NO. 42647-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

AMBER WRIGHT,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

It is undisputed that Amber Wright was abused by her father. But this is not a torts case, and it is not the place to assign liability for that abuse. This is a public records case—a case in which the trial court failed to apply the correct law, ignored the statute that governs access to one of the disputed documents (the recorded interview), overlooked the fact that a second disputed document (the transcript of the recorded interview) did not exist at the time of either of the two public records requests, and disregarded the fact that the other disputed documents (the Investigation Protocols and PRIDE Manual) were not requested in either public records request. It is a case where the trial court, perhaps confused by the plaintiff's frequent references to her separate tort case, treated the matter as a discovery dispute in a tort action. It is a case where the trial court abused its discretion by assessing the highest possible penalty under the Public Records Act where no penalty at all should have been assessed, and awarding extraordinary attorney fees where none should have been awarded. It is a case where the Department complied with the Public Records Act and with the separate requirements in RCW 13.50, and where the Department should have prevailed on the merits. In fact, it is a case that never should have been decided on the merits, because it was filed after the statute of limitations ran and sshould have been dismissed.

II. ARGUMENT

A. Both Requests Are Time-Barred

As explained in the Department's opening brief, on June 1, 2007 the Department provided the last installment in response to Mr. Hick's 2007 records request. *See* Ex. 205. The Department provided the last installment in response to Mr. Moody's 2008 records request on November 14, 2008.[1] Under RCW 42.56.550(6), the statute of limitations for challenging the Department's response to the 2007 request ran on June 1, 2008, and the time for challenging the response to the 2008 request ran, at the latest, on November 14, 2009. Plaintiff filed this lawsuit on April 6, 2010, well after the statute of limitations ran on both requests. The trial court erred by not dismissing this case due to being time-barred.

Ms. Wright seeks to avoid the statute of limitations by arguing that the Department provided two general policy records in 2010, thereby extending the statute of limitations. That argument fails for two reasons. First, neither policy record was requested in 2007 or 2008; instead, the requests unambiguously requested copies of Ms. Wright's file, not general policy or procedural manuals. *See* Appendices C and D attached to Brief of Appellant (Br. Appellant). The manuals apply generally to the

[1] The Department informed attorney David Moody that this production of records made on November 18, 2008, was being provided "under RCW 13.50.100[.]" Ex. 214.

Department's investigative practices and policies; neither manual was specific to Ms. Wright, and neither manual had ever been made a part of her file.

Second, her argument fails because the manuals were not provided in response to any public records request. Instead, the manuals were turned over as part of discovery provided in the separate tort action that Ms. Wright filed in federal court. RP at 60 (Aug. 31, 2011); Exs. 5 and 6.

Ms. Wright also seeks to avoid the statute of limitations by arguing that the Department extended it when providing her a copy of a recorded interview in 2009. As the Department made clear at the time it provided the recording, its disclosure was not governed by the Public Records Act (PRA), but by a separate statute, RCW 13.50, and the recording was provided pursuant to that statute.[2] Because disclosure of that interview was not governed by the PRA, its production cannot restart the statute of limitations in RCW 42.56.550(6).

Records held by DSHS programs other than Children's Administration were disclosed under the PRA. These programs separately produced two installments of responsive records to the 2008 request under

[2] The cover letter providing the recorded interview expressly stated that the transcription and audio recording of the recorded interview was "being provided to you pursuant to RCW 13.50.100." Ex. 215. Indeed, Children's Administration processed all of Ms. Wright's child welfare records under RCW 13.50.100 and repeatedly referenced that statute when providing records. *See* Exs. 207, 213, 214.

RCW 42.56 *et. seq.* and the PRA. *See* Exs. 211, 212. The first PRA installment was July 24, 2008. Ex. 211. The second and final PRA installment was July 31, 2008, which provided one additional responsive record and completed the Department's PRA response. Ex. 212. Thus, Ms. Wright needed to file her PRA claims for the 2008 request by July 31, 2009 – within one year of the "last production" of the PRA installments under RCW 42.56.550(6). Her filing date of April 6, 2010 missed this deadline by 249 days.

