NO. 42647-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

AMBER WRIGHT,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

This is a case brought solely under the Public Records Act (PRA), RCW 42.56 involving two record requests and four records. One record is exempt from production under the PRA because its confidentiality and disclosure is governed exclusively by RCW 13.50. The second record (also governed by RCW 13.50) did not exist at the time of either records request; it was created specifically as a courtesy for the plaintiff and provided immediately after it was created. The remaining two records were not requested in either of the records requests at issue here.

Here, the trial court should have dismissed the case at the outset because it was filed after the applicable statute of limitations ran. Ms. Wright commenced this PRA litigation 22 months after the one-year statute of limitations in RCW 42.56.550(6) had run as to the first records request, and nearly five months after it had run as to the second request.

In addition, the trial court erred by refusing to apply RCW 13.50 to any of the records. To the extent the trial court even addressed compliance with the PRA, it applied the wrong standards, treating the matter as a discovery dispute in a tort action. The Department of Social and Health Services (Department) did not violate the PRA, and the trial court's findings of fact and conclusions of law are not supported by the evidence in the record.

Having extensively erred in its legal analysis, the trial court then also abused its discretion by awarding $649,896.87 in penalties, costs, and attorney fees for the alleged withholding of the four documents. This amount is grossly disproportionate to the *alleged* PRA violation.

This Court should vacate the trial court's judgment awarding penalties, costs, and attorney fees and dismiss the case for failure to comply with the applicable statute of limitations. In the alternative, this Court should reverse findings of fact that are not supported by substantial evidence; rule that as a matter of law the Department did not violate the PRA; and vacate the trial court's judgment awarding penalties, costs, and attorney fees. Finally, if this Court holds that the Department violated the PRA then it should reverse and vacate the penalties, costs, and attorney fees award, because of an abuse of discretion, and determine the proper calculation of penalties, costs, and attorney fees.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by refusing to dismiss the case because it was filed after the applicable statute of limitations had run.

2. The trial court erred by entering Findings of Fact (FOF) 4, 5, and 6 in its September 1, 2011 order,[1] finding that the audio recording, interview transcription, foster care/adoption manual, and investigation

[1] A copy of the trial court's September 1, 2011 order is attached as Appendix A.

protocols were responsive to the plaintiff's records requests. Evidence in the record does not support FOF 4, 5, and 6.

3. The trial court erred by entering FOF 7 in its September 1, 2011 order, finding that the Department failed to provide a privilege log for withheld documents. Evidence in the record does not support FOF 7.

4. The trial court erred by entering Conclusions of Law (COL) 1 and 2 in its September 1, 2011 order, because the case was not filed until after the applicable statute of limitations had run.

5. The trial court erred by entering COL 3 in its September 1, 2011 order, where the audio recording, although overlooked initially, was produced pursuant to RCW 13.50.100 before this case was filed, and the transcription was produced as a courtesy for the requester and did not exist at the time of either records request.

6. The trial court erred by entering COL 4 and 5 in its September 1, 2011 order, because neither record had been requested in the plaintiff's records requests.

7. The trial court erred by entering COL 6 in its September 1, 2011 order, because the Department is not required to make a privilege log when no records are withheld.

8. The trial court erred by entering COL 7 and 8 in its September 1, 2011 order, because the case was not filed until after all

applicable statutes of limitation had run, and the evidence and argument in the record shows that no violation of the PRA occurred.

9. The trial court erred in ordering $649,896.87 in penalties, costs, and fees against the Department, because the case was filed after the statute of limitations had run and each element of the award was error.

10. The trial court erred by entering FOF and COL 1 to 4 in its November 18, 2011 judgment.[2] These findings and conclusions state that there was an "obstruction of justice" meriting penalties of $100 per day, totaling $287,800.00. The finding and conclusions are not supported by the evidence in the record or a full and fair consideration of the *Yousoufian* factors and constitute an abuse of discretion.

11. The trial court erred by entering FOF and COL 1 to 4 in its November 18, 2011 judgment, awarding $346,000.00 in attorney fees. These findings are not supported by adequate documentation and were entered without giving the Department a fair opportunity to respond to the documentation provided to the trial court. The court abused its discretion by accepting inflated per hour billing rates and applying an unwarranted lodestar multiplier, resulting in an attorney fee award of $1,000 per hour.

12. The trial court erred by entering FOF and COL 1 to 4 in its November 18, 2011 judgment, awarding litigation costs of $16,096.87.

[2] A copy of the November 18, 2011 judgment is attached as Appendix B.

The trial court abused its discretion by including impermissible expenditures as part of its cost award.

III. STATEMENT OF ISSUES

1. Did the trial court err by refusing to dismiss Plaintiff's public records action, which was not commenced until 22 months after the statute of limitations in RCW 42.56.550(6) ran on her 2007 request, and nearly five months after the statute of limitations ran on her 2008 request? (Assignments of Error 1, 4, 8, 9.)

2. Did the trial court err by finding a violation of the PRA and imposing penalties for a recorded interview that is confidential and discloseable only as provided in RCW 13.50, and exempt from disclosure under the PRA? (Assignments of Error 2, 5, 8, 9, 10.)

3. Did the trial court err by finding a violation of the PRA and imposing penalties for an interview transcription that is confidential and discloseable only as provided in RCW 13.50, exempt from disclosure under the PRA, and that did not exist at the time the records requests were made? (Assignments of Error 2, 5, 8, 9, 10.)

4. Did the trial court err by finding a violation of the PRA and imposing penalties for two records (a DSHS foster care/adoption manual, and an investigative protocols document for Pierce County) that were not requested in either public record request filed by Plaintiff's attorneys?

(Assignments of Error 2, 6, 8, 9, 10.)

5. Did the trial court err by finding a violation of the PRA and imposing penalties for the Department's failure to provide a privilege log when no records were withheld? (Assignments of Error 3, 7, 8, 9, 10.)

6. Did the trial court err by treating the records requests as discovery requests and applying poorly articulated discovery standards to assess the Department's compliance with the applicable statutes, RCW 42.56 and RCW 13.50, rather than applying the language of the statutes and the published appellate decisions interpreting those statutes? (Assignments of Error 2, 3, 5, 6, 7, 8, 9, 10.)

7. Did the trial court err by ordering penalties of $100 per day, totaling $287,800.00, where (1) the Department fully complied with the PRA by timely providing thousands of pages of records in response to two records requests; (2) the single record the Department inadvertently failed initially to produce is not subject to the PRA—it is confidential and may be disclosed only under RCW 13.50—and where the Department sua sponte corrected its oversight and provided that record before the plaintiff commenced this untimely PRA action; and (3) even if there had been noncompliance with the PRA, the superior court abused its discretion by failing to fully and fairly consider and apply the *Yousoufian* factors in calculating the penalty. (Assignments of Error 9, 10.)

8. Did the trial court abuse its discretion by awarding attorney fees of $346,000, corresponding to as much as $1,000 per hour, without adequate documentation in the record, without giving the Department a fair opportunity to respond to the documentation provided to the trial court, and without adequate justification for applying an unwarranted lodestar multiplier? (Assignments of Error 9, 11.)

9. Did the trial court abuse its discretion by including impermissible expenditures as part of its award of $16,096.87 in litigation costs? (Assignments of Error 9, 12.)

IV. STATEMENT OF THE CASE

A. Ms. Wright's 2007 Records Request

On March 26, 2007, the Department's South Bend Children's Administration field office received a letter from Carter Hick "on behalf of Amber Wright as her lawyer" requesting a copy of her "entire DSHS file." RP at 88 (Aug. 31, 2011); Ex. 1 at 1.[3] The letter was processed by Diane Fuller, a supervisor and social worker. RP at 88 (Aug. 31, 2011).

On March 30, 2007, within five business days, Ms. Fuller responded in writing to Mr. Hick, informing him (1) that he needed to provide a release of information signed by his client to obtain the Children's Administration file for Ms. Wright; (2) that once the release

[3] A copy of the 2007 records request is attached as Appendix C.

was provided, he would "receive the requested information under RCW 13.50"; and (3) that the entire file was five volumes and processing would take approximately 60 days. RP at 89-91 (Aug. 31, 2011); Ex. 202. Ms. Fuller faxed him the authorization form with her response. Ex. 202.

On May 7, 2007, Ms. Fuller received a letter from Mr. Hick that included a signed authorization and confirmed that he was requesting "Amber's entire DSHS file." RP at 91-92 (Aug. 31, 2011); Ex. 203 at 1. The next day she sent Mr. Hick a letter acknowledging receipt of Ms. Wright's authorization and confirming that he was requesting records only from Children's Administration, and not from other administrations in the Department. Ex. 204. Mr. Hick never contacted Ms. Fuller to indicate that he wanted any records other than Ms. Wright's Children's Administration file. RP at 94 (Aug. 31, 2011).

On June 1, 2007, the Department sent Mr. Hick a copy of Ms. Wright's Children's Administration file (approximately 2,200 pages). RP at 94-95 (Aug. 31, 2011); Ex. 205. In a cover letter, Ms. Fuller indicated which records were withheld and briefly explained why they were withheld. RP at 94-95 (Aug. 31, 2011); Ex. 205. She received no further communication from Mr. Hick. RP at 97 (Aug. 31, 2011).

B. Ms. Wright's 2008 Records Request

On May 20, 2008, the Department received a seven-page records

request from David Moody, as attorney for Ms. Wright. RP at 106 (Aug. 31, 2011); Ex. 206.[4] The request stated it was made "[p]ursuant to RCW 42.56 *et seq.* and RCW 13.50 *et seq.*" Ex. 206.[5] The request included signed authorizations to release protected information. Ex. 206. All of the categories of records requested in the lengthy request were for records involving Ms. Wright and her father, David Wright. Ex. 206.

On May 28, 2008, within five business days,[6] Susan Muggoch, the Children's Administration Public Disclosure Supervisor at the time, sent Mr. Moody a letter acknowledging receipt of the request for records. RP at 107-08 (Aug. 31, 2011); Ex. 207. She also explained the statutory authority for producing the confidential records:

> Amber's Children's Administration records are confidential child welfare records and are exempt from public disclosure per RCW 42.56.230(1), RCW 74.04.050 and 13.50.100(2). Her authorization permits them to be disclosed to you under RCW 13.50.100(7), and they will be provided to you under that statute.

Ex. 207 at 1. The letter estimated the records would be produced within 120 business days and stated the request was being forwarded to other administrations within the Department that might have responsive records.

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[4] A copy of the 2008 records request is attached as Appendix D. This is Ex. 206 at 1-7 (the signed authorizations in Ex. 206 at 8-15 are not part of Appendix D).

[5] RCW 42.56 is the Public Records Act. RCW 13.50 addresses the "keeping and release of records by juvenile justice and care agencies."

[6] May 28, 2008 was the fifth business day after the May 20th request because Monday, May 26, 2008 was a federal and state holiday (Memorial Day).

RP at 108-09 (Aug. 31, 2011); Ex. 207 at 1. The request in fact was forwarded. RP at 109-10 (Aug. 31, 2011); Ex. 208 at 1, 19.

On June 10, 2008, unhappy with the time estimate provided by the Department, Mr. Moody sent a letter threatening a lawsuit if all documents were not produced within 40 days. RP at 110-11 (Aug. 31, 2011); Ex. 209. Ms. Muggoch responded on June 20, 2008, explaining the reasons for the time estimate provided on this large request. RP at 112 (Aug. 31, 2011); Ex. 210.[7]

On July 24, 2008 (45 business days after the initial records request), Kristal Wiitala, the Department's Public Disclosure and Privacy Officer, provided 68 pages of responsive documents to Mr. Moody. RP at 103, 115-16 (Aug. 31, 2011); Ex. 211. Her cover letter explained that she was producing the records "from parts of DSHS other than Children's Administration, which will respond separately." Ex. 211. One additional page was located and produced in a second installment on July 31, 2008, with a cover letter stating, "[t]his mailing completes the response to your request from parts of DSHS other than the Children's Administration." RP at 117 (Aug. 31, 2011). The Department provided these two record installments to comply with the PRA. RP at 118

[7] On July 1, 2008, Ms. Wright filed a public records lawsuit against the Department regarding the March 20, 2008 request, but she moved for voluntary dismissal on April 22, 2009, and that lawsuit was dismissed. RP at 113 (Aug. 31, 2011); CP at 9.

