

No. 71052-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CEDAR GROVE COMPOSTING, INCORPORATED

Respondent/Cross-Appellant,

v.

CITY OF MARYSVILLE,

Appellant/Cross-Respondent.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

The brief of respondent Cedar Grove Composting, Inc. (“Cedar Grove”) is noteworthy for its willingness to substitute a fair recitation of the facts at issue in this case with a one-sided articulation of facts that ignores significant facets of what actually transpired below, particularly as to its creation of odors from its composting activities and the relationship of Strategies 360 (“Strategies”) with the City of Marysville (“City”) and the Tulalip Indian tribe (“Tulalip Nation”).

Similarly, Cedar Grove’s argument on the law offers a distorted interpretation of the Public Records Act, RCW 42.56 (“PRA”), that transforms every document generated by an outside government contractor into a public record merely because that private record related to the government contract. Its arguments on any PRA penalties due it from the City obstinately refuse to fully confront our Supreme Court’s *Yousoufian* factors.

Finally, Cedar Grove contends that the trial court abused its discretion in reducing the bloated attorney fee requests it submitted that tried to pile on hours once the trial court had determined a fee award was justified. The trial court properly exercised its discretion in excluding such unnecessary attorney time.

This Court should reverse the trial court's decision on the City's PRA liability as requested, including Strategies' records, and set aside the trial court's penalty and fee decisions accordingly.

B. RESPONSE TO CEDAR GROVE STATEMENT OF THE CASE¹

Cedar Grove's statement of the case is replete with hyperbole and misstatement. For example, it asserts Cedar Grove "is one of the largest 'green' companies in Washington, turning what would otherwise be tons of landfill waste into nutrient-rich compost." Br. of Resp't at 4. It fails to mention that this process involved tons of stinking rotten garbage that fouled the air not only for the City's residents, but also for the residents of the adjacent Tulalip Indian Reservation. As a result, it was substantially fined for the air pollution it created. CP 1751-52.

Marysville citizens, upset with the noxious odors pervading their daily life, filed 117 odor complaints with the City, and hundreds prepared a petition demanding action to redress Cedar Grove's odors. CP 1560, 1566-74, 1576-1645. Their local government appropriately responded,

¹ Cedar Grove's statement of the case violates RAP 10.3(a)(5) in that it is replete with argument, often without any citations to the record for its factual claims. The captions in Cedar Grove's statement of the case are argumentative. Passages in the statement are virtually nothing but argument; the conclusions at the end of its factual recitations are plainly argumentative, and lack citation to the record. Br. of Resp't at 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 21. That Cedar Grove's statement of the case is nothing but a disguised argument is certainly confirmed by its employment of multiple fonts in the brief text to emphasize its argument. As will be noted in the City's argument section, Cedar Grove's "facts" are far from accurate. This Court should disregard Cedar Grove's statement of the case.

challenging the expansion of Cedar Grove's facility, educating their citizens about what could be done, and supporting the imposition of fines by the Puget Sound Clean Air Agency. CP 1684-85, 1689-90. Cedar Grove calls these legitimate governmental efforts, including hiring a consultant to handle public relations relating to the issue, a "smear campaign." Br. of Resp't at 1. Yet Cedar Grove fails to identify anything illegal about what Marysville did, and it cannot seriously contend that it was not the source of the disgusting stench that adversely impacted the lives of Marysville residents or members of the Tulalip Nation, as adjudicated by the Pollution Control Hearings Board. CP 1365.

Cedar Grove then claims it took nearly two years and extensive litigation to secure records establishing that the City was behind the public relations campaign against it. Br. of Resp't at 1. Yet that assertion cannot withstand the scrutiny of the records. Prior to the litigation, the City produced thousands of documents, including its contracts with Strategies 360, the documents the City and its officials had received from Strategies, and even communications with the City Attorney that were privileged. CP 488, 556, 573, 1657, 1659. The *only* records Cedar Grove did not receive prior to the litigation were documents the City never had, and nineteen documents (some with no substantive content) which included the

underlying emails and information that Cedar Grove had previously received. CP 565-67.

With regard to the requests, the undisputed record establishes that the sweeping PRA requests were made by Kris Cappel, who never disclosed at any time that she was requesting documents for Cedar Grove. CP 1371-73. For present purposes, how Cappel worded her requests is significant. Her first 3 requests, including subparts, were for specific types of documents. Cappel then made seven other document requests for “records of communication.” Illustrative is Request No. 4:

Records of communication between or among the City of Marysville, Strategies 360, Inc., The Tulalip Tribe, Mike Davis, Don Powell, Citizens for a Smell Free Marysville, Dave Forman, Pacific Topsoils and/or Capitol City Press relating or referring to Cedar Grove Composting, odor complaints, composting, permits, or licensing.