Ms. Wright's last argument to avoid the statute of limitations is that her PRA claims are not time-barred because she was never provided a privilege log for withheld records. This argument is without merit because the Department never had an obligation to list any of the three "withheld" records on an exemption log. The disclosability of the recorded interview is governed exclusively by RCW 13.50, which does not require an exemption log. CP at 710. Similarly, the Department never had a duty to list the Investigation Protocols and PRIDE Manual on an exemption log because those records were not responsive to either of Ms. Wright's records requests. CP at 710-11. Again, the Investigation Protocols and PRIDE Manual were provided to Ms. Wright *only* in discovery during her *separate tort* lawsuit.

B. The Disclosure Of Amber Wright's Recorded Child Interview Is Strictly Governed By RCW 13.50.100

1. The Department Never Argued That "All" Children's Administration Records Are Governed By RCW 13.50.100, But This Statute Does Govern Disclosure Of The Recorded Interview

Ms. Wright's response brief alleges at least four times that the Department's primary argument is that "all" Children's Administration records are exempt from public disclosure. *See* Respondent's Answering Brief (Br. Resp't) at 12, 22, 24, 26. This has never been the Department's position, and Ms. Wright fails to cite to the record or any language in this appeal that supports these false allegations, because there is nothing to cite.

Ms. Wright uses her mischaracterization of the Department's position to construct an implausible interpretation of RCW 13.50 that would exempt a wide variety of state and local agencies from the Public Records Act. Br. Resp't at 24. That argument is solely Ms. Wright's creation, not the Department's. The Department's actual argument has been and continues to be very narrow:

> Under RCW 13.50, the recording and transcription of Amber Wright's child interview are confidential and the Department may release them only as specifically provided in RCW 13.50.100
>
> . . .
>
> 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.

Br. Appellant at 26-27.

The Department's consistent, narrow interpretation of RCW 13.50 is supported by the very deposition testimony Ms. Wright cites. Br. Resp't at 12. When the Department's Public Records Officer, Kristal Wiitala, was asked if "all Children's Administration records are exempt from public disclosure," she answered "no." She continued:

> Q: Which ones are and which ones are not?
>
> A: The child welfare files that come under 13.50.100 are exempt from disclosure under the Public Records Act. The Children's Administration has a lot of other records like personnel records, licensing records and other types of records that would fall under the Public Records Act.[3]

CP at 328. Ms. Wiitala also testified at trial that not "all" Children's Administration records are exempt from public disclosure. RP at 140 (Aug. 31, 2011).

The relevant question in this case is whether the disclosure of Ms. Wright's recorded interview involving child abuse is governed by RCW 13.50.100. The Department's initial briefing in this appeal and this

[3] The Investigative Protocols record and PRIDE Manual that are at issue in this action are also examples of Children's Administration records that do not pertain to specific children, can be fully disclosed to the public upon request under the Public Records Act, and are not governed by RCW 13.50.100.

Court's decision in *Deer v. Dep't of Soc. & Health Servs.*, 122 Wn. App. 84, 93 P.3d 195 (2004), show the recording squarely falls under the protections of RCW 13.50.100. That statute controls "access to all records and information collected or retained by a juvenile justice or care agency *which pertain to the juvenile*[.]" *See* RCW 13.50.100(7) (emphasis added). The recorded interview was taken when Ms. Wright was a juvenile, directly pertains to her, and falls within RCW 13.50.100. The interview is available to Ms. Wright and her attorney only as provided in that statute and, thus, cannot serve as the basis for a PRA violation.

2. The Trial Record Clearly Established The Recorded Interview Is Governed By RCW 13.50.100

Ms. Wright asserts that at trial, "DSHS offered no evidence that the audio recording was a "record" as defined by RCW 13.50.10" and that "DSHS did not offer the audio recording itself." Br. Resp't at 23. These statements are incorrect. The transcript of the recorded interview was entered into evidence as Exhibit 4 at trial. *See* Ex. 4 at 2-19. The trial court admitted Exhibit 4 as an accurate transcription of Ms. Wright's recorded interview. *See* RP at 63. The cover letter in Exhibit 4 explained that an audio recording and transcription of Amber Wright's recorded interview was being provided to David Moody "pursuant to RCW 13.50.100." Ex. 4 at 1. Also, one of the Department's witnesses,

