

NO. 66630-4

WASHINGTON STATE COURT OF APPEALS
DIVISION I

(Snohomish County Superior Court No. 10-2-04951-5)

SUSAN FORBES,

Petitioner,

vs.

THE CITY OF GOLD BAR,

Respondent.

BRIEF OF RESPONDENT

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I. COUNTER STATEMENT OF THE ISSUES

A. Did the trial court correctly hold that the City fully complied with the Public Records Act by providing a reasonable estimate of the time for fulfillment based on the need to locate, obtain, review and provide the requested records?

B. Does the Public Records Act require a city to identify and create a log of documents that are not public records, as defined by the Act?

C. Did the trial court abuse its discretion in denying Forbes' request to conduct an in-camera review of documents that were not provided on the basis that they are not public records?

D. Is Forbes a prevailing party under the Public Records Act and therefore entitled to attorney's fees and costs?

II. STATEMENT OF THE CASE

A. Procedural History.

This appeal involves a dispute over the City of Gold Bar's ("City") responses to three separate public records requests submitted to the City by Appellant Susan Forbes ("Forbes") under the Public Records Act ("PRA").

Upon completing the responses to Forbes' requests, the City filed a Motion for Summary Judgment seeking dismissal of Forbes' lawsuit on the basis that the City had fully complied with the requirements of the

PRA for each of the three requests.¹ CP 341, 355. Forbes then filed a Cross-Motion for Partial Summary Judgment (“Cross-Motion”) arguing that the City had not complied with the PRA, because it had failed to provide a reasonable estimate of time for its responses. CP 26 – 27, 29, 31 – 33, 35 – 37, 42. After full briefing and oral argument on the motions, the trial court held that the City had met its burden of demonstrating that it had complied with the requirements of the PRA, and that the City had adequately searched for and provided documents within a reasonable estimate of time. CP 2 – 3; RP 26:6 – 12. The court also concluded that Forbes had failed to adequately rebut the City’s evidence and likewise had also failed to demonstrate why an extensive in-camera review was appropriate with respect to documents that were not public records, as defined by the PRA. CP 2 – 3; RP 24:7 – 17. The trial court granted the City’s Motion for Summary Judgment, denied Forbes’ Cross-Motion, and dismissed the lawsuit. CP 2 – 3. This appeal followed.

B. Statement of the Facts.

This action concerns three broad public record requests made to the City of Gold Bar. The first two requests essentially sought all letters and

¹ The City Filed a Motion to Show Cause in accordance with RCW 42.56.550 and in the alternative a Motion for Summary Judgment under CR 56. For ease, the City will refer to the Motion as the “Motion for Summary Judgment” throughout its Brief.)

e-mails between then-Mayor Crystal Hill and all City Councilmembers, City staff, certain planning commissioners, and other individuals that in any way mentioned Susan Forbes. The third request, also very broad, sought all text messages and photos sent or received by Mayor Crystal Hill from City Councilmembers, all Snohomish County employees, and all City staff. The gravamen of Forbes' Complaint was that the City's estimates of time for production of the records and related responses were not reasonable, as required by the PRA, and that the City was required to identify and log documents obtained from the private e-mail accounts of elected and appointed officials, regardless of whether the documents were related to City of Gold Bar business.

On November 24, 2010, the City filed a Motion for Summary Judgment seeking to dismiss Forbes' Complaint. CP 330 – 357. In support of its motion, the City submitted the declarations of the current Mayor of Gold Bar, Joe Beavers, and Michael Meyers, the City's current IT consultant. CP 178 – 329. In her response to the City's Motion for Summary Judgment, and in her Cross-Motion, Forbes argued that the City's estimate of time was "unreasonable." Forbes also requested that the court conduct an in-camera review of approximately 3,000 e-mails claimed by the City not to be public records because they were obtained from the private e-mail accounts of elected officials during the search for

responsive public records. CP 31 – 38. Forbes filed her own declaration in support of her motion. CR 26 – 174.

1. Forbes' Public Records Requests.

a. First Request – May 21, 2009.

The first public records request at issue is Forbes' May 21, 2009 request which sought:

[A]ll letters and emails between Mayor Hill and all City Council members mentioning Susan Forbes and all emails between Mayor Hill & planning commissioner Kelly Broyles mentioning Susan Forbes from January 1, 2009 and present. Also, all e-mails between City Staff & Mayor Hill mentioning Susan Forbes for January 1, 2009 to present.

CP 185, 433 – 434.

The City assigned the request number PRR 2009-053. On May 26, 2009, within five days of receipt of Forbes' request, responded by providing an estimate of the time required to fulfill the request. The City subsequently informed Forbes when extensions of estimates were necessary and provided updates and documents in installments.² CP 184 – 186, 200 – 245, 294.

² Because of the number and overlap of requests for these e-mails, the City informed Forbes and other requesters that it would be providing groups of documents in installments as provided by RCW 42.56.080. This is explained in more detail below.

b. Second Request – November 10, 2009.

Forbes' second public records request was e-mailed to the City on November 10, 2009 and requested:

All emails sent by or received by Dorothy Croshaw and all elected or appointed council, the Mayor and all City Staff and Christopher Wright which in any way relates to Susan Forbes. Again, this is a purposeful broad public records request intended to obtain all emails (including any attachments to those emails) sent to or received by Dorothy Croshaw from any Gold Bar official, whether a governmental or private computer system or electronic device was used, it's subject to the Washington State Public Records Act

CP 187, 436 – 437 (emphasis added).

The City assigned number PRR 2009-115 to the request and responded to Forbes on November 16, 2009 (within the required five day period) with an estimate of time to respond. The City subsequently informed Forbes when extensions of estimates were necessary and timely provided updates and documents in installments. CP 184, 187 – 188, 245 – 294.

c. Third Request – March 12, 2010.

