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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 323889

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

CHRISTOPHER JACK REID,

Appellant,

v.

CITY OF PULLMAN,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

When an agency denies possessing records that have been requested under the Public Records Act (PRA), Chap. 42.56 RCW, it must prove that it reasonably searched for the records. There was no reasonable search in this case. For some records, there was no search at all.

The trial court erroneously held that the City of Pullman could avoid searching for requested records simply by asserting a presumption that those records were destroyed. Under the trial court's reasoning, records would be presumed out of reach once they qualify for deletion under retention schedules, even if the records actually still exist. Agencies could avoid disclosure of embarrassing records without making any effort to find them, simply by presuming destruction, as happened here. This reasoning contradicts the Washington Supreme Court's 2011 decision in *Neighborhood Alliance of Spokane County v. County of Spokane*, as well as the mandate to construe the PRA liberally in favor of disclosure. Thus, reversal is warranted.

Besides misconstruing the law, the trial court overlooked genuine factual issues as to whether the City of Pullman met its burden of proving an adequate PRA response. For example, appellant Christopher Reid presented evidence that the City printed out and maintained hard copies of

emails of the same nature as the ones he requested, raising a fact issue about whether the City should have searched paper files in addition to computer archives. Because of these and other errors, this Court should reverse the summary judgment order, hold that the City's inadequate search violated the PRA, require a new search for records, and instruct the trial court to award costs and attorney fees for this appeal and the trial proceedings.

II. ISSUES AND ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred by granting summary judgment to the City of Pullman.
2. The trial court erred by denying the motion for reconsideration of the summary dismissal.

Issues Pertaining to Error

1. Does an agency violate the reasonable search requirement adopted in *Neighborhood Alliance of Spokane County v. County of Spokane* by denying a request for public records based on a presumption that the records were destroyed, without actually searching for the records?
2. Does a trial court violate the PRA mandate for liberal construction and commit an error of law by holding that "it is not reasonable for an agency to search for records it believes have been destroyed," when

there is no evidence of purging records and when destruction was not required?

3. Does an agency violate the PRA requirement to provide the fullest possible assistance to requesters, as well as the *Neighborhood Alliance* requirement to prove an adequate search, when it produces non-responsive records and refers the requester to another agency to find the records actually requested?

4. Does an agency violate the PRA requirement to promptly produce requested records when it fails to produce records which the agency's records officer identified as responsive to a request?

5. Is it unreasonable, and therefore a violation of the PRA, for an agency to search for requested records only in computer archives when similar records were found in paper files?

6. Is it error to grant summary judgment to an agency in a PRA case when there are factual disputes about the adequacy of the agency's search for records and when discovery is improperly impeded?

III. STATEMENT OF THE CASE

A. Mr. Reid Seeks Records to Support a Personal Restraint Petition.

Appellant Christopher Reid, an inmate contesting his conviction, asserts that the prosecutor in his criminal case improperly withheld evidence

that the victim identified certain other men as the perpetrators when she was shown police photo montages on September 13, 2007. CP 106, 142. September 13, 2007, was the day the victim first reported the crime. CP 442. That day, she signed photo lineup instructions identifying the man in Photo No. 2 of the first montage as the probable accomplice to the main suspect, Kyle Schott. CP 129-131. *See also* CP 456 (identifying Colin Davis as the man in the selected Photo No. 2); CP 448, 461 (naming Schott as the main suspect). Mr. Reid has asserted that Pullman police falsely stated that they did not obtain the Colin Davis photo until September 14, 2007, one day after the victim's lineup identifications. CP 142.

The Pullman Police Department obtained photos for the lineup from the state Department of Licensing ("Licensing" or "DOL"). CP 153. Photos are provided to police by email. CP 135. In order to support a Personal Restraint Petition (PRP) alleging that Pullman police obtained the Davis photo on September 13, 2007 and covered up that timing in violation of his rights, Mr. Reid made a PRA request for the emails used to obtain the Licensing photos. CP 16, 106-07.

B. Mr. Reid Sought to Find the Emails Or Establish That They Were Prematurely Destroyed In Violation of his Rights to Challenge His Conviction.

On July 16, 2012, Mr. Reid sent to the Pullman Police Department the following request related to the Licensing photos:

Pursuant to the Washington Public Records Act and other state laws, I am requesting copies of the following records/documents:

- 1) In response to my request for all records in case 07-P07290, you sent me DOL photos on single pages that were bates numbered [Schott 00571, Davis 00583, Pye 00594, VanHorn 00599, and Peterson 00603]. Please provide me with copies of records validating how and when these photos were obtained from the DOL including emails.
- 2) In the event that records requested in paragraph 1) above have been destroyed, please provide the retention schedule that authorized such destruction.
- 3) In the event that records requested in paragraph 1) above are not kept in the file for cases 07-P07290, 07-P07292, 07-P07299, or 07-P07496, and are kept in some other case file, I still need the records.

