

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 OPENING BRIEF

Attorneys for Appellant

Jones Law Group, PLLC
Marianne K. Jones
Mona K. McPhee
11819 NE 34th Street
Bellevue, WA 98005
425-576-8899

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TABLE OF CONTENTS

	Page
I. Introduction	1
II. Assignments of Error/Issues Pertaining to Assignments of Error	2
<u>Assignment of Error No. 1:</u> Whether findings of fact and conclusions of law entered on January 24, 2012, and as amended on April 26, 2012, must be vacated because the trial court abused its discretion in entering the findings of fact and conclusions of law.	2
<u>Issue No. 1 Pertaining to Assignment of Error No. 1:</u> Under CR 52, whether the entry the initial findings of fact and conclusions of law on January 4, 2012, without proper notice having been provided to Chief Chen, constitutes abuse of discretion.	2
<u>Issue No. 2 Pertaining to Assignment of Error No. 1:</u> Whether the entry of the findings of fact and conclusions of law entered on January 24, 2012, and as amended on April 26, 2012, constitutes an abuse of discretion because a simple order was sufficient.	2
<u>Assignment of Error No. 2:</u> Whether the findings of fact and conclusions of law entered on January 24, 2012, and as amended on April 26, 2012, are void under CR 54(f), because the trial court abused its discretion by entering the findings of fact and conclusions of law on January 4, 2012 without proper notice having been provided to Chief Chen and absent evidence sufficient.	3
<u>Assignment of Error No. 3:</u> Whether, in the alternative, the appellate court should further amend the findings of fact and conclusions of law consistent with Chief Chen's motion for reconsideration.	3

	<u>Assignment of Error No. 4</u> Whether the final judgment entered on April 26, 2012, should be vacated, because the trial court failed to address all issues contained in Chief Chen’s original motion for relief under the PRA and its entry of a final order constitutes an abuse of discretion.	3
III.	Statement of the Case	4
	A. Background	4
	B. March 29, 2011 Public Records Request	4
	C. June 16, 2011 Public Records Request	9
IV.	Argument	17
	A. Standards of Review	17
	B. The findings of fact and conclusions of law entered on January 24, 2012, and as amended on April 26, 2012, must be vacated.	18
	1. Under CR 52(c), the trial court abused its discretion in entering the initial findings of fact and conclusions of law on January 4, 2012, because proper notice was not provided to Chief Chen.	18
	2. The trial court abused its discretion in entering the findings of fact and conclusions of law when their entry was not necessary and a simple order was sufficient.	20
	a. The trial court’s failure to strike conclusions of law numbers 9 and 10 constitutes an abuse of discretion, and the trial court’s determination should be reversed and conclusions of law numbers 9 and 10 stricken.	21

b.	The trial court’s failure to strike conclusions of law numbers 9 and 10 constitutes an abuse of discretion, and the trial court’s determination should be reversed and conclusions of law numbers 9 and 10 stricken.	25
C.	The findings of fact and conclusions of law entered on January 24, 2012, and as amended on April 26, 2012, should be deemed void under CR 54(f), because the trial court abused its discretion by entering the findings of fact and conclusions of law on January 4, 2012 without proper notice having been provided to Chief Chen and absent evidence sufficient.	28
D.	Alternatively, Chief Chen requests that the appellate court amend the findings of fact and conclusions of law as requested in Chief Chen’s motion for reconsideration.	30
E.	The final judgment entered on April 26, 2012, should be vacated, because the trial court’s failed to address all issues contained in Chief Chen’s original motion for relief under the PRA, which constitutes an abuse of discretion.	32
F.	Chen is the prevailing party and entitled to an award of penalties, attorney fees, and costs.	34
V.	Conclusion	35

TABLE OF AUTHORITIES

	Page
<i>Statutes</i>	
RCW 42.56.100	21
RCW 42.56.520	22
RCW 42.56.550	21, 22, 25, 31,
RCW 42.56.550(2)	32
RCW 52.56.550(4)	31, 34, 35
<i>Court Rules</i>	
CR 26(b)(4)	24
CR 52(a)(5)	20
CR 52(c)	18, 19, 20, 30, 35
CR 54(f)	28, 29, 30, 36
<i>Case Law</i>	
<i>Barr v. MacGugan</i> , 119 Wn.App. 43, 78 P.3d 660 (2003)	17, 20, 25, 29, 32, 34
<i>Burton v. Ascol</i> , 105 Wn.2d 344, 715 P.2d 110 (1986).	28

<i>Koenig v. Thurston County</i> , 155 Wn. App. 398, 229 P.3d 910 (2010) <i>pet. for review granted</i> 170 Wn.2d 1020, 245 P.3d 774 (2011)	31
<i>Luckett v. Boeing Co.</i> , 98 Wn.App. 307, 989 P.2d 1144 (1999)	18, 20, 25, 29, 32, 34
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006)	18, 20, 25, 29, 32, 34
<i>Paine-Gallucci, Inc. v. Anderson</i> , 35 Wn.2d 312, 212 P.2d 805 (1949)	19
<i>Progressive Animal Welfare Soc. v. Univ. of Washington</i> , 125 Wn.2d 243, 884 P.2d 592 (1994)	22, 31, 34
<i>Seidler v. Hansen</i> , 14 Wn. App. 915, 547 P.2d 917 (1976)	19
<i>Soter v. Cowles Pub. Co.</i> , 162 Wn.2d 716, 174 P.3d 60 (2007)	24
<i>Tacoma Recycling, Inc. v. Capitol Material Handling Co.</i> , 34 Wn. App. 392, 661 P.2d 609 (1983)	19
<i>Tacoma Pub. Library v. Woessner</i> , 90 Wn. App. 205, 951 P.2d 357 (1998), <i>amended on recons.</i> , 972 P.2d 932 (1999)	31, 34
<i>Yousoufian v. Sims</i> , 168 Wn.2d 444, 229 P.3d 735 (2010)	18, 20, 25, 29, 32, 34, 35

