No. 95001-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

REBECCA A. RUFIN,
Petitioner,

vs.

CITY OF SEATTLE,
Respondent,

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I INTRODUCTION

Discretionary review should be denied. The Court of Appeals correctly ruled, consistent with this Court's precedents, that Public Records Act (PRA) cases are not special proceedings and therefore Civil Rule 68 applies in PRA cases. Given Washington's strong public policy favoring settlements, CR 68 dovetails neatly with the PRA's fundamental purpose of open government. Review is also unnecessary of the fact-bound application of this Court's adequate search precedents under the PRA. This is all the more so because Ms. Rufin was afforded a rare opportunity to have a trial on her claim. It is only by confusing the role of appellate courts reviewing factual findings that Ms. Rufin can claim the Court of Appeals erred in any respect. It did not. Consequently, the Petition should be denied.

II BACKGROUND

The City does not agree with Ms. Rufin's one-sided characterization of the "Factual Background," Pet. at 2-3, as it omits numerous facts supporting the trial court's factual findings regarding the adequacy of the City's search in response to her September 28, 2012 request, and because it also omits any facts related to the City's CR 68 offer of judgment. Rather than detail those facts here, the City notes that the trial court's Findings of

Facts and Conclusions of Law,[1] the Court of Appeals' Opinion,[2] and the City's appellate brief[3] fully lay out the relevant facts.

III ARGUMENT

Discretionary review should be denied on both issues for which Ms. Rufin seeks review. First, the Court of Appeals correctly determined that CR 68 applies in PRA cases and the application of the rule in no way undermines the PRA. Rather, it is completely consistent with the PRA. Second, there is no need for this Court to review the Court of Appeals' affirmance of the trial court's factual conclusion that the City conducted an adequate search, which was based on a two-day trial, because Ms. Rufin's arguments demonstrate a fundamental misunderstanding of the appellate court's role. Discretionary review should be denied.

A. Discretionary review is not warranted because the Court of Appeals faithfully applied this Court's precedents.

In concluding that CR 68 applies in PRA cases, the Court of Appeals faithfully applied this Court's precedents, which hold that a PRA proceeding is not a special proceeding and therefore the Civil Rules apply

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[1] *See* CP 1680-88.

[2] *See* Opinion at 1-4.

[3] *See* City's Answering/Opening Br. at 2-13 (factual background on PRA issues) & *id.* at 37-38 (factual background on CR 68 issues).

in PRA cases. *See* Opinion at 12. Ms. Rufin sidesteps these dispositive rulings. Far from citing "some case law," Pet. at 9, the Court of Appeals relied on this Court's cases in *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005), and *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011), both of which determined that the Civil Rules apply in PRA cases.

In *Spokane Research*, after addressing CR 1, CR 2 and CR 81, this Court distinguished between proceedings that are "statutorily defined," such as garnishment, unlawful detainer, and sexually violent predator proceedings, and general civil actions, noting that "actions under the PDA are not" statutorily defined. 155 Wn.2d at 104-05. As a result, the Court held that the "normal civil procedures are an appropriate method to prosecute a claim under the liberally construed PDA." *Id.* at 105. This Court affirmed this holding several years later, concluding that the civil discovery rules apply in PRA cases. *Neighborhood Alliance*, 172 Wn.2d at 716.

These cases establish that the Civil Rules, not just some of them, apply in PRA cases. Indeed, because the PRA "says nothing about" CR 68, the implication is that "such procedure is proper to the extent allowed by the civil rules." *Spokane Research*, 155 Wn.2d at 105; thus, "no reason exists to treat" CR 68 differently in the context of the PRA. *Neighborhood*

Alliance, 172 Wn.2d at 716. Ms. Rufin's unpersuasive policy arguments cannot overcome these precedents.

