Case No. 38657-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

CITY OF LAKEWOOD, *Respondent,*

v.

DAVID KOENIG
Appellant,

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Even after a Commissioner of this Court has granted interlocutory review of the *Order Compelling Discovery*, the City refuses to recognize that this is not a typical discovery dispute in an ordinary civil action. The useless, burdensome, invasive discovery requests submitted by the City at the outset of this case are not "routine" but wholly unprecedented.

The PRA is directed precisely against "the agency seeking to avoid disclosure." *Amren v. City of Kalama*,131 Wn.2d 25, 34, n.6, 929 P.2d 389 (1997); *see Progressive Animal Welfare Soc'y v. UW (PAWS II)*, 125 Wn.2d 243, 270 n. 17, 884 P.2d 592 (1994). The people in enacting the original PDA, the legislature in amending it, and the courts in interpreting it, have been keenly aware that agencies' self-interest in non-disclosure would lead to attempts to circumvent the PRA. *See PAWS II*, 125 Wn.2d at 259; *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 131, 580 P.2d 246 (1978).

The City's misuse of discovery in at least two different cases takes agency hostility and resistance to the PRA to a new level. No reported case in the 36-year history of the PRA mentions an agency submitting discovery to a requester, yet the City argues that useless, burdensome, invasive discovery is, or should become, "routine." Resp. Br. at 13.

Many requesters would be intimidated and deterred by receiving the City's "routine" discovery requests. This particular instance of

discovery abuse has made its way to this Court only because the City directed its attack on a staunch PRA advocate who is willing and able to stand up to the City. But this opportunity must not be missed. This Court must not allow "routine" discovery to become a weapon by which agencies might seek to deter requests for public records under the PRA.

II. STANDARD OF REVIEW

The City places excessive reliance on the abuse of discretion standard that generally applies to discovery rulings in ordinary civil cases. Resp. Br. at 1, 4, 6-8. The City correctly notes that discovery requests must be "reasonably calculated to lead to the discovery of admissible evidence." Resp. Br. at 7; CR 26(b)(1). However, the City neglects to mention that the City still has the burden to explain the materiality of its discovery requests. *Bronson v. Superior Court*, 194 Wash. 339, 345, 77 P.2d 997 (1938). The City has consistently ignored this rule.

Furthermore, this case is ***not*** just a discovery dispute in an ordinary civil case. Judicial review under the PRA is *de novo*. *Soter v. Cowles Pub'g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007); RCW 42.56.550(3). The trial court has no discretion in the interpretation of the PRA. Even where the trial court has discretion, the trial court may not rely on untenable grounds or erroneously interpret the law. *Lindblad v. Boeing*

Co., 108 Wn. App. 198, 207, 31 P.3d 1 (2001); *Wash. State Physicians Ins. v. Fisons*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).[1]

Finally, the City misleadingly suggests that the trial court's decision was based, in part, on a lack of timely objection by Koenig. Resp. Br. at 1, 2, 3, 7-10. In fact, Koenig made timely objections, CP 32-33, and his cross-motion was timely. Under current law, which the City ignores, the parties were required to hold a discovery conference under CR 26(i) before filing any motions. CP 112. The question of timeliness was never raised or ruled upon in the trial court. Consequently, the City's waiver argument is not only meritless but also violates RAP 2.5(a).[2]

III. ARGUMENT

A. The PRA does not authorize an agency to submit discovery requests to a records requester.

Spokane Research v. City of Spokane, 155 Wn.2d 89, 104-05, 117 P.3d 1117 (2005), holds that the show cause procedure in RCW 42.56.550(1) is optional, that parties may intervene in PRA cases pursuant to the Civil Rules, and that summary judgment may be used in PRA cases.

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[1] The observation in *Gillett v. Conner*, 132 Wn. App. 818, 826, 133 P.3d 960 (2006), that a trial court is in the best position to craft discovery orders under CR 34, has no relevance to a PRA case where the issues are primarily legal and review is *de novo*.

[2] *Rhinehart v. Seattle Times*, 98 Wn.2d 226, 654 P.2d 67 (1982), *Rhinehart v. Seattle Times*, 51 Wn. App. 561, 754 P.2d 1243 (1988), and *Gammon v. Clarke Equip. Co.*, 38 Wn. App. 274, 281, 686 P.2d 1102 (1984), predate the meet and confer requirement in CR 26(i), enacted in 1993. *See* 3A Wash. Prac., *Rules Practice* CR 26 n.57 (5th ed.).

