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Court of Appeals
Division I
State of Washington

No. 74825-4-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

REBECCA A. RUFIN,

Plaintiff/Appellant,

v.

CITY OF SEATTLE,

Defendant/Respondent,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Bill Bowman)

Case No. 14-2-32054-0 SEA

REPLY BRIEF OF APPELLANT / CROSS RESPONDENT

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I. INTRODUCTION

The City claims Ms. Rufin demands perfection in its search. That is not what she requests. Ms. Rufin asks for the City to carry its burden and present substantial evidence to show that it committed no violation of the PRA. Such burden requires the City to prove that its search, responding to the records request filed with Public Records Officer Gary Maehara, was reasonable under the circumstances. The City presented no evidence to explain why Mr. Maehara, the Public Records Officer, after receiving Ms. Rufin's PRA request for emails, failed to instruct his staff that he possessed responsive records.

On appeal, the City surmises that Mr. Maehara may not have recalled receiving the smoking gun email about Ms. Rufin and the CMEM hiring process four months earlier, or perhaps had not opened the email. The record contains no evidence to support these theories. At trial on the PRA claim, the City presented no testimony from Public Records Officer Maehara, and the trial court made no findings regarding the reasonableness of his acts and omissions.

There is also a lack of substantial evidence to show that the timeliness of the City's responses to the March 4, 2014 and March 17, 2014 requests was reasonable. As to both requests, the City failed to obey the PRA's strict requirements for responding, leading to delayed

responses, rather than the “prompt response” required by statute. The trial court erred in finding that “Mr. Walter promptly responded” to the March 17 request and in finding the City acted with reasonable “diligence” in responding to the March 4 request.

Under RCW 42.56.550(4), the court should have awarded Ms. Ruffin attorneys’ fees and per diem penalties for the City’s failure to prove that it promptly responded to the March 2014 requests and conducted a reasonable search in response to her earlier request for emails referencing her name or the CMEM hiring process.

The trial court’s ruling that CR 68 does not apply to the PRA’s unique provision for attorneys’ fee was correct and should be affirmed.

II. REPLY ARGUMENT

A. The PRA Places the Burden of Proof on the City

1. The Public Records Act’s Purpose and Construction

The Public Records Act, originally passed by popular initiative, is a strongly worded mandate that must be “liberally construed.” RCW 42.56.030. The legislature has declared:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

Id.

“In construing the PRA, we look at the Act in its entirety in order to enforce the law’s overall purpose.”¹ The law imposes a duty on agencies to provide “the fullest assistance to inquirers and the most timely possible action on requests for information.” *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) (“*PAWS II*”); RCW 42.56.100. It also directs the Court to “take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience . . . to public officials.” RCW 42.56.550(3). While it is true “[a]gencies shall not distinguish among persons requesting records,” RCW 42.56.080, this language must be considered in combination with an agency’s obligation to take the “most timely possible action on requests” and to respond “promptly.” Thus, the Model Rules for Public Records provide:

[T]reating requestors similarly does not mean that agencies must process requests strictly in the order received because this might not be providing the ‘most timely possible action’ for all requests. A relatively simple request need not wait for a long period of time while a much larger request is being fulfilled. Agencies are encouraged to be flexible and process as many requests as possible even if they are out of order

WAC 44-14-04003(1).

¹ *Rental Hous. Ass’n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009).

2. Under the PRA and FOIA the Burden of Proof is on the Government to Show Compliance with the Law.

The Model Rules for the Public Records Act address the burden of proof in judicial review actions and state simply, “The burden is on an agency to demonstrate that it complied with the act.” WAC 44-14-08004(4), *citing* RCW 42.56.550 (1), (2). Nevertheless, the City disputes that it carries the burden of proof at trial.

The City states that there are two categories of PRA violations: “(1) when an agency wrongfully denies an opportunity to inspect or copy a public record, or (2) when an agency has not made a reasonable estimate of time required to respond to the request.” Resp.’s Br., at 18, *quoting Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 651, 334 P.3d 94 (2014) (citing RCW 42.56.550(1), (2)).²

The City acknowledges that claims in this case that it failed to provide records “in a timely fashion... is tantamount to wrongfully denying access to a document under RCW 42.56.550(1).” Resp.’s Br., at 18-19, *citing Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 723, 261 P.3d 119 (2011) (agreeing with court of appeals “that County wrongfully withheld documents in