CP 16. Thus, Mr. Reid sought to confirm the date when police received the lineup photos and, also important to his PRP, determine if the City unlawfully destroyed evidence of the photo receipt date even though that date could help him challenge his conviction. *Id.* The applicable retention schedule would show how long the City needed to keep the emails at issue, enabling Mr. Reid to assess the lawfulness of any destruction. CP 191-192.

The City received the records request on July 23, 2012. CP 18.¹ On July 31, 2012, police records specialist Carey Murphy sent a letter asking

¹ Two days later, the records specialist wrote to Mr. Reid that “our Records Department will need up to an additional ninety (90) days in order to locate and

Mr. Reid to clarify his records request. CP 21. Regarding Mr. Reid's request to provide "the retention schedule that authorized...destruction" of the requested emails, Ms. Murphy wrote, "I am unable to determine the identifiable public record based on this request." *Id.* The letter did not pose a specific question or indicate precisely what was believed to be unclear. CP 21-22.

Mr. Reid promptly responded to the clarification request as follows:

I need copies of all the emails sent to and from the Department of Licensing that validate exactly when PPD officers obtained DOL photos of Schott, Davis, Pye, VanHorn, and Peterson....Also, please provide me with the metadata that is pertinent to each of the emails requested above...

[P]lease provide me with a copy of the retention schedules pertinent to the emails and metadata requested above.

CP 24. Finding that sufficient, the City processed the request. CP 31.

C. The City Limited Its Search to Computer Archives and Did Not Search for Hard Copies of the Requested Emails.

On August 13, 2012, the City initiated a search for records by giving Mr. Reid's clarification letter to its information systems manager, Mark Bailey.² Mr. Bailey searched only one possible source of responsive records

assemble" the requested records. *Id.* The City had not begun to search for the records when claiming that it would take up to three months to assemble them. CP 36 (the search began on or after August 13, 2012). There was no explanation as to why a few records required a three-month wait. CP 18.

² CP 36, Bailey Dec., ¶2 (identifying the clarification letter as the basis for the search).

– the City’s computer archives. CP 36 (Bailey Dec., ¶3) (“to find the emails and metadata...I conducted several searches of Pullman’s...message archiver”). Based on that limited search, which “did not pull up any responsive emails or metadata,” Mr. Bailey concluded that the requested emails “most likely” were destroyed at some point before the City installed a message archiver in June 2009. CP 37. He stated that no emails were destroyed after June 2009. *Id.*, CP 433.

There is no evidence that any City employee ever looked for paper copies of the requested emails, even though Mr. Reid’s original request specifically suggested looking at police investigative files. CP 16. No paper search was conducted although the Pullman Police Department had retained paper copies of other emails related to Mr. Reid’s case. CP 493. In fact, Mr. Reid’s file included a printout of a September 17, 2007 email which Pullman police used to obtain a photo of Mr. Reid from a Texas agency. CP 514. That is the same kind of record sought by Mr. Reid regarding other suspects in the case. CP 16. There is no evidence that the City investigated the possibility that Pullman police handled similar emails in the same way and retained paper copies of the emails requested by Mr. Reid.

D. The City Told Mr. Reid There Were No Responsive Emails and Produced Two Retention Schedules Unrelated to His Request.

On August 15, 2012, Ms. Murphy wrote to Mr. Reid that the City had searched for emails and metadata and “there are no records responsive to your request.” CP 26. She offered to produce a CD with two records retention schedules, one for local government and one for law enforcement, upon receiving a \$5 fee. *Id.* In a letter dated August 22, 2012, Mr. Reid confirmed that he would pay for the CD and provided his mother’s mailing address. CP 29. He also made a new request for information, stating, “please identify which specific records series the emails fall under in 2007.” *Id.* (emphasis in original). That request was separate from the July records request which was already processed. *Id.*

On September 13, 2012, Ms. Murphy sent a letter to Mr. Reid stating, “In response to your public records request dated 07-16-2012 and based on the clarification letter dated 08-07-2012,” the City had sent two retention schedules to his mother’s address. CP 31. She wrote that the July 12, 2012 request had been fully addressed and “I will consider this public records request closed.” *Id.* As for the new request in Mr. Reid’s August 22, 2012 letter, she advised him to contact Mr. Bailey directly. *Id.*

The local government (“common records” or CORE) retention schedule produced to Mr. Reid did not take effect until January 1, 2012.

