

No.74536-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

THEODORE ROOSEVELT HIKEL, JR.,

Appellant,

vs.

CITY OF LYNNWOOD,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case involves the Respondent City of Lynnwood's good faith compliance with the Public Records Act, Chapter 42.56 RCW ("PRA").

Appellant Theodore Hikel submitted a public records request to the City, asking to inspect "all communications" sent and received by two City personnel, from January 1, 2014 through June 22, 2015. The request required the City to produce 27,500 emails and other documents, one of the largest requests the City has ever received. The City's response was complicated by the fact that Appellant wanted to view the electronic records without paying for copies, and without obtaining his own copy of Microsoft Outlook or other PST file viewer for reading the records.

The City worked diligently and reasonably to fill the request in the manner requested by Appellant, and the first installment of records was available on the date the City had stated for production. The City researched and implemented several different methods to produce the records, to provide them to Appellant more quickly and in his preferred electronic format.

The trial court correctly held that the City did not fail or refuse to comply with the PRA and dismissed the action. To the contrary, the City worked diligently to fill Appellant's large request, in the manner that best

met Appellant's needs while balancing the City's other public functions and while working to fill other records requests filed by Appellant and other citizens.

Although when Appellant came to City Hall on September 1, 2015 to pick up the first installment of records, the City staff at the front counter was not aware of the records' availability, the trial court properly held that this was not a violation of the PRA. The City did not deny Appellant's request, refuse to produce records, fail to meet a self-imposed deadline, or otherwise violate the PRA in its response to Appellant's request. Simply put, this action was not necessary for Appellant to obtain the records. Perhaps realizing that the events of September 1, 2015 did not violate the PRA, Appellant now raises a litany of complaints about other aspects of the City's response. However, the trial court properly ruled these allegations were not PRA violations, or were not properly raised in the trial court. The Court of Appeals should affirm the trial court's decision to deny Appellant's Amended Motion and to dismiss the Complaint.

II. RESPONDENT'S COUNTERSTATEMENT OF ISSUES

1. Where the City diligently responded to Appellant's records request, had an installment available on the date given for production, and went beyond statutory requirements to produce records in Appellant's preferred format, did the City comply with the PRA in its response to Appellant's request?

2. Did the trial court err by limiting consideration of issues raised for the first time in Appellant's Reply Brief?
3. Even if this Court considers Appellant's "inadequate rules" argument, did the rules result in Appellant being denied a record?
4. Did the trial court err in determining that the City's June 29 letter complied with the PRA by requesting clarification?
5. Did the trial court err in determining that the City's July 10 letter complied with the PRA by stating a reasonable estimate of time for providing the first installment of records?
6. Did Appellant waive the claim that the City's June 29 letter violated RCW 42.56.520 by seeking clarification based on the number of responsive records, and if that issue was not waived, did the June 29 request for clarification comply with RCW 42.56.520?
7. Did the City violate RCW 42.56.100 by relying on the July 10 letter, which stated the date on which the first installment of records would be ready?

III. STATEMENT OF THE CASE

A. Appellant Submits a Public Records Request to the City.

On June 22, 2015, Appellant¹ submitted a written public records request to the City, requesting:

All electronic and hard copy communications sent by and received by Council President Loren Simmonds and Council Assistant Beth Morris from Jan. 1, 2014 to June 22, 2015.

CP 149, 164. Appellant submitted the request directly to Debbie Karber,

¹ Appellant is a former City Council Member, and Appellant's counsel is the former Mayor of the City. CP 149.

the Deputy City Clerk, who was the City employee primarily responsible for responding to public records requests.² Appellant indicated that he would like to visually inspect the records before purchasing hard copies. CP 149. Appellant's request included 27,500 emails, together with attachments, as well as other communications. CP 152.

B. The City Responds to Appellant's Records Request.

On June 22, 2015, the same day the request was received, Ms. Karber began working on it. Based on her experience in responding to requests to review emails, she knew that production of a large volume of emails was very time consuming. CP 150. Regarding emails, those electronic records are stored in the City's computer system, in Microsoft Outlook. There are no paper copies available for review. For security reasons, the public cannot have access to City employees' Outlook folders, where the records are stored. CP 150. When the City receives a request for email records, and the requestor only wants to view the records, Ms. Karber must physically review each email, and its attachments, for exempt material. If the documents contain exempt material, they must be redacted. Then, Ms. Karber must convert each email and attachment to a PDF file, and store it on a DVD or CD disk. The requestor may then view

² As Deputy City Clerk, Ms. Karber also has other duties. CP 149.

the records, in the PDF files on the disk, on a computer set up for that purpose at City Hall. Alternatively, the City can print each email for review as a hard copy, but that option is more costly. CP 150, 151.³

Ordinarily, Jerry Vogel, who works in the City's Information Technology (IT) Department, assists in responding to records requests by conducting searches for electronic records on the City's computer system. Mr. Vogel was out of the office the week of June 22, 2015. CP 151.

June 29, 2015 was Mr. Vogel's first day back in the office. That day, Ms. Karber gave him a copy of Appellant's request, and asked him to perform a computer search for responsive records. He determined there were 137,000 responsive emails. On June 29, 2015, Ms. Karber wrote to Appellant, acknowledging his request, asking for clarification due to the large volume of responsive records, and informing him the City might need to produce records in installments. CP 151, 166. On July 1, 2015, Appellant clarified his request and agreed to installments. CP 152, 168.

Due to the size of Appellant's request, the Information Technology

³ Another method to produce email records for review is for the City to save the email as PST files, and the requestor can use a "PST File Viewer" program to view the email. However, using this method, the requestor must either have access to the City's Outlook network (which is not acceptable for security reasons) or the requestor must have other access to Microsoft Outlook or another PST file viewer program. Based on past experience with Appellant, Ms. Karber understood that the PST file method was not a viable option for responding to Appellant's request. Further, printing each responsive record would be unreasonably expensive. Therefore, to respond to Appellant's request, she was going to have to convert each responsive record to a PDF file. CP 151.

Director assigned Mr. Vogel to assist with production of the electronic records. On July 10, 2015, Mr. Vogel determined the volume of responsive emails was actually 27,500. This is still a very large number of records to produce – it is one of the largest requests the City has ever received. CP 152. On July 10, Ms. Karber informed Appellant that the volume of responsive email was 27,500, and that the City would have the first installment of records available on August 6, 2015. CP 153, 170.

In the meantime, in addition to working on Appellant’s request that is the subject of this action, Ms. Karber continued to work on pending and new public records requests from other citizens. From June 22 to July 31, 2015, the City received 68 requests for public records, requesting various volumes of records, all of which had to be addressed. CP 153, 173-88.

Further, as of June 21, 2015, Appellant had two other pending records requests, both submitted to the City on June 17, 2015. Ms. Karber completed the response to these requests on June 24 and July 24. On June 22, 2015, Appellant submitted two more records requests, one of which Ms. Karber completed on June 29 (the other June 22 request is the subject of this action). On June 26, 2015, Appellant submitted another request for records, which Ms. Karber completed on July 6. On July 10, 2015, Appellant submitted three more requests, which Ms. Karber completed on

July 10 (the day it was received), July 31 and September 8. On July 31, 2015, Appellant submitted another request, which Ms. Karber completed on July 31 (the day it was received). On September 15, 2015, Appellant submitted another request, which Ms. Karber completed on September 23. In sum, during the pertinent time frame, Appellant had nine other records requests, all of which were promptly addressed. CP 153, 190-200.

