Supreme Court NO. 100868-6

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

RUSSELL MARTIN,
Appellant.

V.
CITY OF LAKEWOOD CITY

ON APPEAL
FROM THE DIVISION II COURT OF APPEALS
OF THE STATE OF WASHINGTON
CAUSE NO. No. 55221-3-II
TRIAL COURT PIERCE COUNTY SUPERIOR COURT
CAUSE NO. 20-2-00980-3

BRIEF OF APPELLANT
Treated as an Answer to Petition for Review

Alan Harvey
Attorney for
APPELLANT /PLAINTIFF
RUSSEL MARTIN
Northwest Legal Advocates, LLC
PO Box 61912
Vancouver, WA 98666
360 281 9353

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III. INTRODUCTION

To obtain discretionary review in this Court, The State Supreme Court, through RAP 13.4(b) places the onus here on the City to demonstrate that the Division II Court of Appeals decision either:

1. conflicts with a:
   a. decision of this court or
   b. with a published Court of Appeals decision, (RAP 13.4(b)).
   Or,
2. That the City is raising a:
   a. significant constitutional question or
   b. of substantial public interest. (RAP 13.4(b).)

In this matter, the only issue that was before Division II on review related to an order entered on the 1st of September 2020 regarding an imposition of attorney costs pursuant to RCW 4.84.185.

This matter is now before this court and the Appellant, the City of Lakewood, argues that there is basis to grant a petition for review with respect to two prongs set out under RAP 13.4(b);

1. The Division II decision was in conflict with a decision of this court or
2. the Division II decision was in conflict with a published appellate decision.

First, the City's contention that Division II erred in contravention of *Wade's*

Eastside Gun Shop, Inc. v. Dep't of Labor & Indus., 185 Wn.2d 270, 279, 372 P.3d 97 (2016) and *Mayer v. Sto Indus., Inc*., 156 Wn.2d 677, 684, 132 P.3d 115 (2006) is not factually supported and is completely misplaced.

Second, the City's contention that Division II erred in contravention of *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 464 P.3d 563 (2020) is wholly without merit. Specifically, this appears to be an attempt to bypass the limited issue before Division II, i.e. compliance with RCW 4.84.185. The focus upoin *Dotson v. Pierce County*, by the City is an attempt to address the substantive issues before Division III.

The Plaintiff/ Respondent respectfully requests this Court to affirm, Division II, finding that Division II was correct in the manner in which it determined the answer to the singular question of whether the requirements of RCW 4.84.185 were met and in so doing to deny the City/Appellants Petition for Review.

IV. STATEMENT OF THE CASE

A. Procedural History.

On the 3rd of February 2020, the Appellant, Russell Martin, filed and complaint for Disclosure of Public Records, C.P. 1-10. On the 20th of April 2020, the City filed a Motion for Summary Judgement. C.P. 11 – 26.

On or about the 28th of May 2020, the Appellant's Counsel

appeared via zoom and requested a motion to continue. Transcript of the Proceedings, May 28, 2020, Pg. 5. A motion to continue was also filed a motion relating to the issue. Transcript of the Proceedings, May 28 , 2020, Pg. 5. The basis of the motion was related to the facts surrounding a Mr. Martin's wife being in intensive care in the Hospital during the opening weeks of the pandemic with a very serious medical as it was related to brain-related functioning, regarding a stroke. Transcript of the Proceedings, May 28, 2020, Pg. 5. On the 28th of May 2020, the court was informed that although Mr. Martin had been extremely limited in his ability assist counsel during this time period. Transcript of the Proceedings, May 28 , 2020, Pg. 6-7.

The court was also informed that Mr. Martin could not be present for the Zoom proceeding due to having to be with his wife at a medical appointment. Transcript of the Proceedings, May 28, 2020, Pg. 7. The court was informed that although Mr. Martin had these extreme issues with respect to his spouse, he had assisted his attorney to provide a response to the motion for Summary Judgement. Transcript of the Proceedings, May 28, 2020, Pg. 7 and C.P. 53 -73.

The court was informed that the City was aware of the medical leave that had been taken by the Plaintiff as he was an employee of the City of Lakewood. Transcript of the Proceedings, May 28, 2020, Pg. 8. The court was also informed that the

City was aware of Mr. Martin's medial leave and issues since March 2020. Transcript of the Proceedings, May 28, 2020, Pg. 12. The court granted the continuance finding no prejudice to the City. Transcript of the Proceedings, May 28, 2020, Pg. 13.

On the 28th of May 2020, the Court addressed the next issue which was scheduling, and the court indicated as follows:

> I think we are good to go for an-person hearing at any time the parties want to have that. I am aware, based on Mr. Harvey's record, there may be issues actually having some communication and contact. Although, I think at this point, it looks like you've filed a response. So are you ready and prepared -- I mean, obviously, Lakewood gets an opportunity to file a reply. Transcript of the Proceedings, May 28, 2020, Pg. 15-16.

The City responded as follows:

> "I don't think we need to file a reply. I took the five minutes Mr. Harvey gave me to read the response and it's irrelevant. " Indicated that they were "We're prepared to argue it right now." Transcript of the Proceedings, May 28, 2020, Pg. 16.

The court initially, considered setting the matter later July, 2020, on the 20th of July 2020, but the City objected and the matter was set for the 2nd of July 2020. Transcript of the Proceedings, May 28, 2020, Pg. 16. The City objected based upon the facts set out above and the that they were a small city with limited resources.

> "We don't have a lot of time or energy to expend on additional cases. Extending this means that we expend energy, resources on a case that should be dismissed. Extending it to July, it seems ridiculous to

> me. He's already filed a response. He's already filed a declaration or affidavit. There really is no need to extend it until July.
> Transcript of the Proceedings, May 28, 2020, Pg. 16-17.

The Appellant inquired about being physically present and the court indicated that this was going to be the case on the 2nd of July 2020. Transcript of the Proceedings, May 28, 2020, Pg. 20.

On the 23rd of June 2020, the City, although indicating on the 28th of May 2020, filed a reply that was 195 pages in length with attachments. CP 82-279. On the 1st of July 2020, the Appellant filed a five (5) page declaration relating by Lakewood Police Officer Jeremy Vahle relating to the City's procedures and possession of documents that were not provided to Officer Martin.

CP 280- 285/

On the 2nd of July 2020, the court moved forward with the Summary Judgement Hearing. Transcript of the Proceedings, July 2, 2020 (Volume 1), Pg. 5. The Appellant was physically present at 9:00 a.m. with his spouse and the matter didn't move forward until 9:48 a.m. when counsel for the City arrived. Transcript of the Proceedings, July 2, 2020 (Volume 1), Pg. 4. The Appellant appeared physically in court, but due to the care needs as primary caregiver of his spouse, the Appellant appeared had to bring his wife in a wheelchair. Transcript of the Proceedings, July 2, 2020 (Volume 1), Pg. 5. The City moved to strike Officer Vahle's

declaration. Transcript of the Proceedings, July 2, 2020 (Volume 1), Pg. 6. The court indicated that it had not reviewed the declaration. Transcript of the Proceedings, July 2, 2020 (Volume 1), Pg. 6. The City's motion to strike was not granted. However, the trial court found Officer Vahle's declaration was "completely irrelevant" although the trial court had not reviewed the declaration of Officer Vahle. Transcript of the Proceedings, July 2, 2020 (Volume 1), Pg. 29.

