

**FILED**

MAR 09 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 323889

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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CHRISTOPHER J. REID,

Appellant,

v.

CITY OF PULLMAN,

Respondent.

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BRIEF OF RESPONDENT

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## INTRODUCTION

Appellant Christopher Reid (“Reid”) was convicted by a jury of second-degree rape and first-degree burglary in October 2008. This Court affirmed Reid’s conviction on direct appeal. *State v. Reid*, Case No. 27724-1-III, 2010 WL 1544392 (Div. III, April 20, 2010). The Washington Supreme Court denied discretionary review. *State v. Reid*, 169 Wn.2d 1019 (2010). Reid then filed a Personal Restraint Petition (“PRP”) which is now pending in this Court.

This is the second of two lawsuits in which Reid has accused the City of Pullman (“City”) and related entities of “silently withholding” public records that Reid believes will substantiate the claims raised in his PRP. In the first of these cases, (“*Reid I*”) Reid filed a Public Records Act (“PRA”) request for “all records and documents” relating to the Pullman Police Department’s (“PPD”) investigation of the rape. Convinced that the City had conspired to conceal the existence of exculpatory records, Reid sued the City for violating the PRA. Both the trial court and this Court rejected Reid’s claims concluding that the City had produced to Reid each and every document in the PPD’s investigative file. *Reid v. Pullman Police Dep’t*, Case No. 31039-6-III, 179 Wn. App. 1017 (Div. III 2014) (unpublished). The investigative file included printed emails put in the file related to Reid’s rape investigation for which he was convicted.

The instant case (“*Reid II*”) involves a PRA request for electronic emails again relating to his rape investigation. Reid asked the City to

produce “emails and metadata” that would reflect the date on which the PPD received driver’s license photos used in a photo array from the Department of Licensing (“DOL”). CP 558. Anticipating that those transmittal emails may no longer exist at the time of the request, Reid asked the City to identify and produce the retention schedules that “authorized such destruction.” CP 558.

The City searched its email archives for the requested transmittal emails from 2007, and attendant metadata, from the DOL with attached photos. No responsive documents were located. CP 568. The electronic search was conducted on the entire network and included search terms for suspects Schott, Davis, Pye, VanHorn, and Peterson. The City advised Reid there were no responsive emails or metadata located. The City claimed no exemptions. Reid does not appeal any issues related to the City’s search for electronic emails or metadata related to the DOL photos. In regards to the retention schedules, Reid specifically clarified that he wanted retention schedules that were “pertinent to” the requested records (*i.e.*, DOL transmittal emails and metadata), which no longer existed at the time of the request. The City produced copies of the current Local Government Common Records Retention Schedule (“CORE”) and Law Enforcement Records Retention Schedule (“LERRS”). CP 568.

When Reid subsequently asked the City to identify, advise, and produce the exact “record series” that the non-existent emails fell under in September 2007, and which were in effect at the time of the rape investigation, the City responded that this request was not for an

identifiable public record, but instead a request for information and advice. Regardless, the City did tell Reid that those retention schedules had been superseded by the versions previously produced to him, and that the City had destroyed the outdated versions pursuant to the State Archives Office's directive. CP 48-49. In an effort to be helpful, however, the City advised Reid that he could obtain copies of the outdated schedules directly from the State Archives Office. CP 48-49. Retention schedules themselves are subject to retention schedules. CP 578-638

Reid then filed the instant lawsuit, once again alleging that the City "silently withheld" records in violation of the PRA. The court allowed Reid to take depositions regarding retention schedules and the City's search for the requested "emails and metadata." CP 518-523. Preliminarily, the trial court noted that "because of the narrow scope of the issue presented in this case, it is not likely that further discovery will disclose relevant evidence. Furthermore, since Defendant admits having obtained information relating to the date the Pullman Police Department obtained DOL photographs, Plaintiff's efforts to conduct extensive discovery appear to be aimed more toward burdening and harassing Defendant as opposed to obtaining relevant evidence for the present action." CP 625. The court subsequently reviewed all of the deposition transcripts. CP 525. No discovery orders have been appealed.

On February 5, 2014, the trial court awarded summary judgment to the City. CP 798-801. The trial court prefaced its ruling by noting that Reid was "attemp[ing] to complicate a very simple case. He does this by

setting forth allegations not supported by evidence and by arguing facts that are not relevant to issues presented in a public records violation action.” CP 799. The court then listed several “undisputed and dispositive” facts:

The emails and metadata that were the subject of Reid’s public records request were destroyed sometime before July of 2009—more than three years before Reid’s request.

\* \* \*

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.

CP 800. From these and other undisputed facts, the trial court ruled that the City was entitled to judgment as a matter of law:

Pullman has submitted several detailed, sworn declarations explaining the reasonableness of its search and the reason why the requested records were not in existence on the date of Reid’s request. Reid has countered this evidence with nothing more than bare allegations and speculative claims. This is insufficient to raise an issue of material fact in a summary judgment proceeding or to overcome Pullman’s factual evidence which is to be accorded a presumption of good faith. *Forbes v. City of Gold Bar*, 171 Wn.App. 857 (2012).

CP 800-01.

The trial court's ruling was correct and should be affirmed. The issues now on appeal by Reid do not pertain to the searches for electronic emails or metadata, but instead asks this Court to find a PRA violation for (1) failing to search and produce *printed* emails in this case (already produced in *Reid I*, not within the scope of *Reid II*, and being raised essentially for the first time on appeal by legal counsel); and (2) producing the current retention schedules used by the City at the time of Reid's request. This Court should reject Reid's continued efforts to obfuscate the issues. The record shows that the City did not violate the PRA. The PRA does not authorize "indiscriminate sifting through an agency's files by citizens searching for records that have been demonstrated not to exist." *Sperr v. City of Spokane*, 123 Wn. App. 132, 137 (2004). This Court should affirm.

### **ISSUES ON APPEAL**

1. Whether Reid should be permitted to constructively amend the scope of his PRA request to include *printed* copies of emails given that Reid specifically requested "emails and metadata"—records he knew were maintained in electronic form—and given that the City previously produced to Reid the entire contents of the Pullman Police Department's investigative file—including all emails that had been printed by investigators and placed in the file.
2. Whether Reid forfeited his arguments concerning printed emails by failing to squarely raise those arguments below.
3. Whether Reid's request for retention schedules that "authorized" destruction of the "emails and metadata" he sought qualifies as a request for an "identifiable public record" under RCW 42.56.520 to which the City was required to respond.

4. If Reid's request for retention schedules qualifies as a request for an "identifiable public record," whether the City's production of the retention schedules in effect at the time of Reid's request was reasonable in view of the undisputed evidence that the City was required to destroy outdated versions of the schedules, that it did in fact destroy outdated versions of those schedules, and that it helpfully informed Reid that he could obtain copies of outdated schedules from the State Archives Office.
5. Whether testimony by the City's records retention officer that a portion of the Law Enforcement Records Retention Schedule that *was in effect* in 2012 had also been *in effect* in September 2007 somehow supports Reid's contention that the City "currently" *possesses* an outdated version of the schedule and wrongfully withheld it, or that such testimony creates a question of fact.
6. Whether Reid is entitled to an award of attorney's fees, costs and statutory penalties if this Court remands.
7. Whether Reid should be permitted to raise discovery issues that were not properly appealed.

### **STATEMENT OF THE CASE**

#### **A. Factual Statement**

1. Reid is convicted of second-degree rape, unsuccessfully appeals his conviction, and files a Personal Restraint Petition.

A Whitman County jury convicted Reid of second-degree rape and first-degree burglary in October 2008. This Court upheld Reid's conviction on direct appeal. *State v. Reid*, Case No. 27724-1-III, 2010 WL 1544392 (Div. III, April 20, 2010), attached hereto as Appendix A.<sup>1</sup>

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<sup>1</sup> *State v. Reid* is an unpublished opinion. The City cites this case not as legal authority, but rather to "establish facts in a different case that that are relevant to the current case." *State v. Seek*, 109 Wn. App. 876, 878 n.1 (2002).

The Washington Supreme Court denied Reid's petition for discretionary review. *State v. Reid*, 169 Wn.2d 1019 (2010).

Reid subsequently filed a PRP. CP 106, 125, 137, 139-140. The PRP alleged that the victim of the rape identified a different suspect when shown a photo montage the day after the rape. Opening Brief at 3-4. Reid argued that this alleged identification undermined the victim's identification of Reid as the perpetrator during a later phase of the investigation and again at trial. The case of "mistaken identity" and/or allegations by Reid of a "weak" identification by the victim was an issue already presented by Reid at the time of his criminal trial, and raised here to this Court in Reid's unsuccessful appeal of his rape conviction. *State v. Reid*, 2010 WL 1544392, at \*3, \*5-6. Reid's PRP is pending.

2. Reid files a PRA request in 2011 seeking "all records and documents" relating to the Pullman Police Department's investigation of the rape.

On February 3, 2011, Reid submitted a PRA request for records maintained by the PPD relating to the 2007 rape investigation.<sup>2</sup> CP 83-84 Reid's purpose in requesting these records was to obtain documents that he believed might support the claims raised in his PRP. Initially, Reid asked for "all records and documents" in his own investigative file. His specific request was as follows:

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<sup>2</sup> As will be discussed in further detail below, Reid's 2011 PRA request is not at issue in this appeal, except insofar as it reinforces the comparatively narrow scope of the PRA request that is at issue here.

**All records and documents** including but not limited to:

Police - files, statements, reports, audio recordings and transcriptions [sic]. Digital photos/images [sic] of people, places and objects. Photo line ups and witness [sic] ID's.

Crime lab - files, reports, tests and results.

Medical - tests, summaries, reports and results.

Police - phone records - dates, times and records of all phone calls to and from Pullman Police relating to this case/incidents, esp. 911 call when victim reported incident.

**All other records of this case, No. 07-P07290.**

CP 83-84 (emphasis added) (brackets omitted).

In a subsequent letter dated June 17, 2011, Reid expanded the scope of his request to include documents maintained in the investigative files of other suspects. Specifically, Reid requested:

**Any and all documents** in or relating to cases 07-P07292, 07-P07299 and 07-P07496 including, but not limited to:

- (1) Written contemporaneous notes and/or memorabilia used to create supplemental narratives; . . .
- (4) Photo Line-up instructions and Photo Montages; . . .  
[and]
- (6) **Any other records/documents relating to the above mentioned case numbers.**

CP 86, 322, 324 (emphasis added). Reid also noted that he did not want the PPD to produce duplicate copies of records from his own investigative file referenced in his February 3 letter. CP 86, 322, 324.

The PPD performed a thorough search for the requested records and began producing records to Reid on a rolling basis. In total, the PPD produced over 1,000 pages of documents in eight separate installments. CP 247-358; *Reid v. Pullman Police Dep't*, Case No. 31039-6-III, 179 Wn. App. 1017 (Div. III 2014) (unpublished), attached hereto as Appendix B. This production consisted of the PPD's "entire case file." CP 248; *Reid v. Pullman Police Dep't*, 179 Wn. App. 1017. Included among the City's production were copies of email messages that had been printed by PPD investigators and placed in the investigative file. CP 493, 497-514.

