

69429-4

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CASE NO. 69429-4-I

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

JEFFREY CHEN,

Appellant,

v.

CITY OF MEDINA,

Respondent.

APPELLANT'S REPLY BRIEF

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I. REPLY TO CITY'S COUNTERSTATEMENT OF FACTS

Respondent City of Medina (the "City") did not object to the statement of facts asserted by Appellant Jeffrey Chen ("Chen"). Chen specifically objects to certain assertions by the City as follows:

Chen objects to any assertion by the City that the show cause procedure provided by RCW 42.56.550 fully disposed of Chen's claims or that the entry of a judgment was appropriate. (City's Brief at 2.) To the contrary, as set forth in Chen's Opening Brief, the show cause procedure disposed of only a portion of the immediate question about whether a certain extension of time was proper for the public records act request but it did not dispose of the broader question of the allowable timing and quantity for full compliance with the public records request. (Chen Opening Brief at 32-34.)

Chen objects to the City's contention that in November 2010 it "'learned' of unauthorized penetrations of its e-mail system by unknown users." (City's Brief at 3.) This assertion is not supported by the record on appeal.

Chen objects to the City's contention that in December 2010 Michael Bolasina interviewed Chen about complaints of "unauthorized" access into the City's e-mail records. (City's Brief at 3.) The City looks to CP 209, ¶4, the Declaration of Michael Bolasina, to support this contention. However, Mr. Bolasina's declaration makes no mention about interviewing Chen specifically about "unauthorized" access to the e-mail

records, and the record does not support the City's contention. (CP 209, ¶4.)

Chen objects to the City's contention that when Chen was asked to review a statement documenting the statements of his interview with Mr. Bolasina, Chen did not respond. (City's Brief at 3.) The evidence shows that Chen did not respond "at that time." (CP 209, ¶4.) The record does not support that Chen did not respond at all at any time.

Chen objects to the City's contention about the memorandum that Chen provided on January 27, 2011. (City's Brief at 3.) The connotation by the City's contention is that the memorandum was a short document provided by Chen, but the City's own witness, City Manager Donna Hanson, declared under penalty of perjury that Chen provided a "detailed" memorandum to her. (CP 214, ¶ 4.)

The City states that it first provided Chen with an unredacted copy of the Lenhart report on March 31, 2011. (City's Brief at 5.) The evidence the City asserts supports this contention is Exhibit 1 to the Declaration of Donna Hanson dated September 7, 2011. (CP 217-18.) However, this exhibit, special meeting minutes, is dated February 2, 2011, and does not mention any report by Ms. Lenhart. (Id.) Indeed, the minutes are dated prior to the existence of the report, and the evidence cited by the City does not support its contention.

Chen strongly objects to the City's inclusion of the reasons it has stated for which Chen was formally terminated by the City Manager, Donna Hanson on April 27, 2011. (City's Brief at 6.) As Chen has stated all along, the reasons set forth in the Loudermill notice, which is referenced and incorporated by reference into the Declaration of Donna Hanson (CP 215, ¶ 4.) is not supported by evidence, and the statement as it is contained in the City's response brief were merely conjecture on the part of Donna Hanson.¹

Chen objects to the City's reliance upon the exhibits to Rachel Baker's Declaration. (City's Brief at 6.) The exhibit to Ms. Baker's Declaration is gray and is largely illegible. (CP 450-461.)

Chen objects to the City's contention that Nat Levy made a PRA request on March 29, 2011. (City's Brief at 7) This statement is inaccurate in that Mr. Levy's PRA request was made on March 28, 2011. (CP 455) Thus, the record does not support the City's contention.

Chen objects to the City's contention that Heija Nunn made a PRA request on April 29, 2011. (City's Brief at 7.) This statement is inaccurate

¹As of the date of the filing of this Reply Brief, a jury of eight (8) returned a verdict on March 26, 2011 that the City and Donna Hanson engaged in adverse employment action and that Chen's race and/or national origin was a substantial factor in the adverse employment action, and the adverse employment action included forcing Chen to resign, placing Chen on paid administrative leave, and discharging Chen from his employment with the City.

in that Ms. Nunn's PRA request was made on April 28, 2011. (CP 456.) Thus, the record does not support the City's contention.