CP 1372-73. Each of the following requests has the exact same wording of “Records of communication *between and among the City of Marysville and*” some third party. *Id.*

Based upon what was actually requested, the City then produced thousands of documents on a regular timely basis with ease of access for Cappel. CP 1813-14, 1831-32. The City provided privilege logs of what was being withheld. On June 15, Cappel raised an issue as to whether the City correctly identified certain communications with Strategies as

privileged. CP 2042. This was followed by a letter, referencing Cappel's request, from Attorney Moore, who never disclosed he was working for Cedar Grove. CP 2044-47. While the City Administrator guessed the requests came from Cedar Grove, prior to the present litigation, the City never received any information from Cappel, Moore, or Cedar Grove that the PRA requests were on behalf of Cedar Grove. When this action was filed, there is no certification by counsel that Cappel was acting on Cedar Grove's behalf. The complaint merely asserted, without ever mentioning Cappel (who is not a party), that Cedar Grove filed the requests. CP 2116-25.

As noted in the City's opening brief, this case involves 207 documents out of thousands of documents that were produced. Penalties were imposed by the trial court on the basis of "batches" of documents. The uncontradicted factual record establishes the following with respect to such documents:²

Batch 1. These are the nineteen documents for which penalties were imposed on the basis of \$40 per day back to the original request date. The City produced the documents pursuant to a stipulation which stated

² The trial court's Revised Order Granting Plaintiff's Motion for Summary Judgment Regarding Penalties of October 18, 2013 references Exhibit A. CP 21. Yet there is no Exhibit A attached to that order. There is an Exhibit A to the earlier order at CP 455. The City assumes for these purposes that Exhibit A never changed since the total penalties in the amount of \$143,740.00 are the same.

they were responsive to the PRA request. However, the stipulation does not mean that everything in the document is substantive, as demonstrated below. An examination of the specific documents reveals that these documents were not substantive by any stretch of the imagination:

Document 1. This is an email from a City employee to Strategies. It states: “Kevin Nelson asked me to mail you a CD with the documents that were provided based on the attached PRR. You should receive it shortly.” This transmittal email is of the result of a public records request made by the City to the Department of Ecology. It does not mention Cedar Grove or odors. The documents on the CD were produced in the first installment.

Document 2. What was not produced was the email that simply says “FYI.” The email below was previously produced.

Document 3. Another “FYI.” The document it referenced was previously produced.

Document 4. This “document” has no content. What was being forwarded with it was previously produced.

Document 5. This document states: “Wow, thanks Kristin.” The underlying emails were previously produced.

Document 6. These are two emails relating to a *Seattle Times* story. Similar exchanges were previously produced.

Document 7. The document states: “Kristin, This looks good. Thanks. Jon.” The underlying email was previously provided.

Document 8. This document from the City Attorney accepts a meeting. It discusses Cedar Grove intending to give away soil at a Mariners game. Similar documents were previously produced.

Document 9. This document was not revealed in the original term search. However, the underlying email relates to a story in the *Olympian*, which did not involve Cedar Grove.

Document 10. This document was not revealed in the term search. It is largely duplicative of document 9.

Document 11. This document was not revealed in the term search. However, the underlying email relating to Ecology rules was previously produced.

Documents 12, 13, and 14. These documents were not provided because the City did not have them on its server when the request was made. Apparently, they relate to an Outlook appointment that was cancelled when the message was modified, causing a computer glitch. Numerous other Outlook calendaring appointments were previously produced.

Document 15. The document states: "FYI-This letter was signed and sent out today. Thank you." That email never came up from the term search. However, the underlying email and the referenced letter were previously produced.

Documents 16 and 17. These are meeting appointments that were cancelled and were not revealed in the original search. Neither document contains any substantive discussion or a reference to Cedar Grove.

Documents 18 and 19. These are emails from Mayor Nehring to the public records officer sending documents from his home computer. The documents state: "For public records requests." This shows the Mayor was trying to comply with the PRA. The underlying documents and emails, except for one related to a *Seattle Times* story, had been previously provided. The PRA officer thought these had been previously produced.

CP 565-67, 1288-1338.

Batch 2. The second batch of documents consists of fifteen documents produced August 3, 2013, for which a penalty of \$70 per day was imposed. What is not disputed, and is *conceded* by Cedar Grove, is that Cappel and Moore asked that the claim of privilege be reviewed, the

City hired outside counsel to do so, and produced all the documents *before* litigation was instituted. CP 551-52, 1651, 1657; br. of resp't at 7-8. No lawsuit was required to obtain or copy the 15 documents for which fees and penalties were imposed. The documents contained communications from Strategies. CP 486. Thus, prior to this litigation, Cedar Grove obtained all Strategies documents except those never possessed by the City and the handful in Batch 1 which had no substance.