On the 2nd of July 2020, the trial court granted summary judgement finding there were no material facts in dispute. Transcript of the Proceedings, July 2,2020 (Volume 1), Pg. 29-30. Immediately, upon the court's ruling the City provided the court pre-written findings and the court signed off on the findings. Transcript of the Proceedings, July 2, 2020 (Volume 1), Pg. 32, CP286-289. The first paragraph of the order read as follows:

> "Based on consideration of the pleadings, motions, memoranda of law and declarations provided, it is hereby ORDERED that:" CP286.

On the 9th of July 2020, the Plaintiff filed a Notice of Appeal with respect to the court's granting summary Judgement on the 2nd of July 2020. C.P. 290-295.

On August 11, 2020, Division II of the Court of Appeals sent a letter indicating that the Order Granting Summary Judgment signed

and filed in the 2nd of July 2020 did not comply with RAP 9.12. The letter indicated that such orders specify the documents and other evidence which was called to the attention of the trial court in considering summary judgment. In summary the letter indicated that there was substantive content missing from the original Order of Summary Judgement submitted to the court by the City and entered on the 2nd of July 2020. Division II of the Court of Appeal set a date for which to cure the substantive defect with a compliance date for corrections set to be made by August 31, 2020.

On the 28th of August 2020, when the topic was raised by the plaintiff that there was a need to correct a substantive defect counsel for the City indicated as follows:

> And for my part, your Honor, I believe the Court of Appeals ***may have been put off by the footer*** that I left on there. I do a lot of my own typing, and frankly, I just didn't look at it. I cribbed from the stipulation and dismissal. That's why it said stipulation and dismissal on the footer. And I believe that's where the Court of Appeals had trouble with it Under RAP findings 9.12. They didn't understand that it was just a simple order of dismissal of summary judgement.
> Transcript of the Proceedings, August 28, 2020 (Volume 3), Pg. 69.

However, the proffered amended Order on Summary Judgement filed on the 28th of August 2020 actually reflected a substantive change in line with the rules and in the first paragraph as follows:

> based on consideration of the pleadings, motions,

> memoranda of law and declarations provided, and particularly the following: City's Motion for Summary Judgment and Declarations of O'Flaherty, Pitts, and McDougal; Plaintiff's Response to City's Motion and Declarations of Martin and Harvey; City's Reply to Plaintiff's Response and Declarations of O'Flaherty, Lawler and Pitts; Plaintiff's Declaration of Vahle, it is hereby ORDERED that:…

On the 28th of August, 2020 the City's amended order also notably incorporated Officer Vahle's declaration by reference as part of the process and decision making by the court. On the 1st of September 2020, Jodie Thompson of Division II of the Court of Appeals provided notice to the City and the plaintiff that the appeal of the matter filed on the 9th of July 2022 relating to Summary Judgement had been perfected and had been attributed Case No. 55031-8-II by the Court of Appeals. This matter was transferred to Division III due to Covid related overloads in caseloads in Division II and was decided on the 28th of April 2022. (see attachment B below). This is not the subject matter of this appeal and is not before the court, but the attachment is provided for procedural purposes and context.

Additionally, On the 28th of August the trial court also heard arguments regarding the imposition of costs requested pursuant to RCW 4.84.185. Transcript of the Proceedings, August 28, 2020 (Volume 3). At the close of the hearing on the 28th of August the trial court made no findings on the record and indicated as follows:

> We have now been on the record for about an hour and 15 minutes. I will issue a written ruling after I've reviewed everything. I will issue what order I determine to be appropriate regarding the rehearing. And then I will also issue a written ruling regarding my decision on costs and sanctions. Transcript of the Proceedings, August 28, 2020 (Volume 3), Pg. 69.

On the 1st of September 2020, the trial court filed the decision relating the imposition of costs in the matter pursuant to RCW 4.84.185. (CP 416-419). The three-page document is the only embodiment of the trial court's findings, as none occurred during the hearing on the 28th of August 2020. Examining closely the trial courts findings, in the three-page document filed by the court, there is no factual finding that the lawsuit was "frivolous". Further, there is no legal conclusion that the lawsuit was "frivolous." In summary, there is no record at the trial level of a finding that the lawsuit was "frivolous." (CP 416-419). The conclusions of law declined to make such a finding, the conclusions are set out below for illustrative purposes (bold and italics for emphasis):

> II. CONCLUSIONS OF LAW
>
> A. The Court concludes that Plaintiff filed and advanced this action without reasonable cause and the City is entitled to recover reasonable expenses, including attorney's fees, the City incurred in opposing this action pursuant to RCW 4.84.185.
>
> B. The Court is not entering findings on whether a violation of CR 11 occurred but is ***DENYING*** Plaintiffs request for sanctions under this rule.
>
> C. The Court concludes that the City's has provided details of reasonable expenses, including attorney's fees, incurred by the City in opposing this action, providing an adequate record on review to support a fee award. *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998). (CP 419).

The City filed no motions to address the courts order or to have any factual or legal defects addressed or corrected relating to the order filed on the 1st of September 2020.

On the 18th of September 2020, the plaintiff timely filed a Notice of Appeal relating to the Court's entry of the Findings for Attorney's fees. This Notice of Appeal was filed to address the second action by the trial court, the ordering of costs. This appeal is the sole subject matter of the appeal under from the Division II, Court of Appeals decision entered in this matter on Court of Appeals No. 55221-3-II. Further, the courts order on the 1st of September 2020, , i.e. the entry of an order for costs was the sole issue before Division II, Court of Appeals and now this court. The ruling on that issue was issued on the 1st of March 2022. (See attachment A below).

B. Substantive Facts

Russell Martin is a Police Officer and has been employed by the City of Lakewood in that capacity by the since 2004. CP 45-52. Russell Martin has been a member of the collective bargaining unit which represents Lakewood Police Officers, the Lakewood Independent Police Guild, since the formation of the Guild. CP 56 Over the past 16 years, Russell Martin has become familiar with the employees of the City of Lakewood outside of the Police Department and with the policies and procedures of the City of Lakewood, including those independent of the Police Department's. C.P. 56-57.

Russell Martin has been active in Union/ Guld business during

the time he has a member of the Lakewood Independent Police (LPIG) Guild President, specifically in assisting the LPIG President, Jeremy Vahle with guild related activities during the tenure of his presidency from at least 2017 through the fall of 2019. CP 57.

On the 2nd of May 2019, the investigation was completed, and the findings were entered in Russel Martin's matter and his portion of PSS # 2019 PSS004. was finalized or concluded. CP 57. Officer Vahle's matter under PSS # 2019-PSS004. wasn't concluded until approximately 2 weeks later. CP 57. On the 16th of May 2019, Officer Vahle received notice regarding the disposition of his matter under PSS # 2019-PSS004.. From the 22nd of February 2019 until the 16th of May 2019, Office Vahle was still under the restrictions preventing him from discussing his matter. CP 57. On or about the 2nd of May 2019, when Russell Martin was informed that that he had been exonerated with respect to his investigation under PSS # 2019-PSS004. CP 57. On the 2nd of May 2019, Russell Martin contacted Lt. Lawler and made an oral request for records relating to the investigative file relating to the PSS # 2019-PSS004 matter. CP 57. Initially, on the 2nd of May 2019 Lt. Lawler, the supervisor of the Professional Standards Unit, informed Russell Martin that he could provide the investigation to him. CP 57.