(Aug. 31, 2011).

On October 30, 2008, Children's Administration responded separately to Mr. Moody's 2008 request by releasing 2,864 pages relating to Amber Wright's child welfare files. RP at 150-51 (Aug. 31, 2011); Ex. 213. Unlike the records provided by Ms. Wiitala, these records are exempt from the PRA; Barbara McPherson, the Children's Administration Public Disclosure Coordinator, explained in a cover letter that the records were produced under RCW 13.50.100. RP at 152 (Aug. 31, 2011); Ex. 213.[8]

Children's Administration sent a second and final installment of 552 pages to Mr. Moody on November 14, 2008, which consisted of the Children's Administration's electronic record for Ms. Wright. RP at 152-53 (Aug. 31, 2011); Ex. 214.[9] This final installment also included a cover letter from Ms. McPherson explaining that the records were provided pursuant to RCW 13.50.100. Ex. 214. Thus, a total 3,416 pages of Amber Wright's child welfare records were provided to Mr. Moody by November 14, 2008, within the 120 business day estimate originally provided by the Department. *See* Exs. 207 at 1, 213, 214.

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[8] This production included the five volumes previously produced in response to Ms. Wright's 2007 request, plus additional records that had been assembled in the intervening time. CP at 160.

[9] Barbara McPherson testified that this final installment continued from the numbering sequence in the prior installment, and the correct numbering for this final installment was 2865 to 3416. RP at 153-54 (Aug. 31, 2011); Ex. 214.

None of the installments from Children's Administration that responded to Ms. Wright's 2007 and 2008 record requests included any of the four records that are the subject of this appeal.

C. The Four Records That Are The Subject Of This Public Records Act Lawsuit

The four records at issue in this PRA lawsuit were provided to Mr. Moody after the Department completed its responses to the 2007 and 2008 record requests, and before this PRA lawsuit was filed on April 6, 2010. *See* Exs. 5, 6, 215; CP at 1.

1. The Recorded Child Interview And Transcription

In November 2009, Children's Administration discovered that an audio CD in the back of Amber Wright's file had not been copied and provided to Mr. Moody. RP at 155-56 (Aug. 31, 2011); Ex. 215. The CD contained a recorded interview of Ms. Wright in November 2005, when she was a minor, as part of an abuse investigation. *See* Exs. 4, 215.

Children's Administration had the recorded child interview copied and—as a courtesy to Mr. Moody—also had it transcribed. The transcription was created in December 2009 and did not exist at the time of either the 2007 or the 2008 record requests. RP at 135, 156 (Aug. 31, 2011); Ex. 215. Ms. McPherson sent Mr. Moody copies of the CD and transcription on December 11, 2009. RP at 155-57 (Aug. 31,

2011); Ex. 215. The cover letter apologized for the delay, explaining that the recorded child interview had just been found and transcribed and that the copies were being provided pursuant to RCW 13.50.100. Ex. 215.

2. The PRIDE Manual

Separate from this PRA lawsuit, Ms. Wright filed a tort action against the Department in federal court. Ex. 230 at 2.[10] Responding to a request from Marty McLean (an associate of Mr. Moody) in that case, assistant attorney general John McIlhenny sent Mr. Moody a letter on March 4, 2010, that included a copy of the "DSHS Foster/Adoption PRIDE Manual." RP at 60 (Aug. 31, 2011); Exs. 5 and 6.[11]

The 2007 and 2008 requests for records asked for Amber Wright's Children's Administration file and for other documents specifically related to Ms. Wright or her father. Exs. 1, 206 at 1-7. This PRIDE Manual is not a part of Amber Wright's Children's Administration file and is not specific to her; the PRIDE Manual is a Department training manual for foster parents and potential adoptive parents. RP at 96, 159 (Aug. 31, 2011); CP at 709-10. It is not related to any particular person.[12]

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[10] U.S. District Court, W.D. Wash. at Tacoma, Cause No. C09-5126RJB. Ex. 230 at 2. Mr. Moody represents Ms. Wright in that case. CP at 15.

[11] Mr. McIlhenny represented the Department in the federal case. He has never represented the Department in this PRA lawsuit; the assistant attorney general representing the Department in this matter has always been John Clark. CP at 708-09.

[12] The 678 page PRIDE Manual was developed by the Child Welfare League of America and Illinois Department of Children and Family Services. CP at 710, 719-22.

Accordingly, the Department did not consider the PRIDE Manual responsive to the 2007 or 2008 requests for records. RP at 159-60 (Aug. 31, 2011). It was never produced in response to either records request. Ex. 6; CP at 709.

3. The Investigative Protocols Document

On March 16, 2010, Mr. McIlhenny sent Mr. Moody a letter providing supplemental discovery in the federal tort action. Ex. 5 at 1. The supplemental discovery included a 57-page Investigative Protocols document for Pierce County, Washington. Ex. 5 at 3.

Like the PRIDE manual, this Investigative Protocols document is not a part of Amber Wright's Children's Administration file and is not specific to her. RP at 96-97, 159 (Aug. 31, 2011); Ex. 5 (generally at 2 to 59); CP at 709. Instead, this document establishes joint protocols with Pierce County law enforcement for investigating sexual and physical child abuse. Ex. 5 at 2-59; CP at 709. Like the PRIDE Manual, it is not related to any particular person and, like the PRIDE Manual, the Department did not consider the Investigative Protocols document responsive to the 2007 or 2008 requests for records. RP at 159 (Aug. 31, 2011). It was never produced in response to either request. Ex. 5 at 1; CP at 709.

D. Procedural History

Ms. Wright filed this PRA lawsuit on April 6, 2010. CP at 1. The

only cause of action is alleged violations of the PRA under "RCW 42.56 *et seq.*" [13] CP at 5. She did not file an action seeking her child welfare records in juvenile court or claim any right under RCW 13.50. CP at 1, 5.

In January 2011, the Department filed two motions for partial summary judgment, asking in relevant part that the trial court dismiss all records from this PRA lawsuit that are governed by RCW 13.50, and asking that the case be dismissed because it is time-barred by the PRA statute of limitations. CP at 38, 56. The trial court denied both motions on April 29, 2011. CP 165, 167, and 376-78; RP at 20 (Apr. 29, 2011). Despite extensive briefing on the legal standards at issue,[14] the trial court apparently perceived the case as a "discovery" dispute, and mistakenly thought that denying the department's motion would send Ms. Wright's case to Judge Buckner for a trial on Ms. Wright's negligence civil lawsuit. RP at 20 (Apr. 29, 2011).[15] After explaining that a trial on the alleged PRA violations would be needed, the Department's attorney asked for clarification:

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[13] The case was reassigned to Judge Frederick Fleming on May 24, 2010.

[14] *See* CP at 38-54.

[15] Judge Buckner is in Pierce County Superior Court, and Ms. Wright's counsel stated that a civil lawsuit was pending in her court. RP at 6 (Apr. 29, 2011).

> MR. CLARK: And just so we're clear. I'll have to bring the same arguments. Can the Court give any indication as to the 13.50 issues, why these[16] are not controlled by that statute?
>
> THE COURT: Yeah. Because I don't think it's fair.

RP at 21 (Apr. 29, 2011). That was the trial court's sole legal explanation for its summary judgment rulings.

A trial, before Judge Fleming, to determine whether the Department violated the PRA commenced on August 31, 2011. CP at 565-567. Ms. Wright claimed the Department violated the PRA by not timely providing the four records described above in response to her 2007 and 2008 requests. RP at 17-18, 20[17] (Aug. 31, 2011); RP at 10 (Sep, 1, 2011). The Department responded that the recorded child interview and transcription are child welfare records that are strictly governed by RCW 13.50.100 instead of the PRA, and that the PRIDE Manual and Investigative Protocols document were not responsive to the 2007 and 2008 requests. RP at 122-24, 159-60 (Aug. 31, 2011).

During the Department's opening statement, the trial court interrupted numerous times, describing this case as a "discovery" dispute. *See, e.g.*, RP at 29-30, 32, 34 (Aug. 31, 2011).[18] For example, when the Department explained that two of the disputed documents were not in

[16] The word "these" is in reference to Amber Wright's child welfare records.

[17] Ms. Wright's counsel referred to and handed the trial judge their proposed findings of fact and conclusions of law that were ultimately signed by the trial court.

[18] More extended excerpts of RP (Aug. 31, 2011) are attached as Appendix E.

Ms. Wright's file and were never requested, the following exchange occurred:

> THE COURT: How can you -- they asked for discovery.
>
> MR. CLARK: I would like to clarify something for the Court, the Public Records Act is not discovery. It is not pre-trial discovery and the Court should not look at it as pre-trial discovery, as something like, I want everything related to something. And there is --
>
> THE COURT: If that's what the law is the Supreme Court can tell me that because when you ask for discovery and you've got a lawsuit, it is a very simple lawsuit. They're alleging that your client was negligent in caring for this child. And they asked for every piece of evidence in the way of discovery that might support that claim. And if you didn't give it to them, there is a problem. And you can't hide behind some esoteric definition under Title 13 or Title 42.56, I don't think so.
>
> MR. CLARK: Okay. So we'll be asking the Court at the end of the day to go a very different direction and not look at this as a discovery request that asked for all evidence that could in any way support their case.
>
> THE COURT: What else is it then? What do you intend to show that it is then if it isn't a request for discovery?
>
> MR. CLARK: I intend to show it's a public records request for very specific information.
>
> THE COURT: Trying to cut corners and to be extra cautious and you're not calling it a discovery request, you're calling it something else?
>
> Mr. CLARK: Yes, absolutely, we're calling it a public records request.
>
> THE COURT: I would suggest to you that's a problem.
>
> MR. CLARK: Well, we still need to present our case on the record.

RP at 35-36 (Aug. 31, 2011). The trial court then asked if the Department would be showing it was not negligent in putting Ms. Wright "back in the home time after time" and indicated he had already concluded the Department must be at fault in her negligence case. RP at 37, 38 (Aug. 31, 2011). The Department responded:

> MR. CLARK: With all due respect, we will ask the Court to focus on the public records processing and not the allegation --
>
> THE COURT: That's what bothers me. You're expecting me to focus on the public records and something in a statute that flies in the face of what's right here when a person has been injured, at least that's what their claim is, and they should have their opportunity with a jury trial to prove it one way or the other and they should not be -- there should not be obstruction by the entity that's alleged to have caused this injury.

RP at 38 (Aug. 31, 2011).

Ms. Wright presented only one witness, Katherine Kent, a family law attorney, former Department social worker, and the standard of care expert in Ms. Wright's separate negligence case against the Department. RP at 41, 43, 49 (Aug. 31, 2011). Ms. Kent offered very little on whether the recorded child interview was governed by RCW 13.50. RP at 49 (Aug. 31, 2011).[19] On cross examination, she did admit that the PRIDE

[19] Because Ms. Wright did not file a trial brief in this case, Ms. Kent's testimony was the centerpiece of Ms. Wright's argument regarding RCW 13.50. In contrast, the Department filed a trial brief with substantial briefing, supported by relevant appellate precedent, on how RCW 13.50.100 governs the recorded child interview. CP at 544-550.

Manual and Investigative Protocol documents would not be kept in child case files. RP at 84 (Aug. 31, 2011).[20]

On direct examination, Ms. Wright's attorney asked Ms. Kent whether the Investigation Protocols document would have been helpful to Ms. Wright's negligence case. RP at 64 (Aug. 31, 2011). When the Department made a relevance objection, the following exchange occurred:

> THE COURT: I need to ask why that wouldn't be relevant in the discovery case where they're seeking to recover under the tort claim. I don't understand your objection of relevance. You think if you were trying that case that wouldn't be relevant?
>
> MR. CLARK: I think that's a good question you pose, your honor. I would add again this is not a discovery case, it is a public records case.
>
> THE COURT: You know, it is a discovery case. You're alleged to have not disclosed the discovery that's necessary in a tort claim. And in order to determine that you have to know what it is about.