"Washington law strongly favors the public policy of settlement over litigation." *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 772, 174 P.3d 54 (2007) (collecting cases). CR 68 reflects this policy and is designed to "encourage settlements and avoid lengthy litigation." *Dussault v. Seattle Pub. Schools*, 69 Wn. App. 728, 732, 850 P.2d 581 (1993). CR 68 offers operate as a contract, and the City's offer expressly included, in addition to the $40,000 penalty amount, an award of fees to be decided by the court upon acceptance of the Offer. CP 1751.[4] The effect of a CR 68 offer, when it includes attorneys' fees and costs, is simple: it cuts off those fees and costs "up to the date of the offer." *Johnson v. State Dep't of Trans.*, 177 Wn. App. 684, 692, 313 P.3d 1197 (2013). "When the offer of judgment reads that the offered amount includes all reasonable attorney fees and costs, the plaintiff may not recover reasonable attorney fees and costs, *beyond the offered amount*, even if a statute affords recovery for fees

[4] Ms. Rufin's claim that the City's Offer "did not address the mandatory remedy in this case, which was attorney fees and costs," is false. Pet. at 12-13. The Offer states that the "amount does not include costs, including reasonable attorneys' fees, incurred to date, which *shall be awarded* in an amount to be determined by the Superior Court after briefing and argument." Pet. at 8 (quoting Offer; emphasis added). The Offer was clear: The City agreed to have a judgment entered against it in the amount of $40,000, *plus reasonable attorneys' fees*, but left the determination of the amount of those fees to the trial court. In fact, the Offer followed the "prudent practice" of being as clear as possible with respect to fees. *Hodge v. Dev. Servs. of Am.*, 65 Wn. App. 576, 584, 828 P.2d 1175 (1992).

and costs." *Critchlow v. Dex Media West, Inc.*, 192 Wn. App. 710, 719, 368 P.3d 246, *rev. denied*, 186 Wn.2d 1012 (2016). Thus, CR 68 does not foreclose an award of attorneys' fees, it only limits recovery after a date certain depending on a plaintiff's future success.

Ms. Rufin's claim that there is a conflict between CR 68 and the PRA rests on a fundamental misunderstanding of how CR 68 operates. Pet. at 11-12. CR 68 does not negate a party's *right* to attorney's fees and costs. Rather, it merely limits the *amount* of fees *after a date certain* where, as here, the party rejects an offer and fails to obtain a more favorable judgment. Moreover, Ms. Rufin's logic is internally inconsistent. On the one hand, she claims that applying CR 68 undermines the purposes of the PRA. On the other hand, she concedes that any request for fees must be judged against a standard of reasonableness. As the Court of Appeals properly recognized, these are two sides to the same coin, because "[a]pplying CR 68 to the PRA is a reflection of this reasonableness requirement." Opinion at 14.

In *Marek v. Chesny*, 473 U.S. 1 (1985), the Supreme Court came to the same conclusion is a related context—entitlement to fees in brought under the federal civil rights statute 42 U.S.C. § 1983. The Court recognized that the applicable fee-shifting statue, 42. U.S.C. § 1988, "authorizes courts to award only 'reasonable' attorney's fees to prevailing parties," and concluded that Federal Rule 68 was "in no sense inconsistent" with that

statute or the underlying civil rights statute. 473 U.S. at 11.[5] It explained:

> In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff—although technically the prevailing party—has not received any monetary benefits from the postoffer services of his attorney . . . Given Congress' focus on the success achieved, we are not persuaded that shifting the postoffer costs to respondent in these circumstances would in any sense thwart its intent under § 1988.

Id. The same logic applies here. It is undisputed that (1) Ms. Rufin received a judgment that was considerably less favorable than the City's offer, and (2) she received no additional documents responsive to any of her requests *after* the City made its offer. Thus, while Ms. Rufin technically prevailed under the PRA on two of her six claims at trial (both of which the City basically conceded), her post-offer efforts before the trial court were unnecessary and a waste of time because they accomplished nothing. Engaging in needless, post-offer litigation does not advance the purposes of the PRA, which is open government and access to records. *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 903, 346 P.3d 737 (2015).

Moreover, given CR 68's "policy of encouraging settlements is neutral, favoring neither plaintiff nor defendants," *Marek*, 473 U.S. at 10; it

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[5] As Ms. Rufin acknowledges, because the PRA "closely parallels the federal Freedom of Information Act . . . judicial interpretations of that act are particularly helpful in construing" the PRA. Pet. at 18 n.4 (quoting *Neighborhood Alliance*). Notably, Federal Rule 68, which mirrors CR 68, applies in FOIA cases. *See, e.g., Electronic Privacy Info. Ctr. v. U.S. Dep't of Homeland Security*, 982 F. Supp.2d 56, 62 (D.D.C. 2013).

makes sense to apply CR 68 equally to all civil litigation:

> Civil rights plaintiffs—along with other plaintiffs—who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected. But, since the Rule is neutral, many civil rights plaintiffs will benefit from the offers of settlement encouraged by Rule 68. Some plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered. And, even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation. In short, settlements will serve the interests of plaintiffs as well as defendants.