3. Reid unsuccessfully sues the PPD for violating the PRA based upon an alleged "silent withholding" of responsive records; trial court finds Reid received all records and this Court affirms.

In May 2012, Reid sued the PPD for alleged violations of the PRA. Reid's complaint in that case ("*Reid I*"), styled as a "Motion for Order to Show Cause,"<sup>3</sup> accused the PPD of "silently withholding" documents that should have been produced. CP 438-446. The PPD responded by submitting, *inter alia*, a declaration by the Records Specialist who handled the request averring that she had produced to Reid a copy of the entire

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<sup>3</sup> Reid refers to the complaint in *Reid I* as a "Show Cause" throughout the record in these proceedings. *See, e.g.*, CP 108, 110.

investigation file. *Reid v. Pullman Police Dep't*, 179 Wn. App. 1017 at \*2. This investigation file included, among other things emails printed for the file, as well as files for other suspects related to the rape investigation. CP 493, 497-514; *see also* Opening Brief at 3, 7, 28; CP 86, 322, 324; CP 24, 558, 566. The trial court dismissed Reid's claims on summary judgment, finding that the PPD had produced each and every record in its possession at the time it received the request. This Court affirmed the judgment on appeal:

We have reviewed the entire record and conclude, as did the trial court, that [the PPD's] explanations with respect to the absence of records are credible.

\* \* \*

Reid believes the police are seeking to shield exculpatory information, but the background and history of the case does not confirm this contention. The volume of records provided by Pullman suggests that the city lacked desire to exclude any documents in its production.

\* \* \*

[The PPD] submitted seven detailed, sworn statements explaining the reasonableness of its search and attached over 1,000 pages of records demonstrating that it produced Christopher Reid's entire criminal case file.

\* \* \*

After conducting our de novo review of the record, we hold that [the PPD] did not violate either the PRA or the [Preservation and Destruction of Public Records Act].

*Reid v. Pullman Police Dep't*, 179 Wn. App. 1017 at \*2-4.

4. Reid files a second PRA request for emails and metadata relating to the DOL photos used in the lineup cards, as well as retention schedules pertaining to the requested emails and metadata.

Less than six months after this Court affirmed the judgment in *Reid I*, Reid submitted a second PRA request for records maintained by the PPD. This second request, dated July 16, 2012, states:

1) In response to my request [in *Reid I*] 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, 558 (brackets omitted).

The City timely acknowledged receipt of this request on July 25, 2012, and advised Reid that its Records Department would need up to 90 days to provide a complete response. CP 18, 560. Six days later, the Records Specialist assigned to the request, Carey Murphy, asked Reid to clarify pursuant to RCW 42.56.520 which identifiable public records he was seeking. Ms. Murphy's letter to Reid stated:

Please be advised that, while we wish to fully cooperate in processing your request, [we] must ask for clarification on the following:

1. Paragraph 1: Please clarify your sentence: “Please provide me with copies of records validating how and when these photos were obtained from the DOL including emails.”
2. Paragraph 2: I am unable to determine the identifiable public record based on this request and ask that you clarify.
3. Paragraph 3: This paragraph appears to be related to paragraph 1. Please clarify and provide a description of an identifiable public record.

CP 21-22, 563-564.

Reid responded to the City’s request for clarification on August 7, 2012. Reid explained that he was seeking email messages and associated “metadata” that would reflect the date on which the PPD received the photos used in the lineup cards from the DOL:

1. As for paragraph 1., 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.

1a. Also, please provide me with the metadata that is pertinent to each of the emails requested above in paragraph 1.

2. Regarding paragraph 2., please provide me with a copy of the retention schedules pertinent to the emails and metadata requested above.

I trust that you are now fully capable of understanding which records I’ve requested.

CP 24, 566. Reid did not respond to Ms. Murphy's request for clarification about whether paragraph 3 of his request sought an identifiable public record. CP 24, 566.

5. The City searches and finds no responsive emails or metadata, and produces the current retention schedules.

The City received Reid's response to its request for clarification on August 13, 2012. CP 24, 566. Later that same day, the City's Information Systems Manager, Mark Bailey, performed a search of the City's email archiving system for the requested records. CP 36, 421. The City's archiving system automatically stores a copy of all emails and associated metadata sent or received by City employees (including PPD employees) onto a central Barracuda server. CP 37, 422, 431-32. This is the City's only email archiving system. CP 431-32. It is not possible for an email to be sent or received without being archived on this system. CP 431-32. Even if the sender or recipient of an email deletes the file from his or her personal computer, a copy of the file remains on the Barracuda server. CP 37, 422, 611. As of the date of Mr. Bailey's search, no emails had ever been deleted from the Barracuda server. CP 611, 615.

Mr. Bailey personally installed the Barracuda archiving system in June 2009. CP 37, 422. During the installation, Mr. Bailey performed an "exhaustive" search of the City's entire information systems platform (legacy email server and all individual workstations) for existing email files. CP 37, 422, 611. Mr. Bailey then imported all of those existing files

onto the new Barracuda server. CP 37, 422, 611. Thus, at the time Mr. Bailey performed his search for records responsive to Reid's PRA request, the City's message archiving system was populated with all emails sent or received by a City employee since June 2009, plus every email that existed on the City's legacy email server and individual computers as of June 2009. CP 37, 422, 611-12.

Mr. Bailey searched for emails and associated metadata dated September 10, 2007 to September 20, 2007, inclusive, that contained any one of the following search terms: (1) .wa.gov; (2) Schott; (2) Davis; (3) Pye; (4) VanHorn; (5) Peterson; (6) fraud@dol.wa.gov. CP 44. This search did not produce any responsive emails or metadata. CP 37. Based upon his personal knowledge of the message archiving system and the manner in which it was installed, Mr. Bailey concluded that, to the extent any emails and metadata responsive to Reid's request ever existed, they were deleted from the City's servers prior to June 2009. CP 37.

Ms. Murphy handled Reid's request for retention schedules. CP 11. She determined that the State of Washington's Local Government Common Records Retention Schedule ("CORE") and Law Enforcement Records Retention Schedule ("LERRS") were pertinent to the requested records. CP 11.

Ms. Murphy mailed Reid a letter dated August 15, 2012, stating that no emails or metadata had been located, and that the City would produce copies of the CORE and LERRS retention schedules in electronic

form upon receipt of a \$5.00 copying fee. CP 26-27, 568-69. Specifically

Ms. Murphy's letter states:

- 1) We have done a search 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." Based on your prior reference to cases 07-P07290, 07-P07292, 07-P07299, and 07-P07496 our search covered the time period of 09-13-2007 to 09-19-2007. There are no records responsive to your request.
- 1a) In response to your request listed in your clarification letter for "the metadata that is pertinent to each of the emails requested above in paragraph 1", there are no records responsive to your request.
- 2) In response to paragraph 2 of your clarification letter, I have a CD available with the Local Government Common Records Retention Schedule (CORE) and Law Enforcement Records Retention Schedule available for release. The cost for the CD is \$5.00. . . .
- 3) You did not provide clarification to paragraph 3; however, there are no records responsive to your request. See paragraph 1.

If I can be of any further assistance, please do not hesitate to contact me at [phone number].

CP 27. At Reid's request, the City mailed a CD with the CORE and LERRS retentions schedules to Reid's mother. CP 31, 33, 575.

6. Reid requests a legal interpretation of the CORE and LERRS retention schedules; though under no obligation to do so, the Pullman City Attorney responds in the spirit of cooperation.

On August 22, 2012, after receiving the above response, Reid sent the City a letter which contained the following request: “please identify which specific records series the e-mails fell under in 2007.” CP 29, 571. Ms. Murphy responded as follows on August 13, 2012:

[Y]ou requested that we identify “which specific records series the emails fell under in 2007.” Since the City of Pullman’s email system is maintained by the City of Pullman Information Systems Department, you may wish to make your inquiry to the City of Pullman Information Systems Manager, Mr. Mark Bailey, at 325 SE Paradise St., Pullman, WA 99163.

CP 31, 573 (emphasis in original). Ms. Murphy further advised Reid that the City had responded to his PRA request and that, as a result, it would consider the request closed. CP 31, 573.

On September 19, 2012, Reid made a similar request in a letter addressed to Mr. Bailey. The letter states:

\* \* \*

I requested that she identify “which specific records series the emails fell under in 2007” and rather than fulfilling my request, she directed me to you.

Will you please provide me with a document that identifies which specific records series emails fell under in September 2007?

For example, on 9/13/07, while investigating a case involving class A felonies, PPD Officer William Orsborn sent emails to the Department of Licensing wherein he requested DOL photos of suspects.

CP 95 (emphasis in original).

The Pullman City Attorney responded to the above letter on September 27, 2012. The City Attorney's letter states, in relevant part:

[Your September 19, 2012 letter] appears to be a request for an **interpretation** of the Local Government Common Records Retention Schedule (CORE) and the Law Enforcement Records Retention Schedule. . . . It is impossible for the City to interpret for you which records series would apply to the wide variety of emails sent daily within any of the City departments because records retention is determined by the topical content of the record, not merely the fact that a record is in electronic mail form. . . .

[Furthermore,] your request for "a document that identifies which specific records series emails fell under in September, 2007" **is not a request for an identifiable public record (i.e., a "writing") to which the City can respond, it is a request for information and advice.** The City has already provided you with the documents that are responsive to your request.

\* \* \*

I would note that the CORE and Law Enforcement Records Retention Schedules have undergone multiple revisions by the Washington Secretary of State's Archives Office since 2007 (and continue to be revised). **Local governments are required to use the current version of all Records Retention Schedules immediately upon their adoption by the State Archives Office and obsolete versions are destroyed to avoid the inadvertent reference to an outdated Schedule.** Thus, the Records Retention Schedules provided to you by Ms. Murphy were the current versions. **I would refer you to the State Archives Office if you are seeking a copy of the Schedules that were in effect in 2007.** Their website is <http://www.sos.wa.gov/archives>.

CP 48-49 (bold emphasis added).

Reid responded to the City Attorney's letter on November 1, 2012. CP 52, 686. This letter reiterated his prior request that the City generate a new document to help him interpret the retention schedules:

Please provide me with a document showing only the specific records series and retention schedule that an email would fall under given the following circumstances:

A. Email requests to the Department of Licensing for DOL photos of potential suspects in a rape case.

B. Email responses from the DOL that include DOL photos of suspects were used in photo lineups in a rape case [sic].

CP 52, 686 (emphasis in original).

The City Attorney responded as follows on November 7, 2012:

[Y]our repeated requests for the City to explain to you and interpret the provisions of the Local Government Common Records Retention Schedule and Law Enforcement Records Retention Schedule that would govern a non-existent email do not constitute a request for identifiable public records to which the City can possibly respond.

CP 52-53.

**B. Procedural Statement**

Reid filed the instant lawsuit on January 16, 2013, in Whitman County Superior Court. CP 1-5, 583-587. Reid's complaint alleged, in relevant part, that the City violated the PRA by (1) failing to provide all

responsive records; (2) failing to provide an exemption log; (3) directing him to obtain requested records from third-party agencies, and (4) “destroying the emails and metadata *after [he] requested copies of them.*” CP 4, 586 (emphasis added). The Complaint further alleges a violation of the PDPRA stemming from an alleged “fail[ure] to retain the emails and metadata under the retention schedules set forth under the Act.” CP 4, 586.