Forbes' third request was e-mailed to the City on March 12, 2010 and requested:

All text messages and photos sent by Mayor Hill to all elected or appointed council, all elected and appointed Snohomish County employees, and all City Staff, present and past during regular business hours for City Hall from January of 2006 to date of her resignation. All text messages and

photos received by Mayor Hill from all elected or appointed City council, all elected and appointed Snohomish County employees, and all City Staff, present and past during regular business hours for City Hall from January of 2006 to date of her resignation. Again, this is a purposeful broad public records request intended to obtain all text messages and photos (including any attachments to those) sent by Mayor Hill to any Gold Bar official, whether a governmental or private phone system or electronic device was used, it's subject to the Washington State Public Records Act;

CP 188, 440 - 441.

The City assigned the request number PRR 2010-22. The City responded to Forbes that same day, in an e-mail dated March 12, 2010 from City Clerk Laura Kelly, acknowledging receipt of request. The City timely provided an estimate of time to respond to the request and informed Forbes of the need for two extensions and timely provided updates and documents in installments. CP 188 – 189, 200 – 245, 296 – 321.

2. Background and City Responses to the PRA Requests.

The City of Gold Bar is located in Snohomish County and has a population of 2,075 citizens, according to the 2010 census. Prior to 2009, the City received few public records requests. That changed in 2009. On July 20, 2009, when then-Mayor Crystal Hill resigned and Joe Beavers was appointed the City's new Mayor, there were approximately 82 public record

requests that had been made by Forbes and others associated with her.³ CP 180. Most of these requests were processed in fairly short order, except for those requiring extensive production and review of documents. Out of this last category, numerous requests, including Forbes' three requests that are the subject of this appeal, sought e-mails, texts and photos, in various combinations, from and to Mayor Crystal Hill from 2003 to 2009.⁴ CP 180 – 181. In order to process these large, very broad requests, and at the same time avoid having City services come to a stand-still, the City hired an additional full-time employee to work on the requests. The City also transferred an employee from the Public Works Department to work on the requests part-time. Consequently there were 1.5 full-time employees, assigned solely to work on responding to public records requests, including Forbes' requests. CP 190 – 191.⁵

³ Krista Dashtestani, Anne Block, and Susan Forbes are all co-editors of an online blog called the "Gold Bar Reporter." At the time the City was processing her requests, Forbes individually submitted 12 requests in 2009 and 19 requests in 2010. Forbes, Anne Block, and Krista Dashtestani submitted requests under their individual names and under the name of the Gold Bar Reporter. The Gold Bar Reporter filed 17 requests in 2009 and 13 in 2010. Anne Block and Krista Dashtestani, combined, accounted for 67 requests in 2009 and 56 requests in 2010. Forbes regularly picks up responses to records requests for Dashtestani, Anne Block, and the Gold Bar Reporter. CP 180.

⁴ Many of the requests, including one of Forbes' requests that is the subject of this appeal, did not set a beginning date but simply request "all" documents ever sent in relation to the request up to the requesting date.

⁵ The City received 139 public records requests in 2009. CP 179.

Because former Mayor Hill had used her personal BlackBerry as well as her personal AOL e-mail account for some City business, and many Councilmembers and appointed commissioners had likewise used their personal e-mail accounts, the City determined that in order to conduct an adequate search, it needed to review the personal e-mail accounts of said individuals for any public records. CP 180. The City determined that the most effective way to do such a review was to hire Michael Meyers, owner of Eastside Computer, a computer network consulting company, to obtain documents from the various public officials' private e-mail accounts in order to respond to the various requests. CP 180, 326 – 329. Not surprisingly, the process of obtaining and downloading the information from seven separate private accounts was a labor intensive and time consuming task that included obtaining permission from the various individuals, and configuring systems to download information and import documents. CP 179 -- 180 , 326 – 329.

Because of the number and the nature of the overlapping requests, the City concluded the best and only realistic way to respond to these large requests was to provide the documents in installments, beginning with former Mayor Hill's e-mail accounts which had the most responsive documents. The City continued to provide Forbes and the other requesters with estimates and updates regarding their requests and the provision of installments. CP 180, 182, 191. In its October 2, 2009 update, the City

notified Forbes and other requesters that a first installment would be available on November 6, 2009. CP 180-181. Forbes did not object. CP 181.

On November 6, 2009, the first installment of e-mails from former Mayor Hill's BlackBerry was compiled in "paper format" and released on a CD.⁶ CP 181. On this same date, the City notified Forbes that the installment did not appear to have any documents responsive to her first PRA request, PRR 2009-053. The City's letter went on to explain that it was continuing to review the remainder of e-mails from former Mayor Hill's BlackBerry, as well as the e-mails from her AOL account. CP 181, 186, 236.⁷

While processing these and other requests, Mayor Beavers, who had a background in document automation, became concerned that the PDF "paper" format the City was providing might not satisfy the requests that sought that the documents be provided in "native format" where possible. CP 181. The process was also painstakingly slow. Only five

⁶ The term "paper format" means that paper documents were photocopied and then scanned into electronic, PDF files. The term "electronic format" means that the documents were provided in a fully searchable PST format as if the researcher was doing his or her own search at City Hall. PST files contain the exact and unmodified e-mail, including the metadata. CP 327.

⁷ Forbes filed her second public records request four days later on November 10, 2009, which expanded her previous request. CP 187.

e-mails could be printed at one time without causing the system to skip pages, resulting in an error-prone print process. CP 180. Additionally, the “search” function did not appear to be fully reliable, as it appeared to provide different results when identical keywords were re-entered on separate searches. CP 181-182. As part of the ongoing process to respond to the various PRA requests, Mayor Beavers sought approval from the City Council to install a full Exchange Server (to store e-mails in one location) and multiple new computers with server access using updated software. CP 182. While these approved upgrades were being installed and implemented, the City continued to process requests. CP 182 – 183, 326 – 329.