Marek, 473 U.S. at 10. Given CR 68's neutrality, it does not matter that the underlying statute that creates the civil cause of action has a laudable public purpose in assessing whether CR 68 applies. *See, e.g.*, *Interfaith Cmty. Org. v. Honeywell Intern., Inc.*, 726 F.3d 403, 410-11 (3d Cir. 2013).

Likewise, lengthy and costly litigation, is also inconsistent with the PRA. As then Chief Justice Madsen explained:

> Full blown civil litigation, however, is not consistent with the narrow, but important, purposes of the PRA to assure that individuals may obtain public records from their government agencies quickly and expeditiously and that individuals may enjoy the same kind of quick and expeditious process to resolve claims like inadequacy of an agency's search. The consequences are increased costs, time, and effort on the part of the requesters and the agencies, which will have to devote taxpayer-funded time and resources to litigation rather than doing the public work of the agency.

Neighborhood Alliance, 172 Wn.2d at 730 (Madsen, C.J., concurring). In fact, it is for this reason that the Legislature included in the PRA a show cause procedure to address issues under the PRA expeditiously. *See* RCW 42.56.550(1). For reasons known only to Ms. Rufin, she eschewed this streamlined process and instead opted to engage in full-blown litigation. While that was her choice, *see Spokane Research*, 155 Wn.2d at 106; it is a bridge too far for her to now claim that applying CR 68 in the context of this case frustrates the PRA.

Next, without citation or elaboration, Ms. Rufin proclaims that "CR 68 is not designed to address claims in which there are no claims for 'actual damages.'" Pet. at 12. This argument, however, misreads the plain language of CR 68. CR 68 speaks in terms of "judgments" not damages. Thus, under the rule it does not matter whether the basis of the judgment derives from statutory penalties or damages. The result is the same: A *judgment* is entered against the offering party if the offer is accepted.

Nor does it make any difference that the City's offer did not admit wrongdoing, *see Pet.* at 15; because at the end of the day, had Ms. Rufin accepted it, a formal judgment would have been entered against the City. Any claim that applying CR 68 in PRA cases allows an agency "to avoid being exposed and held publicly accountable" for violations of the PRA makes no sense. *Id.* In fact, Ms. Rufin does not agree with her own premise

because her Petition states: "Thus, the *only remedy* that holds government *publicly accountable for wrongdoing* under the PRA is a *judgment* for the plaintiff." *Id.* at 16 (emphasis added). That is precisely what CR 68 does: It allows for entry of judgment against an agency.

Finally, far from creating "absurd results," Pet. at 14, applying CR 68 in PRA cases brings a needed sense of proportionality to PRA litigation. Ms. Rufin's example of non-penalty generating claims underscores the point. *See* Pet. at 14. By legislative design, certain claims under the PRA generate penalties of up to $100 a day, plus fees, while others generate only fees. *See, e.g.*, *Sanders v. State*, 169 Wn.2d 827, 860, 240 P.3d 120 (2010). Take for example, the failure to issue a five-day letter, which only generates fees. *See* Opinion at 11. When an agency fails to issue a five-day letter, the violation is clear: Either it issued the letter or it didn't.[6]

Applying CR 68 in such an instance makes perfect sense because litigating a case such as that all the way to trial, or even to summary judgment, is not proportional or even necessary. In such cases, there is no

[6] This case illustrates the point. On appeal, the Court of Appeals determined that the City's failure to provide Ms. Rufin a five-day letter with respect to her March 17, 2014 request was a violation of the PRA, and remanded the case to the trial court to recalculate Ms. Rufin's fee award. *See* Opinion at 11. The Court of Appeals also awarded her attorneys' fees on appeal. *See id.* at 15-16. Although she only prevailed on one claim on appeal, on an issue the *City conceded at every stage of the proceeding*, Ms. Rufin nevertheless requested almost $40,000 in fees and costs for the appeal. The Court Commissioner, in consultation with the Panel, reduced this amount to $5,000 and Ms. Rufin did not challenge that ruling. *See* Attachment A (Commissioner Ruling) & Attachment B (City's Objection).