Batch 3. Batch 3 consists of the Strategies documents which were never in the City's possession, for which a penalty of \$90 a day was imposed by the trial court. Thirteen of those documents relate to emails between Strategies and the Tulalip Nation, an entirely separate Strategies client that hired it to produce a "mailer." CP 1367-68. The City specifically rejected any participation in the preparation of these mailers, and there is no evidence that anyone from the City prepared, reviewed, or paid for any mailers. *Id.*³

The 160 documents which are the balance of Batch 3 are communications between Strategies and third parties or are exclusively internal Strategies communications. It is undisputed that neither these 160

³ In its response, Cedar Grove misleadingly refers to an August mailer by the City concerning contacting the PSCAA. There is no such mailer. It is a cutout from a several page quarterly newsletter the City sent out covering a wide variety of subjects. CP 1364.

documents nor the thirteen documents relating to the mailer in Batch 3 were ever received, reviewed or possessed by the City. CP 1366-69. In regard to the request for documents that was made by Cappel, *none* of the documents in Batch 3 were “*communication between or among the City of Marysville and same third party.*”

With regard to the *Yousoufian* factors applied by the trial court, it is undisputed factually that in finding 15 the trial court faults the City for failing to give Amy Hess, who was conducting the PRA search, the names of specific Strategies’ employees. CP 18, 20. While it is true that Gloria Hirashima never gave the specific names of Strategies employees to Hess, it is undisputed that Hess was told to search for Strategies’ documents and she did. CP 488. Hess used the domain name “@strategies360.com” in her search. CP 488, 573. Thus, any documents from that domain were brought up in the search, and the names of those sending or receiving documents within that domain were revealed, including the names of the specific employees (Dizon and Aldrich) that the Court faulted the City for not including in its search. In reality, their e-mails were included in the City’s search.

With regard to the 13 documents pertaining to the mailer prepared for the Tulalip Nation by Strategies, in finding 16 the trial court found: “These records are the types of records that would have been generated by

Marysville itself if it had been conducting these tasks in-house instead of relying upon Strategies to perform them.” CP 17-18. However, the unchallenged testimony is that the City specifically declined to be involved in such an effort, so those types of documents would not have been prepared in-house and were not prepared by Strategies for the City. Thus, the court’s findings attributing these documents to the City are not supported by any evidence, much less substantial evidence.

In finding 18, the trial court again raises the issue that Hess did not search specifically for the names “Aldrich” and “Dizon.” CP 18. This finding is contrary to the undisputed testimony of Hess that their e-mails were included in the search by including the Strategies 360 domain. The trial court then found: “If corrected, these omissions could have located the majority of those records.” CP 18. But it is not clear what the “majority of those records” refer to. Numerous Strategies documents, privileged and unprivileged, were located, identified, and disclosed by the City prior to commencement of this litigation.. The only Strategies documents that were not located were 17 in Batch 1, which as explained above, would not have resulted in a “majority” of those documents coming to light, whether the specific names were searched or not.⁴

⁴ The underlying documents had been located and produced.

The trial court's finding 18 also provides that Hess "failed to personally conduct a search of the Mayor's computer for responsive records." CP 18. The duty to conduct the search falls on the City, not Hess personally. The Mayor's City computer was searched, by a City official, the Mayor himself. CP 670, 488. No explanation is given as to what right Hess would have to search the personal home computer of the Mayor.⁵ Nevertheless, the Mayor searched his home computer and turned in responsive documents, including those from Strategies. CP 670-71. The documents being forwarded by the Mayor were produced, including the Draft Strategic Plan. CP 567.

Finally, the trial court emphasizes that a Strategies' employee used the term "plausible deniability" in an email sent to the Tulalip Nation about the mailers the Nation, not the City, authorized and paid for. CP 21. The email was never sent to the City. The Strategies employee making that statement was not an official or employee of the City, but was working on a project exclusively for a different client, the Tulalips. Yet the findings impute the statements of an independent contractor to another client of the contractor on a project not authorized or funded by the City,

⁵ The United States Supreme Court in *Riley v. California*, __ U.S. __, __ S. Ct. __, __ L.Ed.2d __, 2014 WL 2864483 (2014) has held that the Fourth Amendment applies to private cell phone data. It is likely no different for private computer data of a public official.

purporting to make them the basic reason for the imposition of very high penalties against the City.

C. ARGUMENT

(1) Cedar Grove Lacks Standing

Cedar Grove asks this Court to adopt a rule of law that the requestor of public records never has to disclose on whose behalf a PRA request is made and that the requestor of records need not participate in any action to obtain those records. To adopt such a rule goes beyond the language of the statute, the Model Rules promulgated by the Attorney General and the regulations related to them, and case law. As discussed in the City's opening brief, RCW 42.56.550(1) establishes a condition precedent that a litigant seeking penalties and fees must be "any person having been denied an opportunity to inspect or copy a public record." In order to obtain the opportunity to review a record, the person must make a public records request. RCW 42.56.070(1). Under that standard, the person requesting the records is essential to bringing an action. In developing the Model Rules, the Attorney General indicated that the name of the requestor is required. WAC 44-14-030(4) adopts a construction similar to requirements of requestor disclosure in the federal Freedom of Information Act ("FOIA").