The City contends that Ms. Baker needed assistance from MX Logic, because of a large number of requests and the massive request from Chen. (City's Brief at 8.) This statement is not supported by the record on appeal. The City looks to the Declaration of Rachel Baker. (CP 203, ¶ 5.) Ms. Baker's declaration focuses solely upon the request from Heija Nunn and does not mention any other PRA requests or Chen's request, and therefore Chen objects to the City's contention as unsupported. (Id.)

Chen objects to the City's contention about 218 emails being promptly provided on July 30, 2011. (City's Brief at 8-9.) The City looks to paragraph 6 of the Declaration of Rachel Baker as support. (CP 203, ¶ 6.) This evidence does not support the City's contention and therefore Chen objects to its conclusion.

The City asserts that the City of Medina is "a relatively small city, with 23 employees and 7 police officers." (City's Brief at 9) The City neglects to inform this Court that the City has (or had on August 23, 2011) 1.5 additional administrative positions in the police department. (CP 442, ¶ 2) Chen further objects to the City's statement that the City "has limited resources to devote to responding to records requests." (CP 442-43, ¶ 3) This paragraph makes no mention of limited resources. (Id.) Chen also objects to the City's inclusion of the contention, "One of these [two

employees] is the Development Services Coordinator, who responds to records requests for the Development Services Coordinator.” There is no reference to the record for this contention, and Chen objects to its conclusion. Finally, Chen objects to the City’s contention that the Clerk is a “key” staff support to the City Council. Again, the reference to the record, CP 442-43, ¶ 3, does not support this contention, and Chen objects to its conclusion.

Next, Chen objects to the City’s contention that the City’s off-site storage consists of two storage rooms “which contain approximately 238 boxes of records.” (City’s Brief at 10) The City again cites to Ms. Baker’s declaration, but the record does not support that contention. (CP 443, ¶ 4) The City further maintains that electronic records were found in multiple locations, looking to paragraphs 5-8 of Ms. Baker’s declaration. (CP 443-444) While the declaration references multiple locations for physical files (e.g., records onsite, off-site storage facility, temporary trailer at CP 444, ¶ 6; additional file cabinets at city hall and finance records, Ms. Baker’s 4-drawer personnel cabinet, and an additional 5-drawer cabinet at CP 444-45, ¶ 8), the sole reference to electronic records is paragraph 7, which states that other “older emails may . . . exist on individual computers and hard drives. (CP 445, ¶ 7.) Thus, the City’s contention that electronic records “are also found in multiple locations” is not accurate.

Chen objects to the City's contention that in "August 2008, the City began using the MX Logic system to archive and store its e-mails." (City's Brief at 10-11) The City cites to CP 203, ¶ 5. However, this cite does not support this contention.

The City maintains that when it was transitioning from a makeshift trailer to a new City Hall, it was unable to retrieve boxes of records at the outset of the Chen's request. It is unclear which Baker declaration the City relies upon for this contention; there is no Sub Number or CP citation. (City's Brief at 11) It is believed that the City is referring the Baker Declaration at CP 441-448. However, even that declaration at paragraph 6 does not support the City's contention that it was "unable to retrieve" the boxes. (CP 444, ¶ 6.) The declaration mentions that the boxes had to be retrieved but mentioned no difficulty doing so.

Chen also objects to the City's categorization of the files it must review to respond to the PRA requests, for which the City again looks to Rachel Baker's declaration. (City's Brief at 11 citing CP 444, ¶ 8) However, Ms. Baker's declaration at paragraph 8 refers solely to personnel files and finance records. (Id.) The record cited by the City does not support the City's contention.

Chen objects to the City's contention that the records maintained by the Police Department are complicated. (City's brief at 11). The City relies upon the Declaration of Linda Crum. (CP 430-434) The City does

not specifically identify anything within Ms. Crum's declaration wherein she states that the records maintained by the Police Department are complicated. (Id.) Therefore, the record does not support this contention.

Chen objects to the City's contention that there are 3 servers that may contain responsive information. (City's Brief at 12) The City offers no cite to the record to support this contention.