Thus, throughout July, in addition to her other duties, Ms. Karber was working on the City's response to all these requests. She did take a scheduled vacation from July 13 to 17. CP 154. During the next two weeks (from July 20 to August 5, 2015), in addition to her other duties, Ms. Karber worked to fill other pending records requests. She completed 28 records requests during this time, including several of Appellant's requests. To accomplish this, she worked 7.5 hours of overtime. CP 154.

On August 6, 2015, Ms. Karber worked on Appellant's request that is the subject of this action. She reviewed 138 individual responsive emails for exempt material, and converted each email to a PDF file to be saved on a disk for Appellant's review. This took approximately 1.4 hours. Because the process was so time consuming and the request was so large, Ms. Karber spoke again with the IT Department regarding whether there was a less time-intensive method to produce emails for review. Due

to concerns regarding security of the City's electronic records system, at that time the Department did not have a better solution. However, as of August 6, 2015, the date stated in the City's July 10 letter, the City had an installment ready for Appellant's review. Despite the invitation in the July 10 letter, Appellant did not come to City Hall to review the installment on August 6, or any other time in August. CP 154.

During August, Ms. Karber continued to work on all pending records requests. As stated above, from June 22 to July 31, the City received 68 records requests. From August 1 to September 14 (the date the City was served with the Complaint), the City received 46 new requests. Thus, from June 22 to September 14, 2015, the City received 114 records requests, which all had to be addressed. CP 155.

On September 1, 2015, Appellant came to City Hall to pick up the first installment of records. CP 155, 233. Debbie Hodgson, another City employee, spoke to Appellant at the front counter. Ms. Hodgson was not aware that an installment of records had been available for Appellant's review since August 6. CP 155. Appellant left a letter with Ms. Hodgson regarding his June 22 request. CP 154, 202.

Over Labor Day weekend (September 5 to September 7), Ms. Karber came into City Hall and worked for 8.5 hours solely on

Appellant's records request. CP 155.

On September 8, 2015 (Tuesday after Labor Day), in addition to spending time during normal working hours, Ms. Karber worked two hours of overtime on Appellant's request. By then, she had reviewed and converted another 366 emails and attachments to separate PDF files, for a total of 504 emails available for Appellant's review. However, this left more than 26,000 emails to review, redact and convert. She again discussed alternative solutions with the IT Department. As noted above, she completed another of Appellant's pending records requests that day, and wrote to him regarding that request. CP 155-6.

On September 14, 2015, Ms. Karber worked on another of Appellant's records requests, and sent him a letter on that request. CP 156. Also on that date, Ms. Karber again worked on Appellant's June 22 request, reviewing emails for exemptions. She was drafting a letter to Appellant, to inform him that another installment was ready, when Appellant's counsel served her with the Complaint. CP 156.

C. The City Makes Additional Efforts to Expedite Production of Electronic Records in a Format Convenient to Appellant.

After being served with the Complaint, Ms. Karber again discussed with the IT Department whether the City could develop a less time-intensive method to produce email when a requestor asks to review

records without purchasing copies. On September 16, 2015, she met with IT Department staff and discussed the City's ability to set up a special computer at City Hall, with secure access (firewalls) to City PST file folders using the City's Outlook system. CP 157. The City decided to implement this approach, as it would allow citizens to review only the email in the PST folders, while ensuring the City-wide Outlook network was not accessed. Ms. Karber believed this was a good method to provide responsive email to Appellant, as it would make the records available more quickly than the method then being used. CP 157. That day (September 16), Appellant's counsel was informed that an installment would be available for Appellant's review on September 18 (Friday), another installment would be available on September 21 (Monday), and subsequent installments would be available on a weekly basis. CP 157.

On September 17, 2015, the City's IT Department located a computer, installed the necessary software and other security measures, and set up the computer in a public area for citizen review of electronic records. CP 158. On September 17, Ms. Karber wrote to Appellant, informing him that installments of records were available for his review at City Hall. CP 158, 204, 206. Also, the City Attorney confirmed that installments of records would be available for review on September 18, on

September 21, and on a weekly basis thereafter. CP 158.

When City Hall opened on September 18, 2015, the computer and the disk containing an installment of records (in PDF format) were available. That afternoon, Appellant came to City Hall and reviewed the records on the City's computer. CP 158.

On September 21, 2015, a second disk was also available, which also contained records that Ms. Karber had converted to PDF format before September 17. CP 158. On September 22, Appellant returned to City Hall to continue his review of the records. That day, Ms. Karber told Appellant that these two disks contained records in PDF format. She explained that to expedite production of the large volume of records, future installments would be provided in PST format and would have to be viewed using the Microsoft Outlook program. She further explained that the City had a computer specially set up and available for his use with access to the PST files using Outlook if he did not have access to that program himself. CP 158-9. Appellant did not indicate that he would be unable to open or view the email records on his own computer, or that he was dissatisfied with the arrangements the City had made. CP 159.

That afternoon, Appellant spent some time reviewing the PDF records on the City's computer. Appellant returned to City Hall on

September 23, 2015, but instead of using the City's computer to review the records, he purchased the two disks and took them with him. CP 159.

By September 28, 2015, Ms. Karber had reviewed 1,638 additional email and attachments and placed them in a PST file folder on a disk for Appellant. CP 159. On September 29, Appellant came to City Hall to inspect that installment. Rather than viewing the email on the computer the City made available to him with access to Outlook, Appellant again purchased the disk and took it with him. CP 159. He did not indicate that he would be unable to open the records on his own computer, even though he had been told they were in PST format and he would need Outlook to open them. CP 159. That afternoon, Appellant returned to City Hall, indicated he could not open the documents, and demanded that the City provide the records in PDF format. CP 159, 208. Ms. Karber again explained the difficulty in producing a large volume of email for review in PDF format, and that the City had set up the computer with Outlook for his use at no cost to him. CP 159-60. For the first time, Appellant expressed displeasure with that reasonable arrangement. CP 159-60.

The next day, September 30, 2015, Ms. Karber spoke again with the IT Department regarding Appellant's request to view email in PDF format. CP 160. After further review, the Department devised another

solution -- the City could save the emails in a PST file, and then convert an entire installment in the PST file folder to a single PDF file that would be saved on a disk. This method would take much less time than saving each individual email as a separate PDF file. CP 160. On October 2, 2015, Ms. Karber completed this process for the records that were available on September 28, and informed Appellant that a disk containing the installment in PDF format was available. CP 160, 210. Late in the afternoon of October 2, Appellant's counsel served Appellant's unnecessary Amended Motion to Show Cause. CP 160.

On October 5, 2015, Ms. Karber produced another installment in PST format, and informed Appellant that the installment was available. Appellant picked up this installment without issue. CP 160-1.

On October 6, while at work at City Hall, Ms. Karber suffered a medical emergency. She was on medical leave from October 6 through October 20, and then worked part-time until October 26. In her absence, the City assigned other employees to perform her job duties, including continued work on Appellant's records request. The City hired two temporary employees, one to assist with public records requests and another to perform Ms. Karber's other job duties. CP 161.

Due to Ms. Karber's absence, the need to determine which

employee would work on Appellant's request and hire temporary employees, and the necessity for that person to "come up to speed," it was not possible for the City to provide an installment on October 12, 2015. Appellant was informed of this in advance and did not object. CP 161. The City provided the next installment on October 19, 2015, and then provided weekly installments until the request was complete. CP 161.

