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STATE OF WASHINGTON
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No. 385426-III

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

**RUSSELL MARTIN,
Plaintiff/Appellant,**

v.

**CITY OF LAKEWOOD,
Respondent.**

CITY'S PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER.

On June 13, 2022, the City of Lakewood, Respondent, (City) filed this petition to the Supreme Court for discretionary review of the Court of Appeals Division III decision in 385426-III.

2. COURT OF APPEALS DECISION.

On April 28, 2022, Division III held that the superior court erred by summarily dismissing a case brought pursuant to the Public Records Act (PRA), reversed the superior court decision and held that the requester, former officer Martin, is entitled to summary judgment against the City for violating the PRA. *Appendix 1.*

On May 17, 2022, the City filed a timely motion for reconsideration with Division III. On May 20, 2022, Division III denied the City's motion for reconsideration. *Appendix 2.*

3. ISSUES PRESENTED FOR REVIEW.

Is the appellate decision in conflict with established law which has determined that records, even related records, not used or held in a particular file, are not responsive to PRA requests for a particular file and that agencies need not be “mind readers” in responding to PRA requests? *Bonamy v. City of Seattle*, 92 Wn. App. 403, 960 P.2d 447 (1998); *Hobbs v. State*, 183 Wn. App. 925, 944, 335 P.3d 1004 (2014); *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 464 P.3d 563 (2020); *RCW 42.56.080*; *42.56.550(1)*; and *WAC 44-14-04002*.

If the trial court erred by not holding an evidentiary hearing on Martin’s untimely declaration, did the appellate court also err in entering judgment in favor of Martin based on that untimely declaration, effectively creating an issue of fact, but affording the City no opportunity to respond to it, particularly when the City bears the burden of proof under the PRA? *RCW 42.56.550(1)*; *CR 56*.

4. STATEMENT OF THE CASE.

a. Two separate investigations; two separate files; and two separate PRA requests.

Martin was a police officer who was involved in two separate, but concurrent, internal police investigations. Although obviously aware of both investigations, Martin initially requested records related to only *one* of the investigations, *by the particular file name*: “All documents and recordings related to PSS#2019-PSS004.” *CP 30.*

i. City provided all records, as requested.

Before receiving the records related to the PSS004 investigation file, Martin submitted a second request, this time for records related to PSS003. *CP 31.*

The City provided Martin with all records related to both investigation files *7 months before Martin filed this case against the City, first PSS004 and then PSS003. CP32-33; 96.*

ii. Martin misrepresented facts.

Yet, at the trial court level and throughout this appeal, Martin has alleged that the City failed to provide him with one record, the Porche interview, “responsive to my Public Records request under PSS#2019-PSS004 until after the filing of the lawsuit.” *CP 61, lines 14-18, and Martin’s appellate brief at p.12.* This is demonstrably false; Martin received all records before he filed suit. *CP 87 and 96.* Moreover, Martin received all records, as he himself requested them.

The trial court granted the City’s summary judgment motion, noting that Martin misrepresented the facts and that the City provided him with all records he requested, as he requested them. *CP 296.*

iii. Appeals not consolidated.

Martin appealed two trial court orders; the order granting the City summary judgment and the order granting the City costs. Although clearly related, these appeals were not consolidated, but were considered in two different appellate

divisions. The appeal on costs has been further appealed to the Supreme Court. The City will seek to consolidate this petition for review with that petition.

b. Appellate decision reversed trial court based on untimely declaration and did not remand for evidentiary hearing.

The appellate court disagreed with the trial court, holding that the trial court should have conducted an evidentiary hearing on a declaration Martin filed the night before the second summary judgment hearing. Without affording the City an opportunity to counter the untimely declaration, the appellate decision reversed the trial court and entered judgment in favor of Martin, remanding only for assessment of costs against the City.

5. ARGUMENT.

The PRA is meant to ensure prompt access to public records, it is *not* meant to be a game of “gotcha.” *Hobbs v. Wash. State Auditor’s Office*, 183 Wn. App.925, 335 P.3d 1004 (2014).

To that end, the PRA provides a cause of action for two types of violations: (1) when an agency wrongfully denies an opportunity to inspect or copy a public record; and (2) when an agency has not made a reasonable estimate of the time required to respond to the request. RCW 42.56.550(1) (2); *Andrews v. Wash. State Patrol*, 183 Wn.App. 644, 334 P.3d 94 (1994).

In this case, the City did not withhold anything from Martin. The City promptly provided Martin with all responsive records in response to two specific requests for two separate and distinct files, as he himself requested them, seven months before he filed suit.

Martin's first request – PSS004.

Martin asked for records “related to” a specific internal investigation file; PSS004. Consistent with the PRA, established case law and the PRA rules, the City reasonably believed Martin wanted records related to *that particular* file and provided them to him.