The City initially moved for summary judgment on February 19, 2013. CP 97-104. Reid moved for a continuance pursuant to CR 56(f) to conduct discovery. CP 105-23. The trial court granted the motion and allowed Reid to take limited discovery<sup>4</sup> on the following topics:

A. Plaintiff will be allowed to take the deposition of Mark Bailey, who has submitted detailed affidavits in this case, regarding the search for electronic records responsive to Mr. Reid’s public records request. Mr. Bailey is the City of Pullman’s designee in regards to electronic searches and the City’s systems and protocols, including e-mails, his deposition will be taken as a 30(b)(6) Designee and will be limited to the topics set forth herein.

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<sup>4</sup> The trial court expressly limited the scope of discovery that Reid would be permitted to take based upon the following finding:

Because actions under the Public Records Act are frequently decided in an expedited manner based solely on affidavits, RCW 42.56.550, and because of the narrow scope of the issue presented in this case, it is not likely that further discovery will disclose relevant evidence. Furthermore, since Defendant admits having obtained information relating to the date the Pullman Police Department obtained DOL photographs, **Plaintiff’s efforts to conduct extensive discovery appear to be aimed more toward burdening and harassing Defendant as opposed to obtaining relevant evidence for the present action. Accordingly, a limitation on discovery is deemed appropriate and necessary in this case.**

CP 625 (emphasis added).

B. Plaintiff will be allowed to take the deposition of the City of Pullman's Public Records Officer for the Pullman Police Department. The City of Pullman's designee will speak to the issues surrounding the Pullman Police Departments records management and retention protocols. This deposition will be taken as a 30(b)(6) deposition and limited to the topics as set forth herein.

CP 519. Reid subsequently deposed Mr. Bailey and Ms. Reavis.

Following completion of discovery, the City renewed its motion for summary judgment. CP 532-52. The trial court granted the motion on February 5, 2014. CP 798-801. In its dismissal order, the trial court commented that Reid "attempts to complicate a very simple case." CP 799. "He does this by setting forth allegations not supported by evidence and by arguing facts that are not relevant to issues presented in a public records violation action." CP 799. The court then set forth the "undisputed and dispositive" facts supported by the record. CP 799. Specifically, the court stated:

The emails and metadata that were the subject of Reid's public records request were destroyed sometime before July of 2009—more than three years before Reid's request.

\* \* \*

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.

CP 800. From the record evidence, the court ruled that the City was entitled to judgment as a matter of law:

Pullman has submitted several detailed, sworn declarations explaining the reasonableness of its search and the reason why the requested records were not in existence on the date of Reid's request. Reid has countered this evidence with nothing more than bare allegations and speculative claims. This is insufficient to raise an issue of material fact in a summary judgment proceeding or to overcome Pullman's factual evidence which is to be accorded a presumption of good faith. *Forbes v. City of Gold Bar*, 171 Wn.App. 857 (2012).

CP 800-01.

Reid filed a motion to reconsider on February 12, 2014. CP 802-08. The basis for Reid's motion related to searches for the outdated retention schedules. In a response filed on February 19, 2014, the City pointed out that Reid still had presented no material questions of fact regarding the retention schedules and that the City maintains the most current state mandated guidelines. CP 812. The City also reiterated that *reasonableness* is the hallmark of a proper search under the PRA, and that an agency is not required to "prove" that requested records do not exist. CP 813 (citing *Neighborhood Alliance of Spokane Cnty. v. Cnty of Spokane*, 172 Wn.2d 702, 720 (2011)).

The trial court denied the motion for reconsideration. CP 825-27. The court's order recited, once again, that "[t]he unrefuted and undisputed evidence before the court . . . was that [the City] destroys obsolete

versions of retention schedules when retention schedules are revised” and that “there is no genuine issue of fact that [the City] did not possess retention schedules at the time Plaintiff made his request other than those schedules that were provided.” CP 826. The trial court also agreed with the City that the adequacy of an agency’s search for records must be measured against a reasonableness standard, and that, on the undisputed factual record, the City’s search was reasonable. CP 826.

Reid timely appealed the order granting the City’s motion for summary judgment and the denial of his motion for reconsideration. CP 828. No other discovery orders, protective orders, or rulings were appealed. CP 828-37.

## ARGUMENT

### **I. THE CITY’S SEARCH FOR “EMAILS AND METADATA” FULLY COMPORTED WITH ITS OBLIGATIONS UNDER THE PUBLIC RECORDS ACT**

#### **A. Standard of Review**

Judicial review of an agency’s response to a public records request is *de novo*. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 715 (2011); RCW 42.56.550(3). Grants of summary judgment are reviewed *de novo*. *Id.* When the record in a PRA action consists solely of affidavits, memoranda of law and other documentary evidence, an appellate court “stands in the same position as the trial court” in reviewing the adequacy of the challenged response.

*Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 719-20 (2014); *Ameriquest Mortg. Co. v. Office of Attorney Gen. of Wash.*, 177 Wn.2d 467, 478 (2013); *CLEAN v. City of Spokane*, 133 Wn.2d 455, 475 (1997). This standard of review reflects the general principle that when the appellate record “consists entirely of written and graphic material—documents, reports, maps, charts, official data and the like—and the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses . . . nor reconcile[d] conflicting evidence,” the appellate court stands in the same position as the trial court and should conduct its review *de novo*. *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 252-253 (1994) (citation omitted).

**B. An agency must perform a “reasonable” search for public records; it need not prove that responsive records do not exist.**

The PRA requires government agencies to disclose public records upon request, unless a specific statutory exemption applies. *Gendler v. Batiste*, 174 Wn.2d 244, 251 (2012) (citing RCW 42.56.070(1)). When an agency’s search for records yields responsive documents, the agency must determine whether any are exempt from disclosure pursuant to a statutory exemption. If the agency withholds responsive records, it must disclose the existence of those records and provide a brief explanation of why the record has been withheld. *City of Lakewood v. Koenig*, --- Wn.2d ---, 2014 WL 7003790 at \*3 (Dec. 11, 2014). An agency may not “silently

withhold” responsive records. *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 432 (2013).

When an agency’s search produces no responsive records, by contrast, the agency can satisfy its duties under the PRA by informing the requesting party that it has performed a search and that no public records were found. *Fisher Broad.-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 522 (2014); *Gendler*, 174 Wn.2d at 252. The agency’s response “should show at least some evidence that it sincerely attempted to be helpful.” *Fisher Broad.*, 180 Wn.2d at 522. The agency need not indulge “indiscriminate sifting through [its] files by citizens searching for records that have been demonstrated not to exist.” *Sperr v. City of Spokane*, 123 Wn. App. 132, 137 (2004).

In evaluating the sufficiency of an agency’s response to a PRA request, courts look to whether the search was “reasonably calculated to uncover all relevant documents.” *Neighborhood Alliance*, 172 Wn.2d at 720. “[T]he focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate.” *Id.* at 719-20. In other words, the court must evaluate the adequacy of the “search process” rather than the outcome of the search. *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 866 (2012) (quotation and citation omitted). Whether this standard has been satisfied is a fact-sensitive inquiry that “turns on the likelihood that [the search] will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives.” *Id.* (quotation and citation omitted).

**C. The scope of Reid’s PRA request was limited to electronic files and did not extend to printed emails.**

Reid argues that the City violated the PRA by searching for the requested “emails” and “metadata” only in its electronic email system. In Reid’s estimation, this search was inadequate because it failed to account for other places in which the requested “emails” and “metadata” might have been located in print. The crux of Reid’s argument is that the City should have searched anywhere *printed copies* of his requested records could have been found—most notably the City of Pullman Police Department’s investigative files pertaining to the 2007 rape investigation or anywhere else they could be. Opening Brief at 28-29. This latter argument regarding “anywhere else” is not only an unreasonable request for records, it is likewise not an identifiable public records request. More importantly, Reid initially included this broad and undefined request, but abandoned it upon clarification and in his Complaint in this action. CP 558, 566, 2-3<sup>5</sup>

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<sup>5</sup> Reid’s original request included a third request for information of anywhere else documents could be kept other than the files he already received, including the other suspect’s files. CP 559. He dropped that “request”. CP 566, 2-3. Regardless, the electronic search by Mark Bailey covered the scope of all the relevant search terms regarding the other suspects, and was conducted on the entire email server. In terms of asking for the City to look anywhere else, the PRA starts with the requirement that the requester must ask for “identifiable public records.” See RCW 42.56.080. In order for a request to be one for an “identifiable public record,” the request must describe the record with reasonable clarity. *Wright v. State*, 176 Wn. App. 585 (2013). An agency is not obligated to comply with an overbroad request, *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448 (2004), or an unclear request, *Wood v. Lowe*, 102 Wn. App. 872, 879 (2000); *Bonamy v. City of Seattle*, 92 Wn. App. 402, 411-12 (1998). A responding agency may request clarification from the requester in order to properly respond to initially unclear or overbroad requests. RCW 42.56.520. The requester’s failure to provide clarification to a

Reid's assertion that his *Reid II* PRA request included printed emails fails for several reasons. First, it ignores the fact that the City had previously searched for and produced to Reid each and every document in the PPD's rape investigation file in response to the PRA request in *Reid I*. *Reid v. Pullman Police Dep't*, 179 Wn. App. 1017. This massive production **included copies of printed emails** that had been placed in the file by investigators. CP 493, 497-514. The DOL transmittal emails that Reid seeks do not exist either in print or electronic format. This is not an exemption case contrary to Reid's unfounded assertion in the Complaint. CP 2-4. These documents did not exist at the time of either the *Reid I* or *Reid II* PRA request. Reid knows the investigative file contains no records responsive to the PRA request at issue in these proceedings, and he acknowledged this in his own briefing. *Id.* Reid's suggestions otherwise are a contradiction to his own positions and becomes circular.

Second, Reid has conveniently sidestepped the fact that he never *asked* the City to search for printed emails in the case. Instead, Reid asked the City to produce "emails and metadata"—records which he understood were maintained in electronic form. In his initial request dated July 16, 2012, Reid asked for "records validating how and when [the driver's license] photos were obtained from the DOL including emails." CP 558.

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good faith request for clarification entitles the agency to not respond to the request. RCW 42.56.520; *Bonamy*, 92 Wn. App. at 411. Finally, an agency's "failure" to disclose records not requested with reasonable clarity is not a violation of the PRA. *Bonamy*, 92 Wn. App. at 409-10. Reid dropped his third overbroad request to search for printed or electronic emails anywhere they could be located.

When prompted for clarification, Reid explained that the type of “records” he wanted were “emails and metadata”:

1. As for paragraph 1., 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.

1a. Also, please provide me with **the metadata that is pertinent to each of the emails requested** above in paragraph 1.

2. Regarding paragraph 2., please provide me with a copy of the retention schedules pertinent to the **emails and metadata** requested above.

CP 566 (emphasis added).