D. The Trial Court Determines that the City Did Not Violate the PRA in Responding to Appellant's Records Request.

Appellant filed his Complaint, Motion to Show Cause, and supporting Declaration on September 11, 2015. In these documents, Appellant claimed the City violated the PRA by not producing records by the August 6 deadline (or by the date of the Complaint), by not extending time to produce the records, and by not providing any explanation. CP 242, 245, 250-52, 254, 260, 262, 263-64. Essentially, the Complaint and Motion allege the City wrongfully denied access to records.

Likewise, Appellant's Amended Motion filed on October 2, 2015 argued that the City completely failed to produce records (CP 302, 304, 311-12) and engaged in "silent withholding." CP 310-11. The Amended Motion also argued the City violated the PRA by not producing records in

Appellant's preferred electronic format (PDF). CP 302, 312, 320, 322.⁴

On December 8, 2015, the trial court held the show cause hearing. After taking the matter under advisement, the trial court entered its Memorandum Decision and Order, ruling that the City did not violate the PRA in its response to Appellant's records request and dismissing the action. CP 8-12. Regarding Appellant's argument that the City violated the PRA by failing to provide records on September 1, 2015 when front counter staff did not know the installment was available, the trial court took the common sense approach:

[T]his plainly was not a refusal to provide documents. The City had already indicated it would make the records available. What actually happened here is that somebody made a mistake. Appellant received the installment by September 17, two and-a-half weeks later, when the public records officer straightened the matter out. While this was about six weeks after the City had estimated its first installment would be ready, the delay does not necessarily establish a violation, either. An entity does not violate the PRA merely by failing to meet its own self-imposed deadlines as long as it was acting diligently in its attempts to respond to the PRA. *Hobbs v. State Auditor's Office*, 183 Wn.App. 925, 940, 335 P.3d 1004 (2014).

CP 10. Regarding whether the City acted diligently, the court concluded:

It is reasonable to expect the City to prepare documents for disclosure as best it can. It is not reasonable to expect that

⁴ In this appeal, Appellant has withdrawn all claims that the City violated the PRA by not producing records in PDF format. App. Opening Brief, p. 44. Likewise, it appears that Appellant is no longer arguing that the City engaged in "silent withholding."

there will never be a miscommunication between a public records officer and a receptionist.

CP 11. Thus, there was “no violation of the PRA based on the receptionist’s failure to turn over the first installment on September 1.”

CP 11. Likewise, the City did not violate the PRA based on the claim that the City did not convert emails into a format convenient to Appellant.⁵ CP

11. Finally, the court stated that it was considering Appellant’s allegations that the City “failed to promulgate rules, which allegations are contained in Appellant’s Reply memorandum and nowhere else previously, only on the question of whether the City was or was not diligent.” CP 11-12. In this regard, the court noted the allegations were not connected to any failure to promptly respond or provide records. CP 12.

IV. ARGUMENT

A. Standard of Review.

Judicial review of agency action challenged under the PRA is de novo. *RCW 42.56.550(3)*. Appellate courts stand in the same position as the trial courts when reviewing declarations, memoranda of law and other documentary evidence. *Ameriquest Mortgage Co. v. Office of Attorney General*, 177 Wn.2d. 467, 478, 300 P.3d 799 (2013). A superior court’s

⁵ As noted above, by October 2, 2015, the City was again converting responsive email into Appellant’s preferred PDF format, at no cost to Appellant.

decision to dismiss will be affirmed on appeal if it is sustainable on any theory within the pleadings and proof. *Rock v. State*, 91 Wn.2d 94, 95, 586 P.2d 1173 (1978).

B. The Trial Court Correctly Held that the City Complied with the PRA in Responding to Appellant’s Records Request (Appellant’s Assignment of Error No. 6).

The Public Records Act (“PRA”) is a strongly worded mandate for the disclosure of public records. *Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993).⁶ The PRA disclosure requirement is liberally construed in favor of disclosure. *RCW 42.56.030*; *West v. Department of Natural Resources*, 163 Wn.App. 235, 242, 258 P.3d 78 (2011). The PRA requires government agencies to disclose identifiable public records upon request, unless an enumerated exemption applies. *RCW 42.56.080*; *West*, 163 Wn.App. at 242.⁷

Regarding electronic records, the agency must produce nonexempt records “that are reasonably locatable in an electronic format used by the

⁶ The PRA defines “public record” broadly to include “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” *RCW 42.56.010(2)*.

⁷ An “identifiable record” is essentially one that agency staff can “reasonably locate.” WAC 14-44-05002. An agency must conduct an objectively reasonable search for responsive records. WAC 44-14-04003(9). An agency should provide reasonably locatable electronic records. *Id.* A “reasonably locatable” electronic record is one that can be located with typical search functions and organizing methods in the agency’s current program search feature. WAC 44-14-05002.

agency and is generally commercially available, or in a format that is reasonably translatable from the [agency’s format].” WAC 44-14-050(2).⁸ The agency must take reasonable steps to translate its original into a useable copy for the requestor. WAC 44-14-05002(2).⁹

The PRA requires a public agency to respond to a records request within five business days of receiving the request, by either: (1) providing the record; (2) providing an internet address and link on the agency’s web site to the specific records requested; (3) acknowledging receipt of the request and providing a reasonable estimate of the time the agency will require to respond; or (4) denying the public record request. *RCW 42.56.520*. In addition, an agency may request clarification of the request:

Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. In acknowledging receipt of a public record request that is unclear, an agency ... may ask the requestor to clarify what information the requestor is seeking.

⁸ Chapter 44-14 WAC states Model Rules and Comments promulgated by the Attorney General. The Model Rules and Comments are not binding, but are guidance documents. WAC 44-14-00003; *Mitchell v. Dept. of Corrections*, 164 Wn.App. 597, 606, 277 P.3d 670 (2011), citing *Mechling v. City of Monroe*, 152 Wn.App. 830, 222 P.3d 808 (2009).

⁹ When the agency has a record in one electronic format but the requestor seeks a copy in another format, the question is whether the record is “reasonably translatable” into the other format. WAC 44-14-05002(2)(c)(iii).

RCW 42.56.520 (emphasis added).

Thus, the PRA requires an agency to provide requested records in a reasonable timeframe. “The operative word is ‘reasonable.’” *Forbes v. City of Gold Bar*, 171 Wn.App. 857, 864, 288 P.3d 384 (Div. 1 2012). The PRA “recognizes that there are situations where an agency needs additional time to respond to a request.” *Forbes*, 171 Wn.App. at 859. In *Forbes*, similar to Appellant’s request, the plaintiff requested records that included all letters and emails involving various city officials that mentioned plaintiff. As in this case, because the request involved electronic records (email), the city’s response was complicated. Also as in this case, the city had to respond to many other records requests at the same time, including other requests by the plaintiff. The city took 16 months to provide all the records. The Court held this was a reasonable response: “[t]he response to the request was reasonable in light of the difficulty the city had in retrieving the information and the efforts it expended to recover the information.” *Id.*

While the PRA requires governmental agencies to respond promptly to records requests, the Act also recognizes that agencies perform many other essential public services, and response procedures must prevent excessive interference with these other essential functions. *RCW*

42.56.100. According to Attorney General PRA guidelines:

Requestors should keep in mind that all agencies have essential functions in addition to providing public records. Agencies also have greatly differing resources. The act recognizes that agency public records procedures should prevent “excessive interference” with the other “essential functions” of the agency. RCW 42.17.290/42.56.100. Therefore, **while providing public records is an essential function of an agency, it is not required to abandon its other, nonpublic records functions.** Agencies without a full-time public records officer may assign staff part-time to fulfill records requests, provided the agency is providing the “fullest assistance” and the “most timely possible” action on the request. The proper level of staffing for public records requests will vary among agencies, considering the complexity and number of requests to that agency, agency resources, and the agency’s other functions. ...