Barbara McPherson, confirmed at trial that the recorded interview in Exhibit 4 was found in Ms. Wright's file held by Children's Administration. RP at 155-57 (Aug. 31, 2011). This undisputed evidence shows the recorded interview was part of Ms. Wright's case file held by Children's Administration, and thus a "record" under RCW 13.850.010(1)(c).[4]

The Department consistently and repeatedly informed Ms. Wright that the records in her Children's Administration file were available to her only under RCW 13.50, not under the PRA.[5] Consistent with RCW 13.50, she was provided all the records she requested; although one record was discovered after the other records in the file were produced, that last record (recorded interview) was provided without delay—and well before this lawsuit was filed. Ms. Wright nevertheless filed this lawsuit in 2010 insisting that all her records are governed solely by the PRA.[6]

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[4] The Department also submitted a thorough trial brief explaining how RCW 13.50.100 governs Ms. Wright's files in Children's Administration. *See* CP at 544-50. Ms. Wright did not submit a trial brief on this issue. The trial court refused to even consider the application of RCW 13.50.100 and said "you can't hide behind some esoteric definition under Title 13 or Title 42.56." RP at 35 (Aug. 31, 2011).

[5] The Department's initial response letters to the 2007 and 2008 record requests plainly stated that her records would be provided under RCW 13.50.100. Exs. 202, 207, at 1. When Ms. Wright first filed a lawsuit in 2008 under the PRA for her 2008 request, the Department defended and claimed her records were governed by RCW 13.50.100; Ms. Wright voluntarily dismissed that case. CP at 9 ¶¶ 8, 10, 11; 128-29.

[6] The argument that the PRA governs is not correct, but even if it were it would not improve *Ms. Wright's* access to the recorded interview, because she received an unredacted copy of her interview well before this PRA lawsuit was filed. *See* Ex. 4.

3. Although RCW 13.50.100 Is Not Limited To Dependency Records, The Recorded Interview Is A Dependency Record

Ms. Wright argues "the *Deer* decision is narrow -- holding only that RCW 13.50.100 exempts ***dependency*** records[.]" Br. Resp't at 26 (emphasis in original). Even if that were true, the evidence at trial showed that the recorded interview and transcript are dependency records. Kristal Wiitala testified that they are dependency records. RP at 144 (Aug. 31, 2011). Moreover, Ms. Wright's only lay witness, Katherine Kent, who is a former social worker, agreed with Ms. Wiitala.

> Q: Having served as an expert in Amber's tort case, was this transcript, is it important?
>
> A: Yes, absolutely. **This would have been the cornerstone to the dependency petition** that would have been filed when she came into care. This is the interview where she talks about the sexual abuse and physical abuse she endured by her father after being placed back with him . . . .

RP at 59 (Aug. 31, 2011) (emphasis added).

Regardless, RCW 13.50 and the *Deer* decision are not limited to dependency records. The request to DSHS in *Deer* was for " 'complete and total records permitted by law' " of three children " 'and any thing [sic] else associated with them or [Deer]' ". *Deer*, 122 Wn. App. at 87. Later, the mother again asked for " 'ALL records on myself and my children.' " *Id* (emphasis in original). In concluding these records were

exclusively controlled by RCW 13.50, the *Deer* court did not apply any limitation, instead holding that "the records that Deer requested fit the description of 'records of any other juvenile justice or care agency.' " *Id.*, *Deer*, 122 Wn. App. at 91 (citing RCW 13.50.010(1)(c)); *accord In re Dependency of KB*, 150 Wn. App. 912, 916, 210 P.3d 330 (2009) (RCW 13.50.100, instead of the PRA, governed a request to DSHS for "[a]ll documents and/or information whatsoever" regarding a mother and her daughter); *see also North Am. Coun. on Adoptable Children v. Dep't of Soc. & Health Servs.*, 108 Wn.2d 433, 441, 739 P.2d 677 (1987) ("[j]uvenile records are confidential, and may be revealed only under circumstances not satisfied here") (citing RCW 13.50.010, .100).

Ms. Wright's reliance on *Koenig v. City of Des Moines* is misplaced because that decision involved the scope of former RCW 42.17.31901 (1992) under the PRA, and makes no mention of RCW 13.50. *See* Br. Resp't at 27-28; *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006). The *Koenig* decision cannot be used to invalidate the clear language in RCW 13.50 or the *Deer* decision.[7]

[7] Ms. Wright's suggestion that the Department can disclose the child interview to the public and only redact the child's name would ignore RCW 13.50.100. *See Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn. 2d 243, 262, 884 P.2d 592, 603 (1994) (if another statute does not conflict with the PRA and prohibits disclosure of specific public records in their entirety, then the information may be withheld in its entirety notwithstanding the PRA's redaction requirement).