CP 627. Similarly, the Law Enforcement Records Retention Schedule produced to Mr. Reid was not adopted until July 2010. CP 54. Thus, neither schedule produced to Mr. Reid could have authorized destruction of the emails at issue during the relevant period before June 2009.

In a September 27, 2012 letter to Mr. Reid, Pullman's attorney asserted that retention schedules have undergone multiple revisions since 2007, that local governments "are required to use the current version of all Records Retention Schedules immediately upon their adoption by the State Archives Office," and that "obsolete versions are destroyed." CP 49. Therefore, the attorney said, "the records [retention schedules] provided to you by Ms. Murphy were the current versions." *Id.* The attorney, Laura McAloon, did not say that destruction of old retention schedules was required. *Id.*³ Nor did Ms. McAloon claim that the older schedules relevant to Mr. Reid's request had in fact been destroyed. CP 49.

E. The City Did Not Search for the Requested Retention Schedules and Instead Referred Mr. Reid To Another Agency.

According to Mr. Bailey, destruction of the emails at issue would have taken place sometime between September 2007, when the emails were created, and June 2009, when the City stopped deleting emails. CP 37, 44.

³ In fact, the 2005 local records retention schedule advised agencies that they may retain records longer than required. CP 197 (2005 schedule).

However, there is no evidence that the City ever tried searching for the retention schedules that were in effect during the relevant period. None of the 11 declarations offered by the City described such a search. CP 10-61, 62-96, 203-230, 247-249, 382-479, 553-638, 757-786.

Mr. Bailey is the only City employee identified as having searched for old records in response to Mr. Reid's request. CP 99, 543. The "searches exhibit" attached to Mr. Bailey's declaration shows "Email" as the only type of record sought. CP 44. In a deposition, Mr. Bailey described the search as involving only the requested Licensing mails, not retention schedules related to those emails. CP 610 (transcript, p. 27, lines 16-20) (the search was entirely within the "email archiving system").

Ms. Murphy, the records officer, did not claim to have searched for retention schedules other than the currently effective ones which she produced to Mr. Reid. CP 11, 26. Instead of searching for older schedules pertinent to Mr. Reid's request, the City merely referred him to a different agency. CP 49 (McAloon letter) ("I would refer you to the State Archives Office if you are seeking a copy of the schedules that were in effect in 2007").

Based on that referral Mr. Reid's mother contacted the State Archives Office about retention of the emails in question, and was advised

of Law Enforcement Records Retention Schedule LE2010-063, which says that files assembled by police in investigating sex crimes must not be destroyed. CP 126 (Reid Dec., ¶12); CP 158. Rather, the investigative records must be retained for 5 years after conclusion of the investigation and until exhaustion of the appeals process, and then transferred to the Washington Association of Sheriffs and Police Chiefs. *Id.* Destroying the 2007 emails before June 2009 would violate that policy. *Id.* The state, not the City, provided that information, which was relevant to Mr. Reid's PRP.

F. Discovery in This Case Identified Pertinent Retention Schedules and Practices.

In January 2013, Mr. Reid (acting pro se) filed a PRA suit in Whitman County Superior Court alleging that the City of Pullman unlawfully withheld records and failed to properly respond to his July 16, 2012 records request. CP 1-5. The City initially moved for summary judgment on February 15, 2013, but that motion was delayed while the parties wrangled over discovery. CP 97, 105, 359, 518-520.

In July 2013, still acting pro se, Mr. Reid deposed support services manager Penni Reavis, who has handled retention and release of Pullman police records since 1998. CP 683. Mr. Reid asked the records manager if she agreed with an attorney's statement that Law Enforcement Record Retention Schedule Item No. 8.2.5 applied to the Licensing emails at issue.

CP 694. Ms. Reavis initially testified, "I would say no," then said Item 8.2.5 could apply "under some circumstances." CP 695, lines 1 and 9. Asked to specify *which* circumstances would make Item 8.2.5 applicable, Ms. Reavis said:

The retention schedule is never applied to a file while it's being investigated. The officer is gathering information, looking for elements of a crime if one exists....So the file itself isn't subject to the retention schedule until that officer feels his investigation is complete and it comes to records. Even while it's still being reviewed by the prosecutor and those – those areas of law enforcement, the retention schedule is not applied until the case is concluded and sitting on my shelf.