WAC 44-14-04001 (emphasis added).

Pursuant to RCW 42.56.080, an agency may make records available in installments. As noted above, in the initial “five-day letter,” an agency may estimate a reasonable time to provide the records, and this includes a reasonable time estimate for the first installment. *Hobbs v. Washington State Auditor’s Office*, 183 Wn.App. 925, 941-3, 335 P.3d 1004 (2014). However, an agency’s failure to meet a self-imposed production deadline for production **does not violate the PRA**; courts do not impose a “mechanically strict” finding of a PRA violation whenever timelines are missed. *Andrews v. Washington State Patrol*, 183 Wn.App. 644, 651-3,

334 P.3d 94 (2014); *Hobbs*, 183 Wn.App. at 939-41 (stating that *Andrews* held “the PRA did not require an agency to comply with its own self-imposed deadlines as long as the agency was acting diligently in responding to the request in a reasonable and thorough manner”). In addition, an agency can cure potential violations of the PRA, while the request is still pending. *Hobbs*, 183 Wn.App. at 940-41.

In *Andrews*, the agency could not meet a self-imposed deadline for producing an installment of records, and informed the requestor of a new, extended time. The agency did not return the requestor’s telephone calls regarding the reasonableness of the extension, and then missed the extended deadline and neglected to send another extension letter. The Court found no violation of the PRA, stating:

The PRA contains no provision requiring an agency to strictly comply with its estimated production dates. In fact, the statute gives an agency additional time to respond to a request based upon the need to “locate and assemble the information requested.” RCW 42.56.520. “Extended estimates are appropriate when the circumstances have changed.” WAC 44-14-04003(6).

... [T]he legislature did not include a provision requiring an agency to disclose records within its initial estimated response date. Moreover, RCW 42.56.520 does not limit the number of extensions an agency may require to a request. The statute simply requires an agency to provide a “reasonable” estimate, not a precise or exact estimate, recognizing that agencies may need more time than initially anticipated to locate the requested records. RCW 42.56.520.

Andrews, 183 Wn.App. at 651-2. Further:

Mr. Andrews correctly concedes that whether an agency complies with the PRA is a fact specific inquiry and must be decided on a case-by-case basis. Although RCW 42.56.100 requires that agencies provide “the fullest assistance to inquirers and the most timely possible action on requests for information,” the statute does not envision a mechanically strict finding of a PRA violation whenever timelines are missed. Rather, the purpose of the PRA is for agencies to respond with reasonable thoroughness and diligence to public records requests.

Andrews, 183 Wn.App. at 653.

Thus, in this case, the trial court properly focused on whether the City worked reasonably diligently to respond to Appellant’s request in a reasonable timeframe. Appellant’s Complaint, Amended Motion and Declarations all claimed that the City violated the PRA by (1) not meeting the August 6 self-imposed deadline, (2) “denying” or “refusing to provide” records on September 1, and (3) not providing an installment of records in PDF format. See *e.g.* CP 302, 304, 310, 312-3, 320, 322.

The trial court correctly determined the City did not violate the PRA for any of these reasons. The undisputed facts demonstrated that the City worked diligently and reasonably to complete Appellant’s request, given the need to respond to other requests (including nine other requests by Appellant himself) and staff’s other work load. The City had an

installment of records available on August 6, 2015, the date on which the City told Appellant the first installment would be ready.¹⁰ CP 154.

The City continued to work to fill Appellant's request. Over Labor Day weekend, Ms. Karber worked 8.5 hours to make additional records ready for review. On September 8, 2015, she spent additional time on the request, and also responded to another of Appellant's requests. When she was served with the Complaint on September 14, she was preparing a letter informing Appellant that another installment was available. CP 156.

To expedite production of records to Appellant, the City implemented an alternative method for producing them. The City set up a special computer at City Hall, with secure access to the Outlook program, allowing Appellant to review email placed in the PST file folders, without accessing the City-wide Outlook system.¹¹ CP 157. On September 18 and 21, 2015, installments were available for Appellant's review, along with a computer and access to Outlook for his use at no cost to him. CP 158. This provided Appellant with the "fullest assistance" and met the City's obligation to take reasonable steps to produce the electronic records – it

¹⁰ Appellant has never alleged that August 6 was not a reasonable timeframe for the first installment.

¹¹ The City had no duty to take these steps; Microsoft Outlook is a commercially available program, and other "free" PST file viewer programs are also available. CP 228, 289. Appellant could easily have obtained these programs.

provided the records to Appellant more quickly than the prior method and did not even require Appellant to obtain his own copy of Microsoft Outlook or readily available PST file viewer program.

On September 22, Ms. Karber explained to Appellant that the first two disks provided by the City contained records in PDF format, but that to expedite production of the large number of email, future installments would be in PST format and would have to be viewed using the Outlook program. She further explained the City had a computer specially set up with Outlook for his use in accessing the PST files if he did not have the Outlook program himself. Appellant did not indicate that he was unhappy with these arrangements. CP 158-9.

On September 28, 2015, as promised the City had another installment available for Appellant's review. As Ms. Karber had explained, these emails were on a disk in a PST file folder. CP 159. On September 29, Appellant came to City Hall to inspect that installment. Rather than viewing the email on the computer with Outlook that the City provided, Appellant chose to purchase the disk and take it with him, even though he had been informed the records were in PST format and he would need the Outlook program to open them. CP 159. When Plaintiff realized that he could not open the PST files using his own computer

(because he did not want to obtain Outlook or another PST file viewer program) and demanded that the City provide the records in PDF format, within three days the City researched and implemented yet another method to produce the electronic records, which would provide the records to Appellant more quickly and in PDF format. CP 160.

After this, the City provided installments of records on a weekly basis until Appellant's request was complete.¹² Appellant has expressed no concerns with the City's response to his request from this time forward.

Thus, the undisputed facts show that the City worked reasonably and diligently to respond to Appellant's records request, one of the largest requests the City has received. The City's response was complicated by the fact that Appellant wanted to inspect electronic records before receiving (and paying for) any copies, but apparently did not have the Outlook program, and did not want to purchase Outlook or obtain a free, readily available PST file viewer program. The City implemented an alternative, faster method to produce the records for review. When Appellant was not satisfied with this approach, within three days the City developed another method to accommodate Appellant's request for PDF

¹² The sole exception is one week when Ms. Karber suffered a medical emergency. The City immediately hired temporary employees to perform her duties, who resumed work on Appellant's request. CP 161.

format. The City clearly met its obligation under the PRA to respond to Appellant's request, to provide the "fullest assistance" to Appellant, and to take reasonable steps to produce email for review. The City did not fail to meet the August 6, 2015 timeframe, nor did the City deny the request or refuse to provide records. Appellant simply cannot establish that a violation of the PRA has occurred.¹³

1. The Trial Court Did Not Reach an Untenable or Unsupportable Conclusion Regarding Appellant's September 1 Visit to City Hall (Appellant's Assignment of Error No. 6).

Appellant alleges the trial court reached "untenable, unsupportable and absurd" conclusions about Appellant's September 1 visit to City Hall, and was attempting to put the "blame on him." App. Opening Brief, p. 40, 42. However, the trial court was not "blaming" Appellant, but simply held that the events of September 1 were not a violation of the PRA.