I. INTRODUCTION

In March 2011, Appellant Jeffrey Chen (“Chief Chen”) made a public records request to the City of Medina (“Medina”) for the production of records. (CP 40, ¶ 7; CP 42-44.) As of August 5, 2011, Medina had not responded to Chief Chen’s request as required by the Public Records Act “PRA” and Chief Chen filed a complaint against Medina for violations of the Public Records Act, Chapter 42.56 RCW. (CP 1-12.) Initially, Chief Chen sought an order requiring Medina to lodge records with the Court. (CP 118-124.) The Court denied Chief Chen’s motion to lodge records with the Court. (CP 125-126.) Chief Chen subsequently brought a motion for relief under the Public Records Act which was heard on September 12, 2011. (CP 13-30.) On January 4, 2012, the Court entered an Order on Motion for Relief under Public Records Act with Findings of Fact and Conclusions of Law. (CP 90-99.)

Chief Chen sought reconsideration of the Court’s January 4, 2012 order. (CP 100-111) On April 26, 2012, the trial court denied Chief Chen’s motion for reconsideration and entered an Order Denying a Motion for Reconsideration but Amending Prior Order, and entered an amended Order on Motion for Relief under Public Records Act with Findings of Fact and Conclusions of Law. (CP 154-165.) On September 10, 2012,

based upon the amended findings of fact and conclusions of law and order, the Court entered a judgment in favor of Medina awarding it \$200 in costs. (CP 178-179.)

Chief Chen seeks reversal of all the Court's orders and the judgment in the underlying case.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Assignment of Error No. 1: Whether findings of fact and conclusions of law entered on January 24, 2012, and as amended on April 26, 2012, must be vacated because the trial court abused its discretion in entering the findings of fact and conclusions of law.

Issue No. 1 Pertaining to Assignment of Error No. 1: Under CR 52, whether the entry the initial findings of fact and conclusions of law on January 4, 2012, without proper notice having been provided to Chief Chen, constitutes abuse of discretion.

Issue No. 2 Pertaining to Assignment of Error No. 1: Whether the entry of the findings of fact and conclusions of law entered on January 24, 2012, and as amended on April 26, 2012, constitutes an abuse of discretion because a simple order was sufficient.

Assignment of Error No. 2: Whether the findings of fact and conclusions of law entered on January 24, 2012, and as amended on April 26, 2012, are void under CR 54(f), because the trial court abused its discretion by entering the findings of fact and conclusions of law on January 4, 2012 without proper notice having been provided to Chief Chen and absent evidence sufficient.

Assignment of Error No. 3: Whether, in the alternative, the appellate court should further amend the findings of fact and conclusions of law consistent with Chief Chen's motion for reconsideration.

Assignment of Error No. 4: Whether the final judgment entered on April 26, 2012, should be vacated, because the trial court failed to address all issues contained in Chief Chen's original motion for relief under the PRA and its entry of a final order constitutes an abuse of discretion.

III. STATEMENT OF THE CASE

A. Background

Jeffrey Chen is a former police officer and Chief of Police for the City of Medina. (CP 34, ¶ 2.) He was promoted to the office of Chief of Police for the City of Medina, with responsibilities including the Town of Hunts Point. (Id.) In December 2010, Chen was placed on administrative leave. (Id.) Ultimately, Chen was terminated from that position on 4/27/11. (Id.)

B. March 29, 2011 Public Records Request

On March 29, 2011, Chief Chen sent a request for public records to Medina through his then-counsel, Joyce Thomas.¹ The request states:

Pursuant to the Public Records Act, RCW 42.56, I request that you provide to our law firm copies of the following documents:

Any and all documents from February 1, 2004, to date regarding or discussing Jeffrey Chen, the current Chief of Police of the City of Medina. This request includes any and all investigative reports prepared by any investigator retained by the City of Medina, including, but not limited to Michael Bolasina and Ellen Lenhart, any and all documents reviewed by the Medina City Council concerning or about Chief Jeffrey Chen, any and all emails of or about Chief Jeffrey Chen, received or sent, and any and all information in whatever form which discusses in any manner the rationale for placing Chief Chen on administrative leave on December 27, 2010.

...

If you deny any part of this request, please cite each specific reason that you believe justifies your refusal to release the information requested herein.

(CP 40, ¶ 7; CP 42-44.)

On April 1, 2011 Medina acknowledged the request and sought clarification. Rachel Baker, a City employee, emailed Ms. Thomas:

¹Joyce Thomas represented Chief Chen until 4/15/11. (CP 39, ¶2.) Marianne K. Jones substituted as Chief Chen's counsel on 4/15/11. (CP 51, ¶2.) Medina was notified and it was clarified in writing between Ms. Thomas and Medina's counsel that Chief Chen's request remains in effect from the date of the original request and that all future communications and any documents produced in response to the request should be directed to Ms. Jones. (CP 40, ¶ 7; CP 48-50.)

In following up to your request for records, I'd like to request clarification of the specific records you wish to obtain surrounding:

“Any and all documents from February 1, 2004, to date regarding or discussing Jeffrey Chen, the current Chief of Police of the City of Medina.”

Are you seeking purely employment records, or all records in which his name and/or position is referenced in all documents concerning city business since 2/1/2004?

In response to the second portion of your request, records will be provided to you as they become available between now and July 31, 2011.

(CP 40, ¶ 4; CP 45-47.)