No case has ever held that an undisclosed principal, without any participation by the ostensible agent in the case, is entitled to bring a PRA action. Cedar Grove relies upon *Kleven v. City of Des Moines*, 111 Wn. App. 284, 44 P.3d 887 (2002), a case pre-dating our Supreme Court's precedent on requestors as necessary parties to PRA litigation, for the proposition that a lawyer making a request need not disclose his or her client. However, *Kleven* allowed the action to proceed because when the suit was filed, the lawyer making the request was also counsel when the complaint was filed; that lawyer disclosed the client on whose behalf the request was made in the complaint, and, in doing so, was subject to CR 11. *Id.* at 290-91. Here, the complaint does not even mention Cappel and inaccurately states Cedar Grove made the requests. CP 2118. Cedar Grove provides no authority that an undisclosed principal alone has standing when that actual records requestor is not a party or disclosed in the complaint. This is so because there is none.⁶

There is also no public policy reason to support the rule Cedar Grove seeks. In a footnote, br. of resp't at 27 n.14, Cedar Grove contends that disclosing who actually made a request would allow an agency to vary the contents of the public records produced and the vigorousness with

⁶ Cedar Grove has no real answer to the fact that a PRA requestor is a necessary party to litigation as our Supreme Court ruled in *Burt v. Wash. State Dep't of Corrections*, 168 Wn.2d 828, 231 P.3d 191 (2010).

which the search for such records is conducted, depending on the identity of the requester. There is *no evidence* that actually happens or that it happened here. It is ironic that while shedding crocodile tears about transparency, it was Cedar Grove that hid its identity as a record requester. No useful purpose is served by allowing the unfettered use of undisclosed principals in PRA matters. Agencies are entitled to fair notice about who is requesting records, and the penalty provisions are there to address any deficiency in timeliness or adequacy of production by such agencies. Under the rule suggested by Cedar Grove, an agency would be unaware of the party who must be joined as an indispensable party if an injunction is sought under RCW 42.56.540, which is contrary to the ruling in *Burt*.

Not having the requestor as a party to this action is particularly significant here in regard to the 15 documents in Batch 2. When first Cappel, and then Moore on her behalf, requested that the City review its privilege claims, the City did so pursuant to RCW 42.56.520 and produced the documents prior to litigation. Was the production of those documents satisfactory to Cappel? If so, it would remove any personal stake of hers, and those of her principal.⁷ Without the requester being an indispensable party to this lawsuit, the actions taken by public entities performed by

⁷ It is difficult to divine what “personal stake” Cedar Grove has allowing it to litigate its right to inspect and copy documents produced *prior* to litigation in any event.

request from the records requestor cannot be properly addressed. This matter should be dismissed for lack of standing.

(2) Strategies Is Not a Public Agency and All Its Documents Are Not Subject to the PRA

Beginning with its response to the public agency analysis offered by the City, Cedar Grove engages again in its studied exercise of conflation. It *concedes* Strategies is not a public agency as defined in Washington case law. Yet, it simultaneously argues for a result that is exactly the same as if Strategies were a public agency. It asserts that *every document* from Strategies related to the stink Cedar Grove produced, even those produced for the Tulalip Nation and not possessed by the City, had to be produced. In essence, Cedar Grove's analysis of the PRA turns Strategies into a de facto public agency, even if the legal requirements for such a result are not met.

It reaches this result by conflating what it calls are the City's "admissions." For purposes of attorney-client privilege, the City did assert that Strategies was essentially in an employer-employee like relationship. However, Cedar Grove leaves out that this "admission" *only involved communications with counsel*, a proposition the trial court upheld for numerous documents which it found to be privileged. Contrary to Cedar Grove's assertions, the City is neither trying to have it both ways nor

engaged in an “about face” precluded by judicial estoppel. All the City is pointing out is that the analysis relating to attorney-client privilege is different than a PRA analysis, and is not controlling; it has been consistent as to how documents were treated. Communications from regular employees that were not privileged communications with counsel were produced. Similarly, communications with Strategies that that were not privileged communications with counsel were also produced. But simply because communications between the outside contractor and legal counsel can be appropriately cloaked with privilege does not mean that every document produced by an independent government contractor is therefore subject to the PRA. If that is the result, then all independent government contractors are transformed into de facto public agencies. For the reasons discussed in the opening brief, Strategies is not a de facto public agency.

Moreover, this issue is properly before this Court. The City raised the issue in its response to Cedar Grove’s penalty motion. CP 687. As Cedar Grove concedes, the public agency issue was again raised below on reconsideration. It was considered by the trial court, as its order reflects. CP 7-9.⁸

⁸ The trial court’s exclusion of declarations on reconsideration does not mean the issue was not before the court, as its order reflects it still considered the briefs and argument. Moreover, striking the declarations was error.

Cedar Grove's argument that the 173 documents from Strategies were subject to the PRA, br. of resp't at 30-44, is long on rhetoric and short on analysis. According to Cedar Grove, since the City claimed the Strategies was the functional equivalent of an employee for privilege purposes, that ends the matter.