Spokane Research, 155 Wn.2d at 104-06. That case does not address the question of whether agencies may submit discovery to a requester.

The City argues that it "necessarily follows" from *Spokane Research* that the civil rules of discovery also apply in PRA cases. Resp. Br. at 6. But under *Spokane Research*, 155 Wn.2d at 105, the civil rules are applicable to PRA cases only insofar as the rules are not inconsistent with the PRA statute. Discovery to a requester is inconsistent with the PRA for two reasons: (i) an agency does not need discovery to determine whether a record is exempt, and (ii) an agency is barred from considering a requester's identity or the purpose of a request.

Relying on *Soter v. Cowles Pub'g Co.*, 162 Wn.2d 716, 755, 174 P.3d 60 (2007), the City argues that "agencies have the same right of access to the courts" as requesters. Resp. Br. at 21. *Soter* says nothing of the sort. *Soter* held that agencies may use RCW 42.56.**540** to seek judicial determination of whether particular exemptions apply to particular records. *Soter*, 162 Wn.2d at 755-56. Requesters' access to court is governed by RCW 42.56.**550**, which provides a number of remedies including judicial review of exemptions, in camera review, and attorney's fees and penalties. The City also cites *Soter* for the sweeping proposition that "an agency's right to seek court redress under the PRA does not impose a chilling impact on requestors." Resp. Br. at 11. The City reads

Soter far too broadly, and takes language from a footnote in *Soter* out of context. Resp. Br. at 5. The *Soter* court perceived "no chilling effect" where agencies seek judicial review of an exemption claim. *Soter*, 162 Wn.2d at 753, n. 16. Koenig does not dispute the City's right to seek judicial review under RCW 42.56.540.[3] This case is about the City's deliberate misuse of discovery. *Soter* did not invite agencies to force requesters to litigate PRA penalties, nor did it authorize the use of discovery in such efforts.

The City continues to argue that Koenig's argument is inconsistent with his conduct in answering some of the City's discovery requests. Resp. Br. at 6, 18-19; *Opp.* at 5. Koenig's attempt to avoid a showdown with the City, by providing some short answers to interrogatories, is not inconsistent with Koenig's arguments. CP 33. Koenig's answer merely disputed the City's redaction of driver's license numbers. The City did not need to conduct discovery in order to obtain judicial review on that issue.

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[3] The City also argues that it has the right to seek declaratory relief under Chapter 7.24 RCW. Resp. Br. at 5, 18. This new argument adds nothing to the analysis in this case. First, it is not clear why Chapter 7.24 would be applicable. *Soter* does not mention Chapter 7.24. Koenig has never agreed that this is an action under Chapter 7.24 RCW, and the trial court never ruled on that question. The City is not entitled to a declaratory judgment under Chapter 7.24 because it has a completely adequate remedy under the PRA. *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 98-99, 38 P.3d 1040 (2002). Second, Chapter 7.24 RCW would not affect the rights of the parties under

Soter notes that agencies have the burden to establish that a record is exempt. *Soter*, 162 Wn.2d at 731 (citing RCW 42.56.550(1)). Agencies are also required to explain how exemptions have been applied, and to disclose whether records have been withheld. RCW 42.56.210(3); *PAWS II*, 125 Wn.2d at 270-71. These requirements are so fundamental to the PRA that the statute of limitations does not begin to run until an agency has complied with RCW 42.56.210(3) and *PAWS II*. *Rental Housing Ass'n v. Des Moines*, 165 Wn.2d 525, 541, 199 P.3d 393 (2009). An agency may not shift these burdens to the requester by using discovery to determine whether a PRA violation has occurred. But that is exactly what the City is trying to accomplish. *See* CP 107-110. The civil rules are applicable to PRA cases only insofar as the rules are not inconsistent with the PRA. *Spokane Research*, 155 Wn.2d at 105. The City's deliberate misuse of discovery is inconsistent with the PRA and must be rejected.