On Monday, April 4, 2011, Ms. Thomas responded:

In answer to your question, which is copied and pasted herein for ease of reference:

Question:

Are you seeking purely employment records, or all records in which his name and/or position is referenced in all documents concerning city business since 2/1/2004?

Answer:

I am seeking all records in which Chief Jeff Chen's name and/or position is referenced in all documents concerning the City of Medina's business since 2/1/2004. [sic]

(CP 40 ¶ 5; CP 45-46.)

On April 8, 2011, Medina acknowledged the clarification, noted that the volume of documents requested is expected to be “significant,” and, as a result, additional clarification may be requested by April 15, 2011. (CP 40, ¶6; CP 45-47.) Medina also stated, “records will be provided to you **as they become available between now and July 31, 2011.**” (Id. (emphasis added).) Medina neither sought additional clarification regarding the substance of the request nor, at any time prior to July 31, 2011, indicated it would need more than four months to respond. (CP 40, ¶8; CP 52, ¶3.) Medina did not produce any records in response to Chen’s 3/29/11 request until April 30, 2011. (Id.)

Chief Chen estimated his request would produce upwards of 40,000 pages of public records. (CP 35, ¶ 3; CP 52, ¶ 4.) On July 30, 2011, Medina produced approximately **500 pages** of records consisting of a total of 216 records exclusively in the form of emails (and some attachments to the emails). (CP 79, ¶ 3; *see also* CP 62-67.) Chief Chen’s request sought public records beginning February 1, 2004, but the earliest record produced is from 9/4/2010. (CP 79, ¶ 3.) The produced records exclude nearly six and a half years of requested records. (Id.)

Medina did not disclose the identity or nature of any other records that meet the parameters of Chief Chen’s request. (CP 53, ¶ 8.) Medina

also did not provide any statement of exemption for any records. (Id.) And, further, Medina has not indicated in any of its communications with Chief Chen the actual or estimated volume of records it has collected for review or expects to collect other than anticipating, back on April 8th, that the volume would be “significant.” (Id.; *see also* CP 45-47.)

As of August 26, 2011, the records produced were not complete in themselves. (CP 79, ¶4.) Some of the email records did not include referenced attachments. For example, an April 29, 2011 4:58 PM email re Public Records Request, 2011-090, from Rachel Baker on behalf of Medina to Scott Gutierrez references attached documents, but those attached documents were not part of Medina’s July 30th response. (Id.; CP 62-67.) It also appeared that at least some, if not all, of the emails produced do not include any “bcc” recipients. (CP 79, ¶4.) However, based on review, some emails clearly were sent to “bcc” recipients. (Id.) For example, City Manager Donna Hanson sent an email to multiple unidentified persons on 2/15/11 at 1:01 and 1:02 PM and it is possible to infer that the “bcc” field must have been used because Medina produced multiple responses to the same outgoing email from multiple individuals but there is no one listed in the “To” field in the original email. CP 79, ¶4; CP 62-67.) Therefore, it was apparent Medina had only produced some,

but not all, versions of records, and as a result the produced records were not complete. (CP 17) Medina had withheld the original versions without claiming any exemption. (Id.)

On 7/30/11, on the eve of its own disclosure deadline, and four months after Chief Chen's March 29, 2011 request, Medina "updated [the] estimated disclosure date extending it from 7/31/11 to 10/31/11," and again promised Chief Chen would "be notified when additional records become available for disclosure by and before this revised date." (CP 52-53, ¶6; CP 62-67.) In a July 30, 2011 email to Chief Chen's counsel that accompanied Medina's paltry record production, Medina admitted, "additional time [is] necessary to **collect** and review **added responsive records**," and that other records had been collected but were not yet available for disclosure. (CP 53, ¶7; CP 62-67 (emphasis added)) In other words, in four months Medina made little progress responding to Chen's request and could only disclose and produce about 500 pages of records. (CP 5-6)

Also in the four months Medina initially gave itself to respond, and despite claiming to have additional records, Medina failed to disclose the identity of or produce any other responsive records, including the Bolasina report or any records relating to the Bolasina investigation and any drafts

or earlier versions, notes or records of the Lenhart report identified in Chen's records request by name. (CP 53-54, ¶ 9) Medina failed to state any exemptions authorized by the PRA, or state any reason permitted by the PRA for withholding disclosure or publication of any other record. (Id.)

C. June 16, 2011 Public Records Request

Chief Chen submitted a second public records request on June 16, 2011, requesting only one specific record – a council meeting recording. (CP 52, ¶5; CP 56-57.) Medina usually maintains recordings of its council meetings on a public website. (CP 35, ¶4; CP 52, ¶5) For an unknown reason, the 11/8/10 meeting was not (and as of August 26, 2011 had not) been made available on the website. (CP 35, ¶4; CP 52, ¶5; CP 79-80, ¶6.) Rather than producing the single recording upon demand, Medina informed Chief Chen that it would take almost one month to produce the recording and it would do so by July 15, 2011. (CP 52-53, ¶6; CP 5) The day before the date initially estimated by Medina, Medina notified Chief Chen it would not produce the recording for another three and a half week on August 8, 2011. (Id.) Chief Chen objected because Medina had already taken nearly one month to produce a single record that simply involved downloading the recording of a public meeting to a disc. (Id.) Medina

mailed the recording to Chief Chen on or about July 18, 2011. (Id.) Upon review of the entire recording, it appears the recording was redacted or modified, and a key four minutes are not on the recording. (CP 35, ¶4.) As of August 26, 2011, Medina had not provided any statement, explanation, or claim of exemption or privacy interest relating to this redaction and instead insists that the information is present. (CP 18) A further careful review revealed the information on the disc provided did not contain what Rachel Baker stated was present in the original recording regarding a conversation regarding an employee and MX Logic. (CP 53-54, ¶9.)