CP 696, lines 13-25. Thus, if the emails used to obtain the Davis photo had been printed out and placed in a file concerning Mr. Davis, Mr. Schott or Mr. Reid, they would have remained in that file at least until the investigator sent the file to Ms. Reavis for a retention review. Even then, according to Ms. Reavis, the file probably would remain intact for at least six years.

...[O]ur records come up for review every six years, and we would review those and see where they fall in line with the...retention schedule.... Every year we pick an old case, and we...make sure that it is ready to be destroyed, or if it needs to be saved, if it needs to go to the archives, if it has historical value, but those cases are typically seven years or older.

CP 684, lines 7-10 and 19-23.

Ms. Reavis said that Item 8.2.5 was only “one of many” retention series that could have been produced in response to Mr. Reid’s records request for a schedule authorizing destruction of the 2007 Licensing emails. CP 697. When shown the June 2001 “Local Government Agency of Washington State Records Management Guidelines,” and asked to discuss “each page that she would apply” to the 2007 emails at issue, Ms. Reavis pointed to the email-related guidelines. CP 699-706. Similarly, when shown the 2001 “Law Enforcement Agencies of Washington State Records Management Guidelines and General Records Retention Schedules,” Ms. Reavis identified a policy referencing email “transmittals” as applicable to the Licensing emails at issue. CP 710 (the policy); CP 713 (transcript lines 23-25). That policy, Item L-54, says:

Individual E-mail messages may be public records with legally mandated retention requirements, or may be information with no retention value. E-mail messages are public records when they are created or received in the transaction of public business and retained as evidence of official policies, actions, decisions or transactions. Such messages must be identified, filed and retained just like records in other formats.

CP 710. The policy listed a dozen types of messages “which are usually public records,” and seven other types which usually have no retention value including “Transmittals (Letters/memos).” *Id.* “Letters of

transmittal” are those “which do not add any information to the transmitted materials.” CP 712.

Ms. Reavis said the transmittal policy would have applied to the destroyed Licensing emails at issue. CP 715, lines 10-20. When Mr. Reid asked if the policy of not retaining transmittals was in effect on September 13, 2007, she said, “That’s – that is what we currently have, so I’m going to say yes.” *Id.*, lines 8-9.

The City never produced the 2001 retention schedules in response to Mr. Reid’s records request despite the City statements that they would have applied to the September 2007 emails in question. CP 715, lines 6-9 (Reavis); CP 704, lines 4-11 and 20-21 (attorney Theresa Keyes) (stating that the 2001 local government records guidelines were effective in 2007). Mr. Reid asked Ms. Reavis why the City failed to produce to him, in response to his July 2012 records request, the 2001 retention schedules which she identified as responsive to his request. CP 723. The City’s attorney, Theresa Keyes, interjected:

Mr. Reid, you know that there’s a primary record holder, there’s secondary record holders, and you made your subpoena to the [state] archives. And I think somebody directed you to the archives. So you received everything from the archives.

CP 723, lines 18-22. Ms. Keyes prevented the CR 30(b)(6) deponent, Ms. Reavis, from answering the question herself. CP 723-724.⁴

G. The City Incorrectly Asserted That A Current Retention Schedule “Mandates” Destruction of Former Schedules.

After the Reavis deposition, the City moved for summary judgment a second time. CP 541. In a declaration attached to the motion, the City’s attorney asserted:

Series 5.6 of the Local Government Common Records Retention Schedule, Version 2.2 (December 2011) (referred to herein as the “CORE”), concerns the retention and destruction of Retention Schedules. Exhibit F. According to the CORE, when revisions to Retention Schedules are issued, “[a]ll previously approved disposition authorities....are revoked” and superceded. Ex. F at p. 1 of 150. When superceded, Retention Schedules are no longer needed for agency business, and *the CORE mandates that the superceded Retention Schedules are to be destroyed.* Ex. F. at p. 121 of 150.

CP 579-580 (Keyes Decl. ¶8) (italics added).

In fact, the CORE merely *permits* an agency to destroy copies of outdated retention schedules once they are no longer needed. CP 628. Nowhere does the CORE schedule say that destruction is *required.* *Id.*

⁴ Ms. Keyes repeatedly instructed the witness not to answer Mr. Reid’s questions. CP 722. At one point, after instructing Ms. Reavis not to answer what retention schedule series applies to Mr. Reid’s criminal file, the attorney told Mr. Reid, “it’s your job to figure out how this [retention] works.” CP 726.