² The City writes that all of Rufin’s claims fall into the first category, her claims based on the January 3, 2013 and March 17, 2014 requests involved the fact that the City failed to provide “a reasonable estimate of time to respond,” resulting in delayed responses to these request. CP 6-8. Also, Rufin alleged that the City failed to meets its estimate of time with respect to the March 4, 2014 request. CP 5.

violation of PRA as a result of [its] inadequate search”). *See also, e.g., Kitsap Cty. Prosecuting Attorney’s Guild v. Kitsap Cty.*, 156 Wn. App. 110, 118, 231 P.3d 219 (2010) (holding that unless records are exempt, “their disclosure must be timely” and “[a]ttorney fees, costs, and penalties for late disclosure are mandatory”); *and see* Laws of 1992, ch. 139, §8 (adding to PRA provision mandating fees when a party prevails in action seeking “the right to receive a response . . . within a reasonable amount of time”).³

Though the City recognizes that claims for lack of a timely response or inadequate search are “tantamount” to a wrongful denial violation under RCW 42.56.550(1), it maintains that such provision’s placement of the burden of proof on the agency does not apply to any claims in this case, arguing *expressio unius est exclusio alterius*. The City’s proposed construction, inferring from the express statements in RCW 42.56.550(1)-(2) that the legislature intended to exclude the agency from bearing the burden of proof for claims of unreasonable delay, failure to make a prompt response, or inadequate search, runs counter to the overall purpose of the PRA and gives too narrow of a construction to the Act, rather than the liberal construction the law

³ *See also* Wash. State Bar Ass’n, Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Laws § 18.1 (2d ed. 2014) (stating that a records requestor who has “access unreasonably delayed, is to be awarded its costs, including reasonable attorney fees, and within the discretion of the court a penalty”).

mandates. *See* RCW 42.56.030. “The mandate of liberal construction requires the court to view with caution any interpretation of the statute that would frustrate its purpose.” *ACLU of Wash. v. Blaine Sch. Dist.* 503, 86 Wn. App. 688, 693, 937 P.2d 1176 (1997).

Judicial interpretations of the Freedom of Information Act (“FOIA”) are helpful for construing the PRA’s standards related to the adequacy of an agency search for records.⁴ Under FOIA, the agency bears the “*burden of persuasion*” in establishing that “any limitations on the search it undertakes in a particular case comport with its obligation to conduct a reasonably thorough investigation.” *McGehee v. C.I.A.*, 697 F.2d 1095, 1101 (D.C. Cir. 1983), *vacated in part on other grounds*, 711 F.2d 1076 (1983). The Court of Appeals for the District of Columbia explained the rationale for allocating the burden of persuasion to the government, as follows:

The Act explicitly assigns to the agency the burden of persuasion with regard to the closely related issue of the legitimacy of the agency’s invocation of a statutory exemption to justify withholding of material. Two considerations indicate that the same rule should govern the issue before us. One is that the information bearing upon the reasonableness of any temporal or other limitation on a search effort is within the agency’s exclusive control. The other is that the Act as a whole is clearly written so as to favor the disclosure of any documents not covered by one of the enumerated exemptions. Insofar as burdens of persuasion are generally assigned to parties advancing

⁴ *Neighborhood Alliance*, 172 Wn.2d at 719.

disfavored contentions, the agency should bear the responsibility of convincing the trier of fact that its less than comprehensive search is reasonable under the circumstances.

Id.

The agency's burden of showing that a search was reasonable under the circumstances is not just a summary judgment burden. *See Coss v. United States Dep't of Justice*, 133 F. Supp. 3d 1, 3-4 (D.D.C. 2015) ("In FOIA cases, the agency bears the ultimate burden of proof to show that it conducted an adequate search."); *and CareToLive v. Food & Drug Admin.*, 631 F.3d 336, 340 (6th Cir. 2011) ("At all times the burden is on the agency to establish the adequacy of the search."), *quoting Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534 (6th Cir. 2001).

The Supreme Court's decision in *Neighborhood Alliance*, which is in part based on *McGehee*, adopts the same federal standard. *See, e.g.*, 172 Wn.2d at 725 ("penalties will not accrue at all if the agency carries its burden of showing an adequate search"). The portion of *Neighborhood Alliance* that the City quotes, in which the Court, discussing agency motions for summary judgment, states, "In such situations, the agency bears the burden, beyond material doubt, of showing its search was adequate" does not suggest the City only bears the burden of proof at summary judgment. Rather, the quoted portion

indicates that, “in such situations,” the agency is required to prove its case “*beyond material doubt.*” *See id.*, at 720-21.