C. The PRIDE Manual And The Investigation Protocols Document Were Not Requested In Either The 2007 Request Or The 2008 Request

As explained in detail at pages 34-38 of the Department's opening brief, neither of Ms. Wright's records requests asked for general policy documents or procedural manuals; they asked for records contained in Ms. Wright's files. Ms. Wright concedes that the Investigation Protocols document and PRIDE Manual are not responsive to the 2007 request, but argues that "great deference" should be afforded the trial court's finding that these two records were responsive to the 2008 request. Br. Resp't at 29-31. In fact, the trial court's ruling on this issue is not clear, and it contains insufficient detail to merit deference on that issue.[8]

Ms. Wright argues that these two records would have been used by the Department in investigating her claims. Br. Resp't at 30-31. But that argument does not change the language in the 2007 and 2008 records requests—which did not ask for these two records.

More importantly, Ms. Wright offers no explanation or support for the trial court's treatment of the "withheld" records as a discovery

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[8] Ms. Wright claims her recommended chart and penalties of $387,800 "were incorporated into the Court's Judgment Against DSHS." Br. Resp't at 30. But the judgment—drafted by plaintiff's counsel—did not incorporate or mention any charts or exhibits or otherwise detail the calculation used to assess PRA penalties. CP 798-801. The Findings of Fact and Conclusions of Law include only very general (and factually incorrect) statements that the manuals were responsive to Ms. Wright's "requests." CP 795-97. Neither document distinguishes the 2007 record request from the 2008 request in any way except to note they were made on different dates.

violation throughout the PRA trial. Here, the trial court erred by applying an undefined civil tort "discovery" standard to conclude these two records should have been provided.[9] As explained in the Br. Appellant at 32-38, the proper standard is the "identifiable public records" standard in RCW 42.56.080, which the trial court refused to apply. Ms. Wright has made no attempt to address the correct standard, failing to even acknowledge it or cite RCW 42.56.080 in her response brief.

Indeed, Ms. Wright cannot provide support for the trial court's clear misapplication of the law in this case. During opening statements the trial court stated:

> 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.

RP at 35-36 (Aug. 31, 2011). During Katherine Kent's examination, the following exchange occurred:

> MR. CLARK: . . . 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.

[9] The trial court's undefined "discovery" standard seems to inquire whether the two records would be helpful in Ms. Wright's tort case. RP at 65 (Aug. 31, 2011).

RP at 65 (Aug. 31, 2011). Finally, during closing argument, the trial court said that it was "obstructionist" for the Department's lawyer to not consider the "protocol" document responsive to the 2007 request. RP at 15-16 (Sep. 1, 2011). When the Department started to explain why it disagreed with that characterization, the following exchange occurred:

> THE COURT: Okay, go ahead, that's what your job is at this point in your life.
>
> . . .
>
> 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.

RP at 16-17 (Sep. 1, 2011). At no point did the trial court ever inquire or analyze whether the Investigative Protocols document and PRIDE Manual were identifiable records under RCW 42.56.080 given the language of either records request.

Tacitly recognizing the trial court's error, Ms. Wright now attempts to broaden the scope of her 2008 request by paraphrasing and selectively omitting key language from the actual relevant 2008 request language:

> In contrast to her March 2007 request, Amber's May 2008 request required DSHS to disclose "any document relating

> to the resolution of" the various reports that Amber was being physically and sexually abused.

Br. Resp't at 30. The actual request language submitted by attorney David Moody (which was repeated for twelve specific CPS referral files) is as follows:

> Any and all documents associated with CPS referral ID #[xxxxxxx], dated [xx/xx/xxxx]. 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 personal during the 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.

Exhibit 206 at 2-5 (emphasis added and original boldface omitted). The examples included in the request for "documents relating to the resolution of this complaint"—"reports, compliance agreements, revocation letters, etc."—describe records specific to Ms. Wright, not general records applicable to entire programs. This Court should consider what records were identified by the *actual* language of the records requests, not the selective characterization in the response brief that lacks any principled limit.