However, later the same day, on the 2nd of May 2019, after Lt. Lawler granted the oral request by Russell Martin, Lt. Lawler contacted Russel Martin and then later denied his request to be provided the

records related to PSS # 2019-PSS004. CP 58 Lt. Lawler is in a supervisory capacity with respect to Svea Pitts in the Professional Standards Unit. CP 58

On or about the 2nd of May 10, 2019, Russell Martin became aware that the same allegations made against him were also made as against Officer Jeremy Vahle under PSS # 2019-PSS004 and that these had been sustained as to Officer Vahle. CP 58. Specifically, on the 14th of May 2019, as to PSS # 2019-PSS004 Russell Martin made a written public records request to the City of Lakewood through the portal for public records requests; stating as follows: “All documents and recordings related to PSS#2019-PSS004.” CP 58

There is no evidence that a request for clarification was sent by the City relating to this request. The request appears to be clear and understandable on its face. Russell Martin’s request relating to “PSS#2019-PSS004” which was a reference to an internal affairs investigation case number from the Professional Standards Unit. Prior and throughout the time that PSS # 2019- PSS004 was initiated Officer Jeremy Vahle was the President of the Lakewood Independent Police Guild. CP 58. After Russell Martin had been served with the allegations related to PSS #2019-PSS-004 and before his matter was completed on the 2nd of May 2020, he became aware of a petition within the LPIG going around for a recall vote of the LPIG Jeremy Vahle. CP 60. A primary concern and basis for Russell Martin’s public record request was to allow for

him to understand what was done in the investigation under PSS # 2019-PSS004, to discover who was interviewed and what information supported the decision- making process. CP.61

In summary a primary purpose for the request was to enable Russell Martin to try to understand how he was exonerated, and Jeremy Vahle was not. CP 61. Russell Martin was attempting to engage in legitimate union activity in a search for information. CP 61. Lakewood Police Sgt. Charles Porsche was the immediate supervisor of the officer whose honesty was the subject of concerns of Officer Jeremy Vahle and Russell Martin, which in turn resulted in the investigation refenced above at PSS# 2019-PSS004.

CP.62. Sgt. Charles Porsche was interviewed as part of PSS # 2019-PSS004. CP. 62 Sgt. Charles Porsche's interview was not provided by the City of Lakewood responsive to my Public Records request under PSS# 2019- PSS004 until after the filing of this lawsuit by Mr. Martin. CP 62 Sgt. Charles Porsche's consent forms for his video interview were also not provided by the City of Lakewood responsive to my Public Records request under PSS# 2019-PSS004 until after the filing of the lawsuit. CP 62.

Jeremy Vahle provided a sworn statement highlighting how he came to be in possession of the items that were not provided to Russ Martin in PSS # 2019-PSS004. CP. 280 -285. These items, i.e , the video interview of Sgt. Porsche and related consent forms were provided to Jeremy Vahle by Lakewood clerk Svea Pitts within days of

the request made by Russ Martin. These Items were provided not via a public records request. They were provided by the City to Jeremy Vahle as were part of the PSS # 2019-PS004 file in relation to his disciplinary matter. CP.283. Jeremy Vahle's declaration details when his investigation closed. C.P. 282-283. Although, the court didn't even read Jeremy Vahle's declaration on the 2nd of July 2020, when summary judgement was ordered, it appears the trial court had read it by the 28th of August 2020, after the appeal of summary judgement had been filed. Transcript of the Proceedings, July 2, 2020 (Volume 1), Pg. 6, and Transcript of the Proceedings, August 28, 2020 (Volume 3), Pgs. 111-112. Specifically, the court stated as follows on the 28th of August 2020:

> THE COURT: So the City concedes that there potentially could have been a delay damage type complaint if the Porche interview was in fact contained in a file but not provided until a second request was made?
>
> MS. McKAIN: (Nods head up and down.)
>
> THE COURT: As I understand the City's filings in this case up until that summary judgment motion when I think Ms. Pitts changed her tune a little bit about cross-reference, --
> MS. McKAIN: Right.
>
> THE COURT: -- even the City was under the impression up to that time that there may have been some cross-reference here. And like you said, "Oh, we may not have produced this."
> MS. McKAIN: Yeah.
>
> THE COURT: So doesn't that in and of itself make it not a frivolous lawsuit, since --..
> Transcript of the Proceedings, August 28, 2020 (Volume 3), Pgs. 111-112.

Although, it is clear that the trial judge had not actually read Jeremy Vahle's declaration back on the 2nd of July 2020, when the court ordered summary judgement, it is also clear by the 28th of August 2020, that the court had taken the opportunity to read the Vahle declaration and had compare the content to Ms. Svea Pitt's multiple inconsistent declarations. Transcript of the Proceedings, August 28, 2020 (Volume 3), Pgs. 111-112. On the 28th of August 2020, the trial court made direct comments that facts it was considering related to a finding that the lawsuit was "not a frivolous lawsuit." Transcript of the Proceedings, August 28, 2020 (Volume 3), Pg. 112. The trial court's findings entered later on 1st of September 2020, did not contain a finding that the lawsuit was "frivolous." (CP 419) (and see above exact language from the findings entered on 1st of September 2020.)

C. Argument

The underlying issues relating to the granting of summary judgment was not the subject matter of this appeal. The only issue before Division II Court of Appeals was the related to order entered on the 1st of September 2020. Division II committed no error regarding this matter.

The order for costs requested by the City and entered by the court was predicated and/or pursuant to RCW 4.84.185. RCW

4.84.185 provides in part as follows (bold and italics for emphasis):

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was ***frivolous and advanced without reasonable cause***, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense…(RCW 4.84.185)

It is undisputed that the record doesn't include a finding that this matter was "frivolous" decision addressed the order entered on the 1st of September 2020 by the trial court. Division II committed no error. The scope of review is related to whether the trial court's findings fell within RCW 4.84.185. Further, it is undisputed that the court denied sanctions under Rule 11. It should be noted that the trial court incorporated *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998) into the conclusions of law. This case is not a case which related to the interpretation of RCW 4.84.185 and was also apparently impliedly overruled by this court by *Sentinelc3 v. Hunt,* 181 Wash.2d 127(2014).

In this matter, Division II relied upon *Kilduff v. San Juan County*, 194 Wn.2d 859, 877, 453 P.3d 719 (2019) on the specific issue of findings related to RCW 4.84.185 and on the issue of what is "frivolous." Division II court stated as follows:

> We make no decision on the ultimate merits of Martin's claims or whether the superior court erred in granting the underlying motion for summary judgment to the City.

> However, given the PRA's broad mandate for disclosure and resulting obligation of agencies to make an adequate search for responsive records, Martin's claims cannot be characterized as frivolous. On this record, there are rational arguments based on both fact and law that the Porsche interview was sufficiently relevant to PSS0004 to have been properly responsive to Martin's PRA request for that file.
>
> The fact that Martin ultimately received the Porsche interview in response to a separate request may be relevant to potential damages, but it does not necessarily shield the City from liability. Accordingly, we conclude the superior court abused its discretion in its awarding sanctions to the City. (Division II unpublished decision at attachment A below at pg 6.)

The "plain meaning" rule is an examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, and it is appropriate as part of the determination whether a plain meaning can be ascertained. *Estate of Lyons v. Sorenson*, 83 Wash.2d 105, 108, 515 P.2d 1293 (1973). The court in Estate of Lyons stated that legislative intent is to be determined from what the Legislature said, if possible. The court then determined legislative intent from the "plain and unambiguous" language of a statute "in the context of the entire act" in which it appeared. Id.;(see also C.J.C. v. Corp. of the Catholic Bishop of Yakima, 138 Wash.2d 699, 708–09, 985 P.2d 262 (1999).)