Reid’s request for “emails and metadata” was a request for electronic records. CP 566. Since emails and metadata are created and stored electronically, *see O’Neil v. City of Shoreline*, 170 Wn.2d 138, 143 (2010) (“Metadata is most clearly defined as ‘data about data’ or hidden information about electronic documents created by software programs.”), construing Reid’s request for “emails and metadata” as a request for printed documents in without merit.

The limited scope of this request becomes even more obvious when contrasted with the exceptionally broad request at issue in *Reid I*:

**All records and documents** including, but not limited to: [Police - files, statements, reports, audio recordings and transcriptions, digital photos/images of people, places and objects, photo line ups [sic] and whitness [sic] I.D.’s.]

[Forensic - files, reports, tests and results.] [Medical - tests, summary reports and results.] [Police - phone records - dates, times and records of all phone calls to and from Pullman Police relating to this case/incident[,] esp. 911 call when victim reported compliant.]

**All other records of this case[,]** 07-P07290[.]

CP 83-84, 86, 322, 324. Given that Reid expressly limited his request to “emails and metadata,” the City was well-justified in limiting its search to electronic files. *See Wright v. State*, 176 Wn. App. 585, 593-94 (2013) (holding that agency need not search for records beyond the scope of those expressly identified in a PRA request).

Having discovered that there are no “emails and metadata” responsive to his request, Reid cannot reframe the issue now on appeal. In that regard, it bears noting that Reid himself described his request as a request for electronic records in the trial court below. *See, e.g.*, CP 106 (“Reid’s investigation has narrowed the “how” part of this puzzle down to two possible ways the DOL photos were transmitted from Olympia to Pullman on September 13, 2007. They were either e-mailed using the ACCESS system, or e-mailed using Microsoft Outlook—both methods creating **metadata and electronic records subject to the PRA.**”) (bold emphasis added); CP 119-22

In the final analysis, a PRA request must be “specific enough for the government employee to locate the requested record.” *Zink v. City of Mesa*, 162 Wn. App. 688, 711 (2011), *review denied*, 173 Wn.2d 1010 (2012); *see also Hangartner v. City of Seattle*, 151 Wn.2d 439, 448 (2004)

(proper request under the PDA must “identify with reasonable clarity those documents that are desired”). Once a specific request has been submitted, the agency must perform a search which is “reasonably calculated to uncover all relevant documents.” *Neighborhood Alliance*, 172 Wn.2d at 720. This “reasonably calculated” standard necessarily accounts for the specificity of the request. *See id.* (explaining that an agency need not search “every possible place a record may conceivably be stored, but only those places where it is *reasonably likely* to be found”) (emphasis in original). When a request is specifically limited to “emails and metadata,” a search for electronic files is eminently reasonable. Accordingly, this Court should rule that the City’s search of its email archiving system for documents responsive to Reid’s request complied with the PRA.

**D. Even if Reid’s request extended to printed emails, his present argument is procedurally defaulted.**

Washington Rule of Appellate Procedure 2.5(a) provides that an appellate court “may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). While application of this rule is discretionary, *see Roberson v. Perez*, 156 Wn.2d 33, 39 (2005), the interests of fairness and judicial economy are best served by strict enforcement, *see State v. Lindsey*, 177 Wn. App. 233, 247 (2013) *review denied*, 180 Wn.2d 1022 (2014). Thus, as a general rule, “an argument neither pleaded nor argued to the trial court cannot be raised for the first

time on appeal.” *Washington Fed. Sav. v. Klein*, 177 Wn. App. 22, 29 (2013) *review denied*, 179 Wn.2d 1019 (2014).

Reid devotes a significant portion of his opening brief to arguing that the City violated the PRA by failing to search for printed emails in this “*Reid II*” PRA case. That argument, however, was not squarely raised in the trial court below. In fact, the only time printed emails were ever mentioned in the trial court proceedings was a single passing reference in Reid’s memorandum filed in opposition to the City’s motion for summary judgment. CP 675. Referencing his original request—as opposed to his subsequent clarification—Reid argued that there was “no evidence that the City looked in *any* police investigative files to determine if printouts of the September 2007 emails were stored in hard-copy form.” CP 675 (emphasis in original). This passing reference to printed emails, which reframes his original PRA request post-litigation in the face of a summary judgment motion, and which new position on appeal was never the scope or focus of the discovery or litigation, is insufficient to preserve the argument on appeal. This Court should deem the argument waived pursuant to RAP 2.5(a).

**II. THE CITY’S PROCESSING OF REID’S REQUEST FOR RETENTION SCHEDULES WAS REASONABLE AND DID NOT VIOLATE THE PUBLIC RECORDS ACT**

**A. Reid’s request for retention schedules that “authorized” destruction of the emails he sought was not a request for an “identifiable public record.”**

An agency's duty to respond to a PRA request is not triggered until it receives a request for an "identifiable public record." RCW 42.56.080. To qualify as a request for an "identifiable public record," a request must "identify the documents with reasonable clarity to allow the agency to locate them." *Hangartner*, 151 Wn.2d at 447. If the request does not identify the records sought with reasonable clarity, the responding agency may request clarification. RCW 42.56.520; *Kleven v. City of Des Moines*, 111 Wn. App. 284, 294 (2002). If the agency requests clarification and receives no response, it need not take further action. RCW 42.56.520; *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409 (1998) (agency need not respond "until and unless there has been a specific request for records.").

A mere "request for information" does not qualify as a request for an "identifiable public record" to which an agency must respond. *See, e.g., Gendler v. Batiste*, 158 Wn. App. 661, 672 (2010) *aff'd*, 174 Wn.2d 244 (2012) ("[A] request under the PRA must be for an "*identifiable public record*," and a mere request for *information* does not so qualify.") (emphasis in original) (internal citation omitted); *Wood v. Lowe*, 102 Wn. App. 872, 879 (2000) (a request for "information" is not a request for an 'identifiable public record.'"); *Bonamy*, 92 Wn. App. at 411-12 (no duty to respond to PRA request where plaintiff had "only requested information"); *accord Landmark Legal Found. v. Env'tl. Prot. Agency*, 272 F. Supp. 2d 59, 64 (D. D.C. 2003) ("[A]n agency is not required to answer questions disguised as a FOIA request."). Thus, when an agency receives a request for information couched as a public records request, the appropriate

procedure is for the agency to request clarification about whether an “identifiable public record” is truly being sought. RCW 42.56.520; *Bonamy*, 92 Wn. App. at 411-12.

Reid’s request for retention schedules “authorizing” the City to destroy the requested emails did not amount to a request for an “identifiable public record.” *Bonamy* is instructive. The plaintiff in *Bonamy* was being investigated by his employer, the City of Seattle, for workplace harassment. Upon learning of the investigation, the plaintiff issued the following PRA request:

I want to know what policy guidelines govern investigations into employee conduct, specifically how management investigates a personal complaint by one employee against another. Are they the same, or how are they different, [from those that apply] when the complaint is brought by someone in management . . . ?

Please cite for me the references to the controlling regulations, so that I can look them up.

*Bonamy*, 92 Wn. App. at 405-06. Division One of the Court of Appeals held that this was not a request for an “identifiable public record” because it called for the agency to do more than simply produce a public record. *Id.* at 409-10. Specifically, the Court explained:

An important distinction must be drawn between a request for *information* about public records and a request for the records themselves. *The act does not require agencies to research or explain public records, but only to make those records accessible to the public.*

*Id.* at 409 (emphasis added) (citations omitted).

Reid initially asked the City to produce emails from the DOL transmitting driver's license photos of Schott, Davis, Pye, VanHorn and Peterson, or, "in the event that [those records] have been destroyed . . . the **retention schedule that authorized such destruction.**" CP 558 (emphasis added). As in *Bonamy*, the second part of this request does not qualify as a request for an "identifiable public record" because it asks the City to "research or explain" a public record rather than simply produce it. By asking the City to produce the retention schedule that *authorized* destruction of the subject emails, Reid was effectively asking for a legal opinion—or perhaps more accurately, a legal justification. Given that the request called for the City to make its own substantive determination, the City was perfectly justified in asking Reid to reframe his request. RCW 42.56.520; *Bonamy*, 92 Wn. App. at 411-12; *accord Anderson v. U.S. Dep't of Justice*, 518 F. Supp. 2d 1, 10 (D. D.C. 2007) ("To the extent that plaintiff's FOIA requests are questions or requests for explanations of policies or procedures, these are not proper FOIA requests."); *West v. Jackson*, 538 F. Supp. 2d 12, 21 (D. D.C. 2008) ("An agency is not required to provide copies of federal regulations or perform legal research for the requester.").

To be clear, the City is not arguing that an agency may rebuff any request that calls for it to exercise a degree of discretion in deciding which records are responsive. Instead, the City's position is simply that a request

that calls for an agency to make a *legal determination* in order to identify responsive records does not qualify as a request for an “identifiable public record” under RCW 42.56.520. The requesting party, rather than the agency, must “identify” the records to be produced.

It also bears noting that the City did in fact provide responsive records after Reid reframed his request in a manner that did not call for the City to make a legal determination. Upon being advised that Reid sought “a copy of the retention schedules pertinent to the emails and metadata requested above,” CP 566, the City produced copies of the current CORE and LERRS schedules. CP 568.

In his opening brief, Reid argues that the City’s production of these retention schedules was improper because neither “could have authorized destruction of the emails at issue during the relevant period before June 2009.” Opening Brief at 9. This argument is problematic for two reasons. First, Reid’s clarified request asked for schedules “pertaining to” the DOL transmittal emails rather than schedules that “authorized destruction” of such emails. The City fully complied with this request by producing copies of the retention schedules that currently “pertained to” retention of email records.

More importantly, however, this argument blithely assumes that Reid’s modified request identified a “relevant period.” It did not. Reid seems to be arguing that the City should have “known” that he wanted retention schedules either dating back to 2007 or guessing when the non-existent emails were deleted after that, but before 2009, and their exact

content. But agencies are not required to be “mind readers.” *Bonamy*, 92 Wn. App. at 409. This Court should not allow Reid’s attempt to constructively amend or reframe the scope of his PRA request now. The City respectfully requests that the Court affirm the trial court on the ground that Reid never requested an “identifiable public record” for retention schedules other than those that the City actually produced in response to his clarification.

**B. Even if this Court concludes that Reid requested an identifiable public record vis-à-vis outdated retention schedules, it should hold that the City’s processing of that request was reasonable and comported with the PRA.**

Even if this Court were to conclude that Reid’s request for retention schedules that “authorized” destruction of the DOL transmittal emails amounts to a request for an “identifiable public record,” it should nevertheless hold that the City’s response to that request was reasonable.

1. The City had a reasonable, good-faith belief that copies of all outdated retention schedules had been destroyed pursuant to mandatory retention policy.

The adequacy of an agency’s search for public records is evaluated under the totality of the circumstances presented in each individual case. *Neighborhood Alliance*, 172 Wn.2d at 720. A search is deemed adequate when it is “reasonably calculated to uncover all relevant documents.” *Id.* The focus of the inquiry “is not whether responsive documents to in fact

exist, but whether the search itself was adequate” under the circumstances. *Id.* at 719-20. In other words, “the issue of whether the search was reasonably calculated [to uncover relevant records] and therefore adequate is separate from whether additional responsive documents exist but are not found.” *Id.* at 720.