Cedar Grove claims Strategies was not an independent contractor, but it does not dispute that Strategies had many other clients, including the Tulalip Nation. It offered no evidence that the City authorized, directed, reviewed, or paid for the mailer prepared by Strategies for its other client. The only evidence is to the contrary, and was ignored by the Court.⁹ CP 665 (Aldrich); CP 1441 (Dizon); CP 1366-8 (Hirashima). It points to no evidence that anyone from the City had direction and control as to how Strategies operated. More significantly, it points to nothing which would allow the City to obtain internal documents from a contractor or documents which a contractor produced for another client of the contractor. Hobbesian choices are exactly what the City faced. If it chose to assert, as it properly did, functional equivalence for attorney-client privilege, such an "admission" is now being used against it in the PRA

⁹ The only "evidence" Cedar Grove introduced was the declaration of a paralegal (Tilstra) attaching documents, CP 740-1287, and the Hess deposition excerpts. CP 456-83, 752-92. Hess never testified as to the mailers.

context for failing to produce documents it never possessed and had no ability to obtain from Strategies.

(3) The Documents Are Not Subject to the PRA Because the City Never Used Them

Cedar Grove urges upon this Court to adopt a rule of law that goes far beyond case law, a sweeping definition of “use” under RCW 42.56.010(3) which would encompass every document generated by a government contractor. Cedar Grove relies upon *Concerned Ratepayers Ass’n v. Public Util. Dist. No. 1*, 138 Wn.2d 950, 960, 983 P.2d 635 (1999) to claim that documents are “used” by a public agency if they are “either (1) employed for; (2) applied to; or (3) made instrumental to a governmental end or purpose.” Obviously, when a government agency contracts with a third party, the purpose of the contract is to further a governmental end or purpose. Therefore, under the construction urged by Cedar Grove, *every document* generated by a government contractor working on a government contract is subject to the PRA. The cases Cedar Grove cites for a liberal construction of the PRA relate to documents the government agency actually had or used.

Concerned Ratepayers is indeed instructive; however, it does not support the sweeping proposition Cedar Grove advances here. There, the technical documents were once possessed by the public agency. More

significantly, the technical documents were *used in the decision making process of the agency*. The fact that the agency no longer possessed the document was not significant, given that decision making connection. The document could be obtained and was used by the agency in its decision making.

In interpreting their disclosure laws, other courts have rejected Cedar Grove's expansive interpretation of the PRA. In *Mountain-Plains Investment Corp. v. Parker Jordan Metropolitan Dist.*, 312 P.3d 260 (Colo. App. 2013), the Colorado Court of Appeals, for example, held that emails concerning a project sent to or received by a district were public records, but emails in the possession of the district's private engineering consultant were not because the emails were not made, maintained, or kept by the district or its records maintenance organization. *Id.* at 266. The Colorado court's analysis is persuasive here.

By contrast, the 173 documents involved here were never received by the City. More significantly, 13 of those documents related to a mailer that the City made an express decision that it was not going to be involved in developing. None of these documents had any relation to City decision making. Strategies produced the document for the Tulalip Nation. In short, Cedar Grove urges the Court to accept the notion that a public record is one created for another sovereign entity that the City expressly

said it did not want to be involved in developing or using. Instead of furthering a governmental purpose, the documents were in *direct derogation* of the City conscious governmental decision. Under these facts, that is not “use” under the PRA. Again, Cedar Grove conflates the basis for asserting an employment-type relationship for purposes of privilege to turn everything a contractor produced, even against the wishes of the City, into a public document. To adopt the construction urged by Cedar Grove would destroy any distinction between a government contractor and a public agency.

(4) The Trial Court’s PRA Penalties Are Excessive

The trial court abused its discretion in awarding the PRA penalties by improperly applying the required *Yousoufian* factors and making many of its findings with no evidentiary support.

It is noteworthy that the *Yousoufian* factors contain *both* mitigating and aggravating factors. The trial court decision only specifically discusses the aggravating factors, with little concern for any mitigating factors. CP 19-21. That alone suggests an abuse of discretion.

Further, there are abundant *Yousoufian* mitigating factors present here: “(1) lack of clarity in the PRA request.” The request was sweeping in nature. The City sought clarification of one item, got no response from Cappel, and followed up. “(2) the agency’s prompt response or legitimate

follow-up inquiry for clarification.” Here, over 10,000 documents were responsive to the request which had to be reviewed and produced. A schedule of monthly installments was set up. Those documents which did not require deep review or redacting were immediately provided. The schedule was adhered to by the City. “(3) the agency’s good faith, honest, timely, and strict compliance with all PRA procedural compliance.” Here only 270 documents out of 10,000 ended up being subject to litigation. Of those, 15 were provided before litigation. The personal computers of the Mayor and City Administrator were searched and documents turned over to Cedar Grove. The City Attorney searched his computer and those at his firm. As per the actual request made by Cappel, Strategies’ documents “between and among” the City and Strategies were produced. CP 1369. “(4) proper training and supervision of the agency’s personnel.” The trial court found proper training. “(5) the reasonableness of any explanation for noncompliance by the agency.” The trial court essentially ignored that after Cappel and Moore requested a review, the City produced the documents for which privilege was initially erroneously asserted and provided them before the case was filed. More significantly, there is no evidence the trial court really considered any of the explanations about the 19 documents in the first batch of documents. The underlying documents had already been produced, one had no content so it would not have been

found, and others were not in the City's computer when the request was received. None of this was mentioned in the trial court's analysis. "(6) the helpfulness of the agency to the requestor." Here, the City set up an access protocol and direct access for Cappel. It kept the documents available on-line to assist here. The City followed up on a clarification request. Cappel thanked the City for its helpfulness. None of this is reflected in the trial court decision. "(7) the existence of agency systems to track and retrieve public records." Here, the City employed a special search engine, used the proper domain names, tracked document requests, and prepared privilege logs. None of this is reflected in the trial court's decision.