The City cites *Adams v. Washington State Dep’t of Corrections*, 189 Wn. App. 925, 952, 361 P.3d 749 (2015) to argue it does not bear the ultimate burden of proof at trial. The issue decided in *Adams* is not the issue in this case. In *Adams*, an inmate claimed “the trial court erred in imposing the burden on him of proving bad faith under the newly enacted RCW 42.56.565(1).” 189 Wn. App at 952. The Court of Appeals held it was not error to require the inmate to prove bad faith for purposes of RCW 42.56.565(1). However, the question of which party carries the burden of proof at trial in proving a PRA violation was not decided in *Adams*, where the Department of Corrections did “not challenge the trial court’s ruling that a PRA violation occurred.” *Id.*, at 939.

In spite of the language of the PRA and FOIA’s jurisprudence, the City maintains that the “general rule” places the burden of persuasion at trial on the plaintiff, citing *Baldwin v. Sisters of Providence in Wash.*, 112 Wn.2d 127, 135, 769 P.2d 298 (1989), an implied contract case based on an employee “handbook.” However, in *Baldwin* there was no statutory language to suggest the defendant bore the burden of proof. *See id.* Even still, *Baldwin* acknowledges that in

tort cases alleging wrongful discharge in violation of public policy, “[i]t is not clear whether the burden of . . . persuasion shifts to the employer.”⁵ As for statutory claims, the PRA is not alone in diverging from the “general burden” described in *Baldwin*. The legislature has also placed the burden of proof on the State in certain civil rights cases. *See* RCW 42.40.050 (State Employee Whistleblower law, creating a statutory presumption of retaliation and placing the burden on the agency to prove by a preponderance of evidence that “improper motive was not a substantial factor” once an employee shows she is a whistleblower subjected to an adverse action).

B. The City did not meet its burden of showing a reasonable search or that it followed all obvious leads.

For searches conducted in response to a PRA request, “[w]hat will be considered reasonable will depend on the facts of each case.” *Neighborhood Alliance*, 172 Wn.2d at 720. “It is well-settled that if an agency has reason to know that certain places may contain responsive documents, it is obligated under FOIA to search barring an undue burden.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999), *cited with approval in Neighborhood Alliance*, 172 Wn.2d at 722 (discussing agency’s duty to “follow obvious leads”).

⁵ *See id.* (discussing *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232-33, 685 P.2d 1081 (1984)).

Public Records Officer Gary Maehara, with whom Ms. Rufin's PRA request was filed, had reason to know that his own email contained responsive records (emails referencing Ms. Rufin and the CMEM hiring process), obligating the City to follow this obvious lead. *See Ex. 1*. Though the Defendant had the burden of proof, it offered no testimony from Maehara, leading the trial court to make no findings about its Public Records Officer's omissions. *See CP 1680-83*.

Maehara received Rufin's PRA request, supervised the City's search for responsive records, and is the only person who actually possessed the email at issue that was not disclosed. If the City's explanation for Maehara's failure to direct that his own files be searched is: "it is possible Mr. Maehara never even opened and read the email," (Resp.'s Br., 9-10, citing RP 298) "and, even if he had, it is unlikely to have left a lasting impression" (Resp.'s Br., at 26), then the City should have presented testimony to that effect from Maehara. He is the only person with knowledge of whether these claims are true. Rather than submit evidence supporting these theories for Maehara's omissions, the City offers "guess, speculation, or conjecture." *See State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817, 822 (2001). The testimony that the City cites from Ms. Williams, discussing her

review of Maehara's email archive, is inconclusive and offers no support for finding that Maehara never opened the email. *See* RP 298.

The City argues that Maehara's personal knowledge is not relevant to determining whether it conducted a reasonable search.

However, under FOIA, such personal knowledge is relevant.

'[A]gencies should continue to keep in mind ... that 'their superior knowledge of the contents of their files should be used to further the philosophy of the act by facilitating ... the handling of requests for records.'

Founding Church of Scientology of Washington, D. C., Inc. v. Nat'l Sec. Agency, 610 F.2d 824, n.107, 838 (D.C. Cir. 1979) (quoting S.Rep.No.854, 93d Cong., 2d Sess. 10 (1974)); *accord* RCW 42.56.100 (requiring "the fullest assistance to inquirers").