need to spend "thousands of dollars to subpoena and depose witnesses, obtain documents, and conduct a trial." Pet. at 14. Doing all of things wastes everyone's time and money. Providing a mechanism for early resolution of those claims makes perfect sense unless one views the award of attorneys' fees as purely punitive, or as a hedge, as Ms. Rufin apparently does.

Applying CR 68 facilitates early resolution of claims and is consistent with the PRA. A contrary conclusion will incentivize plaintiffs (and their counsel) to reject reasonable settlement offers and run-up large fee amounts in the hopes they prevail at trial. CR 68 provides a necessary counterweight. Incentivizing such gamesmanship, by foreclosing the application of a valuable settlement tool, does not advance the PRA; rather, it undermines the societal benefits inherent in the settlement process and promotes misuse of PRA lawsuits. Ms. Rufin's Petition should be denied.

B. Discretionary review is not warranted to review the trial court's factual findings that were made after a bench trial.

Although Ms. Rufin was provided an extraordinarily rare opportunity in this case—an actual trial on the merits of her PRA claim that the City did not conduct an adequate search—her arguments ignore the trial court proceedings and factual findings. Pet. at 20. Seizing on a single line in the Opinion, Ms. Rufin claims that the Court of Appeals placed the

burden on her to demonstrate the City's search was unreasonable. *Id.* at 17.[7] This assertion makes no sense because the appeals court was not reviewing a legal ruling or even a ruling based only on documentary evidence. Instead, it was reviewing *factual findings* made by the trial court after that court heard from six live witnesses and reviewed over a hundred exhibits.

Ms. Rufin's Opening Brief assigned error to the two key *factual findings* made by the trial court with request to the September 28, 2012 request: (1) that the City's search was reasonable; and, (2) that there were no obvious leads that would have led the City to search Mr. Maehara's email account. *See* Opening Br. at 7. She also concedes that factual findings can only be overturned on appeal if they are not supported by substantial evidence. *See id.* at 31 (acknowledging factual findings "based on the testimonial record" are tested against the substantial evidence standard) (quoting *Zink v. City of Mesa*, 140 Wn. App. 328, 337, 166 P.3d 738 (2007)). Thus, because the trial court made factual findings as to the reasonableness of the City search, Ms. Rufin's burden on appeal was to demonstrate that substantial evidence did not support those findings.

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[7] While Ms. Rufin argues that the trial court improperly placed the burden on her at trial, irrespective of whether she is correct, it is undisputed that she never assigned error to this issue. *See* Opinion at 6 n.1; *see generally* Opening Brief. Thus, she waived any claim of error arising from the purported misallocation of the burden of proof. *See, e.g.*, *Cowiche Canyon Conservatory v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Moreover, given the nature of appellate review of factual findings, even assuming the burden was misallocated at trial, that error was harmless. *See* Opinion at 6 n.1.

"Resolution of this question necessarily involves a review of the trial record by the appellate court. To speak of 'burden of proof' on appeal is therefore disingenuous." *Structurals NW, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 716, 658 P.2d 679 (1983). Ms. Rufin cannot dispute that the appellate court thoroughly reviewed the trial court record. *See* Opinion at 6 n.1 ("We have reviewed all the evidence, and it clearly establishes that there were no PRA violations except where indicated otherwise."). When the Court of Appeals said that "Rufin failed to present any evidence that Maehara remembered, or even saw, the e-mail in question," *id.* at 8; it was pointing out this lack of evidence in the context of reviewing the trial court's factual findings under the substantial evidence standard that Ms. Rufin herself advanced. The fundamental flaw in Ms. Rufin's logic is that she confuses the burden of persuasion at trial with the burden of overcoming factual findings on appeal. It is only by misconstruing the proper role of the appellate court in reviewing factual findings that Ms. Rufin can claim that the Court of Appeals somehow erred in determining that substantial evidence supported the trial court's factual findings.