RP at 65 (Aug. 31, 2011).

During closing argument the following day, the trial court continued to insist this was a discovery case:

> MR. CLARK: We would argue it's not a discovery request, it is a request for public records.

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[20] The Department's three witnesses, Dianne Fuller, Kristal Wiitala, and Barbara McPherson, testified about how the 2007 and 2008 requests were processed. Their testimony is summarized in the factual background above. Both Ms. Fuller and Ms. McPherson testified that the PRIDE Manual and Investigation Protocols document were not kept in Ms. Wright's Children's Administration file. RP at 96-97, 159 (Aug. 31, 2011). Ms. Wiitala and Ms. McPherson testified that the 2008 request did not ask for the PRIDE Manual and Investigative Protocols document. RP at 123, 159 (Aug. 31, 2011).

> THE COURT: See, that's where you're starting off, in my opinion, representing your client on the wrong foot. What was the basis for this request? It is a trial and what do you do in trials? You send out interrogatories, you take depositions, what is all that categorized as? Discovery.

RP at 17 (Sep. 1, 2011).[21] A few minutes later the trial court again interrupted the Department's closing statement:

> THE COURT: Again, that gets me to where I just have trouble. All of this would not need to happen where experienced lawyers know what they should do in completing discovery. And just because you're part of the executive branch of the government does not give you the right to obstruct.

RP at 17 (Sep. 1, 2011). When the Department attempted to explain the appellate court's precedent distinguishing RCW 13.50 from the PRA, the trial judge asserted this "discovery" case could have been avoided if "the lawyers would have got together for this discovery and worked out protection orders[.]" RP at 31 (Sep. 1, 2011).[22]

At the end of the trial the court signed Ms. Wright's proposed order without any substantive modification. RP at 57 (Sep. 1, 2011); CP at 565-67. The only explanation or legal analysis the trial court provided was the following:

> THE COURT: I'm finding, as I've indicated I think

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[21] More extended excerpts of RP (Sep. 1, 2011) are attached as Appendix F.

[22] The Department's counsel responded that protective orders are irrelevant to the three documents because there was a signed authorization for the recorded child interview, and the other two records would be released to the public upon request without a protective order. RP at 32 (Sep. 1, 2011).

> throughout this, that there was an unbelievable obstruction of justice by the executive branch of our government contrary to what this country is all about, again, which is open government, justice, and that's been violated, violated maliciously almost. The obstruction is clear and it insults the citizens of this country for a government entity to proceed as DSHS proceeded in this matter.

RP at 57 (Sep. 1, 2011).

On November 18, 2011, the trial court heard Ms. Wright's petition for PRA penalties, attorney's fees, and costs. *See* RP at 1-49 (Nov. 18, 2011). Ms. Wright's petition relied on the trial judge's "obstruction of justice" statement as support for finding bad faith, and provided a single page of briefing on the penalty factors set out in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 471, 229 P.3d 735, 749 (2010); CP at 575, 579-580, 585.

Ms. Wright asked for a per record penalty for each of the disputed records at $100 per day, with the recorded child interview and transcript penalized separately for the two requests, for a total PRA penalty of $287,800.[23] CP at 585, 632. She also asked for $346,000 in attorney fees, which included a 2x lodestar multiplier, and $16,096.87 in costs. CP at 585-586, 662, 664, 667, 735.[24]

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[23] Ms. Wright thus requested (and received) $200 per day penalties for the recorded child interview and transcript for the period from May 20, 2008 (date of 2008 request) to December 11, 2009 (date provided). *See* CP at 632.

[24] Ms. Wright's petition listed the total hours spent by each of her four attorneys on this case, but provided no breakdown or billing summary of the attorney work

The Department raised several legal arguments against Ms. Wright's proposed penalty scheme, and provided extensive briefing on the *Yousoufian* factors, supported by declarations from Kristal Wiitala and Barbara McPherson. CP at 671-87, 694, 706.[25] In oral argument, the Department reviewed the evidence, showed how it is "not a fact pattern for bad faith," and asked the trial court "to move away from its statement of an obstruction of justice." RP at 16 (Nov. 18, 2011).

At the end of the hearing the trial court again provided very little legal analysis, instead repeating its conclusion that the Department obstructed justice in its attempt to comply with the statutes:

> THE COURT: . . . In this Court's judgment this was an unbelievable obstruction of justice, subtle, but obstruction by DSHS which is contrary to what this Court believes that this country is all about. The obstruction is clear and insults the citizens of this country where a government entity to proceed as DSHS did in this matter . . . .

RP at 45 (Nov. 18, 2011). The court signed Ms. Wright's proposed judgment without modification, awarding a total judgment of $649,896.87.

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expended on this case. *See* CP at 662, 667. Ms. Wright did provide a detailed attorney fee billing summary with her reply brief; the trial court denied the Department's request for an opportunity to provide a written response to the court on the detailed billing summary. CP at 754-65, 780-84; RP at 24 (Nov. 18, 2011).

[25] Without conceding any violation of the PRA, the Department asked the trial court to (1) not apply a double penalty to the recorded child interview from May, 20, 2008 forward; (2) treat the PRIDE Manual and Investigation Protocols document as a single record category; (3) reduce the penalty periods to the actual number of days Ms. Wright did not receive the records; (4) not penalize the Department for the audio recording transcription, which was created after the requests for records; and (5) not aggravate the penalty for not providing a privilege log. CP at 672-84.

RP at 44-46 (Nov. 18, 2011); CP at 785-88. The Department filed an appeal and notice of supersedeas to stay the judgment. CP at 789-803.

V. ARGUMENT

A. Standard Of Review

Questions of law, including an agency's obligations under the PRA, are reviewed de novo. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 145, 270 P.3d 1149 (2010). When construing the PRA, this court "look[s] at the act in its entirety in order to enforce the law's overall purpose." *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009).

A trial court's findings of fact based on a testimonial record are reviewed for substantial evidence; to survive scrutiny, findings must be supported by substantial evidence. *Zink v City of Mesa*, 140 Wn. App. 328, 337, 166 P.3d 738 (2007), *review denied*, 162 Wn.2d 1014 (2008).

A trial court's determination of daily penalties under the PRA is reviewed for abuse of discretion. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 431, 98 P.3d 463 (2005). A trial court's decision regarding the amount of an award of attorney's fees and costs is also reviewed for abuse of discretion. *Sanders v State*, 169 Wn.2d 827, 866, 240 P.3d 120, 140 (2010). "A trial court abuses its discretion when it makes a decision that is manifestly unreasonable or based on untenable

reasons." *Yousoufian*, 168 Wn.2d at 471, quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court's decision is manifestly unreasonable if it takes a view no reasonable person would take. *Yousoufian*, 168 Wn.2d at 471. A decision rests on untenable reasons if it is the result of an incorrect standard or facts that do not meet the correct standard. *Yousoufian*, 168 Wn.2d at 471, quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

B. This Litigation Was Filed After The Statute Of Limitations Ran And Should Have Been Dismissed At The Outset (Issue 1)

Four records are at issue here. As explained fully in the next section, two of the records (the recorded interview and transcription) are not discloseable under the PRA, because their confidentiality and discloseability are determined solely by RCW 13.50. The PRA does not apply to them. Therefore, there can be no action under the PRA to compel their disclosure or seek a remedy. Any action to compel nondisclosure of records under RCW 13.50 must be brought in juvenile court under that chapter. This case was not brought in juvenile court, was not brought under RCW 13.50, and the confidentiality or discloseability of those two records therefore was not before the superior court. Accordingly, there could be no PRA violation or penalty assessed with respect to these two records.

The other two records (the PRIDE Manual and the Investigative Protocols document) are discloseable under the PRA, but only if requested.[26] Regardless of whether these two documents were requested, the statute of limitations on the 2007 request began to run on June 1, 2007, when the Department completed its response to that request. *See* Ex. 205.

RCW 42.56.550 provides, in pertinent part, that "[a]ctions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." RCW 42.56.550(6). Thus, because the PRA provides for a one year statute of limitations within which a party must bring an action, or be forever barred, the statutory deadline for challenging the response to the 2007 request was June 1, 2008. Since Ms. Wright filed this PRA lawsuit on April 6, 2010, she missed the limitations period by 674 days (approximately 22 months). *See* CP at 1.

Alternatively, since the 2007 request was for records governed by RCW 13.50.100 instead of the PRA, the "catch-all" two year statute of limitations under RCW 4.16.130 applies to that request, her limitations period ran on June 1, 2009, and her lawsuit was 309 days late.[27] *See*

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[26] As explained below, neither were requested in either the 2007 or 2008 request.

[27] When the Department argued in closing argument that claims involving the 2007 request were time-barred, the court responded:

> THE COURT: So if you delay and obstruct long enough, the statute of limitations come into play and you're out, I don't think so.

Johnson v. State Dep't of Corr., 164 Wn. App. 769, 778, 265 P.3d 216 (2011) (court "need not choose whether RCW 42.56.550(6)'s one-year statute of limitations or RCW 4.16.130's two-year 'catch-all' statute of limitations applies" if action not filed within the longer period).

With regard to the 2008 request, the statute of limitations began to run on July 31, 2008, when Ms. Wiitala provided all non-child welfare records. Ms. Wiitala's first installment was provided on July 24, 2008, and her second and final installment under the PRA was provided on July 31, 2008. Exs. 211, 221. Thus, Ms. Wright had to file this PRA lawsuit by July 31, 2009, and she was 249 days late. Even if the installments of Ms. Wright's child welfare file are considered PRA installments, Ms. McPherson provided the second and final Children's Administration installment on November 14, 2008, which means Ms. Wright missed the November 14, 2009 one year filing deadline by 143 days. Exs. 213, 214.

This PRA action was time-barred and must be dismissed. *Johnson*, 164 Wn. App. at 779-80. The trial court's orders should all be vacated.

C. Amber Wright's Recorded Child Interview And Its Transcription May Be Disclosed Only As Provided In RCW 13.50.100 (Issues 2, 3)

Under RCW 13.50, the recording and transcription of Amber

RP at 19-20 (Sep. 1, 2011).

Wright's child interview are confidential and the Department may release them only as specifically provided in RCW 13.50.100. They are not subject to the PRA's disclosure provisions.

The requirements of RCW 13.50 apply "to all juvenile justice or care agency records created on or after July 1, 1978." RCW 13.50.250. "Juvenile justice or care agency" is defined to include the Department and "records" is defined as the "official juvenile court file, the social file, and records of any other juvenile justice or care agency in the case[.]" RCW 13.50.010(1)(a), (1)(c). Thus, the contents of Ms. Wright's juvenile case file held by the Department's Children's Administration, including the recorded child interview and its transcription, are records of a juvenile justice or care agency subject to RCW 13.50.

RCW 13.50.100 governs the protection and release of all records regulated by RCW 13.50, other than records relating to the commission of juvenile offenses.[28] "Records covered by this section *shall be confidential and shall be released only pursuant to this section* and RCW 13.50.010." RCW 13.50.100(2) (emphasis added).

Although the public does not have access to them, a juvenile or a juvenile's attorney "shall, upon request, be given access to all records and information collected or retained by a juvenile justice or care agency

[28] Records relating to the commission of juvenile offenses are governed by RCW 13.50.050.

which pertain to the juvenile[.]" RCW 13.50.100(7).[29] The Department consistently explained to Ms. Wright's attorneys that the processing and release of Ms. Wright's Children's Administration file is governed by RCW 13.50. *See* Exs. 202, 207 at 1, 213, 214, 215. If Ms. Wright or her attorneys believed she was denied access to the recorded child interview, they were required to comply with the exclusive process set forth in RCW 13.50.100:

> (8) A juvenile or his or her parent denied access to any records following an agency determination under subsection (7) of this section may file a motion in juvenile court requesting access to the records. The court shall grant the motion unless it finds access may not be permitted according to the standards found in subsection (7)(a) and (b) of this section.

RCW 13.50.100(8). They did not follow this procedure, instead filing an action in superior court *solely* claiming violations of the PRA.