The City also disputes that Mr. Maehara would have remembered Mr. Haynes' email about Rufin and the CMEM hiring process four months later, describing the email as "unremarkable." Again, the record contains no evidence to show Maehara forgot about the email. Haynes, for his part, testified he had written to H.R. and Maehara, because "a candidate ... reach[ing] out in an active hiring process" was "unusual." RP 67-68. Haynes testified that he did not recall whether he also spoke with Maehara about the email. RP 69.

While the City alleges, "Maehara had no personal involvement in responding to Ms. Rufin's request," Resp.'s Br., at 26, the trial

testimony it cites in support of this claim shows Mr. Walter testifying he did not know if Maehara participated in responding. RP 142. It is undisputed that Mr. Maehara, not Mr. Walter, was the person Ms. Rufin wrote to make the PRA request. Ex. 6. Mr. Walter also admits that he conducted searches for responsive emails “under Mr. Maehara’s supervision.” RP 118, 134; *see also* Ex. 7-8; Ex. 11 at 3.

Under the facts of the facts of this case, the City failed to present sufficient evidence to meet its burden and show that it conducted a reasonable search, following all obvious leads.

C. The March 4, 2014 PRA request was not processed with “reasonable diligence.”

The same argument presented on appeal regarding the 3/4/14 request was presented to the trial court, despite claims to the contrary.

In her brief for the bench trial, Ms. Rufin wrote about the request:

The City cannot meet [its] burden [of acting “diligently” under *Andrews v. Washington State Patrol*, 183 Wn. App. 644, 653-54, 334 P.3d 94 (2014)], where the evidence will show that Walter delayed giving the records custodian the content of Rufin’s 3/4/14 request until 14 days after Walter gave Ms. Rufin an estimate that records should be provided within 20 days. By no definition can such conduct be considered to meet the duty of ‘fullest assistance to inquirers and the most timely possible action on requests for information.’ RCW 42.56.100.

CP 1502.

In accord with RCW 42.56.100, the Model Rules for Public

Records state that “[a]n agency should not ignore a request and then continuously send extended estimates. Routine extensions with little or no action to fulfill the request would show that the previous estimates probably were not ‘reasonable.’ ” WAC 44-14-04003(6).⁶

In its brief, the City writes that Rufin “faults the City for taking two weeks to begin working on her request... [b]ut that timeframe was eminently reasonable given the City’s workload and resources.”

Resp.’s Br., at 31-32. The trial court issued no such finding or explanation for why the City neglected to start processing the 3/4/14 request for two weeks, after Rufin was told it would take 20 days for records to be provided.⁷ The City’s argument that Mr. Walter’s workload kept him from working on the request is not credible, where he was able to immediately email the City’s trial counsel about the request. *See* Ex. 58 (email dated March 5, 2014). The task to begin processing the 3/4/14 request was no more time-consuming.

To start processing the request Mr. Walter simply had to send a note to the H.R. department (“Can you have payroll start pulling records for the following requests”?) including a “copy and paste” of

⁶ “While the model rules are not binding on the City, ... they contain persuasive reasoning.” *Beal v. City of Seattle*, 150 Wn. App. 865, 874, 209 P.3d 872 (2009). *See also* CP 1466 (Def.’s Trial Br.) (“The Attorney General’s Model Rules for Public Disclosure provide agencies and requesters with best practice guidance.”)

⁷ *See* RP 264, 270 (analyzing only whether “the City was not diligently working on that request *beyond* the 20 days”)

the 3/4/14 request below his note. *See* CP 1993-96, Ex. 258; *and compare with* Ex. 257. Such processing of PRA requests was Mr. Walter's primary job responsibility, *see* RP 137, and it would have taken him no more time to email H.R. than to notify defense counsel about the 3/4/14 request. *Compare* Ex. 58 *with* CP 1993-96, Ex. 258.

The record provides no explanation for the delay and the trial court's analysis of the issue erroneously failed to consider the City's conduct in the period before the 20-day initial estimate expired. *See generally*, CP 1680-87. Under the record established at trial, it was error for the court to grant the CR 41(b)(3) motion to dismiss, as there was a lack of evidence to show the City met its burden in proving that it acted with reasonable diligence and responded promptly to the 3/4/14 request.

D. There is a lack of substantial evidence to support finding that the City's response to the March 17, 2014 request, which included hiring records impeaching Mr. Haynes, was "prompt" or provided in a reasonable time period.