Applying the plain meaning rule to RCW 4.84.185, there is no legislative history regarding this section that is instructive.

The next step would be to determined legislative intent is to look at the "plain and unambiguous" language of a statute "in the context of the entire act" in which it appears. In the instant analysis is clear that the intent was to have "frivoulus" stand alone a required element. This would appear to be consistent with the holding from *Kilduff v. San Juan County*, 194 Wn.2d 859, 877, 453 P.3d 719 (2019).

The Plaintiff/Appellant takes no issue with the analysis engaged in by Division II. However, a more basic application regarding abuse of discretion is apparent and applicable. The record is clear that the trial court made no findings or conclusions relating to the matter being "frivolous" The statutory requirement, under RCW 4.84.185 is conjunctive, requiring a finding by court that a lawsuit is "frivolous" and "advanced without reasonable cause."

In the instant case, the trial court's record doesn't support or contain such and finding. Additionally, the court had the opportunity and did not with respect to Rule 11 sanctions. Therefore, it was a factual and legal error to impose sanctions as there was never a basis to impose an award pursuant to the requirements contained in RCW 4.84.185. The decision by Division II was made without error. The decision by Division II did not conflict with a decision of this court. The decision by Division II did not conflict with a published Court of Appeals decision. The decision by Division II did not raising a significant constitutional question. The decision by Division II is not one of substantial public interest.

In summary, the City failed to meet any of the criteria required to allow for granting a Petition for Review. The Plaintiff respectfully requests that the Petition for Review be denied for the

above stated reason.

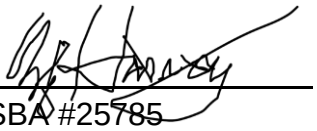
D. Attorney's Fees and Cost

In line with RAP 18.1(b) and RAP 14.1, 14.3, this is the first briefing as a Respondent in this matter before this court. The Respondent, upon viewing the arguments of the City to this court believes they are without merit and therefore request in the event that the Plaintiff is found to have substantially prevailed that the Plaintiff/ Respondent be awarded attorney's fees and the cost incurred for the preparation and costs of the briefing before this court.

V. CONCLUSION

The panel of Judges in Division II, Court of Appeals did not err. The City/ Petitioner failed to meet the standards and criterial for review as set out engaged in RAP 13.4. In the event this court denies the petition for review, the Plaintiff/ Respondent request and order granting attorneys fees and costs in reliance upon RAP 14 and RAP 18.1(b). The Plaintiff/ Respondent respectfully request this Court deny the Petition for Review filed by the City and uphold the decision of the entire panel from Division II, court of appeals.

Respectfully submitted,



ALAN E. HARVEY, WSBA #25785
Attorney for the Plaintiff/ Respondent

I. CERTIFICATE OF PERSONAL SERVICE AND ELECTRONIC SERVICE

I hereby certify that on 20th of May 2022, I filed the foregoing in with the Clerk of the Washington State Supreme Court and had the above in this matter which was electronically served upon counsel for City:

NAME	Email Address and/or Service by the Appeals portal
Washington State Supreme Court 950 Broadway, Suite 300 Olympia, WA 98402	By portal
Eileen McKain Assistant City Attorney City of Lakewood 6000 Main Street SW Lakewood, WA 98499	By Portal Email: emckain@cityoflakewood.us

DATED this 20th day of May 2022

ALAN E. HARVEY, WSBA #25785
Attorney for the Plaintiff

Attachment A

Filed
Washington State
Court of Appeals
Division Two

March 1, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RUSSELL MARTIN, Appellant, v. CITY OF LAKEWOOD, a Washington Governmental Entity, Respondent.	No. 55221-3-II UNPUBLISHED OPINION

PRICE, J. — Lakewood Police Officer Russell Martin brought a lawsuit under the Public Records Act (PRA)[1] against the City of Lakewood. Martin's lawsuit related to his PRA request for records from the Lakewood Police Department's investigation into him as an officer. In response, the City brought a motion for summary judgment that was granted by the superior court. The superior court dismissed Martin's case and awarded sanctions to the City. Martin appeals the superior court's award of sanctions.[2] We hold that the superior court erred in awarding sanctions and reverse.

[1] Ch. 42.56 RCW.

[2] In a separate appeal, Martin argues that the superior court erred by granting the City's underlying motion for summary judgment. The appeal of the underlying summary judgment motion is not before this court, so we limit our consideration to the superior court's order on sanctions.

FACTS

In 2019, the Lakewood Police Department conducted two separate but related investigations into officers following allegations of dishonesty and misconduct. The first investigation involved a single officer being investigated for dishonesty and was labeled 2019-PSS-003 (PSS003).[3] The second investigation involved officers Jeremy Vahle and Martin and was labeled 2019-PSS-004 (PSS004). Vahle and Martin were being investigated for failure to report the alleged dishonesty of the first officer.

In the PSS004 investigation, allegations against Vahle were sustained. Prior to his union discipline hearing, Vahle was provided with a thumb drive containing documents related to the investigation into his conduct. Included on the thumb drive was an interview with Sgt. Charles Porsche, the supervisor of the officer who was the subject of the PSS003 investigation.

PUBLIC RECORDS REQUESTS AND LAWSUIT

After the conclusion of the investigations, Martin made two public records requests to the City of Lakewood. First, Martin requested records related to the second investigation, specifically, "[a]ll documents and recordings related to [PSS004]." Clerk's Papers (CP) at 58. Then, about a month later, Martin made the following request related to the first investigation: "All documents and recordings related to [PSS003]." *Id.* at 31.

The City responded to both of Martin's requests, providing him with documents and redacting information determined to be exempt from disclosure. In response to his request for documents and recordings related to PSS004, Martin received the following files:

[3] PSS stands for "Professional Standards Section," which is a division of the Lakewood Police Department. CP at 30.

Jeremy-Vahle-2019PSS-004.mp4
Russ-Martin-2019PSS-004.mp4
Suver-2019PSS-003---004.mp4
Suver-re-interview-2019PSS-004.mp4
Vahle determination.pdf
2019PSS-004-redacted.pdf

Id. at 14. The provided documents contained references to the PSS003 investigation, including two employee statements that were labeled as being related to both PSS003 and PSS004. The Porsche interview was not provided. Upon providing Martin with the documents, the City informed him that it considered his first request relating to PSS004 closed.

In response to Martin's subsequent request for files related to PSS003, Martin received, among other records, the Porsche interview that was labeled, "Porsche-witness-interview-2019PSS003---004.mp4." *Id.* The employee statement signed by Porsche stated that he was being interviewed "as part of an internal investigation under PSS Control # 003 & 004." *Id.* at 130. Although there was a certain amount of overlap between records provided in response to the PSS003 and the PSS004 requests,[4] and notwithstanding that Porsche's employee statement and the label on the interview carrying references to both investigations, the Porsche interview was provided only in response to Martin's PSS003 request and *not* in response to Martin's PSS004 request. There was no further communication between Martin and the City following the City's responses.

[4] Certain documents provided were not labeled but provided in response to both requests. Other documents were labeled as belonging to both investigations but only provided in response to one of the requests. One document was labeled in its file name as belonging to both investigations and was provided in response to both requests.

