No. 100424-9

Court of Appeals No. 53613-7-II

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

DAVID O'DEA,

Petitioner,

v.

CITY OF TACOMA, a public agency; and TACOMA POLICE DEPARTMENT, a public agency,

Respondents.

ANSWER TO PETITION FOR REVIEW & CONTINGENT CROSS PETITION FOR REVIEW

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INTRODUCTION

Lt. David O'Dea was fired because he twice engaged in reckless behaviors that endangered both the public and his fellow police officers: (1) on Halloween Night 2015, he initiated a pursuit that resulted in a multi-vehicle collision, causing significant injuries to citizens and substantial damage to property; and (2) he fired his weapon at a car *11 times*. His termination was affirmed, and his "wrongful termination" claim was summarily dismissed, which is final.

During his meritless wrongful-termination suit, O'Dea allegedly mailed two letters to the City requesting documents under the PRA, but the City never received them. Although his attorney had filed *many* PRA requests with the City, which had *never* failed to respond, he heard nothing, but sat silent for months. After attaching the letters to a PRA Complaint, he did nothing. He even kept quiet after the City denied the requests in its Answer, explaining

that it had never received them and thus had never failed or refused to respond to a valid PRA request.

And when the City's counsel asked O'Dea's counsel whether he wanted the City to treat his denied PRA requests as *new* PRA requests, he still kept quiet, until the City was able to pin him down on the record in a deposition, saying the City should do so. The City *immediately* processed the two requests, responding with over 700 records. But as noted, his baseless claims were dismissed.

The trial court found that the City did not act in bad faith. Yet it imposed a $10 per-day penalty, and then skyrocketed that fine by imposing a *per-record multiplier* – amounting to as much as *$7,000 per day* – for a total fine in the wholly unprecedented amount of *$2.6 million*. Still it ignored 80% of the ***Yousoufian*** factors, and failed to even *consider* the mitigating factors. The appellate court correctly found this "astonishingly high penalty" a "manifest abuse of discretion." This Court should deny review.

FACTS RELEVANT TO ANSWER

A. After endangering the public in a prior incident, Lt. O'Dea was terminated for shooting at a car *11 times* – endangering both the public and other officers – and the dismissal of his wrongful-termination claim was affirmed on appeal.

As the Court of Appeals held in an unpublished opinion this Court declined to review regarding the underlying action giving rise to O'Dea's PRA requests:

> Former Tacoma Police Department Lieutenant David O'Dea fired 11 shots at a car driven by Jose Manuel Mendoza Davalos as Mendoza Davalos was attempting to flee a group of officers. After an internal investigation, the Tacoma Police Department terminated O'Dea for violating the Department's use of force policy and exhibiting a lack of judgment that caused concern for community safety.
>
> . . .
>
> The record shows that the Department terminated O'Dea because he discharged his weapon in a situation where the Department believed it was unreasonable and unnecessary to do so and because O'Dea demonstrated a pattern of poor decision-making. . . .
>
> We . . . conclude that the trial court did not err when it granted summary judgment in favor of the City and dismissed O'Dea's wrongful discharge claim. . . . We affirm.

O'Dea v. City of Tacoma, No. 54240-4-II, 2021 Wash. App. LEXIS 1236, *1 (May 18, 2021) (*see* Appendix A), *rev. denied*, 2021 Wash. LEXIS 708 (Dec. 1, 2021).

Yet this was not O'Dea's first offense. On "Halloween night 2015," O'Dea "initiated a pursuit" "that caused 'a multi-vehicle collision resulting in significant injuries to citizens and substantial damage to property.'" *Id*. at *3 (record citations omitted). "After that incident, the Department found that O'Dea's performance was unsatisfactory and that he violated Department policies relating to vehicle pursuits." *Id*. "The Department suspended O'Dea for 40 hours and notified him that 'any further violation of the Tacoma Police Department Policies . . . may result in more severe discipline, up to and including termination of employment.'" *Id*.

O'Dea's termination was affirmed, his wrongful-termination suit against the City was dismissed, that dismissal was affirmed on appeal, and it is now final.

B. The trial court nonetheless imposed an unprecedented $2.6 million PRA penalty on the City, yet found no bad faith and failed to address most of this Court's *Yousoufian* factors.

In light of O'Dea's egregious misconduct giving rise to his failed wrongful-termination litigation, there is manifest injustice in the trial court's massive $2.6 million PRA penalty: how could O'Dea possibly be entitled to such a huge PRA windfall, when the claims under which he sought public records were legally and factually baseless? This is particularly true in light of (a) the trial court's refusal to find any bad faith conduct by the City; and (b) its failure to even address 80% of the 16 factors this Court adopted in ***Yousoufian v. Office of King Cnty. Exec.***, 168 Wn.2d 444, 460-63, 467-68, 229 P.3d 735 (2010).[1]

[1] To be fair to the distinguished trial judge (now Justice Whitener) she could not then know that O'Dea's termination would yet be affirmed, as would the dismissal of his baseless wrongful-termination claims. But with the benefit of such hindsight, imposing such an unprecedented penalty in this matter would work a gross injustice.

As further discussed *infra*, the Court of Appeals did not err – much less act in conflict with existing appellate precedent. Rather, the court properly followed this and other courts' precedents in holding that the trial court's $2.6 million penalty was manifestly unreasonable. ***O'Dea v. City of Tacoma***, 19 Wn. App. 2d 67, 84-91, 493 P.3d 1245 (2021) (attached as Appendix B).[2] Specifically, the trial court used a *per record multiplier* for more than 700 records to reach its "extreme" penalty. ***O'Dea***, 19 Wn. App. 2d at 86. It reached *$7,000 per day*, even at the relatively low $10 penalty amount. *Id*. The appellate court correctly noted that "an extreme per record multiplier" like this one "should be justified with a robust explanation for the severity of the

[2] Citing ***Hoffman v. Kittitas Cnty.***, 194 Wn.2d 217, 449 P.3d 277 (2019); ***Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.***, 185 Wn.2d 270, 372 P.3d 97 (2016); ***Yousoufian***, *supra*; ***Zink v. City of Mesa***, 4 Wn. App. 2d 112, 419 P.3d 847 (2018); ***Andrews v. Wash. State Patrol***, 183 Wn. App. 644, 334 P.3d 94 (2014); ***Hobbs v. Wash. State Auditor's Office***, 183 Wn. App. 925, 335 P.3d 1004 (2014).

penalty" and "should be reserved for the most extreme cases . . . involving a bad faith withholding of a record subject to intense public interest." *Id*. at 86-87.

Yet the trial court here imposed its unprecedented $2.6 million penalty "based on minimal discussion, a total of five sentences, mentioning three aggravating factors." *Id*. at 88. It "did not include any discussion of why mitigating factors did not apply, nor did it say why the circumstances of this case were particularly egregious." *Id*. "The trial court did not find any bad faith." *Id*.

Simply put, the trial court stated no tenable basis for imposing this manifestly unreasonable and "astoundingly high penalty." *Id*. at 88. Absent any bad faith on the City's part, three aggravators are grossly insufficient to justify "an amount more than 35 times higher than" the penalty for much more egregious, bad-faith withholding. *Id*. at 86. And the trial court's silence on mitigators unjustly leaves the City guessing as to why it suffered such a high penalty.

REASONS THIS COURT SHOULD DENY REVIEW

A. O'Dea states no cognizable basis for review.

O'Dea fails to cite or discuss this Court's criteria for accepting review. This alone is a sufficient ground on which to deny his Petition. This Court should do so.

B. There is no conflict with any precedent.

Arguing the merits, O'Dea implies – but never argues – that the ***O'Dea*** decision fails to follow this Court's precedents. Yet he *quotes* a portion of the appellate decision's analysis that properly cites (and then applies) this Court's precedents. *See* PFR 16 (quoting ***O'Dea***, 19 Wn. App. 2d at 85 (quoting ***Yousoufian*** and ***Hoffman***, *supra*)). Indeed, the appellate decision carefully applies the abuse of discretion standards, and properly finds a manifest abuse of discretion. That is a standard of *review*, so it is certainly not "improper" for the appellate court to *find* an abuse of discretion under it.

1. The decision does not hold that a $10 per-day penalty is an abuse of discretion.

O'Dea first aims at a nonexistent target: the $10 per-day penalty. PRF 18-21. He again *falsely* claims that the City "agreed to" $10, but in fact, when faced with the trial court's determination that some penalty was appropriate, the City *argued* that a $10 *per diem* should be the *maximum* penalty; it nowhere conceded that *any* penalty would be appropriate here. But beyond that, the decision nowhere asserts that a $10 per-day penalty is an abuse of discretion. O'Dea's claim is false.

2. The decision correctly holds that an unexplained *per-record multiplier* is an abuse of discretion under these circumstances, which involve no bad faith.

O'Dea's second specific claim (PFR 22-23) aims closer to the mark, but nonetheless misses the point: the appellate court held that the trial court's *per-record multiplier* was an abuse of discretion where, as here, no bad faith exists and the trial court found only three

aggravators, while failing to discuss any mitigators. ***O'Dea***, 19 Wn. App. 2d at 85-88. That is, it simply held that "the overall amount was manifestly unreasonable, especially in light of the trial court's lack of supporting explanation." *Id*. at 88. This is *classic* abuse of discretion review.

It is also correct on the merits. It is undisputed that the City never received the PRA requests O'Dea's counsel allegedly mailed. *Id*. at 73. When he later attached them to a complaint, the City's Answer expressly denied ever receiving them, explaining that it thus never failed to respond to a proper PRA request, thereby plainly stating a proper statutory ground for denying them. *Compare* CP 33, 37 (denying receipt of either PRA letter) *with* RCW 42.56.520(1)(e) (denying the request is an acceptable response) *and with* RCW 42.56.520(4) (denials "must be accompanied by a written statement of the specific reasons therefor"). It is not possible to be *more specific* than this:

we never received them and thus never refused or failed to respond to them. *Id*.; *see* Contingent Cross Petition, *infra*.

Based on the undisputed fact that the City never received O'Dea's requests by mail, the trial court found no bad faith. Yet it imposed the largest-ever PRA fine by failing to group the records or to consider mitigators. A failure to *exercise* discretion *is* an abuse of discretion. ***Bowcutt v. Delta N. Star Corp.***, 95 Wn. App. 311, 320, 976 P.2d 643 (1999) (citing ***State v. Pettitt***, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980)).

In light of the undisputed facts, O'Dea's claim that this penalty is "self-inflicted" rings exceedingly hollow. The appellate decision notes numerous significant mitigators that the trial court failed to even consider, such as:

> (1) the City's lack of bad faith;
>
> (2) O'Dea's failures to bring a show cause motion and to respond to the City's requests for clarification;
>
> (3) the City's immediate and timely PRA responses once O'Dea finally clarified that the *denied* requests

attached to his complaint should now be treated as *new* requests;

(4) the absence of any determination that the City's diligent responses after notice were unduly delayed; and

(5) the necessity of giving the City reasonable time to diligently locate and assemble the records.

O'Dea, 19 Wn. App. 2d at 82, 88-91.

Ultimately, all that the appellate court did here was to send the matter back *for a proper exercise of discretion*. O'Dea's "the sky is falling" claims are unfounded. Simply requiring a reasonable exercise of discretion cannot "threaten" the PRA. This Court should deny review.

3. O'Dea lay in wait rather than seeking a show-cause order to obtain records.

O'Dea makes a misleading claim that the appellate court misunderstood the facts. PFR 23-24. The decision's point was that O'Dea had the right to seek a show-cause order *within weeks after allegedly mailing his PRA requests*. *See, e.g.* RCW 42.56.550 (permitting hearing to determine issues in a PRA case); ***Wood v. Lowe***, 102 Wn.

App. 872, 875-76, 10 P.3d 494 (2000) (PRA requestor sought show-cause order *within two weeks of filing her request*); ***O'Neill v. City of Shoreline***, 170 Wn.2d 138, 153, 240 P.3d 1149 (2010) (the *usual* method of resolving litigation under the PRA is a show cause hearing). The City never received his mailed requests, and O'Dea never sought a show-cause order, even after he filed his Complaint. Indeed, O'Dea's counsel had filed *many* PRA requests with the City, and he had *always* received a response – yet he did not even inquire this time. The trial court abused its discretion in not even considering these mitigating factors.

4. Finding 8 is contrary to law.

O'Dea falsely claims that the appellate court "reversed the trial court's award of additional penalties for the City's failure to conduct an adequate search for the records requested." PFR 26 (citing nothing). No such analysis or holding appears in the appellate decision.

Rather, the appellate court never addresses the trial court's improper Finding 8:

> That additional documents were found after the Court's February 6, 2019 order supports a finding that the City's prior search in response to the March 28, 2017 request was inadequate.

CP 1114 (F/F 8). The City assigned error to this Finding and argued that it is *contrary to law* because the mere fact that a record is eventually found does not *itself* establish the inadequacy of an agency's search. *See, e.g.*, ***Kozol v. Dep't of Corr.***, 192 Wn. App. 1, 8, 366 P.3d 933 (2015).

But the appellate court reversed and remanded *the entire $2.6 million penalty* as manifestly unreasonable. Whether any penalties are warranted and what those might be will be up to the trial court on remand. The appellate court's silence on this issue is no ground for review.

C. No issue of substantial public interest exists.

O'Dea also fails to argue that this matter is of substantial public interest. It is not. He was properly fired for repeatedly endangering the public, which was affirmed

on appeal. His wrongful termination action was properly dismissed, as also affirmed on appeal. Since O'Dea had no legally cognizable claims, the City's not realizing that two exhibits attached to his Complaint could possibly be live PRA requests – even after it denied them – cannot have harmed him or the public. The public has no interest in this sort of "gotcha" PRA litigation.

This Court should deny discretionary review.