Chen further objects to the City's contention that limited staff resources caused an inability to fully respond to Chen's PRA request before August 8, 2011. (City's Brief at 12) The City offers no cite to the record to support this contention.

Chen objects to the City's contention that "Plaintiff submitted its proposed order at 1:00 on December 23, 2011, during the time of counsel's claimed "unavailability". (City's Brief at 16.) Chen also objects to the contention that "The City filed and served its proposed order on Tuesday, December 27, 2012." (Id.) First, there are no cites to the record to support these contentions. Second, a proposed order had already been prepared and was submitted as an attachment to Chen's motion, as was required by King County Local Rule 7(b)(5)(C). (CP 31-33, order attached to motion at CP 13-30.) Therefore, the City had advance notice of the content of Chen's proposed order. The City, on the other hand, did not provide a proposed order with its opposition to Chen's motion for relief under the PRA. (CP 184-201, no proposed order attached) Thus, since the

Order had not been filed as required by the local rules and because it was finally served on Chen's counsel during a time of unavailability, Chen did not have an opportunity to object to the City's proposed order.

Chen objects to the City's contention about his request for amendment of the order on his PRA motion. (City's Brief at 17) The City looks to CP 110, which is a portion of Chen's motion for reconsideration requesting amendment of the order. However, the City draws the appellate court's attention away from the factual errors contained within the order that was addressed by Chen in his motion for reconsideration. (CP 103) While amendment was a proper way to correct the errors, only a portion of the errors were addressed.

Finally, Chen objects to the City's contention that some of Chen's proposed changes were semantic or immaterial to the PRA claims. (City's Brief at 17) The City looks to CP 327-338. In the City's response, while the City agreed with two factual issues, the City downplays the other proposed changes. (City's Brief at 17) However, the City vehemently opposed these other changes the City now claims were "largely semantic and immaterial" to the PRA case. (Id.) In making this argument, the City opined that Chen's concerns were utterly speculative and that, for example, the findings accurately stated the basis by Donna Hanson for Chen's termination, as that may relate to the parallel federal lawsuit filed by Chen. (CP 333.) However, the basis for Ms. Hanson's was determined

to be false. For example, the sentence “Lenhart independently interviewed witnesses and issued a report (the “Lenhart Report”) directed to Alexander on March 23, 2011” was not supported by the record in the King County case.²

II. STRICT REPLY TO ARGUMENT

Chen strictly replies to the City’s response as follows:

A. THE TRIAL COURT’S APRIL 26, 2012 AMENDMENT WAS NOT PROPER AND DID PREJUDICE CHEN.

1. Chen was not provided sufficient notice of the proposed Order.

Chen was not in the exact same position as the City, as argued by the City. (City’s Brief at 20) Chen did not have the benefit of having seen the City’s proposed order before it was entered, as the City did. Under KCLR 7(b)(5)(C), the City was required to attach a proposed order to its response to Chen’s Motion for Relief under the Public Records Act. It did not do this. As such, the first time Chen saw any order proposed by Chen was after the return of Chen’s counsel to the office on January 3, 2012. (CP 115, 128-123) The City attempts to depreciate Chen’s position by pointing to the submission by Chen of a Word version of an Order to the Court. (City’s Brief at 16³) However, the Chen order had already been

² Nonetheless, the report was specifically relied upon by the City to defend, albeit ineffectively, against Chen’s claims in the concurrent federal action.

³ The City offers no reference to the record on appeal to support this contention.

prepared and provided in PDF form to the Court and the City when Chen initially filed his motion. (CP 31-33) The City, on the other hand, did not provide a proposed order with its opposition; thus, Chen did not have notice of the content of any proposed order by the City as, and the City's position does not equate with Chen's. (CP 184-201) Chen did not receive any proposed Order until the City finally provided it to the Court on December 27, 2012, during the time Chen's counsel had notified the City and the Court that it would be unavailable. (CP 115, 128-130.) Here, the Court had the opportunity to remedy any error by providing Chen with the minimum 5 days' notice under CR 52(c) to allow him an opportunity to respond to the City's proposed order by delaying the entry of its Order, but it did not do so and therefore committed error in entering the order in the first place without providing Chen sufficient time to respond. The trial court abused its discretion by improperly entering findings of fact and conclusions of law and an order without requiring Medina to comply with Civil Rules 52(c) and 54(f).