Instead, the trial court focused exclusively on aggravating factors.¹⁰ "(22) "Overall delay." The trial court found delay for the 19 documents and assessed delay for documents from Strategies that the City did not have. The Court ignored the prompt regular installments provided and the establishment of a secure website to facilitate easy access to the City's records, which prompted compliments from Cappel. CP 558-62. The trial court also found "there was not necessarily any urgency as to the

¹⁰ The trial court's findings on the factors are 22-30. CP 19-21. The discussion which follows references the trial court's finding number.

date the records were required.” Yet it imposed high end penalties going back to the original request date. (23) “Lack of strict compliance with the PRA.” The trial court found this only for the 15 documents originally withheld for privilege. It failed to note the documents were provided before litigation. (24) “Lack of proper training.” This was not found. (25) “Unreasonableness of any explanation by the agency.” The trial court found little or no explanation for 17 of the 19 documents. It ignored that each document was discussed by Hess, as recounted above. It then faulted Hess for failing to search by specific name of Strategies employee, ignoring that the Strategies domain was used and produced the same names. It faulted her for not personally searching the Mayor’s computer, yet fails to acknowledge the Mayor did so and sent the documents to Hess. It also failed to acknowledge the City has no right to search the Mayor’s personal computer in any event. (26) “Negligent/reckless/bad faith intentional non-compliance.” The trial court focused almost exclusively on the “plausible deniability” statement written by a Strategies employee relating to the mailers that the City did not authorize or pay for. Yet the trial court found, with no evidentiary basis, that the City did pay for such mailers. (27) “Agency dishonesty.” The trial court did not find dishonesty as much as “strategic planning” to avoid disclosure of the Strategies documents. In making that finding, the trial court ignored that

the City produced hundreds of Strategies documents, including those covered by privilege. The only delay was in regard to documents the City never had. (28) “Public importance.” The trial court again was mesmerized by a statement from someone not from the City. While the odor issue may have been important, there can be no finding that any of the 19 documents withheld had any public importance. It is impossible for documents which merely state “FYI” as to newspaper articles or have no content to be publicly important. The significance of any of the 173 Strategies documents was never discussed. (29) “Economic loss to the requestor.” The trial court provided no basis as to the economic loss suffered by Cappel, the actual requestor, or Cedar Grove. (30) “Penalty necessary to deter future misconduct.” The trial court found this factor to impose stiff penalties, without specifying what misconduct needed to be deterred.

In sum, the trial court abused its discretion in failing to consider the mitigating as well as the properly articulated aggravating factors in its analysis.

The specifics of the various batches of documents also should have been considered. As a threshold matter, penalties consist of the number of days a violation is found times the daily penalty rate found by the trial court. The only time frame imposed by the PRA for a response to a

request for records is five days; in its initial response, an agency can provide a reasonable estimate of when the requested documents will be provided. RCW 42.56.520. That is what happened here. A schedule was set up for production and adhered to by the City. When a request is as sweeping (10,000 documents) as here, it is *impossible* to produce the requested documents in five days. Yet, penalties for all the batches of documents begin from the date of the original request when the documents could not be produced.

In regard to the 15 documents (Batch 2) initially not produced under a claim of privilege, it was an abuse of discretion not to take into account that the City disclosed the documents in a privilege log, Cappel/Moore requested review of the documents being claimed as privileged, and the City did the review and produced all the documents prior to litigation. In this type of situation, there should be no violation of the PRA. Even if one is found, it is an abuse of discretion to impose high end penalties as if the public agency grossly defied its obligations under the PRA.

Cedar Grove contends that *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005) and *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011) compel a different result. However, both cases have unique facts

about the requestor obtaining the requested documents prior to the filing of the PRA case in which fees and penalties were awarded. In *Spokane Research*, the documents were produced because of other litigation. The Court there was concerned with avoiding the situation of a record being denied, a requestor then bringing suit, and then the public agency “voluntarily” providing the record to avoid fees and penalties. That never happened here. In *Neighborhood Alliance*, the nonprofit requestor obtained the document anonymously and Spokane County failed to respond to the PRA request and “disclose” the document. A legal action was required to ascertain that the document received anonymously actually existed, was a public record, and could be officially obtained. Here the documents were both “disclosed” in the privilege log and produced *prior* to litigation. That hardly supports an extreme penalty of \$70 per day.