D. O'Dea is not entitled to any attorney fees award.

O'Dea asks for attorney fees for *filing* his Petition for Review. He cites nothing because nothing authorizes awarding fees for filing a PFR. On the contrary, this Court's Rules permit a fee award for *answering* a PFR. RAP 18.1(j). Thus, this Court may award fees to the City when it denies O'Dea's PFR, but no fees or costs are otherwise awardable. And as discussed *infra*, O'Dea has *not* prevailed, so he is not entitled to any fee award, anywhere. This Court should deny both fees and review.

CONTINGENT CROSS PETITION FOR REVIEW

For the reasons noted *supra*, this Court should deny review and permit the trial court to engage in a proper exercise of discretion. But if this Court accepts review, then in the interests of justice, it should also accept the City's issues raised in its briefing and Motion for Reconsideration.

ISSUES RE: CONTINGENT CROSS PETITION

1. Did the appellate court err in holding that the City's denial of O'Dea's legally ambiguous PRA requests was unclear?

2. Did it err in holding that O'Dea prevailed despite losing $2.6 million, his cross appeal, and his trial court fees?

FACTS RE: CONTINGENT CROSS PETITION

This appellate decision reversed the trial court's unprecedented and manifestly unreasonable award of PRA penalties ($2.6 million) and remanded for reconsideration of penalties. Additionally, the court upheld the dismissal of O'Dea's roughly two-dozen other PRA claims, rejecting O'Dea's cross appeal *in toto*. It also

reversed and remanded his fee award in the trial court. O'Dea raises none of his cross-appeal issues in his PFR, so those decisions are final.

Yet the appellate court held that despite losing a $2.6 million penalty award, his cross appeal, and his fee award, O'Dea *prevailed* on appeal by winning one novel issue of first impression (whether two PRA requests attached as exhibits to a Complaint – requests the City denied because it never received them – were somehow new PRA requests). It thus awarded him fees on appeal.

ARGUMENT RE: CONTINGENT CROSS PFR

A. The City's denial (in its Answer) of O'Dea's unreceived PRA requests (attached to his Complaint) was as clear as it possibly could be.

The appellate court incorrectly held that the "trial court properly concluded that the City violated the PRA when it failed to respond to the two PRA request letters when it received them as attachments to the complaint." ***O'Dea***, 19 Wn. App. 2d at 72. And it incorrectly rejected the

City's argument that it properly *denied* those PRA requests in its Answer, although conceding that it "is true that '[d]enying the public record request' is one acceptable response to a PRA request under RCW 42.56.520(1)(e)," but noting that "'[d]enials of requests must be accompanied by a written statement of the specific reasons therefor." *Id*. at 83 (quoting RCW 42.56.520(4)). "Silent withholding is prohibited," but no one claims that the City was *silent*. *Id*.

Rather, the appellate court found that the "City's answer did not meet these requirements for establishing a clearly stated denial of the public records requests including a statement of reasons for the denial." *Id*. 83-84. This analysis unfortunately overlooked the key facts in the record, failing to even mention the language in the City's Answer denying O'Dea's PRA requests, which the City repeatedly cited in its opening and reply briefs (CP 33, 37):

> [The City] denies that either the Tacoma Police Department or the City of Tacoma City Clerk ever received the letter attached as Exhibit "A" to Plaintiff's

> Amended Complaint and further denies that it refused or failed to respond to any such public records request.
>
> [The City] denies that either the Tacoma Police Department or the City of Tacoma City Clerk ever received the letter attached as Exhibit "B" to Plaintiff's Amended Complaint and further denies that it refused or failed to respond to any such public records request.
>
> [The City] denies that it ever received the alleged requests for public records as outlined in Exhibits "A" and "B" to plaintiff's Amended Complaint. [The City] denies … any remaining allegations contained in this paragraph.

These denials could not have been clearer. They explained *that* and *why* the requests were denied: *the City never received them*. O'Dea's proper response to this denial (as the appellate court notes in its penalty analysis) was to seek an order to show cause, or just to make a phone call. O'Dea did neither.

But the City should not be, and is not, legally required to explain more than that it was denying the requests because it never received them. Certainly, the PRA imposes no such requirement. RCW 42.56.520(4)

("[d]enials of requests must be accompanied by a written statement of the specific reasons therefor"). The "specific reason" the City denied O'Dea's requests is that *it never received them*. Appellate courts may not add *additional* requirements to the PRA.

If there had been any uncertainty here, O'Dea's choice to attach the letters to his Complaint created it. While (as the City argued) the complaint exhibits were certainly legally ambiguous, that was O'Dea's choice. *See* BA 19-25. The City should not be penalized for *properly* answering his Complaint and *unequivocally* explaining *why* it was denying his requests: it never received them.

There is nothing unclear about that. While this Court should deny review, if it nonetheless grants review, then in the interests of justice, it should consider both whether O'Dea's legally ambiguous choice to attach the letters to a complaint somehow revived them and whether the City's Answer denying them was clear. *See* BA 4.

B. By any reasonable standard, O'Dea has not prevailed on appeal.

Had the trial court entered a reasonable PRA penalty, the City likely would not have appealed. The City has always – quite reasonably – conceded that the Complaint Exhibits themselves (the two PRA letters) are PRA requests on their face. Admittedly, the legal ambiguity that O'Dea created by attaching his unreceived requests to a complaint was concerning. Indeed, the ***O'Dea*** decision may well invite all sorts of litigation shenanigans by *creative* PRA requestors.

But *by far* the major issue in this appeal was whether this "astoundingly high penalty" could stand. ***O'Dea***, 19 Wn. App. 2d at 85. The City prevailed on that key issue. And O'Dea obviously did not prevail by losing $2.6 million. He did not prevail by losing his cross appeal regarding his roughly two dozen *other* claims. And he did not prevail by losing his attorney fee award in the trial court.

Yet the appellate court held that he is the prevailing party in this appeal. 19 Wn. App. 2d at *48-49. *No one* could reasonably be said to have prevailed, where he lost $2.6 million, lost his cross appeal, and lost his fee award in the trial court. O'Dea *lost*: he did not prevail.

CONCLUSION

This Court should deny review and grant the City fees. If not, it should also review the City's issues. It should not grant fees to O'Dea in any event.

RESPECTFULLY SUBMITTED this 9th day of February 2022.

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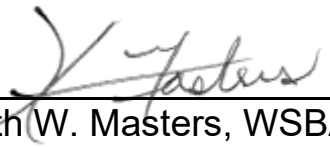
CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to RAP 18.17, the foregoing **ANSWER TO PETITION FOR REVIEW & CONTINGENT CROSS PETITION FOR REVIEW** was produced using word processing software and the number of words contained in the document, exclusive of words contained in any appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images (*e.g.,* photographs, maps, diagrams, and exhibits) is 3,595.



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APPENDIX
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APPENDIX A

O'Dea v. City of Tacoma, No. 54240-4-II, 2021 Wash. App. LEXIS 1236 (May 18, 2021)

O'Dea v. City of Tacoma

Court of Appeals of Washington, Division Two

February 17, 2021, Oral Argument; May 18, 2021, Filed

No. 54240-4-II

Reporter
2021 Wash. App. LEXIS 1236 *; 2021 WL 1985439

DAVID O'DEA, *Appellant*, v. THE CITY OF TACOMA, *Respondent*.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *O'Dea v. City of Tacoma, 2021 Wash. App. LEXIS 1283 (Wash. Ct. App., May 18, 2021)*

Prior History: [*1] Appeal from Pierce County Superior Court. Docket No: 18-2-08048-2. Judge signing: Honorable Stanley J Rumbaugh. Judgment or order under review. Date filed: 10/18/2019.

Counsel: For Appellant: Brett Andrews Purtzer, Attorney at Law, Tacoma, WA; Law Group Hester, Hester Law Group, Inc., Tacoma, WA.

For Respondent: Jean P Homan, Tacoma City Attorneys Office, Tacoma, WA.

Judges: Authored by Rebecca Glasgow. Concurring: Bradley Maxa, Lisa Sutton.

Opinion by: Rebecca Glasgow

Opinion

¶1 GLASGOW, A.C. J.—Former Tacoma Police Department Lieutenant David O'Dea fired 11 shots at a car driven by Jose Manuel Mendoza Davalos as Mendoza Davalos was attempting to flee a group of officers. After an internal investigation, the Tacoma Police Department terminated O'Dea for violating the Department's use of force policy and exhibiting a lack of judgment that caused concern for community safety.

¶2 O'Dea argues the Department terminated him because he did not shoot directly at Mendoza Davalos and instead shot at the tires of the car, sparing Mendoza Davalos's life. O'Dea filed a complaint for damages against the City of Tacoma, alleging wrongful discharge in violation of public policy, in particular the public policy of preserving human life. He also **[*2]** alleged intentional infliction of emotional distress and negligent infliction of emotional distress. The trial court granted summary judgment in favor of the City.

¶3 The record shows that the Department terminated O'Dea because he discharged his weapon in a situation where the Department

believed it was unreasonable and unnecessary to do so and because O'Dea demonstrated a pattern of poor decision-making. Even viewing the evidence in the light most favorable to O'Dea, he cannot establish the causation element of a wrongful discharge claim by showing that public-policy-linked conduct caused his termination.

¶4 We therefore conclude that the trial court did not err when it granted summary judgment in favor of the City and dismissed O'Dea's wrongful discharge claim. The trial court also did not err when it granted summary judgment to the City on O'Dea's emotional distress claims. We affirm.

FACTS

¶5 In 2017, the Department terminated O'Dea. It found that he violated the Department's use of force policy by firing multiple shots at Mendoza Davalos's car when it was not an imminent threat to him. The Department also found that O'Dea's performance was unsatisfactory during and after this incident and **[*3]** that he carried a backup weapon without the necessary qualification. Former Tacoma Police Chief Don Ramsdell explained, however, that the "disciplinary decision would be the same even without the minor violations." Clerk's Papers (CP) at 151.

¶6 In his notice of intent to terminate, Ramsdell also considered that O'Dea initiated a pursuit on Halloween night 2015 that caused "a multi-vehicle collision resulting in significant injuries to citizens and substantial damage to property." *Id.* After that incident, the Department found that O'Dea's performance was unsatisfactory and that he violated Department policies relating to vehicle pursuits. The Department suspended O'Dea for 40 hours and notified him that "any further violation of the Tacoma Police Department Policies … may result in more severe discipline, up to and including termination of employment." CP at 210.

¶7 Ramsdell stated that his decision to terminate O'Dea after the shooting incident was "rooted [in] a reoccurring pattern of poor [judgment]," as well as O'Dea's repeated failure to take responsibility for his actions. CP at 151.

I. USE OF FORCE INCIDENT

¶8 O'Dea responded to a call for assistance from Officer Edwin Huebner. Huebner **[*4]** was in the parking lot of an apartment complex in Tacoma investigating a possible traffic collision. Mendoza Davalos, who was one of the drivers involved in the incident, became angry with Huebner, backed into Huebner's patrol car, locked himself in his own car, and then refused to respond to officer commands.

¶9 Multiple officers were called to the scene. O'Dea, who was a supervisor, arrived soon after Officers Travis Waddell and Ryan Koskovich. O'Dea learned that Mendoza Davalos had "rammed" Huebner's patrol car. CP at 243. He saw Waddell and Koskovich with their guns drawn in a low ready position.

¶10 Mendoza Davalos called 911, and the officers attempted to communicate with him

through dispatch, but he remained noncompliant. At one point, Mendoza Davalos told dispatch that if the officers did not move out of the way, he would run them over. The record suggests that at least some of the officers on scene heard dispatch relay this statement when it was made.

¶11 While O'Dea was speaking with Huebner, Mendoza Davalos began to drive. O'Dea saw the car "surge[] up over the … curb" in front of it and saw Waddell "violently move backwards," which caused O'Dea to believe that Waddell may have been **[*5]** hit by the car. CP at 262. Mendoza Davalos then reversed more forcefully into the car that had been parked next to him. That car was pushed into the adjacent parking space, and Koskovich was forced to jump out of the way to avoid being hit.

¶12 O'Dea began to move away from Mendoza Davalos's car. He thought Mendoza Davalos was preparing to make a right turn toward the only exit in the parking lot, but then Mendoza Davalos turned the wheels back to the left and drove forward, putting O'Dea in the car's path. O'Dea saw the car accelerating "directly toward" him and believed that Mendoza Davalos was "trying to run [him] over." CP at 245. O'Dea recalled being five to seven feet in front of the car, "in [the] center of the vehicle," with the headlights equally distant from him. CP at 268. He "did not believe that [he] had enough time or distance to escape." CP at 246. O'Dea explained, "I knew he was going to kill me if I just stood there … . and if I continue[d] to move, he was going to kill me. He was going to hit me. I had to do something to change that dynamic." CP at 271.

¶13 O'Dea stated that he began moving to the right driver's side of the car, and he began firing shots toward the front **[*6]** of the vehicle, specifically the front left tire. O'Dea "determined [that his] best option would be to shoot at the vehicle and to get inside of Mendoza Davalos's OODA loop[1] [thought process], allowing [O'Dea] enough time to reach a [vehicle] to [his] right." CP at 246. O'Dea admitted he did not know where any of the other three officers were positioned, and he was concerned that firing at Mendoza Davalos would endanger their lives. He fired 11 times.

¶14 When O'Dea began firing, Waddell was running alongside the car and was forced to stop suddenly because he was "essentially running into [O'Dea's] line of fire." CP at 381. Waddell was within 10 to 12 feet of O'Dea when he began firing, and it took Waddell about 8 feet to decelerate and stop running. Koskovich initially stated that he was not in danger of being hit, but he later expressed concern that he was in close proximity to O'Dea and bullet fragments were retrieved about 35 feet from where O'Dea had been firing. O'Dea admitted that he "had no clear idea" where Koskovich was when he started firing, but he claimed Koskovich was "not in the immediate vicinity" and "not in [his] line of vision at all." CP at 121.

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[1] "OODA" stands for "observe, orient, decide and act." CP at 270. It is a principle used to describe the decision-making process.