The crux of Reid’s argument is that it was unreasonable as a matter of law for the City not to search for outdated retention schedules dating back to September 2007. This argument fails to account for two key facts which go directly to the reasonableness of the City’s actions. First, the record reflects that outdated retention schedules must be destroyed. Section 5.6 of the CORE, which governs retention of retention schedules, directs agencies to “**Retain** until no longer needed for agency business *then Destroy*.” CP 628 (emphasis in original). The CORE further provides that old versions of a retention schedule are automatically “revoked” upon the adoption of a new retention schedule:

**Revocation of previously issued records retention schedules**

All previously approved disposition authorities for records that are covered by this retention schedule are *revoked*, including those listed in all general and agency unique retention schedules. Local government agencies should take measures to ensure that the retention and disposition of public records is in accordance with *current* approved records retention schedules.

CP 627. The meaning of this language is abundantly clear: once a new retention schedule goes into effect, all prior versions are “revoked” and are

“no longer needed for agency business.” Pursuant to Section 5.6, the prior versions must be “**Destroy[ed].**”

Of equal importance, the record reflects that the City follows this directive. At her deposition, the City’s CR 30(b)(6) designee, Ms. Reavis, testified that the City maintains its records in accordance with the retention schedules adopted by the State Archives Office and that it “always use[s] the most current version” of the retention schedules. CP 697. Additional undisputed record evidence established that retention schedules themselves are subject to retention schedules, and the City does not maintain outdated and obsolete versions. CP 579-580; 49. As the trial court properly concluded, this evidence and deposition testimony supports only one rational conclusion: that the City “did not possess retention schedules at the time [Reid] made his request other than those schedules that were provided.” CP 826.<sup>6</sup>

In a desperate attempt to create a genuine issue of material fact, Reid asserts that Ms. Reavis’s deposition testimony supports the opposite finding—that the City “currently” possesses outdated copies of retention schedules. Opening Brief at 17 (emphasis added); *see also* Opening Brief at 20 (Ms. Reavis’s testimony established that the 2001 law enforcement

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<sup>6</sup> Reid assigns error to this conclusion because “nobody ever testified that the City ‘did not possess’ outdated retention schedules as of July 2012.” Opening Brief at 17. Contrary to Reid’s assertion, the absence of direct testimony on this issue does not preclude summary judgment. Where, as here, “reasonable persons could reach only one conclusion from all of the evidence” viewed in the light most favorable to the non-moving party, summary judgment is appropriate. *Hansen v. Friend*, 118 Wn.2d 476, 485 (1992).

schedule applied to the destroyed emails at issue, and that the City ‘currently’ possessed it as of July 2013.”). This is a brazen mischaracterization of Ms. Reavis’s testimony. What Ms. Reavis actually said was that a portion of the LERRS that was in *effect* at the time of Reid’s PRA request in 2012 had also been *in effect* back in September 2007—not that the City currently possessed and failed to produce a 2007 retention schedule. CP 715. Reid’s brand-new characterization<sup>7</sup> of Ms. Reavis’ testimony as an admission that the City “currently” possessed outdated retention schedules is wholly unsupported by the “evidence” that he cites, and in any event comes nowhere near creating a genuine issue of material fact to defeat summary judgment based on the record.

Reid argues that the City’s failure to search anywhere for an outdated and obsolete retention schedule (with no particular date) was unreasonable. *Neighborhood Alliance* supports the opposite conclusion. The plaintiff in that case, an agency devoted to promoting government accountability, alleged that Spokane County violated the PRA by failing to search a specific computer for records responsive to its PRA request. *Neighborhood Alliance*, 172 Wn.2d at 710-12. Discovery revealed that the county had replaced the computer at issue shortly before the plaintiff filed its request. *Id.* at 711. The Court held that the county’s search was deficient because (1) the requested record had likely been created on the old computer; (2) the old computer had been replaced under suspicious

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<sup>7</sup> It bears noting that this is the first time that Reid has characterized Ms. Reavis’s testimony as a damaging admission. He did not do so in the trial court. CP 666-69.

circumstances; and (3) the county either knew or had reason to know that “searching only the new computer would prove unfruitful.” *Id.* at 722. Because the county had deliberately limited its search to “the only place a complete electronic record could *not* be found,” the Court reasoned, the search was not reasonable. *Id.* at 721-22 (emphasis added).

This case presents the converse situation. Unlike the defendant in *Neighborhood Alliance*, which either knew or had reason to know that the requested record still existed and where it could be found, the City had a reasonable, good-faith belief that outdated versions of the CORE and LERRS retention schedules had been destroyed and would not be located.

At its core, *Neighborhood Alliance* stands for the proposition that an agency’s firsthand knowledge of the existence and probable location of a requested record is germane to the reasonableness calculus. Where, as in *Neighborhood Alliance*, the agency knows or has reason to know where a record can be found and fails to search there, it will likely have violated the PRA. Conversely, where an agency has a reasonable, good-faith belief grounded in firsthand knowledge of its own policies, it is not reasonable to require a search anywhere a document could be—and here that would be assuming Reid asked for an identifiable public record in the first instance—which he did not.

Reid insists that this creates a “presumption” that records have been destroyed, resulting in an “exception to the search requirement for records that are old enough to be lawfully destroyed.” Opening Brief at 27. Not so.

As Reid himself notes, *Neighborhood Alliance* places the burden of proving reasonableness squarely on the responding agency. *See* 172 Wn.2d at 721 (to prevail on summary judgment, agency must establish “beyond material doubt” that its search was reasonable under the circumstances presented). Contrary to Reid’s suggestion, an agency cannot satisfy its burden simply by showing that a particular record “*could have* been destroyed pursuant to a retention schedule.” Opening Brief at 27 (emphasis in original). Instead, the agency must go one step further and demonstrate a reasonable, good-faith belief that the record *had in fact* been destroyed. This showing can be made (as it was here) by submitting sworn testimony establishing that the requested record was subject to mandatory destruction, that the agency was aware of and adhered to that mandatory destruction protocol, and that destruction of the record served a legitimate agency purpose.<sup>8</sup> When such a showing is made on the facts of a particular case, a court can conclude that the agency’s search was reasonable. This Court should so conclude here.

2. The City’s response was all the more reasonable given that it referred Reid to the very agency charged with maintaining the records he sought.

Reid argues that the City “shirked” its obligations under the PRA by referring him to the State Archives Office for copies of retention

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<sup>8</sup> In the event that an employee has a personal recollection of having destroyed the particular record, a sworn declaration to that effect would also suffice.

schedules that were in effect in 2007. Opening Brief at 22. That assertion is wholly unsupported. The record demonstrates that the City, upon realizing that Reid was asking for outdated retention schedules, promptly explained that it only retained the current versions of those schedules. CP 49. In an effort to be helpful, however, the City Attorney advised Reid that he could obtain copies of outdated schedules from the State Archives Office:

I would note that the CORE and Law Enforcement Records Retention Schedules have undergone multiple revisions by the Washington Secretary of State's Archives Office since 2007 (and continue to be revised). Local governments are required to use the current version of all Records Retention Schedules immediately upon their adoption by the State Archives Office and obsolete versions are destroyed to avoid the inadvertent reference to an outdated Schedule. Thus, the Records Retention Schedules provided to you by Ms. Murphy were the current versions. **I would refer you to the State Archives Office if you are seeking a copy of the Schedules that were in effect in 2007. Their website is <http://www.sos.wa.gov/archives>.**

CP 49 (emphasis added).

This response can hardly be characterized as the City “shirking” its obligations. Instead, this response reflects a good-faith effort to direct Reid to the best possible source of the records he sought.

In sum, the fact that the City did not search for outdated retention schedules does not render its search unreasonable. To the contrary, the City's search for only current retention schedules was reasonable under the circumstances—*i.e.*, where the outdated schedules were subject to a

mandatory destruction protocol, where the City was aware of and closely adhered to that protocol, and where the City referred Reid to the very agency responsible for preserving those schedules. The Trial Court's Summary dismissal should be affirmed.

**III. REID IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES, COSTS OR STATUTORY PENALTIES EVEN IF THIS COURT REMANDS**

**A. If this Court remands, Reid would not be entitled to an award of attorney's fees and costs because he would not have "prevailed" on the merits of his claims.**

Reid argues that he is entitled to an award of attorney's fees and costs if he prevails in this appeal. Opening Brief at 30-31. The PRA authorizes "any person who **prevails** against an agency in any action" to recover reasonable attorney's fees and costs. RCW 42.56.550(4). "A PRA claimant 'prevails' against an agency if the agency wrongfully withheld the requested documents." *West v. Port of Olympia*, 183 Wn. App. 306, 317 (2014).

The trial court granted summary judgment to the City, concluding that there were no disputed issues of material fact concerning the reasonableness of the City's search. If the Court remands, the trial court would need to first resolve other disputed factual issues. Reid would not be entitled to any fees at this time even upon an order for remand.

**B. Reid is not entitled to an award of statutory penalties because he has failed to demonstrate that the City acted in bad faith in responding to his PRA request.**

Reid also asks the Court to award statutory penalties pursuant to RCW 42.56.565(1). Opening Brief at 31. RCW 42.56.565(1) prohibits an award of statutory penalties to a plaintiff incarcerated in a state correctional facility on the date of his or her public records request unless the plaintiff proves that the agency acted in bad faith:

A court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made, unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record.

RCW 42.56.565.

Reid has been serving a criminal sentence at Stafford Creek Corrections Center (“SCCC”) at all times relevant to this case. CP 558, 566, 571. SCCC is a state-owned facility operated by the Washington Department of Corrections. WAC 137-04-020(2)(a). Thus, Reid is barred from receiving an award of statutory penalties unless he can prove that the City acted in “bad faith.” RCW 42.56.565(1).

A finding of bad faith is a “threshold” requirement for awarding penalties to an inmate for a violation of the PRA. *Faulkner v Wash. Dep’t of Corr.*, --- Wn. App. ---, 332 P.3d 1136, 1141 (Div. III, Aug. 19, 2014). Bad faith is “a higher level of culpability than simple or casual

negligence.” *Id.* An agency’s mere failure to conduct a “reasonable” search does not amount to bad faith. *Id.* Nor does “making a mistake” in a records search or “following a legal position that [is] subsequently reversed.” *Id.* at 1140 (quotation and citation omitted).

Instead, bad faith requires “a wanton or willful omission” by the responding agency. *Id.* at 1141. As explained in *Faulkner*, this standard occupies the “high end of the culpability spectrum.” *Id.* The inmate must ultimately prove that the agency acted “with *utter indifference to the purpose of the PRA.*” *Id.* at 1142 (emphasis added). None of these facts are present here.

Reid has not addressed RCW 42.56.565(1)’s bad faith requirement. This Court should reject any attempt by Reid to address this issue for the first time in his forthcoming reply. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”); *Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 297 (2003) (arguments not raised in an appellant’s opening brief are waived).