1. Agencies may not consider the identity of a requester or the purpose of a request.

The City does not deny that agencies may not consider either the identity of the requester or the purpose of a request. Instead, the City argues that the "commencement of a lawsuit" does not discriminate

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the PRA. There is no reason to believe that the outcome of *Livingston v. Cedeno*, 164 Wn.2d 46, 186 P.3d 1055 (2008) would have been different under Chapter 7.24 RCW.

against a PRA requester. Resp. Br. at 19. The City deliberately misstates the issue. Koenig has ***not*** argued that the City engaged in improper discrimination by merely seeking judicial review under *Soter* and RCW 42.56.540. Koenig challenges the City's misuse of ***discovery***, which the City ignores in its lengthy discussion of *Livingston* and RCW 42.56.080.

Second, *Livingston* does not support the City's attempt to distinguish between a PRA requestor and a PRA litigant. *Livingston* held that, while the Department of Corrections was required to respond to the inmate's public disclosure requests, it was permitted to seize those records as contraband because the requestor was also an inmate. *Livingston*, 164 Wn.2d at 53. In contrast to the inmate in *Livingston*, Koenig has no legal relationship to the City other than as a records requester under the PRA. The fact that the City has sued Koenig does not alter his rights under the PRA. Nor do *Soter* and RCW 42.56.540 give the City the right to engage in the very same discrimination that RCW 42.56.080 forbids.

If the City were correct, the prohibition in RCW 42.56.080 would evaporate as soon as a lawsuit is filed. Under the City's proposed rule, an agency may discriminate against a PRA litigant, and may use discovery to make the very same inquiries that RCW 42.56.080 expressly forbids. According to the City's argument, an agency could routinely submit the following interrogatory to the requester in any PRA case:

INTERROGATORY NO. X:

> With respect to each record you contend was improperly withheld, please specifically state your political, academic, legal, personal or other reason for requesting such record.

Would the Court allow an agency to submit such discovery requests to the ACLU, The News Tribune, or the Republican Party despite the plain language of RCW 42.56.080? Of course not. Such intrusive and burdensome discovery is unacceptable in light of the purpose of the PRA, and violates the right to request records without an agency inquiring into the requester's identity or the purpose of a request. RCW 42.56.080.

2. A requester's economic loss, or lack thereof, is *not* a proper factor for penalties under RCW 42.56.550(4).

As Koenig's brief explained, the statement in various reported cases — that a requester's economic loss is relevant to penalties — is mere dicta. The City notes that economic loss was also mentioned in *Yousoufian v. Sims ("Yousoufian IV")*, 165 Wn.2d 439, 200 P.3d 232 (2009). Resp. Br. at 15. But the Supreme Court has recalled the mandate in that case, and the author of the majority opinion has recused himself.[4]

More importantly, nothing in *Yousoufian IV* would prevent this Court from holding that a requester's economic loss, or lack thereof, is not a proper factor for penalties under RCW 42.56.550(4). The *Yousoufian IV*

[4] On June 12, 2009, the Supreme Court issued an order to recall the mandate in *Yousoufian IV*. As of the date of this brief the *Yousoufian IV* case remains pending.

majority was clearly struggling with the fact that the PRA was never intended to provide a remedy for economic loss, and the suggestion that economic loss is a proper factor remains dicta. *Yousoufian IV*, 165 Wn.2d at 455, 460-61; App. Br. at 15-16. Furthermore, because *Yousoufian IV* did not consider the issues raised by Koenig in this case, this Court is not required to accept economic loss as a penalty factor. *See ETCO v. Dept. Labor & Indus.*, 66 Wn. App. 302, 307, 831 P.2d 1133 (1992).

Koenig has also explained that consideration of economic loss requires a court to consider the identity of a requester and/or the purpose of a request, and that litigation involving economic loss is complex and expensive. App. Br. at 16-17. The City concedes both points *sub silentio*.

3. *Yousoufian IV* does not invite discovery into the identity of the requester or the purpose of a request.

Attempting to justify its intrusive discovery requests, the City now argues that its discovery of Koenig's litigation history "has a potential impact on several of [the *Yousoufian IV*] factors." Resp. Br. at 15. Contrary to the City's argument, most of the penalty factors in *Yousoufian IV* focus entirely on the agency's conduct. Only a few of the *Yousoufian IV* aggravating factors invite any consideration of the nature of the request: (1) delayed response when time is of the essence, (7) potential for public harm, including economic loss resulting from non-disclosure,

and (8) personal economic loss. *Yousoufian IV*, 165 Wn.2d at 458-59. Only one of those factors, personal economic loss, depends on the identity of the requester and/or the purpose of the request, and that factor is dicta.[5] This Court should squarely hold that a requester's economic loss, or lack thereof, is ***not*** a proper factor for penalties under RCW 42.56.550(4).