¶15 Shortly after the shots **[*7]** were fired, Huebner was able to stop Mendoza Davalos's car by blocking it with his own car, and Huebner, Waddell, and Koskovich were able to remove Mendoza Davalos from the car and arrest him.

¶16 Huebner, Waddell, and Koskovich were interviewed multiple times after the incident. Huebner said that the car drove directly toward O'Dea "[a]t first," but then it "veered" away. CP at 354. He reported that O'Dea was out of the way and not in danger, but then O'Dea "stepped forward," toward the car, and began firing as the car was "passing by." CP at 618.

¶17 Waddell reported that O'Dea "jumped out of the way" and began to shoot. CP at 445. He said O'Dea was "kind of at the front and the side" of the car when he started firing, "about at a 45 to 60 degree angle from the vehicle," and the car was "brushing by him … while the shots were happening." CP at 381, 444.

¶18 On the night of the incident, Koskovich recounted that he observed O'Dea backpedal and fire "in the direction of the car as it's driving at him." CP at 368. Later on, during his Internal Affairs interview, Koskovich stated that O'Dea was "just off to the side of the vehicle … within a foot or two of the vehicle as he was firing" and **[*8]** that he fired as the vehicle was passing him. CP at 417. In an affidavit in support of the City's motion for summary judgment, Koskovich stated, "When Lt. O'Dea fired his weapon, he was out of the way of Mendoza Davalos['s] car and not in imminent danger." CP at 633.

¶19 Mendoza Davalos pleaded guilty to third degree assault and third degree malicious mischief. In his guilty plea to the assault charge, Mendoza Davalos wrote, "I drove my vehicle in [O'Dea's] direction and he believed I was going to hit him with my car, causing him to attempt … to alter my vehicle's path by firing his gun … resulting in his gun's bullet fragments [bouncing] off my vehicle and strik[ing] O'Dea causing bodily injury." CP at 401. O'Dea had lacerations on his chin and left forearm and a contusion on his left forearm.

II. POLICIES AND TRAINING

¶20 It is a guiding principle of the Department's use of force policy that "[t]he Tacoma Police Department recognizes and respects the value of all human life." CP at 465. The Department's "[p]rocedures and training are designed to resolve confrontations prior to escalation to the point deadly force may be applied." *Id.* (emphasis omitted).[2]

¶21 Officers "shall use only that **[*9]** force which is reasonable." CP at 457 (emphasis omitted). And an application of force is considered "[n]ecessary" if "no reasonably effective alternative to the use of force appeared to exist and … the amount of force used was reasonable to effect the lawful purpose intended." CP at 458 (emphasis omitted).

¶22 To review a use of force, the Department employs a "Reasonable Officer Standard," which it defines as a "[s]tandard

[2] "Emphasis omitted" may also include "bold face omitted" when citing to clerk's papers.

of professional conduct relating to force application based on training, experience, facts and perceptions known to the [o]fficer at the time." CP at 458 (emphasis omitted).

¶23 The Department's policy allows for the use of "tools and tactics outside the parameters of departmental training," but officers must generally act consistently with departmental training. *Id.* (emphasis omitted). All uses of force outside of departmental training "shall meet the same standard of reasonableness as those which have been previously identified and approved." *Id.* Any "application of force must proportionally de-escalate or cease … when control is gained or [the] threat is removed." *Id.* (emphasis omitted).

¶24 The Department's policy considers the use of a firearm to be deadly force and **[*10]** indicates that it can only be used in response to life-threatening danger. "Deadly force should not be used against a subject in a moving vehicle unless it is necessary to protect against imminent danger to the life of the [o]fficer or others." CP at 465 (emphasis omitted). "When a law enforcement [o]fficer is pursuing a fleeing suspect, [they] may use deadly force only to prevent escape if the [o]fficer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the [o]fficer or others." *Id.*

¶25 The Department has trained officers that deadly force should not be used to stop a moving vehicle. Former Sergeant James Barrett, who developed and conducted use of force trainings for the Department and served as the Department's "firearm and use of deadly force subject matter expert," stated that he never trained officers to disable a vehicle with a firearm and that the proper tools for disabling a vehicle are spike strips and pursuit intervention techniques. CP at 582. He further stated that if a moving vehicle is posing an imminent threat to an officer's life, the "intended target should be the subject posing the threat," meaning the driver. **[*11]** CP at 583. Chief Ramsdell similarly emphasized that officers are not trained to shoot at moving vehicles—they can shoot at the subject, or driver, of a vehicle only as a last resort. *See* CP at 482-83. O'Dea's police practices expert also admitted that he was "not aware of any such training that says shoot the tires of a vehicle." CP at 491. He stated that "in most cases [this tactic] is ineffective [because t]he vehicle just keeps driving." *Id.*

¶26 O'Dea agreed that the Department had not trained him to shoot to disable a moving vehicle, but he argued that he received "similar" training on how to shoot at a moving suspect and this circumstance was "not all that different." CP at 306. Moreover, O'Dea does not recall any training that specifically instructed officers *not* to shoot at the tires or engine block. O'Dea maintains that by using tools and tactics outside of the Department's models and training, he was able to preserve life in a deadly force situation. He argues, "If I could see another way [besides shooting at the driver himself,] … I should be allowed to exercise that [option]." CP at 109. In contrast, Ramsdell characterized the relevant question in this case as whether O'Dea **[*12]** was justified in shooting his

gun *at all*.

III. INVESTIGATION AND REVIEW

¶27 The incident triggered several layers of Department review. First, four of six members of the Deadly Force Review Board concluded that O'Dea's use of force was not reasonable and not within Department policy. This board is comprised of two management representatives, two union representatives, and two citizen representatives. The two management representatives recommended an internal investigation of possible policy violations.

¶28 Internal Affairs then investigated O'Dea on allegations of violating Department policies related to use of force, unsatisfactory performance, and equipment violations. Internal Affairs interviewed the three officers who were present during the shooting, three officers who showed up to assist after the shooting, several officers who were involved in forensic processing of the evidence, the officer responsible for the Department's firearms training, and O'Dea himself. Internal Affairs sustained all of the allegations against O'Dea.

¶29 A Department detective who performed forensic analysis stated that "there were no defects located to the tire tread of the front left tire … the defects were from **[*13]** the side." CP at 165. He concluded that there was nothing to indicate that O'Dea was standing in front of the car when he began shooting and estimated that O'Dea was probably standing "in front of the door hinge, next to the door hinge, or behind it." *Id.* Another detective who analyzed the forensic evidence reported that the bullet strikes were "almost perpendicular to the wheel rather than from the front of the vehicle," and he believed O'Dea was standing "almost perpendicular, right at the left front wheel directly to the side of the vehicle as he was shooting." *Id.* He also noted "additional shots farther down the car." *Id.*

¶30 Internal Affairs relied on the forensic analysts' conclusions that O'Dea likely fired "while standing at the side of the vehicle" and stated that this "interpretation of the evidence coincided with Officers Huebner, Koskovich, and Waddell's statements that Lt. O'Dea was standing to the side of the suspect vehicle when he fired his weapon." CP at 173.[3]

¶31 Internal Affairs recognized that O'Dea believed Mendoza Davalos posed a significant danger, but it found that "O'Dea's determination to shoot at the vehicle's tire due to his fear of being struck by the suspect's car **[*14]** [was] negated by the fact that he was shooting at the tires of the vehicle as it was driving past him rather than driving towards him." *Id.* It found that he violated the use of force policy.

¶32 In his complaint, O'Dea claimed that he provided a statement from a mechanic familiar with ballistic evidence and that he hired a forensic scientist to conduct a second inspection of the car, but the scientist was not permitted to remove the

[3] The Internal Affairs report is in the record, but the City did not submit declarations or deposition testimony from the detectives who performed the forensic analysis.

front left tire to examine it. According to O'Dea, the mechanic determined that there was damage "coming from the front of the vehicle traveling to the back of the vehicle." CP at 29. The record on appeal does not include any declaration or deposition testimony from the mechanic or the forensic scientist.

¶33 Internal Affairs also found O'Dea's performance was unsatisfactory due to his "poor decision[-]making." CP at 173. He failed to follow the Department's use of force policy, failed to inform dispatch and incoming officers that shots had been fired, and failed to follow other Department protocols after the shooting. He also violated the equipment policy because he did not have a current qualification to carry a backup handgun.

¶34 Internal Affairs noted O'Dea's 2015 **[*15]** suspension as well, which was imposed after the Halloween high-speed chase he initiated resulted in a collision and injuries, some serious, to members of the public, including children. Internal Affairs recommended termination, stating, "Lt. O'Dea has continued to make unsatisfactory decisions and his performance[] does not meet the standards expected of a Tacoma Police Officer, especially a Lieutenant." CP at 174. It concluded, "Lt. O'Dea does not model the behavior and actions expected of a seasoned law enforcement officer or commander. Lt. O'Dea's last two incidents have created a danger to himself, the officers around him, and the public." CP at 175.

¶35 Following a *Loudermill*[4] hearing where O'Dea and his union representative were permitted to speak, Chief Ramsdell accepted Internal Affairs' recommendation and terminated O'Dea. In a sworn affidavit, Ramsdell explained:

> I terminated Mr. O'Dea's employment because he violated the Tacoma Police Department use of force policy by using deadly force when it was not necessary or reasonable. When confronted with an actively resistant suspect who was trying to flee, Mr. O'Dea fired his weapon at the tires of the vehicle eleven times. At the moment **[*16]** Mr. O'Dea fired his weapon, the suspect vehicle was *passing* him and was not an imminent threat to either Mr. O'Dea or any of the officers present at the scene.
>
> … I understand that Mr. O'Dea is claiming that I terminated his employment because he did not shoot the driver of the vehicle, but instead aimed at the tires of the car — in other words, that I terminated his employment "because he decided not to shoot at and/or kill Mr. Mendoza-Davalos[.]" That is not why I terminated Mr. O'Dea. I terminated Mr. O'Dea from his position with [the Department] ***because Mr. O'Dea never should have fired his weapon*** under the circumstances. Although Mr. O'Dea states that he believed he was in imminent danger, a

[4] *Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)* (due process requires providing some public employees with a "pretermination opportunity to respond").

> reasonable police officer facing the same circumstances would not have viewed the suspect as an imminent threat and would not have considered the use of deadly force necessary.
>
> … Another factor in my decision to terminate Mr. O'Dea's employment was a reoccurring pattern of poor judgment and his lack of accountability for his actions and decisions. In 2015, I suspended Mr. O'Dea for 40 hours for violating the Department's pursuit policy in an incident that resulted in a serious motor vehicle **[*17]** accident where multiple persons were injured. Despite a clear violation of the pursuit policy and significant discipline, Mr. O'Dea refused to take responsibility for this incident. Similarly, Mr. O'Dea continues to claim that his use of deadly force was not a violation of the use of force policy. His decision-making in both situations was dangerous and he is either unable or unwilling to admit it. Because of this, I have no reasonable basis to believe that he will not continue to exercise extremely poor judgment and engage in dangerous behavior, which ultimately puts the public and other officers at risk.

CP at 141-42 (footnote omitted) (citation omitted). Ramsdell further explained in his notice of intent to terminate, "Although I appreciate [O'Dea's] perspective and opinions on what happened that day, I must base my decision on what I would expect a reasonable officer to do in that situation." CP at 148. He added, "While I do not believe in general, the use of deadly force was within policy, I also find that the decision to shoot at the tires was not within policy nor consistent with training." CP at 149.

¶36 O'Dea appealed to the Discipline Review Board, which unanimously upheld the **[*18]** termination.

IV. O'DEA'S LAWSUIT AGAINST THE CITY

¶37 In 2018, O'Dea sued the City[5] for damages. He alleged wrongful discharge in violation of public policy, intentional infliction of emotional distress (outrage), negligent infliction of emotional distress, and defamation. The City filed a motion for summary judgment on all claims. In his response, O'Dea conceded that he could not establish defamation.

¶38 At a hearing on the motion, the trial court considered how shooting at a vehicle 11 times could endanger other officers and anyone nearby. The trial court explained,

> Whether or not the vehicle was headed for Mr. O'Dea or whether it had turned off before the discharge of the weapon or whether both things were true, the use of deadly force and firing off eleven rounds in an urban setting under these circumstances -- to discharge an officer on that basis does not, in my view, violate some kind of public policy. It advances public safety.

Verbatim Report of Proceedings at 20.[6] The

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[5] The Tacoma Police Department is a department of the city of Tacoma and not a separate legal entity.

[6] O'Dea assigns error to the trial court "assum[ing] facts not in evidence when it suggested that Lt. O'Dea's 'random' shots placed other citizens in danger." Br. of Appellant at 2. The record does not identify specific citizens as endangered by O'Dea's actions, but

trial court granted the City's motion for summary judgment on the remaining claims. O'Dea appeals.

ANALYSIS

I. SUMMARY JUDGMENT STANDARD

¶39 A motion for summary judgment shall be granted "if the pleadings, depositions, answers **[*19]** to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *CR 56(c)*. "A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation's outcome." *Youker v. Douglas County, 178 Wn. App. 793, 796, 327 P.3d 1243 (2014)*. When determining whether a genuine issue of material fact exists, this court considers all evidence in the light most favorable to the nonmoving party. *Vargas v. Inland Wash., LLC, 194 Wn.2d 720, 728, 452 P.3d 1205 (2019)*. If, after reviewing all the evidence, a reasonable person could reach only one conclusion, summary judgment is proper. *Id.*

¶40 If a defendant files a motion for summary judgment and shows an "'absence of evidence to support the [plaintiff]'s case,'" then the burden shifts to the plaintiff to set forth specific facts showing a genuine issue of material fact for trial. *Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989)* (quoting *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*); *see also M.E. & J.E. through McKasy v. City of Tacoma, 15 Wn. App. 2d 21, 31, 471 P.3d 950 (2020)*, *review denied, 196 Wn.2d 1035 (2021)*. If the plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,'" summary judgment is proper. *Young, 112 Wn.2d at 225* (quoting *Celotex Corp., 477 U.S. at 322*). We review the superior court's order granting summary judgment **[*20]** de novo. *Vargas, 194 Wn.2d at 728*.

II. WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

¶41 The Washington Supreme Court has recognized a cause of action in tort for wrongful discharge that "contravenes a clear mandate of public policy." *Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)*. Generally, this tort arises in four specific scenarios: where an employee is fired for "refusing to commit an illegal act;" for "performing a public duty or obligation, such as serving jury duty;" for "exercising a legal right or privilege, such as filing workers' compensation claims;" or for "reporting employer misconduct, *i.e.*, whistleblowing." *Gardner v. Loomis Armored Inc., 128 Wn.2d 931, 936, 913 P.2d 377 (1996)*. But a claim may exist outside of these scenarios if the plaintiff satisfies a four-part test. *Martin v. Gonzaga*

Koskovich did describe the area as "busy." CP at 369. Regardless, O'Dea does not develop this argument in his brief, so we deem it waived. ***RAP 10.3(a)(6)***; *Riley v. Iron Gate Self Storage, 198 Wn. App. 692, 713, 395 P.3d 1059 (2017)* ("If an appellant's brief does not include argument or authority to support its assignment of error, the assignment of error is waived.").

Univ., 191 Wn.2d 712, 723, 425 P.3d 837 (2018) (affirming the use of the four-part "Perritt test" for cases that do "not fit neatly into one of those four recognized categories" (citing Henry H. Perritt Jr., *Workplace Torts: Rights and Liabilities* (1991))). "The plaintiff[ ] must prove the existence of a clear public policy (the *clarity* element)[,] … that discouraging the conduct in which they engaged would jeopardize the public policy (the *jeopardy* element)[,] … [and] that the public-policy-linked conduct caused the dismissal (the *causation* element)." *Gardner, 128 Wn.2d at 941* (citing Perritt, *supra*, §§ 3.7, .14, .19). **[*21]** Finally, if the plaintiff satisfies the first three elements, then "[t]he defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element)." *Id.* (citing Perritt, *supra*, § 3.21).

¶42 This cause of action is a "narrow" exception to the at will employment doctrine. *Thompson, 102 Wn.2d at 232*. It is therefore the employee's burden to prove that their dismissal contravenes public policy. *Id.* Once an employee shows a violation of public policy, the burden shifts to the employer to prove that the dismissal was for legitimate, nonpretextual reasons. *Gardner, 128 Wn.2d at 936*. "This protects against frivolous lawsuits and allows trial courts to weed out cases that do not involve any public policy principle. It also allows employers to make personnel decisions without fear of incurring civil liability." *Thompson, 102 Wn.2d at 232*. The exception "should be applied cautiously so as to not swallow the rule" that employers generally need not explain their employment decisions to the courts. *Briggs v. Nova Servs., 166 Wn.2d 794, 802, 213 P.3d 910 (2009)*.

A. Clarity Element

¶43 O'Dea claims his actions furthered the public policy of protecting human life. "The City does not dispute that society places a high priority on human life," and we agree. Br. of Resp't at 13.

¶44 The Supreme Court has previously **[*22]** recognized a public policy of prioritizing the protection of human life. It described this policy as "fundamental" and "clearly evidenced by countless statutes and judicial decisions." *Gardner, 128 Wn.2d at 944*.

¶45 In *Gardner*, the plaintiff was a "guard and driver of an armored car." *Id. at 933*. Gardner's employer had a company rule that if an employee left their armored car unattended for any reason, that was grounds for termination. *Id. at 934-35*. While in an armored car, Gardner saw a man chasing a woman with a knife. *Id. at 934*. The woman screamed for help, and Gardner left the armored car to help her. *Id.* The Supreme Court held that Gardner could not be terminated for violating the company rule where the violation occurred "because he saw a woman who faced imminent life-threatening harm, and he reasonably believed his intervention was necessary to save her life." *Id. at 950*. The court recognized a "public policy encouraging such heroic conduct." *Id.*

¶46 The Supreme Court applied *Gardner* in *Ellis v. City of Seattle, 142 Wn.2d 450, 13 P.3d 1065 (2000)*. There, a sound technician was discharged for "'gross insubordination'" after he refused his employer's order to disable part of an arena's fire alarm system without authorization to do so. *Id. at 457*. Ellis was "concerned about the potential danger to human life that might occur if he **[*23]** had to alter the designed operation of the fire alarm system," and the Supreme Court recognized that "[p]ublic policy should encourage the safe operation of fire alarm systems." *Id. at 466*.

¶47 The Department also "recognizes and respects the value of all human life" in its use of force policy. CP at 465. Officers are instructed that the need for deadly force "arises when there is no reasonable alternative," and they may apply deadly force only "as a last resort … to protect themselves or others." *Id.*

¶48 Protecting human life is a clear mandate of public policy. *See Gardner, 128 Wn.2d at 950*; *Ellis, 142 Wn.2d at 466*; *see also* CP at 465. O'Dea has satisfied the clarity element of the *Gardner* test.

B. Jeopardy Element

¶49 O'Dea claims that by terminating him for shooting at the tires of the car, rather than at Mendoza Davalos, the Department jeopardized the public policy of protecting human life. If O'Dea were fired because he chose not to shoot at Mendoza Davalos, as he asserts, then he could satisfy the jeopardy element.

¶50 The purpose of the jeopardy element is to ensure that "an employer's personnel management decisions will not be challenged unless a public policy is *genuinely* threatened." *Gardner, 128 Wn.2d at 941-42* (emphasis added). To satisfy the jeopardy element, O'Dea must show that **[*24]** his "conduct *directly relate*[*d*] to the public policy, or was *necessary* for the effective enforcement of the public policy." *Id. at 945*. "Additionally, [O'Dea] must show how the threat of dismissal will discourage others from engaging in the desirable conduct." *Id.*

¶51 The decision not to shoot at another person directly relates to the public policy of protecting human life. If O'Dea were dismissed because he made the decision not to shoot at Mendoza Davalos, his termination would jeopardize the identified public policy. His dismissal might discourage other officers from choosing viable alternatives to shooting at suspects, and this would jeopardize the public policy of prioritizing the protection of human life.

C. Causation Element

¶52 However, O'Dea's decision not to shoot at Mendoza Davalos was not the basis for O'Dea's termination. In briefing and in oral argument, O'Dea argued that he was terminated because he "chose not to shoot at or 'target' Mendoza Davalos when his actions threatened Lt. O'Dea's life." Br. of Appellant at 16. But O'Dea was not terminated because he chose to shoot at the tires, rather than shoot at Mendoza Davalos. Chief Ramsdell clearly stated that the Department terminated O'Dea **[*25]**

because he chose to discharge his firearm at all, and O'Dea has not presented evidence to the contrary.

¶53 To satisfy the causation element, O'Dea "must prove that the public-policy-linked conduct caused the dismissal." *Gardner, 128 Wn.2d at 941*. O'Dea need not prove that this was the sole cause of his dismissal, but he must prove that it was a cause. *Wilmot v. Kaiser Alum. & Chem. Corp., 118 Wn.2d 46, 70, 821 P.2d 18 (1991)*.

¶54 Ramsdell was explicit that he did *not* terminate O'Dea because O'Dea decided not to shoot at Mendoza Davalos. In Ramsdell's sworn affidavit, he stated, "I terminated Mr. O'Dea's employment because he violated the Tacoma Police Department use of force policy by using deadly force when it was not necessary or reasonable." CP at 141. Ramsdell concluded that O'Dea's use of force was not necessary or reasonable because O'Dea fired his weapon when the car was already passing him. He continued, "I terminated Mr. O'Dea from his position with [the Department] ***because Mr. O'Dea never should have fired his weapon*** under the circumstances." *Id.*

¶55 In his notice of intent to terminate, Ramsdell acknowledged that this was "a rapidly evolving situation" with a noncompliant individual and that, "at some point," O'Dea was in front of a moving vehicle. CP at 148. He acknowledged that O'Dea **[*26]** felt his own life was in danger and believed it was necessary to shoot to save himself. However, Ramsdell explained that "what matters when determining whether the use of deadly force was within policy is whether [O'Dea was] in imminent threat of death or serious bodily injury *at the time of the application of force*." CP at 149 (emphasis added). According to Ramsdell, the evidence was "clear" that when O'Dea started shooting, he had already avoided being hit by the car, and he was not in imminent danger. *Id.*[7]

¶56 Ramsdell did express "serious concern" with O'Dea's decision to shoot at the tires because he did not see how this action would have stopped the vehicle from moving. *Id.* But this was a secondary concern. Both Ramsdell's sworn declaration and the Internal Affairs conclusions identified O'Dea's decision to use his firearm *at all* as the reason for his termination.

¶57 In addition, Ramsdell stated that "[a]nother factor in [his] decision to terminate Mr. O'Dea's employment was a reoccurring pattern of poor judgment." CP at 142. Ramsdell considered O'Dea's 2015 vehicle pursuit, which resulted in injuries to multiple people, and he noted that O'Dea never took full responsibility for his actions **[*27]** in that incident. Ramsdell concluded, "I have no reasonable basis to believe that [O'Dea] will not continue to exercise extremely poor judgment and engage in dangerous behavior, which ultimately puts the public and other officers

[7] Ramsdell reviewed the contrary evidence offered by O'Dea's mechanic, but he found that the mechanic conducted a different type of forensic analysis than the Department and, therefore, Ramsdell did not rely on the mechanic's analysis. The mechanic's analysis was not provided to the trial court, and it is not in this record.

at risk." *Id.*

¶58 There is no genuine issue of material fact regarding the cause of O'Dea's termination. The Department terminated O'Dea because it disapproved of his use of force. Ramsdell relied on the investigation conducted by Internal Affairs and concluded that when O'Dea fired his weapon, it was not reasonable or necessary. He also expressed concern that O'Dea had repeatedly violated Department policies and endangered others.

¶59 While a reasonable person in Ramsdell's position might have reached a different conclusion or made a different decision under the circumstances, that is not the test for whether a prima facie case of wrongful discharge in violation of public policy has been established. This claim is a narrow exception to the employment at will doctrine, and it applies only where an employee is terminated for conduct that furthers an identified public policy.

¶60 O'Dea fails to satisfy the causation element of the *Gardner* test because his termination was ***[*28]*** *not* caused by the conduct that O'Dea claims is linked to the identified public policy—his decision to shoot at the car rather than Mendoza Davalos, thereby preserving Mendoza Davalos's life. It was caused by his decision to use his firearm at all. The Department did not terminate O'Dea for engaging in conduct that furthered the public policy of protecting human life; it terminated him because it believed that his conduct was unreasonable, unnecessary, and unsafe. Because O'Dea cannot establish this element of a wrongful discharge claim, his claim fails as a matter of law, and we must affirm the trial court's grant of summary judgment to the City.[8]

III. Additional Tort Claims

¶61 O'Dea neglected to assign error in his opening brief to the trial court's dismissal of his other two claims, as required by *RAP 10.3(a)(4)*. However, "[w]e have 'discretion to decide an issue a party fails to argue in its initial brief, especially where … the party raised it below and addresses it in a reply brief.'" *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife, 14 Wn. App. 2d 945, 978, 474 P.3d 1107 (2020)* (alteration in original) (quoting *In re Recall Charges Against Seattle Sch. Dist. No. 1 Dirs., 162 Wn.2d 501, 513, 173 P.3d 265 (2007)*). We exercise our discretion to briefly address the arguments raised in O'Dea's reply brief.

A. Negligent Infliction of Emotional Distress

¶62 O'Dea argues that his termination was a **[*29]** negligent infliction of emotional distress. But negligent infliction of emotional distress claims are not cognizable where they arise from employee discipline.

¶63 "Negligent infliction of emotional distress may be a cognizable claim in the workplace *when it does not result from an employer's disciplinary acts*." *Strong v. Terrell, 147 Wn. App. 376, 387, 195 P.3d 977 (2008)* (emphasis added). Generally, "employers do not owe employees a duty to

[8] Although we do not reach the absence of justification element, we note that O'Dea also failed to establish that the Department's justification for his termination was pretextual.

use reasonable care to avoid the inadvertent infliction of emotional distress when responding to workplace disputes." *Bishop v. State, 77 Wn. App. 228, 235, 889 P.2d 959 (1995)*. This includes disputes that result in an employee's termination because "employers, not the courts, are in the best position to determine whether such disputes should be resolved by employee counseling, discipline, transfers, terminations or no action at all," and "the courts cannot guarantee a stress-free workplace." *Id. at 234*.

¶64 Here, the Department's termination of O'Dea was a disciplinary action. O'Dea relies on *Cagle v. Burns & Roe, Inc., 106 Wn.2d 911, 726 P.2d 434 (1986)*, but that case does not address a stand-alone claim of negligent infliction of emotional distress. Instead, it considers "whether, and on what standard of proof," emotional distress damages are recoverable, should a plaintiff establish a claim of wrongful discharge in violation of public policy. **[*30]** *Id. at 912*. If O'Dea were able to prove the elements of his wrongful discharge claim, then he could also present an argument that emotional distress damages were warranted. But O'Dea is unable to establish a wrongful discharge claim, and a separate cause of action for negligent infliction of emotional distress claim is not cognizable.

B. Intentional Infliction of Emotional Distress (Outrage)

¶65 O'Dea also argues that "his termination was outrageous because he spared Mr. Mendoza Davalos' life." Appellant's Reply Br. at 11. We disagree.