In any event, the record is devoid of evidence that the City made a “wanton or willful omission” or that it acted with “utter indifference” to the purpose of the PRA. *Id.* at 1141-42. To the contrary, the record reflects that the City conducted a reasonable search and responded diligently to each of Reid’s follow-up inquiries. Indeed, Reid’s follow-up inquiries made it all the way to the desk of the City Attorney, who went out of her way to assist Reid in interpreting the documents he had been

provided. CP 48-49, 51-54. In short, there is no basis for awarding attorney's fees and costs or statutory penalties.

**IV. REID APPEALED NO DISCOVERY ORDERS**

Reid contends that the City "improperly thwarted" his efforts to take discovery. Opening Brief at 29. This argument is improper. Reid did not appeal any of the trial court's discovery orders. CP 828. Such arguments are not properly before this Court and have been waived.

**CONCLUSION**

For the foregoing reasons, this Court on *de novo* review should affirm the trial court's order dismissing Reid's Complaint and finding that there exists no genuine issue of material fact that the City did not violate the Public Record's Act. The judgment in favor of the City should be affirmed.

DATED this 2nd day of March , 2015.

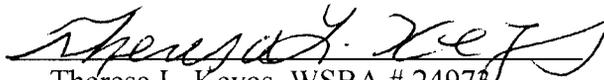
K&L GATES LLP

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 2nd day of March, 2015, I caused to be served a true and correct copy of the foregoing on the persons below stated via U.S. Mail, postage prepaid and addressed as follows:

Katherine George  
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Attorneys for the City of Pullman

# APPENDIX A

155 Wash.App. 1032

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,  
Division 3.

STATE of Washington, Respondent,  
v.  
Christopher Jack REID, Appellant.

No. 27724-1-III. | April 20, 2010.

West KeySummary

**1 Criminal Law** — Jury selection and composition

Counsel's failure to object when the court informed jurors that the case did not involve the death penalty did not prejudice the defendant, and thus was not ineffective assistance. The judge asked whether any juror could not assure that they would be able to follow the court's instructions, and mentioned that the death penalty as one of three areas, none of which were at issue, where some jurors might have trouble following the law instead of personal beliefs. The main question presented at the trial was the identity of the rapist, and the court's statements did not suggest that the jury should not give careful consideration to whether the evidence established the defendant as the rapist. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

Appeal from Whitman Superior Court; Honorable John David Frazier, J.

**Attorneys and Law Firms**

Kenneth H. Kato, Attorney at Law, Spokane, WA, for Respondent.

Denis Paul Tracy, Whitman Co. Prosecutor, Colfax, WA, for Respondent.

**Opinion**

KORSMO, J.

**\*1** Christopher Reid appeals his Whitman County Superior Court convictions for second degree rape, first degree burglary, and two counts of residential burglary. He primarily argues that the trial court erred by not granting a continuance and that his counsel erred in several instances, resulting in ineffective assistance. We conclude that the trial court did not abuse its discretion in denying the continuance and that Mr. Reid has not shown that his attorney performed so deficiently that he was denied his right to counsel. The convictions are affirmed.

**FACTS**

Mr. Reid formerly worked in the adult film industry and visited Pullman on September 12, 2007, after completing filming of a movie in Seattle. Mr. Reid's screen name was "Jack Venice." Reid introduced himself by that name to people at Munchies, a Pullman restaurant. Reid told Colin Tuggle that he was a "porn star" and asked Tuggle if he knew any women interested in making a movie with him. Tuggle did not. Tuggle also noticed that Venice had a tattoo on the back of his neck, and he also claimed to have bullet tattoos around his leg. Tuggle later identified Exhibit 6, a picture of Mr. Reid's neck tattoo, as the same tattoo that Venice had.

Colin Davis and Kyle Schott were friends. Around 9 or 10 p.m. they went to Stubblefield's, a Pullman bar. Schott was wearing a bandage on his arm that evening. At the bar the two met a man named Jack Venice.<sup>1</sup> Other patrons of the bar recognized Venice from his film career; he agreed that he was the person in the films.

<sup>1</sup> Davis identified Reid in court as the man he knew as Venice.

After an hour or two at Stubblefield's, Davis, Schott, and Reid (Venice) went to Valhalla, a nearby bar. They stayed there for about 45 minutes before returning to Stubblefield's. Davis went home to go to bed; the other two entered the bar. Maria Scherrer testified that she served several drinks to Mr. Reid, who was with a man with a bandage on his arm. Mr. Reid made several sexually offensive remarks to her.

The two men left the bar at closing, which Ms. Scherrer referred to as "1:45 which is two o'clock bar time." Mr. Reid wanted to find a party; the two men found one at an apartment down the hill from the bar. They were admitted to the party and joined two men in a drinking game called "beer pong." Reid told the men that he was in the adult film industry and asked if they knew any women who might want to make movies with him. Reid offered to pay for use of the apartment's bedroom for filming. The men did not believe Reid, so he used a computer to access Internet sites displaying his work. He then dropped his pants to show the partygoers his bullet tattoos. They asked him to leave.

Reid and Schott left and went looking for another party. They arrived first at the Pi Beta Phi sorority house. Schott believed Reid was looking for women to have sex with. Reid climbed up on a porch and entered the building through a window. He later threw pillows and other items out of a third floor window; Schott threw them back up to the third floor. Reid came out of the front door of the house.

**\*2** The two men moved down the street to the Delta Gamma sorority house. Schott boosted Reid through a window of the house; Reid then let Schott in through the front door. There they each started drinking soft drinks found in the building. A woman arrived and told the two to leave. The men left and tried punching numbers on the keypad for the Alpha Gamma Rho fraternity across the street. Two men came to the door and told the pair to leave. They again departed.

The two next came upon the Kappa Alpha Theta sorority. Mr. Reid again entered the building through a window and then let Mr. Schott in through the front door. The two used a computer in a second floor study lounge before moving up to the third floor. There they saw a light from a television set coming from one of the rooms. They entered and saw a woman, K.E., asleep on the floor.

Reid told Schott that this was what he had been looking for and that he would "hook up" with the woman. Reid pulled his pants down to his knees and began caressing K.E. with his hand. He asked Schott for a condom; Schott provided it. Schott began touching K.E.'s vagina and eventually penetrated her with his finger. Reid placed the condom on and rubbed his penis against K.E.'s vagina.

K.E. woke to the sound of a candy wrapper being opened and realized that she was being touched in several places. She turned and saw a face. She identified Mr. Reid at trial as the person she saw. She heard him say something to the effect of, "go, she's awake." The two men fled the building.<sup>2</sup>

<sup>2</sup> Schott testified that he saw Reid run from the room and followed him. Reid then told Schott that the woman had awakened.

Charges were promptly filed against both men. Mr. Schott reached a plea agreement with prosecutors and entered guilty pleas to charges of third degree rape and second degree burglary. He agreed to testify against Mr. Reid.

Mr. Reid was charged with second degree rape, first degree burglary, two counts of residential burglary, and one count of attempted second degree burglary. He was arraigned and the trial date was originally scheduled for November 26, 2007. A series of continuances and rescheduled trial dates followed: March 10, 2008; May 19, 2008; September 15, 2008; October 20, 2008. <sup>3</sup>

<sup>3</sup> This court has not been provided with the trial scheduling/continuance orders or the transcripts of those hearings (if any). This record is found in the trial court's comments while denying a continuance of the October 20 setting.

Defense counsel sought to extend the trial date one more time. The court heard the motion telephonically on October 10. Defense counsel advised the court that he was in trial in Spokane County and that delays in that proceeding would keep him in trial through October 16. He needed to meet with his client and interview the victim, but the other witness interviews had been completed. He also advised the court that if ordered to trial on the 20th, "I could, I do have concerns about whether I would be fully prepared but I could do it. I would feel very uncomfortable about it." Report of Proceedings (Oct. 10, 2008) 6.

The court reviewed the record and determined that while several of the previous continuances had been for evidence analysis, one of the prior continuances had been granted at defense request. The court noted that significant efforts had been made to reset the court's calendar to accommodate the October 20 trial setting. In light of these circumstances, it was "not reasonable" to continue the case again because there had been adequate time to prepare.

\*<sup>3</sup> Trial started October 20 as scheduled without a further request for a continuance. K.E. identified Mr. Reid as the assailant in the courtroom. At a side bar, defense counsel indicated he would cross examine her about a photo montage in which she had identified Mr. Reid with only modest confidence. The prosecutor then elected to present the montage during K.E.'s testimony. Defense counsel did cross examine her about the uncertainty of her montage identification. <sup>4</sup> Later in the trial, the court commented that the montage was suggestive in the manner in which it permitted K.E. to rule out Mr. Davis. The court also commented that the montage did not play a role in K.E.'s in-court identification of Mr. Reid.

<sup>4</sup> K.E. put her confidence in the identification as five or six out of ten.

DNA testing of the condom wrapper established that about one-third of the population could have contributed the DNA found there. Mr. Reid, Mr. Schott, and K.E. were all potential contributors. The testimony on this topic was admitted without objection.

Defense counsel argued the case on the theory that Schott was the rapist and that he implicated Reid for his own benefit; Colin Davis likely was Schott's accomplice. Counsel also argued that K.E.'s identification was weak and effected by the suggestive nature of the montage as well as the constant publicity concerning Mr. Reid's occupation. As a "porn star" who gets paid to have sex with women, he did not "need" to rape anyone.

The jury acquitted Mr. Reid on the attempted burglary charge involving the fraternity house, but found him guilty on all other counts. The trial court imposed a low-end minimum sentence. Mr. Reid timely appealed to this court.

## ANALYSIS

The issues in this appeal include whether the trial court erred by not granting the continuance and whether counsel was ineffective. <sup>5</sup> Mr. Reid also challenges the sufficiency of the evidence to support the convictions. We address each challenge in turn.

5 Mr. Reid has also filed a *pro se* Statement of Additional Grounds (SAG) which we will address in the course of the ineffective assistance analysis.

### *Continuance*

A trial court's decision to grant or deny a continuance of trial is reviewed for manifest abuse of discretion. *State v. Campbell*, 103 Wash.2d 1, 14, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985); *State v. Early*, 70 Wash.App. 452, 458, 853 P.2d 964 (1993), *review denied*, 123 Wash.2d 1004, 868 P.2d 872 (1994). When a case has been previously continued, an even stronger showing in support of the subsequent request is necessary. *State v. Barnes*, 58 Wash.App. 465, 471, 794 P.2d 52 (1990), *aff'd*, 117 Wash.2d 701, 818 P.2d 1088 (1991). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

The trial court certainly had tenable grounds for denying the request. There had been four prior continuances, and the October 20 setting had been entered after great efforts to rearrange the court's calendar and assure a date that all counsel could meet. While the unexpected delays in the Spokane County case understandably cut into his preparation time, counsel still had four days to meet with his client and interview the victim. All other interviews were complete. Most tellingly, defense counsel did not renew his request for a continuance on the 20th nor claim that any preparation work remained.