As Congress wrote in adopting FOIA, "information is often useful only if it is timely. Thus, excessive delay by the agency in its response is often tantamount to denial." H. Rep. No. 876, 93d Cong., 2d Sess. (1974). "The denial of access to government records in a

timely fashion is precisely the harm FOIA is intended to prevent.”⁸

“Even when an agency does not deny a FOIA request outright, the requesting party may still be able to claim ‘improper’ withholding by alleging that the agency has responded in an inadequate manner.” U.S. Dep’t of Justice v. Tax Analysts, 492 U.S. 136, 151, n.12, 109 S. Ct. 2841, 106 L. Ed. 2d 112 (1989). Again, the PRA requires “the most timely possible action,” *PAWS II*, 125 Wn.2d at 252, and mandates a “prompt” response to a request, which at a minimum requires an acknowledgment of the request and reasonable estimate of time the agency will require to respond within five days. RCW 42.56.520. “[T]he purpose of the PRA is for agencies to respond with reasonable ... diligence.” *Andrews*, 183 Wn. App. at 653.

In this case, the trial court erred in finding that the City “promptly responded” to the 3/17/14 PRA request and “provided all of the records responsive to her request in a reasonable time period,” terms of art under RCW 42.56.520 and RCW 42.56.550(4). Such findings conflict with the finding that the City “failed to initially respond to Ms. Rufin’s request within five days” as required by law. CP 1686. *See Doe I v. Washington State Patrol*, 80 Wn. App. 296, 304, 908 P.2d 914 (1996) (holding agency failed to “respond

⁸ *Brown v. U.S. Customs & Border Prot.*, 132 F. Supp. 3d 1170, 1172-73 (N.D. Cal. 2015).

promptly” as required by former RCW 42.17.320 where agency “failed to comply with the strict requirements” of the law and “did not, within five days of receiving Jane Doe’s request, respond by granting or denying the request, or acknowledging the request and providing an estimate of when it would respond”); *Gronquist v. Washington State Dep’t of Licensing*, 175 Wn. App. 729, 745, 756, 309 P.3d 538 (2013) (holding plaintiff prevailed and was entitled to fees, in part, based on showing the agency failed to provide response “within the statutory time frame”); WAC 44-14-04003(4) (“An agency’s failure to provide an initial response is arguably a violation of the act.”).

The trial court made no findings to explain the City’s failure to comply with RCW 42.56.520, nor find that the City nevertheless exercised reasonable diligence in processing the request. By analogy, in FOIA cases, the agency “retain[s] the burden of establishing that it exercised due diligence in not processing [a] request in accordance with FOIA’s ten-day requirement.” *See Morrow v. F.B.I.*, 2 F.3d 642, 644 (5th Cir. 1993).

As to Ms. Rufin’s March 17 request, it was also uncontested that Mr. Walter promised to produce records responsive to the request on May 9 or 10, but failed to produce any records for three weeks,

until May 30.⁹ The City presented no evidence to show why the May 9 or 10 estimated response date was no longer feasible. *Compare Andrews*, 183 Wn. App. at 653 (uncontested facts showed “disclosure by the initial estimate response date was not feasible” and that “WSP acted diligently”). Here, the City offered no evidence to even show how soon or when Mr. Walter began contacting “the appropriate person” to begin searching for records responsive to the 3/17/14 request. *Compare* RP 152, Exs. 263-64 (receiving and responding to 3/17/14 request), *with* Ex. 257, Exs. 258-61 (CP 1993-2004), and Ex. 262 (compiling salary records from HR in response to 3/4/14 request). The record revealed only that Mr. Walter promptly emailed the City’s defense counsel about the 3/17/14 request. Ex. 31; RP 125-27. The trial court made no finding about that contact, nor did it find that the City acted with reasonable diligence in responding to the 3/17/14 request. *See* CP 1686-87.

For all of these reasons, the record lacks substantial evidence to support finding that the City met its burden on the issue of whether it provided a “prompt response” and the “most timely action possible.”

⁹ Ex. 98; CP 7, ¶ 3.24; CP 52, ¶ 3.24; CP 1970, ¶ 3; Ex. 100.

E. The findings about Mr. Walter’s lack of bad faith were made only as to specific issues and requests, and in no case do they determine whether the City violated the PRA.