If Ms. Wright wanted policies, protocols or training manuals that are relied upon in CPS investigations, or that "would have" been relied

upon when investigating Ms. Wright's circumstances, she could have simply asked for them with enough description to allow the Department to identify and locate them. *Beal v. City of Seattle*, 150 Wn. App. 865, 872, 209 P.3d 872 (2009) (identifiable public record is one for which the requestor has given a reasonable description enabling the government employee to locate the requested record). *See also* WAC 44-14-04002(2) (a model PRA rule giving the example that a "request to inspect or copy an agency's policies and procedures for handling discrimination complaints would be a request for an 'identifiable record'"). Ms. Wright did not request these types of documents though and the Department would have had no motivation or reason to withhold them had they been requested.

D. A Privilege Log Was Not Required In This Case

The correct issue on appeal is whether the trial court erred in its September 1, 2011, order by ruling the Department violated the PRA by failing to provide a privilege log. *See* Br. Appellant at 3, 6, 38. Ms. Wright's response brief does not address that issue.[10]

The Department did not withhold any of the records at issue here

[10] The response brief addresses only how the alleged lack of a privilege log prevents the statute of limitations from starting under one prong of RCW 42.55.550(6). Br. Resp't at 18. However, it is the other prong of RCW 42.55.550(6)—the date of "the last production of a record on a partial or installment basis" that started the PRA's statute of limitations in this case.

under any claim of exemption. No privilege log was prepared because no privilege was claimed for any of the documents at issue. Two "records" were not actually requested (Investigation Protocols, and Pride Manual), and the PRA does not require a privilege log for records that are not responsive to a PRA request. The third record (the recorded interview) was not discovered until some time later, was subject to the exclusive provisions of RCW 13.50 and not the PRA, and was timely provided under RCW 13.50 once it was discovered. The fourth record (the transcript of the recorded interview) did not exist at the time of the 2007 and 2008 records requests, was subject to the exclusive provisions of RCW 13.50, and was provided anyway under that statute. There simply was no legal reason to prepare a privilege log in this case.

Moreover, Ms. Wright received unredacted copies of the recorded interview and transcript under the provisions of RCW 13.50. She also received unredacted copies of the Investigation Protocols and Pride Manual through discovery in her tort lawsuit. Nothing was withheld under the PRA.

E. The Trial Court Ignored The Law And Abused Its Discretion In Determining and Awarding Penalties Under The PRA

Ms. Wright argues there was no abuse of discretion and "[t]he trial court's ruling at the conclusion of the penalty hearing makes clear that it

both understood and correctly applied the law when assessing penalties." Br. Resp't at 35. This is incorrect. Directly following the penalty hearing, the trial court only made a short oral ruling and then signed Ms. Wright's proposed judgment. RP at 44-46 (Nov. 18, 2011).

The trial court's oral ruling started, "Plaintiff is not asking for per document per day penalties." RP at 44-46 (Nov. 18, 2011). But Ms. Wright clearly asked for per document per day penalties totaling $287,800, and that is what the judge awarded. CP at 632, 786.

The trial court's oral ruling also did not specifically address the *Yousoufian* factors, but instead stated its conclusion that "DSHS was egregious" and "this was an unbelievable obstruction of justice[.]" RP at 45 (Nov. 18, 2011). The trial court's oral and written ruling did not articulate a single fact in this case that was "egregious." The only fact mentioned by the trial judge in his oral ruling was his recollection that "it was cited during the trial that DSHS gets 20,000 claims a year . . . and they say very few of them are tried." RP at 46 (Nov. 18, 2011). The trial judge sua sponte commented:

> THE COURT: 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 46 (Nov. 18, 2011).

The trial court's raw speculation as to why only a small number of public records requests are appealed is not evidence of egregious conduct by the Department. It is equally plausible, in the absence of evidence to the contrary, that the Department provides requested records to the satisfaction of the requester in the vast majority of cases. The trial court's written order provides no additional insight on the *Yousoufian* penalty factors and includes only a single sentence stating "there was an obstruction of justice" such that penalties of $100 per day totaling $287,800 are appropriate. CP at 786. There was no evidence, let alone substantial evidence, in this record that supports a penalty of $100 per day. *See Sargent v. Seattle Police Dep't*, 167 Wn. App. 1, 24-25, 260 P.3d 1006, 1018 (2011) (trial court had no basis for maximum $100 per day penalty, and finding of bad faith was not supported by evidence).