This Court recognized that RCW 13.50 provides the exclusive procedure for obtaining such records in *Deer v. Dep't of Social & Health Servs.*, 122 Wn. App. 84, 88, 93 P.3d 195 (2004), a case involving a PRA request for Child Protective Services records held by the Department. This Court held that RCW 13.50 qualifies as an "other statute" under former RCW 42.17.260(1) (now codified at RCW 42.56.070(1)) because the protections of RCW 13.50 are consistent with the PRA's purpose of

[29] The statute includes exceptions that are not relevant to this appeal. RCW 13.50.100(7)(a)-(c).

exempting from its purview only those "public records most capable of causing substantial damage to the privacy rights of citizens." *Deer*, 122 Wn. App. at 91, quoting *Limstrom v. Ladenburg*, 136 Wn.2d 595, 607, 963 P.2d 869 (1998). The Court explained that RCW 13.50 contains an alternative means of requesting and seeking juvenile records that balances and protects the privacy needs of the juvenile and his or her family and that is not in conflict with the PRA. *Deer*, 122 Wn. App. at 92. Citing the language in RCW 13.50.100(2), this Court held:

> This language not only provides for a means of obtaining access to the juvenile records, it also makes clear that this method is the *exclusive means* of obtaining juvenile justice and care records. A parent or person included in the records who has been denied access to these records "may file a motion in juvenile court requesting access to the records.

Deer, 122 Wn. App. at 92-93 (emphasis added). The Court summarized its holding as follows, in pertinent part:

> [T]he limitations in chapter 13.50 RCW on access to juvenile records and the procedures in chapter 13.50 RCW for obtaining access to those records provide an exception to the general rule that all records are open. A party denied access to juvenile records must follow the procedures set forth in chapter 13.50 RCW.

Id., at 94.

This Court further recognized that RCW 13.50 is the exclusive method for obtaining penalties if a child welfare record is not provided. In *In re Dependency of K.B.*, 150 Wn. App. 912, 210 P.3d 330 (2009), a

mother made a request to the Department for all records regarding herself and her daughter following a dependency guardianship hearing. *K.B.*, 150 Wn. App. at 916. When KB's mother did not receive the records, she filed a motion requesting access to records, attorney fees, and a daily fine of $100 for each day her requests were not fulfilled. *Id.*, at 917. The trial court denied her motion, and KB's mother appealed. *Id.*, at 917-18. On appeal, KB's mother argued that the PRA allowed her to obtain penalties and fees. *Id.*

The mother agreed that RCW 13.50 provided the exclusive process for obtaining the Department records, but she argued that sanctions for wrongful nondisclosure of records should include those allowed under the PRA. *K.B.*, 150 Wn. App. at 920, 922. This Court disagreed, explaining that "RCW 13.50.100 contains two remedial provisions which apply when DSHS fails to provide requested records, RCW 13.50.100(8) and (10)." *K.B.*, 150 Wn. App. at 921.[30] The Court reasoned that "[i]f the legislature had intended to provide PRA sanctions in cases in which DSHS wrongfully denies access to chapter 13.50 RCW records, then it would

[30] In *K.B.*, as in the present case, RCW 13.50.100(10) applies because no agency determination was made under RCW 13.50.100(7). *See In re K.B.*, 50 Wn. App. at 921. This Court explained that RCW 13.50.100 virtually mirrors RCW 42.56.550(4) because it provides for attorney fees, costs, and other sanctions when the Department wrongfully denies a records request. *In re K.B.*, 50 Wn. App. at 923. RCW 13.50.100(10) authorizes a prevailing party to obtain attorneys' fees, costs, and "an amount not less than five dollars and not more than one hundred dollars for each day the records were wrongfully denied."

have specified this in RCW 13.50.100(10)." *K.B.*, 150 Wn. App. at 923. The Court refused to allow any penalties and fees under the PRA. *Id.*, at 924.

Applying the plain language of RCW 13.50, as interpreted by this Court in *Deer* and *K.B.*, Ms. Wright was required to follow the exclusive process in RCW 13.50.100 to address her claim that she was delayed access to the recorded child interview in her Children's Administration file. She cannot obtain relief by filing a PRA lawsuit in superior court.

The trial court in this case flatly refused to apply RCW 13.50.100. When denying summary judgment, the trial court explained its refusal as: "[b]ecause I don't think it's fair." RP at 21 (April 29, 2011). In the Department's opening statement at trial, when the Department tried to explain how RCW 13.50.100 protects records, the trial court accused the Department of "hiding behind" RCW 13.50, which it believed "was not lawful." RP at 31 (Aug. 31, 2011). The trial court repeated its accusation a few minutes later: "[Y]ou can't hide behind some esoteric definition under Title 13 or Title 42.56." RP at 35 (Aug. 31, 2011).

The Department made one last attempt at the RCW 13.50.100 argument during closing argument at trial. Instead of addressing the statute's application, the trial court responded with a statement about the importance of jury trials and said "when you can't trust the executive

branch of your government to follow what's inherent in a jury trial, we've got real problems." RP at 30-31 (Sep. 1, 2011).

The trial court erred in refusing to apply RCW 13.50.100 to the recorded child interview. This Court should hold that the release of the recorded child interview from Ms. Wright's Children's Administration file and the later transcription of that interview is exclusively governed by RCW 13.50.100, that this case was not filed pursuant to the exclusive process provided in RCW 13.50.100, that the trial court erred by finding violations under the PRA, that Ms. Wright is not entitled to any remedy under the PRA for these records, and vacate the trial court's award of penalties, fees and costs under the PRA for these records.

In addition, that the transcription was not in existence at the time the relevant requests were filed constitutes a separate ground for reversing and vacating the PRA penalty imposed by the trial court for the transcript. *Building Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 734, 218 P.3d 196 (2009) (an agency has no duty under the PRA to create or produce a record that does not exist at the time of a public record request); *accord Zink v. City of Mesa*, 162 Wn. App. 688, 718, 256 P.3d 384 (2011).

D. The PRIDE Manual And The Investigation Protocols Document Were Not Requested In Either Records Request; The PRA Does Not Require The Department To Provide Records That Were Not Requested (Issues 4, 6)

The PRA does not require agencies to be mindreaders. *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), *review denied*, 137 Wn. 2d 1012 (1999). The PRA thus requires agencies to respond to requests only for "identifiable public records." *See* RCW 42.56.080; *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447-48, 90 P.3d 26 (2003). A request must be stated with sufficient clarity to give the agency fair notice that it had received a request for specific records. *See Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000) (an identifiable public record is one in which the requester has given "a reasonable description enabling the government employee to locate the requested records").

Here, the trial court erred as a matter of law by not applying the "identifiable public records" standard in RCW 42.56.080. As described above, at pages 16-20, the trial court repeatedly and consistently applied a vague "discovery standard," instead of the statutory standard. The trial court interrupted the Department's opening statement multiple times to state that it considered this case to be a discovery dispute. *See, e.g.*, RP at 29-30, 32, 34, 35-36 (Aug. 31, 2011). The trial court consistently referenced discovery standards during testimony. *See, e.g.*, RP at 64-65 (Aug. 31, 2011). During closing argument, the trial court continued to assert its belief that this case is a discovery case. *See, e.g.*, RP at 16-17,

31-32 (Sep. 1, 2011). Even at closing argument in the penalty hearing, the trial court treated this case as a discovery case:

> THE COURT: What's more important to a trial than discovery, that's what this case is all about, discovery. What does it say going clear back to the Magna Carta, the two most important things in that, government by representation and jury trials. You can't have a jury trial without having discovery, the right to discovery, and the complete discovery.

RP at 33 (Nov. 18, 2011).

The trial court erred in repeatedly focusing on a broad discovery principle instead of focusing on whether language in Ms. Wright's requests actually identified a category of records that includes these two documents, as required by RCW 42.56.080.

Neither the 2007 nor the 2008 records requests asked for the PRIDE Manual or the Investigation Protocols document. The PRIDE Manual is a Department-wide training manual for foster parents and potential adoptive parents. RP at 159 (Aug. 31, 2011); CP at 710, 719-22. The Investigations Protocol document is a detailed agreement with Pierce County entities and law enforcement establishing protocols for investigating sexual and physical child abuse. Ex. 5 (generally at 2 to 59).

The 2007 request from Mr. Hick asked for "a copy of her entire DSHS file." Ex. 203 (attached as Appendix A to this brief). As explained above, Ms. Fuller confirmed by letter that the request was only for

Ms. Wright's Children Administration file, and the testimony at trial confirmed that the PRIDE Manual and Investigation Protocols document are not specific to any person and are not part of Ms. Wright's file. Ex. 204; RP at 94, 96-97, 159-60 (Aug. 31, 2011).

The 2008 request, although long and detailed, also did not ask for the PRIDE Manual or the Investigation Protocols document. Ex. 206 (Appendix B of this brief). The request is in four parts, all focusing on documents related specifically to Amber Wright or her father.[31]

There is nothing in the orders issued by the trial court that references the language of the requests, nor is there any indication the trial court examined that language. Indeed, it appears that the briefing and testimony offered on behalf of Ms. Wright sought to avoid that language.

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[31] The first part asks for documents already produced to any person regarding Amber Wright or her father. Ex. 206 at 1.

The second part asks for documents related to complaints reported to and investigated by the Department. Ex. 206 at 2. Mr. Moody requested copies of documents "regarding the Department's CPS history as it relates to Amber Wright and/or David Wright" and other documents "regarding" or "relating to" Amber Wright or her father. Ex. 206 at 2, 5 (¶¶ 1, 14). The second part also includes twelve separate and numbered Child Protective Services referral matters, providing a CPS ID number and date for each referral. Ex. 206 at 2-5 (¶¶ 2-13). Each of these twelve separate requests for CPS referral records contained language specifically referencing "reports, compliance agreements, revocation letters, etc.," all of which are examples of documents that are specific to the CPS referral in Ms. Wright's file.

The third part asks for the "Department's Files of Amber Wright." Ex. 206 at 6. While it requests "any and all documents related in any manner whatsoever to the Department's files as they relate to Amber Wright," that request is clarified by four enumerated sentences referring to assessments, service plans, medical and counseling records, and sexual assault examinations and records relating to Ms. Wright. Ex. 206 at 6.

The fourth part asks for other documents related to Ms. Wright or her father. Ex. 206 at 6-7.

The request language is not accurately quoted in any pleading filed by Ms. Wright. *See, e.g.*, Ms. Wright's petition for PRA penalties and fees. CP at 574-78. The request language also was not mentioned in Ms. Wright's closing argument. *See* RP at 1-12 (Sep. 1, 2011).

When the Department asked Ms. Wright's only witness at trial, Ms. Kent, about the language in the 2007 request, she testified that it asked "for all records pertaining to Ms. Wright" and then said the Investigative Protocols document was "relevant" to Amber's case. RP at 82 (Aug. 31, 2011). When counsel attempted to follow up, the trial court interrupted:

> THE COURT: She's answered. She said any and all records. We shouldn't be playing word games here, that's what the problem is. Any person knows you ask for any and all the records that pertain to this claim, that's what you provide. And I don't know of any magistrate that's going to put up with trying to, I don't know what you call it, obstruct is the only thing I can think of, the words discovery. Discovery is discovery is discovery.

RP at 83 (Aug. 31, 2011).[32] However, Ms. Kent later testified the 2007

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[32] The trial court consistently referred to the relevancy standard in discovery, rather than the statutory requirements in the PRA. For example, when Ms. Wiitala was asked about the language used in the records requests, the trial court interrupted again:

> THE COURT: Let me tell you something, I'm not buying that, that it has to be so specific. That's just not justice. If you don't mention protocols or manuals you don't get it. You know, that's really distasteful.
>
> MR. CLARK: Am I still permitted to ask my witness the questions about that?
>
> THE COURT: You can ask all the questions you want, but anyone looking at this has to understand that you can't be so specific

request was actually for the DSHS file on Ms. Wright and that the PRIDE Manual and Investigation Protocols document are not kept in every child's case file. RP at 84 (Aug. 31, 2011).