¶66 To establish a claim of outrage, O'Dea must show "'(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress.'" *Snyder v. Med. Serv. Corp. of E. Wash., 145 Wn.2d 233, 242, 35 P.3d 1158 (2001)* (internal quotation marks omitted) (quoting *Birklid v. Boeing Co., 127 Wn.2d 853, 867, 904 P.2d 278 (1995)*). "'The conduct in question must be *so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.*'" *Birklid, 127 Wn.2d at 867* (internal quotation marks omitted) (quoting *Dicomes v. State, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989)*). Whether certain conduct is sufficiently outrageous to establish an outrage claim is ordinarily a question for the jury, "'but it is initially **[*31]** for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability.'" *Id.* (quoting *Dicomes, 113 Wn.2d at 630*).

¶67 Here, reasonable minds would agree that O'Dea's termination was not sufficiently extreme to establish liability. If O'Dea were correct that the Department terminated him for not shooting at Mendoza Davalos, then perhaps he would have an outrage claim. However, the Department thoroughly explained that it terminated O'Dea because he fired his weapon in a situation where the Department believed it was unreasonable, unnecessary, and unsafe to do so and because O'Dea demonstrated a pattern of poor decision-making. Neither the

Department's offered justification for his termination, nor its manner of terminating him, which involved extensive investigation and multiple levels of review, was so outrageous or extreme that it could be regarded as "'atrocious'" or "'utterly intolerable in a civilized community.'" *Birklid, 127 Wn.2d at 867* (emphasis omitted) (internal quotation marks omitted) (quoting *Dicomes, 113 Wn.2d at 630*). Summary judgment dismissal of O'Dea's intentional infliction of emotional distress claim was proper.

CONCLUSION

¶68 We affirm the trial court's grant of summary judgment on O'Dea's **[*32]** claims of wrongful discharge in violation of public policy, negligent infliction of emotional distress, and intentional infliction of emotional distress.

¶69 A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with *RCW 2.06.040*, it is so ordered.

MAXA and SUTTON, JJ., concur.

Reconsideration denied July 20, 2021.

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APPENDIX B

O'Dea v. City of Tacoma, 19 Wn. App. 2d 67, 493 P.3d 1245 (Aug. 24, 2021)

O'Dea v. City of Tacoma

Court of Appeals of Washington, Division Two

May 20, 2021, Oral Argument; August 24, 2021, Filed

No. 53613-7-II

Reporter
19 Wn. App. 2d 67 *; 493 P.3d 1245 **; 2021 Wash. App. LEXIS 2161 ***; 2021 WL 3732293

DAVID O'DEA, *Respondent*, v. THE CITY OF TACOMA ET AL., *Appellants*.

Notice: PUBLISHED IN PART

Subsequent History: Reconsideration denied by, Motion denied by *O'Dea v. City of Tacoma, 2021 Wash. App. LEXIS 2564 (Wash. Ct. App., Nov. 1, 2021)*

Prior History: **[***1]** Appeal from Pierce County Superior Court. Docket No: 17-2-13016-3. Judge signing: Honorable G. Helen Whitener. Judgment or order under review. Date filed: 06/28/2019.

O'Dea v. City of Tacoma, 17 Wn. App. 2d 1054, 2021 Wash. App. LEXIS 1283 (May 18, 2021)

Counsel: *Bill Fosbre*, *City Attorney*, and *Jennifer J. Taylor*, *Assistant*; and *Kenneth W. Masters* (of *Masters Law Group PLLC*), for appellants.

Brett A. Purtzer, for respondent.

Judges: Authored by Rebecca Glasgow. Concurring: Bernard Veljacic, Lisa Sutton.

Opinion by: Rebecca Glasgow

Opinion

[*71] [1247]**

¶1 GLASGOW, A.C.J. — The Tacoma Police Department placed Lieutenant David O'Dea on administrative leave following a shooting incident in August 2016, investigated his conduct, and ultimately fired him in June 2017. While on administrative leave, O'Dea requested documents and information from the Department relating to the investigation and his participation in a promotional test. In March 2017, O'Dea's lawyer mailed two letters requesting documents under the *Public Records Act (PRA), chapter 42.56 RCW.* It is undisputed on appeal that the City of Tacoma's public records officer never received these letters and did not respond.[1]

[1248]**

¶2 O'Dea then sued the City in November 2017, alleging multiple PRA violations. O'Dea attached the PRA request letters **[***2]** as exhibits to the complaint. The City answered the complaint but did not start responding to the PRA request

[1] The Tacoma Police Department is a department of the City of Tacoma.

letters until nine months later.

¶3 Both parties filed cross motions for partial summary judgment. The trial court granted O'Dea's motion, holding that the City had an obligation under the PRA to respond to the two PRA request letters when it received them as attachments to the complaint. The trial court also granted the City's motion for partial summary judgment, dismissing O'Dea's other claims. The trial court then awarded approximately $2.6 million in penalties to O'Dea for the City's **[*72]** delay in responding to the two letter requests after receiving them with the complaint in November 2017.

¶4 The City appeals the order granting O'Dea's motion for partial summary judgment and imposing penalties. O'Dea cross appeals the dismissal of his other claims, the denial of a motion for additional searches, and the trial court's refusal to find bad faith. The City seeks to reverse the attorney fees award in favor of O'Dea below, and O'Dea requests attorney fees on appeal.

¶5 We affirm the trial court's summary judgment decision. The trial court properly concluded that the City violated the PRA when **[***3]** it failed to respond to the two PRA request letters when it received them as attachments to the complaint. The trial court also properly dismissed O'Dea's remaining claims. However, we reverse the $2.6 million penalty award as an abuse of discretion and remand for recalculation of penalties and attorney fees consistent with this opinion. We award appellate attorney fees to O'Dea to the extent fees for his prevailing argument can be segregated.

FACTS

¶6 In August 2016, O'Dea fired multiple shots at a car whose driver was trying to flee a group of officers. The Department placed O'Dea on administrative leave and investigated whether he had violated Department policies. O'Dea made several requests for information and records while he was on administrative leave. We address issues related to those requests in the unpublished portion of this opinion.

A. March 2017 PRA Request Letters

¶7 In March 2017, O'Dea's counsel, Brett Purtzer, wrote and mailed to the Department two letters explicitly requesting documents under the PRA on O'Dea's behalf. The subject lines of both letters read, "PUBLIC RECORDS **[*73]** REQUEST." Clerk's Papers (CP) at 23, 25 (underscore omitted).

¶8 The first letter, dated March 24, 2017, **[***4]** requested several categories of records. O'Dea sought documentation showing how the Department tracked internal affairs investigations from 2006 to 2017. Purtzer requested information about the deadly force review board and "[c]opies of any and all Claims for Damages filed against the … Department for the period January 1, 2006 [to] March 17, 2017," relating to use of force, personal injury, civil rights violations, racial discrimination, harassment, and bias. CP at 24 (underscore omitted). O'Dea sought policies and procedures for notifying Department staff about incidents involving use of force and deployment of chaplains and other support

services for officers involved in use of force incidents.

¶9 The second PRA request letter, dated March 28, 2017, requested three additional categories of records. O'Dea requested training directives and special orders that addressed the use of force, as well as "[d]ata" about these trainings, including dates, times, locations, "[p]ersonnel attending," and "[t]opics covered in the training." CP at 25. O'Dea asked for "[p]ersonnel [r]osters or any other documents or reports" revealing "the assignments of personnel within the various bureaus of the **[***5]** Department" from 1995 to 2017. *Id.* Finally, the letter sought "memorandums, notifications, emails, and/or text messages concerning [the assistant chief's]" interviews for positions outside the Department. CP at 26.

¶10 Purtzer's paralegal testified that she deposited the letters in the mail on March 24 and 28, 2017. For reasons that are unclear, the City's public records officer did not receive them, a fact that is not contested on appeal.

[1249]** B. November 2017 Complaint

¶11 In June 2017, The Department terminated O'Dea's employment and a review board upheld that decision.
[*74]

¶12 In November 2017, O'Dea sued the City, alleging violations of the PRA. O'Dea alleged that he made multiple requests for records under the PRA via the two PRA request letters and in other communications and that the Department violated the PRA by withholding responsive records. O'Dea requested penalties and "[a]n order that all records requested … be provided promptly for inspection and copying." CP at 21. O'Dea attached the PRA letters as exhibits to both his initial and amended complaints. In its answer, the City denied receiving the PRA request letters. The City did not transmit the PRA request letters to its PRA officer at **[***6]** that time, nor did it begin to respond to the PRA requests.

C. Cross Motions for Summary Judgment and Initial Response to PRA Requests

¶13 In May 2018, the City sent interrogatories and requests for production to O'Dea, asking him to identify the communications he claimed were PRA requests. O'Dea again provided the two PRA request letters in response to the request for production.

¶14 In June 2018, O'Dea moved for partial summary judgment, arguing that the two PRA request letters attached to his complaint were public records requests and that the City failed to provide a timely response.

¶15 In July 2018, City attorney Jennifer Taylor e-mailed Purtzer, asking if he wanted to treat the two letters attached to the complaint as PRA requests. Purtzer did not respond.

¶16 In August 2018, the City deposed Purtzer's paralegal, Lee Ann Mathews. While on the record, Taylor reiterated that the City did not receive the letters

purportedly mailed in March and again asked Purtzer whether she should give the letters to the public records staff to begin responding. Purtzer told Taylor that the City should have done so when it received the complaint in November 2017, but he confirmed that Taylor should send the letters **[***7]** to the **[*75]** public records staff. Taylor immediately sent the letters to Lisa Anderson, a public records officer for the City.

¶17 On August 31, 2018, within five days of receiving the two PRA request letters, Anderson sent Purtzer a notice acknowledging his PRA requests. Anderson told Purtzer that the City would likely finish responding to the letter originally dated March 28, 2017 by October 2, 2018. For the more extensive March 24, 2017 letter, Anderson estimated the City would provide complete responses by February 27, 2019. Due to the more complicated requests in the March 24, 2017 letter, Anderson warned Purtzer that it could take up to a year to fully respond. Anderson said the City would provide responses in monthly installments.

¶18 In September 2018, the City moved for partial summary judgment, asking the trial court to dismiss all of O'Dea's PRA claims except those arising from the two PRA request letters. The City also responded to O'Dea's motion for partial summary judgment, explaining that it never received the letters in March 2017. The City further contended that attaching the letters to the complaint did not constitute a valid PRA request.

¶19 On October 2, 2018, the City provided more **[***8]** than 500 documents in response to the letter originally dated March 28, 2017 and closed that request. The City continued to work on its response to the larger March 24, 2017 letter.

¶20 The trial court granted both parties' motions for partial summary judgment. The trial court found there was no dispute that the City received the two PRA letters as attachments to the complaint. The trial court held that the letter attachments constituted valid PRA requests and there was "no genuine issue of material fact that the City violated [the] PRA regarding those two letters" when it failed to respond to these requests upon receipt of the complaint. CP at 438. The trial court also granted the City's motion for partial summary judgment, holding that none of O'Dea's other communications during his administrative leave could reasonably have been construed as PRA requests.

[*76] **[**1250]** D. Production of Records in Installments and Initial PRA Penalty Award

¶21 On December 13, 2018, the City provided its first installment of records for the PRA request letter originally dated March 24, 2017.

¶22 Later in December 2018, O'Dea filed a motion for an order compelling production of the outstanding documents, for a show cause order **[***9]** requiring the City to explain why it would take one year to fully produce all records responsive to the March 24, 2017 letter, and for penalties based on

the records the City had produced so far. The City provided two more installments of records in response to the March 24, 2017 letter in late January 2019 and on February 1, 2019.

¶23 On February 6, 2019, the trial court entered an initial decision on penalties. The trial court discussed the *Yousoufian*[2] factors used to inform public records penalties, finding three aggravators and one mitigator. For each of the PRA request letters, the trial court imposed $10 per day, *per record* penalties beginning on the date the City first received the requests with the complaint and ending when the City began responding. The trial court imposed a $39,500 penalty for the letter dated March 24, 2017 and a $1,731,280 penalty for the letter dated March 28, 2017.

¶24 The trial court also ordered the City to conduct additional searches for the remaining documents "within 30 days of the date of this Order" and "penalties for additional documents identified in the search will be determined later upon completion of the search." CP at 585.

¶25 The City filed a motion for **[***10]** reconsideration of the penalty order, arguing, "The Court's order to produce all documents within 30 days - rather than setting a show cause hearing as requested by the parties, or making a determination whether the City's estimate was reasonable **[*77]** - [was] also premature." CP at 604 (boldface omitted). The trial court denied the motion for reconsideration.

¶26 The City provided two more installments of records responsive to the March 24, 2017 letter later in February and closed that request on February 21, 2019, ahead of its estimated completion date and the close of the trial court's 30-day window.

E. Additional Penalties

¶27 On April 3, 2019, O'Dea filed a motion for additional penalties based on a declaration in which he alleged numerous deficiencies in the City's responses. O'Dea also moved to compel additional searches and produce documents responsive to the PRA request letters that he claimed were missing. O'Dea argued that the City's five installments responding to the March 24, 2017 letter since its first installment in December 2018 supported an additional penalty of over $830,000.

¶28 Later in April, the City found and disclosed two more sets of responsive records. One record, responsive to **[***11]** the March 24, 2017 letter, was inadvertently not produced sooner because of a software glitch. The City also found 12 files responsive to the March 28, 2017 letter in an old computer drive previously thought to have been purged of relevant materials.

¶29 In May 2019, O'Dea filed a supplemental declaration and additional briefing arguing that the City had destroyed responsive records after receiving his PRA requests. O'Dea contended that this supported a finding of bad faith and mandated a higher per day penalty under *Yousoufian*. The City acknowledged that it

[2] *Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 467-68, 229 P.3d 735 (2010)*.

had inadvertently purged six files from a database containing responsive records in November 2018.

¶30 In June 2019, the trial court granted O'Dea's motion for additional penalties based on responses not already included in the trial court's February 6, 2019 penalty order. **[*78]** According to the trial court, the fact "[t]hat additional documents were found after the Court's February 6, 2019 order supports a finding that the City's prior search in response to the March 28, 2017 request was inadequate." CP at 1114. The trial court concluded that every search for documents responsive to the March 24, 2017 request, except the documents discovered **[***12]** after the City resolved the computer glitch, were also subject to additional per record, per day penalties. **[**1251]** The trial court employed a separate penalty period for each installment and each period spanned the number of days between the City's receipt of the complaint in November 2017 and the date it produced records. The trial court did not find that the destruction of records evinced bad faith.