Martin's second request – PSS003.

When Martin later requested records “related to” a separate, concurrent investigation file (PSS003), the City again reasonably believed Martin wanted records related to *that particular* file and provided them to him. The City withheld *nothing* from Martin.

Martin submitted his second request before the City could provide records responsive to his first request. This confirmed the City’s interpretation of Martin’s request for the specific files. In fact, had the City consolidated Martin’s two requests and provided the two separate file records in installments, Martin might have argued that the City unreasonably delayed production of the records. While the first file requested – PSS004 – required no third party notice or redactions, the second file – PSS003 did. The City did not consolidate or otherwise delay production of PSS004 records, but provided them as quickly as possible. Similarly, the City did not consolidate or otherwise delay production of PSS003

records, but provided them as quickly as possible, after third party notice and redactions.

Alleged PRA violation.

Seven months later, and in possession of all responsive records, Martin claimed the City failed to provide him with one record, the Porche interview, “responsive to my Public Records request under PSS#2019-PSS004 until after the filing of the lawsuit.” *CP 61, lines 14-18, and Martin’s appellate brief at p.12.* Martin did not receive the Porche records in response to his request for PSS004 because the Porche records were not – ever – part of the PSS004 file or investigation. Moreover, Martin’s claim is demonstrably false; Martin received all records before he filed suit; PSS004 records in response to his request for PSS004 records and PSS003 records in response to his request for PSS003 records. *CP 87.*

- a. Appellate decision – concurrent investigation was “sufficiently related” to file requested.**

The appellate decision, however, holds that the City should have known Martin wanted part of the concurrent investigation file because that concurrent investigation file was “sufficiently related” to the file Martin actually and specifically requested.

- i. The appellate decision is in conflict with *Dotson* which established that records, even *related* records, not used or held in a particular file are *not* responsive to PRA requests for that particular file.**

The appellate decision is in conflict with *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 464 P.3d 563 (2020). In *Dotson*, the court concluded that other records may be “related” to a particular file, but if those records were not actually used or held in that file, then they are not responsive to a public records request.

Like *Dotson*, records from the separate, concurrent investigation may have been related to the file Martin requested, PSS004, but pursuant to *Dotson*, because those related records were not actually used or held in PSS004, they

should not be considered responsive to Martin's request for records "related to" PSS004.

The appellate decision, however, concluded that the trial court's application of *Dotson* to the facts in this case was overstated because in *Dotson*, there was "no substantive relationship between the files," and in this case, there was "substantial overlap" between the two files in this case.

However, *Dotson* does not rely on the degree of overlap between related files. *Dotson* specifies that if related records were *not* actually used or held in that file, then they are *not responsive* to a public records request. In this case, the related record – the Porche interview – was not used or even mentioned in PSS004. As such, no violation should have been found.

Moreover, under the PRA, Martin's request for a specific file should dictate the scope and adequacy of the City's search. Otherwise, instead of working with requests *as submitted*, agencies will be required to be "mind readers" in assessing

what a requester actually wants; an untenable position. *Bonamy v. City of Seattle*, 92 Wn. App. 403, 960 P.2d 447 (1998).

- ii. **The focus should have been on Martin’s request as submitted. As submitted, Martin limited the scope of his request to PSS004.**

Courts have made it clear that people requesting records under the PRA have the obligation to “identify the documents with sufficient clarity to allow the agency to locate them.”

Hobbs v. State, 183 Wn. App. 925, 944, 335 P.3d 1004 (2014) and see, *RCW 42.56.080; 42.56.550(1)*.

Martin’s request for PSS004 may be characterized as an “identifiable” record because it targets a specific file by name, *but* it is also qualified. The PRA rules note that when requests are qualified with an “inexact phrase” such as all records “relating to” a topic, as in this case, agencies may interpret the request as one for records which directly and fairly address the topic. *WAC 44-14-04002*.

In this case, when Martin asked for records “related to” a specific and particular file - PSS004 – he himself limited the scope of the search to records related to that particular file - not records in other files. *Id and Dotson v. Pierce County*, 13 Wn. App. 2d 455, 464 P.3d 563 (2020).

iii. Martin confirmed the limited scope of his request by referring to “this investigation” as opposed to all other investigations, in his request.

Martin repeatedly confirmed the City’s reasonable interpretation of his request as limited to “this investigation” under PSS004. Specifically, Martin characterized it as a request related to “*this* internal investigation,” as opposed to any other internal investigation. *CP 2 and CP 60 (emphasis added)*.

Martin also specifically described the records allegedly withheld as “in the possession of the city *under* 2019 PSS004” as opposed to any other particular file or investigation. *CP 4*. Martin continued the reference to the particular investigation

and file throughout this appeal. *Appellant's Opening Brief at p. 12.*

As used by Martin, these definite demonstrative articles refer to a specific investigation; a specific file – as opposed to all others, including the separate, but concurrent investigation file of PSS003 which included the Porche interview.

iv. Martin was well aware that there were two separate investigations and files, but requested only one of them at a time.