The City further argues that Chen was not prejudiced by the entry of the Court because the Court considered and ruled upon his objections raised on reconsideration. In making this argument, the City draws upon the "invited error" doctrine for the proposition that Chen cannot complain of the Court amending the order, when Chen suggested amendment was proper.

However, the “invited error” doctrine does not apply in this instance. “The ‘invited error doctrine’ states that ‘a party may not request an instruction and later complain on appeal that the requested instruction was given.’” *State v. Johnson*, 172 Wn.App. 112, -- P.3 – (2012), citing *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The original goal of the invited error doctrine was to prohibit a party from setting up an error at trial and then complaining of it on appeal. *Johnson*, 172 Wn.App. at 720, citing *State v. Pam*, 101 Wn.2d 507, 511 680 P.2d 762 (1984), overruled on other grounds by *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995) Invited error arises when a party requests a ruling which is erroneous and then seeks to claim error from that ruling on appeal. *Sandler v. U.S. Development Co.*, 44 Wn.App. 98, 103, 721 P.2d 532 (1986), citing *Graham v. Graham*, 41 Wn.2d 845 252 P.2d 313 (1953); 5 Am.Jur.2d *Appeal & Error* § 713 (1962).

Chen did not invite the Court to enter amended findings and conclusions that continued to be in error. On the contrary, Chen invited the Court to either vacate the incorrect order or amend the order to correct the errors. Thus, the procedural objection by Chen is valid and not moot.

2. The Court did not properly enter the findings and conclusions.

Chen does not dispute that the trial court has discretion to enter findings of fact and conclusions of law at all. Chen maintains that the trial court abused that discretion in this PRA action, when the entry of findings

of fact and conclusions of law is not mandatory and the Court had discretion to enter only a simple order as to Chen's two primary issues: (1) whether Medina's proposed date of response was reasonable; and (2) whether Medina afforded Chief Chen its fullest assistance. Here, Chen sought specific relief from the Court. (CP 11-12). The entry of the findings of fact related to anything other than those claims was extraneous and constituted an abuse of discretion.

As argued in Chen's opening brief, the trial court's orders did not affirmatively determine whether the Medina's response date of seven months after Chief Chen's initial request, when Medina did not seek additional clarification after Chief Chen's response, was reasonable under RCW 42.56.550(2). Instead, the trial court's decisions simply stated that three months and a decision to provide records in installments was reasonable. There were no statements limiting the reasonable time period to that which the trial court was presented, which was until October 31, 2011. After that date, the trial court should have clearly stated that it was neither authorizing nor ruling on the reasonableness of future installments or whether all documents should have been provided by October 31, 2011, or that any future record production should be addressed by the judge taking over the case. Finally, the trial court's orders did not address whether Medina provided the fullest assistance and the trial court's ruling on that issue is still entirely unknown.

Despite these issues not having been resolved, the trial court entered a “final judgment” in this case, ceasing Chief Chen’s ability to proceed with these remaining issues. Under the circumstances, the trial court’s entry of a final judgment without full adjudication of all of the issues was manifestly unreasonable and constitutes an abuse of discretion, and the judgment should be reversed. *Barr v. MacGugan*, 119 Wn.App. 43, 46, 78 P.3d 660 (2003), *citing Lockett v. Boeing Co.*, 98 Wn.App. 307, 309, 989 P.2d 1144 (1999); *see also Yousoufian*, 168 Wn.2d at 458-59, *citing Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

B. IN ENTERING CONCLUSIONS OF LAW 9 AND 10 THE COURT ADOPTED A VIEW THAT NO NORMAL PERSON WOULD TAKE IN LIGHT OF THE EVIDENCE.

The City ignores Chen’s challenge of the Court’s entry of Conclusions of Law 9 and 10. As previously stated by Chen in his opening brief, to the extent Ms. Hanson relied on Mr. Bolasina’s documents to form a basis for Chief Chen’s termination, without access to the documents, including how Mr. Bolasina presented them, Chen’s ability to prepare his wrongful termination before the U.S. District Court was impaired. Medina did not meet its burden of proof under RCW 42.56.550 to provide Chen the fullest assistance or under RCW 42.56.520 to provide Chen with an explanation for denial of his request as to how any particular record was exempt. In addition, the City does not address the issue that the

documents were a public record under RCW 42.56.010(3), discoverable under CR 26, and therefore not exempt under RCW 45.56.290. The City simply ignores these issues.