Further, the number of days the penalty was imposed also does not even correspond to the PRA violation found by the trial court. The trial court found:

The City of Marysville violated the Public Records Act by improperly withholding the following records in its April 5, 2012 Fifth Installment until the records were produced to Cedar Grove in its amended installment response on August 2, 2012: [the fifteen documents of batch 2]

CP 1461. That period of time is 119 days. Yet Marysville was penalized for 158 days. CP 455.¹¹

A penalty of \$90 per day for the Strategies' records in Batch 3 is so draconian it demonstrates an abuse of discretion in light of the facts before the trial court. Again, these are internal documents of Strategies or communications between it and third parties the City never received. Cappel *never requested* those documents. Every single one of her requests for "records of communications" used the language "between and among the City of Marysville" and a third party. A fair reading of that request suggests *the City* had to receive the communication. Construing the document request in that matter is certainly reasonable and cannot constitute bad faith. If Cappel wanted internal Strategies documents or its communications with other clients, she could have asked for them. She was certainly aware of Strategies when the request was made, since the request directly referenced Strategies. If she had made such a request, at least then the City would have received notice of what was being sought, and could have given notice to Strategies so that it or its other clients would have had the opportunity to seek injunctive relief, a proceeding for which Cappel would have been a necessary and indispensable party.

¹¹ It appears the trial court concluded 277 days elapsed from the date of the original request until August 3, 2013, from which it deducted 119 days.

Instead, Cedar Grove urged, and the trial court adopted, an approach to severely punish the City's taxpayers because the City only produced the documents that were actually requested, and did not produce the documents that were not requested. Apparently, the City was supposed to know that by asserting privilege for documents involving communications with counsel, which ironically it voluntarily produced before this litigation, that meant the production request somehow morphed into a duty to produce documents it never received and had no right to obtain.

Further, the number of days for the \$90 penalty imposed cannot be reconciled with the trial court's findings. The trial court found that the Strategies' documents consisted of 173 records. CP 15 (Finding 9), and CP 17 (Finding 16). The trial court's penalty calculation in Exhibit A references the Strategies' records in Batch 3. It imposed a penalty for 124 records for 560 days, and 49 records for 360 days. CP 455. The basis for this is not entirely unclear from the written record.¹² However, it is clear that most of the penalty goes back to the original request date. The requests were for only documents "between and among" the City and third parties. As discussed above, the City only produced the documents it had because that was what was requested.

¹² It appears the penalties were calculated from the initial request (11/1/14) for the 124 records and from the subsequent request (6/8/12) for the 49 records.

Exactly what type of conduct has to be deterred justifying \$90 a day is entirely missing from the trial court's analysis. Cedar Grove complains that a Strategies employee suggested that a phone conversation be held which would avoid the PRA. Telephone calls are appropriate to conduct government business. Nothing in the PRA requires an agency to *create* documents. Yet that is what the trial court decision implies. Unfortunately, the trial court ascribed to the City words no one associated with it uttered. In doing so, it abused its discretion and imposed unduly harsh and unsupportable penalties.

(5) The Trial Court Did Not Abuse Its Discretion in Reducing the Excessive Attorney Fee Request of Cedar Grove's Attorneys

Cedar Grove cross-appealed the trial court's decision to reduce its attorneys' bloated fee request. In its brief, Cedar Grove *concedes* that the standard of review for reviewing a trial court's decision on the reasonableness of a fee request is a manifest abuse of discretion. Br. of Resp't at 57. It further *concedes* that the appropriate analysis for the reasonableness of any attorney fee request here is the lodestar method. *Id.* at 56.

However, Cedar Grove neglects to cite this Court's most recent, comprehensive discussion of the application of the lodestar methodology. *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013), *review*

denied, 179 Wn.2d 1026 (2014). There, this Court reaffirmed various long-standing principles governing fee awards. The burden for demonstrating that its fee request was reasonable rested on Cedar Grove. The trial court was obliged to actively assess the reasonableness of Cedar Grove's fee request and not take its fee-related declarations at face value. A fee award must be supported by findings of fact and conclusions of law. *Id.* at 656-58. In calculating the fee award, this Court emphasized that the lodestar is "limited to hours reasonably expended" and that the attorneys' actual time spent on a matter "is relevant, but not dispositive." *Id.* at 662. Duplicated effort and time spent on unsuccessful matters must be excluded. *Id.* For example, the *Berryman* court severely criticized overstaffing, duplicative efforts, and unproductive and excessive time. *Id.* at 662-64.

The remarkable fact here is that Cedar Grove's argument on cross-appeal is obtuse to these considerations. The trial court made an *extensive* ruling on fees, CP 1-6, that effectively contained findings that were supported by substantial evidence.¹³

¹³ While Cedar Grove has complained about the trial court's findings in its brief, *nowhere* has it stated that they were not supported by substantial evidence.

Beginning its litany of complaints on the trial court's fee decision, Cedar Grove attempts to fault the City for its attorneys bloated hours. Br. of Resp't at 58. It cites, albeit in a footnote, *id.* at 58 n.23, the many hours it spent on a motion to compel. Bloated attorney hours must be reduced by a court, as our Supreme Court held in *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993), where the Court reduced the recoverable hours relating to a motion to dismiss for want of jurisdiction from 481.89 to 70. The Court there noted that the key to any lodestar fee is ascertaining the number of hours a reasonably competent attorney would spend to achieve the result for the client. *Id.* at 151. Obviously, this is *not* necessarily the same as the number of hours billed by the attorneys.