\*4 The stronger showing needed in support of yet another continuance was not made. Counsel agreed that he would be ready, but simply would be "uncomfortable" with his preparation. In the absence of some showing of prejudice to the defense, the trial court did not abuse its discretion by denying yet another continuance of this trial. *Early*; *Barnes*; *State v. Honton*, 85 Wash.App. 415, 423, 932 P.2d 1276, *review denied*, 133 Wash.2d 1011, 946 P.2d 401 (1997); *State v. Roth*, 75 Wash.App. 808, 825-826, 881 P.2d 268 (1994), *review denied*, 126 Wash.2d 1016, 894 P.2d 565 (1995).

The trial court did not err in denying the continuance request.

### *Effective Assistance of Counsel*

Mr. Reid argues that his defense attorney did not provide effective assistance of counsel as required by the Sixth Amendment. Much of the allegedly defective behavior involved tactical choices left to the discretion of counsel.

The Sixth Amendment guarantees the right to counsel. More than the mere presence of an attorney is required. The attorney must perform to the standards of the profession. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wash.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions and there is a strong presumption that counsel performed adequately. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

*Comment on Death Penalty.* Mr. Reid first argues that his counsel erred in not objecting when the court informed jurors that the case did not involve the death penalty. This issue arose during voir dire when the court asked:

Is there anyone here that can't assure the court that they'll be able to follow the court's instructions if they have a personal opinion or belief that differs from the law?

Okay. Does this concept give anyone any concern[?]

*And we have some touchy issues that aren't involved in this case, so I'll throw those out. Abortion, and gun control, and death penalty.* And sometimes people can have strong personal or religious beliefs that are different than what—what's on the

books. But you'd be required—The jury doesn't get to decide what the law is. And you have to follow the court's instructions. Is there anyone that has any concern or anyone that can't assure me they'll be able to do that?

RP 71 (emphasis added). Defense counsel did not object to these statements or seek to have the court clarify them.

The Washington Supreme Court has determined that it is improper for a trial judge to tell a jury being selected for a murder trial that the case does not involve the death penalty. *State v. Townsend*, 142 Wash.2d 838, 840, 15 P.3d 145 (2001). Defense counsel is deficient for failing to object to such an instruction. *Id.* at 847, 15 P.3d 145. However, if the error does not affect the outcome of the case, the prejudice prong of the Strickland test is not satisfied. *Id.* at 849, 15 P.3d 145.

\*5 The reason that telling a jury the death penalty is not involved is error arises from the fear that jurors may take their case less seriously. *Id.* at 846-847, 15 P.3d 145. We do not believe that problem is implicated in this case. First, this was not a murder case and there is no reason to think that the jury would have construed the statement as denigrating its responsibility to give careful consideration to this case. More importantly, the context of the court's statement here is totally different. Rather than instruct that this was not a capital case, the court simply mentioned the death penalty as one of three areas, none of which were at issue, where some jurors might have trouble following the law instead of their own consciences. Unlike a murder trial, use of the capital punishment example in this context simply did not present the possibility that the jury might disregard its obligations to give serious consideration of the case. It instead was used to help identify jurors who might disregard the law.

Thus, it is unclear that counsel erred at all. We need not decide that, however, because even if this was error, it was not prejudicial to the defense case. While Mr. Reid argues that the case against him was weak due to identification difficulties, we do not agree. More to the point, the question presented at this trial was the identity of the rapist. Commentary that this was not a capital case simply did not impact that issue. The court's statements did not suggest to the jury that it should not give careful consideration to whether or not the evidence established that Mr. Reid was the rapist.

Failure to object to the court's comment that this was not a death penalty case did not change the outcome of this case. Counsel did not fail his client.

*Juror No. 9.* Appellant next contends that his counsel erred by not striking juror 9, a clergyman who had strong personal feelings against pornography and adult films. The juror also had been falsely accused of sexual assault. Neither party challenged the juror for cause. Neither party used all of its peremptory challenges.

The juror stated that he could set aside his personal feelings and fairly try the case. Thus, it is doubtful that a challenge for cause would have succeeded. The juror's background as a person who had falsely been accused of sexual assault likely resonated with the defense since it was the same theme being used by Mr. Reid. He, too, claimed to be wrongly accused. Under these circumstances, it is understandable that the defense would not challenge juror 9. This decision appears to be a classical tactical decision that is immune from challenge under *Strickland*.

Accepting juror 9 was a tactical choice that cannot be a basis for finding that counsel somehow erred.

*Photo Montage and Identification.* Mr. Reid next challenges counsel's decision to permit the photo montage to be introduced into evidence and failing to seek exclusion of K.E.'s in-court<sup>6</sup> and out-of-court identification of him. These, too, were clear tactical choices.

<sup>6</sup> Argued by Mr. Reid in his SAG.

\*6 The prosecutor initially decided not to seek admission of the montage. After the victim's strong in-court identification of Mr. Reid, defense counsel decided that he would seek to use the montage. The prosecutor then admitted the montage without objection and examined K.E. about her identification. Defense counsel cross examined K.E. about it at some length. He then used that testimony in closing argument to impeach her in-court identification, stressing that her recent identification was the

result of a year's worth of publicity about Mr. Reid and contrasting it with the uncertainty of her September 2007 identification. This approach, along with attacking Schott's motivation, was the primary thrust of the defense closing argument.

The decision to use the montage and the out-of-court identification was clearly a tactical choice. It does not establish any failure by defense counsel. *Strickland*.

Appellant also argues that counsel should have sought to exclude K.E.'s in-court identification as the fruit of a suggestive montage. However, the evidence does not support the argument. As noted, K.E.'s identification from the montage was of modest strength. At trial, K.E. explained that her identification was based on seeing Mr. Reid's face in front of her rather than on a memory of the photograph, which she did not see again until after the in-court identification. Any motion to suppress would not have been likely to succeed.

Any error here would also have been harmless. All of the identification testimony at trial pointed at Reid, not Davis, as Schott's late evening companion. Schott's testimony figured prominently at trial as well. There was no testimony suggesting that K.E. misidentified Mr. Reid as her assailant.

Neither prong of the *Strickland* standard is met in this instance. Mr. Reid has not shown that his trial counsel committed error that prejudiced him in the handling of the identification testimony.

*DNA Evidence.* Appellant next contends that counsel erred by not seeking to exclude the DNA evidence. He contends that the results were not definitive enough to have been admitted.

The evidence was certainly relevant. Because the test results did not exclude Reid, Schott, or K.E. as contributors, it did tend to support the State's theory of the case. It was therefore relevant evidence. ER 401. Relevant evidence is admissible. ER 402. Any motion to exclude the evidence would undoubtedly have been denied. Questions about the weight to be given DNA evidence are factual matters for the jury to consider rather than being a basis for exclusion. *State v. Copeland*, 130 Wash.2d 244, 270-277, 922 P.2d 1304 (1996); *State v. Kalakosky*, 121 Wash.2d 525, 540-543, 852 P.2d 1064 (1993); *State v. Cauthron*, 120 Wash.2d 879, 889-891, 898-899, 846 P.2d 502 (1993).

There was no basis for excluding the DNA evidence. Counsel did not err when he declined to challenge the testimony.

*Prior Acts.* Finally,<sup>7</sup> Mr. Reid argues that his counsel erred by not objecting to the testimony of Mr. Tuggle and Ms. Scherrer, and by not challenging the frequent references to Mr. Reid's occupation ("porn star").<sup>8</sup> This evidence, too, was clearly admissible on the question of identity. Counsel did not err by failing to challenge it.

<sup>7</sup> Appellant also argues that the accumulation of counsel's errors established ineffective assistance. Since we do not believe any errors occurred, let alone an accumulation of them, we do not separately address this argument.

<sup>8</sup> The latter claim is raised in the SAG.

\*7 The testimony from Mr. Tuggle established Mr. Reid's presence in Pullman and used Mr. Reid's own description of himself as "Jack Venice" and a "porn star." He also showed a distinctive neck tattoo. Mr. Reid (Venice) also told Tuggle he was seeking women to star with him in adult movies. All of this testimony was relevant to showing that Mr. Reid was in Pullman's college hill area and what one of his motivations was for being there.

Similar testimony was elicited from Ms. Scherrer, who also testified about Reid's comments about sexual activities. Her testimony was important to tying Reid to Schott (and only Schott) in the early morning (1:45 a.m.) shortly before the charged offenses occurred. As a bartender at a college area tavern, Scherrer's identification of a young man who appeared once in her bar a year earlier would undoubtedly be suspect if there was not a reason why she remembered him. Reid's obnoxious behavior

and unusual profession undoubtedly played a role in reinforcing her memories of his single visit to her bar. Thus, evidence of Mr. Reid's behavior in the bar that night was admissible to explain Scherrer's ability to identify him.

The testimony from both witnesses was admissible on the critical issue of identity. Defense counsel understandably did not waste time making futile objections to the testimony. The use of the term "porn star" to identify Mr. Reid presents a similar issue. He regularly used that description in his interactions with Pullman residents in the bars and apartments he visited. That description was important to their ability to identify him. Counsel can hardly be faulted for not objecting to admissible evidence that came from his client's own mouth. There simply was no basis for exclusion.

While perhaps use of the phrase "porn star" was overplayed to a degree, it did not harm the defense. Cumulative use of admissible evidence is not reversible error. *State v. Todd*, 78 Wash.2d 362, 372, 474 P.2d 542 (1970). The evidence also allowed counsel to make his arguments that Mr. Reid's profession precluded him being a rapist and that Schott (and others) were ganging up on the out-of-towner to blame him for the crime. In other words, defense counsel also had a good tactical reason not to object to the evidence.

Mr. Reid needed to show both that his counsel failed to perform to professional standards and that counsel's defective performance prejudiced his case. He has established neither. Accordingly, he has not shown that his counsel provided ineffective assistance contrary to the requirements of the Sixth Amendment.

#### *Sufficiency of the Evidence*

Mr. Reid also argues that the evidence did not support the convictions. He argues that the rape and first degree burglary fall for failure to prove he was present at the scene. He argues that the two residential burglary counts failed to establish that he intended to commit any crime inside the two sorority houses. Properly viewed, the evidence was sufficient.

**\*8** Sufficiency of the evidence challenges are reviewed according to well-settled standards. Appellate courts review to see if there was evidence from which the trier-of-fact could find each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wash.2d 216, 221-222, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.*

In view of the specific nature of the alleged proof deficiencies, we will only address the evidence relevant to the challenges. Appellant argues that he was not present at the Kappa Alpha Theta house where the rape and first degree burglary counts occurred. To the contrary, both K.E. and Mr. Schott testified that Mr. Reid was not only present, he was the perpetrator. Viewed most favorably to the State, this evidence certainly permitted the jury to conclude that Mr. Reid committed both offenses.

With respect to the two residential burglaries, Mr. Reid challenges the sufficiency of the evidence to support the element that he was present unlawfully "with intent to commit a crime" in the residences. RCW 9A.52.025(1). Viewing the evidence in a light most favorable to the prosecution, the evidence amply supported the jury's verdicts. First, Mr. Schott testified that Mr. Reid was looking for women to have sex with him. As his subsequent conduct demonstrated, he was not looking for a willing partner. This evidence alone would establish his intent in breaking into the two houses.