Ms. Wright also incorrectly alleges the trial court found Ms. Wright "suffered the potential for economic harm" and "DSHS' conduct could have impacted Amber's torts lawsuit by causing her federal claims to be dismissed." Br. Resp't at 35, citing RP 19 (Nov. 18, 2011). The trial court made no such finding, her federal lawsuit was dismissed after she already had the three disputed records in hand, and the federal court in her tort case did not find any discovery violations. *See* RP at 19-20 (Nov. 18, 2011); Ex. 230 at 6, 7. Ms. Wright's claim that

"DSHS offered no evidence of training" is also contrary to the record's lengthy summary of agency PRA training. *See* Br. Resp't at 33; CP at 695-97.

This record does not support the award of any penalty, much less the maximum penalty permitted under the PRA. The trial court abused its discretion by assessing a penalty without applying a multi-factor analysis and articulating the basis, as required in *Yousoufian*, and by applying undefined "discovery" and "obstruction of justice" standards throughout this case. *See Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467-68, 229 P.3d 735 (2010). This Court should reverse and direct that the complaint be dismissed.

F. The Superior Court Committed Legal Error And Abused Its Discretion In Awarding Attorney Fees And Costs

The trial court signed Ms. Wright's proposed judgment granting $346,000 in attorney fees immediately after hearing oral argument. RP at 19-20 (Nov. 18, 2011). The court's oral ruling merely says "costs equal $16,096.87" and makes absolutely no mention of attorney fees. RP at 19-20 (Nov. 18, 2011). The record does not show the court met the requirement of independently analyzing the attorney fee award. *See 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).

Ms. Wright argues the court did not err when it denied the Department an opportunity to respond to the itemized billing summary submitted in her reply brief, because only the trial court needed to review the fee request. Br. Resp't at 41 n.13, CP at 754-65. Fundamental fairness requires that the Department be allowed to respond to the twelve pages of detailed attorney fee billings submitted in Ms. Wright's reply brief. *See In re Marriage of Kastanas*, 78 Wn. App. 193, 201-02, 896 P.2d 726, 731 (1995) (appellate court refused to consider attorney fee request in reply brief because there was no opportunity for a response); *In re Marriage of Sacco,* 114 Wn.2d 1, 784 P.2d 1266 (1990) (denying attorney fees when first requested in reply brief).

Regarding the 2X lodestar multiplier, the *Sanders* decision *does* disfavor a multiplier in the present case. *Sanders v. State*, 169 Wn.2d 827, 869, 240 P.3d 120, 141 (2010) (multiplier properly refused when rate times hours calculation of the award already exceeded contingency fee). Ms. Wright does not dispute that the $346,000 fee award adds a quarter-million dollar premium to a standard one-third contingency fee for the $287,800 penalty award.

The judgment says the 2X multiplier is warranted given "the obstacles surmounted due to DSHS' obstruction in obtaining these public

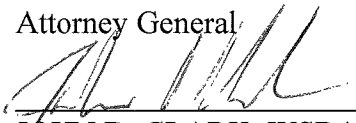
records." CP at 787. This is error because the $346,000 in attorney fees did not result in a single additional record being disclosed; Ms. Wright received all three disputed records prior to this PRA lawsuit being filed. Ex. 4, 5, 6. The attorney fee award should not be treated by the court as a penalty.

III. CONCLUSION

This Court should reverse the trial court, vacate its judgment, and dismiss the underlying case in its entirety for having been filed after the statute of limitations in RCW 42.56.550(6) had run. If this Court were to reach the merits, it should reverse the trial court, hold that the Department did not violate the Public Records Act, and vacate the trial court's judgment in its entirety, including the award of penalties and attorney fees. In either event, Ms. Wright's request for attorney fees on appeal should be denied.

RESPECTFULLY SUBMITTED this 24th day of August, 2012.

ROBERT M. MCKENNA
Attorney General



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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 August 24, 2012, I served a true and correct copy of this Reply Brief Of Appellant on the following parties to this action, as indicated below:

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

DATED this 24th day of August 2012, at Tumwater, Washington

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