¶31 The trial court increased the penalty award for the March 24, 2017 letter to $813,300 and added $63,360 in penalties for the 12 recently discovered files responsive to the March 28, 2017 letter. In total, the trial court awarded O'Dea $2,607,940 in PRA penalties.

¶32 The City appeals the October 2018 order granting O'Dea's motion for partial summary judgment, the February 2019 decision imposing penalties, and the June 2019 final judgment.

ANALYSIS

THE CITY'S APPEAL

A. Background on the PRA

[1, 2] ¶33 The PRA is a "'strongly worded mandate for broad disclosure of public records.'" *Serv. Emps. Int'l Union Local 925 v. Univ. of Wash., 193 Wn.2d 860, 866-67, 447 P.3d 534 (2019)* (*SEIU*) (internal quotation marks omitted) (quoting *Yakima County v. Yakima Herald-Republic, 170 Wn.2d 775, 791, 246 P.3d 768 (2011)*). The PRA must be "liberally construed and its exemptions narrowly construed." *RCW 42.56.030*.
[*79]

[3-6] ¶34 A government agency must disclose responsive records unless a specific exemption in the PRA or another **[***13]** statute applies. *Fisher Broad.-Seattle TV LLC v. City of Seattle, 180 Wn.2d 515, 521-22, 326 P.3d 688 (2014)*; *RCW 42.56.070(1)*. The PRA does not require agencies to create or produce records that do not exist. *Fisher, 180 Wn.2d at 522*. The PRA requires adequate searches for responsive records, and an inadequate search is treated as a PRA violation. *Neigh. All. of Spokane County v. Spokane County, 172 Wn.2d 702, 721, 261 P.3d 119 (2011)*. A trial court reviews agency actions under the PRA de novo and "may conduct a [PRA] hearing based solely on affidavits." *RCW 42.56.550(3)*.

[7-10] ¶35 We review de novo "both the agency action and the court opinions

below." *Fisher, 180 Wn.2d at 522*; *see also RCW 42.56.550(3)*. If "the record on appeal consists solely of declarations or other documentary evidence, we stand in the same position as the trial court." *SEIU, 193 Wn.2d at 866*. We review penalty assessments and attorney fees awarded under the PRA for an abuse of discretion. *Hoffman v. Kittitas County, 194 Wn.2d 217, 224, 228, 449 P.3d 277 (2019)*.

¶36 In reviewing a summary judgment decision, we apply the same standard as the trial court. *Neigh. All., 172 Wn.2d at 715*. Summary judgment is appropriate "if … there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." *CR 56(c)*. We review all evidence and reasonable inferences in the light most favorable to the nonmoving party and consider only the evidence that was brought to the trial court's attention. *West v. City of Tacoma, 12 Wn. App. 2d 45, 69-70, 456 P.3d 894 (2020)*; *RAP 9.12*. We review the trial court's conclusions of law de novo and may affirm on any basis supported **[***14]** by the record. *Bavand v. OneWest Bank, FSB, 196 Wn. App. 813, 825, 385 P.3d 233 (2016)*; *RAP 2.5(a)*.

[*80] B. Two PRA Request Letters

¶37 The City argues that although the PRA request "letters are plainly PRA requests on their faces, the City never received them in a context recognizable as PRA requests." Br. of Appellants/Cross-Resp'ts at 22. According to the City, "exhibits attached to a PRA complaint do not give an agency 'fair notice' that the exhibits themselves [were] *new* PRA requests." *Id.* at 19 (boldface omitted). We disagree.

1. Fair notice test

[11, 12] ¶38 "'[T]he P[R]A only applies when public records have been requested. In other words, public disclosure is not necessary until and unless there has been a specific request for records.'" *Germeau v. Mason County, 166 Wn. App. 789, 804, 271 P.3d 932 (2012)* (alterations in original) (internal quotation marks omitted) (quoting *Wood v. Lowe, 102 Wn. App. 872, 876-77, 10 P.3d 494 (2000)*). "No official format is required **[**1252]** for making a records request; however, agencies may recommend that requestors submit requests using an agency provided form or web page." *RCW 42.56.080(2)*. A requester need not expressly reference the PRA. *Germeau, 166 Wn. App. at 806*. Nor must a requester submit their request to a designated PRA coordinator. *Id. at 806 n.17*.

¶39 Washington courts apply a "fair notice" test to distinguish PRA requests from those arising from some other legal authority. *Id. at 804*. "[T]he person requesting documents from an agency" **[***15]** must "state the request with sufficient clarity to give the agency fair notice that it ha[s] received a request for a public record." *Wood, 102 Wn. App. at 878*. "Fair notice" under the PRA does not have a comprehensive definition, but Washington courts "have advanced factors that comprise 'fair notice.'" *Germeau, 166 Wn. App. at 805*. "These factors fall under two broad categories: …

characteristics of the request itself, and … characteristics of the requested records." *Id.* **[*81]**

¶40 The factors relating to the characteristics of the request are (1) its language, (2) its format, and (3) the recipient of the request. *Id.* The factors relating to the characteristics of the records are "(1) whether the request was for specific records, as opposed to information about or contained in the records," "(2) whether the requested records were actual public records," and "(3) whether it was reasonable for the agency to believe that the requester was requesting the documents under an independent, non-PRA authority." *Id. at 807* (emphasis omitted).

2. The PRA request letters satisfy the fair notice test

[13] ¶41 Here, all three factors related to the characteristics of the request favor O'Dea. The letters were addressed to the Department's public records officer, and each **[***16]** was clearly titled "PUBLIC RECORDS ACT REQUEST." CP at 9-12 (underscore omitted); *see Germeau, 166 Wn. App. at 805*. And, although the requests did not arrive through the City's online PRA submission form, agencies cannot mandate a particular mode of submission. *RCW 42.56.080(2)*; *Germeau, 166 Wn. App. at 806 n.17*.

¶42 Two of the three factors concerning the characteristics of the records clearly favor O'Dea. For the most part, the letters sought specific public records, not information about records. *See Germeau, 166 Wn. App. at 807*. O'Dea asked for documents relating to Department investigations, deadly force review board incidents, claims for damages, policies and procedures, training directives, personnel rosters, and other internal communications, all public records that the City possessed.

¶43 Whether it was reasonable for the City to believe O'Dea requested documents under an independent, non-PRA authority is a closer question but still favors O'Dea. Although the City received the letters as attachments to a complaint, when read in context with the substance of the complaint, it was obvious that the plaintiffs had already attempted to submit these letters as public records requests. **[*82]** The complaint explicitly referenced the attached letters and stated that Purtzer mailed two "Public Disclosure **[***17]** Request[s] to the … Department" and "[n]o response was ever received." CP at 18. O'Dea's complaint asked the trial court to "order that all records requested … be provided promptly." CP at 21. Regardless of whether the original letters were lost in the mail or somehow misplaced, O'Dea's complaint made clear that he sought public records and he was awaiting a response to the PRA request letters. And the City could not reasonably have believed O'Dea sought the records under an independent non-PRA authority, given that both letters expressly referenced the PRA. *See Germeau, 166 Wn. App. at 807*.

¶44 To the extent the City argues that the way it received the PRA request letters attached to a complaint made them

ambiguous, no authority limits the context under which a PRA request may be received, so long as the request provides fair notice, which these letters clearly did. Although the City argues its attorney could not have treated the attachments as PRA responses without abdicating her duty to defend her client, we disagree. She could simultaneously argue **[**1253]** the City did not receive the letters until it received the complaint and instruct the City to respond to the letters as PRA requests as soon as it received them. **[***18]** In fact, starting the PRA response, rather than waiting nine months for confirmation of something the City already knew—that O'Dea was seeking these records under the PRA—was the only reasonable course.

¶45 Even so, the City attempted to clarify whether O'Dea wanted to treat the letters as PRA requests in July 2018 but received no response from O'Dea until August 2018. O'Dea's failure to respond to the request for clarification, while it does not absolve the City from penalties for its delayed response, should have been a mitigating factor for penalty purposes.

¶46 We affirm the trial court's ruling that the City violated the PRA by not treating the PRA request letters as **[*83]** PRA requests when it received them in November 2017, regardless of whether they arrived as complaint attachments. We also affirm the denial of the City's motion for reconsideration.

3. The City's answer to the complaint did not satisfy its PRA obligations

¶47 The City suggests that it received the PRA request letters while the parties were "in a litigation mode," so its only duty was to comply with the civil rules and answer the complaint. Wash. Court of Appeals oral argument, *O'Dea v. City of Tacoma*, (May 20, 2021), at 8 min., **[***19]** 0 sec. to 8 min., 40 sec. (on file with court). The City also contends that its answer to the complaint amounted to a denial of the requests and the City had no further obligation to respond. We reject these arguments. No authority supports the proposition that complying with the civil rules excuses an agency from fulfilling an independent duty to respond under the PRA. Here, although the City properly responded to O'Dea's complaint by denying that it had received the PRA request letters prior to November 2017, this did not discharge its duty under the PRA to respond to the PRA requests once it did receive them.

[14] ¶48 Moreover, even if we were to interpret the City's answer to the complaint as a denial of any PRA requests received in November 2017, as the City encourages us to do, the City would not be protected from penalties. It is true that "[d]enying the public record request" is one acceptable response to a PRA request under *RCW 42.56.520(1)(e)*, but "[d]enials of requests must be accompanied by a written statement of the specific reasons therefor." *RCW 42.56.520(4)*. "An agency must explain and justify any withholding, in whole or in part, of any requested public records. Silent withholding is prohibited." *Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 432, 327 P.3d 600 (2013)* (citations

omitted). **[***20]** The City's answer did not meet these requirements for establishing a clearly stated denial **[*84]** of the public records requests including a statement of reasons for the denial.[3]

¶49 In sum, the trial court did not err when it granted partial summary judgment to O'Dea, concluding that the City violated the PRA when it failed to begin responding to the PRA request letters as soon as it received them in November 2017 as attachments to the complaint.

C. Penalty Award for the Two PRA Request Letters

¶50 The City received the PRA request letters as complaint attachments in November 2017 but did not begin responding until August 2018. For the delay in responding to the two PRA request letters, the trial court imposed penalties of more than $2.6 million. In February 2019, the trial court imposed an initial penalty of $1,731,280. In June 2019, the trial court entered an additional $837,160 in penalties for subsequent installments not accounted for in the February 2019 order. The trial court applied a *per record* multiplier in both orders. The total penalty was $2,607,940, not including attorney fees.

[15] ¶51 The City claims the trial court's penalty award was an abuse of discretion. The City argues the trial court should **[***21]** not have imposed penalties between November 2017, **[**1254]** when it received the complaint, and August 2018, when O'Dea's counsel confirmed that the City should treat the letters attached to the complaint as PRA requests. The City also contends that the trial court erred by imposing additional penalties worth more than $800,000 in its June 2019 order, in addition to the $1.7 million in its February 2019 order. The City argues that the *Yousoufian* factors do not support a $2.6 million penalty in this case. Although trial courts generally have broad discretion in setting public record penalties, we agree with the City that the more than $2.6 million penalty was an abuse of discretion. **[*85]**

[16] ¶52 The trial court has discretion to impose penalties for violations "not to exceed one hundred dollars for each day that [the requester] was denied" access to the public record. *RCW 42.56.550(4)*. In *Yousoufian*, the Washington Supreme Court "set forth a nonexclusive list of aggravating and mitigating factors, including agency bad faith, to guide trial courts as they exercise discretion." *Hoffman, 194 Wn.2d at 219*. "[T]he factors may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate **[***22]** considerations." *Yousoufian, 168 Wn.2d at 468*. No single factor controls, and the factors themselves "should not infringe upon the considerable discretion of trial courts to determine PRA penalties." *Id.*

[17] ¶53 "We holistically review the overall

[3] To the extent the City argues that its failure to respond to the PRA request letters between March and November 2017 also amounted to a denial that effectively closed the request, this reasoning also applies. There was no clearly stated denial of the two PRA request letters.

penalty assessment for abuse of discretion." *Hoffman, 194 Wn.2d at 229*. We do not perform "piecemeal de novo review of individual *Yousoufian* … factors." *Id. at 228*. "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons." *Yousoufian, 168 Wn.2d at 458*.

¶54 Here, the trial court concluded the City's explanation that it did not receive the initial mailed copies of the PRA request letters was reasonable. Therefore, the trial court did not impose penalties until the City received the requests as attachments to the complaint in November 2017. For the period after the City received the requests, the trial court found three aggravating factors: O'Dea's request was time sensitive, "[t]he City's explanation for noncompliance [was] unreasonable," and a large penalty was necessary to deter future misconduct. CP at 585. For the request letter originally dated March 24, 2017, the trial court multiplied "(11/13/2017 to 12/13/2018 for a total of 395 days) is 395 x 10 documents x $10/day for **[***23]** a total of $39,500." *Id.* For the request letter originally dated March 28, 2017, the trial court multiplied "(11/13/2017 to 10/2/2018 for a total of 323 days) is 323 x 536 documents x $10 **[*86]** per day for a total of $1,731,280." *Id.* In a second order in June 2019, the trial court entered additional *per record* penalties for 180 records responsive to the March 24, 2017 letter, plus an additional $63,360 for 12 records responsive to the March 28, 2017 letter.

[18] ¶55 The trial court reached its more than $2.6 million total penalty by applying a *per record* multiplier to a total of more than 700 records. O'Dea points to no case holding that a multiplier is required under the PRA, and we are aware of none. The Supreme Court has allowed a per record or per page multiplier, but it has also endorsed grouping documents together and then imposing per day penalties for each group if a multiplier is necessary for deterrence. *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus., 185 Wn.2d 270, 277-80, 372 P.3d 97 (2016)*.