The City relies upon *King County v. Parmelee*, 162 Wn.App. 337, 360, 254 P.3d 927 (2011), for the premise that the decision to review records *in camera* is discretionary where document at issue in a Public Records Act case are in dispute. The City's reliance upon *Parmelee* is misplaced. The *Parmelee* court only considered, on the merits, whether RCW 42.56.565 was improperly applied retroactively in issuing a second injunction, and in considering this issue on the merits the *Parmelee* court limited its inquiry to four issues: (1) retroactivity; (2) due process; (3) vagueness and overbreadth, and (4) equal protection. Having considered these issues on the merits, the *Parmelee* court affirmed the issuance of the second injunction and all other decisions of the trial court that the court considered on the merits. The remaining issues, however, were not published, including specific issues related to the findings of fact not being supported by the record. *Parmelee*, 162 Wn.App. at 360, 254 P.3d at 939 (2011) This included the issue on the motion for *in camera* review.⁴

⁴ As a side-note, even though *Parmelee* has no precedential value for the premise the City proposes, it should be noted that even in *Parmelee* the court conducted a limited *in camera* review of certain documents before making its decision. In Chen's case, the trial court did not do that.

The City makes an unusual argument that Chen does not take issue with the “substance” of Conclusions 9 and 10; this assertion is simply incorrect. Chen takes issue with the entry of these conclusions of law in their entirety without the City having met its initial burdens under RCW 42.56.550, 42.56.520 and 42.56.290.

It is clear that the parties are at least in agreement that the abuse of discretion standard applies. (City’s Brief at 25) At the least, the trial court should not have entered findings or conclusions of law that might affect and significantly limit Chief Chen’s ability to prepare his federal case. Under these circumstances, the trial court’s entry of conclusions of law numbers 9 and 10 was manifestly unreasonable, highly prejudicial to Chief Chen, and constituted abuse of discretion by the trial court. *Barr*, 119 Wn.App. at 46, *citing Lockett*, 98 Wn.App. at 309; *see also Yousofian*, 168 Wn.2d at 458-59, *citing Mayer v. Sto Indus., Inc.*, 156 Wn.2d at 684. The trial court further abused its discretion when it failed to strike these conclusions of law on reconsideration. Conclusions 9 and 10 should be stricken.

The City argues, without authority and without evidence, that changes to the findings of fact and conclusions of law sought by Chen are inaccurate, immaterial, semantic, or constituted harmless error. (City’s Brief at 28) The City also offers no evidence of a determination by the Court that any of Chen’s suggested changes were indeed inaccurate,

immaterial or semantic, or constituted harmless error. (City's Brief at 27-28.)

The City did not address Chen's position that the trial court's decision was manifestly unreasonable because the court, applying the correct legal standard to the supported facts, adopted a view "that no reasonable person would take." *Yousoufian v. Sims*, 168 Wn.2d 444, 458-59, 229 P.3d 735 (2010), citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)(quotations omitted). Instead, the City takes the unsupported position that the findings of fact reached by the trial court, which were in error, constitute harmless error. (City's Brief at 27)

The general premise of harmless error is that the error is harmless unless it was unreasonably probable that it changed the outcome of the trial. *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 191 P.3d 879, 891 (2008), citing *State v. Bourgeois*, 133 Wash.2d 389, 403, 945 P.2d 1120 (1997). Harmless error is error which is trivial, formal, or academic. *Tiegs v. Watts*, 135 Wn.2d 1, 954 P.2d 877 (1998), citing *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wash.2d 15, 36, 864 P.2d 921 (1995)(quoting *State v. Ray*, 116 Wash.2d 531, 543, 806 P.2d 1220 (1991)). A harmless error would also not be prejudicial to the substantial rights of the party assigning it, and would in no way affect the final outcome of the case. *Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 898 P.2d 284 (1995), citing *State v. Wanrow*, 88 Wn.2d 221, 237,