At the end of the day, direct review is not warranted to review a fact-bound application of this Court's precedents regarding what constitutes an adequate search under the PRA. Both the trial court and Court of Appeals faithfully applied that law. Likewise, both the trial court and the appellate

court acted within their respective roles: The trial court received evidence and made factual findings, and the appellate court reviewed those findings for substantial evidence. That Ms. Rufin could not overcome those factual findings on appeal does not mean that the Court of Appeals (or the trial court) erred in any material respect that warrants this Court's review.

IV CONCLUSION

For the foregoing reasons, this Court should deny Ms. Rufin's Petition for Discretionary Review.

RESPECTFULLY SUBMITTED this 28th day of September 2017.

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PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that on the 28th day of September 2017, I caused to be served, a true copy of the foregoing ANSWER TO PETITION FOR DISCRETIONARY REVIEW upon the parties listed below:

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Dated this 28th day of September 2017.

/s/ Marisa Johnson
Marisa Johnson, Legal Assistant

ATTACHMENT A

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

REBECCA A. RUFIN, an individual, Appellant, v. CITY OF SEATTLE, a municipality, Respondent.	)	No. 74825-4-I COMMISSIONER'S RULING AWARDING ATTORNEY FEES AND COSTS

This is a public records act (PRA) case. On June 26, 2017, this Court issued a published opinion. On Rebecca Rufin's appeal from the trial court's dismissal of her three PRA claims arising from her September 28, 2012, March 4, 2014, and March 17, 2014 PRA requests, this Court reversed the dismissal only as to her March 17, 2014 request based on the City of Seattle's undisputed failure to respond to that request within five days. Otherwise, this Court affirmed the dismissals. On the City's cross appeal, this Court reversed the trial court's conclusion that CR 68 offer of judgment did not apply to the PRA. This Court awarded reasonable attorney fees on appeal to Rufin under RCW 42.56.550(4). On August 17, 2017, this Court denied Rufin's motion for reconsideration.

Rufin filed a declaration of counsel and a cost bill, seeking $36,145 in attorney fees and $3,471.87 in costs. The City filed an objection, arguing that the requested attorney fees and costs are excessive when Rufin lost on all but one claim related to the City's undisputed technical error. Rufin did not file a reply in response to the City's objection.

Reasonable attorney fees are based on the number of hours reasonably spent, multiplied by a reasonable hourly rate.[1] "Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel."[2] Hours spent on "unsuccessful claims, duplicated effort, or otherwise unproductive time" should be discounted.[3]

Considering the parties' briefs and the opinion, the requested attorney fees are excessive because they include hours spent on claims on which Rufin lost. Rufin prevailed only on one of her three PRA claims where the City conceded its failure to meet the five-day response requirement, and the City prevailed on its cross appeal. Also, I agree with the City that 5.3 hours spent at the $350 hourly rate on a designation of clerk's papers are excessive. With consultation with the panel of judges who determined this appeal, attorney fees are awarded as reduced from $36,145 (requested) to $4,000.

As to the costs, this Court will generally award costs to a party who substantially prevailed on review under RAP 14.2. If there is no substantially prevailing party, no costs will be awarded to any party. In determining which party substantially prevailed, this Court may look beyond the bottom line of reversal or affirmance.[4] Rufin did not substantially prevail on review under RAP 14.2. However, RCW 42.56.550(4) authorizes an award of costs and attorney

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[1] Berryman v. Metcalf, 177 Wn. App. 644, 660, 312 P.3d 745 (2013).
[2] Berryman, 177 Wn. App. at 657 (quoting Mahler v. Szucs, 135 Wn.2d 398, 434-35, 957 P.2d 632, 966 P.2d 305 (1998)).
[3] Id. at 662.
[4] Family Med. Bldg., Inc. v. DSHS, 38 Wn. App. 738, 739, 689 P.2d 413 (1984).

fees to any person "who prevails against an agency" under the act.[5] Under the statute, this Court determined that Rufin prevailed on review on one claim. With consultation with the panel of judges who determined this appeal, costs are awarded as reduced from $3,471.87 (requested) to $1,000.

Therefore, it is

ORDERED that attorney fees and costs in the total amount of $5,000 are awarded to Rufin. The City shall pay this amount.