Nothing in *Yousoufian II* or *IV* contradicts Koenig's argument that PRA penalty factors should be based on the conduct of the agency, and that factors which consider either the identity of the requester or the purpose of a request are ***not*** appropriate. None of the various *Yousoufian* opinions gave any consideration to the identity of the particular requester.

More importantly, *Yousoufian IV* gave no consideration whatsoever to Armen Yousoufian's subjective reasons for requesting records about the stadium financing. Rather, the Court focused on the *potential harm to the public*. "The potential for public harm is obvious; however, the lack of actual public harm is irrelevant to penalizing King County for its misconduct." *Yousoufian IV*, 165 Wn.2d at 455.

Contrary to the City's argument, nothing in *Yousoufian IV* allows a court to base a determination of penalties upon either the identity of a

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[5] Nor does *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997), support the City's statement that "the agency's conduct is largely measured against its interactions with a requestor and cannot be viewed in isolation." Resp. Br. at 15. *Amren* states that a court should consider an agency's bad faith as well as economic loss. *Amren*, 131 Wn.2d at 38. The discussion of economic loss is dicta.

requester or the subjective purpose of the request. The City's interpretation of *Yousoufian IV* directly violates the general rule that agencies may not consider either the identity of the requester or the purpose of a request. *See* RCW 42.56.080; *Livingston*, 164 Wn.2d at 53.

The City also notes that one of the *Yousoufian IV* factors is "whether an agency is helpful in responding to a requestor." Resp. Br. at 16. But the City does not explain why an agency would need to conduct extensive discovery to the requester in order to address this factor. The relative helpfulness of the agency, or lack thereof, is documented in the requests and the agency's responses. *See Yousoufian IV*, 165 Wn.2d 446-450; CP 62-71. That information is already in the agency's possession. Koenig's interactions with other agencies about other requests is not relevant to whether the City was helpful to Koenig in this case.

The City argues that examples of Koenig's interactions with other agencies might show that the City's conduct was reasonable in this case. Resp. Br. at 17. If the City's argument were correct, Koenig could introduce examples of prompt, clear PRA responses from other agencies to show that the City has been unreasonable and should receive a higher penalty. But the City has no authority for its assumption that either the *Yousoufian IV* factors or the rules of evidence would allow a court to draw such attenuated inferences in imposing penalties. Rather, *Yousoufian IV*

indicates that the court would only look at the direct evidence of the clarity of the request and the reasonableness of the agency's response.

The City continues to argue that it "noted a pattern of deliberate delay" by Koenig, and that it expects to find other instances of such delay. Resp. Br. at 16. The City's allegation of intentional delay is false. The City has already litigated that allegation and lost, and that the allegation is barred by collateral estoppel. *See* App. Br. at 22-23; CP 16, 66, 78, 90.

The City's argument about the relevance of delay has evolved throughout this case. The City has abandoned its argument that delay in other cases would be relevant to the penalty period (number of days). As the Commissioner has pointed out, the City filed this case, and there is no issue of delay on the part of Koenig. *Ruling Granting Review* at 3.

Now that discretionary review has been granted, the City's argues that Koenig's alleged delay is relevant to whether a requester has a "genuine interest in the records," and to rebut a claim of "prompt need" for records. Resp. Br. at 16-17. As explained above, Koenig's subjective purpose is ***not*** a proper penalty factor under *Yousoufian IV*. Such a factor directly violates RCW 42.56.080 and *Livingston*. The PRA does not require a requester to give a reason for a request or to show a "genuine

interest" in requested records.[6] In sum, *Yousoufian IV* does not require discovery into the identity of the requester or the purpose of a request.

B. In the alternative, the City's discovery requests are not reasonably calculated to lead to the discovery of admissible evidence.

Assuming, *arguendo*, that an agency is permitted to propound discovery to a requester, such discovery must be reasonably calculated to lead to the discovery of admissible evidence. CR 26(b)(1). Furthermore, the City has the burden to explain the materiality of its discovery requests. *Bronson*, 194 Wash at 345. Instead of providing concrete explanations of the materiality of its discovery requests, the City largely relies on boilerplate and non-PRA discovery cases.[7] Resp. Br. at 8, 10-14, 18.