559 P.2d 548 (1977) (quoting *State v. Golladay*, 78 Wn.2d 121, 139, 470 P.2d 191 (1970)) An error will be considered prejudicial if it affects, or presumptively affects, the outcome of the trial. *Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 668 P.2d 571 (1983), citing *James S. Black & Co. v. P & R Co.*, 12 Wn.App. 533, 537, 530 P.2d 722 (1975). Examples of harmless error include: technical errors, such as a deviation from a technical rule requirement; exclusion of evidence which is cumulative or has speculative value; erroneous jury instruction if it is not prejudicial to the substantial rights of the party[ies] and in no way affected the outcome of the case; admission of defendant's testimony where similar evidence presented without objection.

The inclusion or exclusion of certain language from the findings and conclusions changed the entire outcome of the case. The City first addresses finding of fact number 3, in which the word "detailed" was omitted. The evidence clearly shows that Chen provided a "detailed" memorandum to Donna Hanson; the Declaration of Donna Hanson states that she received a "detailed memorandum" from Mr. Chen. (CP 214, ¶ 4.) The evidence supports the finding that the memorandum was detailed and should either be amended or stricken.

The next finding the City's addresses is finding of fact number 4, where the Court did not add the language "except Stephanie Alexander." The evidence in this case also shows that Mr. Bolasina sent the key

documents he had gathered to assist him in his advice to the City Council to Stephanie Alexander. (CP 139, lines 13-15) The City argues an issue of semantics itself where it has argued that because the city attorney Ms. Alexander works for a private law firm and is not “at the City,” Chen’s suggested change is also semantic. (CP 92, lines 14-16; CP 156, lines 7-8) However, the reference to Mr. Bolasina’s provision of the records to Ms. Alexander is material in and of itself. It is inaccurate to reflect that the records were provided to no one at the City or to anyone who represented its interests. The evidence clearly shows that the documents were provided to Stephanie Alexander, and any finding of fact should reflect that evidence. A reasonable person looking at the evidence could not reach the conclusion that Ms. Alexander was not provided with the records. Therefore, the language proposed by the City within findings of fact 3 and 4, to which Chen did not have an opportunity to respond prior to its initial entry, should have been stricken or revised to accurately reflect the evidence.

Moreover, Chen is prejudiced by the Court’s failure to include this reference, because ultimately the Court entered conclusions of law based in part upon this finding of fact and which resulted in an affirmative Judgment in favor of the City and against Chen such that he did not have the ability to proceed with the remainder of his claims against the City.

C. OBJECTIONS WERE NOT MERELY SEMANTIC OR IMMATERIAL

Regarding Finding 4, the failure of the trial court to include the language “except Stephanie Alexander” is not simply a matter of semantics, and the Finding must be stricken as inaccurate. First, the City takes the position that the proposed language that should have been included, “except Stephanie Alexander” modifies the preposition “at the City.” Even if that is the case, because Ms. Alexander was the City’s legal counsel, her knowledge of the Bolasina documents was imputed to the City, and it is incorrect to say that no one at the City was provided with the records. *Tatham v. Rogers*, 170 Wn.App. 76, 283 P.3d 583 (2012), *citing Hill v. Department of Labor and Industries*, 90 Wn.2d 276, 580 P.2d 636 (1978), (*citing Yakima Fin. Corp. v. Thompson*, 171 Wn.2d 309, 318, 17 P.2d 908 (1933) and *Stubbe v. Stangler*, 157 Wash. 283, 288 P. 916 (1930)). Thus, Finding 4 is only accurate if the Finding indicates that the documents were transmitted to Ms. Alexander. Second, the language “except Stephanie Alexander” does not modify only the preposition “at the City.” Rather, it modifies the entire idea of the sentence where the intent of the Finding, as drafted by the City, was clearly to establish that the documents were not sent to the council members or anyone else.

Regardless of which part of the sentence the proposed language modifies, the evidence in this case does not comport with the City’s position that the records were not provided to the City or any one else. At

best, the record on appeal is inconsistent, where Michael Bolasina declares on the one hand that he did not provide the records he gathered to the council or anyone at the City (CP 211) and his deposition where he states that he provided the records to Stephanie Alexander in June of 2011 (CP 139, lines 13-20). Finding 4, as written by the City, is wrong and must be stricken.