On January 12, 2010, the City released a second installment of former Mayor Hill’s BlackBerry e-mails in “paper format.” Mayor Beavers also sent a summary explanation of what documents were provided with the two installments as well as a short tutorial on how to inspect e-mails contained on the CDs that contained BlackBerry e-mails. CP 288. It also explained that the first installment consisted of documents that clearly were public records not subject to any exemptions; that the second installment included documents that had been redacted, or at least reviewed for redaction; that the City was continuing to review and retrieve former Mayor Hill’s AOL e-mails; and that the next installment would be

provided on February 15, 2010. CP 181, 186, 234, 288-289. On February 8, 2010, seven days prior to the anticipated February 15 installment date, the City provided the first installment of former Mayor Hill's AOL e-mails on CD in "paper format," which consisted of 140 redacted e-mails. The City also explained that it would continue to provide installments of the AOL e-mails on a monthly basis, with the next installment due on or before March 12, 2010.⁸ CP 181, 186, 234.

Also in January 2010, the incorporation of public documents obtained from the various public officials' private e-mail accounts into the City's upgraded system was far enough along to begin the more accurate "electronic format" processing of those e-mails. CP 182 - 183. On February 12, 2010, Mayor Beavers notified Forbes that the City had upgraded its computer system and software in order to provide more complete public record responses and that this upgrade would provide a more streamlined process for responding to records requests. Mayor

⁸ Forbes asserts in her Statement of the Case that that the City failed to meet its extended timeline of February 15, 2010, but instead provided its response "8 days past the promised date," on February 23, 2010. Brief of Appellant at 4. This clearly is not accurate given that the City provided the first installment of Mayor Hill's non-exempt e-mails in PDF format from former Mayor Hill's BlackBerry on February 8, 2010, seven days prior to the February 15 deadline, along with an explanation that the next response would occur by February 23, 2010, when in fact the next installment did occur. CP 182 - 183. Similarly, Forbes' statements that the City "failed to release any records until six months after [she] filed suit" is neither accurate nor supported by the record since she received installments of documents, beginning in November 2009, and received most of the installments of records prior to serving her suit on the City in July of 2010. Brief of Appellant at 1, 12, 13; CP 182 - 187.

Beavers also explained to Forbes that he had sent her some e-mails and documents in a PST “electronic format” as a test to see if she could access the documents. CP 182 – 183. On February 17, 2010, Mayor Beavers sent an e-mail specifically asking Forbes if she was able to access the e-mails on the CD provided to her on February 12, 2010, as she had not responded to his previous e-mail. Forbes responded by e-mail that same day that she had to have a neighbor open the e-mails but that it “it wasn’t an issue.” Beavers CP 182 – 183, 231. On February 23, 2010, the City sent Forbes a CD of former Mayor Hill’s January 2009 BlackBerry e-mails in the new PST “electronic format.” CP 186 – 188.⁹

On March 9, 2010, the City sent Forbes a second installment of former Mayor Hill’s AOL e-mails for 2005 through 2009, comprised of 1,700 e-mails on CD in PDF “paper format,” along with a searchable PDF log. The City also notified Forbes that its next release would be of former Mayor Hill’s AOL e-mails in the new PST format, to be provided on or before March 30, 2010. CP 182 - 183, 294.¹⁰ On March 30, 2010, the

⁹ Forbes states that she did not request former Mayor Hill’s BlackBerry e-mails. Appellate Brief at 4. That is not correct. Forbes requested “all e-mails” from former Mayor Hill, which would include e-mails sent from Hill’s BlackBerry. Had the City not interpreted the request “broadly” to include those e-mails, as specifically requested by Forbes, she would have no doubt argued that the City did not conduct an adequate search for documents.

¹⁰ Three days later, on March 12, 2010 Forbes filed her third public records request.

City sent Forbes an update explaining that the process of retrieving the data structure of the retained e-mails was making it difficult to efficiently retrieve requested records. The data files had to be duplicated, arranged in folders and divided into three categories. The City explained that it needed another six weeks to fulfill the request and that a status update or fulfillment was expected on or before May 14, 2010. CP 182 – 184.

On May 14, 2010, the City notified Forbes that it needed additional time to process the next installment due to some technical problems, as well as the potential need to notify third parties of the intended records to be released, as provided for in RCW 42.56.080. The City stated that it would respond with an update or an installment production on or before May 28, 2010. CP 182 – 183. As promised, on May 28, 2010, the City provided Forbes with a DVD holding 13,000 records containing all 2009 non-exempt e-mails in fully searchable PST format. The City also informed Forbes that its next release would be made on or before June 25, 2010. This next production would include all of the 2008 non-exempt e-mails, followed by the 2007 non-exempt emails, followed by the 2006 non-exempt emails. CP 182 – 184, 223, 272, 294.

Once the upgrade to the full Exchange Server was properly functioning, the City was able to directly download electronic documents

onto a disc for production to Forbes. On June 23, 2010, Forbes received from the City a fully searchable DVD containing 10,000 records, consisting of all non-exempt conduct of business e-mails from pre-2006 through 2008.¹¹ CP 184, 294.

On July 15, 2010, Forbes served her Complaint for Access to Public Records on the City, asserting that the City had failed to comply with the PRA with respect to her three separate public records requests. CP at 410 – 411.

On August 27, 2010, the City provided Forbes with another CD containing 180 redacted e-mails in PDF format from January to March, 2009, as well as an exemption log. CP 184. The release also contained 40 e-mails in electronic PST format that upon review were determined not to be subject to any exemptions. CP 294.

On September 16, 2010, the City provided Forbes with another CD containing 280 e-mails from April to June, 2009, as well as an exemption log with instruction on how to search the records. CP 184 – 186.

The July 15, August 29, and September 16, 2010 installments were all provided within the previously provided estimates of time for

¹¹ Additionally, the added improvement to the adequacy of the search was immediate apparent. Once the Exchange Server was installed, the City's IT contractor, Michael Meyers, refreshed the data set from the original disk sets. A sample search was conducted that produced 900 e-mails where the same search previously only provide 50 e-mails. CP 183 – 184.

production. CP 182 – 184, 186 – 189, 200 – 321. The City continued to review the remaining approximately 1,300 e-mails from 2006 to 2009, but none of these outstanding e-mails were deemed responsive to Forbes’ requests at issue in this appeal.