As Koenig's brief explained, speculation that a requester may have a pending divorce or bankruptcy cannot justify an interrogatory that seeks information about all litigation history over a period of ten years. App. Br. at 19-20. The City concedes this, *sub silentio*. The City argues that

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[6] Even if there were a "genuine interest" requirement, the City erroneously assumes that evidence of delay in other cases would support an inference that Koenig did not have a "genuine interest" in the records in such cases. From that inference, the City would draw a further inference that Koenig did not have a genuine interest in the records at issue here. Such attenuated inferences would be sheer speculation and would be inadmissible under ER 404(b) as impermissible character or "propensity" evidence. *E.g.*, *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 432, 814 P.2d 687 (1991).

[7] In *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 777, 819 P.2d 370 (1992), the relevance of the discovery was unquestioned. *Bushman v. New Holland Div.*, 83 Wn.2d 429, 434, 518 P.2d 1078 (1974), which is ***not*** cited in *Doe*, merely confirms that discovery is limited by relevancy and not the precise issues in the pleadings.

the trial court observed that litigation history "goes to whether a claimant has standing to even seek damages." Resp. Br. at 14. But this does not explain the broad scope of the City's discovery requests. Furthermore, the City concedes that this theory of materiality came from the trial court, and that the City did not make this argument in the trial court.

The City notes that certain criminal convictions may be admissible for impeachment under ER 609. Resp. Br. at 14. But the City has failed to address Koenig's points that there is only a remote possibility that a requester would ever be called as a witness in a PRA case, and that the Court can only speculate about how the requester's testimony could be relevant in a penalty hearing. *See* App. Br. at 20. The Court should rule that the annoyance, embarrassment, and oppression inherent in such discovery requests constitutes good cause to deny such discovery where an agency seeks judicial review under the PRA.

As explained in section A(2), economic loss is not a proper PRA penalty factor. Nonetheless, even if economic loss were a proper penalty factor, the City does not deny that its interrogatories do not ask whether Koenig suffered any economic loss.

Finally, as Koenig has already explained, the City's allegations of intentional delay are both false and irrelevant to this case. *See* section A(3)(above). Furthermore, even if Koenig's other PRA cases were

somehow relevant, that fact cannot justify an interrogatory that seeks information about ***all litigation***, CP 105, not just PRA litigation.

1. Discovery requests must be reasonably calculated to lead to the discovery of admissible evidence. There is no exception for "routine" discovery.

CR 26(b)(1) is not optional. That rule limits the use of discovery to matters that are "reasonably calculated to lead to the discovery of admissible evidence." Yet the City freely admits that it failed to tailor its discovery requests to fit the narrow issues in this PRA case. It is undisputed that the City simply used pattern interrogatories for a personal injury case. CP 162. The City submitted the same pattern interrogatories to another requester in another case filed by the City. CP 130-38.

In its defense of interrogatories that clearly violate CR 26(b)(1), the City argues that "an adversary's prior litigation history is routine in civil discovery." Resp. Br. at 13. There is no exception to CR 26(b)(1) for "routine" discovery. The cases cited by the City do not support the City's argument that "routine" discovery" is somehow exempt from the requirement of CR 26(b)(1).[8] Rather, those cases merely establish that

[8] *Gober v. City of Leesburg*, 197 F.R.D. 519, 521 n.2 (M.D. Fla. 2000), cited by the City, notes that certain background information is routine discovery in "***almost*** all civil matters." But that is because some types of information routinely meet the requirements of CR 26(b)(1) in most, ***but not all***, civil cases. PRA cases represent an exception, because the PRA unambiguously forbids any consideration of the identity of a requester or the purpose of a request. RCW 42.56.080.

prior litigation is discoverable where the CR 26(b)(1) standard is met.[9] That standard is not met in this case. Because the City's discovery requests are not reasonably calculated to lead to the discovery of admissible evidence, those discovery requests should be quashed.

2. The City's discovery requests serve only to burden, intimidate, harass and embarrass the requestor.

CR 26(c) permits the court to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. The City does not deny that its requests for criminal history, divorce history, or prior bankruptcy would intimidate any normal person who received them.

