. The County provided some materials in response to Mr. Cannell's requests, but it also noted Mr. Cannell was contracted through TD & H and, therefore, the County may not have all correspondence. Eventually, the County provided Mr. Eggleston a copy of Mr. Cannell's Cultural Resource Program Scope of Work that had been sent to TD & H in January 2002. See CP at 53. However, the County never provided a copy of the 2002 e-mail Mr. Cannell sent to TD & H along with his proposed scope of work.

Commencement of the Project and discovery of archaeological sites

*2 Construction on the Project commenced during June 2010. But by October, crews working on the Project encountered human remains and realized they had unearthed Native American graves. The Project then stalled to allow for negotiations between the County, the Nez Perce tribe and other agencies on how to handle the remains. During this delay, the project plans went through numerous changes. A final set of plans for the Project were not completed until September 2012.

Requests for "current sheets" of the Project plans and initiation of litigation

Mr. Eggleston's next records request came on April 26, 2012. At this point, he did not ask for documents related to Mr. Cannell or his archaeological work. Instead, he sought copies of the current drawing sheets (the April Plans) for the Project. Mr. Eggleston indicated he had received page one of the April Plans¹ at a meeting with the County and he wanted to view the remaining pages. The County responded on May 16, 2012, claiming the April Plans were exempt from disclosure under RCW 42.56.280. The County reasoned that this exemption applied because the April Plans were preliminary drafts and the design for the Project was still in flux as discussions with the tribe continued. Until an agreement on the redesign was reached, the April Plans were exempt from disclosure.

Mr. Eggleston filed suit against the County on June 18, 2012, alleging violations of the PRA. Subsequent to filing suit, Mr. Eggleston submitted a request on July 17, 2012 for "current project plans." CP at 69. The County responded on July 19, 2012, and provided Mr. Eggleston with a set of documents, referred to in the record as "the Nez Perce submittal." 1 Verbatim Report of Proceedings (VRP) (Mar. 5, 2013) at 18; 1 VRP (Apr. 1, 2015) at 42; CP at 70. The County also indicated that it had fully responded to Mr. Eggleston's request and now considered it closed.

Mr. Eggleston's attorney sent a letter to the County's attorney on August 2, 2012, claiming the County's responses to Mr. Eggleston's request for plans were incomplete. Counsel explained Mr. Eggleston was looking for current project plans, not the Nez Perce submittal. Counsel asserted that if the County intended to withhold pages, a withholding log must be provided. The County responded on August 9, 2012, and offered further explanation as to why Mr. Eggleston's request was denied pursuant to RCW 42.56.280. The County explained Mr. Eggleston had been provided everything that had been submitted to the tribe. However, the materials provided to the tribe did not contain a complete copy of the preliminary project plan. Thus, nothing currently available had been withheld. The County offered to provide the finalized plans to Mr. Eggleston when the documents were available.

Mr. Eggleston's attorney sent additional letters on August 24 and September 7, 2012, following up on the prior requests. The August 24 letter requested a withholding log and the September 7 letter clarified that the County had not complied with the requests for the April and July plans. Counsel reiterated that Mr. Eggleston had not requested the plans that were submitted to the Nez Perce Tribe. Instead, Mr. Eggleston had requested a complete set of plans as they existed on the date of his request. Although the County responded to the August 24 letter, it did not provide a withholding log. The County never responded to the September 7 letter.

*3 Although the County did not provide Mr. Eggleston with copies of the April and July plans as requested, Mr. Eggleston did obtain copies of the documents. Mr. Eggleston had received a copy of the April Plans from the Nez Perce Tribe prior to ever requesting the documents from the County. The County ultimately provided Mr. Eggleston a copy of the

Respondent.
Supreme Court of Washington
Oct. 24, 2008

...FN1. Effective July 1, 2006, the Public Records Act was recodified at chapter 42.56 RCW. This case arose in May 2005, prior to recodification, and therefore citations will be to the code as it existed ...