On August 5, 2011, Chief Chen filed a Complaint for enforcement of the PRA. (CP 1-12.) Chief Chen sought a hearing requiring Medina to appear and show cause why the relief requested in Chen's complaint should not be granted, and brought a motion in support of his position on show cause hearing. (CP 13-30) Chief Chen also made a motion to this court to require Medina to lodge with the Court all records it has collected in response to Chen's public records request because the records were necessary for the Court to consider and determine Chief Chen's motion. (CP 118-124)

On 11/30/11, counsel for the Plaintiff provided counsel for the Defendant a Notice of Unavailability for the dates 12/17/11 through

1/2/12. (CP 127-130) In addition, counsel for Plaintiff placed an “Automatic Reply” on her email system which read:

This is an automated reply; I am away through January 2, 2012; and will not be able to reply to you immediately. I will get back to you after I return. If you are intending to serve anything via email, service will be effective January 3, 2012. Happy Holidays. Marianne.

(CP 115 ¶5)

On December 27, 2011, in response to a string of emails beginning December 14, 2011, Defendant’s counsel, Jeffrey Meyers, sent the proposed Findings of Fact and Conclusions of Law. They were served by email as the only form of service. This is by agreement of the parties. However, based upon the Notice of Unavailability served on November 30, 2011 and the Automatic Reply indicating service is effective January 3, 2012; service was not effective until January 3, 2012. On December 15, 2011, counsel for the defendant knew that the court would issue a ruling by January 6, 2012 because it was so indicated in the email from the court.

(CP 131-134)

Chief Chen’s original PRA Motion was made prior to any ongoing production of documents, prior to any indexes being provided, prior to any privilege logs being provided, prior to any refusal to provide documents, and prior to any discovery. Between the time the PRA Motion was heard

on September 12, 2011 and the PRA Motion was ruled on January 4, 2012, three additional submissions of hundreds of documents had been provided by the City of Medina. However, there were still no indexes, no privilege logs, no refusal to provide documents, and counsel for plaintiff had obtained a copy of the October 31, 2011 Michael Bolasina deposition specifically relating to a Public Records Act case by a Medina resident who requested the same Bolasina documents. This deposition contained information that conflicted with the Declaration of Michael Bolasina and with the Findings of Fact and Conclusions of Law that were entered by this Court on January 4, 2012. (CP 90-99; CP 115, ¶3)

There were numerous factual errors contained within the Findings of Fact and Conclusions of Law entered on January 4, 2012, including the following:

F/F P. 1: “Instead” was argumentative and not included in anyone’s declaration, particularly the declaration cited. It was not a transitional word, nor did it assist in the context. It was intentionally placed in as referring to Chief Chen’s actions being alternative to signing a declaration. Nothing in the evidence supported that fact and it was speculative that the act of not signing a declaration in any way relates to the act of resigning. (CP 91, line 22)

F/F P.1: The word “abruptly” with “unexpectedly.” The word unexpectedly was used in the declaration that was submitted. (CP 91, line 23)

F/F P. 3: Add in the word “detailed” within the sentence, “On January 27, 2011, Chen provided a “detailed” memorandum . . .” This is what was in the declaration. (CP 92, lines 4-5)

F/F P. 4: Add to the last sentence of P. 4 “except Stephanie Alexander.” (CP 92, line 16) In Bolasina’s deposition at pages (62 and 63) he stated that he provided the documents to Stephanie Alexander. (CP 135-140) The statement as written was not true.

F/F P. 5: “After” should be “Before”. (CP 92, line 17) In lawyer bills that were publicly disclosed by the WCIA it showed Stephanie Alexander was retained by the City and the first billing was incurred on February 1, 2011, which was before the February 2, 2011 meeting. (CP 141-147)

F/F P. 5: The sentence: Lenhart independently interviewed witnesses and issued a report (the “Lenhart Report”) directed to Alexander on March 23, 2011. (CP 92, line 21) This was not supported by the reference cited and it was not submitted as any evidence anywhere within the court record.

F/F P.5: The sentence: “The City was only provided with the final version of the report.” (CP 92, line 23-24) This sentence is untrue, because the billing records of Ellen Lenhart showed that Ms. Lenhart sent a draft to Stephanie Alexander. Stephanie Alexander’s billing records showed that she made revisions and that those revisions were incorporated and a new draft was sent. (CP 141-147)

F/F P.10: All of the reasons listed for terminating Chief Chen in this paragraph were not contained within the declaration of Donna Hanson. (CP 93, ¶10) While Ms. Hanson does attach the Lenhart report, in the actual termination letter not all of the items in the Lenhart report were listed as reasons for termination.

F/F P.14: (CP 94, ¶14) The reference to Ex. 1 of Baker Supp. Dec. should have read Paragraph 3.