Appellant did not come to City Hall until September 1, 2015,

¹³ Previously, Appellant argued that the City engaged in "silent withholding," citing *Progressive Animal Welfare Society v. Univ. of Wn.*, 125 Wn.2d 243, 884 P.2d 592 (1994). To the extent Appellant takes this position on appeal, the argument is misplaced. In *PAWS*, a University representative stated in writing that he would not respond to records requests. The court held there was a question of fact as to whether that person "silently withheld documents," explaining: "Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The [PRA] does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records." *Id.* at 270. Here, the City did not withhold any records; *PAWS* is simply not applicable.

nearly one month after the first installment was available on August 6. Appellant alleges that the City violated the PRA by not providing the first installment to him on that date. While it is unfortunate that City staff at the front counter was not aware that an installment was available, Appellant provides no authority for the proposition that this violated the PRA. The trial court did not err by taking a common sense approach to the events of September 1:

[T]his plainly was not a refusal to provide documents. The City had already indicated it would make the records available. What actually happened here is that somebody made a mistake. Plaintiff received the installment by September 17, two and-a-half weeks later, when the public records officer straightened the matter out. While this was about six weeks after the City had estimated its first installment would be ready, the delay does not necessarily establish a violation, either. An entity does not violate the PRA merely by failing to meet its own self-imposed deadlines as long as it was acting diligently in its attempts to respond to the PRA. *Hobbs v. State Auditor's Office*, 183 Wn.App. 925, 940, 335 P.3d 1004 (2014).

CP 10. Likewise, the Court concluded:

It is reasonable to expect the City to prepare documents for disclosure as best it can. It is not reasonable to expect that there will never be a miscommunication between a public records officer and a receptionist.

CP 11. Regarding Appellant's claim that the City violated the PRA by denying production of records on September 1, the trial court reasoned:

Specifically, he argued he had a reasonable belief that the

City would not provide responsive records based on the City's failure to provide them on September 1st. *Hobbs*, 183 Wn.App. at 936 (suggesting a silent denial). In fact, what happened was that Plaintiff met a receptionist who did not know about the prepared records. Nobody told Plaintiff that the City had changed its mind about providing them. If it appeared to Plaintiff that the City was not refusing to provide records, this was simply unreasonable. There is no violation of the PRA based on the receptionist's failure to turn over the first installment on September 1.

CP 11. To the extent these rulings are factual, they are supported by the Karber Declaration. The Hikel Declarations do not contain any contrary facts. The conclusions are not untenable or absurd; they are a common sense and practical characterization of what happened on September 1.

In any event, the City did not miss a self-imposed deadline; even if it had, that would not violate the PRA. The ultimate inquiry is whether the City provided the records in a reasonable timeframe, and it did. Appellant never alleged that August 6 (or September 1) was not reasonable for the first installment. And other than complaining he was not given an installment on September 1, Appellant has never claimed the City did not provide that installment or any other in a reasonable timeframe.

C. The Trial Court Did Not Err by Considering Appellant's "Inadequate Rules" Argument for Limited Purposes Only (Appellant's Assignment of Error Nos. 4 and 5).

1. The Trial Court Did Not Abuse its Discretion By Limiting Consideration of an Argument First Raised in Appellant's Reply Brief (Appellant's Assignment of Error

No. 5).

Appellant alleges that the trial court erred by not considering his “inadequate rules” argument. First, Appellant appears to argue the trial court did not consider at all his claim that the City’s rules are inadequate. Clearly, the trial court did consider this argument in the context of Appellant’s allegation that the City did not diligently process Appellant’s records request. See CP 11-12.

The trial court did not consider Appellant’s argument that the City “failed to promulgate rules” to the extent that Appellant alleged that the rules themselves, or the fact that the City did not update its rules, were an independent violation of the PRA, that the rules provided an independent grounds for relief, or that Appellant was entitled to injunctive relief requiring the City to update the rules. Before the trial court, Appellant first raised these arguments in his Reply Brief (dated December 7, 2015), filed the day before the show cause hearing. CP 15-18, 24-35; see Declaration #3 of Theodore Hikel (dated December 7, 2015), CP 88, 91; Declaration #2 of Attorney Donald Gough (dated December 7, 2015), CP 40-41.¹⁴ Therefore, the trial court limited consideration of the “inadequate

¹⁴ In fact, the Reply Brief focuses almost exclusively on arguing that the City’s rules are inadequate. CP 15-18, 24-35. Because this argument was first raised in the Reply Brief filed the day before the show cause hearing, the City did not have the opportunity to submit rebuttal materials on this point.

rules” argument to the issue of whether the City was or was not diligent in responding to Appellant’s records request, an issue properly raised in Appellant’s prior pleadings. The trial court did not err in this regard.

Generally, it is within a court’s discretion not to consider arguments first raised in reply briefs.¹⁵ In the context of a summary judgment motion, this Court has held that rebuttal documents “are limited to documents which explain, disprove, or contradict the adverse party’s evidence.” *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 168-9, 810 P.2d 4 (1991).

Further, Snohomish County Local Court Rule 7 states:

[a]ny material offered at a time later than required by this rule may be stricken by the court and not considered. If the court decides to allow the late filing and consider the material, the court may continue the matter or impose other appropriate remedies including terms, or both.

SCLCR 7(b)(2)(C). SCLCR 7(b)(2)(D) requires a motion to state the relief requested, the grounds on which the motion is based, issue statements, and the evidence and legal authority relied upon. SCLCR 6(d)(1) authorizes a reply to a response to a motion. It was within the trial court’s discretion to limit consideration of arguments raised for the first

¹⁵ *Dickson v. U.S. Fidelity & Guaranty Co.*, 77 Wn.2d 785, 787, 466 P.2d 515 (1970)(“Contentions may not be presented for the first time in the reply brief,” referring to the appellate reply brief); *State v. McAllaster*, 31 Wn.App. 554, 558, 644 P.2d 677 (1981) (Court strikes appellate reply brief that raises issue not previously argued).

time in the Reply Brief. Put another way, the trial court properly interpreted its local court rules as not authorizing a litigant to raise issues for the first time in a reply brief.¹⁶

Moreover, Appellant does not argue that the trial court erred by ruling it would limit consideration of an argument first raised in a reply brief; instead, Appellant asserts that he did raise the argument that the City's public records rules are themselves an independent violation of the PRA in his Complaint, his initial Motion to Show Cause, his Amended Motion, and supporting Declarations. App. Opening Brief, p. 30-1, 35-38. However, a review of these pleadings confirms the trial court correctly determined that Appellant first raised this argument in his Reply Brief.

The argument is not raised in the Complaint. CP 257-265. The Complaint alleges the City "made zero installments," and violated the PRA by not producing records by the deadline it established, not communicating, and not extending time for production. CP 260, 262. Under the heading "Claims and Causes of Action," the Complaint alleges the City violated the PRA because it did not produce records by August 6, 2015, and provided no explanation for not producing records. CP 263.

¹⁶ *Snyder v. State*, 19 Wn.App. 631, 637, 577 P.2d 160 (1978) ("Where the issue is the interpretation of a local rule by the trial court, that court is the best exponent of its own rules, and their use will not be disturbed by the appellate court unless the construction placed thereon is clearly wrong or an injustice has been done").

The “Relief Requested” does not request any injunctive relief regarding the City’s rules. CP 263-4. Essentially, the Complaint alleges the City wrongfully denied access to records; it does not claim the City violated the PRA by having inadequate local rules or by not updating its rules.

The Complaint does restate the PRA’s provision that a local agency is required to adopt rules. CP 260. However, that is all the Complaint does. It does not allege that the City has not adopted or updated rules, or that the City’s rules violate the PRA.