Ms. Fuller and Ms. McPherson testified that the PRIDE Manual and the Investigation Protocols document are not records that would be stored in a child's DSHS file and are not records specific to Ms. Wright. RP at 96-97, 159 (Aug. 31, 2011). Ms. Wiitala testified that she read the 2008 request as asking for records relating specifically to Amber Wright and David Wright, and not for general policies, procedures, manuals, or protocols. RP at 122 (Aug. 31, 2011). She also testified that she has received other records requests from Mr. Moody, and that he had asked for manuals and protocols in other requests, but not in this one. RP at 122-23 (Aug. 31, 2011).

The language of both requests asked for records *specifically* related to Ms. Wright (and her father in the second request), focusing on various files involving Ms. Wright. Neither request mentioned general departmental manuals, protocols, policies, or other similar documents. The Department did not consider PRIDE Manual and the Investigation Protocols document responsive to the 2007 or 2008 requests for records.

> when you're asking for discovery if you don't say manuals and protocols and so on. That's just not lawful in my opinion.

RP at 123-24 (Aug. 31, 2011).

RP at 122-24, 159-60 (Aug. 31, 2011). Given the language of the requests, the Department's understanding was reasonable.[33]

Under RCW 42.56.080, the two documents were not "identifiable public records" described in either of Ms. Wright's records requests. In other words, neither request asked for these two documents and the Department did not violate the PRA by not providing documents that were never requested. This Court should reverse the trial court, hold that the Department did not violate the PRA by not producing these two documents, and vacate the orders granting PRA remedies.

E. The PRA Does Not Require A Privilege Log Where No Records Are Withheld (Issue 5)

RCW 42.56.210(3) requires that "an agency withholding or redacting any record must specify the exemption *and* give a brief explanation of how the exemption applies to the document." RCW 42.56.210(3). *Sanders v. State*, 169 Wn.2d 827, 846, 240 P.3d 120 (2010) (emphasis in original). Exemption logs are needed only where documents are withheld in their entirety, or where redacted documents provided to a requester do not properly identify and provide a brief explanation of the exemption being claimed. *See Rental Housing*, 165 Wn.2d at 541.

[33] Moreover, prior to this litigation Ms. Wright's attorneys never mentioned these two documents to the Department in the context of their public records requests.

As the *Rental Housing* court explained, the purpose of an exemption log is to provide the requester with a "specific means of identifying any individual records which are being withheld in their entirety." *Rental Housing*, 165 Wn.2d at 538, citing *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 270-71, 884 P.2d 592 (1994). Although *Rental Housing* does require an agency to identify responsive records that are being withheld in their entirety, it does not mandate an exemption log for responsive records that are initially missed due to inadvertent mistake (such as the recorded child interview, if it were subject to the PRA's provisions rather than those of RCW 13.50), records that were never identified by the agency as being responsive (such as the PRIDE Manual and Investigation Protocols document), or records that did not exist at the time of the request (such as the transcription of the recorded child interview).

Ms. Wright's suggestion that such documents be on a privilege log is absurd. If a record is mistakenly missed, the agency would not know to put the erroneously undisclosed document on a privilege log. RP at 155 (Aug. 31, 2011). In the case of the recorded child interview in this case, the agency would never put that document on a privilege log; they would provide the record as soon as the error is found. RP at 145 (Aug. 31, 2011). Likewise, it would be similarly absurd to require the Department

to list records that are not requested or that do not exist. The trial court's findings on this issue were unsupported by substantial evidence, and the resulting PRA remedies awarded by the trial court should be vacated.

F. The Trial Court Applied Incorrect Standards, Ignored The Law, And Abused Its Discretion In Determining and Awarding Penalties Under The PRA (Issue 7)[34]

As explained above, the trial court erred as a matter of law in awarding penalties where the litigation was barred because it was filed after the statute of limitations had run. On that basis alone, this Court may reverse the trial court; vacate its award of penalties, attorney fees, and costs; and dismiss this action in its entirety.

As also explained above, the Department did not violate the PRA, on any of the grounds alleged by Ms. Wright and/or adopted by the superior court. The trial court erred as a matter of law in awarding any penalties where there was no violation of the PRA.

Even if penalties had been appropriate under the PRA, the trial court erred as a matter of law and abused its discretion when it used its own undefined "obstruction of justice" standard, instead of applying the *Yousoufian* factors, and awarded a per-record penalty of $100 per day. Determining the appropriate per day penalty is within the discretion of the trial court, and the Washington Supreme Court has set forth sixteen

[34] The remaining issues may not need to be addressed if this Court determines that the prior appeal issues require vacating or reversal of the trial court's orders.

nonexclusive mitigating and aggravating factors that a trial court may consider when determining a daily PRA penalty. *Yousoufian*, 168 Wn.2d at 439, 467-68. A strict and singular emphasis on good faith or bad faith is inadequate to fully consider a PRA penalty determination. *Id.* at 461. But that is exactly what the trial court did here.

At the conclusion of both the trial and the penalty hearing, the trial court referred to this case as an "unbelievable obstruction of justice." RP at 57 (Sep. 1, 2011); RP at 45 (Nov. 18, 2011). The trial court came up with this obstruction of justice standard sua sponte. Obstruction of justice is a crime and is a serious accusation that should not be alleged lightly. *See In re Recall of Lindquist*, 172 Wn.2d 120, 137, 258 P.3d 9, 17 (2011) (accusation of obstruction of justice is a serious allegation, and doing so baselessly without knowing the elements justifies an award of attorney fees). The trial court never did explain why it thought this case involved an obstruction of justice.[35]

Ms. Wright, in her petition for penalties, relied heavily on the trial court's "obstruction of justice" standard; accordingly, her petition provided less than one page of argument on *Yousoufian* aggravating factors; the argument is comprised of a list of factors and a reference to the

[35] At the penalty hearing the Department's counsel asked that the trial court not use the obstruction of justice standard because it indicates a crime, and because Ms. Wright never asked for this standard at the trial. RP at 16 (Nov. 18, 2011). The Department strongly disputes that there was any obstruction.

privilege log. CP at 575, 579-80. Nevertheless, without providing any specific details, Ms. Wright's counsel argued at the penalty hearing that "[e]ach of the aggravating factors described in the *Yousoufian* case apply to this particular case." RP at 8 (Nov. 18, 2011).

The Department presented the trial court with extensive briefing and argument on other penalty cases, along with supporting declarations from Ms. Wiitala and Ms. McPherson on numerous *Yousoufian* mitigating factors, much of which was uncontested. CP at 671-683, 694-700, 706-711; RP at 9-23 (Nov. 18, 2011). However, in applying the maximum $100 per-record daily penalty, the trial court completely discounted all mitigation evidence. For example, the Department showed that its employees have substantial PRA training, and that the State Auditor's Office found the Department to be a top PRA performer in 2008; the trial court responded, "That in itself is scary to this Court." RP at 18 (Nov. 18, 2011). And in response to the Department's evidence that although the agency receives some 24,000 record requests per year, it only has about seven PRA lawsuits per year, the trial court suggested the following:

> THE COURT: Now, what's the reason for that? Arguably, the reason for that is that people who seek justice in their claims don't have the patience, don't have the money, to prosecute their claims when the obstruction is as it was in this case and so they give up. It is too big and powerful and individual people aren't important.

RP at 18 (Nov. 18, 2011); CP at 698-99.

Every record at issue in this case was voluntarily provided to Ms. Wright before this PRA lawsuit was filed.[36] Exs. 5, 6, 215. This PRA lawsuit did not cause a single record to be disclosed. The trial court's oral penalty ruling and resulting judgment completely failed to articulate the actual facts, evidence, or application of the *Yousoufian* factors that support awarding $100 per-record penalties totaling $287,800. RP at 46 (Nov. 18, 2011); CP at 786.

It was an abuse of discretion for the trial court to award this penalty based on an undefined obstruction of justice standard instead of applying the *Yousoufian* factors. This Court should vacate the award of penalties on this basis.

Although the penalty award should be reversed and vacated for the reasons given above, it should be noted that the trial court also erred as a matter of law by agreeing to a double penalty (to $200 per day) for the recorded child interview simply because it had been requested twice. Under RCW 42.56.550(4), the trial court only had discretion to award a "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." Because the trial court awarded a $100 per day penalty for the recorded

[36] The PRIDE Manual and Investigation Protocols document were provided in response to discovery in Ms. Wright's negligence case. Exs. 5, 6.

child interview for both the 2007 and 2008 requests, Ms. Wright received a daily penalty of $200 per day for that single record for a period of 570 days ending on December 11, 2009.[37] CP at 632, 787. This violates the plain language of RCW 42.56.550(4).

G. The Superior Court Committed Legal Error And Abused Its Discretion In Awarding Attorney Fees And Costs (Issues 8, 9)

As explained above, the superior court erred as a matter of law in awarding any penalties at all where the litigation was barred because it was filed after the statute of limitations had run. Failure to timely file a PRA action also bars an award of attorney fees and costs. On that basis alone, this Court may reverse the superior court; vacate its award of penalties, attorney fees, and costs; and dismiss this action in its entirety.

Attorney fees and costs are available only to a prevailing party. RCW 42.56.550. Where there is no violation of the PRA, there is no prevailing party. *See Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 172 P.3d 329 (2007) (whether a party is prevailing is a legal question of whether the records should have been disclosed on request). Because the Department did not violate the PRA, the trial court erred as a matter of law in awarding any attorney fees and costs, and this Court should vacate that award in its entirety.

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[37] This 570 days is the period from the May 20, 2008 request until the recorded interview was provided on December 11, 2009. *See* CP at 632.

The Department does not concede any violation of the PRA and does not concede that any attorney fees should be awarded. Even if an award of attorney fees had been warranted, the trial court abused its discretion by failing to conduct a thorough lodestar analysis when it awarded Ms. Wright *all* of her $346,000 requested attorneys' fees, which were billed at up to $500 per hour and included a lodestar 2x multiplier.

The lodestar method is appropriate for calculating attorney fees under the PRA. *Sanders,* 169 Wn.2d at 869. A Lodestar figure is determined as follows:

> The trial court must determine the number of hours reasonably expended in the litigation. . . . The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. [citation omitted] A trial court may reduce the requested fee if it finds that the hours billed are excessive or unnecessary.

American Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503, 95 Wn. App. 106, 118, 975 P.2d 536 (1999). A court using the lodestar method multiplies a reasonable attorney rate for the prevailing party by a reasonable number of hours worked. *Sanders*, 169 Wn.2d at 869.

The party seeking attorney fees bears the burden of proving the reasonableness of the fees. *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998). The reasonableness of the fees must be determined independently by the court, and the court should take an active role in

analyzing attorney fee awards. *Absher Constr. Co. v. Kent Sch. Dist.*, 79 Wn. App. 841, 846, 917 P.2d 1086 (1995), *citing Nordstrom v. Tampourlos,* 107 Wn.2d 735, 744, 733 P.2d 208 (1987).[38]

The trial court may supplement its Lodestar determination using the factors listed in former RPC 1.5(a), and one such factor is "[t]he fee customarily charged in the locality for similar legal services." *See Mahler,* 135 Wn.2d at 433 n.20. Ms. Wright claimed her primary attorney fee rate was $500 per hour, but she provided no evidence that any attorney has ever charged or been awarded that rate in a PRA case. CP at 643. In response the Department cited *West v. Port of Olympia,* 146 Wn. App. 108, 123, 192 P.3d 926 (2008), to show that $300 per hour had been held to be an unreasonable hourly fee in a PRA lawsuit, even where the attorney is former Washington State Supreme Court Justice Philip Talmadge. RP at 27-28 (Nov. 18, 2011); CP at 686. The trial court speculated that the fee was set at $250 per hour in that case because Justice Talmadge faced an unsophisticated litigant. RP at 28 (Nov. 18, 2011). Nothing in the *West*

---

[38] In *Nordstrom*, the Supreme Court cautioned against simply adopting the request of the plaintiff's attorney, as the superior court did in this case. The Supreme Court warned:

> [T]he determination of what constitutes reasonable attorney fees should not be accomplished solely by reference to the number of hours which the law firm representing the successful plaintiff can bill. . . . [T]he trial court, instead of merely relying on the billing records of the plaintiff's attorney, should make an independent decision as to what represents a reasonable amount for attorney fees. The amount actually spent by the plaintiff's attorney may be relevant, but it is in no way dispositive.