[19] ¶56 A *per record* multiplier imposed in the context of a large public records request can lead to extreme penalty amounts, as it did in this case where the total response involved more than 700 records. Even at the relatively low penalty rate of $10 per day, a per record multiplier means the **[***24]** City was charged more than $7,000 per day for some days in the penalty period when all 700 plus records were outstanding.

¶57 We cannot lose sight of the fact that public records penalty awards are ultimately paid with taxpayer dollars. For example, the Supreme Court has discussed the amount per resident a penalty represents for a jurisdiction. *Hoffman, 194 Wn.2d at 232*. In *Hoffman*, the court noted total penalty awards that amounted to $0.34 and $0.19 per resident where small cities were the defendants. *Id.* In comparison, here the more than $2.6 million penalty amounts to almost **[**1255]** $12 for each of Tacoma's approximately 220,000 residents, an amount more than 35 times higher than the per-resident amount approved in *Hoffman*.

¶58 Such an extreme per record multiplier should be justified with a robust explanation for the severity of the penalty. And such large per record multipliers should be **[*87]** reserved for the most extreme cases, for example, those involving a bad faith withholding of a record subject to intense public interest. In *Yousoufian*, where the Supreme Court held that the trial court abused its discretion by imposing too low of a daily per record penalty, the agency engaged in years of delay, misrepresentation, and **[***25]** "grossly negligent noncompliance." *168 Wn.2d at 463*. Even under the egregious facts in *Yousoufian*, the ultimate overall penalty was just over $370,000, and amounted to $0.19 per resident. *Id. at 470*; *Hoffman, 194 Wn. App. at 232*. "[M]ost penalty awards against jurisdictions in PRA cases rarely exceed more than a few dollars per resident on a per capita basis." *Zink v. City of Mesa, 4 Wn. App. 2d 112, 128, 419 P.3d 847 (2018)*.

¶59 In *Wade's*, the Supreme Court affirmed a more than $500,000 total penalty based on a daily penalty multiplied by thousands of records. *185 Wn.2d at 276-78, 288*. The court emphasized the trial court's discretion to impose per record multipliers, but the PRA violations described in that case were more egregious, the request was one involving media interest and public safety, and the trial court specifically discussed how the agency's conduct supported the penalty award. *See, e.g., id. at 276, 285-86, 291, 293, 295-96*.

¶60 The $502,827 penalty in *Wade's*, one of the highest recent PRA penalties in this state, was less than one fifth of the $2.6 million penalty in this case. *Id. at 276*.[4] And although the trial court in *Wade's* imposed a per record multiplier to a large number of records, the trial court kept the total penalty amount within reason by setting the daily per record penalties at only a few cents for the vast majority of the records at issue. *Id. at 285, 288, 291*. The **[***26]** highest daily per record penalty was $5, which applied only to records the agency had compiled and yet continued to withhold even after the court ordered them to be produced, **[*88]** and some of which the agency did not provide until the requester threatened a contempt motion. *Id. at 295-96*. Finally, because the Department of Labor and Industries is a statewide agency, the per capita taxpayer burden in *Wade's* was dramatically lower than in this case.

¶61 Here, the trial court imposed per record penalties based on minimal discussion, a total of five sentences, mentioning three aggravating factors. The trial court did not include any discussion of why mitigating factors did not apply, nor did it say why the circumstances of this case were particularly egregious. The trial court did not find any bad faith.

¶62 Reviewed holistically, this more than $2.6 million penalty was an abuse of discretion because the overall amount was manifestly unreasonable, especially in light of the trial court's lack of supporting

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[4] As of 2018, the more than $502,827 penalty in *Wade's* appeared to be the highest total PRA penalty on record in Washington State. *Zink, 4 Wn. App. 2d at 128 n.9*.

explanation. While we do not do a piecemeal review of the *Yousoufian* factors and they are not to be applied rigidly, the trial court here found only three aggravators and no bad faith, which was not enough **[***27]** to justify the astoundingly high penalty. Although deterrence is a permissible goal when setting public record penalties, and the need for deterrence could justify a multiplier, a far more reasonable course would have been to multiply the per day penalty by the number of days and by the number of requests, or by grouping the records for penalty calculation purposes in another way to achieve a more reasonable multiplier. As a result, we remand for recalculation of the public record penalty.

D. Issues Relating to Setting the Penalty Period

¶63 The City also argues that the trial court erred in setting the penalty period. Because the trial court must address the penalty period on remand when revisiting the appropriate penalty, we address the onset of the penalty period and the trial court's discretion **[**1256]** in setting penalties during the time the City was diligently gathering and producing records.

[*89] 1. Onset of penalty period

¶64 The City argues that no penalties should have been imposed between November 13, 2017 and August 24, 2018, because it was not until August that Purtzer clarified that the City should treat the letters attached to the complaint as PRA requests. We disagree.

¶65 Because the City did not **[***28]** seek clarification from Purtzer until July 2018, even though it received the complaint in November 2017, the City should not be absolved from all penalties for its failure to act on the PRA request letters until it sought clarification in July 2018. Nonetheless, O'Dea's failure to bring a show cause motion or respond to the City's request for clarification should be a significant mitigating factor in favor of the City. The trial court should take these facts into account when recalculating penalties on remand.

2. Penalties for the time period when the City was diligently responding

¶66 The City contends that the additional over $800,000 penalty imposed for its ongoing response in installments to the March 24, 2017 PRA letter request was an abuse of discretion because the PRA permits an agency to provide records in installments, and O'Dea had no cause of action "until the City has completed its last production." Br. of Appellants/Cross-Resp'ts at 42.

[20] ¶67 As an initial matter, we reject the City's contention that no cause of action accrued at all until the City closed its response in February 2019. O'Dea was entitled to claim a PRA violation for an unreasonably delayed response when the City failed **[***29]** to timely respond to the PRA requests attached to the complaint. *See RCW 42.56.100*; *see also Andrews v. Wash. State Patrol, 183 Wn. App. 644, 652-54, 334 P.3d 94 (2014)* (acknowledging that *RCW 42.56.100* requires the agency to act in a

timely, thorough, and diligent manner).
[*90]

¶68 Nevertheless, under the PRA, the penalty period is "each day that [the requester] was denied the right to inspect or copy" the requested public record. RCW 42.56.550(4). An agency may respond by providing a reasonable estimate of the time required to respond to the request, and it may require additional time to respond to a request based on the need to locate and assemble the requested records. *See* RCW 42.56.520(1)(c), (2). In addition, although there was an unreasonable preresponse delay in this case, in more typical circumstances, a cause of action for denial of the right to inspect a public record under the PRA does not normally accrue until "the agency has taken final action and denied the requested records." *Hobbs v. Wash. State Auditor's Office*, 183 Wn. App. 925, 941, 335 P.3d 1004 (2014).

¶69 These provisions of the PRA and *Hobbs* support a conclusion that a requester is not denied their right under the PRA to inspect or copy the requested record during the time when the agency is diligently responding. Indeed, we are aware of at least one instance where we approved subtracting a number of days from the penalty period during a reasonable **[***30]** amount of time when an agency was gathering and processing responsive records in a situation similar to this case.[5]

¶70 Thus, even in situations like this one where a requester claims that an agency has taken an unreasonable amount of time to initiate its response to a public records request, the language of the PRA allows a $0 per day penalty during any reasonable amount of time that the agency takes to gather records and respond to the request.

¶71 Here, once the City began responding, it was entitled to a reasonable amount of time to process its response to O'Dea's two PRA letter requests. Once the requests were sent to Anderson for processing, the trial court never found **[*91]** that the City's estimated completion date was unreasonable. Between December 13, 2018 and February 21, 2019, the City provided 187 documents in five installments before closing the request on February 21, 2019, which was ahead of both its own estimate and the 30-day deadline the trial court set in its February 6, 2019 order.
[1257]**

¶72 A court can impose daily penalties at varying per day rates, daily penalties can be anywhere between $0 and $100 under RCW 42.56.550(4), and the time necessary to diligently locate and assemble the requested **[***31]** records should be taken into account when setting penalties on remand.[6] The trial court on remand has discretion to impose a $0 penalty for the days when the City was diligently working

[5] ***West v. Gregoire*, noted at 170 Wn. App. 1029**, 2012 WL 5348107, at *2-4, 2012 Wash. App. LEXIS 2141, at *5-11.

[6] The City also contests the total number of records ultimately produced and subjected to penalties. We do not determine the precise number of records produced because we reverse the per record multiplier. Because we are remanding for the trial court to recalculate penalties, we need not address any other arguments raised regarding the penalty amounts.

on O'Dea's request.

E. Attorney Fees Below

¶73 The City asks this court to reverse the trial court's attorney fees award in favor of O'Dea. Because we affirm the partial summary judgment order regarding the PRA request letters in O'Dea's favor, O'Dea is still entitled to some attorney fees below. But the amount may change based on the trial court's reconsideration of the penalties on remand. Thus, on remand, the trial court should also reconsider the amount of attorney fees in light of this opinion.

CONCLUSION

¶74 In sum, the trial court properly concluded that the City violated the PRA when it failed to respond to the two PRA letter requests when it received them as attachments to O'Dea's complaint. But the trial court abused its discretion by imposing a per record multiplier without offering **[*92]** sufficient explanation supporting the resulting extreme penalty. On remand, the trial court must recalculate penalties and attorney fees. We resolve the remaining issues in the unpublished portion of this opinion.

¶75 A majority **[***32]** of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with *RCW 2.06.040*, it is so ordered.

Unpublished Text Follows

II. ADEQUATE SEARCH FOR LATER-DISCLOSED RECORDS

¶76 The City contends that the trial court abused its discretion by adding $63,360 in penalties for 12 additional training directives that the City found when it searched an old computer hard drive because there was no nonspeculative evidence that the City's original search was inadequate. We agree.

A. Additional Facts

¶77 After closing its response to the PRA request letters, the City discovered additional responsive records that it had inadvertently missed in its original searches. Michael Smith, the City attorney who oversaw the Department's PRA response, stated in a declaration that the training unit produced "hundreds of pages of records which were responsive" to the request for training directives. CP at 554. Jon Verone, a sergeant in the training section, recalled conducting the search with two other staff members and explained that they searched "the Training Drive, and the Skills Manager database, **[***33]** where Training Directives are most likely to be found," using search terms "'Training Directives'" and "'use of force.'" CP at 564. Verone also noted that typically, training directives prior to 2014 would no longer exist because the Department purged them every three years.

¶78 Verone further explained that his staff found the additional 12 training directives later when they located and searched an old computer drive that had not been used since 2010. Verone explained that after reviewing O'Dea's declaration in which he alleged

various training directives were missing, Verone instructed his staff to search again "in a good faith effort to ensure that we had produced everything." CP at 885. One of his staff members "located additional training directives on the old common drive server." *Id.* The old drive had not been used to store training directives since 2010, and Verone "believed that any Training Directives would have been transferred to our current systems and any Training Directives on the shared drive were believed to have been purged." *Id.* Similarly, Smith stated that the old drive was not housed in the "location used by the Training Section for business purposes anymore. Unfortunately, **[***34]** even as Tacoma Police continues to update its computer systems and databases, the old network drives are apparently not deleted. I do not know why records were still maintained in that drive, or who maintained them." CP at 889.

B. Adequate Search Legal Principles

¶79 The failure to locate and produce a record is not a per se violation of the PRA. *See* *Block v. City of Gold Bar, 189 Wn. App. 262, 274, 355 P.3d 266 (2015)*. The touchstone is instead the adequacy of the agency's search. *Id.* "[T]he mere fact that a record is eventually found does not itself establish the inadequacy of an agency's search." *West, 12 Wn. App. 2d at 79*.

¶80 The adequacy and reasonableness of a search depends on the specific facts of the case. *Id.* An agency's "search must be reasonably calculated to uncover all relevant documents." *Neigh. All., 172 Wn.2d at 720*. Even so, the agency need not "search *every* possible place a record may conceivably be stored, but only those places where it is *reasonably likely* to be found." *Id.* Courts consider "the scope of the agency's search as a whole and whether that search was reasonable, not whether the requester has presented alternatives that [they] believe[ ] would have more accurately produced the records [they] requested." *West, 12 Wn. App. 2d at 79*. "[A]gencies are required to make more than a perfunctory search and to follow obvious **[***35]** leads as they are uncovered." *Neigh. All., 172 Wn.2d at 720*.

¶81 An agency bears the burden of showing its search was adequate beyond material doubt. *Id. at 721*. "To do so, the agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. These should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched." *Id.* "Purely speculative claims about the existence and discoverability of other documents will not overcome an agency affidavit, which is accorded a presumption of good faith." *Forbes v. City of Gold Bar, 171 Wn. App. 857, 867, 288 P.3d 384 (2012)*.

C. City's Search for Training Directives

¶82 To the extent the trial court concluded that the discovery of additional responsive documents alone "support[ed] a finding that the City's prior search in response to the March 28, 2017 request was inadequate," this contradicts the principle that the discovery of records does not alone establish inadequacy. CP at 1114; *West, 12*

Wn. App. 2d at 79.

¶83 The City presented reasonably detailed, nonconclusory, good faith declarations establishing that its original search was adequate. The City's declarations are sufficient to establish that although the City discovered additional training directives after its initial search, **[***36]** it found them in a location that was not reasonably likely to contain responsive records. *See Neigh. All.* at 720.

¶84 We reverse the trial court's conclusion that the discovery of the additional training directives reflected a previously inadequate search. The trial court on remand must not impose penalties for the late disclosure of these records.

III. O'DEA'S CROSS APPEAL

¶85 O'Dea cross appeals the October 2018 order granting the City's motion for partial summary judgment and dismissing O'Dea's claims other than those related to the PRA letters. O'Dea also cross appeals the June 2019 findings of fact and conclusions of law to the extent the trial court denied his motion for additional searches and did not address the destruction of documents.