The trial court made no findings about the intent of Gary Maehara, Seattle City Light’s Public Records Officer, or his reason for failing to advise his staff (Mr. Walter) that he received communications about Ms. Rufin responsive to her public records request, such that his email archives should be included in the City’s search. *See* CP 1680-83. Nor did the trial court make any findings about the appropriateness of Mr. Maehara and Mr. Walter’s many contacts with the City’s defense counsel regarding the *Rufin v. City of Seattle* retaliation case while they processed Ms. Rufin’s PRA requests. *See* CP 1680-88. While the trial court made a limited finding that “Mr. Walter acted in good faith,” such statement was made in the context of discussing the amount of penalties to award for Mr. Walter’s failure to process the January 3, 2013 request, which the court found Mr. Walter had “inadvertently missed.” *See* CP 1683-85. The trial court did not make findings about whether the City, Gary Maehara, or Mr. Walter acted in “good faith” in general, or with regard to processing other requests. *See* CP 1680-87.¹⁰ Even if he had,

¹⁰ The trial court’s rejection of the argument that Mr. Walter located the smoking gun “and purposefully withheld it from her” is a discrete issue that is not appealed. *See* CP 1683. The issue on appeal asks only whether the City and PRO Gary Maehara

only public records requestors who are incarcerated are required to show “bad faith” to have a remedy under RCW 42.56.550(4). *See Adams*, 189 Wn. App. at 937-39 (discussing application of newly enacted RCW 42.56.565(1)). In all other cases, “[t]he City’s good faith ... does not determine whether it complied with the PDA.... Good faith is only relevant to assessing the *amount* of damages to be awarded for violations of the PDA.” *Zink v. City of Mesa*, 140 Wn. App. 328, 340, 166 P.3d 738 (2007) (reiterating that the PRA “requires strict compliance”); *Amren v. City of Kalama*, 131 Wn.2d 25, 32, 929 P.2d 389 (1997) (stating “[a]lthough a showing of bad faith ... is not required in the determination of whether an award for delay in disclosure should be granted,” good faith is a “factorto consider in determining the *amount* to be awarded”).

III. RESPONSE TO CROSS-APPEAL

A. The Trial Court Was Correct In Not Applying CR 68 To A Request For Fees Under The Public Records Act.

The Public Records Act must be liberally construed, which includes giving “a liberal construction of the statute’s provision for award of reasonable attorneys’ fees.” *Progressive Animal Welfare Soc. v. Univ. of Washington*, 114 Wn.2d 677, 683, 790 P.2d 604 (1990)

should have “reasonably” searched, or known to search, Mr. Maehara’s email account for responsive records. *See* Br. of Appellant, at 7-8 (II.A.1- A.2., B.1-B.2).

(“*PAWS I*”). The PRA provision regarding attorney fees states:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

RCW 42.56.550(4).

The Supreme Court has “made clear that ‘strict enforcement’ of fees and fines will discourage improper denial of access to public records.” *PAWS I*, 114 Wn.2d at 686 (rejecting the argument that requestor had a “duty to negotiate prior to seeking judicial intervention” and holding that “‘a failure to negotiate’ is an untenable ground for a reduction of attorneys’ fees under our state freedom of information act.”). “[P]ermitting a liberal recovery of costs is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public’s right to access public records.” *ACLU of Wash. v. Blaine*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999).

1. The PRA is Uniquely Worded, Mandating an Award of Costs and Reasonable Attorneys’ Fees Independent of Whether Discretionary Penalties Are Awarded.

Federal case law under FOIA is not helpful in interpreting the PRA's attorney fee provision, as there are significant differences in the remedial provisions of the PRA and FOIA. *See PAWS I*, 114 Wn.2d at 687-88 (discussing how "federal case law [is] more restrictive in awarding attorneys' fees"; fees under the federal act are discretionary, while fees under the PRA are mandatory); *Amren*, 131 Wn.2d at 35 ("FOIA does not provide any guidance with respect to the question of costs, attorney's fees, or penalties because the FOIA does not have a provision similar to" the PRA's provision).