Nordstrom v. Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987).

decision supports that speculation. The trial court abused its discretion by approving $500 as a reasonable hourly fee in a PRA case.

The trial court abused its discretion by making absolutely no reductions to the 427 hours of legal time requested by Ms. Wright. CP at 740. The issues in this case were not particularly complex. Ms. Wright had one witness, entered nine exhibits at trial, and failed to file a trial brief. She argued that four records[39] were provided late. CP at 561, 565-566. Moreover, at the penalty hearing, the Department identified more than $62,000 in fees that appeared to be improper or unjustified, including $11,000 in fees for work performed before the litigation, $1,600 for filing the lawsuit, $27,000 for document review, and $24,000 for preparing a 14 page petition. RP at 25, 27 (Nov. 18, 2011).[40] The trial court abused its discretion by failing to independently scrutinize all these cost and fee issues.

For a court to determine the number of hours reasonably expended in the litigation, "the attorneys must provide reasonable documentation of the work performed." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d

[39] Four records out of roughly 5,600 total records produced in response to the 2007 and 2008 requests. CP at 670; Exs. 205, 213, 214.

[40] The Department also identified several impermissible expenditures as part of Ms. Wright's request for $16,096.87 in litigation costs. For example, the Department asked the superior court to deduct roughly $6,300 paid in expert witness fees to Ms. Kent because she was never qualified as an expert in public records and she provided no expert opinions. RP at 34-35 (Nov. 18, 2011).

581, 597, 675 P.2d 193 (1983). In addition to the number of hours worked, the documentation must include "the type of work performed and the category of attorney who performed the work." *Id.*

Ms. Wright's petition for attorney fees provided lump-sum hours for each of her four attorneys, but failed to give any information on the work performed. CP at 642-44. When the Department's response complained about this, Ms. Wright then submitted 12 pages of detailed attorney fee billing information in her reply brief. CP at 685, 754-765.

At the penalty hearing the Department asked the trial court to "either strike their detailed billings or provide DSHS a fair opportunity to provide a response to their detailed billings that were provided in the reply brief instead of their petition." RP at 24 (Nov. 18, 2011). The trial court denied the request without explanation. RP at 24 (Nov. 18, 2011). The trial court abused its discretion by refusing to allow the Department a fair opportunity to respond to Ms. Wright's detailed attorney fee billing summary submitted with her reply brief.

Not only did the trial court abandon its duty to independently scrutinize the attorney fees and costs requested, but it also abused its discretion by applying a lodestar 2x multiplier without conducting any analysis whatsoever. As a consequence, the superior court effectively awarded attorney fees of up to $1,000 per hour.

The superior court refused to acknowledge the Washington Supreme Court's approval of a trial court's refusal to grant Justice Sanders his requested 1.5 lodestar multiplier in a PRA case. *See Sanders*, 169 Wn.2d at 869. "It was not an abuse of discretion for the trial court to refuse to give Justice Sanders the benefit of the exception when the rate times hours product already greatly exceeded the contingency fee for the case." *Id.* In this case, based on the trial court's penalty award to Ms. Wright of $287,800, the trial court's attorney fee award of $346,000 would be a contingency fee of 120 percent,[41] which is the personification of an unreasonable attorney fee. The trial court's doubling of these already excessive attorney fees was an abuse of discretion.

VI. CONCLUSION

This Court should reverse the trial court, vacate its judgment awarding penalties and attorney fees, and dismiss the underlying case in its entirety for having been filed after the statue of limitations in RCW 42.56.550(6) had run.

Alternatively, this Court should hold that the Department did not violate the Public Records Act with respect to the four records at issue, because two of the records are not subject to the PRA's disclosure

[41] A standard one-third attorney contingency fee for the $287,800 penalty award to Ms. Wright would be $95,933, and Ms. Wright's attorney fee and cost award of $346,000 exceeds this amount by a quarter-million dollars.

provisions, and the other two records were not requested. Because there was no violation of the PRA, this Court should vacate the superior court's judgment awarding penalties and attorney fees, and dismiss the underlying case in its entirety.

Should the Court decide to address the amount of penalties and attorney fees awarded, it should reverse and vacate the superior court's judgment awarding penalties and attorney fees as constituting an abuse of discretion. In that event, given the errors above, the Department respectfully would request that this Court determine the proper calculation of penalties, attorney fees and costs.

RESPECTFULLY SUBMITTED this 9th day of April, 2012.

ROBERT M. MCKENNA
Attorney General

/s/ JOHN D. CLARK
JOHN D. CLARK, WSBA No. 28537
Assistant Attorney General

Attorneys for the State of Washington,
Department of Social & Health Services

CERTIFICATE OF SERVICE

Beverly Cox, states and declares as follows:

I am a citizen of the Untied States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. On April 9, 2012, I served a true and correct copy of this Brief of Appellant on the following parties to this action, as indicated below:

Counsel for Respondent
DAVID P MOODY
MARTIN D MCLEAN
Hagens Berman Sobol Shapiro LLP
1918 8th Avenue, Suite 3300
Seattle, WA 98101

☒ ABC/Legal Messenger

Co-Counsel for Respondent
Carter Hick
Connolly Tacon & Merserve
201 5th Avenue SW Suite 301
Olympia WA 98501-1063

☒ ABC/Legal Messenger

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

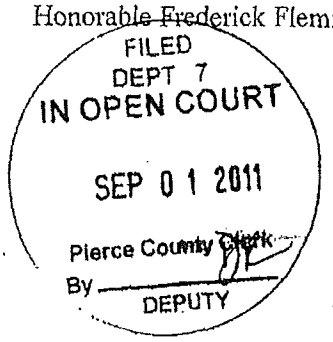
DATED this 9th day of April 2012, at Tumwater, Washington

Beverly Cox

BEVERLY COX
Legal Assistant

APPENDIX A

Honorable Frederick Fleming



SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

AMBER WRIGHT,

Plaintiff,

v.

STATE OF WASHINGTON, DSHS,

Defendant.

No. 10-2-08114-9

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court on Plaintiff's Complaint for Violations of the Public Records Act. The Court having considered the evidence presented by the parties hereby enters the following:

FINDINGS OF FACT

1. Plaintiff made her first Public Records Act request on March 26, 2007;

2. Plaintiff made her second Public Records Act request on May 20, 2008;

3. On November 14, 2008, Defendant DSHS informed plaintiff that its response to her Public Records Act request(s) was complete;

4. On December 11, 2009, Defendant DSHS produced an audio recording and a transcription of an interview wherein plaintiff disclosed that she was physically and sexually abused. These materials were response to plaintiff's Public Records Act requests;

5. On March 4, 2010, Defendant DSHS produced a DSHS foster care/adoption manual. These records were responsive to plaintiff's Public Records Act requests;

6. On March 16, 2010, Defendant DSHS produced the Child Physical and Sexual Abuse Investigation Protocols for Pierce County, Washington. These records were responsive to plaintiff's Public Records Act requests; and

7. Despite withholding records from plaintiff's Public Records Act requests, Defendant DSHS failed to provide a privilege log.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties;

2. Venue is proper with this Court;

3. Defendant DSHS violated the Public Records Act by withholding the audio recording and a transcription of an interview wherein plaintiff disclosed that she was physically and sexually abused until December 11, 2009;

4. Defendant DSHS violated the Public Records Act by withholding the DSHS foster care/adoption manual until March 4, 2010;

5. Defendant DSHS violated the Public Records Act by withholding Child Physical and Sexual Abuse Investigation Protocols for Pierce County, Washington, until March 16, 2010;

6. Defendant DSHS violated the Public Records Act by failing to provide a privilege log identifying each record withheld from plaintiff's Public Records Act requests;

7. Pursuant to RCW 42.56.550(4), ~~plaintiff is entitled to a statutory penalty for each day each of the above-described records was withheld from her Public Records Act requests; and~~ the penalties will be determined at a subsequent hearing; and

8. Pursuant to RCW 42.56.550(4), plaintiff is entitled to cost and attorneys' fees necessary for bringing this action.

ORDER

1. No later than September 30, 2011, the parties are ordered to meet and confer to attempt to negotiate the amount of penalties to be assessed and the amount of attorneys' fees and costs to which plaintiff is entitled to receive.

2. If the parties are not able to reach an agreement regarding the amount of penalties, costs and attorneys' fees, the Court will determine the amount of statutory penalties, attorneys' fees and costs as a part of its ~~regular~~ 28 day motion calendar.

3. If the motion is filed, the parties shall work together to propose a form of judgment that has been agreed upon in as many areas as possible.

SIGNED IN OPEN COURT this 1st day of ~~August~~ September, 2011.

THE HONORABLE FREDERICK FLEMING

FILED
DEPT 7
IN OPEN COURT
SEP 01 2011
Pierce County Clerk
By DEPUTY

Presented By:

HAGENS BERMAN SOBOL SHAPIRO LLP
Attorneys for Plaintiff

David P. Moody, WSBA #22853
Martin D. McLean, WSBA #33269
Carter W. Hick, WSBA #36721

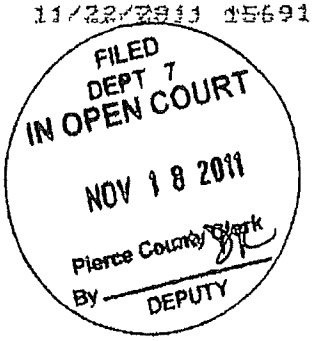
Approved as to form:

OFFICE OF THE ATTORNEY GENERAL
Attorneys for Defendant DSHS

By
John Clark, WSBA #28537
Assistant Attorney General

APPENDIX B

11/22/2011 15691 719282



SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

AMBER WRIGHT,

Plaintiff,

v.

STATE OF WASHINGTON, DSHS

Defendant.

No. 10-2-08114-9

~~[PROPOSED]~~
JUDGMENT AGAINST DSHS

With Findings of Fact & Conclusions of Law

****

CLERK'S ACTION REQUIRED

JUDGMENT SUMMARY (RCW 4.64.030)

1.	**Judgment Creditor:**	**Amber Wright**
2.	**Judgment Creditors Attorneys:**	**David P. Moody** **Marty McLean** **Carter W. Hick**
3.	**Judgment Debtor:**	State of Washington, DSHS
4.	**Total Judgment Amount:**	$649,896.87
5.	**Pre-judgment Interest:**	$0
6.	**Post-judgment Interest:**	$0
7.	**Taxable Costs and Attorneys' fees:**	Included in Total Judgment Amount
		Total: $649,896.87

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Active Role Taken By Court

There was a bench trial on August 31 and September 1, 2011. Accordingly, this Court served as the trier of fact and is familiar with the evidence, the law, the circumstances of this case, and the dedication, skill and reputation of the attorneys. Before signing this order, the Court carefully considered the briefing of the parties, the law, and heard oral argument from counsel. Finally, this Court took an active role in determining the reasonableness of the award for attorneys' fees, costs and penalties imposed.

Findings of Fact

The Court finds that there was an obstruction of justice, that the obstruction is clear, and that it insults the citizens for a government entity to proceed as DSHS proceeded in this matter, and therefore the Court finds that **penalties** of $100/day are appropriate.

The penalties equal $287,800.00.

The Court finds that **plaintiff's attorneys' fees** are reasonable and necessary because:

i. There were no duplicated efforts;

ii. There was a significant amount of time and labor required due to the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;

iii. The attorneys' fees charged are customary and reasonable in the locality for similar legal services;

iv. The results obtained are exceptional;

v. The nature and length of the professional relationship between plaintiff and her attorneys was significant and long-standing;

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vi. Plaintiff's attorneys are experienced, have a particularly strong reputation for successfully prosecuting claims against DSHS, including the largest public records settlement against DSHS in state history; and

vii. The fee was contingent in nature, making this an all-or-nothing proposition for plaintiff's attorneys.