About seven months after the City's response, Martin filed a complaint for disclosure of public records. Martin alleged that the City had wrongfully withheld documents in response to his public records request for documents related to PSS004. He seemed to argue that the interview of Porsche was sufficiently related to the PSS004 file such that it should have been provided in in response to his request for that file, not just in response to his request for the PSS003 file.

After Martin brought his lawsuit, the City filed a motion for summary judgment. The City argued that the Porsche interview was never used for the PSS0004 file and, therefore, was not responsive to his request for that file. The City further argued that in any event, Martin eventually received all of the requested documents. The superior court granted the City's motion for summary judgment.

Shortly thereafter, the City brought a motion for sanctions asserting that Martin's action was frivolous and advanced without reasonable cause. The City argued that costs and sanctions should be awarded because Martin's action had neither a factual nor a legal basis. The superior court agreed with the City and awarded sanctions because Martin brought the lawsuit without reasonable cause.

Martin appeals the award of sanctions.

ANALYSIS

"The PRA is a strongly worded mandate for broad disclosure of public records." *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 468, 464 P.3d 563, *review denied*, 196 Wn.2d 1018 (2020). The PRA is "liberally construed and its exemptions narrowly construed." RCW 42.56.030. When responding to a request under the PRA, an agency must conduct an adequate search.

Neighborhood All. of Spokane County v. Spokane County, 172 Wn.2d 702, 721, 261 P.3d 119 (2011). There is not a set definition for what constitutes an adequate search:

> [T]he focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate. *The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. What will be considered reasonable will depend on the facts of each case*. . . .
>
> Additionally, agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. The search should not be limited to one or more places if there are additional sources for the information requested. Indeed, "the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." This is not to say, of course, that an agency must search every possible place a record may conceivably be stored, but only those places where it is reasonably likely to be found.

Id. at 719-20 (emphasis added and omitted) (internal citations omitted) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)).

Furthermore, where an agency violates the PRA in failing to provide a public record, subsequent provision of the record previously wrongfully withheld does not protect the agency from liability. *Id.* at 726-27. The harm occurs at the time the record is withheld. *Id.* "[T]he remedial provisions of the PRA are triggered when an agency fails to properly disclose and produce records, and any intervening disclosure serves only to stop the clock on daily penalties, rather than to eviscerate the remedial provisions altogether." *Id.* at 727.

A superior court may award a prevailing party its costs where it determines that "the position of the nonprevailing party was frivolous and advanced without reasonable cause." RCW 4.84.185. An action is frivolous if, "considering the action in its entirety, it cannot be supported by any rational argument based in fact or law." *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App.

758, 785, 275 P.3d 339 (2012). This court reviews an award of sanctions under this provision for an abuse of discretion. *Kilduff v. San Juan County*, 194 Wn.2d 859, 877, 453 P.3d 719 (2019).

Here, Martin argues that the superior court erred in granting the City's request for sanctions because his lawsuit was not frivolous. We make no decision on the ultimate merits of Martin's claims or whether the superior court erred in granting the underlying motion for summary judgment to the City. However, given the PRA's broad mandate for disclosure and resulting obligation of agencies to make an adequate search for responsive records, Martin's claims cannot be characterized as frivolous. On this record, there are rational arguments based on both fact and law that the Porsche interview was sufficiently relevant to PSS0004 to have been properly responsive to Martin's PRA request for that file. The fact that Martin ultimately received the Porsche interview in response to a separate request may be relevant to potential damages, but it does not necessarily shield the City from liability. Accordingly, we conclude the superior court abused its discretion in its awarding sanctions to the City.

CONCLUSION

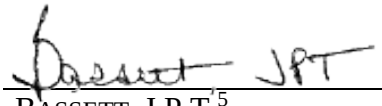
In conclusion, because Martin's PRA claims cannot fairly be characterized as frivolous, we reverse the superior court's award of sanctions to the City.

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.

PRICE, J.

We concur:

MAXA, P.J.



BASSETT, J.P.T.[5]

[5] Judge Jeffrey Bassett is serving as a judge pro tempore of the court pursuant to RCW 2.06.150.

Attachment B

FILED
APRIL 28, 2022
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

RUSSELL MARTIN, Appellant, v. CITY OF LAKEWOOD, a Washington governmental entity, Respondent.	)	No. 38542-6-III UNPUBLISHED OPINION

JOHNSON, J.[*] — The Public Records Act (PRA), chapter 42.56 RCW, requires governmental agencies to make an adequate investigation when responding to a request for public records. An agency's investigation is adequate when it is reasonably calculated to uncover all relevant documents. Here, Lakewood Police Officer Russell Martin filed a lawsuit under the PRA alleging the City of Lakewood failed to provide a document relevant to one of his two requests for public records. The City responded by filing a motion for summary judgment that was granted by the superior court. Martin appeals. Because the superior court erred by summarily dismissing Martin's case when the

[*] Judge Brandon L. Johnson is serving as judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

undisputed facts show the City failed to produce a document related to Martin's request, we reverse, hold that Martin is entitled to summary judgment for violation of the PRA, and remand for further proceedings.

FACTS

Background

In 2019, the Lakewood Police Department conducted two separate, but related, investigations into officers following allegations of dishonesty and misconduct. CP 98, 102, 162. The first, labeled 2019-PSS003 (PSS003),[1] involved a single officer being investigated for dishonesty. The second investigation, labeled 2019-PSS004 (PSS004), involved Officer Jeremy Vahle and Officer Russell Martin (Martin). Vahle and Martin were being investigated for failing to report the alleged dishonesty of the officer in the first investigation.

In the second investigation, allegations against Vahle were sustained. Prior to his *Loudermill*[2] hearing, Vahle was provided with a thumb drive containing documents related to the investigation into his conduct. Included on the thumb drive was an

[1] PSS stands for "Professional Standards Section," which is a division of the Lakewood Police Department.

[2] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

interview with Sergeant Charles Porche, the supervisor of the officer who was the subject of the first investigation.

Martin's PRA requests

After the conclusion of the investigations, Martin made two public records requests to the City. First, Martin requested records related to the second investigation, specifically, "[a]ll documents and recordings related to [PSS004]." Clerk's Papers (CP) at 58. Second, approximately a month later, Martin made the following request related to the first investigation: "All documents and recordings related to [PSS003]." CP at 31.

The City responded to both of Martin's requests, providing him with the responsive documents and redacting information determined to be exempt from disclosure. In response to his request for documents and recordings related to PSS004, Martin received the following files:

- Jeremy-Vahle-2019PSS-004.mp4
- Russ-Martin-2019PSS-004.mp4
- Suver-2019PSS-003---004.mp4
- Suver-re-interview-2019PSS-004.mp4
- Vahle determination.pdf

- 2019PSS-004-redacted.pdf

CP at 14. The provided documents contained references to the PSS003 investigation, including two employee statements that were labeled as being related to both PSS003 and PSS004. Upon providing Martin with the documents, the City informed him that it considered his first request relating to PSS004 closed.

In response to Martin's request for files related to PSS003, Martin received, among other records, the video recording of the Porche interview labeled, "Porche-witness-interview- 2019PSS003---004.mp4." CP at 14. The employee statement signed by Porche stated that he was being interviewed "as part of an internal investigation under PSS Control # 003 & 004." CP at 130. The interview, however, had not been included in the City's response to the PSS004 request. Otherwise, though, there was a certain amount of overlap between records provided in response to the PSS003 and the PSS004 requests.[3]

There was no further communication between Martin and the City following the City's responses.