[See More Briefs](#)

Trial Court Documents

White v. Clark County

2014 WL 10916330
Timothy WHITE, Plaintiff, v. CLARK COUNTY, Defendant.
Superior Court of Washington.
Feb. 14, 2014

...Plaintiff Timothy White is a long-time open elections advocate working to ensure public oversight of the democratic process. Mr. White requested copies of ballot images and associated metadata to retur...

White v. Clark County

2014 WL 10916334
Timothy WHITE, Plaintiff, v. CLARK COUNTY, Defendant.
Superior Court of Washington.
Feb. 11, 2014

...Plaintiff Timothy White (hereinafter "Plaintiff") submitted a request under the Public Records Act for copies of images of "pre-tabulated" ballots held by the Clark County Auditor's Office for the 2013...

BichIndaritz v. University of Washington

2013 WL 6817830
Isabelle BICHINDARITZ, Plaintiff, v. UNIVERSITY OF WASHINGTON, Defendant.
Superior Court of Washington.
Sep. 06, 2013

...THIS MATTER came on regularly before this Court for a trial held by affidavit pursuant to RCW 42.56.550. The Court having considered the following: Plaintiffs Trial Brief in Support of Trial by Affidav...

[See More Trial Court Documents](#)

April Plans on December 10, 2012. In addition, during January 2013, Mr. Eggleston received copies of the April and July plans at a pretrial deposition of a TD & H employee.

Summary judgment

The trial court initially addressed the merits of Mr. Eggleston's PRA complaint through cross motions for summary judgment. With respect to Mr. Eggleston's requests regarding the 2002 e-mail from archaeologist Kevin Cannell, the court held the requested information was not a public record and that, in any event, those portions of Mr. Eggleston's complaint were untimely under the statute of limitation. The court ordered a trial on whether the County was entitled to withhold disclosure of the April and July plans.

Trial, penalties, and attorney fees and costs

After hearing from multiple witnesses over the course of a two-day bench trial, the trial court largely ruled in favor of Mr. Eggleston as to the April and July plans. The trial court determined that both sets of plans constituted public records and the County violated the PRA by failing to disclose the documents to Mr. Eggleston. The trial court specifically rejected the County's claim that the records were exempt from disclosure under [RCW 42.56.280](#), which pertains to preliminary drafts, notes, recommendations, and intra-agency memoranda.

With respect to the statutory penalty, the trial court determined Mr. Eggleston had established two violations of the PRA pertaining to the April and July plans. Although Mr. Eggleston had made multiple requests for each of these plans, the trial court ruled that the multiple requests were followups, not new independent requests. Relying on the framework from *Yousoufian v. Office of Ron Simms, King County Executive*, 168 Wn.2d 444, 467–68, 229 P.3d 735 (2010) (*Yousoufian II*), the trial court analyzed a number of aggravating and mitigating factors before setting the penalty amount. The trial court then arrived at a penalty of \$35.00 per day. Applied to a total of 1,411 days,² the total penalty award came to \$49,385.00.

The trial court then addressed an award of attorney fees and costs to Mr. Eggleston based on the lodestar method. In determining the number of hours worked by counsel, the trial court indicated it had disregarded the time spent by counsel on Mr. Eggleston's claims that were dismissed through summary judgment, ignored entries related to other litigation and from contracted law firms, and adjusted seemingly duplicative or excessive time entries noting that some of the briefing in this case was excessive. Also, the trial court lowered the hourly rate for counsel's office staff from \$95.00 per hour to \$25.00 per hour, for 122.8 hours, due to a lack of evidence on the staff's training and qualifications. Lastly, the trial court set a reasonable hourly rate of \$190.00 per hour for 233.3 hours of attorney time. The trial court awarded \$44,327.00 for counsel's time, \$3,070.00 for office staff time, and \$2,736.67 for miscellaneous court costs for a total attorney fee and cost award of \$50,133.67. A judgment against the County was entered shortly thereafter.

²4 Mr. Eggleston appeals. The County cross appeals.