Done this 1st day of September, 2017.

Masako Hanegawa
Court Commissioner

[5] RCW 42.56.550(4).

ATTACHMENT B

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

REBECCA A. RUFIN, Appellant/Cross-Respondent, vs. CITY OF SEATTLE, a municipality, Respondent/Cross-Appellant.	No. 74825-4-I OBJECTION TO COST BILL

I INTRODUCTION

Rebecca Rufin challenged the City of Seattle's handling of six requests made under chapter 42.56 RCW, the Public Records Act ("PRA"). She lost on all but one claim before the trial court. Likewise, Ms. Rufin lost on nearly all her claims on appeal, and lost on the City's cross-appeal of the trial court's ruling on applicability of CR 68. Although never directly argued by Ms. Rufin, this Court ruled in favor of Ms. Rufin on the narrow issue that for purposes of attorney's fees only, that she should have been considered a "prevailing party" in the trial

court because of the City's failure to provide her with a five-day letter under the PRA.

In requesting appellate fees and costs, Ms. Rufin makes no effort, as she must, to segregate out time spent on her unsuccessful claims on appeal. Because Ms. Rufin lost nearly all of her appeal while the City prevailed on its cross-appeal, Ms. Rufin's request for the *entire amount* of her appellate fees and costs should be denied. Rather, this Court should, as it recently did in *Hikel v. City of Lynnwood*, award Ms. Rufin "only those fees and costs incurred litigating" the five-day letter issue "on appeal." 197 Wn. App. 366, 389 P.3d 677 (2016). That amount is mere fraction of the amount Ms. Rufin seeks on appeal.

II PROCEDURAL HISTORY

On November 26, 2014, Ms. Rufin filed a complaint against the City alleging deficiencies with six of her PRA requests. CP 1-11. Two of those claims were dismissed on summary judgment, and Ms. Rufin did not appeal those. Four of those issues went to trial, and Ms. Rufin prevailed on one of those claims below. The only request relevant on appeal is Ms. Rufin's March 17, 2014 request for portions of hiring files from Seattle City Light under the PRA. At every stage of the proceedings, including oral argument before this Court, the City conceded that it did not provide

Ms. Rufin with a five-day letter in response to this request, however all responsive records were provided in May, June and July of 2014.

At trial, Ms. Rufin argued the City did not promptly respond to her request in violation of the PRA. The trial court found that the City did not send a five-day letter but concluded that the City promptly responded to Ms. Rufin's request. CP 1687. Ms. Rufin assigned error to the trial court's conclusion that the City promptly responded, Opening Brief at 7, and before this Court focused her argument associated with the March 17, 2014 request on that issue alone. Ms. Rufin assigned error to the court's award of attorney's fees, Opening Brief at 8, but did not argue the court's error with respect to the attorney's fees associated with that request. This Court affirmed the trial court's determination that (1) the City reasonably responded to this request; and (2) no penalty was warranted for this technical violation. This Court did, however, "remand the case for recalculation of attorney fees, as Rufin is entitled to fees for the March 17, 2014 request" based on the City's failure to provide her with a five-day letter. Opinion at 11.

Below, Ms. Rufin requested over $168,000 in attorney's fees and costs, CP 1721, but based on her limited success, the trial court awarded her only $33,229.12 in attorney's fees and costs. CP 1768. On appeal, Ms.

Rufin never argued that the trial court abused its discretion by only awarding her fees and costs for those claims she successfully pursued. Rather, she argued only that if she were to prevail on appeal, the matter should be remanded for a recalculation of attorney's fees. *See* Opening Brief at 42 ("Assuming Ms. Rufin succeeds with her appeal, on remand the trial court should be asked to reconsider the finding that it was 'appropriate to award Plaintiff twenty-five (25) percent of her total costs and fees[.]"). In fact, both in the court below and on appeal, the City argued that Ms. Rufin's maximum award of attorney's fees should be just under $13,000 because Ms. Rufin did not accept the City's CR 68 offer and did not best the City's offer at trial. City's Answering/Opening Brief at 37-48. This Court agreed with the City, and reversed the trial court's attorney's fees award, and remanded the case for further proceedings. Opinion at 11-16. Thus, although Ms. Rufin came into this appeal being owed over $33,000 in fees and costs, now the maximum amount she can recover before the trial court is just under $13,000.