In addition, on December 16, 2011 a federal court action was filed by Chief Chen against Medina specifically relating to the termination of plaintiff from his position as the Chief of Police. The facts contained in the Findings of Fact and Conclusions of Law unnecessarily included statements regarding the termination that not based upon a determination of evidentiary facts in the case. The facts related to the termination or investigation had nothing to do with the public records requests and the Findings of Fact and Conclusions of Law should have been void of such findings and conclusions. (CP 116) The trial court entered the following conclusions of law:

C/L P.9: Bolasina's set of gathered documents from this executive session are not "public records" under RCW 42.56.020. They were not "prepared, owned, used or retained" by City and did not relate to any governmental decision-making by the Council. The Council took no action following the executive session. (CP 98, ¶9)

C/L P.10: To the extent that the documents gathered by attorney Bolasina could be considered public records, they constitute attorney work product that was gathered to facilitate attorney-client discussion with the City Council during executive session, as permitted by the Open Public Meetings Act. The documents gathered by an attorney to discuss potential litigation reflect his mental impressions and what he considered to be key elements of possible litigation As such they would be exempt from disclosure as work product under RCW 42.56.290 which exempts records relevant to a controversy to which an agency is a

party that would not be discoverable under the rules of civil discovery. (CP 98, ¶10)

Chief Chen sought reconsideration of the Court's January 4, 2012, findings of fact and conclusions of law. (CP 100-111) On April 26, 2012, the Court denied Chief Chen's motion for reconsideration and amended the order on Chief Chen's motion for relief under the PRA. (CP 164-165; CP 154-163) However, the trial court did not address the following issues raised by Chief Chen in his motion for reconsideration:

F/F P.1: The trial court did not address or revise the argumentative inclusion of the word "instead", despite nothing in the evidence supported that fact and it was speculative that the act of not signing a declaration in any way relates to the act of resigning. (CP 155, line 22)

F/F P.1: The trial court did not address or revise the word "abruptly," when the word "unexpectedly" was the word used in the declaration that was submitted. (CP 155, line 23)

F/F P.3: The trial court did not add in the word "detailed" within the sentence, "On January 27, 2011, Chen provided a "detailed" memorandum . . .," which was in the declaration. (CP 156, line 4-5)

F/F P.4: The trial court did not add "except Stephanie Alexander" to the end of paragraph 4, even though Mr. Bolasina stated in his deposition that he provided the documents to Stephanie Alexander, and the statement was written is not true. (CP 156, line 16)

F/F P.5: The trial court did not address or revise the sentence, "Lenhart independently interviewed witnesses and issued a report (the "Lenhart Report") directed to

Alexander on March 23, 2011,” even though this was not supported by the reference cited and it was not submitted as any evidence anywhere within the court record. (CP 156, line 21-22)

F/F P.5: The trial court did not address or revise the sentence, “The City was only provided with the final version of the report,” even though the billing records of Ellen Lenhart showed that Ms. Lenhart sent a draft to Stephanie Alexander. Stephanie Alexander’s billing records showed that she made revisions and that those revisions were incorporated and a new draft was sent. (CP 156, line 24)

F/F P.10: The trial court did not address or revise this finding of fact, even though all of the reasons listed for terminating Chief Chen in this paragraph were not contained within the declaration of Donna Hanson and not all of the items in the Lenhart report, which was attached to Ms. Hanson’s’ declaration, were listed as reasons for termination. (CP 157-158, ¶10)

F/F P.14: The trial court did not address or revise the reference to Ex. 1 of Baker Supp. Dec., which should have read Paragraph 3. (CP 158, line 22)

C/L P.9: Bolasina’s set of gathered documents from this executive session are not “public records” under RCW 42.56.020. They were not “prepared, owned, used or retained” by City and did not relate to any governmental decision-making by the Council. The Council took no action following the executive session. (CP 162, ¶9)

C/L P.10: To the extent that the documents gathered by attorney Bolasina could be considered public records, they constitute attorney work product that was gathered to facilitate attorney-client discussion with the City Council during executive session, as permitted by the Open Public Meetings Act. The documents gathered by an attorney to discuss potential litigation reflect his mental impressions

and what he considered to be key elements of possible litigation As such they would be exempt from disclosure as work product under RCW 42.56.290 which exempts records relevant to a controversy to which an agency is a party that would not be discoverable under the rules of civil discovery. (CP 162, ¶10)

Based upon the amended findings of fact and conclusions of law, Medina sought a judgment against Chief Chen, to which Chief Chen objected. Chief Chen first objected to the entry of the judgment by Judge Canova because the matter had been transferred to Judge McCarthy. (CP 166) Chief Chen further objected to entry of a final judgment for the reason that the judgment proposed by Medina purported that all issues in the matter had been resolved and that the judgment was final. (CP 167) Medina was continuing, albeit very slowly, to produce records sought under Chief Chen's PRA requests, and Chief Chen's claim for penalties related to Medina's production of records have not been resolved. (Id.)

Notwithstanding Plaintiff's objections, the Court entered a "final judgment" awarding Medina \$200 in costs. (CP 178-179) Chief Chen appeals this judgment and the amended findings and conclusions.

IV. ARGUMENT

A. Standards of review.

The standard of review for a decision granting or denying a motion to vacate under CR 60(b) is abuse of discretion. *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) A court abuses its discretion when its decision is based on untenable grounds or reasoning. *Id.*

Similarly, a trial court's determination under the Public Records Act is reviewed for an abuse of discretion. *See e.g., Yousoufian v. Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010). A trial court's decision is "manifestly unreasonable" if "the court, applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take." *Yousoufian*, 168 Wn.2d at 458-59, *citing Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)(*quotations omitted*)

B. The findings of fact and conclusions of law entered on January 24, 2012, and as amended on April 26, 2012, must be vacated.

1. Under CR 52(c), the trial court abused its discretion in entering the initial findings of fact and conclusions of law on January 4, 2012, because proper notice was not provided to Chief Chen.

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). CR 52(c) states, in relevant part, "the court shall not sign findings of fact or conclusions of law until the defeated party or parties have received 5 days' notice of the time and place of the submission, and have been served with copies of the

proposed findings and conclusions.” Medina served the proposed findings of fact and conclusions of law on Chief Chen through counsel on December 27, 2011. (CP 115, lines 14-17) At the time, counsel was unavailable to accept service for a short period, and Medina (i) had been provided prior notice of counsel’s unavailability, and (ii) received a responsive email upon service of the proposed findings of fact and conclusions of law, that counsel was unavailable for service. (Id.) Counsel’s notice of unavailability had also been filed with the court on November 30, 2011. (Id.) Therefore, Chief Chen did not receive the five days’ notice contemplated by CR 52(c).