ANALYSIS

Summary judgment dismissal of the 2002 e-mail claim

The PRA is a broad public mandate, requiring that citizens be afforded access to public records. *Belenski v. Jefferson County*, 186 Wn.2d 452, 456–57, 378 P.3d 176 (2016). A public record "includes any [1] writing [2] containing information relating to the conduct of government or the performance of any governmental or proprietary function [3] prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." [RCW 42.56.010\(3\)](#). Although the PRA exempts certain records from production, the statute is to "be liberally construed and its exemptions narrowly construed" to promote public access to information. [RCW 42.56.030](#).

In PRA litigation, a threshold question is whether requested information constitutes a public record. Our case law fails to provide clear guidance on who bears the initial burden of showing that a request made of a public agency was directed at a public record. Division One of this court has suggested the burden falls on the plaintiff. *Dragonslayer, Inc. v. Washington State Gambling Comm'n*, 139 Wn. App. 433, 441, 161 P.3d 428 (2007). However, our Supreme Court has stated, without equivocation, that the burden of justifying nondisclosure always falls on the government agency. *Fisher Broad.—Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 522, 326 P.3d 688 (2014) ("The agency refusing to release records bears the burden of showing secrecy is lawful."); *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1*, 138 Wn.2d 950, 958, 983 P.2d 835 (1999). Our review of whether a

document constitutes a public record is de novo. See *Gronquist v. Dept of Licensing*, 175 Wn. App. 729, 741–42, 309 P.3d 538 (2013).

The parties' dispute over the 2002 e-mail revolves around the threshold issue of whether the information sought by Mr. Eggleston meets the definition of a public record. No claim of exemption has been made. With respect to the conflict over the public record definition, the parties specifically debate whether the 2002 e-mail constituted something prepared, owned, used, or retained by the County, as a public agency.

It is uncontroverted that the 2002 e-mail was not prepared by the County and does not qualify as a public record under that basis. The 2002 e-mail was prepared by Mr. Cannell prior to TD & H hiring him as a subcontractor. Thus, the 2002 e-mail can only constitute a public record if it was owned, used, or retained by the County.

Mr. Eggleston claims the County owned and retained the 2002 e-mail based on language contained in the County's contract with TD & H. Specifically, the contract states that "[a]ll designs, drawings, specifications, documents, and other work products prepared by [TD & H] ... are property of [the County]." CP at 1029.³ Again, the 2002 e-mail was prepared by Mr. Cannell, not TD & H. The contract language is inapplicable.

³ Because the 2002 e-mail was prepared by a private party, Mr. Eggleston's claims regarding the e-mail can only succeed if there are facts indicating the County "used" the 2002 e-mail as contemplated by the PRA. In order to have used the 2002 e-mail, the e-mail must have been "(1) employed for; (2) applied to; or (3) made instrumental to" the county's project or some other governmental function. *Concerned Ratepayers*, 138 Wn.2d at 960 (emphasis in original).

Mr. Eggleston claims the County used the 2002 e-mail when TD & H referred to the e-mail in a June 2002 letter. We disagree. TD & H's letter was written to Mr. Cannell in order to retain his services as an archaeological consultant. The letter references a scope of work sent to TD & H by Mr. Cannell "via email on January 11, 2002." CP at 276 (emphasis added). TD & H's passing reference to the 2002 e-mail, even if attributed to the County, is insufficient to constitute "use." *Concerned Ratepayers*, 138 Wn.2d at 960–61.

This case is much different from *Concerned Ratepayers*, wherein the plaintiffs requested technical plans for a type of generator that had been considered for use at a public power plant. Although the technical plans were owned and possessed by a subcontractor, there was evidence the public utility district employees had reviewed and evaluated the plans during meetings with the contractors. This substantive consideration, along with various references to the generator in other public documents, was sufficient to show the generator's technical plans had a nexus to the public utility district's activities in constructing its power plant and that the document constituted a public record, used by the public agency. 138 Wn.2d at 961–62. The lone fact proffered by Mr. Eggleston as to "use" of the 2002 e-mail pales in comparison to the facts set forth in *Concerned Ratepayers*.