In assessing Ms. Rufin's request on appeal, it is important to consider that the City conceded in depositions, at summary judgment, at trial, and during appellate argument that it failed to provide the five-day letter. Ms. Rufin herself acknowledged that it "is uncontested that the

City did not respond to Rufin's 3/17/14 [sic] within five days...." Opening Brief at 5. She also acknowledged the trial court's finding that the City "failed to initially respond to Ms. Rufin's request within five days...." Appellant's Reply Brief, p. 15. This issue required little-to-no litigation and little time was spent on the issue on appeal, let alone $40,000 in fees and costs. Reduction of the fees and costs is required under *Hikel*.

III ARGUMENT

Under the PRA, a prevailing party is entitled to attorney's fees. RCW 42.56.550(4). "The amount of attorney fees is within the discretion" of the court awarding fees. *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 729, 354 P.2d 249 (2015). Courts employ the "lodestar method," under which a "court multiplies a reasonable attorney rate by a reasonable number of hours worked." *Id.* at 729-30. When determining reasonableness, courts must "discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time." *O'Neill v. City of Shoreline*, 183 Wn. App.15, 25, 332 P.3d 1099 (2014).

Consistent with the lodestar method, this Court recently held that when a party prevails solely on a claim that an agency did not technically

comply with the five-day requirement under RCW 42.56.520, that party is entitled to "only those fees and costs incurred litigating that issue in the trial court *and on appeal*." *Hikel*, 197 Wn. App. at 380 (2016) (emphasis added). Here, Ms. Rufin prevailed solely on the technical violation under RCW 42.56.520. As such, Ms. Rufin's request for fees and costs should be reduced accordingly.

Indeed, as the party claiming an award of attorney fees, Ms. Rufin shoulders "the burden of segregating [her] lawyer's time." *Manna Funding, LLC v. Kittitas County*, 173 Wn. App. 879, 901, 295 P.3d 1197 (2013); *see also Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 690, 82 P.2d 1199 (2004). Despite this burden, Ms. Rufin makes no attempt to segregate the time spent on her successful and unsuccessful claims. Segregation is mandatory, and particularly so in cases such as this where the success is of such a limited nature.

> A party in Public Records Act litigation may recover attorney fees only for work on successful issues. When a party may recover fees on only some of its claims, the award must reflect a segregation of the time spent on the varying claims. The court separates time spent on theories essential to the successful claim from time spent on theories related to other claims.

O'Neill, 183 Wn. App. at 25 (2014) (footnotes omitted); *Cedar Grove*, 188 Wn. App. at 730 (2015) ("In determining a reasonable number of

hours, the court discounts the hours spent on unsuccessful claims, duplicated effort, and otherwise unproductive time.") (quotation omitted). Because Ms. Rufin only prevailed on one claim she cannot recover fees for time spent on her unsuccessful claims. Following the *Hikel* decision and consistent with the lodestar method, Ms. Rufin's request should be significantly reduced.

A. The request for fees should be reduced.

Under *Sanders v. State*, Ms. Rufin is only entitled to the portion of those fees attributable to the one minor claim upon which she prevailed on appeal. 169 Wn.2d 827, 866, 240 P.3d 120 (2010). Given the limited time devoted to the issue of attorney's fees relating to the March 17, 2014 request, Ms. Rufin's fees should be reduced or rejected as follows:

1. Fees associated with preparation of clerk's papers and trial exhibits.

Objection: Ms. Rufin requests $1,855 for 5.3 hours of attorney time necessary to prepare the designation of clerk's papers and trial exhibits. For the most part, the exhibits and transcripts in this matter do not relate to the March 17, 2014 request. In addition, the question of attorney's fees is a question of law making hundreds of pages of exhibits unnecessary. In fact, to succeed on appeal, Ms. Rufin needed only to

designate the trial court's Findings of Fact and Conclusions of Law (which find that the City did not provide the five-day letter) and the trial court's attorney's fees ruling (which determined Ms. Rufin was not a prevailing party for purposes of the March 17, 2014 request). Designating these two documents should have taken virtually no time. Accordingly, this request should be greatly reduced, if not denied altogether, given Ms. Rufin's failure to segregate her attorney's time. At most, this Court should award a nominal amount of fees and costs for having to designate two orders from the trial court.