[3] Certain documents provided were not labeled but provided in response to both requests. Other documents were labeled as belonging to both investigations but only provided in response to one of the requests. One document was labeled in its file name as belonging to both investigations and was provided in response to both requests.

Martin's PRA lawsuit

Approximately seven months after the City responded, Martin filed a complaint for disclosure of public records. In the complaint, Martin alleged that the City had withheld documents in response to his public records request for documents related to PSS004. The complaint did not specify which records Martin was claiming had been wrongfully withheld.

When it learned of Martin's lawsuit, the City reached out to Martin asking for information about what records he believed had been withheld. Based on a conversation with Martin's attorney, the City opened a new public records request in an effort to provide Martin with the documents he had claimed were withheld.

Summary judgment

Several months after Martin brought his lawsuit, the City filed a motion for summary judgment. The City argued it had properly searched for and provided the records requested and had made substantial efforts after the lawsuit was filed to ensure that Martin had received the records requested.

In support of its motion, the City provided a declaration from Svea Pitts, the individual who had responded to both of Martin's requests. She said that when Martin requested documents related to the PSS004 investigation, she "believed . . . he wanted that

particular file" and apparently provided only those documents. CP at 279. Pitts also provided information regarding the record-keeping process of the police department:

> The [PSS] conducts internal investigations and the files created are labeled PSS with the date and a number, kept in chronological order. Because these investigations are usually sensitive matters, no documents related to any PSS investigation are kept outside of Professional Standards Section. The hard copy records are kept [ ] in a locked closet down our secure hallway. The electronic copies are kept in IAPRO which is our internal software program for cases involving [Lakewood Police Department] employees.

CP at 41. Pitts stated that she had uploaded the records that had been sent to Martin to the website used for responding to public records requests. After she learned of the lawsuit, Pitts re-checked for responsive records in both the stored physical documents as well as the electronic database. She noted that although the interview of Porche was referenced in the PSS004 file, it was physically located in the PSS003 file. However, Pitts changed this statement in a subsequent declaration, saying that the interview was neither summarized nor referenced in the PSS004 file and that it was physically located only in the PSS003 file because it was used only in that investigation.

The City also supported its motion for summary judgment by arguing it had provided all records "related" to the investigation files, and after doing so, it received no further communication from Martin. The City maintained that there had been no

violation of the PRA because, prior to filing the action, Martin had been provided all of the records he had been entitled to receive.

On the day of the scheduled hearing on the motion for summary judgment, Martin requested a continuance for medical reasons. Martin also filed a response the same day, in which he argued the City had failed to provide all the responsive documents to the first request, and that the search conducted by Pitts was inadequate. Over the City's objection, the superior court continued the hearing.

After 4:00 p.m. the day before the continued hearing on the motion for summary judgment, Martin filed a declaration from Vahle in response to the City's reply that had been filed approximately a week prior. In his declaration, Vahle stated that prior to his *Loudermill* hearing, he had received an e-mail from Pitts informing him that she was retrieving the records "associated with [his PSS004] investigation" that included the interview of Porche in a file named "IA 2019-PSS004." CP at 282.

At the outset of the hearing, the City moved to strike Vahle's declaration arguing that it was untimely, did not comport with state and local rules, and was irrelevant. In response, the superior court said that it was not aware of the existence of such a declaration and that it had not read it. Martin argued that the declaration was relevant and that he had not been able to file it earlier due to difficulties coordinating with Vahle.

The trial court never ruled on the City's motion to strike, but did allow Martin to describe the contents of the declaration and rely on it in his argument. The trial court itself referenced the declaration in its oral ruling saying that it was "completely irrelevant to the [summary judgment issue]" because the documents were provided in the context of a *Loudermill* hearing and not a public records request. Report of Proceedings (RP) (Jul. 2, 2020) at 29.

The City never addressed the details of the actual contents of Vahle's declaration, instead maintaining throughout the hearing that the declaration should be either struck or that its contents were irrelevant.

The superior court granted the City's motion for summary judgment. Martin appeals.[4] A Division Three panel considered Mr. Martin's appeal with oral argument after receipt of an administrative transfer of the case from Division Two.

ANALYSIS

"The PRA is a strongly worded mandate for broad disclosure of public records." *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 468, 464 P.3d 563 (2020). The PRA is "liberally construed and its exemptions narrowly construed." RCW 42.56.030.

[4] By agreement of the chief judges, Division Two of this Court transferred this appeal to Division Three pursuant to CAR 21(a) and RAP 4.4.

Under the PRA, governmental agencies must "make available for public inspection and copying all public records, unless the record falls within specific exemptions." *Rental Housing Assn of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 535, 199 P.3d 393 (2009) (quoting RCW 42.56.070(1)). The PRA creates a cause of action if an agency wrongfully denies a requester an opportunity to inspect or copy a public record. RCW 42.56.550(1). Where a party claims that it has been wrongfully denied access to a public record by an agency in violation of the PRA, the burden of proof is on the agency to establish that it has acted in accordance with the statute. RCW 42.56.550.

Where an agency violates the PRA by failing to provide a public record, subsequent provisions of the record wrongfully withheld does not protect the agency from liability. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 726-27, 261 P.3d 119 (2011). The harm occurs at the time the record is withheld. *Id*. "[T]he remedial provisions of the PRA are triggered when an agency fails to properly disclose and produce records, and any intervening disclosure serves only to stop the clock on daily penalties, rather than to eviscerate the remedial provisions altogether." *Id*. at 727.

The fact that a requested record contains a reference to another record does not mean that an agency is required, under the PRA, to include the additional record in the response. *Dotson,* 13 Wn. App. 2d at 466. However, when responding to a request under

the PRA, an agency must conduct an adequate search. *Neighborhood Alliance*, 172 Wn.2d at 721. There is no bright line definition for what constitutes an adequate search, but rather:

> [T]he focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate. *The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. What will be considered reasonable will depend on the facts of each case. . . .*
>
> Additionally, agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. The search should not be limited to one or more places if there are additional sources for the information requested. Indeed, 'the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested.' This is not to say, of course, that an agency must search every possible place a record may conceivably be stored, but only those places where it is reasonably *likely* to be found.

Id. at 719-20 (some emphasis added) (citations omitted).

This court reviews questions of statutory interpretation and allegations of agency violations of the PRA de novo. *Id*. at 715.

Summary judgment is also reviewed de novo. *Id*. Summary judgment is appropriate where "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). If "the record on appeal consists solely of declarations or other documentary evidence, [this court] stands in the same position as the trial court" and does not make determinations as to credibility.

Service Emps. Int'l Union Local 925 v. University of Wash., 193 Wn.2d 860, 866, 447 P.3d 534 (2019).

Martin argues that the trial court erred in granting the City's motion for summary judgment. The City argues there was no genuine issue of material fact as to whether the PRA had been violated. However, examination of the record reveals the undisputed facts show the City violated the PRA as a matter of law by failing to conduct an adequate search and by not providing the undeniably related interview of Porche in response to the PSS004 request.

The City appears to take the position that its obligation to search for records extended no further than the physical file for the PSS004 investigation. However, this position fails when one appreciates the significant overlap between the PSS003 and PSS004 investigations. The subject matters were intertwined, and both investigation files contained several of the same documents. The actions of Pitts herself demonstrated this overlap when she provided Vahle with Porche's interview as a file "associated with" the PSS004 investigation, although it was purportedly only contained in the PSS003 file, to aid him in preparing for his *Loudermill* hearing. Additionally, multiple documents were labeled, either by their file name or within the document itself, as belonging to both investigations. This duplicative labeling of multiple documents between the two

investigations shows that a search reasonably calculated to uncover all responsive documents should have been broadened to include both files. The "perfunctory search" performed by the City failed to follow the "obvious lead[ ]" of the PSS003 file, and therefore was not reasonable. *Neighborhood Alliance*, 172 Wn.2d at 720.