Mr. Eggleston voices frustration with the fact that the 2002 e-mail has never been produced and thus we can never know for certain that it did not contain substantive information. We understand this concern. But the County had no duty to procure a document from a third party that did not meet the definition of a public record. Mr. Eggleston suggests the County is hiding something and speculates the 2002 e-mail contained substantive information, important to the Project.⁴ Such speculation is insufficient to raise an issue of fact necessary to overcome summary judgment. See *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 626–27, 818 P.2d 1056 (1991); *Wash. Fed Nat'l Ass'n v. Azure Chelan LLC*, 195 Wn. App. 644, 662, 382 P.3d 20 (2016).

Because the 2002 e-mail was not a public record, we need not address whether Mr. Eggleston's requests for the e-mail fell outside the statute of limitation.

The April and July plans

⁴ As it did with the 2002 e-mail, the County claims the April and July plans are not public documents. However, the plain terms of the contract provide otherwise. The April and July plans were created and used by TD & H during its substantive work on the County's Project. As such, both documents were captured by the contract's clause on ownership and both fall squarely in the definition of public records.

The County asserts that even if the April and July plans are public records, they are exempt from production. As the agency claiming an exemption, the County bears the burden of proving an exemption applies. See *Am. Civil Liberties Union of Wash. v. City of Seattle*, 121

Wn. App. 544, 89 P.3d 295 (2004). The only exemption that has been preserved for our review is the preliminary draft exemption, RCW 42.56.280.⁴ We review the applicability of this exemption de novo. *Id.* at 549.

The purpose of the preliminary draft exemption, is to protect "the give-and-take of deliberations that are necessary to formulate agency policy." *Id.* This purpose "severely limits [the exemption's] scope." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 520 P.2d 246 (1978). "[O]nly those portions of documents actually reflecting policy recommendations and opinions may be withheld." *Id.* Factual data is not included. "Unless disclosure reveals and exposes the deliberative process, as opposed to the facts upon which a decision is based, the exemption cannot apply." *Id.*

In *Progressive Animal Welfare Society v. University of Wash.*, 125 Wn.2d 243, 844 P.2d 592 (1994) (PAWS), the Supreme Court analyzed the scope of the preliminary draft exemption in circumstances similar to here. At issue in PAWS was whether the University of Washington's unfunded grant proposals, submitted to the National Institute of Health (NIH), fell under the scope of the PRA. The Court held that the unfunded grant proposals did not reveal the kind of "deliberative or policy-making process contemplated by the exemption." *Id.* at 257. Thus the unfunded proposals themselves did not qualify for exemption. However, the NIH's written comments on the unfunded proposals, referred to as "pink sheets," were quintessentially deliberative and, thus, qualified for exemption. *Id.*

The preliminary project plans, created by TD & H in April and July 2012, are akin to the unfunded grant proposals discussed in PAWS. They set forth the project ideas, some of which did not ultimately come to fruition. Nowhere on the preliminary plans is there any commentary. The testimony at trial was that, during negotiations over the Project, such commentary would be provided subsequent to review of a particular preliminary plan. While one might be able to guess at what the evaluations of the preliminary plans were by comparing the preliminary plans with the final project plan, this kind of indirect disclosure is not what is contemplated by the statute. Indeed, the same could be said for the university's unfunded grant proposals. The preliminary plans did not clearly express any opinions or recommendations regarding the Project's final plan. Accordingly, the April and July plans were not exempt from disclosure under the preliminary draft exception.⁵

Calculation of penalties, attorney fees and costs

*7 Calculating a PRA penalty is a two-step process: "(1) determine the amount of days the party was denied access and (2) determine the appropriate per day penalty" up to \$100. *Yousoufian v. Office of King County Executive*, 152 Wn.2d 421, 438, 98 P.3d 463 (2004) (*Yousoufian I*). Both steps are contested here.