The Court further finds that a **loadstar multiplier** of 2x is warranted given the reputation and skill of plaintiff's attorneys, the contingent nature of this litigation, the result obtained for plaintiff, and the obstacles surmounted due to DSHS' obstruction in obtaining these public records.

Attorneys' fees, including a multiplier of 2x, equal $346,000.00.

The Court finds that **plaintiff's litigation costs** are reasonable and necessary.

The costs equal $16,096.87.

Conclusions of Law

1. Judgment shall be taken against Defendant State of Washington, DSHS, in the total amount of $649,896.87, which breaks down as follows;

   a. $287,800.00 for statutory penalties;

   b. $346,000.00 for attorneys' fees;

   c. $16,096.87 for litigation costs.

2. The total judgment of $649,896.87 shall be deposited by Defendant State of Washington, DSHS, into the Registry of the Pierce County Superior Court no later than five business days after the date of entry and filing of this judgment;

3. Upon presentation of identification, the Pierce County Superior Court Clerk is directed to release the funds to plaintiff's counsel, David P. Moody of Hagens Berman Sobol Shapiro, LLP ("David P. Moody, Attorney, in trust for Amber Wright"); and

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(206) 623-7292 • FAX (206) 623-0594

4. Upon receipt of $649,896.87, the Court Clerk shall enter satisfaction of the judgment against Defendant State of Washington, DSHS.

Ordered this 18th day of November, 2011.

The Honorable Frederick Fleming

FILED
DEPT 7
IN OPEN COURT
NOV 18 2011
Pierce County Clerk
By DEPUTY

Presented by:

HAGENS BERMAN SOBOL SHAPIRO LLP
Attorneys for Plaintiff

By
David P. Moody, WSBA No. 22853
Martin D. McLean, WSBA No. 33269

CONNOLLY TACON & MESERVE
Co-Counsel for Plaintiff

By:
Carter W. Hick, WSBA No. 36721

Agreed as to Form

John D. Clark, AAG
WSBA 28537
Office of the Attorney General, Attorneys for DSHS

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APPENDIX C

CONNOLLY TACON & MESERVE

ATTORNEYS AT LAW · A PROFESSIONAL SERVICES CORPORATION

James A. Connolly
Carter W. Hick
Leonard K. Lucenko, Jr
Christina A. Meserve
Stacie-Dee M. Motoyama
Charles E. Szurszewski
Avelin P. Tacon III

Heritage Bank Building
201 5th Avenue SW, Suite 301
Olympia, WA 98501

Phone (360) 943-6747
Fax (360) 943-9651
www.olylaw.com

March 26, 2007

Diane Fuller
DSHS
P.O. Box 87
South Bend, Washington 98586

Re: Amber Wright

Ms. Fuller:

It was a pleasure speaking with you today on the phone. Thank you very much for all of your help.

I write to you on behalf of Amber Wright as her lawyer and request a copy of her entire DSHS file. It is my understanding that your office has a copy of this file. Additionally, if there is more information you need from me, or if there are other channels I need to explore in order to obtain this file, please advise as soon as possible.

Please do not hesitate to contact me with questions or concerns. Thank you very much for your consideration.

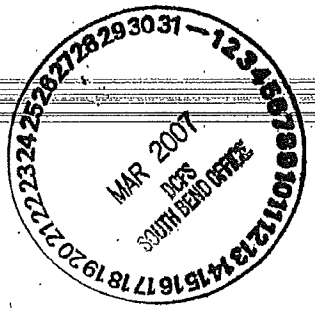
Sincerely,

CARTER W. HICK

CWH:po

c: Amber Wright

H:\CWH\PI\Wright, Amber\DHSH ltr.wpd



APPENDIX D

DAVID P. MOODY
DIRECT • (206) 268-9323
DAVIDM@HBSSLAW.COM

HAGENS BERMAN
SOBOL SHAPIRO LLP

May 20, 2008

VIA FACSIMILE
FOLLOWED BY UPS OVERNIGHT

Public Records/
Privacy Officer
RECEIVED
MAY 20 2008
DEPARTMENT OF SOCIAL
AND HEALTH SERVICES

Ms. Kristal Wiitala Knutson
Department of Social and Health Services
Public Disclosure Manager
P.O. Box 45010
Olympia, WA 98504-5010

Re: *Amber Wright (Child)*
David Wright (Parent)

Ms. Knutson:

I represent Amber Wright.

Pursuant to RCW 42.56 *et seq.* and RCW 13.50 *et seq.*, please consider this an official request pursuant to the Washington State Public Disclosure Statutes for any and all documents relating to Amber Wright and/or David Wright.

Documents Already Produced to Other Entities

Please produce copies of any and all documents already produced to *any* person or agency regarding Amber Wright and/or David Wright. This includes, but is not limited to, the following documents:

1. Any and all documents produced to the Pacific County Prosecutor's Office;
2. Any and all documents produced to the Summer Police Department; and
3. Any and all documents produced as a result of any prior public disclosure and/or records request not listed above.

Exhibit 206
1 of 15
Br Appellant
Appendix D

Documents Related to Complaints Reported to and Investigated by the Department

1. Copies of all documents drafted, authored, or prepared by any department employee to any law enforcement agency regarding the Department's CPS history as it relates to Amber Wright and/or David Wright, and all documents received by the Department from any law enforcement agency regarding Amber Wright and/or David Wright.

2. **Any and all documents associated with CPS referral ID #1669000, dated 11/10/2005.** This includes, but is not limited to any and all intake documents, any and all notes, e-mails, letters, faxes, photographs and/or other documentation generated or received by Department personnel during investigation of this complaint. This request also includes, but is not limited to, any documents relating to the resolution of this complaint including reports, compliance agreements, revocation letters, etc. **Please also produce copies of the Department's law enforcement referrals/reports required by RCW 26.44.030 associated with this referral.**

3. **Any and all documents associated with CPS referral ID #1620410, dated 05/17/2005.** This includes, but is not limited to any and all intake documents, any and all notes, e-mails, letters, faxes, photographs and/or other documentation generated or received by Department personnel during investigation of this complaint. This request also includes, but is not limited to, any documents relating to the resolution of this complaint including reports, compliance agreements, revocation letters, etc. **Please also produce copies of the Department's law enforcement referrals/reports required by RCW 26.44.030 associated with this referral.**

4. **Any and all documents associated with CPS referral ID #1620317.** This includes, but is not limited to any and all intake documents, any and all notes, e-mails, letters, faxes, photographs and/or other documentation generated or received by Department personnel during investigation of this complaint. This request also includes, but is not limited to, any documents relating to the resolution of this complaint including reports, compliance agreements, revocation letters, etc. **Please also produce copies of the Department's law enforcement referrals/reports required by RCW 26.44.030 associated with this referral.**

5. **Any and all documents associated with CPS referral ID #1543537, dated 08/18/2004.** This includes, but is not limited to any and all intake documents, any and all notes, e-mails, letters, faxes, photographs and/or other documentation generated or received by Department personnel during investigation of this complaint. This request also includes, but is not limited to, any documents relating to the resolution of this complaint including reports, compliance agreements, revocation letters, etc.

   Please also produce copies of the Department's law enforcement referrals/reports required by RCW 26.44.030 associated with this referral.

6. **Any and all documents associated with CPS referral ID #1511937, dated 04/26/2004.** This includes, but is not limited to any and all intake documents, any and all notes, e-mails, letters, faxes, photographs and/or other documentation generated or received by Department personnel during investigation of this complaint. This request also includes, but is not limited to, any documents relating to the resolution of this complaint including reports, compliance agreements, revocation letters, etc. **Please also produce copies of the Department's law enforcement referrals/reports required by RCW 26.44.030 associated with this referral.**

7. **Any and all documents associated with CPS referral ID #1470214, dated 11/30/2003.** This includes, but is not limited to any and all intake documents, any and all notes, e-mails, letters, faxes, photographs and/or other documentation generated or received by Department personnel during investigation of this complaint. This request also includes, but is not limited to, any documents relating to the resolution of this complaint including reports, compliance agreements, revocation letters, etc. **Please also produce copies of the Department's law enforcement referrals/reports required by RCW 26.44.030 associated with this referral.**

8. **Any and all documents associated with CPS referral ID #1412414, dated 05/01/2003.** This includes, but is not limited to any and all intake documents, any and all notes, e-mails, letters, faxes, photographs and/or other documentation generated or received by Department personnel during investigation of this complaint. This request also includes, but is not limited to, any documents relating to the resolution of this complaint including reports, compliance agreements, revocation letters, etc. **Please also produce copies of the Department's law enforcement referrals/reports required by RCW 26.44.030 associated with this referral.**

9. **Any and all documents associated with CPS referral ID #1411226, dated 04/28/2003.** This includes, but is not limited to any and all intake documents, any and all notes, e-mails, letters, faxes, photographs and/or other documentation generated or received by Department personnel during investigation of this complaint. This request also includes, but is not limited to, any documents relating to the resolution of this complaint including reports, compliance agreements, revocation letters, etc. **Please also produce copies of the Department's law enforcement referrals/reports required by RCW 26.44.030 associated with this referral.**

10. **Any and all documents associated with CPS referral ID #1318889, dated 05/21/2002.** This includes, but is not limited to any and all intake documents, any and all notes, e-mails, letters, faxes, photographs and/or other documentation generated or received by Department personnel during investigation of this complaint. This request also includes, but is not limited to, any documents relating to the resolution of this complaint including reports, compliance agreements, revocation letters, etc. **Please also produce copies of the Department's law enforcement referrals/reports required by RCW 26.44.030 associated with this referral.**

11. **Any and all documents associated with CPS referral ID #5355, dated 03/16/1990.** This includes, but is not limited to any and all intake documents, any and all notes, e-mails, letters, faxes, photographs and/or other documentation generated or received by Department personnel during investigation of this complaint. This request also includes, but is not limited to, any documents relating to the resolution of this complaint including reports, compliance agreements, revocation letters, etc.

Please also produce copies of the Department's law enforcement referrals/reports required by RCW 26.44.030 associated with this referral.

12. **Any and all documents associated with CPS referral ID #5356, dated 03/16/1990.** This includes, but is not limited to any and all intake documents, any and all notes, e-mails, letters, faxes, photographs and/or other documentation generated or received by Department personnel during investigation of this complaint. This request also includes, but is not limited to, any documents relating to the resolution of this complaint including reports, compliance agreements, revocation letters, etc. **Please also produce copies of the Department's law enforcement referrals/reports required by RCW 26.44.030 associated with this referral.**

13. **Any and all documents associated with CPS referral ID #5357, dated 09/13/1989.** This includes, but is not limited to any and all intake documents, any and all notes, e-mails, letters, faxes, photographs and/or other documentation generated or received by Department personnel during investigation of this complaint. This request also includes, but is not limited to, any documents relating to the resolution of this complaint including reports, compliance agreements, revocation letters, etc. **Please also produce copies of the Department's law enforcement referrals/reports required by RCW 26.44.030 associated with this referral.**

14. Any and all documents generated, maintained and/or obtained by the following Department employees that relate in any manner to Amber Wright and/or David Wright. This request includes, but is not limited to, photographs, SERs (service episode records), investigative reports, e-mails, correspondence, CPS referrals and law enforcement referrals.

    (a) Kerry Applegate
    (b) Kenneth Babcock
    (c) Dawn Cooper
    (d) Marissa Corrales
    (e) Cynthia Dickson
    (f) Juliette Farinas-Cope
    (g) Dianne Fuller
    (h) Melody Johnson

(i) Ann Kaluzny
(j) Linda Karu
(k) Carla Keeler
(l) Don Kreager
(m) Bruce Morrison
(n) William Parrish
(o) Susan Phillips
(p) Eva Robinett
(q) Raymond Robinson

Department's Files of Amber Wright

Produce any and all documents related in any manner whatsoever to the Department's files as they relate to Amber Wright. This includes, but is not limited to, the following documents:

1. Any and all Department Assessments (as defined by WAC 388-148-0010) relating in any manner to Amber Wright;

2. Any and all Department Service Plans (as defined by WAC 388-148-0010) relating in any manner to Amber Wright;

3. Any and all medical, psychiatric, and/or counseling records relating in any manner whatsoever to Amber Wright, and

4. Any and all sexual assault examinations, reports, and/or records relating in any manner whatsoever to Amber Wright.

Other Documents

1. To the extent not already produced pursuant to any of the requests identified above, please produce copies of any and all letters or e-mails, written or received, by any state employee concerning any aspect of David Wright's parenting or home, including but not limited to any e-mails that mention, refer to, or discuss: (1) allegations of abuse, neglect or exploitation; (2) Amber Wright; (3) any friends of Amber Wright, or (4) any other child who lived, or was living, with David Wright at any time.