“[F]ailure to give 5 days’ notice of the content of the proposed findings and conclusions pursuant to CR 52(c) [is] error and required that the findings of fact, conclusions of law and judgment be vacated. *Tacoma Recycling, Inc. v. Capitol Material Handling Co.*, 34 Wn. App. 392, 396, 661 P.2d 609, 611 (1983) (citing *Paine-Gallucci, Inc. v. Anderson*, 35 Wn.2d 312, 212 P.2d 805 (1949)). The reason CR 52(c) requires five days’ notice, and a failure to comply with this notice results in vacating the order, is that a defeated party “is entitled to 5 days’ notice of presentation of any proposed findings and conclusions in order to evaluate them and prepare all relevant arguments against their adoption.” *Id.* (citing *Seidler v.*

Hansen, 14 Wn. App. 915, 919, 547 P.2d 917 (1976)). Here, because the court had not issued an oral ruling or a preliminary written order indicating its decision and/or the basis for its decision, even if Chief Chen was afforded proper notice under CR 52(c), he was not aware that the court intended to deny his motion. Therefore, Chief Chen could not have known he was a “defeated party” under the rule, and thus, that he was in a position where he needed to object to Medina’s proposed findings of fact and conclusions of law, or have them entered against him.

The trial court’s decision not to vacate the January 4, 2012 order was manifestly unreasonable. *Barr*, 119 Wn.App. at 46, *citing Luckett*, 98 Wn.App. at 309; *see also Yousoufian*, 168 Wn.2d at 458-59, *citing Mayer v. Sto Indus., Inc.*, 156 Wn.2d at 684. The January 4, 2012, findings of fact and conclusions of law and order should be vacated.

2. The trial court abused its discretion in entering the findings of fact and conclusions of law when their entry was not necessary and a simple order was sufficient.

In seeking to have the January 4, 2012, findings and conclusions and order vacated, Chief Chen requested that the trial court simply enter a denial without entering supporting findings of fact and conclusions of law. CR 52(a)(5) provides that entry of findings of fact and conclusions of law are not necessary for decisions on motions (except decisions on motions

pursuant to CR 41(b)(3) (motion to dismiss a plaintiff's case at the close of plaintiff's evidence) or CR 55(b)(2) (motion for default judgment)). Thus, findings of fact and conclusions of law were not necessary as to the trial court's determination regarding Chief 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.

- a. The trial court's failure to strike conclusions of law numbers 9 and 10 constitutes an abuse of discretion, and the trial court's determination should be reversed and conclusions of law numbers 9 and 10 stricken.**

Chief Chen's motion for relief under the PRA primarily sought the court's determination that Medina's proposed time for providing records to Chief Chen was unreasonable under RCW 42.56.550(2) and that Medina failed to comply with the PRA by not providing Chief Chen "the fullest assistance," required by RCW 42.56.100. At the time of Chief Chen's motion and still through the date Chief Chen sought reconsideration, Medina had essentially only *denied* Chief Chen's request as to three specific records: (i) the Bolasina report, (ii) all versions of the Lenhart report, and (iii) an unredacted version of the November 8, 2010 city council meeting recording.²

²At the time of Chief Chen's motion, Medina had not specifically denied Chief Chen any responsive records or claimed any exemptions, and had not done so as of the date Chief

Entry of findings of fact and conclusions of law regarding the Bolasina documents was improper because Chief Chen was prejudiced by the procedure Medina used to declare the documents are exempt and then obtain the trial court's ruling on the applicability of the exemption. Under the PRA, an agency that denies a public records request on the basis of either an exemption or an argument that the request does not seek "public records" must inform the requestor of the denial and provide an explanation for the denial that explains how the particular record is exempt. RCW 42.56.520 ("Denials of requests must be accompanied by a written statement of the specific reasons therefor."); *see also Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 270-71, 884 P.2d 592, 607 (1994) ("Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request"). The requesting party then has the right to file a complaint and seek a show cause hearing disputing the denial and its basis. RCW 42.56.550. The requesting party can then gather evidence through discovery that disputes the basis of the agency's denial, and then produce that evidence and argument to the court in a motion for relief. *Id.* At that

Chen filed his motion for reconsideration other than by way of responsive memoranda to Chief Chen's Motion to Show Cause. Chief Chen did not receive a direct response from

point, the agency has the opportunity to attempt to meet its burden of proof and prove that the exemption applies. *Id.* The requesting party can then reply. In many instances, the parties are also able to present live testimony to the court.

Here, Donna Hanson would likely testify that her conclusions that Chief Chen lied during Mr. Bolasina and Ms. Lenhart's investigations, which form a significant basis of Medina's pretext basis for terminating Chief Chen, included consideration of the "key documents" Mr. Bolasina gathered and presented to the Council on February 2, 2011. Regardless of whether the Medina Council may have taken any further formal action, Medina, through Ms. Hanson, relied on those key documents to reach conclusions about Chief Chen that resulted in his termination. As a result, the documents are (i) a "public record," under RCW 42.56.010(3) which "includes any writing containing 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..." and (ii) may be

Medina specifically claiming that any requested records would not be produced because they meet a statutory exemption.

discoverable under Civil Rule 26, and therefore not exempt under RCW 45.56.290.