Penalty period

Both parties complain the trial court improperly calculated the penalty period for the County's PRA violations. Mr. Eggleston claims the trial court abused its discretion by treating his multiple requests for the April and July plans as followups to two requests, as opposed to multiple, separate requests. The County complains the trial court should have shortened the penalty period assessed for the July Plans since Mr. Eggleston received a copy of the plan at a pretrial deposition. Determining the number of days a public record request was wrongfully denied or delayed involves a question of fact. *Zink v. City of Mesa*, 162 Wn. App. 688, 706, 256 P.3d 384 (2011). "When, as here, the trial court heard live testimony and judged the credibility of witnesses, we afford deference to its determination of this fact." *Id.*

We disagree with Mr. Eggleston's claim that the trial court was required to treat his various requests for the April and July plans as separate requests for purposes of PRA penalties. The trial court had discretion to group together related requests in assessing penalties. *Id.* at 711–12, 722. The facts presented at trial justified its decision to group together Mr. Eggleston's requests for the April and July plans as two requests, rather than several independent requests. In his followup inquiries regarding the April and July plans (dated August 2, August 24, and September 2, 2012), Mr. Eggleston did not seek new information. Instead, he complained about the County's failure to respond to his prior requests. Mr. Eggleston did seek a withholding log in one of his followup inquiries. But this did not constitute a new request. A withholding log is not a separate document that is subject to a PRA request. It is a document that forms a part of an agency's response to a records request. RCW 42.56.210(3). Given the totality of the circumstances, the trial court had ample grounds for finding only two PRA violations.

The County argues the trial court should not have calculated the penalty period for the July Plans to run until the first date of trial. Instead, the County claims the penalty period should

have ended on January 18, 2013, when Mr. Eggleston received the July Plans from an employee of TD & H at a pretrial deposition. Assuming an agency can comply with the PRA by delegating the task of records disclosure to a third party,⁷ there are no facts in the record suggesting that happened. The record on appeal merely indicates an employee of TD & H provided Mr. Eggleston a copy of the July Plans in compliance with a subpoena duces tecum issued by Mr. Eggleston's attorney. Nothing indicates the County facilitated access to the document. *Cf. RCW 42.56.070* (duty to make records available falls on the agency). Based on this circumstance, the trial court correctly calculated the penalty period for the July Plans as extending through the first day of trial.

Daily penalty amount

*8 Both parties also complain the trial court improperly calculated the daily penalty amount for the County's PRA violations. Mr. Eggleston argues for an increase in the daily fee. The County claims it is excessive. A trial court's determination of daily penalties under the PRA is reviewed for abuse of discretion. *Yousouffian II*, 168 Wn.2d at 458. Discretion is abused if the trial court's decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.* Although the Supreme Court's *Yousouffian II* decision set forth a nonexclusive list of aggravating and mitigating factors relevant to the penalty analysis, trial courts retain "considerable discretion" to set PRA penalties. *Wade's Eastside Gun Shop, Inc. v. Dept of Labor & Indus.*, 185 Wn.2d 270, 279, 372 P.3d 97 (2016).

The trial court did not commit any legal error in assessing penalties against the County. The court correctly identified the applicable nonexclusive aggravating and mitigating factors. It did not improperly focus on one factor to the exclusion of others. *Sergeant v. Seattle Police Dept.*, 179 Wn.2d 376, 398, 314 P.3d 1093 (2013). Nor did the court erroneously adopt a presumptive starting point when considering the statutory penalty range. *Yousouffian II*, 168 Wn.2d at 466.

The trial court also supported its legal analysis with tenable facts. In essence, the trial court found some of the factors favored the County (e.g., county officials relied in good faith on legal counsel and were legitimately concerned about project delays), others favored Mr. Eggleston (e.g., legal counsel incorrectly advised the County of the law), and some went both ways (some of the County's interactions with Mr. Eggleston were fully appropriate, others bordered on bad faith). The record amply supports this position. The trial court was not required to make detailed findings regarding the *Yousouffian II* factors. *See id.* at 470. We therefore decline to quibble with aspects of the trial court's ruling that could have been stated with greater clarity.

In the end, the ultimate penalty selected by the trial court was not outside the broad realm of reasonableness. *See id.* at 458–59 (manifestly unreasonable decision is one that no reasonable person would take). The \$35.00 daily penalty was not particularly low. *Cf. id.* (reversing a \$15.00 per day penalty as manifestly inadequate). It therefore reflects that at least some of the County's responses to Mr. Eggleston at least bordered on bad faith. But at the same time, the penalty amount appropriately takes into account the County's limited resources and the lack of any proven economic loss by Mr. Eggleston. Neither party has established a basis for altering the daily penalty amount.