Regarding Finding 5, as to whether Ms. Lenhart independently interviewed witnesses, the City looks to the declaration of Donna Hanson, ¶¶ 6 and 7 (CP 214-215) and Ms. Lenhart's final report attached as Exhibit 2 to Ms. Hanson's September 7, 2011 declaration (CP 221-325). First, Ms. Hanson's declaration sheds no light upon whether or not Ms. Lenhart conducted independent interviews of any witnesses. (CP 214-215) It is improper to rely upon the Declaration of Donna Hanson for this Finding. In addition, the City relies upon the final report attached to Ms. Hanson's declaration, but again the report does not support a finding that Ms. Lenhart conducted "independent interviews" of any witnesses. At most, Ms. Hanson declares that she "hired" Ms. Lenhart to conduct an independent investigation, but her declaration does not support a finding of Ms. Lenhart's conduction of independent interviews. conducted indeed conducted an independent investigation. The record simply does not support the finding that Ms. Lenhart independently interviewed witnesses, and Finding 5 should be stricken in its entirety.

Similarly, the City's objection to the amendment of Finding 5 should be rejected as it relates to drafts of the Lenhart report. (City's Brief at 30) The City maintains that because Ms. Alexander is outside counsel, Finding 5 is accurate as it relates to the final version of Ms. Lenhart's report. However, the City again misses the point of Chen's objection to Finding 5. Chen specifically objects to this finding to the extent it establishes that, "The city was only provided with the final version of the report." The City, again, takes the position that because Ms. Alexander is outside counsel, the provision of a draft of the Lenhart report to Ms. Alexander does not equate to with the City being provided with a draft. This is incorrect, as Ms. Alexander's knowledge of the draft report was imputed to the City. *Tatham*, 170 Wn.App. 76, 283 P.3d 583 (2012), *citing Hill v. Department of Labor and Industries*, 90 Wn.2d 276, 580 P.2d 636 (1978),(*citing Yakima Fin. Corp. v. Thompson*, 171 Wn.2d at 318 and *Stubbe*, 157 Wash. at 288).

Further, the record in this appeal establishes that Ellen Lenhart provided a draft of the report to Ms. Alexander on March 22-23, 2011 (CP 142-143.⁵). Therefore, where a draft of the report was provided to Ms.

⁵ In reviewing the record, it appears that Ms. Lenhart's billing records may contain a date error on page two of her invoice to Stephanie Alexander. (CP 143) The date referenced is "2/23/11"; however, for continuity the date was likely meant to be "3/23/11". This error has no bearing on Chen's position, where the record clearly establishes that a draft of Ms. Lenhart's report was provided on at least March 22, 2011, and most likely again the next day on March 23, 2011.

Alexander, and Ms. Alexander's knowledge is imputed to the City, then it is inaccurate to maintain a finding that the City was only provided with the final version of Ms. Lenhart's report. The City's position that the Court properly excluded Ms. Alexander as a recipient is patently wrong, and the finding should be stricken.

Regarding Finding 14, the City's position is unsupported. Exhibit 1 does not show MX Logic's involvement, that it worked with Rachel Baker, or that the involvement was to conduct word searches for Chen's request. Even if the Court were to look to paragraph 5 of Ms. Baker's declaration, which is where Exhibit 1 is referenced, the declaration only addresses the request made by Heijja Nunn; it does not reference in any way the request made by Chen as it relates to MX Logic's involvement. Therefore, the Court reliance upon Exhibit 1 for this premise is misplaced, and Finding 14 should be stricken in its entirety.