“Washington's Civil Rule (CR) 26(b)(4) governs discovery of materials generated in preparation for trial, codifying the work product protection, and we have held that this rule also governs disclosure under the controversy exception of the Public Records Act, RCW 42.56.290. If the documents at issue ... are discoverable under CR 26, then they are subject to disclosure under the act.” *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 733-34, 174 P.3d 60, 70 (2007) (internal citations omitted). CR 26(b)(4) provides in relevant part,

“Trial Preparation: Materials. ... a party may obtain discovery of documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

To the extent Ms. Hanson relied on Mr. Bolasina's documents, they form, at least in part, a basis for Chief Chen's termination. Without access to the documents, including how Mr. Bolasina presented them,

Chief Chen is unable to fully prepare his wrongful termination case currently pending before the U.S. District Court for the District of Western Washington, which is scheduled for trial on March 11, 2013. Therefore, the Bolasina documents may be discoverable and the exemption not applicable. Medina did not meet its burden of proof under RCW 42.56.550. 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 Yousoufian*, 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. Chief Chen requests that the appellate court reverse the trial court's order and strike conclusions of law numbers 9 and 10.

b. The trial court's failure to strike conclusions of law numbers 9 and 10 constitutes an abuse of discretion, and the trial court's determination should be reversed and conclusions of law numbers 9 and 10 stricken.

As to the three specific documents that the City refused to produce to Chief Chen, Medina relied on the defense of a statutory exception only in regards to the Bolasina report. Medina claimed the Bolasina documents were exempt pursuant to RCW 42.56.290. However, had Medina properly provided a privilege log and claimed an exemption to these documents rather than alleging it for the first time in response to Chief Chen's Motion to Show Cause, then the documents could have been lodged for *in camera* review to determine as a matter of law whether they were privileged.³

Medina admitted that the documents themselves were not privileged, and rather argued that the order in which they were compiled made the documents as a whole privileged. Without *in camera* review, the evidence simply did not support the trial court's finding and conclusions that the documents contained in the "Bolasina Report" were privileged. Without the documents being contained on a privilege log, indexed and

³After entry of the trial court's orders in the underlying King County action, this very issue was raised in a contemporaneous action in King County Superior Court, *City of Medina v. King County*, Case No. 12-2-09043-2 SEA, filed by Medina on March 19, 2012, wherein the issue of privilege of the Bolasina documents was brought front and center before the court. Medina was clearly aware of issues related to the Bolasina

lodged so as to afford an *in camera* review by the trial court, there was no ability to conclude as a matter of law that the documents were contained somewhere within the hundreds of documents thus far disclosed.

Creating a privilege log, lodging the records, and *in camera* review, was the proper way to address this issue. The trial court's failure to require Medina to provide a privilege log, lodge the records with the trial court, and conduct an *in camera* review of the documents constituted an abuse of discretion. The issue is now moot because in a different case filed in King County under cause No. 12-2-09043-2 SEA, Chief Chen intervened and was afforded the relief sought herein. However, Chief Chen requests that the appellate court reverse the trial court's denial of Chief Chen's motion for reconsideration, and declare Chief Chen as the prevailing party on this issue so that prevailing party attorney fees and costs can be awarded to Chief Chen and denied to the City of Medina.

documents at that time and had the means provide a privilege log and to bring the same issue before the trial court in Chief Chen's case.

C. The findings of fact and conclusions of law entered on January 24, 2012, and as amended on April 26, 2012, should be deemed void under CR 54(f), because the trial court abused its discretion by entering the findings of fact and conclusions of law on January 4, 2012 without proper notice having been provided to Chief Chen and absent evidence sufficient.

Chief Chen did not receive five days' notice of presentation of the findings of fact and conclusions of law and order proposed by Medina. CR 54(f) directs notice of presentation of orders.

(2) Notice of Presentation. No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment [unless certain circumstances that do not apply here are present].

Instead, Medina submitted a proposed order with detailed findings of facts and conclusions of law, while counsel was unavailable and without setting a date for or providing a notice of presentation. "Failure to comply with the notice requirement in CR 54(f)(2)" may render the order void where the party not afforded proper notice is prejudiced. *Burton v. Ascol*, 105 Wn.2d 344, 352, 715 P.2d 110, 115 (1986). Had Chief Chen been afforded notice, all of the factual discrepancies stated within the statement of fact and supported by the Declaration would have been raised.

More importantly, the trial court would have been apprised that a new lawsuit in Federal Court had just been filed on December 16, 2011

and that it was evident that the attorney for Medina was merely attempting to obtain findings and conclusions to be entered that so that Medina may argue subsequently that the findings had been determined.

The findings entered by the trial court were in error, not supported by evidence submitted, were not subject to an evidentiary hearing or any other fact finder under the same standard applicable to the newly filed case, and were not relevant to a PRA case. Chief Chen's exposure to prejudice in this situation has been extreme because it is unknown how another court may view the findings issued in this case. Further evidence of prejudice is included with the objections detailed in this motion, *infra*. Because Chief Chen was not given notice of presentation mandated by CR 54(f)(2), and he suffered prejudice as a result, the appellate court should determine the trial court's order void.

The entry of the Order without evidence, which is highly prejudicial to Chief Chen, was manifestly unreasonable and constitutes abuse of discretion by the trial court. *Barr*, 119 Wn.App. at 46, *citing Luckett*, 98 Wn.App. at 309; *see also Yousoufian*, 168 Wn.2d at 458-59, *citing Mayer v. Sto Indus., Inc.*, 156 Wn.2d at 684. Chief Chen requests that the appellate court void the order, and otherwise deny the portions of

the Motion to Show Cause that were denied and grant the remaining portions that were granted.

D. Alternatively, Chief Chen requests that the appellate court amend the findings of fact and conclusions of law as requested in Chief Chen's motion for reconsideration.