Martin requested records “related to” PSS004 and the City reasonably believed he wanted the records in that file. Had Martin wanted a record from another file - the Porche interview in PSS003 - he could have asked for it and it would have been provided. But even though fully aware that there were two, separate investigations in two, separate files, Martin limited his request to only *one* of them. ¹

¹ Initially. Before the City could provide Martin with the records related to PSS004, Martin submitted a request for PSS003.

This is one difference between *Dotson* and this case. The requester in *Dotson* did not know about both files until the agency had provided her with the records and she saw a reference to it. Unlike *Dotson*, Martin was aware of *both* files before he submitted his first request, but he requested only *one* of them at a time.

This distinction is important because while both requesters used the inexact phrase “related to,” perhaps hoping to broaden the scope of their requests, Martin simultaneously limited his request by identifying a specific file number and he did so when he knew there was another, separate, file available.

In both *Dotson* and this case, there was no effort to hide the other file. The other files were referenced so that a requester could ask for them if they wanted them. In this case, once Martin requested the other file – PSS003 - the City provided it to him; the City provided it to him seven months before he filed suit.

B. The appellate decision erred in granting Martin summary judgment because the appellate court's disagreement with trial court over relevancy of an untimely motion created an issue of fact that the City had no opportunity to address.

The City has the burden of proving it did not violate the PRA pursuant to the PRA and when it moves for summary judgment. *RCW 42.56.550 and CR 56*. By statute and practice, the Court may decide PRA cases on the basis of declarations. *Id; RCW 42.56.550; and Dotson v. Pierce County*, Division II June 2020. Evidentiary hearings with testimony are rare.

Therefore, in the ordinary course of proceedings under the PRA and summary judgment, the City is permitted to demonstrate, with good faith declarations, that it complied with the PRA; Martin is permitted to respond; and the City may then reply.

i. This case did not follow an ordinary course because Martin repeatedly missed court deadlines and the files were confused.

This case did not follow an ordinary course. *CP 83*. The City sought to resolve this case with Martin by, among other

things, understanding what Martin believed the City had failed to provide. *CP 12*. These efforts were unsuccessful; Martin provided only clues and sought no discovery. Having good reason to believe it had complied with the PRA and bearing the burden of proof under PRA, the City moved for summary judgment. *CP 11*. The City scheduled the hearing, giving more time than required and noting it for the trial court's pre-populated mandatory hearing date, which was generated when Martin file his complaint. Given all of this, Martin should not have been unprepared for a hearing on that date.

However, Martin was not prepared for the hearing, instead filing a response and a motion to continue the night before the hearing. In his untimely response to the City's summary judgment motion, Martin argued that the City withheld the Porche interview. *CP 53*. Martin's response was the first time Martin had specifically identified the Porche interview as the "missing" record.

The City then checked the two files and confirmed that the Porche interview was *never* part of the first file Martin had requested. The City was prepared to explain this at the first summary judgment hearing, but Martin insisted that the hearing should be continued. The hearing was continued. To resolve the confusion, the City attached the two files for the trial court's independent review in its reply brief. *CP 85*. The trial court confirmed what the City had found; the Porche interview was not used or even mentioned in the PSS004 investigation or file. *CP 296-299*.

The day before the second summary judgment hearing, Martin filed a declaration alleging – for the first time - facts he had known for over a year, but had not brought forward; the Vahle declaration. *CP 280-285*. Officer Vahle had, like Martin, been involved in both investigations and the allegations against him had been sustained. *Id.* Vahle claimed in the declaration that he was given records, including the Porche interview, in advance of a *Loudermill* hearing regarding the

sustained allegations. *Id.* The City moved to strike, but also noted that the untimely Vahle declaration was irrelevant to what the City provided Martin in the context of his request for records “related to” a specific investigation file. The trial court agreed. *CP 296-299.*

- ii. **The appellate decision concluded that the trial court should have held an evidentiary hearing on Martin’s untimely declaration, but then without an evidentiary or allowing the City to respond to the declaration, granted summary judgment in favor of Martin.**

The appellate decision, reviewing the case de novo, concluded that the trial court should not have ruled on the untimely declaration without the benefit of an evidentiary hearing.

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.”).²

Martin v. City of Lakewood, at p. 14.

The PRA statute does not require evidentiary hearings, but specifically authorizes the trial court to “conduct a hearing based solely on affidavits.” *RCW 42.56.550*. However, if the trial court committed error, the remedy was to remand for an evidentiary hearing on Martin’s untimely submission and allow the City to respond to it. *State v. Cobos*, 178 Wn. App. 692, 315 P.3d 600 (2013) (In sentencing hearing, trial court failed to conduct an evidentiary hearing triggered by objections to underlying facts and case was remanded for such an evidentiary hearing.)