Appellant’s original Motion to Show Cause similarly claims a complete failure to produce records on August 6, 2015. CP 242, 245, 252, 254. The Motion alleges the City engaged in “silent withholding.” CP 250, 251, 254. Again, the Motion essentially argues the City wrongfully denied access to records; it does not argue that the City violated the PRA by having inadequate rules or by not updating its rules.

The Motion’s only reference to the City’s rules is to note that the local rules are dated June 3, 2005 and are posted on the City’s website. CP 251. The Motion then argues that the City’s rules “confirm that emails are public records.” CP 252. The Motion does not allege that the City has not adopted or updated its rules, or that the City’s rules violate the PRA.

The Declaration #1 of Theodore Hikel (dated September 11, 2015)

and the Declaration #2 of Theodore Hikel (dated October 2, 2015) do not contain any reference to the City's rules. CP 231-234; CP 280-281.

The Declaration of Don Gough (dated October 2, 2015) attaches City rules and asks the Court to take judicial notice of the rules. CP 288. The Gough Declaration does not claim that the City's rules violate the PRA or make any argument regarding the adequacy of the rules.

Finally, Appellant's Amended Motion to Show Cause argues that the City committed a complete failure to produce records (CP 302, 304, 311, 312) and engaged in "silent withholding." CP 310, 311.¹⁷ As with the original Motion, the Amended Motion essentially argues that the City wrongfully denied access to records; it does not argue that the City violated the PRA by having inadequate local rules.

As in the original Motion, the Amended Motion states that the PRA requires the City to adopt local rules. The Amended Motion notes that the City's rules require an expeditious response, and argues the City violated this by missing the production deadline and not producing records. CP 312. The Amended Motion also states that the City's policy confirms that emails are public records. CP 313. The Amended Motion

¹⁷ The Amended Motion also argued that the City violated the PRA by not producing email records in Appellant's preferred electronic format (PDF). Appellant now states that the issue was "resolved between the parties and not raised at the hearing." App. Opening Brief, p. 44. Thus, the City does not address it in this Response Brief.

does not argue that the City's rules violate the PRA.

Thus, prior to the Reply Brief and Declarations filed with the Reply, Appellant only referenced the City's rules in the context of his position that the City violated the PRA in responding to his records request. The Complaint does not mention the claim that the City's rules are an independent PRA violation, nor does the Complaint's request for relief ask for a declaration that the City's rules violate the PRA or an injunction requiring the City to adopt different rules. The trial court correctly concluded that Appellant first raised these arguments and requests in the Reply, and properly limited consideration of the "failure to promulgate rules" allegation to the issue of whether the City diligently responded to Appellant's request.¹⁸ And as these claims were not properly raised to the trial court, this Court should likewise not consider them.

2. Under RCW 42.56.550(4), a Party Must Establish that the Agency Wrongfully Denied Access to Records Before the Party Is Entitled to Penalties or Attorneys' Fees.

RCW 42.56.550(4) provides the basis for an award of penalties or attorney's fees and costs under the PRA. That statute states:

¹⁸ *Gronquist v. Dept. of Licensing*, 175 Wn.App. 729, 309 P.3d 538 (2013), cited by Appellant, does not require a different conclusion. In *Gronquist*, the Court allowed plaintiff's argument first raised in the reply brief, as plaintiff was responding to information first provided in the defendant's response brief. *Id.* at 746. Here, Appellant has been aware of the City's rules at all times; the rules are not information disclosed in a response brief.

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.

RCW 42.56.550(4). Likewise, *RCW 42.56.550(1)*¹⁹ provides:

Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records.

As noted above, Appellant's Complaint does not request any relief relating to the City's rules. The Complaint requests a declaration that the City violated Appellant's rights under the PRA, an order that the City immediately produce certain records and others in weekly installments, and an award of per diem penalties and attorneys' fees. CP 263-64. To be entitled to any of this relief, Appellant had to establish the City wrongfully denied him "the right to inspect or copy any public record or the right to

¹⁹ *RCW 42.56.550(2)* also states: "Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court ... may require the responsible agency to show that the estimate it provided is reasonable." However, Appellant has never claimed that the City's time estimates for production were unreasonable.

receive a response to a public record request within a reasonable amount of time.” *RCW 42.56.550(4)*.²⁰ Regardless of whether the “inadequate rules” argument was raised before the Reply Brief, the trial court did not err by not considering the argument as an independent ground for relief. And, even if the PRA did provide an independent claim based on inadequate rules, Appellant did not plead that claim in the Complaint.

Further, even if Appellant had properly raised this claim in the Complaint or before the trial court, Appellant cannot establish that the City’s rules violate the PRA. *RCW 42.56.100* requires agencies to:

adopt and enforce reasonable rules and regulations ... consonant with the intent of this chapter to provide full access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency Such rules and regulations shall provide for the fullest assistance to inquirers and most timely possible action on requests for information.

The City’s rules meet this general standard.²¹ To the extent that Appellant claims the City violated *RCW 42.56.040*,²² Appellant admits the City posts the rules on its website and the rules are available at City Hall for

²⁰ Under *RCW 42.56.550*, a person prevails against an agency only when that agency wrongly withheld documents. *Germeau v. Mason County*, 166 Wn.App. 789, 811, 271 P.3d 932 (2012).

²¹ Again, the City did not have the opportunity to develop the record on this point.

²² *RCW 42.56.040* requires local agencies to “prominently display and make available for inspection and copying at the central office of such local agency” several listed documents, including “rules of procedure.”

inspection and copying. Finally, Appellant’s “inadequate rules” argument is irrelevant, because the City complied with all requirements of the PRA in its response to Appellant’s records request.

D. The Trial Court Did Not Misinterpret or Misapply RCW 42.56.520’s Requirement to Provide a Reasonable Estimate of Time for the City’s Response to Appellant’s Records Request (Appellant’s Assignment of Error No. 1).

1. The Trial Court Did Not Err By Determining that the City’s June 29 Letter Complied with the PRA by Requesting Clarification.

Appellant argues that the City’s June 29 letter violated RCW 42.56.520 because it requested clarification, without providing a time estimate for the City’s response. The trial court did not err in concluding that the June 29 letter complied with the PRA. CP 10.

RCW 42.56.520 provides that an agency must provide a prompt response to a public records request, and states in part:

Within five business days of receiving a public record request, an agency ... must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested, ... ; (3) acknowledging that the agency ... has received the request and providing a reasonable estimate of the time the agency ... ; or (4) denying the public record request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. In acknowledging

receipt of a public record request that is unclear, an agency ... may ask the requestor to clarify what information the requestor is seeking. ...

Thus, the PRA clearly contemplates that in an agency's initial response to a requestor, the agency may ask the requestor to clarify the request. In fact, the Model Rules and the Comments both state that an agency's initial response letter may request clarification, as a separate option for the initial letter. The Model Rules state:

Within five business days of receipt of the request, the public records officer will do **one or more of the following**:

- (a) Make the records available for inspection or copying;
- (b) If copies are requested and payment of a deposit for the copies, if any, is made or terms of payment are agreed upon, send the copies to the requestor;
- (c) Provide a reasonable estimate of when records will be available; or
- (d) If the request is unclear or does not sufficiently identify the requested records, **request clarification from the requestor**. Such clarification may be requested and provided by telephone. The public records officer or designee may revise the estimate of when records will be available; or
- (e) Deny the request.

WAC 44-14-040(2)(d)(emphasis added); WAC 44-14-04003(4)(c) (“The initial response must do one of four things: ... (c) Seek a clarification of the request ...”).