After argument on the merits of the City’s Motion for Summary Judgment and Forbes’ Cross-Motion, the court ruled that the City had met its burden on its motion; that the City had complied with the PRA and acted reasonably in providing its estimates of time and related responses; and that Forbes had failed to adequately rebut the City’s showing of compliance. CP 2 – 3, RP 23: 23-25 -- 24: 1-17, 25:4-25. The court also ruled that Forbes had failed to make even a preliminary showing of the need for an in-camera review of personal e-mails from home computers, and therefore denied the request to do so. RP 24: 1 - 7. This appeal followed.

III. ARGUMENT

A. The Trial Court Correctly Ruled that the City Fully Complied with the Public Records Act by Providing a Reasonable Estimate of the Time for Fulfillment Based on the Need to Locate, Obtain, Review, and Provide the Requested Records.

The City clearly demonstrated that it had complied with the requirements of the Public Records Act in three ways: it conducted adequate searches and identified “reasonably locatable” records; it

provided reasonable estimates of the time needed to provide the requested records; and it then time provided the requested records in accordance with the PRA. The trial court correctly concluded that in responding to Forbes' requests, the City fully complied with the requirements of the PRA.

1. Public Records Act Standards.

RCW 42.56.520 requires a public agency to respond to public records requests within five business days by either providing the records, denying the request, or providing a reasonable estimate of time needed to respond to the request. The PRA does not require an agency to provide a written explanation as to the need for additional time when it does not provide the records within five days of the request. *Ockerman v. King County Dept. of Developmental and Environmental Services*, 102 Wn. App. 212, 6 P.3d 1214 (2000). In fact, the statute explicitly recognizes that:

[a]dditional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.

RCW 42.56.520.

In making its five-day response, an agency must only provide a reasonable “estimate” of the amount of time needed to respond. An “estimate” is not a precise calculation, but an “approximate judgment or calculation” of the amount of time needed to respond. *See Webster’s College Dictionary* (1991) at 457. Implicit in the concept of providing an “estimate” or advance approximation of the time needed to respond is that one cannot anticipate all possible circumstances that could delay the response. The ability to estimate the time needed is made even more difficult by very broad public record requests, as well as those seeking records in native format.

When it becomes clear that a response to a records request will take longer than the estimated time, an agency may notify the requester that it needs further time to fulfill the request. *See Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Laws*, Washington State Bar Ass’n, §5.3(1)(a), at 5-11. In doing so, authorities recommend that at that juncture an agency should provide justification for the need for additional time. *Id.* Likewise, the Attorney General’s Model Rules on Public Disclosure provides a recommendation comparable to the Deskbook with respect to responding to broad records requests and notifying requesters of the need for an extension of time. WAC 44-14-04003(10) provides:

(10) Expiration of reasonable estimate. An agency should provide a record within the time provided in its reasonable estimate or communicate with the requester that additional time is required to fulfill the request based on specified criteria. Unjustified failure to provide the record by the expiration of the estimate is a denial of access to the record.

(emphasis added.)

After estimating the time needed to fulfill a request, and identifying reasonable locatable documents, the Act requires a public agency to “make [the records] promptly available to any person including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure.” RCW 42.56.080. While an agency may not deny a request solely on the grounds that it is overbroad, an agency may justifiably take more time to respond to a broad request, and may take additional time to respond to a request “based upon the need to . . . locate and assemble the information requested” RCW 42.56.520. This process is also recognized by the Attorney General’s Model Rules on Public Disclosure in the provision dealing with the responsibilities of agencies. In processing requests, WAC 44-14-04003(6) states, in relevant part, that it’s an agency’s responsibility to:

(6) Provide a reasonable estimate of the time to fully respond. . . . Fully responding can mean processing the request (assembling records, redacting, preparing a withholding index, or notifying third parties named in the

records who might seek an injunction against disclosure) or determining if the records are exempt from disclosure.

Additionally, the PRA allows records to be released in installments. RCW 42.56.080. That is exactly what the City did here.

2. The City Provided a Reasonable Estimate to Locate, Process, and Provide Requested Documents.

The trial court correctly concluded that the City had demonstrated that its estimates of time to respond to Forbes were reasonable and denied Forbes' Cross-Motion on that issue. The record contains ample evidence to support the trial court's finding on this issue as summarized below.

The City determined that in order to conduct an adequate search of the requested records, it needed to obtain data from at least seven separate private e-mail accounts and then import that data into the City's computer system. The City had received numerous, broad public records requests seeking overlapping information from the same data for the same City officials. Searching and processing these large requests individually would have been inefficient and more time-consuming than pulling all of the information together in large batches and then sorting the e-mails into the appropriate categories for processing. CP 179 – 181, 326 – 328. Once the data was downloaded, the City realized it had obtained private, e-mails from the various personal e-mail accounts. Because of the large volume of e-mails and the inclusion of private e-mails, the City determined that

the most efficient way to review and search the documents was to sort the data into three different categories, as follows: private-non-conduct of government; conduct of government non-exempt; and conduct of government exempt.¹² CP 179. Using its then-existing software, it was unable to quickly run searches and the search results were not consistent. Accordingly, attempting to process the additional amounts of data with the existing system would only exacerbate the problem. CP 182, 326 – 329. Mayor Beavers continued to process former Mayor Hill’s AOL and BlackBerry e-mails first, in installments, in searchable PDF format, and that it was upgrading its software and technology to produce another set of documents once the upgrade was completed. Documents were then provided to Forbes in PDF and PST format.¹³ CP 182 – 190, 327 – 328. The City hired and re-assigned employees to do nothing but process requests, amounting to an additional 1.5 City employees working on the requests. CP 190 – 191, RP 9:3 – 17. The City provided a timely five-day response to each of Forbes’ requests and then provided Forbes with