Instead, the appellate court ignored Martin’s violation of the court rules, considered the untimely declaration, failed to allow the City an opportunity to provide a substantive response,

² It is not clear why the appellate court cited to this case.

reversed the trial court and granted summary judgment in favor of Martin.

If the trial court erred in ruling on the untimely declaration without the benefit of an evidentiary hearing, then the appellate court also erred on the same grounds. The appellate decision did not simply consider all facts in the light most favorable to Martin, as the nonmoving party, it ruled on the untimely declaration without permitting the City an opportunity to respond to it. The appellate decision created an issue of fact while rewarding Martin for violating the court rules.

6. Conclusion.

The PRA is meant to ensure prompt access to public records; it is *not* meant to be a game of “gotcha.” *Hobbs v. Wash. State Auditor’s Office*, 183 Wn. App.925, 335 P.3d 1004 (2014). Martin’s omission and denial of material facts should

not form the basis of an award of fees and penalties against the City under the PRA.

Martin had all records responsive to his two requests for two particular investigative files months before he chose to file this lawsuit – but he denied receipt of those records in the course of litigation; playing “gotcha.” Worse, Martin omitted and misrepresented material facts before the trial and appellate courts.

The facts demonstrate – unequivocally – that the City provided Martin with all records related to each one of the files he requested within weeks of each request and 7 months prior to this lawsuit. Martin suffered no harm and there has been no actionable denial of public records under the PRA. The City respectfully requests reversal of the appellate decision.

DATED this 13th day of June, 2022.

Respectfully submitted,

CITY OF LAKEWOOD
HEIDI ANN WACHTER, CITY ATTORNEY

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CERTIFICATE OF COMPLIANCE

This document contains 3,217 words, excluding the parts of the document exempted from the word count by RAP 18.17.

(10) Petitions for review, answers, and replies (RAP 13.4): 5,000 words (word processing software) or 20 pages (typewriter or handwritten).

The word limitations exclude words in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits).

**CITY OF LAKEWOOD
HEIDI ANN WACHTER, CITY ATTORNEY**

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CERTIFICATE OF SERVICE

I certify that on the 13th day of June, 2022 I caused a true and correct copy of the City’s Petition for Discretionary Review to be served on the following in the manner indicated below:

Counsel for Plaintiff Alan Harvey 1104 Main St Suite 214 Vancouver, WA 98660 <u>Alan.Harvey@NWLAdvocates.com</u>	Electronic Service via Court of Appeals Portal
Court of Appeals Derek Byrne, Clerk Court of appeals Division II 909 A Street Tacoma, WA 98402	Electronic Service via Court of Appeals Portal

Dated this 13th day of June 2022.



Amanda Collins
Public Records / Legal Specialist

APPENDIX 1

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April 28, 2022

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CASE # 385426
Russell Martin, Appellant v. City of Lakewood, Respondent
PIERCE COUNTY SUPERIOR COURT No. 202046456

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

A handwritten signature in black ink, appearing to read "Tristen L. Worthen".

Tristen L. Worthen
Clerk/Administrator

TLW:ko
Attach.
c: **E-mail** Hon. Alicia Burton

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

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).

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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.

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Martin v. City of Lakewood

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

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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

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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.

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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.

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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

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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.

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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

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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.”).

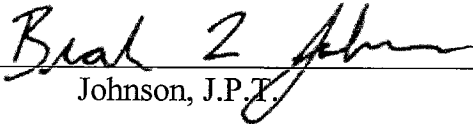
Whether or not the Porche interview was substantively used in the underlying PSS004 investigation, for which the City asserts it was not, is not the appropriate test. Whether it was ultimately used in the investigation does not determine whether it was “related” to the investigation. Martin’s request 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.

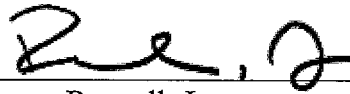
CONCLUSION

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.

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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

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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.

....

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(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

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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

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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

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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

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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

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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

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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.

CITY OF LAKEWOOD

June 13, 2022 - 1:51 PM

Filing Petition for Review

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: Case Initiation
Appellate Court Case Title: Russell Martin, Appellant v. City of Lakewood, Respondent (385426)

The following documents have been uploaded:

- PRV_Petition_for_Review_20220613135026SC087216_5220.pdf
This File Contains:
Petition for Review
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A copy of the uploaded files will be sent to:

- Alan.Harvey@NWLAdvocates.com
- acollins@cityoflakewood.us

Comments:

Sender Name: Eileen McKain - Email: emckain@cityoflakewood.us
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