To be precise, the schedule states that outdated local retention schedules are subject to the following “retention and disposition action”: “**Retain** until no longer needed for agency business *then Destroy*,” and also states, “Washington State Archives strongly recommends the disposition of public records at the end of their minimum retention period for the efficient and effective management of local resources.” CP 627-628 (emphasis in original). Thus, there is merely a *recommendation* to take the authorized “disposition action” once a schedule is no longer needed. *Id.* The City presented no evidence establishing when any particular retention schedule was “no longer needed” such that it could be destroyed.

H. The Trial Court Found No Duty to Search for The Responsive Retention Schedules.

In granting summary judgment to the City, the trial court found that the requested emails were destroyed sometime before July 2009 and that the City sufficiently explained why it did not produce retention schedules applicable to those emails. CP 800. The Memorandum Decision said:

Retention schedules are frequently revised and local governments are required to use current versions immediately upon their adoption by the State Archives Office. Pullman destroys obsolete versions to avoid inadvertent references to outdated schedules and believes that such destruction is required by the retention schedules and the State Archives Office.

Id. The Decision also said that Mr. Reid offered “nothing more than bare assertions” regarding the inadequacy of the City’s search. CP 800-801.

Mr. Reid moved for reconsideration, noting that it was the City’s burden to prove an adequate search and there was no evidence of *any* search for retention schedules in effect before June 2009. CP 802-808. In denying reconsideration, the trial court said:

Regardless of whether Defendant’s destruction of retention schedules was legally proper and regardless of whether Defendant was legally incorrect in the ‘belief’ that such destruction was mandated, there is no genuine issue of fact that Defendant did not possess retention schedules at the time Plaintiff made his request other than those schedules that were provided.

Furthermore...the sufficiency of an agency’s search is viewed under a reasonableness standard viewed in relationship to what is reasonable under the facts of the case. [Citation omitted]. This court must conclude as a matter of law that it is not reasonable for an agency to search for records it believes have been destroyed pursuant to a governmental requirement.

CP 826. In fact, nobody ever testified that the City “did not possess” outdated retention schedules as of July 2012, nor could anyone make such a statement in the absence of a search. The only witness to address the issue was Ms. Reavis, who testified in July 2013 that “we currently have” the 2001 law enforcement schedule which would have authorized destruction of the emails. CP 715.

IV. ARGUMENT

A. Standard of Review.

Agency actions under the PRA are subject to de novo review. RCW 42.56.550(3). On review, appellate courts take into account the PRA policy that open examination of public records is in the public interest, even if examination may cause inconvenience or embarrassment. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011), citing RCW 42.56.550(3). Interpretations of law are similarly reviewed de novo. *Neighborhood Alliance* at 715, citing *State v. Kintz*, 169 Wn.2d 537, 545, 238 P.3d 470 (2010).

Grants of summary judgment are reviewed de novo. *Neighborhood Alliance* at 715. The reviewing court engages in the same inquiry as the trial court. *Id.*, citing *Lallas v. Skagit County*, 167 Wn.2d 861, 864, 225 P.3d 910 (2009).

B. The PRA is Strongly Worded Mandate Which Must Be Construed Liberally in Favor of Disclosure.

The PRA is “a strongly worded mandate for broad disclosure of public records.” *Burt v. Dep't of Corr.*, 168 Wn.2d 828, 832, 231 P.3d 191 (2010); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). Passed by popular initiative, it stands for the proposition that “full access to information concerning the conduct of government on every level must be

assured as a fundamental and necessary precondition to the sound governance of a free society.” *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592, 607 (1994) (“PAWS”); RCW 42.17A.001(11). The PRA says:

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. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

RCW 42.56.030.

C. The City Did Not Meet Its Burden of Proving It Promptly Produced All Requested Public Records.

The burden is on the City of Pullman “to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure.” RCW 42.56.550(1). That burden was not met here, where the City never produced responsive retention schedules such as the 2001 law enforcement schedule, and never claimed that an exemption applied.

Under RCW 42.56.070(1), an agency must make a public record “promptly” available upon request “unless the record falls within the

specific exemptions” of the PRA or another statute. *See also* RCW 42.56.080 (“agencies shall, upon request for identifiable public records, make them promptly available”). More specifically, an agency must, within five business days of receiving a request, produce or deny the requested records or provide “a reasonable estimate” of the time required to respond. RCW 42.56.520. Delay is permissible only “to clarify the intent of the request, locate and assemble the information requested, notify third persons or agencies affected by the request, or determine whether any of the information requested is exempt.” *Id.* A prisoner has the same right to a prompt response as anyone else. RCW 42.56.080 (“Agencies shall not distinguish among persons requesting records”).