Other authority reaches the same conclusion. In discussing an agency's duty to respond within five days of receiving the request, the Public Records Act Deskbook likewise states that an agency may respond

“in one of four ways,” and lists requesting clarification as one of the four separate options. *Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Laws*, (2006 and Supp. 2010), §5.3(1)(A), p. 5-10 (listing “an agency may ask the requestor to clarify the request” as the third alternative).

This interpretation of the statute makes sense. It would not be logical to require an agency to provide an estimate of the time necessary to respond to a request that is unclear, or that might be narrowed; the statute should not be interpreted so as to require an unreasonable or illogical result.²³ The more reasonable interpretation of RCW 42.56.520 is that an agency may request clarification in the initial 5-day letter, and this extends the time for providing the reasonable time estimate to produce the records.

Finally, even assuming this was not the proper interpretation of RCW 42.56.520, the fact that the June 29 letter did not estimate a time for production of requested records did not result in a denial of records to Appellant, or even a delay in producing records, and so by itself would not support a claim for relief. See RCW 42.56.550(4)(authorizing award of

²³ *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 431, 300 P.3d 376 (2013) (Court “will avoid absurd results” when interpreting the PRA); *Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007); *Seven Gables Corp. v. MGM/UA Ent. Co.*, 106 Wn.2d 1, 6, 726 P.2d 1 (1986) (“Any statutory interpretation which would render an unreasonable and illogical consequence should be avoided”).

penalties and costs to any person who prevails in an action “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”).

2. The Trial Court Did Not Err By Determining that the City’s July 10 Letter Complied with the PRA by Stating a Reasonable Time Estimate for Providing the First Installment of Records.

Appellant argues that the City’s July 10, 2015 letter violated RCW 42.56.520, because the letter stated the date on which the first installment of records would be available, rather than estimating when the City would “fully complete” the response to Appellant. App. Opening Brief, p. 21-24.

RCW 42.56.520 states in part:

Within five business days of receiving a public record request, an agency ... must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested, ... ; (3) acknowledging that the agency ... has received the request and providing a reasonable estimate of the time the agency ... will require to respond to the request; or (4) denying the public record request.

The City’s July 10 letter fully complied with RCW 42.56.520. Appellant’s position ignores that a Washington court has considered this precise issue, and held that under RCW 42.56.520, if an agency will be providing records in installments, the agency’s initial response letter may provide a reasonable estimate of when the agency will provide the first

installment. *Hobbs*, 183 Wn.App. at 941-43. The City did exactly this, and informed Appellant that it would have the first installment ready on August 6, 2015.

In *Hobbs*, the State Auditor’s Office informed the plaintiff that it would respond to his records request in installments, and gave an estimated date for the first installment. The plaintiff contended this response violated RCW 42.56.520 because it did not state an estimated date for completing the Auditor’s entire response to his request. *Hobbs*, 183 Wn.App. at 941. The Court disagreed:

... RCW 42.56.080 allows an agency to produce records on a “partial or installment basis.” Here, the Auditor informed Hobbs that it would be producing the records in installments. We must, therefore, determine whether RCW 42.56.520 requires an agency to respond to a public records request by providing a reasonable estimate of when the agency will be able to provide the *completed* response to the request, or whether it is sufficient for the initial response to include only a reasonable estimate of the time it will take the agency to produce the first installment of responsive records.

... The plain language of RCW 42.56.520 requires that the agency provide a reasonable estimate of the time required to respond to the request. Here, the Auditor provided a reasonable estimate of the time required to respond to Hobbs’ public records request; the Auditor stated it would provide the first installment of records by December 16. As noted, an agency can make the records available on an installment basis. RCW 42.56.080. Because the Auditor complied with the plain language of RCW 42.56.520, we hold that the superior court did not err in finding that the Auditor complied with the prompt response requirement of the PRA.

Hobbs, 183 Wn.App. at 941-2 (emph. in original). The Court explained:

Hobbs asks us to read additional language into RCW 42.56.520. Specifically, he asks us to interpret RCW 42.56.520 as requiring the agency to provide an estimate of the reasonable amount of time needed to fully or completely respond to the request. When interpreting a statute, “we ‘must not add words where the legislature has chosen not to include them.’” ... Accordingly, we will not interpret RCW 42.56.520 to require agencies to provide an estimate of when it will fully respond to a public records request when the legislature has declined to include such language in the statute.

Hobbs, 183 Wn.App. at 943 (cites omitted).²⁴

Thus, the City’s July 10 letter did not violate RCW 42.56.520 by stating an estimated date for the first installment, rather than the date when the City would complete the entire response to Appellant’s request. Appellant’s cited cases do not require a different conclusion. Appellant claims that *Ockerman v. King County Dept. of Dev.* is “exactly on point,” App. Opening Brief, p. 22, but *Ockerman* did not even address the issue of whether an agency’s initial letter may estimate when the agency will provide a first installment. *Ockerman* addressed whether an agency must provide a written explanation for its time estimate, and held the PRA does

²⁴ The *Hobbs* ruling makes practical sense. When an agency provides an initial letter informing the requestor that it will respond to a large request in installments, the agency will not yet know the extent of required redactions, whether third parties will have to be notified and given time to seek a protective order, or even the number of responsive records. Any time estimate for providing all responsive records would be speculative.

not require that. *Ockerman v. King County Dept. of Dev. & Env. Services*, 102 Wn.App. 212, 214, 217, 6 P.3d 1214 (2000).²⁵ In fact, consistent with the Court's reasoning in *Hobbs*, *Ockerman* held that the plain language of the predecessor to RCW 42.56.520 did not contain any reasonable explanation requirement, stating:

Had the legislature intended that an explanation of the reasonable time estimate be included in the response, it could have said so. ... No interpretation of this statute, no matter how liberal, allows this court to modify by judicial fiat the plain wording of the statute.

Ockerman, 102 Wn.App. at 218, cited in App. Opening Brief, p. 28.

E. Appellant Waived Assignment of Error No. 2 by Not Properly Raising the Claim in the Superior Court.

Appellant argues for the first time in this appeal that the City's June 29, 2015 letter violated RCW 42.56.520 by improperly seeking clarification based on the number of responsive records. App. Opening Brief, p. 24-28 (Appellant's Assignment of Error No. 2).²⁶ This argument was not raised at all before the trial court. Arguments that are not made to

²⁵ Likewise, *Smith v. Okanagon County*, cited by Appellant (Opening Brief, p. 22), did not address the issue of whether an agency's initial letter may provide a time estimate for a first installment. See *Smith v. Okanagon County*, 100 Wn.App. 7, 992 P.2d 85 (2000).

²⁶ Appellant argued at the show cause hearing that the June 29 letter violated the PRA because it only sought clarification and did not give a time estimate for the City's response (and the trial court addressed this argument even though it was not stated in any of his motion documents). Appellant did not argue before the trial court that the request for clarification was for an improper purpose.

the trial court are waived. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (“The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal”).

Appellant’s improper clarification argument is not mentioned in the Complaint (CP 257-79), the original Motion to Show Cause (CP 242-56), the Amended Motion (CP 301-23), any of the Declarations of Theodore Hikel (CP 85-91, 231-34, 280-81) or Donald Gough (CP 39-43, 287-89), or the Reply Brief (CP 13-38). Because this issue was not raised before the trial court, this Court should not consider it.