His conduct within each house, however, also established the element. At the Pi Beta Phi sorority he threw property out of the window. This established the crime of theft. Similarly, at the Delta Gamma house, two soft drinks were taken and partially consumed. Once again, this was a theft. In both instances, this evidence showed that the defendant did in fact commit a crime within each building. The evidence permitted the jury to find this challenged element in both of the residential burglary counts.

The evidence was sufficient for the jury to find each contested element of the four crimes. The convictions are affirmed.

State v. Reid, Not Reported in P.3d (2010)  
155 Wash.App. 1032

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: KULIK, C.J., and BROWN, J.

**Parallel Citations**

2010 WL 1544392 (Wash.App. Div. 3)

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# **APPENDIX B**

179 Wash.App. 1017

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,  
Division 3.

Christopher Jack REID, Appellant,

v.

PULLMAN POLICE DEPARTMENT, Respondent.

No. 31039-6-III. | Jan. 28, 2014.

Appeal from Whitman Superior Court; Honorable John David Frazier, J.

**Attorneys and Law Firms**

Christopher Jack Reid (Appearing Pro Se), Stafford Creek Corrections Centery, Aberdeen, WA, for Appellant.

Laura Debaecker McAloon, Theresa Lalone Keyes, K & L Gates LLP, Spokane, WA, for Respondent.

**UNPUBLISHED OPINION**

FEARING, J.

\*1 Christopher Jack Reid seeks to compel, under the Public Records Act (PRA), chapter 42.56 RCW, the Pullman Police Department (PPD) to produce, among other records, records the police department might have maintained in its investigatory file but claims it *did not possess at the time* of Reid's records request. The trial court denied Reid relief, and we affirm.

**FACTS**

A jury convicted Christopher Reid of second degree rape and burglary. After losing an appeal, Reid requested all records related to his criminal case that the PPD, the investigating agency, possessed. The PPD responded, providing Reid with what it claims to be the entire copy of his criminal case file. The PPD produced over 1,000 pages and the response included two four-inch, loose-leaf notebooks and one three-inch notebook.

After reviewing the voluminous records given to him by PPD, Christopher Reid concluded that records were missing. For example, he demands that PPD produce a copy of the audio recording of the rape victim's 911 call. An independent agency, Whitcom, however, took and recorded the call. Whitcom is a consolidated 911 dispatch center for Pullman, Asotin County, Washington State University, and Moscow, Idaho. The PPD informed Reid that the city did not have the 911 recording and suggested to Reid that he contact Whitcom.

In a narrative report by Pullman Police Officer William Orsborn, Orsborn wrote that he gave photo lineup sheets to other officers who conducted interviews of those who saw Reid and Reid's accomplice. The records produced by PPD included statements of the witnesses who underwent the photo lineups. Christopher Reid supposes the PPD failed to produce documents because the records he received do not identify the names of the officers who performed the photo lineups.

Christopher Reid believes that the PPD failed to provide him with an audio recording of an interview of the rape victim, K.N.E., conducted on September 13, 2007 by Pullman Police Officer Scott Kirk. A narrative report of Officer Kirk contains, near the

end, the words “End of tape” and the initials “JSK/es.” Clerk's Papers (CP) at 46. Officer Kirk signed an affidavit declaring: “I never took an audio recorded statement of the victim in this case. This record does not exist.” CP at 127. He also stated that he dictated his narrative, and the narrative report was typed by a transcriptionist. The transcriptionist, Elysia Spencer, averred that she transcribed the report Kirk dictated and that she did not transcribe an audio recording of a statement from the victim. In other words, reference to the “End of tape” in the report refers to the dictated tape from Kirk, not a tape of a recording of the victim. CP at 46.

Separately from the request to Pullman, Christopher Reid requested records from the Washington State Patrol Identification and Criminal History Section (WSP). Reid compared the WSP records with the case file PPD produced. The WSP records showed that, during Pullman's rape investigation, PPD Officers William Orsborn and Michael Crow requested and received criminal histories of four other individuals. The results from those requests were not in the file PPD produced. Christopher Reid believes these missing records will substantiate his claim of innocence. He does not explain, but it is not relevant to the appeal, why these purported exculpatory records have not or cannot be received from the WSP.

\*2 According to PPD's Property and Evidence Specialist, police officers in the field obtain information from WSP databases by radioing requests to Whitcom, a regional dispatch center, and then receiving results over the radio. In such circumstances, an officer generally does not request printouts of the results for insertion in the case file. Even if an officer requests printouts and those printouts enter the case file, the officer may later remove them “in light of new information that tended to show the WSP record was irrelevant.” CP at 134.

One investigating officer, Michael Crow, submitted an affidavit stating he did not print the histories he obtained from the WSP when investigating the rape. Pullman, however, did not submit an affidavit from Officer William Orsborn, who also requested the histories from the WSP. Orsborn is retired.

Reid filed a motion with the trial court to “order [PPD] to show cause on why it has refused to allow copying” of the criminal histories, among the other records. CP at 9. The City of Pullman responded that it did not possess or control the records. In support of its position, Pullman submitted seven sworn statements from Pullman employees explaining why the records Christopher Reid requested did not exist. PPD's Records Specialist averred that, upon receipt of Reid's records request, she provided him a copy of the department's entire investigation file concerning the rape.

After Pullman responded to the show cause order, Christopher Reid filed a motion for leave to insert an additional claim seeking declaratory relief for alleged violations of the Preservation and Destruction of Public Records Act (PDPRA) chapter 40.14 RCW. After reviewing the affidavits submitted by the parties, the trial court denied Reid any relief. The trial court found that Pullman's explanation for the absence of the criminal histories was “credible and logical” and that Pullman produced every record in its possession and control at the time the records request was made. CP at 126.

## ANALYSIS

### PUBLIC RECORDS ACT

On appeal, Christopher Reid continues to argue that Pullman violated the PRA because it has not produced records it possesses or possessed. The superior court reviews an agency's response to a public records request *de novo*. RCW 42.56.550(3); *Zink v. City of Mesa*, 140 Wn.App. 328, 335–37, 166 P.3d 738 (2007). In turn, we also undertake *de novo* review, when the trial court rendered, as it did here, a decision based upon pleadings rather than oral testimony. *Gronquist v. Dep't of Corrections*, 159 Wn.App. 576, 590, 247 P.3d 436 (2011). Under such circumstances, the appellate court stands in the same position as the trial court and is not bound by the trial court's findings on disputed factual issues. *Id.*

We have reviewed the entire record and conclude, as did the trial court, that Pullman's explanations with respect to the absence of records are credible. An officer may contact WSP for information that the officer reviews on a computer and never prints. The names of the officers performing lineups may often be important, but could have been of little consequence in the rape investigation because of a lack of certainty in the lineups, such that the names were never documented. Contrary to Reid's contention, the police department provided pages of raw data prepared as part of the lineups. Pullman amply explains why it has produced no recording of an interview of the victim or the 911 call of the victim.

\*3 Reid believes the police are seeking to shield exculpatory information, but the background and history of the case does not confirm this contention. The volume of records provided by Pullman suggests that the city lacked desire to exclude any documents in its production. In short, Reid has provided no firm evidence that Pullman withheld records. "Purely speculative claims about the existence and discoverability of other documents will not overcome an agency affidavit which is accorded a presumption of good faith." *Forbes v. City of Gold Bar*, 171 Wn.App. 857, 867, 288 P.3d 384, 389 (2012) (quoting *Trentadue v. F.B.I.*, 572 F.3d 794, 808 (10th Cir.2009)), review denied, 177 Wn.2d 1002 (2013).

Christopher Reid correctly notes that an agency is forbidden from destroying responsive documents while a PRA request is pending. See RCW 42.56.100. Nevertheless, the argument does not control since the evidence does not support a finding of spoliation of records. Assuming officers discarded the WSP criminal histories, the disposal occurred years before the records request. Christopher Reid also impliedly argues the PPD violated the PRA when it did not create records to identify officers who assisted in photo lineups. Yet, "an agency has no duty to create or produce a record that is nonexistent." *Bldg. Indus. Ass'n of Wash. v. McCarthy (BLAW)*, 152 Wn.App. 720, 734, 218 P.3d 196 (2009) (quoting *Sperr v. City of Spokane*, 123 Wn.App. 132, 136-37, 969 P.3d 1012 (2004)).

Christopher Reid argues that the trial court erred when it found the PPD complied with the PRA without an affidavit from Officer William Orsborn. In violation of RAP 10.3(a)(6), Reid fails to cite legal authority for this contention. Regardless, Orsborn's testimony is not required. In PRA cases, the agency's burden is to establish "beyond material doubt" the reasonableness of its search for documents, and "[t]o do so, the agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith." *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 720-21, 261 P.3d 119 (2011). Pullman submitted seven detailed, sworn statements explaining the reasonableness of its search and attached over 1,000 pages of records demonstrating that it produced Christopher Reid's entire criminal case file.

## PRESERVATION AND DESTRUCTION OF PUBLIC RECORDS ACT

Christopher Reid faults the trial court for refusing to require the PPD to offer proof that it complied with the State Records Management Guidelines and Retention Schedules. The PDPRA permits the State Archivist to create guidelines to assist government agencies to comply with the Act. RCW 40.14.070(2)(a)(iii). The State Archivist created and distributed the Records Management Guidelines for Local Government Agencies of Washington State (Guidelines).

Reid asserts Washington courts have relied on the Guidelines when analyzing whether agencies violated the Public Records Act citing *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 148-49, 240 P.3d 1149 (2010); *Bldg. Indus. Ass'n of Washington (BLAW)*, 152 Wn.App. 720; *Daines v. Spokane County*, 111 Wn.App. 342, 350, 44 P.3d 909 (2002), overruled in part on other grounds by *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011). To the contrary, however, courts have held that an agency need not show it complied with the PDPRA to prove it complied with the PRA. *West v. Dep't of Natural Resources*, 163 Wn.App. 235, 245, 258 P.2d 78 (2011), review denied 173 Wn.2d 1020 (2012); *BLAW*, 152 Wn. App. at 741. Anyway, Reid identifies no guideline violated by Pullman and courts have questioned whether a private party has standing to sue under the PDPRA. *BLAW*, 152 Wn.App. at 742; *Daines*, 111 Wn.App. at 350.

### MOTION FOR ADDITIONAL BRIEFING

\*4 In its brief, Pullman wrote that the trial court reasonably concluded it did not violate the PRA based on affidavits along with “the context of certain records.” Christopher Reid claims he has no knowledge of the “context” or “certain records” to which Pullman refers. In his reply brief, Reid asks this court, pursuant to RAP 10.4(d), to order Pullman to elaborate on the meaning of the phrase. This court denies Reid’s motion because RAP 10.4(d) does not permit a party to file a non-dispositive motion in his brief. *Ash v. Dep’t of Labor & Indus.*, 173 Wn.App. 559, 561, 294 P.3d 834 (2013).

### CONCLUSION

After conducting our de novo review of the record, we hold that Pullman did not violate either the PRA or the PDPR. We affirm the trial court.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: KORSMO, C.J., and KULIK, J.

#### Parallel Citations

2014 WL 301065 (Wash.App. Div. 3)

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