The labeling of the documents also indicated that some of the documents, including Porche's interview, were intended to have been actually located in the PSS004 file but were inadvertently left out or misfiled. It is evident from the provided records that there was likely a standard convention for naming files that included putting the investigation number the files belonged to at the end of the file name. The file containing Porche's interview provided in response to the second request was labeled in part "2019PSS003---004," indicating it was part of the PSS003 file as well as the PSS004 file. CP at 14. Additionally, the file containing the same Porche interview provided to Vahle was labeled in part "PSS004," also showing it was part of, or at a minimum related to, the PSS004 file. Moreover, the employee statement signed by Porche said he was being interviewed "as part of an internal investigation under PSS Control # 003 & 004," indicating the interview was part of the PSS004 file. In fact, two other employee statements were similarly designated as being related to both investigations and were included in response to the PSS004 request.

Although the City offered declarations stating that Porche's interview was only part of the PSS003 investigation, this ignores the fact that Martin's request was for documents "related to" the PSS004, not merely those *included in* the file. The City's reading of Martin's request is simply too narrow. At a minimum, the joint labeling of multiple documents demonstrates that the two investigations were so closely related that a reasonable search for records related to PSS004 must have included the PSS003 file to ensure that documents intended to be located in both files were actually compiled and provided in response to a PRA request related to PSS0004.

The superior court relied on the *Dotson* case to support its ruling that the City need not have searched outside of the PSS004 file simply because the PSS003 file was referenced in some of the documents in the PSS004 file. The application of *Dotson* to the facts of this case was overstated. It is true that, under *Dotson*, the mere fact that the PSS003 investigation was referenced in the PSS004 investigation file did not, by itself, require the City to include all the documents in the PSS003 file in response to the PSS004 request. 13 Wn. App. 2d at 466. However, the record in *Dotson* clearly established that there was no substantive relationship between the two files. Here, as discussed above, there was a substantial overlap between the two investigations.

The superior court essentially made factual findings by determining the Vahle declaration was "totally irrelevant." It was improper for the court to make such a factual determination without the benefit of an evidentiary hearing with testimony, and was, moreover, a violation of the applicable standard for evaluating motions for summary judgment. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 677, 880 P.2d 988 (1994) ("When reviewing a motion for summary judgment, the court considers all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party.").

Whether or not the Porche interview was substantively used in the underlying PSS004 investigation, for which the City asserts it was not, is not the appropriate test. Whether it was ultimately used in the investigation does not determine whether it was "related" to the investigation. Martin's request cannot be read so narrowly as to only seek documents that the City deems were substantially used in the investigation.[5]

[5] Additionally, the City argues that prior to the commencement of this action, Martin had received all the records he claims he was entitled to as part of his second request, and because he was provided all relevant records, Martin cannot sustain an action under the PRA. Br. of Resp't at 14. However, any violation of the PRA occurs when a record is wrongly withheld, and while subsequent provision of that record may be relevant to potential penalties, it does not negate the City's liability. *Neighborhood Alliance*, 172 Wn.2d at 726-27.

CONCLUSION

The Porche interview was a document "related to" the PSS004 investigation as a matter of law based on the undisputed evidence before the superior court. The City violated the PRA when it failed to conduct an adequate search for responsive records and then failed to produce the Porche interview. Accordingly, we reverse the superior court's granting of the City's motion for summary judgment, hold that the City violated the PRA by not producing the Porche interview, and remand to the superior court for calculation of the appropriate penalty pursuant to the factors set forth in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010).

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

Johnson, J.P.T.

I CONCUR:

Pennell, J.

No. 38542-6-III

FEARING, J. (concurring) — I join in the majority's ruling that directs summary judgment in favor of Russell Martin. I write separately to register my view that the Public Records Act (PRA), chapter 42.56 RCW, imposes no free-standing duty on a government agency to perform an adequate search for requested records. I will refer to this ostensible duty as the reasonable search or adequate search rule. My view conflicts with current Court of Appeals jurisprudence. Under my contrarian perspective, a court may not grant a public records requester relief for any inadequate search by itself.

In a bygone era of legal ease, when practitioners could not cite unpublished opinions as authority, I might not write this concurrence. Now that, under GR 14.1, legal writers may cite unpublished opinions as holding persuasive value, I do not wish to be branded as a supporter of the adequate search rule. The rule conflicts with the letter of and policy behind the PRA.

I begin with standard and familiar language heralding the purposes behind Washington's PRA. The PRA promotes open government. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 719, 261 P.3d 119 (2011). The PRA seeks to increase governmental transparency and accountability by making public records accessible to Washington citizens. *John Doe A v. Washington State Patrol*, 185

Wn.2d 363, 371, 374 P.3d 63 (2016). These objectives partially motivate my rejection of the Washington reasonable search rule.

The operative provision of the PRA reads:

> Each agency, in accordance with published rules, *shall make available for public inspection and copying all public records*, unless the record falls within the specific exemptions of subsection (8) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.

RCW 42.56.070(1) (emphasis added). This section of the PRA seeks to render virtually every document generated by an agency available to the public unless an exemption applies. *Ameriquest Mortgage Co. v. Office of the Attorney General*, 177 Wn.2d 467, 485-86, 300 P.3d 799 (2013); *Rental Housing Association of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 535, 199 P.3d 393 (2009); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978).

The PRA creates a private cause of action for a requester when the government agency fails to produce, in accordance with RCW 42.56.070(1), a public record not subject to an exemption. RCW 42.56.550 declares:

> (1) Upon the motion of any person *having been denied an opportunity* to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.
>
> . . . .

> (4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(Emphasis added.)

RCW 42.56.070(1), RCW 42.56.550, and all other sections of the PRA levy no burden on a government agency to reasonably search for records. Creating such an obligation violates principles of statutory construction. Courts may not read into a statute a meaning that is not there. *Burton v. Lehman*, 153 Wn.2d 416, 422-23, 103 P.3d 1230 (2005). When interpreting a statute, we must not add words when the legislature has chosen not to include them. *Lake v. Woodcreek Homeowners Association*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

The majority correctly notes that Washington decisions, despite the absence of statutory language demanding any form of a records search, promote the adequate search rule. The Washington Supreme Court wrote in *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 719 (2011), that the court focuses on the adequacy of a search, not whether responsive documents exist but were not disclosed or produced. Accordingly, a search need not be perfect, only adequate. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 720 (2011). The

Supreme Court compared an inadequate search to the denial of production of a record. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 721 (2011).

Despite its discussion of a reasonable search, the Washington Supreme Court, in *Neighborhood Alliance*, recognized that the PRA falls silent about what constitutes an adequate search. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 719 (2011). The high court should have added that the PRA also does not read that an agency holds an obligation to conduct a reasonable search.