¹² The term “conduct of government” was used to describe documents that the City concluded were prepared, owned, used, or maintained by city officials or staff and related to the conduct of City business, as opposed to private documents and e-mails completely unrelated to the conduct of City business. The later documents were referred to as “private-non-conduct of government” e-mails. These were e-mails and documents from the private e-mail accounts of the elected and appointed officials that were not related to City business in any way. “Non exempt” documents were those that did not fall within any of the listed exemptions under the PRA or related case law, and “exempt” documents were those that did fall within the PRA listed exemptions or related case law, and that the City had to review, redact or withhold, and identify in its responses. CP 179.

additional reasonable estimates of time necessary to provide documents , updated those estimates as necessary, provided Forbes with installments of documents within those estimated time frames, provided Forbes with logs and redactions, and even took the additional step of upgrading its software and technology in order to provide a more thorough and timely search and response to Forbes' broad and voluminous requests. CP 178 – 190, 326 – 329.

Based on these uncontested facts, the trial court properly held that the City's estimate of time was reasonable, and denied Forbes' Cross-Motion. RP 26: 4 - 12.

On appeal, Forbes does not challenge the court's decision to deny her Cross-Motion regarding her claim that the City failed to provide a reasonable estimate of time for fulfillment of the public records requests. Forbes has therefore conceded that the City's estimate of time was reasonable, and/or has waived that claim on this appeal. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549, 553 (1992) (Plaintiff waives assignment of error if not addressed in its opening brief).

Even though Forbes has waived this claim, the record, nevertheless, supports the trial court's finding that the City's estimates of

¹³ PST files contain the exact and unmodified e-mail, including the metadata. CP 327.

time were reasonable. In summary, the records shows that each of Forbes' records requests was extremely broad, seeking information from numerous individuals, agencies, and sources. In fact, in both her second and third record requests, Forbes specifically stated, "[a]gain, this is a purposeful [sic] broad public records request". CP at 187 – 188. Despite these acknowledgements, the City responded within five days to each request, and demonstrated that the estimates of time necessary to respond were reasonable, and that under the circumstances, extensions of time to respond were reasonable as well.¹⁴ The City then began to provide Forbes with CDs and DVDs documents along with continued status updates. This process continued from November, 2009 until September, 2010, when the City sent the final CD closing its responses to Forbes' request. As a matter of law, the City's response was indisputably reasonable, given the breadth of the request, the inherent limitations of the City's computer system, the number of overlapping and related requests that the City was processing, and the need to locate and obtain the documents. CP at 185 – 186, 200 – 243.

¹⁴ For example, in response to Forbes' first request, the City's May 26, 2009 response estimated that it would provide documents by June 19, 2009, and when it was determined that this estimate had to be revised due to unforeseen complications, the City then provided Forbes with an update of its progress every three to four weeks thereafter. CP 180 – 182, 189 – 191, 326 – 329.

The City also complied with the PRA's time requirement by providing the documents in installments as they became available. RCW 42.56.080 (agency may make records available "on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure."). Here, the City provided documents in installments. First, Forbes was provided with documents in a "paper document" format. CP 181. After the City's computer and software upgrade was able to better compile the documents, the City next provided Forbes and the other requesters, on May 28, 2010, with a DVD of approximately 13,000 e-mails -- essentially all non-exempt e-mails from 2009 in a searchable PST format. CP 182 – 183, 223. On June 23, 2010, a second DVD with approximately 10,000 e-mails was provided for all non-exempt e-mails from pre-2006 through 2008. CP 184, 222. The City provided an installment of redacted documents and a redaction log on August 27, 2010 and again on September 16, 2010. CP 184, 205 – 206. The City completed the production of documents in installments and closed the May 21, 2009 request on October 27, 2010. CP 186, 205. The City completed and closed the November 10, 2009 request on October 27, 2010. CP 187 – 188, 205. The City completed the March 12, 2010 request on August 11, 2010 and closed it on September 22, 2010. CP 188 – 189, 296.

Forbes simply provided no evidence to rebut the City's showing that its time estimates, and provision of records in installments, were reasonable. That is not surprising, however, because in order to do so, Forbes would have had to demonstrate that the City estimated a time longer than it actually took to locate and process the documents. The City demonstrated, however, that it was processing the requests as quickly and thoroughly as it could and, to the extent that its time estimates were incorrect, they were too short, not too long. This required the City to provide additional responses informing Forbes that additional time would be necessary. This is exactly the process that the Attorney General recommends that agencies follow. The Attorney General's guidelines expressly allow an agency responding to a records request to provide for extensions of estimates of time: "An agency should provide a record within the time provided in its reasonable estimate or communicate with the requester that additional time is required to fulfill the request based on specified criteria." WAC 44-14-4003(10) (emphasis added).

Given the foregoing, the trial court's holding that the City provided a reasonable estimate of time to respond, and provided documents in reasonable installments, must be affirmed.

3. The Trial Court Found Actual Compliance with the PRA, Not Substantial Compliance, and its Holding Should be Affirmed.

Faced with the inevitable conclusion that the City properly provided a reasonable estimate of time, and reasonably provided documents in installments, Forbes attempts to misconstrue the trial court's holding, twisting its ruling that the City had acted reasonably by providing reasonable time estimates into an argument that the trial court ruled that the City only substantially complied with the PRA when strict compliance is instead required. Brief of Appellant ("Forbes' Brief") at 23 - 24. In an attempt to support this argument, Forbes provides excerpts of the transcript of the trial court's oral ruling. The excerpts, however, are taken out of actual context of the court's statements, as well as the general context of the case before the court.