A. Other Requests

¶86 O'Dea argues that the trial court erred when it granted the City's motion for partial summary judgment and dismissed his claims based on requests for policies and procedures, captain's assessment materials, O'Dea's own finance records, and oral requests for firearm training sign-in sheets and training directives. We disagree because none of these requests provided fair notice under the PRA.

1. Additional facts

¶87 While on administrative leave, **[***37]** O'Dea could not access Department facilities or records, but he was assigned Department contacts and afforded procedural rights under Department policies, including the right to "access … all materials supporting the proposed [disciplinary] action." CP at 378. As a union member, O'Dea was also protected by the union's collective bargaining agreement. O'Dea was represented by counsel throughout the investigation, initially by the union attorney and then by independent counsel, Purtzer.

¶88 Between August 2016 and June 2017, O'Dea communicated frequently with his designated Department contacts, union contacts, and other Department employees. O'Dea requested documents from the Department, including policies and procedures, materials related to a test for officers applying to be captains, firearm training sign-in sheets, and training directives. O'Dea never mentioned the PRA in any of these requests. O'Dea also contacted staff in the finance department to cash out his accrued leave time. The finance manager told O'Dea how much leave time he was entitled to cash out and provided the City's form for requesting a one-time payout. The City denied that these communications were PRA requests **[***38]** and said it had already provided much of the material he sought.

2. The fair notice test

¶89 Here again, we must apply the fair notice test described above in the published portion of this opinion to determine whether O'Dea's other requests were actually requests under the PRA. In *Germeau*, the plaintiff's request for documents did not pass the fair notice test because it could reasonably have been a request for documents under the plaintiff's collective bargaining agreement instead of the PRA. *166 Wn. App. at 805, 810*. Germeau was a union representative who requested documents on behalf of another officer who believed they were the subject of an internal investigation. *Id. at 793-94*. Germeau submitted a letter to the sheriff's office, identifying himself as the officer's union representative and instructing the sheriff's office to communicate with him about any internal investigation. *Id. at 806*. Germeau's letter also requested documents relating to any investigation the sheriff's office may have been conducting. *Id. at 806-07*.

¶90 In applying the fair notice test, we held that the language of the request favored the agency and was a determinative factor. *Id. at 805-07*. Germeau's "language indicated that the purpose of [his] request for notes, e-mails, memos, and **[***39]** findings was to become privy to any investigation" of the officer, not to request records under the PRA. *Id. at 807*. Likewise, we held it was "[m]ost important" that "the letter's language strongly suggested that the collective-bargaining agreement entitled Germeau (in his capacity as guild representative) to the requested records or, at the very least, that Germeau was making the request in such a capacity, not as a PRA request." *Id. at 808*. We agreed with the County that "'The Guild ha[d] a right [under *RCW 41.56.030(4)*'s definition of "collective bargaining"] to … information from the Sheriff's Office to … represent its members in internal affairs investigations.'" *Id.* (alterations in original) (quoting respondent's brief). We emphasized that the character of the records was ambiguous and "it was reasonable for the County to have believed that Germeau's letter requested documents under the collective-bargaining agreement rather than under the PRA." *Id. at 810*.

¶91 In *Wood*, the plaintiff "was a current, but soon-to-be-terminated, employee seeking access to her file to find out why she was being forced out of her job." *102 Wn. App. at 880*. Wood sent a letter to the prosecuting attorney's office seeking information about her impending termination **[***40]** and authorization for the agency to provide her personnel file. *Id. at 874-75*. Division Three recognized that "[o]rdinarily, a request for documents within a public employee's personnel file falls within the scope of the [PRA]." *Id. at 879*. But in *Wood*, "[n]either the letter nor the authorization indicated" that Wood was making a public records request. *Id. at 875*. Division Three explained, "Wood's general request for her [own] personnel file was not a request for an identifiable public record as contemplated under the [PRA]." *Id. at 880*. It held that "the trial court correctly noted the ambiguity in … Wood's blanket letter; her request could be reasonably interpreted

as falling under" the personnel file statute, *RCW 49.12.250(1)*. *Id.*

¶92 Applying the fair notice factors, we conclude that O'Dea's remaining requests did not give fair notice that they were intended to be public records requests.

3. Characteristics of O'Dea's requests

¶93 Here, as in *Germeau*, the language of the request is the most important factor in this category. *166 Wn. App. at 805-06*. This factor weighs against O'Dea.

¶94 O'Dea never expressly requested records under the PRA when he communicated the requests at issue to the Department. Instead, he emphasized his need to defend himself against the Department's **[***41]** investigation and to participate in the captain's test. O'Dea explained, for example, that he needed the Department's policy and procedure manual "to properly defend myself," and he requested policies and procedures relating to the specific policies the Department alleged he violated. CP at 98. O'Dea also requested the policy and procedure manual to prepare for the captain's assessment. And when O'Dea requested other test-related materials, including a memo announcing the exam and a document identifying Department goals, he again referenced only his need to prepare for the exam and specifically invoked his "rights under the city's Civil Service Rules." CP at 112.

¶95 The remaining two factors, the format and recipient of the requests, also weigh in favor of the agency, although we give them minimal weight. *See Germeau, 166 Wn. App. at 806 n.17*. O'Dea did not use the City's online PRA submission form. This alone would not render a PRA request invalid because there is no required PRA request format, but because the language of the request also did not reference the PRA, the format of O'Dea's communications did not suggest that he sought records under the PRA. *See id.* Likewise, O'Dea did not address his requests to the City's **[***42]** public records staff, which did not "render his claim fatal," but also did not signal that he was making a PRA request. *Id.* Taken together, the characteristics of O'Dea's request did not provide fair notice to the City that O'Dea was requesting materials under the PRA. *See id.*

4. Characteristics of the requested records

¶96 Following *Germeau*, the most important factor in this category is whether the City could reasonably have believed that O'Dea sought documents under an independent, non-PRA authority. *Id. at 807-08*. This factor weighs against O'Dea.

¶97 Here, as in *Germeau*, the police union had a collective bargaining agreement with the City that covered O'Dea's employment and guaranteed various procedural rights in the event of a disciplinary proceeding. *See id. at 809-10*. Indeed, the City's personnel management policy for covered employees, including O'Dea, provided that an employee subject to a predisciplinary proceeding, "will have access to all materials supporting the proposed action and, if requested, he/she will be supplied with a copy of such material." CP at 378. O'Dea thus had

statutory and contract rights to information about the investigation.

¶98 According to O'Dea, none of the items he requested was contained **[***43]** in his personnel file, meaning that his request could not have been reasonably interpreted to fall under any other non-PRA authority. But the City provided numerous declarations from employees who interacted with O'Dea during his administrative leave. None of these employees believed O'Dea's requests for information or documents, other than the two clear PRA request letters, arose under the authority of the PRA. With regard to any other materials related to the investigation, such as the policy and procedure manual, these assumptions were reasonable given O'Dea's rights under the collective bargaining agreement and City personnel policies. Likewise, the City reasonably construed O'Dea's requests for test preparation materials as arising from an independent employment right to equal treatment rather than a PRA request, especially because he emphasized his right to participate in promotion opportunities and never mentioned the PRA.

¶99 O'Dea's inquiries about cashing out his leave time were mostly requests for information and not identifiable records, so did not invoke the PRA. *Bonamy v. City of Seattle, 92 Wn. App. 403, 409, 960 P.2d 447 (1998)*. And to the extent O'Dea requested records about his leave time, the City could reasonably have inferred that O'Dea **[***44]** did so under *RCW 49.12.250(1)*, under which employees may access their own personnel file. *See Wood, 102 Wn. App. at 880*.

¶100 Finally, O'Dea alleges that he verbally requested copies of the Department's firearm training sign-in sheets and training directives during his internal investigation interview in January 2017. Oral requests for records are less likely to pass the fair notice test because "orally requesting public records makes it unnecessarily difficult for citizens to prove that they in fact requested public records." *Beal v. City of Seattle, 150 Wn. App. 865, 874-75, 209 P.3d 872 (2009)*. An employer is entitled to treat an ambiguous request for documents by a current employee covered by a collective bargaining agreement and facing an investigation as a request under the collective bargaining agreement, not the PRA. *See Germeau, 166 Wn. App. at 808-10*. We hold that O'Dea's request for firearm training sign-in sheets and training directives did not trigger a duty under the PRA.

¶101 The other two factors, whether O'Dea sought only information or identifiable records and whether any records he sought were in fact public records, slightly favor O'Dea but do not outweigh the other factors. *See id. at 807*. Many of O'Dea's communications did refer to identifiable records that were in fact public records, such as the policy and procedure manual **[***45]** and intradepartmental memoranda. But other communications, such as his inquiries and complaints about scheduling the captain's test and cashing out leave time, sought *information* and were not requests for actual public records. As a

whole, the characteristics of the records O'Dea purportedly requested did not reasonably put the City on notice that O'Dea sought records under the PRA. *See Id. at 807-08*.

¶102 In sum, none of O'Dea's communications with the Department while on administrative leave, except the PRA request letters, provided fair notice to the City that O'Dea was requesting records under the PRA. We affirm the trial court's summary judgment order dismissing O'Dea's claims except those arising from the PRA request letters discussed above.

B. Trial Court's Refusal to Order Additional Searches

¶103 O'Dea argues that the trial court erred by denying his motion to compel additional searches in its June 2019 order. We reject this argument.

¶104 O'Dea offered a declaration in which he described hundreds of additional documents he believed should have existed. In particular, O'Dea asserts that the City's search was inadequate because it did not produce various records from the 1990s and early 2000s. O'Dea also **[***46]** relies on his own recollection of Department record keeping practices to describe documents he believed should have existed and should have been included in the City's responses.

¶105 The City, on the other hand, provided declarations from six Department employees who responded to each of O'Dea's allegations about missing documents. Frequently, they stated that records for older time periods no longer existed due to retention schedules. The City also provided sworn statements establishing it searched the places responsive records were reasonably likely to be found and produced the records it discovered. When the trial court denied O'Dea's motion to compel additional searches in June 2019, the City had produced over 700 documents after nine searches.

¶106 O'Dea also argued below that the City erred by not producing full claim files for claims for damages against the Department. But his counsel had previously agreed to a modified request for Excel spreadsheets tracking such claims. After the City provided its first installment of records, Anderson spoke with Purtzer about his request for claims for damages against the City. Anderson explained that because there were hundreds of claim files, it could **[***47]** take up to a year to fully respond if he wanted the contents of every file. Purtzer and Anderson agreed that the City would instead provide "an Excel spreadsheet relating to police-related claims," and Purtzer could request specific files in their entirety. CP at 864-65. Purtzer never requested specific claim files, so the City considered its response to this portion of the request complete when it provided the Excel spreadsheet a few days later. O'Dea acknowledges he received those spreadsheets.

¶107 And to the extent O'Dea sought "[d]ata" about training directives beyond what the training directive itself contains, he offered no nonspeculative evidence that such data existed as an *identifiable public*

record. See, e.g., CP at 726-27. The City was not obligated under the PRA to create a record by mining data and creating a new document. *RCW 42.56.010(3)*, *(4)*; *see also Fisher, 180 Wn.2d at 523-24*.

¶108 In sum, the trial court properly denied O'Dea's motion to compel additional searches because the PRA does not permit indiscriminate sifting through the Department's files for additional records he claimed should have existed. *See Bldg. Indus. Ass'n of Wash. v. McCarthy, 152 Wn. App. 720, 734-35, 218 P.3d 196 (2009)*. The City's reasonably detailed, nonconclusory, good faith affidavits reflect an appropriate search, and the trial **[***48]** court did not abuse its discretion when it denied O'Dea's request to order additional searches.

C. Trial Court's Failure to Address Destruction of Documents

¶109 O'Dea claims the trial court erred by failing to address the City's destruction of documents between November and December 2018. O'Dea suggests the trial court erred by failing to assign bad faith to the City's destruction of records, but he does not claim it should have supported an additional PRA violation or penalties.

¶110 In November 2018, the City accidentally purged six documents from a database. But O'Dea only speculates that the City destroyed any records to avoid producing them in response to his PRA requests. The trial court properly declined to find the City acted in bad faith on the basis of any inadvertent record destruction. We do not condone destruction of responsive records while a request is pending, but the only thing O'Dea challenges is the lack of a bad faith finding. This record does not support a finding of bad faith.

IV. Attorney Fees on Appeal

¶111 O'Dea requests attorney fees on appeal under *RAP 18.1(a)* and *(b)* and *RCW 42.56.550(4)*. Under *RCW 42.56.550(4)*, a PRA requester who prevails against the agency is entitled to attorney fees. Our commissioner may determine **[***49]** whether fees can be segregated at this level and, if so, what portion is attributable to the arguments relating to the partial summary judgment order in favor of O'Dea, on which he has prevailed on appeal.

CONCLUSION

¶112 We reverse the trial court's penalty award and remand for recalculation of penalties and attorney fees in accord with our decision, but we otherwise affirm the trial court's conclusion that the City violated the PRA by not responding to the PRA requests attached to the November 2017 complaint when it received them. We affirm the trial court's summary judgment ruling in favor of the City dismissing O'Dea's other claims and award attorney fees to O'Dea on appeal for the work performed on his prevailing argument.

Sutton and Veljacic, JJ., concur.

Reconsideration denied November 1, 2021.

References

Annotated Revised Code of Washington by LexisNexis

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CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **ANSWER TO PETITION FOR REVIEW & CONTINGENT CROSS PETITION FOR REVIEW** on the 9th day of February 2022 as follows:

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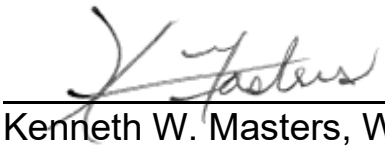

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Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,424-9
Appellate Court Case Title:	David O'Dea v. City of Tacoma, et al.
Superior Court Case Number:	17-2-13016-3

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