If Cedar Grove is complaining about a percentage reduction in fees, appellate courts have routinely approved percentage reductions. For example, in *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 272 P.3d 827 (2012), our Supreme Court specifically affirmed a trial court's percentage reduction in fees, rather than the excising of specific hourly record entries, "where the specifics of the case make segregating actual hours difficult." *Id.* at 82. Percentage reductions after a lodestar calculation are routinely approved in the Ninth Circuit so long as the trial court explains its rationale for such a reduction. *Gates v. Deukmejian*, 987 F.2d 1392, 1399

(9th Cir. 1992); *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007) (affirming 20% reduction where fee applicant block billed thereby increasing hours by 10-30%).

Moreover, Cedar Grove also complains about the trial court's reduction in its fee request for overbilling when compared to the fees billed by the City's counsel. Br. of Resp't at 59. The fees billed by opposing counsel are appropriately considered in Washington. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 66, 738 P.2d 665 (1987) (comparing rates charged by opposing counsel); *Fiore v. PPG Industries, Inc.*, 169 Wn. App. 325, 354, 279 P.3d 972, *review denied*, 175 Wn.2d 1027 (2012) (a comparison of hours and rates charged by opposing counsel is probative of the reasonableness of a request for attorney fees by prevailing counsel).

Finally, Cedar Grove also complains about the fact that the trial court legitimately expressed concerns that its attorney "loaded up" their hours once it had ruled that Cedar Grove was entitled to a fee award. Br. of Resp't at 59-60. The trial court's concern was entirely legitimate. Cedar Grove's attorneys billed the bulk of their hours after the trial court determined fees must be awarded in April 2013. CP 36, 375-85.¹⁴

¹⁴ Without citation to the record, Cedar Grove asserts that the fees at issue were only 5% of its request. Br. of Resp't at 60 n.25. Cedar Grove is wrong. It knew it would recover fees after the trial court's first summary judgment motion in April, 2013, as the trial court explained in its fee ruling. CP 2. The court ruled orally on April 19, 2013 that the City violated the PRA (even though the order on its ruling was entered in July - CP

Cedar Grove's reliance on *Sargent v. Seattle Police Dep't*, 167 Wn. App. 1, 260 P.3d 1006 (2011), *review denied*, 179 Wn.2d 376, 314 P.3d 1093 (2013) is misplaced. Although it is not exactly crystal clear from the Court of Appeals opinion, it appears that the trial court there refused to award any fees after the PRA show cause hearing, although additional fees were incurred by the requestor that bore on his favorable efforts to obtain public records. That point is unremarkable and *not at issue here*. The trial court awarded fees to Cedar Grove for the entire case. It simply did not believe that the conduct of Cedar Grove's counsel in loading up on time after the trial court determined that fees should be allowed was reasonable. The trial court was doing its job under the lodestar method – it excised wasteful, duplicative, and unproductive time from an award of reasonable attorney fees.

Ultimately, the trial court appropriately exercised its discretion in making the fee award here. It applied the lodestar methodology faithfully as envisioned in *Berryman* and entered detailed findings and conclusions documenting its decision. This Court should affirm the trial court's fee decision as it did not manifestly abuse its discretion, *Berryman*, 177 Wn. App. at 656-57. The trial court was in the best position to determine

1460-62). After April, Cedar Grove's lawyers loaded up their activities to maximize a fee award as the City amply documented below. CP 155-62.

which hours are appropriately included in the lodestar calculation, *id.* at 659; *Miller v. Kenny*, ___ Wn. App. ___, 325 P.3d 278, 304 (2014). The trial court assessed the hours spent by Cedar Grove's counsel and properly found them excessive.

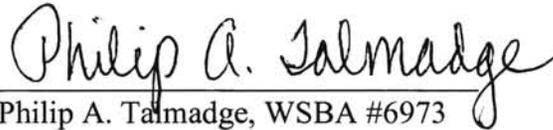
D. CONCLUSION

Nothing in Cedar Grove's brief should dissuade this Court from reversing the trial court's judgment. Cedar Grove lacked standing to file this action. Cedar Grove's expansive interpretation of the PRA would make all the records of any government contractor public records, distorting the scope of the PRA. The trial court's PRA penalty decision is inconsistent with the Supreme Court's direction in *Yousoufian*.

This Court should reverse the trial court's order on summary judgment and fee award and remand the case to the trial court for a revision of the summary judgment order and penalty and fees decisions as set forth herein. Costs on appeal should be awarded to the City.

DATED this 2d day of July, 2014.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Motion for Over-Length Reply Brief and the Reply Brief of Appellant in Court of Appeals Cause No. 71052-4-I to the following parties:

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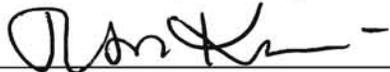
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 3rd, 2014, at Seattle, Washington.



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