2. Please produce any timelines, chronologies or summaries prepared by the Department concerning Amber Wright and/or David Wright. This

includes, but is not limited to, any chronologies, charts, summaries, talking points, or timelines.

3. Please produce copies of any and all correspondence, documents, e-mails, letters, charts, notes, outlines, or other information provided to, or received by, the Office of the Family and Children's Ombudsman concerning Amber Wright, and/or any other children living with David Wright, any allegation of abuse/neglect/exploitation concerning David Wright, or any other issue concerning David Wright's parenting.

4. Any and all correspondence, referrals, reports, investigations, notes, evaluations, and/or other documents received from or sent to any Family Preservation Service agency/contractor, counselor, and/or therapist.

RCW 42.56 *et seq.* and RCW 13.50 *et seq.* call for a prompt response to this request. The law mandates you contact me within five (5) business days to either deny this request or inform me as to when I will receive these records.

Please send records to the following address:

David P. Moody
Hagens Berman Sobol Shapiro, LLP
1301 Fifth Avenue, Suite 2900
Seattle, Washington 98101

Should you have any questions or concerns, please contact me. I have enclosed releases executed by Amber Wright. I look forward to receiving either the records or your response within five (5) business days.

Respectfully,

HAGENS BERMAN SOBOL SHAPIRO LLP

David P. Moody

DPM:ccm

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APPENDIX E

MR. CLARK: With regard to that interview, it was provided late, it doesn't give them a public records penalty. First off, we have to make our argument under 13 --

THE COURT: We're not there yet, you're not under penalty or attorney's fees. I thought you agreed with the other side in the event that there is -- responsibility is found, that you'll go from there.

MR. CLARK: I'm not going into what the penalty should be, I'm going into whether there is a violation or not for that disclosure of the recorded interview. The Public Records Act does not call that a violation that's entitled to any penalty if they have the record in hand before they file their public records lawsuit.

THE COURT: I read that.

MR. CLARK: That's why they're not entitled for any remedy for that recorded interview. The other two documents he talks about, the protocol documents, those are general protocols for investigating. That's not in Amber Wright's file, they never requested that document. They requested Amber Wright's records. The Court will need to look at the actual --

THE COURT: How can you -- they asked for discovery.

MR. CLARK: I would like to clarify something for the Court, the Public Records Act is not discovery. It is not pre-trial discovery and the Court should not look at it as pre-trial discovery, as something like, I want everything related to something. And there is --

THE COURT: If that's what the law is the Supreme Court can tell me that because when you ask for discovery and you've got a lawsuit, it is a very simple lawsuit. They're alleging that your client was negligent in caring for this child. And they asked for every piece of evidence in the way of discovery that might support that claim. And if you didn't give it to them, there is a problem. And you can't hide behind some esoteric definition under Title 13 or Title 42.56, I don't think.

MR. CLARK: Okay. So we'll be asking the Court at the end of the day to go a very different direction and not look at this as a discovery request that asked for all evidence that could in any way support their case.

THE COURT: What else is it then? What do you intend to show that it is then if it isn't a request for discovery?

MR. CLARK: I intend to show it's a public records request for very specific information.

THE COURT: Trying to cut corners and to be extra cautious and you're not calling it a discovery request, you're calling it something else?

MR. CLARK: Yes, absolutely, we're calling it a public records request.

THE COURT: I would suggest to you that's a problem.

MR. CLARK: Well, we still need to present our case on the record.

THE COURT: Sure you do, and I'm not prejudging it. But I'm listening to what your opening statement is and I've known situations like this where on the opening statements courts have ruled. I'm not going that far with it yet.

MR. CLARK: I would ask the Court not to do that because these cases, they tend to get remanded back if there is no findings. We at least need some findings and conclusions of law on this. With all due respect, I do want an opportunity to present all our evidence.

THE COURT: You'll have an opportunity. I'm just saying what has happened before and I'm well aware of it. Federal courts do it all the time.

MR. CLARK: Okay. As a final matter that I hope will clarify this a little, you'll hear the words public records throughout the case. And I believe

plaintiff will try to make that a confusing issue and it's not a confusing issue.

THE COURT: I don't think it is confusing at all.

MR. CLARK: Because I agree it shouldn't be. Counsel was reading some of the statutes on this, it is all public records, DSHS will not dispute that. Amber Wright's confidential Child Welfare file is a public record. But after that is where it gets confusing. We'll be showing it doesn't mean the public can get it.

THE COURT: Absolutely not. That's not what I'm being asked to rule on is that the public is entitled to anything. What is the issue is what she is entitled to when she brings this cause of action against a claim against the Department of Social and Health Services and all its sub-agencies for the way she was treated by her biological father, and based upon the evidence that was apparently the file was full of.

MR. CLARK: Okay. DSHS gives records in public records, it's not trying to measure those records as to whether they're evidence or not.

THE COURT: Don't you intend to show that DSHS was taking the responsibility for putting her back in the home time after time?

MR. CLARK: In today's case?

THE COURT: Well, in her claims against DSHS. It wasn't anybody else putting her back into the home, it was a satellite or administrative part of DSHS that had the authority to put her back in that home. And to hide the records is not right under the guise of any rights of people and individuals against an entity such as we have here.

MR. CLARK: With all due respect, we will ask the Court to focus on the public records processing and not the allegation --

THE COURT: That's what bothers me. You're expecting me to focus on public records and something in a statute that flies in the face of what's right here when a person has been injured, at least that's what their claim is, and they should have their opportunity with a jury trial to prove it one way or the other and they should not be -- there should not be obstruction by the entity that's alleged to have caused this injury.

MR. CLARK: Well, I'll wrap up my opening here, your Honor, we will show this was not a purposeful obstruction. And the Department communicated with the requester on both requests every step of the way, tried to be cooperative, and they didn't violate the Public Records Act. We will ask the Court to apply the law that applies.

THE COURT: Did they violate her rights?

MR. CLARK: She hasn't alleged a violation of her rights, she has alleged a violation of the Public Records Act. That's the only cause of action in this case.

THE COURT: That's circular and --

MR. CLARK: I'm not the person to determine whether some --

THE COURT: You're in a tough position, but you're here for me to discuss this with and I'm not throwing you out at this point.

MR. CLARK: She is free to claim any violation of rights she wants to and she has done so in other cases.

THE COURT: But she doesn't have to do it when she's obstructed in getting her matter heard by a jury everywhere she turned until now.

MR. CLARK: Well, we will also show evidence that in the tort case there weren't discovery problems in that case, she has the records she needed.

THE COURT: Well, I guess that's a contest. That's your position, but I'm not so sure that's the plaintiff's position.

MR. CLARK: And I would ask that plaintiff be limited to the evidence he's presenting. He's making

APPENDIX F

supposed to be asking for if they don't know until they get the discovery?

MR. CLARK: We would argue it's not a discovery request, it is a request for public records.

THE COURT: See, that's where you're starting off, in my opinion, representing your client on the wrong foot. What was the basis for this request? It is a trial and what do you do in trials? You send out interrogatories, you take depositions, what is all that categorized as? Discovery.

MR. CLARK: With regard to public records or anyone requesting their records from DSHS, DSHS doesn't concern itself with the purpose, and they're not supposed to. You're not supposed to analyze --

THE COURT: Do you think they're trumped? Do you think that purpose they think they're following is trumped by what we have been talking about?

MR. CLARK: I'm saying they didn't need to consider the purpose.

THE COURT: A jury trial, you think that trumps? You're trying to represent to this Court and to the people, the citizens, I don't think so.

MR. CLARK: I'll move forward. The way Diane Fuller at DSHS, South Bend Regional Office, as a supervising --

THE COURT: That's the way she's been trained.

MR. CLARK: The way she responded was she gave that file to Mr. Hick.

THE COURT: Incomplete.

MR. CLARK: She did not provide a copy of the reported interviewed, that is correct.

THE COURT: Is that the same way of saying it was incomplete?

MR. CLARK: Yes.

THE COURT: All right.

MR. CLARK: She missed the recorded interview.

THE COURT: Was that -- just that recorded interview, was that important?

MR. CLARK: That's not for me to say.

THE COURT: Well, I can understand that.

MR. CLARK: So she responds on June 1st, 2007 with that. At the end of her letter on June 1st, she said, If you have any questions, please contact me. Mr. Hick never did contact her. So the legal issues with regard to the 2007 response are --

THE COURT: Didn't Mr. Hick get another law firm that was maybe more experienced in this involved, that's what he did? Maybe he didn't contact you, but Ms. Wright's attorney that Mr. Hick brought in, the way I understand it, they contacted the defendant.

MR. CLARK: Yes, your Honor, I'll get to that, and why that is important, in just a moment. There are two issues --

THE COURT: Again, that gets me to where I just have trouble. All of this would not need to happen where experienced lawyers know what they should do in completing discovery. And just because you're a part of the executive branch of the government does not give you the right to obstruct.

MR. CLARK: With regard to the 2007 response, first and foremost, all of those records are governed by RCW 13.50. I'll explain that when I get to the 2008.

THE COURT: I know what your argument is.

MR. CLARK: I believe you do under 13.50. All those records are governed by 13.50. They don't have a public records remedy for any children's record in Amber Wright's file under the Public Records Act. Second, that 2007 request is barred by the statute of limitations. As I just said, Diane Fuller completed her response on June 1st, 2007. RCW 13.50 does not have a specific statute of limitations. We ask this Court to apply the two year general statute of limitations under RCW 4.16.130. Her response was on June 1st, 2007. This lawsuit did not get filed until April 6, 2010. It was not filed timely with regard to that 2007 request. That

request should be dismissed. That's the argument on the 2007 request.

Moving on to the 2008 request --

THE COURT: So if you delay and obstruct long enough, the statute of limitations comes into play and you're out, I don't think so.

MR. CLARK: I would argue they didn't purposely delay and obstruct, they missed the recorded interview. That got discovered in December of 2009, again, past the statute of limitations. As Barbara McPherson testified, there were records within the production that mention that the interview took place. They were given notice of the interview. The copying of the CD with the audio recording of the interview did not get provided.

THE COURT: She was worried about her job, that's the bottom line. She couldn't even tell me what plain words like, her entire DSHS file, meant. She didn't want to get fired for disclosing discovery that was necessary and appropriate through this jury trial procedure that these folks had to go into.

MR. CLARK: Well, I would ask your Honor to consider the possibility that when someone says, I want my entire DSHS file, sometimes they really do want every possible DSHS file on that person and sometimes they

don't. Sometimes they don't understand that DSHS has 18,000 employees, multiple administration and offices across the state, multiple programs not just dealing with children, dealing with public assistance --

THE COURT: And there may in lie a problem. It is so unwieldily that it doesn't have its house in order. And they make citizens go to this extent. How many citizens do not have the wherewithal to do what these folks have done. How many citizens are out there treated like this plaintiff was treated about her claims that just go away. How many just go away because they have to fight the biggest law firm in the State of Washington, the executive branch of the government, because they haven't kept -- you could argue, arguably, they haven't kept their house in order.

MR. CLARK: I would argue they are doing it correctly and the process doesn't require --

THE COURT: I know, you're paid to do that.

MR. CLARK: The process doesn't require an elaborate litigation that should go on for 14 months. What the Public Records Act is supposed to involve is an expedited judicial review. You go into court with a show cause motion and say, I think the agency did this wrong, and the agency comes in quickly says, here's why we think it we did it right, and a judge, based on

WASHINGTON STATE ATTORNEY GENERAL

April 09, 2012 - 12:20 PM

Transmittal Letter

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