Yet the City continues to argue, contrary to the plain language of CR 26(c), that the annoyance, embarrassment, and oppression caused by such useless, intrusive discovery is not sufficient harm to warrant a protective order. Resp. Br. at 10. The City cites 3A Wash. Practice: Rules Practice, CR 26 for the proposition that "good cause" requires a "specific factual showing," and that "Stock, boilerplate conclusions are not sufficient." Resp. Br. at 10. Koenig does not rely on boilerplate conclusions. Koenig has shown in detail how the City's interrogatories are excessive, intrusive, and unnecessary. *Fisons*, 122 Wn.2d at 354, does

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[9] *Barfield v. City of Seattle*, 100 Wn.2d 878, 888, 676 P.3d 438 (1984); *Cobb v. Snohomish County*, 86 Wn. App. 223, 236, 935 P.2d 1384 (1997) (not a discovery case).

not support the City's assertion that Koenig must also provide "testimony, declarations, or evidence" to show that the City's discovery requests are useless and burdensome, and serve only to annoy and harass the requester. The City has no authority to support a requirement that discovery be shown to have "chilled [Koenig's] right to seek public records or impaired his right to support a claim or defense." Resp. Br. at 11.[10]

The City's argument flies in the face of CR 26(c), which expressly recognizes that parties must be protected from the annoyance, embarrassment, oppression, or undue burden or expense of useless discovery. Being compelled to provide large amounts of personal information to an adverse party for no good reason is exactly the harm that limits on discovery are intended to prevent. *Rhinehart v. The Seattle Times*, 98 Wn.2d 226, 256, 654 P.2d 673, 676 (1982), *aff'd* 467 U.S. 20 (1984); *see also Bronson*, 194 Wash. at 344. Requiring a PRA requester to provide more specific factual information about the burden imposed by discovery increases the cost and difficulty in obtaining a protective order, which, in turn, increases the harassment and intimidation value of the agency's discovery requests. This Court must protect PRA requesters

[10] The remaining authorities cited by the City are irrelevant. *Dreiling v Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004), and *Foltz v. State Farm Ins.*, 331 F.3d 1122 (9th Cir. 2003), deal with protective orders to seal court files.

from the deliberate misuse of "routine" discovery by agencies. If discovery is permitted at all, the Court must require agencies to show that their limited discovery requests strictly comply with CR 26(b)(1).

Even under the deferential standard of review applied to discovery rulings, the trial court's decision to allow the City's discovery in this case was clearly an abuse of discretion. *Lindblad*, 108 Wn. App. at 207. There were no tenable grounds or reasons for the trial court to allow intrusive, burdensome discovery without requiring the City to show how such discovery would lead to admissible evidence.

C. In the alternative, discovery relating to penalties should not be permitted until after an agency has been found liable for penalties under RCW 42.56.550(4).

Koenig has explained that (i) the City's discovery requests are unrelated to the issue of PRA compliance, (ii) discovery is a barrier to access to records, and (iii) discovery on penalties at this early stage is a waste of both agency and judicial resources. App. Br. at 24-25. The City simply ignores these points. But the Commissioner correctly noted that "[a]nswers to the interrogatories should not be required until the court has ruled on the claimed exemptions." *Ruling Granting Review* (2/24/09) at 3. The City has completely ignored the Commissioner as well.

The City asserts that the trial court "apparently" agreed with the City, Resp. Br. at 12, but the record does not show any actual

consideration or reasoning by the trial court. In fact, the trial court never explained why the City's discovery could not wait until after a determination of liability. The trial court simply ignored Koenig's alternative request. CP 176-77; VRP 1-16. The trial court clearly abused its discretion as it gave no reasons, tenable or otherwise, for refusing to suspend the City's discovery. *State v. Hampton*, 107 Wn.2d 403, 408-09, 728 P.2d 1049 (1986).[11]

The City also claims to have a desire for "prompt resolution on all issues." Resp. Br. 12. This claim is transparently pretextual. The City is causing the very delay that it professes a desire to avoid.

Finally, the City argues that "a number of provisions of the PRA are designed to expedite resolution of PRA-related requests." Resp. Br. at 12. But the City cites only the optional show cause provision in RCW 42.56.550(1), which has no relevance to any issue in this case.

In sum, there is no valid reason to allow an agency to conduct discovery relating to PRA penalties prior to any determination of liability under the PRA. The trial court abused its discretion in allowing discovery to proceed. If this Court concludes that the City's discovery requests are

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[11] Apart from the boilerplate proposition that a trial court has discretion to control discovery, *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 556, 815 P.2d 798 (1991), does not support the City's arguments. On the contrary, *Kramer* held that the trial court properly rejected discovery that was not calculated to lead to the discovery of admissible evidence. *Id.*

somehow related to the question of penalties and not unduly burdensome, then the Court should order the trial court to suspend such discovery until after there has been a determination that the City is actually liable. To rule otherwise would reward the City's intentional misuse of discovery as a weapon against records requesters.