Here, Ms. Reavis’s testimony established that the 2001 law enforcement schedule applied to the destroyed emails at issue, and that the City “currently” possessed it as of July 2013. Because Mr. Reid asked for the retention schedule authorizing destruction of the 2007 Licensing emails, and because the City’s own witness identified the 2001 schedule’s transmittal policy as authorization to destroy the emails, the City violated by the PRA by failing to produce the schedule promptly in response to Mr. Reid’s July 2012 records request. RCW 42.56.070(1); RCW 42.56.080. A requester should not have to file a PRA suit and engage in a discovery

battle in order to learn about the existence of an agency's records. At a minimum, Ms. Reavis's testimony created a genuine fact issue about the existence of a responsive record withheld from Mr. Reid, making summary judgment improper. CR 56(c) (judgment shall be rendered only if the declarations on file show no genuine issue as to any material fact).

Moreover, the City had the burden of proving that its failure to produce the 2001 retention schedule was justified. RCW 42.56.550(1). The City submitted no testimony or documentary evidence establishing that the City did *not* possess the 2001 schedule as of July 2012 or that the 2001 schedule was *not* responsive to Mr. Reid's request. In the absence of such proof, the City failed to meet its burden under RCW 42.56.550(1).

The only reason offered for withholding the 2001 retention schedules was that the City is a "secondary record holder" and Mr. Reid had received the records from the State Archives Office. But an agency is not relieved of liability for a PRA violation simply because the requester eventually obtained withheld records from another source. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 102-04, 117 P.3d 1117 (2005) (lawfulness of an agency's response is determined based on the time records are requested, and "subsequent events do not affect the wrongfulness of the agency's initial action to withhold the records").

The PRA does not permit shirking disclosure duties by referring a requester to another agency, as happened here when the City's attorney told Mr. Reid to ask the State Archives Office for retention schedules in effect as of 2007. *Id.* Rather, agencies must provide the "fullest assistance" and "the most timely possible action" on PRA requests. RCW 42.56.100. By forcing Mr. Reid to file suit and compel discovery in order to learn that the City had a relevant non-exempt record, the City violated RCW 42.56.100 as well as the mandate for prompt disclosure stated in RCW 42.56.070(1), RCW 42.56.080 and RCW 42.56.520.

"When an agency fails to respond as provided" in RCW 42.56.520, "it violates the Act and the individual requesting the public record is entitled to a statutory penalty." *Smith v. Okanogan County*, 100 Wn. 7, 12, 994 P.2d 857 (Div. 3, 2000) (italics added), citing *Doe I v. Washington State Patrol*, 80 Wn.App. 296, 304, 908 P.2d 914 (1996). "For practical purposes, the law treats a failure to properly respond as a denial." *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 750 (2007). In sum, because the City did not prove compliance with Mr. Reid's request for the retention schedule authorizing the City's admitted destruction of emails in his case, this Court should reverse the summary judgment order and hold that the City violated the PRA.

D. The City Failed To Conduct A Reasonable Search.

In *Neighborhood Alliance*, 172 Wn.2d at 720, the Washington Supreme Court held that agencies must conduct a search that is “reasonably calculated to uncover all relevant documents.” Borrowing from case law implementing the federal Freedom of Information Act, the Court said, “What will be considered reasonable will depend on the facts of each case.” *Id.* “When examining the circumstances of a case, then, the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found.” *Id.*, citing *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (1990).

Importantly, “agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered.” *Neighborhood Alliance* at 720, citing *Valencia–Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (1999). “The search should not be limited to one or more places if there are additional sources for the information requested.” *Id.* “The agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested.” *Id.*, citing *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68

(1990) (emphasis added). The City of Pullman “bears the burden, beyond material doubt, of showing its search was adequate.” *Id.* at 721.

Here, the City offered no proof of conducting any search at all for the older retention schedules pertaining to the destroyed emails. The City also failed to prove that it searched beyond a single location - computer archives - for the emails in question. Accordingly, the *Neighborhood Alliance* standard was not met.

1. A non-existent search cannot be reasonable.

Here, the City admittedly searched “only one record system” – computer archives – without including retention schedules in the search terms. There is simply no evidence that the City made any effort to find retention schedules other than the produced current schedules which were not pertinent to Mr. Reid’s request. There is no evidence that the City asked Ms. Reavis or other records managers to check their computers, hard drives or file cabinets for retention schedules effective during the relevant period from September 2007 to June 2009. The City simply assumed that all copies of all outdated schedules were destroyed without attempting to verify such destruction. In short, there was no search.