First, it should be noted that at no time was the issue of substantial compliance before the trial court. In its motion below, the City asserted (as it does here) that the City had fully complied with the requirements of the PRA. CP 341, 355; RP 10:9 – 11, 19:1 – 2. Instead, the issue before the trial court was whether the City's estimates of time and its provision of documents in installments were reasonable. Indeed, Forbes' own Cross-Motion below argued that the City's estimated response time was

unreasonable. CP 26 – 27, 29, 31 – 33, 35 – 37, 42. Moreover, just prior to the court ruling from the bench, Forbes herself raised the reasonableness of the City’s timing:

I don’t believe they have complied with the Public Records Act, and I don’t believe they complied with the timeliness because early on they did have PST files that they could have searched and given me some information. Even if it was just an installment, I should have gotten something from them. And also I want to point out that WAC 44.14.040(03) states that the time, the response time has to be reasonable. And I also want to point out that same WAC states a request for a small number of documents which are located at nearly the same time should be provided all at once, and they have not done that. They have not responded to my request ever. I just -- I don’t believe they have proved their timeliness issue. I don’t believe they have complied with the Public Records Act.

RP 20: 4 – 13 (emphasis added). The statements made by the trial court regarding “reasonableness” addressed Forbes’ motion and related oral argument before it – not the wrong legal standard as Forbes’ asserts.

Second, Forbes takes the excerpts of the trial court’s oral ruling completely out of context. The full excerpts from the trial court are set out below with the portion omitted by Forbes in italics:

The Court also fully understands and appreciates the importance of full disclosure under our Public Records Act. Much has been written about this subject. I have reviewed much of the case law in preparation for this hearing today, including what is the most recent opinion of our state Supreme Court in O’Neill versus the City of Shoreline, which came out in one of the very recent advance sheets. It’s now under 170 Wn.2d 138. In the briefs, there were

many quotations of previous appellate decisions in this area. I have not only considered the factual record that is before me, but the case authority and law in this regard as well. One other quotation that I reflected on is illustrative of my understanding of the importance of these full disclosure principles. I look back at a written decision that I made in another large public records case just over a year ago. In my written decision in this other case about a year ago I recited the fundamental purposes of the Public Records Act -- which are found among other places in RCW 42.45.030 where it says, "The people of this state do not yield their sovereignty to the agencies that serve them. The people in delegating authority do not give their public servants the right to decide what is good for the people to know and what is good for them not to know..... This chapter shall be liberally construed, and its exemptions narrowly construed."

Those are principles, among others, that the Court certainly has in mind as it approaches those issues. I certainly had them in mind in that other large public records case over a year ago, and I certainly have them in mind today. I might note in that other case, ultimately, I largely granted the request for disclosures, summing up with another quote, from the 1960s, "Let the sunshine in." Having stated the importance of public disclosure in a free society, the Court does, and should, also recognize efforts by public entities if they act reasonably in response to public disclosure requests, particularly, in this era of limited public resources. But notwithstanding the dire financial straits that many public agencies now face, and whatever the cost, the law is what it is. The law must be complied with.

Nonetheless, I will offer a few thoughts in terms of my conclusions. Let me highlight one particularly compelling aspect of this case that I noted. It's referred to elsewhere in the pleadings. But its summarized most concisely in Exhibit D attached to Mayor Beavers' declaration. It is recited there, the history of disclosures, e-mails made

available, when they were made available, and the number of documents that were made available.

In looking at those provisions in Exhibit D -- this is essentially, as I see it, unrebutted, or, at least, not persuasively rebutted anywhere in the record, that this was done. The recitation would be as follows: November 6, 2009, 1,700 records made available; January 12, 2010, 140 records made available; February 8, 2010, 500; February 23, 2010, 540; March 9, 2010, 1790; May 28th, 2010, 13,000; June 23, 2010, 10,000; July 6, 2010, 120; August 27, 2010, 180, and then again on that date, another 40; September 16, 2010, 280. When one adds that up, I believe that comes to a total of 11 disclosures for a total of 28,290 records or documents made available. Now, this is admittedly not determinative of itself. But any fair-minded observer would conclude that that is a huge number -- and indicates that the City has, indeed, made good faith efforts at compliance with the public disclosure requests in this matter.

Now, I understand that plaintiff Ms. Forbes makes arguments to the contrary. But ultimately, on balance, those arguments are not persuasive. The City has met its burden of showing that it has acted reasonably -- not perfectly, perhaps -- but perfection is not required.

The City has acted reasonably; and accordingly, the bottom line is that the City's motion to dismiss shall be granted and the plaintiff's cross-motions are respectfully denied.

RP 21: 18 – 25; RP 22, RP 23:1 – 15, RP 25: 2 – 25, RP 26: 1 – 12.

As noted above, the trial court was referring to the fact that the City had demonstrated that it had complied with the PRA requirement to provide a “reasonable” estimate of time and to provide records in reasonable installments, and that Forbes had failed to adequately rebut that

evidence. The Court expressly rejected a “substantial compliance” approach based on an agency’s financial condition, ruling that “notwithstanding the dire financial straits that many public agencies now face, and whatever the cost, the law is what it is. The law must be complied with.” RP 23: 12 - 15 (emphasis added). Given the trial court’s express acknowledgment, and given the legal issues presented by the motions before it, the trial court’s ruling that the City’s compliance was “reasonable” did not equate to a finding of mere “substantial compliance” instead of actual compliance with the PRA, as Forbes argues. Instead, the court concluded that the City’s estimates of time were reasonable, which is all that is required by the PRA.¹⁵ There is simply nothing in the record to demonstrate anything but that the City complied with the PRA.

In sum, the lower court applied the correct standard and correctly concluded that the City had met its burden on the issue of providing a reasonable time estimate, and providing records in reasonable installments.

¹⁵ The court’s statement that the “City has met its burden of showing that it has acted reasonably -- not perfectly, perhaps -- but perfection is not required” again underscores that the trial court was referring to the estimate of time, which the cases and statute clearly hold only needs to be “reasonable,” not perfect. RCW 42.56.520(3) (agency required to respond by acknowledging receipt of records request “and providing a reasonable estimate of the time the agency . . . will require to respond to the request”).

B. The Public Records Act Does Not Require the City to Create a Log of E-Mails or other Documents that are Not Public Records.