Chief Chen requested that if the trial court concluded the January 4, 2012, order was neither void nor should be vacated for failure to comply with CR 52(c) and CR 54(f)(2), the trial court amend the findings of fact and conclusions of law. CR 52(b) permits findings and judgment to be amended “[u]pon motion of a party filed not later than 10 days after entry of judgment...,” and the motion and subsequent amendments may be based on the moving party’s questioning of “the sufficiency of the evidence to support the findings ... whether or not the party raising the question has made in the court an objection to such findings or has made a motion to amend them or a motion for judgment.” CR 52(b). The ten factual errors specifically provided in the factual summary should all have been changed. Moreover, all factual references as to plaintiff’s termination from employment or any investigation should have been removed as not relevant to Chief Chen’s PRA case. However, the trial court did not amend the findings of fact and conclusions of law as required.

In addition, the trial court found that Chief Chen's request for documents was reasonable and should be disclosed. Medina attempted to obtain fees as the prevailing party but Medina's original order provided that Chief Chen's request was unreasonable. However, Chief Chen's case was not concluded and, at the time the Court entered the judgment, it was premature to award fees or costs. A party who wins disclosure of information sought, is a "prevailing party" under RCW 42.56.550(4). See *Koenig v. Thurston County*, 155 Wn. App. 398, 419, 229 P.3d 910 (2010) *pet. for review granted* 170 Wn.2d 1020, 245 P.3d 774 (2011) (citing *Tacoma Pub. Library v. Woessner*, 90 Wn. App. 205, 951 P.2d 357 (1998), *amended on recons.*, 972 P.2d 932 (1999) (citing *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 684, 790 P.2d 604 (1990)). This status results even if only some, but not all, of the information sought must be disclosed. *Id.*

Despite the premature nature of the determination, the trial court included an order that that Medina was entitled to judgment, including statutory costs and statutory attorney's fees. (CP 99, ¶2) The trial court did not revise this order on April 26, 2012. (CP 163, ¶2), and the trial court entered a judgment based upon that order on September 10, 2012. (CP 178-179) However, if all of the issues presented by Chief Chen were

considered by the trial court, in the end Chief Chen may be the party to awarded prevailing party fees and/or costs for having to bring litigation to obtain documents that were being provided in installments. Thus, even if some information is deemed to not need to be disclosed, Chief Chen may still prevail.

The trial court's inclusion of a determination that Medina was entitled to statutory costs and attorney's fees, when all issues had not yet been determined, was manifestly unreasonable and constitutes an abuse of discretion. *Barr*, 119 Wn.App. at 46, *citing Lockett*, 98 Wn.App. at 309; *see also Yousoufian*, 168 Wn.2d at 458-59, *citing Mayer v. Sto Indus., Inc.*, 156 Wn.2d at 684. The trial court's order and judgment should be reversed.

E. The final judgment entered on April 26, 2012, should be vacated, because the trial court's failed to address all issues contained in Chief Chen's original motion for relief under the PRA, which constitutes an abuse of discretion.

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. Given the estimate that 40,000 pages of documents were expected to be produced, Medina produced less than 1% of the anticipated number of records. (CP 35, ¶ 3; CP 52, ¶ 4) At this rate, it would take over 41 years to produce all of the records Chief Chen believes are responsive. It would take more than a lifetime based upon Medina's estimate of how many records need to be reviewed. The court failed to require Medina to substantively begin the process of compliance and resolve the entire issue rather than just stating that installments were proper.

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*, 119 Wn.App. at 46, citing *Luckett*, 98 Wn.App. at 309; see also *Yousoufian*, 168 Wn.2d at 458-59, citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d at 684.

F. Chen is the prevailing party and entitled to an award of penalties, attorney fees, and costs.

A party who wins disclosure of information sought, is a “prevailing party” under RCW 42.56.550(4). See *Koenig v. Thurston County*, 155 Wn. App. 398, 419, 229 P.3d 910 (2010) *pet. for review granted* 170 Wn.2d 1020, 245 P.3d 774 (2011) (citing *Tacoma Pub. Library v. Woessner*, 90 Wn. App. 205, 951 P.2d 357 (1998), *amended on recons.*, 972 P.2d 932 (1999) (citing *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 684, 790 P.2d 604 (1990)). This status results even if only some, but not all, of the information sought must be disclosed. *Id.*

Any person who prevails against an agency in seeking the right to inspect or copy any public record or the right to receive a public record request within a reasonable amount of time shall be awarded a penalty within the statutory range and all costs, including reasonable attorney fees, incurred in connection with such legal action. RCW 42.56.550(4). The penalty imposed pursuant to RCW 42.56.550(4) is within the discretion of

the court in an amount not less than five dollars and not to exceed one hundred dollars for each day that the requestor was denied the right to inspect or copy the public record. *Id.* The court must consider a number of mitigating and aggravating factors in setting the daily penalty amount. *Yousoufian*, 168 Wn.2d at 465-67 (establishing a framework for trial courts to set a PRA penalty within the statutory range and identifying sixteen factors guiding the court's discretion). By their nature, the factors established by the (2010) *Yousoufian* Court require that consideration take place after Medina has fully complied with the PRA and, in all probability, that discovery among the parties relating to the factors take place and evidence be presented. *See id.* Therefore, Chief Chen requests that the court enter an order finding that he is the prevailing party, is entitled to an award of mandatory penalties, attorney fees and costs under RCW 42.56.550(4), and granting Chen leave to file a motion to establish a penalty amount upon the City's compliance with the PRA.

V. CONCLUSION

The findings of fact and conclusions of law entered on January 24, 2012, and as amended on April 26, 2012, must be vacated under CR 52(c), because the trial court abused its discretion in entering the initial findings of fact and conclusions of law on January 4, 2012, without proper notice