In *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010), the Court analyzed the text of RCW 42.56.550(4) and noted that "[t]he first sentence entitles a prevailing party to costs and reasonable attorney fees for vindicating 'the right to inspect or copy' or 'the right to receive a response,' but the second sentence authorizes penalties only for denials of 'the right to inspect or copy.'" *Id.* As a result, under the PRA a requestor may be considered a "prevailing party ... at least entitled to costs and reasonable attorneys fees," even if they are not entitled to receive a penalty. *See, e.g., Neighborhood Alliance*, 172 Wn.2d, at 724-25 (discussing entitlement to fees based on the inadequate PRA response resulting from an inadequate search). In *Sanders v. State*, the Court held that Justice Sanders prevailed on a

“brief explanation claim,” the violation of which was “obvious,” but which his “attorneys established... by suing,” entitling him to an award of attorney’s fees for the violation. *See* 169 Wn.2d at 866-67, n.23 (“By way of analogy, one would not deny costs and attorney fees to a prevailing party in an action under 42 U.S.C. § 1983 just because it was ‘obvious’ that the party’s constitutional rights were violated.”)

2. The City’s Offer of Judgment Was Based On Penalties, But Did Not Recognize Any PRA Violation.

The City offered Ms. Rufin \$40,0000 “for daily penalties.” CP 1751. Its offer did “not constitute an admission of liability,” nor concede that the City committed any PRA violation. *Id.* It stated, “In the event plaintiff does not accept this offer, and judgment is obtained against defendant, plaintiff must pay plaintiff’s costs, including attorneys’ fees, incurred after the date of this offer in the event that the judgment for penalties finally obtained is not more favorable than the amount of this offer.” CP 1752.

3. In light of the PRA’s unique text and liberal construction, CR 68 should not apply.

Washington Courts have not yet addressed whether CR 68 can limit an award of attorney’s fees under the PRA, where the statutory language provides that any person who prevails in the action “*shall be awarded all costs*, including reasonable attorney fees, incurred in

connection with such legal action,” irrespective of whether the court awards any penalties, which are discretionary. *See* RCW 42.56.550(4).

“When a statute is silent on a particular issue, the civil rules govern the procedure.” *City of Lakewood v. Koenig*, 160 Wn. App. 883, 890, 250 P.3d 113 (2011). Thus, the Supreme Court has previously concluded that “since the PRA is silent concerning intervention, ... intervention is therefore allowed in a PRA case,” and similarly “because the PRA is silent about discovery, no reason exists to treat discovery any differently than intervention, especially given the PRA’s policy of broad disclosure.” *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 716, 261 P.3d 119 (2011). However, unlike the issue of intervention or discovery, the plain language of the PRA makes clear that a prevailing party “shall be awarded *all costs*, including reasonable attorneys fees.”

For such reasons, the Court should affirm the trial court’s rulings that CR 68 does not apply to this case. CP 1777-78. Under the plain language of the PRA, a prevailing party is entitled to all costs, including reasonable attorneys’ fees, “whether or not a penalty is imposed. ... [I]t would undermine the statutory purpose of the PRA to limit Plaintiff’s recovery of costs and attorney fees.” *Id.* The City’s concern about the potential for generating excessive fees in a PRA

case is already adequately controlled by the discretion afforded to the trial court to award what it deems are “reasonable” attorneys fees. The comparison to *Mitchell v. Washington State Ins. of Pub. Policy*, 153 Wn. App. 803, 830, 225 P.3d 280 (2009) is ill-fitting, where the quoted statement addressed circumstances where an inmate’s “misconduct and misrepresentations used to inflate the cost bill” had resulted in the vacation of judgment. This case, regarding construction of RCW 42.56.550(4) and the alleged application of CR 68, presents circumstances that are not remotely similar.

IV. CONCLUSION

The Court should hold that the search made in response to Ms. Rufin’s 9/28/12 request was not reasonable; that the City failed to promptly respond to the 3/17/14 request; and that the City failed to meet its burden of proving that it was working diligently before it missed the self-imposed deadline for responding to Rufin’s 3/4/14 request. The matter should be remanded to the trial court to make further findings on daily penalties and attorneys’ fees to be awarded consistent with such decision. The court’s ruling regarding the inapplicability of CR 68 should be affirmed.

RESPECTFULLY SUBMITTED this 17th day of October, 2016.

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DECLARATION OF SERVICE

I, Mark Rose, state and declare as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by the Sheridan Law Firm, P.S., and I make this declaration based on my personal knowledge and belief.

2. On October 17, 2016, I caused a copy of the Reply Brief of Appellant to be delivered via email and the Court's electronic filing system to:

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

DATED this 17th day of October, 2016 at Seattle, King
County, Washington.

s/Mark Rose
Mark Rose, WSBA #41916