Forbes argues that the City violated the PRA because it “refused” to provide Forbes with a log of e-mail communications that do not qualify as public records because they are private communications unrelated to the conduct of government business. Forbes’ Brief at 18 - 23. Forbes further argues that the City’s refusal to provide such a log amounts to “silent withholding” (Forbes’ Brief at 20 - 21), and that the trial court abused its discretion when it dismissed her claims without conducting an in-camera review of the private communications. Forbes’ Brief at 24 - 25. She is wrong on all counts.

The PRA requires disclosure of “public records.” RCW 42.56.070(1) (“Each agency, in accordance with published rules, shall make available for public inspection and copying *all public records*”) (emphasis added). The PRA expressly defines a “public record” as “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function” A public record is defined in RCW 42.56.010(2)¹⁶ as “any writing containing

¹⁶ The Public Records Act, effective July 1, 2006, recodified the public records portion of the Public Disclosure Act, moving it from RCW 42.17 to RCW 42.56. Accordingly, many of the cases that address the issue of what is a public record cite to the older provisions.

information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”¹⁷ Thus, to qualify as a public record a document must be: (1) a writing; (2) containing information related to the conduct of government or the performance of any governmental or proprietary function; and (3) prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. *Dragonslayer, Inc. v. Washington State Gambling*, 139 Wn. App. 433, 444, 161 P.2d 428, 433 (2007). All three elements of the above three-prong test must be satisfied for a document or record to be a “public record.” *Id.*

The distinction between documents that are public records, and those that are not, is not merely academic. If a record does *not* meet these criteria, it is not a “public record,” and the PRA’s requirements do not apply. For documents that are *not* public records, there is no “presumption” of disclosure because the PRA does not apply to the document at all. When a document *is* a “public record,” the document *is* subject to the Act and must be disclosed, unless the document may be

¹⁷ The term “writing” is also defined very broadly and encompasses a wide range of communication forms or representation. Writing includes, but is not limited to, any form of letters, words, pictures, sounds, or symbols and all papers, maps, tapes, films, prints, motion picture, film, and video recordings. RCW 42.56.010(3).

withheld or redacted because the information therein falls within one of the PRA's specific exemptions. RCW 42.56.070(1). Further, if a document is a "public record" and an agency determines all or a portion of it is exempt from disclosure, the agency must provide "a written statement of the specific reasons therefore." RCW 42.56.520(4). This is typically accomplished by preparation of a "log" listing the documents that are exempt and/or redacted, along with a brief explanation of the documents' contents and the reasons for the documents' exemptions and/or redactions.

In the instant case, however, the e-mails that Forbes' asserts the City is required to disclose and log are *not* public records at all, but rather private personal e-mails that were obtained when the City undertook a download of the Mayor's and City Councilmembers' private e-mail accounts in order to identify the documents that *were* public records. These private e-mails were unrelated to the conduct of government and, therefore, were segregated from the e-mails that were determined to be public records. CP 179 – 180, 182 – 183.

Forbes' Brief provides no coherent argument as to why the over 3,000 private e-mails she seeks constitute "public records." Instead, she simply assumes that the e-mails are "public records," and that the City erred by failing to prepare and disclose a log of the e-mails, an inaction

she disparagingly labels “silent withholding.” Forbes’ Brief at 19 - 22. But the PRA’s requirements for disclosure, and for a log and written narrative explaining the basis for any withholding, apply *only* to “public records” – the log and exemption requirements do *not* apply to strictly private communications utterly unrelated to the conduct of governmental business.

This commonsense proposition is clearly demonstrated by applicable appellant precedent. In order to determine whether the second and the third prongs of the definition of “public record” are met, the information contained in the document must not only relate to the conduct or performance of the City or its proprietary functions, it must also be a “relevant factor” in the action taken by the City. *Dragonslayer*, 139 Wn. App. at 433, 445; *see also Concerned Ratepayers Ass’n v. PUD No. 1 of Clark County*, 138 Wn.2d 950, 961, 983 P.2d 635, 647 (1999). A few more cases are illustrative. In *Oliver v. Harborview Medical Center*, 94 Wn.2d 559, 618 P.2d 76, (1980), the medical record of a patient was a public record because the “use and care, methods of diagnosis, analysis, treatment and costs” all related to the performance of a governmental or proprietary function. On the other hand, requests seeking information about an “employee’s position, salary, and length of service relate neither to the conduct of government, nor to the performance of any governmental

function . . . and are not subject to disclosure.” *Smith v. Okanogan County*, 100 Wn. App 7, 994 P.2d 857 (2000). Likewise, in *Tiberino v. Spokane County*, 103 Wn. App. 680, 13 P.3d 1104 (2000), the Court ruled that personal e-mails used as a basis for termination of an employee would not have been public records because they were personal, but because the County printed them out and evaluated them and used them as a basis to terminate an employee (used the e-mails in its proprietary function as the employer), the documents were in fact “public records.”

Forbes makes no argument under the foregoing cases – or any others – that the e-mails from the former Mayor’s and Councilmembers’ private BlackBerry and e-mail accounts constitute “public records.” Instead, Forbes mistakenly relies on *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808, (2009). In *Mechlin*, the issue before the Court was whether the City had properly exempted certain information from public records. There was no dispute about whether the underlying document was a “public record;” rather, the dispute was whether or not the *information* contained in the document was subject to disclosure. *Id.* at 854. The *Mechling* Court held that the City of Monroe had improperly redacted information from a public record because it had erroneously determined that some of the actual information in the “public record” did not itself meet the definition of public record. *Id.* The Court ruled that

because the document itself met the definition of a public record, withholding or redaction of information contained in the document could only occur if it was based on a “stated exemption in the PRA.” *Id.*

The facts in the instant case are actually the reverse of those in *Mechling*. In *Mechling*, the documents sought were acknowledged “public records,” even though they contained some incidental information that, standing alone, would not have qualified as a “public record.” Here, the documents sought -- private e-mails from private e-mail accounts incidentally obtained during a search by the City for responsive “public records” -- are documents that have absolutely nothing to do with the conduct or performance of the City’s governmental or proprietary functions. Thus, the e-mails Forbes seeks fail to satisfy the second prong “public record” definition.