2. Fees associated with opening brief

Objection: Ms. Rufin's Opening Brief is 43 pages long, focuses primarily on her conspiracy theory and unsuccessful claims, and devotes at best one and one-half pages to the five-day letter and attorney's fees, or 3.5% of the 43 pages she prepared. Accordingly, Ms. Rufin's requested fees of **$4,655** associated with her opening brief should be reduced to **$163** (3.5%).

3. Fees associated with Motion for Extension of Time to File Reply Brief

Objection: The need to file a motion for extension of time was solely in the control of Ms. Rufin and certainly would not have been necessary for briefing the single issue of attorney's fees associated with an

undisputed violation. Moreover, the City did not oppose the motion. As such, the City objects to the award of any amount of fees associated with such motion, and such request should be reduced to **zero**.

4. Fees associated with reply brief

Objection: Ms. Rufin's Reply Brief was 25 pages long and focused almost exclusively on unsuccessful claims and her response to the City's successful cross-appeal. Less than the equivalent of one page was devoted to the five-day letter and attorney's fees, or roughly 4% of 25 pages. As such, Ms. Rufin's fees of **$18,655** associated with her reply brief should be reduced to **$746** (4%).

5. Fees associated with preparation for and attendance at oral argument

Objection: At oral argument on appeal, Ms. Rufin's counsel did not argue the issue of attorney's fees relating to the five-day letter. In fact, it was Judge Schindler who raised the issue with the City's counsel, who immediately conceded that the City did not provide Ms. Rufin with a five-day letter and that a fee award in the trial court for the failure would have been appropriate, but who went on to argue that the issue was waived

because it was not properly presented in Ms. Rufin's appellate briefs.[1] In fact, in rebuttal at oral argument, Ms. Rufin's counsel did not address the question of waiver. Thus, during oral argument, Ms. Rufin never once mentioned the five-day letter nor argued any entitlement to fees (either appellate or trial) based on the City's failure to provide such a letter. Thus, Ms. Rufin's request of $8,580 for 15.6 hours of attorney should be substantially reduced, if not completely disregarded because very little (if any) preparation time would have been required for this narrow issue.

6. Fees associated with post-Decision review and discussion

Objection: The City objects to any award of fees associated with Ms. Rufin's counsel's review and consideration of the decision issued by this Court. This request should be reduced to **zero**.

B. The request for costs should be reduced.

In addition to attorney's fees, Ms. Rufin's costs for the following items should be reduced to reflect the costs incurred litigating the issue of attorney's fees associated with the five-day letter as set forth in *Hikel*. Looking at the percentages above used for determining the proper proportion of attorney's fees to award, and considering some of the costs

[1] This discussion occurs at about the 15-minute mark of oral argument. http://www.courts.wa.gov/content/OralArgAudio/a01/20170530/3.%20Rufin%20v.%20City%20of%20Seattle%20%20%20748254.wma

would have been incurred if solely the issue of attorney's fees related to the five-day letter were appealed, allowing 10% of charges is more than sufficient to cover any costs reasonably associated with the very narrow issue upon which Ms. Rufin prevailed on appeal. As such, Ms. Rufin's total costs of $3,471.87 should be reduced to **$347.20**.

IV CONCLUSION

On appeal, Ms. Rufin lost virtually all of her claims, and lost on the City's cross-appeal, which left her in a worse position than if she had not appealed at all. As such, the City respectfully requests that Ms. Rufin's fees and costs be substantially reduced to reflect the proportion of time and effort Ms. Rufin expended in connection with her limited success.

RESPECTFULLY SUBMITTED this 17th day of July, 2017.

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DECLARATION OF SERVICE

I, Charolette Mace, certify under penalty of perjury under the laws of the State of Washington and the United States that, on the date below, I e-filed the document to which this Certificate is attached, and copies were e-served by the Clerk to the parties listed below.

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DATED this 17th day of July, 2017.

Charolette Mace, *Legal Assistant*

SEATTLE CITY ATTORNEY'S OFFICE - GOVERNMENT AFFAIRS

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