The trial court improperly shifted the burden to Mr. Reid to prove that the search was inadequate, stating that he offered “nothing more than

bare assertions.” This was factually wrong because Mr. Reid: a) pointed to undisputed evidence that Mr. Bailey conducted the only search of archived records; b) pointed to undisputed evidence that Mr. Bailey’s search was limited to “emails” and not retention schedules; c) pointed out that Ms. Murphy, the only witness who addressed searching for retention schedules, did not claim to have searched for schedules other than the inapplicable current ones which she produced; and d) pointed to evidence that the current schedule merely recommended and did not expressly require destruction of outdated schedules. These were not bare assertions. Each assertion was supported by specific testimony or documents in the record.

But even if Mr. Reid had relied on bare assertions, it would not matter because he did not have the burden of proof. RCW 42.56.550(1). The City “bears the burden, beyond material doubt, of showing its search was adequate.” *Neighborhood Alliance*, 172 Wn.2d at 721. The only way to establish “beyond material doubt” that the requested retention schedules did not exist would be to search for them or else verify that some person at some point actually purged every record system of every copy of the schedules. No such showing was made here.

To prove that a search was adequate, an agency should submit detailed affidavits which “include the search terms and the type of search

performed,” and “establish that all places likely to contain responsive materials were searched.” *Id.* at 721. Here, places likely to contain older retention schedules included the file cabinets and computers of the City’s records managers. Yet those were not checked. Even if records managers threw away all paper copies and deleted all electronic copies of the applicable schedules, which was not proven, it is reasonably likely that the schedules still could be found on the City’s hard drives or in email archives.

In *Neighborhood Alliance*, the Supreme Court held that Spokane County’s search was inadequate in part because the County produced no evidence that an old computer under its control was “wiped of all data” responsive to a records request. 172 Wn.2d at 723. Similarly here, the City failed to prove that the requested retention schedules were wiped off all computers which might still contain obsolete records. The City submitted four declarations in support of its first summary judgment motion and two declarations in support of its second summary judgment motion, none of which stated that any particular retention schedule was known to be actually wiped out of all existence. Just as the search in *Neighborhood Alliance* was inadequate because an old computer was not checked, here the City’s search was not reasonable because nobody examined hard drives or archives likely to contain obsolete records. *Neighborhood Alliance*, 172 Wn.2d at 723.

Instead of proving that it searched all probable locations of older schedules, the City offered a mere presumption that a search would have been fruitless. By accepting a presumption in lieu of an actual search, the trial court contradicted *Neighborhood Alliance*. A search cannot be adequate if it never took place.

The trial court essentially created an exception to the search requirement for all records which are old enough to be lawfully destroyed. Under the trial court's reasoning, any time a requester asks for a record which *could have* been destroyed pursuant to a retention schedule, the agency may avoid searching for or producing the record even if it still exists. The agency can simply say "we believe that's gone now." If such reasoning is upheld, an enormous number of important older records may be placed out of the public's reach, contrary to the legislative intent to maximize disclosure. RCW 42.56.030. If the trial court had liberally construed the PRA as required, it would have recognized that an agency may indeed retain records longer than necessary and that at least a minimal inquiry is required to protect the public's right to open and accountable government. *Id.* In sum, the City failed to prove beyond material doubt that it possessed no retention schedule applicable to the destroyed Licensing emails, and therefore the summary judgment should be reversed.

2. The City also failed to prove an adequate search for emails.

When first requesting the September 2007 emails used to obtain Licensing photos of Mr. Davis and other suspects in his criminal case, Mr. Reid specifically asked the City to check criminal files other than his own. Later, he submitted evidence that Pullman police printed out and retained a paper copy of the same kind of record he was requesting. He showed that his own file contained paper copies of numerous emails printed out by investigators, including an email used to obtain a photo of Mr. Reid. Based on that evidence, it was reasonably likely that investigators had retained paper copies of similar emails used to obtain photos of the other suspects.

Despite that evidence and the obvious possibility that investigators may keep printouts in their files, there is no evidence that the City looked at paper files. Nor is there evidence that the City even bothered to ask investigators if they printed out the emails at issue. This was unreasonable because the City was “required to make more than a perfunctory search and to follow obvious leads as they are uncovered.” *Neighborhood Alliance* at 720. The City could not limit the search to one place when there was an additional source identified. *Id.*

The computer-only search was especially unreasonable in light of Ms. Reavis' testimony that, in order to determine which records were responsive to Mr. Reid's request, the City needed to determine when the investigating officer closed the cases in which the Licensing photos were gathered. She testified that case files are reviewed for destruction only after investigations are closed, and usually only after seven years. It was unreasonable for the City to limit its search to email archives when the Licensing photos concerned numerous suspects, all of whom likely had criminal files separate from Mr. Reid's, and when less than seven years had passed since the investigations were initiated.