Cost award

Any person who prevails in a PRA action shall be awarded "all costs, including reasonable attorney fees." *RCW 42.56.550(4)*. Here, the trial court awarded \$2,736.67 for various court costs. But Mr. Eggleston claimed \$4,261.67 in costs. He argues the trial court erred in not awarding all of his costs because the PRA does not permit any discretion in an award of costs, like it does for reasonable attorney fees. While the PRA does not define "all costs," this phrase has been interpreted to allow a party to "recover all reasonable costs incurred in litigating the dispute." *Am. Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115–17, 975 P.2d 536 (1999) (emphasis added); *see also Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 828–30, 225 P.3d 280 (2009). While these cases indicate a liberal award of costs is preferred, the phrase reasonable costs implies some discretion on the part of the trial court to disallow costs that are unreasonable. Mr. Eggleston does not argue the trial court abused its discretion in not awarding any specific costs. He simply argues there was no room for discretion. He is incorrect. The trial court did not abuse its discretion in adjusting the cost award.

ATTORNEY FEES/APPELLATE COSTS

*9 The attorney fee provision of the PRA, *RCW 42.56.550(4)*, also applies to appellate costs. *PAWS*, 125 Wn.2d at 271. Because Mr. Eggleston has prevailed on his right to inspect the April and July plans, he is entitled to an award of fees and costs, limited to this aspect of his

defense of the County's cross appeal. An award shall issue upon Mr. Eggleston's compliance with [RAP 18.1\(d\)](#).

CONCLUSION

The judgment of the trial court is affirmed. Mr. Eggleston's request for appellate fees and costs is granted in part, as set forth in this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to [RCW 2.06.040](#)

WE CONCUR:

[Fearing, C.J.](#)

[Lawrence-Berrey, J.](#)

All Citations

Not Reported in P.3d, 1 Wash.App.2d 1045, 2017 WL 6388976

Footnotes

- 1 Apart from the page Mr. Eggleston obtained at the County meeting, Mr. Eggleston had actually received a copy of the April Plans from the Nez Perce Tribe. Mr. Eggleston sought a copy of the plans at the behest of the tribe because the tribe did not fully trust the County and wanted to test the accuracy of its records.
- 2 From April 26, 2012 (date of request for the April Plans) until December 10, 2012 (when Mr. Eggleston received the April Plans) is 228 days. From July 17, 2012 (date of request for the July Plans) until October 13, 2015 (Day 1 of the penalty phase of trial since the July Plans were never produced by the County) is 1,183 days.
- 3 Mr. Eggleston also briefly refers to a portion of the contract that requires the consultant (TD & H) to keep documents for three years. However, that portion of the contract only pertains to "cost records and accounts." CP at 1046. It is not applicable here.
- 4 Mr. Eggleston claims that a conversation he had with Kevin Cannell suggests the 2002 e-mail contained substantive information. During that conversation, Mr. Cannell told Mr. Eggleston he had written a proposal in about 2001, documenting cultural resource concerns with the project location. However, Mr. Cannell did not indicate his "proposal" took the form of a 2002 e-mail. Given that Mr. Cannell's scope of work, which was attached to the 2002 e-mail and which was disclosed as a public record, identified cultural resource concerns for the site, Mr. Cannell's conversation with Mr. Eggleston does not suggest the existence of any undisclosed documents.
- 5 Two additional exemptions have been raised for the first time on appeal and are not preserved. [Sargent v. Seattle Police Dept.](#), 179 Wn.2d 376, 394–97, 314 P.3d 1093 (2013).
- 6 Even if the April and July plans contained some commentary, they still qualified as public records and should have been disclosed in redacted form.
- 7 The parties on appeal agree that TD & H does not qualify as a de facto public agency.

End of
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DECLARATION OF SERVICE

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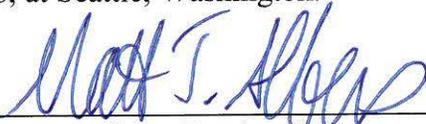
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 17, 2018, at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

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