D. Koenig is entitled to reasonable attorney's fees for this appeal.

The City argues that Koenig's request for attorney's fees is premature because Koenig "has yet to prevail on the merits." Resp. Br. at 22. In support of this argument, the City takes a small portion of *Spokane Research*, *supra*, out of context. Resp. Br. at 22. *Spokane Research* did not actually address the issue of whether a requester may be a prevailing party, for purposes of attorney's fees, on an intermediate appeal in a PRA case. The question before this Court is whether the reasoning of *Spokane Research* requires an award of fees if Koenig prevails here.

In the portion of *Spokane Research* cited by the City, the Supreme Court rejected an argument that a requester must actually cause the disclosure of records in order to be a prevailing party. 155 Wn.2d at 102-03. The agency in that case had been forced to release the records at issue by a court order in another case. The Supreme Court held that the requester was the prevailing party if his challenges to the agency's exemption claims turned out to be correct. *Id.* The court reached this

result because the higher threshold 'causing disclosure' (suggested by a prior case) would have allowed the agency to avoid paying the requester's fees, contrary to the policy of the PRA. *Id.*

It does ***not*** follow from *Spokane Research* that a request must prove wrongful withholding in order to be a prevailing party.[12] On the contrary, an agency is liable for fees for failing to cite an exemption, whether or not the record is actually exempt. *Citizens for Fair Share v. Dept. of Corrections*, 117 Wn. App. 411, 437, 72 P.3d 206 (2003).

The statute only requires Koenig to prevail "against an agency ***in any action*** in the courts seeking the right to inspect or copy any public record ..." RCW 542.56.550(4). The statute does ***not*** require the requester to prevail on any particular issue or to obtain any particular relief. In addition, the PRA requires awards of fees to a requester who only partially prevails. *Citizens for Fair Share*, 117 Wn. App. at 431. A requester who successfully appeals an interlocutory ruling has prevailed in the appeal for purposes of RCW 42.56.550(4).

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[12] In *Clarke v. Tri-Cities Animal Care*, 144 Wn. App. 185, 196, 181 P.3d 811 (2008), Division III held that the requester had not prevailed under the PRA where the court had only determined that the TCAC was an agency under the PRA. *Clarke*, 144 Wn. App. at 196. That holding was not supported by any analysis of either the language of RCW 42.56.550(4) or the underlying policy of the PRA. An agency that forced a requester to establish that the PRA applied to the agency clearly should have been liable for fees. The contrary result in *Clarke* is not consistent with the purpose of the attorney's fee provision in the PRA. This Court is not required to follow the erroneous analysis in

The attorney's fee provision in the PRA "like the rest of the [PRA], is to be liberally construed to promote full access to public records." *Yousoufian v. Sims*, 114 Wn. App. 836, 855, 60 P.3d 667 (2003), *overruled on other grounds*, 152 Wn.2d 421 (2005). The City has forced Koenig to incur substantial attorney's fees to defend his rights under the PRA. Under *Spokane Research* and the rule of liberal construction, the Court must award attorney's fees to Koenig. To hold otherwise would flout the purpose of the PRA. If agencies are permitted to use "routine" discovery as a weapon against requesters, the important public policy animating the PRA will be severely compromised.

In *McCallum v. Allstate Ins. Co.*, 149 Wn. App. 412, 429, 204 P.3d 944 (2009), cited by the City, the plaintiff had prevailed on appeal but was denied fees because she had not prevailed on her claim that the defendant insurer violated the Consumer Protection Act (CPA). Noting that both the PRA and CPA provide for liberal construction, the City argues that a PRA requester "must prevail on the underlying merits" to be awarded fees. Resp. Br. at 23-24. The CPA does not shed any light on the question of when a PRA requester is entitled to fees. The CPA requires a plaintiff to prove some measure of injury to property interests or money. *See Mason*

Clark, and it should not do so. *See State v. Nonog*, 145 Wn. App. 802, 187 P.3d 335 (2008).