In sum, based on the undisputed facts that the search for requested emails was limited to computer archives even though similar emails were found in printed form, the City's search was not reasonable. The City failed to "establish that all places likely to contain responsive materials were searched." *Neighborhood Alliance*, 172 Wn.2d at 721. Therefore, this Court should reverse summary judgment and hold that the City violated the PRA. *Id.*

E. The City Violated Discovery Rules.

Another reason for reversing summary judgment is that the City improperly thwarted discovery by Mr. Reid. Civil rules of discovery

apply to PRA actions, allowing the same broad discovery as in other civil suits. *Neighborhood Alliance*, 172 Wn.2d at 716. For example, PRA plaintiffs are entitled to discover “*why* documents were withheld, destroyed, or even lost.” *Id.* at 718.

In *Neighborhood Alliance*, the Washington Supreme Court held that it was improper for Spokane County to engage in the same kind of conduct which occurred in this case, stating:

The County additionally objected to and refused to answer deposition questions as being outside the scope of a PRA action, relying on its own interpretations of the PRA statutes and case law. A party must answer deposition questions unless instructed not to because of privilege or discovery abuse. CR 30(d), (h). As in any other civil suit, the County should have...allowed Knutsen to answer the deposition questions or else sought a protective order.

Id. Finding the record “incomplete” due to discovery violations, the Court remanded the case to the trial court for additional discovery. *Id.* at 719. Here, the City’s attorney repeatedly instructed Ms. Reavis not to answer questions aimed at non-privileged information. Due to this obstruction, summary judgment should be reversed. *Neighborhood Alliance*, 172 Wn.2d at 718-19.

F. Mr. Reid Should Be Awarded Attorney Fees.

Under the PRA, any person who “prevails against an agency” in seeking the right to inspect or copy records “shall be awarded all costs,

including reasonable attorney fees, incurred in connection with such legal action.” RCW 42.56.550(4). This applies to fees incurred on appeal. *Resident Action Council v. Seattle Housing Authority*, -- Wn.2d --, 327 P.3d 600, 613 (2013).

An inadequate search has the same result as an unlawful denial of records and should be treated similarly in awarding costs, reasonable attorney fees and penalties under RCW 42.56.550(4). *Neighborhood Alliance*, 172 Wn.2d at 721. As the Washington Supreme Court explained, “An inadequate search is a violation of the PRA because it precludes an adequate response.” *Id.* at 724. Therefore, a prevailing party in an inadequate search case such as this one “is at least entitled to costs and reasonable attorney fees.” *Id.* at 724-725. Because the City of Pullman conducted an inadequate search for records requested by Mr. Reid, this Court should hold that he is entitled to an award of fees for this appeal as well as for the trial proceedings. In addition, the trial court should award penalties for each day the City withheld the responsive 2001 law enforcement retention schedule in bad faith. RCW 42.56.565(1).

V. CONCLUSION

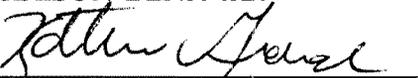
For the foregoing reasons, this Court should reverse the order granting summary judgment to the City of Pullman and hold that the City

failed to conduct a reasonable search as required by *Neighborhood Alliance* and unlawfully withheld records in violation of the PRA. This Court should hold that a new search is required and that if additional responsive records are located, Mr. Reid will be entitled to an additional award of attorney fees and an opportunity to seek penalties under RCW 42.56.550(4) and RCW 42.56.565(1). Finally, this Court should hold that Mr. Reid is entitled to an award of costs and reasonable attorney fees for this appeal and the trial proceedings reviewed here, and should remand the case to the trial court to determine the amount of fees and to consider an award of discretionary penalties based on withholding the 2001 law enforcement schedule.

Dated this 11th day of September, 2014.

RESPECTFULLY SUBMITTED,

HARRISON-BENIS LLP

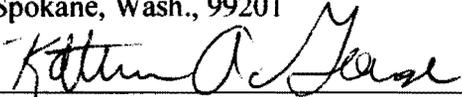
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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on September 11, 2014, I caused delivery of a copy of the foregoing Brief of Appellant by U.S. mail and e-mail to the following:

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