The Washington Court of Appeals has followed the language from *Neighborhood Alliance* and adopted a rule that the PRA requires a government agency to conduct an adequate search in response to a public records request. *Rufin v. City of Seattle*, 199 Wn. App. 348, 356, 398 P.3d 1237 (2017); *Block v. City of Gold Bar*, 189 Wn. App. 262, 266, 355 P.3d 266 (2015); *Hobbs v. State*, 183 Wn. App. 925, 943, 335 P.3d 1004 (2014); *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 866, 288 P.3d 384 (2012). The Supreme Court restated, but did not apply, the reasonable search rule in *Nissen v. Pierce County*, 183 Wn.2d 863, 885, 357 P.3d 45 (2015).

Contrary to analysis by the Washington Court of Appeals and the Supreme Court's passing remark in *Nissen v. Pierce County*, the Supreme Court, in *Neighborhood Alliance*, did not hold that an inadequate search forms an independent cause of action. The court instead reserved for another day the question of whether the PRA authorizes a

penalty if the requester would otherwise have no remedy for an unreasonable search. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 724 (2011). The court, in *Neighborhood Alliance*, limited its holding to characterizing an inadequate search as an aggravating factor to be considered in setting the daily penalty amount.

The Washington PRA closely parallels the federal Freedom of Information Act (FOIA), and thus judicial interpretations of the federal act usually assist in construing our own act. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 129 (1978). In *Neighborhood Alliance*, the Washington Supreme Court followed federal decisions that impose an enforceable duty, under FOIA, on federal agencies to conduct an adequate search. Some of those decisions now include *Rojas v. Federal Aviation Administration*, 927 F.3d 1046, 1052-53 (9th Cir. 2019), *superseded on reh'g*, 989 F.3d 666; *Ancient Coin Collectors Guild v. U.S. Department of State*, 641 F.3d 504, 514 (D.C. Cir. 2011); *Trentadue v. Federal Bureau of Investigation*, 572 F.3d 794 (10th Cir. 2009); *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353 (4th Cir. 2009); *Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235 (11th Cir. 2008); *Abdelfattah v. U.S. Department of Homeland Security*, 488 F.3d 178 (3rd Cir. 2007); *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473 (2d. Cir. 1999); *Patterson v. Internal Revenue Service*, 56 F.3d 832 (7th Cir. 1995); *Miller v. U.S. Department of State*, 779 F.2d 1378 (8th Cir. 1985).

The imposition of an enforceable duty to search makes sense under FOIA because the federal act expressly imposes such an onus on the government agency. 5 U.S.C. § 552(a)(3) declares:

> (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> . . . .
>
> (C) In responding under this paragraph to a request for records, an agency *shall make reasonable efforts to search* for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.
>
> (D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(Emphasis added.) To repeat my theme, the Washington PRA admits no such language regarding a search. Thus, Washington should not adopt the federal view. Washington courts do not adopt the construction placed on a similar federal statute if the language of the statute in Washington substantially differs from the language in the United States statute. *Everett Concrete Products, Inc. v. Department of Labor & Industries*, 109 Wn.2d 819, 826, 748 P.2d 1112 (1988).

Advocates of government transparency may welcome an adequate search rule as effectuating the values behind the PRA. Unfortunately, however, the opposite result has ensued. The Washington Court of Appeals has contorted and distorted the supposed duty

of an adequate search into a gift of immunity from liability when the agency conducts a reasonable search but fails to produce an extant document. Thus, even if the public records requester establishes that the government agency failed to produce a record identified by him or her, the court grants the agency safe harbor if the court deems the agency performed a reasonable search. Thrice, this court has affirmed summary judgment dismissal of PRA claims because of an adequate search despite evidence that the government agency failed to produce one or more requested record. *Rufin v. City of Seattle*, 199 Wn. App. 348 (2017); *Block v. City of Gold Bar*, 189 Wn. App. 262 (2015); *Hobbs v. State*, 183 Wn. App. 925 (2014). In the end, the reasonable search rule has caused more harm than good to the public.

Contrary to *Rufin v. City of Seattle*, *Block v. City of Gold Bar*, and *Hobbs v. State*, no Washington statute grants immunity when the government agency fails to disclose a record or produce an unexempted document. Instead, RCW 42.56.550 affords the requester a cause of action for any failure to produce unexempted records, and the statute grants the superior court discretion to impose sanctions up to $100 per day for a violation.

The adequate search rule conflicts with other principles pronounced by the Washington Supreme Court. Withholding a nonexempt document constitutes wrongful withholding and violates the PRA. *Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010). Even according to the Supreme Court, in *Neighborhood Alliance of Spokane County v. Spokane County*, agencies must disclose any public record on request unless

the record falls within a specific, enumerated exemption. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 714-15 (2011).

I recognize that a regulation adopted by the Washington Attorney General, WAC 44-14-04003(10), imposes on a government agency an obligation to "conduct an objectively reasonable search for responsive records." Nevertheless, regulations inconsistent with or broader than a statute they implement are invalid. *Washington State Hospital Association v. Department of Health*, 183 Wn.2d 590, 595, 353 P.3d 1285 (2015); *Center for Biological Diversity v. Department of Fish & Wildlife*, 14 Wn. App. 2d 945, 967, 474 P.3d 1107 (2020). When statutory language is plain and unambiguous, a court will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of a contrary interpretation by an administrative agency. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005); *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 752, 888 P.2d 147 (1995).

To fulfill the purpose behind the PRA, a government agency should be held liable for failing to produce a requested record regardless of the extent of the search performed by the agency. The PRA seeks to make all records available for review and reading by the public, not just those records that the government agency finds with a reasonable search. The public deserves access to public records no matter the difficulty behind a search. We must interpret the PRA liberally and in light of the people's insistence that they have information about the workings of the government they created. Imposing

strict liability on the agency for failure to produce a record will encourage agencies to exert proactive steps to catalogue records into a system that facilitates the ready production of all records on hand.

I concede an anomaly could arise under my dismissal of the adequate search rule. A government agency could fail to conduct an adequate search but fortuitously produce all records requested. In such an instance, any reasonable search rule would serve no purpose in penalizing the agency since it fulfilled the PRA by producing all demanded documents.

I agree that a duty to reasonably search may facilitate the production of records requested. Also, unless the government agency conducts a reasonable search, the requester may never know whether the agency produced all requested documents. Going further, the government agency may need to detail the actions taken pursuant to a public records search in order to show the reasonableness of the search and to convince the court that it produced all requested documents. For this reason, the imposition of an unattached duty, outside the confines of a duty to produce the records sought, will usually lack any consequence in discrete cases.

Instead of shielding the government agency from liability for failing to produce a requested record, the adequacy of the search should influence the penalty to be imposed by the superior court in the event the government agency fails to produce a record. In *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467-68, 239 P.3d 735 (2010), the

Supreme Court outlined seven mitigating and nine aggravating factors for a superior court to consider when imposing a daily penalty. The aggravating factors generally form a reverse image of the mitigating factors. None of the mitigating factors explicitly mention the adequacy of the search as a factor, but the reasonableness of the search would fall within the abating categories of an agency's good faith, honest, timely and strict compliance with PRA procedures; the helpfulness of the agency to the public records requester; and the existence of agency systems to track and retrieve public records. The Washington Supreme Court recognized this limited approach to the relevance of an inadequate search in its seminal decision, *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 724 (2011).

In Russell Martin's appeal, the majority holds that Martin is entitled to summary judgment because, under the undisputed evidence, the City of Lakewood failed to conduct an adequate search for responsive records and then failed to produce the Porche interview. The majority could and should rest this holding on the sole ground that Lakewood failed to produce a document requested.

I CONCUR:

Fearing, J.

NORTHWEST LEGAL ADVOCATES

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