v. Mortgage America, Inc., 114 Wn.2d 842, 854, 792 P.2d 142 (1990). The CPA lacks declaratory relief, and does not provide a remedy in the absence of damages. *Girard v. Myers*, 39 Wn. App. 577, 589, 694 P.2d 678 (1985). In contrast, the PRA requires an award of fees in cases under RCW 42.56.540 and where a requester does not actually cause the disclosure of records. *Soter*, 162 Wn.2d at 750-51; *Spokane Research*, 155 Wn.2d at 102-03.[13]

The City fails to recognize that this case is not just a discovery dispute. This appeal involves the rights of persons who request records under the PRA. The "underlying merits" of this case is the question of whether agencies will be permitted to routinely subject PRA requesters to useless, burdensome discovery, and to violate the well-established rule that agencies may not consider either the identity of the requester or the purpose of a request. *See* RCW 42.56.080; *Livingston*, 164 Wn.2d at 53. As the Commissioner noted, discovery should not become a barrier to determinations regarding disclosure under the PRA. *Ruling Granting*

[13] Moreover, *McCallum* is not persuasive because it simply does not address the issue presented in this case. *McCallum* simply followed an earlier case in which the plaintiff had established actual damages. *McCallum*, 149 Wn. App. at 429 (citing *Nuttall v. Dowell*, 31 Wn. App. 98, 114-15, 639 P.2d 832 (1982)). Nothing in *McCallum* suggests that the court even considered the question of whether the CPA statute or policy required an award of fees without a successful underlying CPA claim. Consequently, *McCallum* is not precedent even on the question of attorney's fees under the CPA. *In re Burton*, 80 Wn. App. 573, 582, 910 P.2d 1295 (1996) (language in an appellate opinion is not precedent on an issue the court did not actually consider and address).

Review (2/24/09) at 3. "**Such a result contravenes the intent of the legislature and the rule reiterated in *Livingston v. Cedeno, supra.***" *Id.*

The question of whether the City has properly redacted driver's license numbers is secondary. If the City really wanted judicial review on that issue it could have asked the trial court to decide that question more than a year ago. But it has not done so. If the trial court eventually rules that driver's license numbers are exempt, the City will have accomplished its actual objective in this litigation: to subject Koenig to useless, burdensome discovery and to establish its ability to employ such tactics against other requesters in other cases. The attorney fee provision in RCW 42.56.550 must be broadly interpreted to require an agency to compensate requesters for the attorney's fees that the agency forces a requester to incur. The City's proposed rule, if adopted, would only encourage agencies to misuse discovery whenever they are willing to gamble that their exemption claims will be upheld or whenever they calculate that the burden of discovery will force the requester to abandon a request.

Agencies can violate the PRA without improperly withholding or redacting records. The PRA requires agencies to explain exemptions, to provide exemption logs, and to not silently withhold records. RCW 42.56.210(3); *PAWS II*, 125 Wn.2d at 270; *Rental Housing Ass'n v. Des*

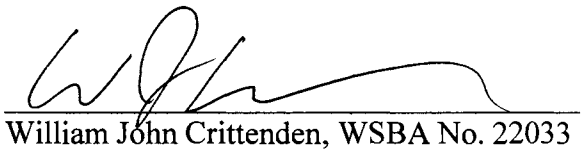
Moines, 165 Wn.2d 525, 537-38, 199 P.3d 393 (2009). If the City were correct, an agency could violate these requirements with impunity so long as a court eventually concluded that withheld records were in fact exempt.

Under RCW 42.56.550(4) and *Spokane Research*, 155 Wn.2d at 102-03, there is no requirement that Koenig cause the disclosure of records in order to be awarded fees. If this Court reverses the trial court's discovery order then Koenig is the prevailing party and he is entitled to attorney's fees for this appeal.

IV. CONCLUSION

For all these reasons the Court should reverse the trial court's *Order Compelling Discovery*. This matter should be remanded to the trial court with instructions to quash the City's discovery requests. In addition, Koenig should be awarded his attorney's fees for this appeal.

RESPECTFULLY SUBMITTED this 3rd day of July, 2009.

By: 

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Certificate of Service

I, the undersigned, certify that on the 3rd day of July, 2009, I caused a true and correct copy of this *Reply Brief of Appellant* to be served, by the method(s) indicated below, to the following person(s):

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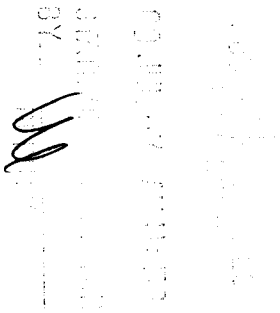

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