D. REPLY REGARDING COURT UPHOLDING CITY'S RESPONSES TO SPECIFIC REQUESTS

1. Exemption of Bolasina Report and documents gathered for February 2, 2011 executive session.

The City maintains that materials gathered by an attorney in anticipation of litigation in advance of an executive session were protected from disclosure and exempt under the Public Records Act. In limited circumstances that are specified in detail at RCW 42.30.110, a governing body may call an executive session and exclude the public from its

meeting; however, there is no requirement that the public be excluded. RCW 42.30.110. When it calls an executive session, the governing body must take care to confine the executive session to only that content which is designated in the statute, otherwise, the OPMA is violated and liability exists. *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1089 (9th Cir. 2003), citing *In re the Recall of Lakewood City Council Members*, 144 Wn.2d 583, 586, 30 P.3d 474 (2001)(The Washington Supreme Court has held that executive session exception is available when the relevant government actor (1) discusses with counsel (2) actual or potential litigation (3) where public knowledge of the discussion is likely to cause adverse legal or financial consequences.) In and of itself, however, the statutory “executive session” tool conveys neither confidentiality nor privilege on the proceedings within the session.

Instead, confidentiality or privilege, if any, arises as a result of some other applicable rule of law. In the context of privilege, it *may* apply to specific portions of an executive session such an advice from an attorney being provided to their client.

In this instance, the documents discussed and utilized by the City Council are not protected simply because they were used in an executive session. If the documents were within the public domain, they do not become exempt simply because they were used within an executive session. Therefore, the Court erred in determining that Mr. Bolasina’s set

of gathered documents from the executive session were “not public” records under RCW 42.56.020, and Conclusion 9 should be stricken.

2. Lenhart Report

Chen does not specifically assign error to the Finding 7 but generally assigns error to the fact that the Court entered findings and conclusions in the first place, when a simple order addressing the specific claims brought by Chen were sufficient. In doing so, all of the findings of fact have been challenged.

In addition, as argued *supra*, Chen has assigned error to the findings made by the Court that the City was not in possession of drafts of the Lenhart Report and that the City was obligated to produce those drafts to Chen in response to his PRA request.

3. November 8, 2010 Council Meeting recording

Chen does not specifically assign error to the Finding 16 but generally assigns error to the fact that the Court entered findings and conclusions in the first place, when a simple order addressing the specific claims brought by Chen were sufficient. In doing so, all of the findings of fact have been challenged.

E. COURT OF APPEALS’ AUTHORITY TO AMEND TRIAL COURT’S FINDINGS.

Under RAP 7.3, the appellate court has the authority to determine whether a matter is properly before it, and to perform all acts necessary or appropriate to secure the fair and orderly review of a case. Under RAP

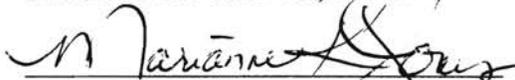
12.3(a), an appellate court may issue a decision on the merits, which in this instance would necessarily include either a reversal of the trial court's findings of fact and conclusions of law and judgment or amendment of the findings of fact and conclusions of law.

F. ALL OF CHEN'S PRA CLAIMS WERE NOT ADDRESSED BY THE TRIAL COURT'S AMENDMENT.

In his motion for relief under the PRA, Chen specifically requested that the City be directed to promptly disclose and produce all records in response to his requests for disclosure of public records. (CP 19) In making its findings and conclusions, both in its original order and the amendment, the Court did not address the remaining production by the City and the timing on the City's provision of those records. (CP 90-99; 154-163.) The problem was compounded by the Court's entry of a final judgment in this case, effectively disposing of Chen's claim without first conducting the requisite inquiry required by RCW 42.56 *et seq.*, and the findings of fact and conclusions of law should be reversed and remanded for full consideration by the trial court.

RESPECTFULLY SUBMITTED this 15th day of April, 2013.

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CASE NO. 69429-4-I

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

JEFFREY CHEN,

Appellant,

v.

CITY OF MEDINA,

Respondent.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury under the laws of the State of Washington, that on April 15, 2013, I caused to be served the original of Appellant's Reply Brief on the following by first class mail:

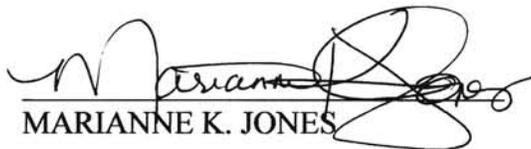
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I FURTHER CERTIFY, under penalty of perjury under the laws of the State of Washington, that on April 15, 2013, I caused to be served a true and correct copy of Appellant's Reply Brief on counsel for the Respondent in this matter:

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DATED this 15th day of April, 2013.


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