F. The City’s Request for Clarification Complied with the PRA (Appellant’s Assignment of Error No. 2).

Appellant argues that the City’s June 29, 2015 letter violated RCW 42.56.520 by improperly seeking clarification based on the number of responsive records. App. Opening Brief, p. 24-28. Even if Appellant had not waived the issue, the City’s June 29 request for clarification did not violate RCW 42.56.520. RCW 42.56.520 states in pertinent part:

Within five business days of receiving a public record request, an agency ... must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested, ... ; (3) acknowledging that the agency ... has received the request

and providing a reasonable estimate of the time the agency ... ; or (4) denying the public record request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. In acknowledging receipt of a public record request that is unclear, an agency ... may ask the requestor to clarify what information the requestor is seeking.

Thus, the PRA clearly contemplates that an agency may ask a requestor to clarify a request. WAC 44-14-040(2)(d); WAC 44-14-04003(4)(c). To the extent Appellant argues that the PRA does not authorize clarification requests, the argument is meritless. See App. Opening Brief, p. 25.²⁷

In arguing that the City's June 29 letter violated RCW 42.56.520 because it sought clarification due to the size of the request, Appellant focuses on the phrase allowing additional time to respond based on "need to clarify the intent of the request," and argues the City did not ask Appellant to clarify the request's "intent." However, there is nothing inappropriate about the City's request for clarification. Nothing in RCW 42.56.520 precludes an agency from asking a requestor to clarify a request based on the number of records it will generate. After receiving the

²⁷ Likewise, to the extent that Appellant argues that the City's rules violate the PRA by "creating one more, but unauthorized response option," (App. Opening Brief, p. 25), the argument has no merit.

request, the City promptly began researching the scope of the request and determined that it involved a huge number of electronic records (initially thought to be 137,000 and later determined to be 27,500). Since Appellant wanted to review electronic records without paying for copies, the production process was going to be extremely time consuming. Therefore, the City reasonably asked for clarification – if Appellant did not want to review that number of records and preferred some limited subset, the City could produce the records that Appellant was actually interested in more quickly and at less expense to the public. Put another way, the City was asking whether Appellant “intended” to request to review tens of thousands of records. Appellant’s interpretation of RCW 42.56.520 leads to the illogical and unreasonable result that an agency is prohibited from seeking clarification based on the number of responsive records, when clarification could result in saving public funds and providing the requestor with the truly pertinent records more quickly.²⁸ In fact, such clarification is one part of providing the “fullest assistance” to requestors. *RCW 42.56.100.*

For these precise reasons, the PRA Deskbook instructs:

²⁸ *Resident Action Council*, 177 Wn.2d at 431 (Court “will avoid absurd results” when interpreting the PRA); *Tingey*, 159 Wn.2d at 664; *Seven Gables Corp.*, 106 Wn.2d at 6.

If an agency reasonably estimates it will take a significant period of time to provide the requested records, the agency may contact the requestor to inquire whether the requestor would be willing to clarify the request by narrowing it to a smaller set of records as a means of shortening the time estimate. Some requestors would rather receive a smaller set of more focused records in a shorter period of time than a large comprehensive set of records that takes longer to process.

Public Records Act Deskbook, at §5.3(2)(a), p. 5-14. Here, this is exactly what the City did.

Finally, the June 29 request for clarification did not prevent the City from reasonably and promptly responding to Appellant's request. Appellant provided clarification, stating that he preferred to receive emails "in date sequence beginning with the most recent." CP 168. The City replied on July 10, confirming the agreement to provide records in installments and that the first installment would be available on August 6. The City had an installment available on that date. Appellant has never alleged that the August 6 date was unreasonable.

G. The City Did Not Violate RCW 42.56.100 By Relying on the July 10 Letter to Inform Appellant the First Installment Would Be Ready on August 6 (Appellant's Assignment of Error No. 3).

Appellant argues that the City violated RCW 42.56.100 by relying on its July 10 letter to inform Appellant the first installment would be ready on August 6, and by not sending Appellant another letter confirming

this. App. Opening Brief, p. 29-30. However, nothing in the PRA requires that a second confirmation letter be sent.²⁹

RCW 42.56.100 states in pertinent part:

Agencies shall adopt and enforce reasonable rules and regulations, ... consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information.

The plain language of RCW 42.56.100 does not require a confirmation letter. The Court should not read such a requirement into the statute. *Ockerman*, 102 Wn.App. at 218. Courts cannot add words or clauses to a statute when the legislature has chosen not to include that language.³⁰

Appellant cites WAC 44-14-04005(1) for the proposition that a confirmation letter is “essential to protecting a requestor’s rights.” App. Opening Brief, p. 29-30. This Comment to the Model Rules does not support Appellant’s position. The Comment states:

After the agency notifies the requestor that the records or an installment of them are ready for inspection or copying, the

²⁹ At the trial court’s hearing, Appellant admitted that no statute in the PRA requires a confirmation letter. Verbatim Transcript of Proceedings, p. 8, lines 7 – 11.

³⁰ *State v. Delgado*, 2148 Wn.2d 723, 727, 63 P.3d 792 (2002); *Applied Industries v. Mellon*, 74 Wn.App. 73, 79, 872 P.2d 87 (1994) (In construing a statute, it is always safer not to add to, or subtract from, the statute’s language unless it is imperatively required to make it a rational statute).

requestor must claim or review the records or the installment. ... If a requestor fails to claim or review the records or any installment of them within the thirty-day notification period, the agency may close the request and refile the records. If a requestor who has failed to claim or review the records then requests the same or almost identical records again, the agency ... can process the repeat request for the now-refiled records as a new request after other pending requests.

WAC 44-14-04005(1).

The Comment does not state or imply that the requestor cannot rely on the agency's original letter stating the date on which an installment will be available. Here, the City informed Appellant that the first installment would be ready on August 6, 2015. The City had an installment ready on that date. Nothing prevented Appellant from coming to City Hall on August 6 or any day after that. While it is unfortunate that the City staff person at the front counter on September 1 (when Appellant did come to City Hall) was not aware of the installment, the trial court properly concluded that was not a violation of the PRA.³¹

Appellant also argues that a second letter confirming the record's availability was necessary because the City could have closed his request

³¹ Appellant alleges that the City had a past practice of sending him a letter confirming that records were available on a particular date. Appellant first raised this in his "Declaration #3," submitted with the Reply the day before the show cause hearing. CP 88. Thus, the City did not have the opportunity to submit rebuttal materials on this point. Regardless of whether or not in the past the City had sent a second notice confirming records were available, it would not have been a requirement of RCW 42.56.100.

if he did not pick up the records within 30 days after they were available.

However, the City never attempted to close his request.

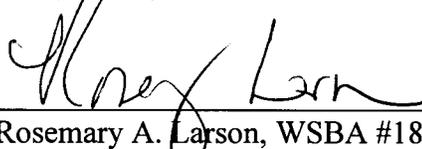
V. CONCLUSION

Based on the foregoing, the City respectfully requests that this Court affirm the trial court's decision that the City did not violate the PRA, dismissing this action with prejudice.

RESPECTFULLY SUBMITTED this 8th day of July, 2016.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By



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Attorneys for Respondent City of Lynnwood

DECLARATION OF SERVICE

I HEREBY DECLARE that under penalty of perjury under the laws of the State of Washington that on this 8th day of July, 2016, I caused to be served a true and correct copy of the *Brief of Respondent* on the individual named below in the specific manner indicated:

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DATED this 8th day of July, 2016, at Bellevue, Washington.

Tawnya A. Sarazin
Tawnya A. Sarazin, *Legal Assistant*

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STATE OF WASHINGTON