Given the foregoing, the private documents sought by Forbes do not fall within the PRA requirements for disclosure or exemption. Forbes has cited nothing to support her contention that private e-mails – sent from and received on privately owned BlackBerry and other devices, and unrelated to the conduct of government – qualify as “public records.” In addition, she has failed to set forth any legal basis to support her request for an in-camera review by the court. As the trial court noted:

It has been suggested or requested that the Court undertake an in-camera review of at least 3,000 additional e-mails. . . . The Court would do so, and certainly has done so in terms of in-camera reviews, if that is appropriate. But one notes that there needs to be some preliminary showing of why such an extensive in-camera review is appropriate, why that is appropriate, what the Court would be looking for -- really, anything of substance. The type of broad-blanket request for an in-camera review, essentially, as I see, would be sending the Court on what amounts to be a fishing expedition. There's no clear articulation of why that would be appropriate, or what the Court would be looking for. Without significant basis for such an in-camera review, it is not something that the Court is inclined to do.

RP 23:23 - 25 – 24:1 - 17 (emphasis added). Forbes offers this Court no more support for the claimed need for an in-camera review than she offered the trial court. As such, the trial court's ruling was not an abuse of discretion and should be affirmed.

Recognizing that she has no basis to require a review of the documents or to support her claim that the individual “not conduct of government” e-mails are in fact public records, Forbes attempts to set forth a brand new argument at the eleventh hour. Forbes' new strategy is to argue that the City's alleged violation of the PRA stems not from its failure to provide records within a reasonable estimate of time, but rather from its failure to enact a “policy” forbidding the use of personal e-mail by elected officials. Forbes' Brief at 19 - 20, citing RCW 42.56.100.

Forbes, however, raises this issue for the first time on appeal, and therefore it is not properly before this Court.

Even if this Court chooses to consider Forbes' new argument, there is simply no legal basis for its support. While having a policy in place regarding the use of personal electronic communication devices by elected and appointed officials may be prudent, it does not follow that the failure to have such a policy somehow amounts to a violation of the PRA. RCW 42.56.100 calls for agencies to have "reasonable rules" – not to adopt unreasonable and unenforceable blanket prohibitions. The PRA simply does not require the draconian measures Forbes suggests for the first time in her brief to this Court.

C. Forbes is Not a Prevailing Party Under the PRA and Therefore is Not Entitled to Attorney's Fees and Costs.

Forbes requests attorney's fees and costs be awarded to her pursuant to RCW 42.56.550(4) and RAP 18.1. Forbes' Brief at 26 - 27.

The attorney fees section of the PRA provides in pertinent part:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

RCW 42.56.550(4). Forbes' did not prevail against the City in her PRA action at the trial court level, and accordingly she is not entitled to statutory attorney's fees and cost.

Similarly, Forbes is not entitled to recovery for attorney's fees on appeal. Pursuant to RAP 18.1(a), a party may be entitled to attorney's fees if the applicable law grants her the right to recover on review. The PRA makes no mention of awarding attorney's fees on review. Rather, it refers to the awarding of attorney's fees at the lower court level, fees to which Forbes is not entitled. As a result, she is not entitled to attorney's fees on this appeal.

Finally, Forbes argues that she should be deemed a prevailing party because, she alleges, the City first produced records five months after she filed suit. Forbes argues that this Court should infer that her lawsuit "had a causative effect on the City's decision" to release records. Forbes Brief at 25 - 26. Forbes' argument overlooks the fact that the trial court ruled that the City's time estimates were reasonable, as was the provision of documents in installments in response to Forbes' "purposeful [sic] broad" requests. Because the City's provision of documents in installments was ruled reasonable, it follows that they cannot be said to have been unreasonably delayed or produced in response to Forbes' filing her lawsuit. There simply is no basis to deem Forbes the prevailing party or to award her attorney's fees.

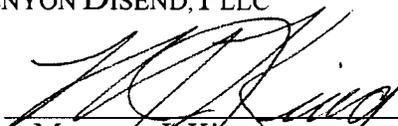
IV. CONCLUSION

The superior court correctly properly dismissed Forbes' public records complaint, finding that the City had met the requirements of the PRA when responding to Forbes' three records requests. Likewise, the superior court did not abuse its discretion when it chose not to undertake an in-camera review of the "not conduct of government" e-mails. Finally, Forbes has failed to set forth any legal basis for her claim that the PRA requires the City to create a log of documents that are not "public records" as defined by the PRA. Accordingly, the superior court's decision should be affirmed in all regards. Additionally, because Forbes is not a prevailing party, the Court should deny her request for attorney's fees, costs, and penalties.

RESPECTFULLY SUBMITTED this 17th day of October, 2011.

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NO. 66630-4

WASHINGTON STATE COURT OF APPEALS
DIVISION I

(Snohomish County Superior Court No. 10-2-04951-5)

SUSAN FORBES,

Petitioner,

vs.

THE CITY OF GOLD BAR,

Respondent.

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DECLARATION OF SERVICE

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DECLARATION OF SERVICE

I, Kathy I. Swoyer, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 17th day of October, 2011, I served a true copy of the foregoing Brief of Respondent on the following counsel and parties of record using the method of service indicated below.

Susan Forbes
209 17th St.
Gold Bar, WA

- First Class, U.S. Mail
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail: Per agreement of the parties: poorpeanut@hotmail.com

Atty for Petitioner:

Anne K. Block
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Monroe, WA 98272

- First Class, U.S. Mail
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail: Per agreement of the parties: Anne.K.Block@comcast.net

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

DATED this 17th day of October, 2011, at Issaquah, Washington.



Kathy I. Swoyer