69429-4

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NO. 69-429-4-I

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION I

JEFFREY CHEN,

Appellant,

v.

CITY OF MEDINA,

Respondent.

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*Amended** BRIEF OF RESPONDENT

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*Amended brief filed to reflect citations to the Clerk's papers which were received from the Superior Court *after* the due date of the Response brief.

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I. ISSUES PRESENTED

A. Whether the trial court abused its discretion when it entered an Amended Order on Motion for Relief Under Public Records Act with Findings of Fact and Conclusions of Law on April 26, 2012?

B. Whether the trial court abused its discretion when it entered an Order Denying Chen's Motion for Reconsideration and entered amended Findings of Fact and Conclusions of Law on April 26, 2012?

C. Whether Chen's failure to appeal within 30 days of the Court's April 26, 2012 Order Denying Motion for Reconsideration renders this appeal untimely?

D. Whether the City is entitled to attorney's fees pursuant to RAP 18.9 because this appeal is frivolous?

II. STATEMENT OF FACTS

A. FACTUAL SUMMARY.

This case concerns extraordinarily broad public records requests made by former Medina Chief of Police Jeffrey Chen to the City of Medina. Chen was terminated from that position in April 2011. CP 4. Through legal counsel, Chen made records requests for any and all records relating to him since 2004 as well as for some specific records. CP 5-6. Chen alleged that the City did not respond within a reasonable time as required by RCW 42.56.550(2); that certain specific records were unlawfully withheld under RCW 42.56.550(1); and that the City failed to provide the fullest assistance

in its responses. CP 10-12.

The trial court held a show cause hearing on September 12, 2011. CP 180-181.[1] After taking the matter under advisement, Judge Greg Canova rejected Chen's claims that specific records were unlawfully withheld, ruled that the City responded reasonably by providing installments and that it was reasonable for the City to have required more time than demanded by Chen. CP 154-163.

Because the show cause procedure provided by RCW 42.56.550 is dispositive, the Court entered findings of fact and conclusions of law to support its order. Chen made certain objections in a motion for reconsideration. On April 26, 2012, the Court denied Chen's motion for reconsideration and issued amended findings to correct minor issues. *Id.* The court directed entry of judgment in favor of the City and awarded statutory attorney fees. On September 10, 2012, the $200 statutory attorney's fee award was reduced to a judgment in favor of the City. CP 178-179. Chen appeals.

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[1] Appellant Chen designated only a partial record of the trial court. Respondent City of Medina filed two supplemental designations of additional clerk's papers with the King County Clerk, but did not receive the Clerk's Papers number designations by the time of filing this brief, and therefore files this Amended Brief to provide the correct references to the recently designated clerk's papers identified in the Supplemental Designation of Clerk's papers and Second Supplemental Designation of Clerk's papers. No other changes have been made in the Amended Respondent's Brief.

B. BACKGROUND OF CHEN'S EMPLOYMENT DISPUTE WITH CITY OF MEDINA.

In November 2010, the City of Medina learned of unauthorized penetrations of its e-mail system by unknown users. At the time Chen was the police chief. CP 4. Attorney Michael Bolasina was hired by the City's insurer, the Washington Cities Insurance Authority as an attorney to provide legal advice to the City concerning the unauthorized access into the City's e-mail archives. CP 209, ¶3; CP 213, ¶2. In December 2010, Bolasina interviewed Chen about the complaints of unauthorized access into City e-mail records. CP 209, ¶4. He asked Chen to review a statement documenting his interview statements. *Id.* Chen did not respond. *Id.* Instead, two days later, he abruptly resigned and shortly thereafter attempted to rescind his resignation. CP 209-210, ¶5.

Chen was then placed on administrative leave by the City Manager. CP 214, ¶3. On January 27, 2011, Chen provided a memorandum that contradicted his statements to the City's legal counsel in December and sought protection as a "whistleblower". CP 214, ¶4; CP 210, ¶7. Bolasina, as the City's legal counsel, reviewed Chen's memorandum and advised the City Manager in preparing a response. CP 210, ¶7. It led him to believe that litigation with Chen was likely. *Id.* Bolasina then met in an executive

session with the City Council to advise them about potential litigation, as authorized by the Open Public Meetings Act. CP 210-211, ¶8. In preparation for this meeting, Bolasina gathered key documents to assist in his advice to the Council, but did not prepare a written report. *Id.* At the conclusion of the executive session, the documents were collected from the Council members and were not further provided to them or anyone else at the City. CP 210-211, ¶8.

The City hired Stephanie Alexander as additional legal counsel because Bolasina was likely a witness to the statements Chen made in December. CP 214, ¶5. Ms. Alexander retained Ellen Lenhart to conduct an independent investigation into Chen's resignation and employment issues. CP 214-215, ¶6. She independently interviewed witnesses and issued a report ("the Lenhart Report") directed to Alexander on March 23, 2011. CP 215, ¶7. She was not supervised by the City Manager and did not provide the City with preliminary drafts or notes. CP 214-215, ¶ 6. The City only received the final version of the Lenhart report. CP 215, ¶7. The Lenhart Report was provided in unredacted form to Chen, who used it to draft a response to the findings and conclusions about his conduct. *Id.*. This is the only investigation report concerning Chief Chen that the City possesses. *Id.*

On March 29, 2011, the City received a request for a massive number of public records from Joyce Thomas, an attorney representing Chen. CP 445, ¶9. Her request sought:

> Any and all documents from February 1, 2004, to date regarding or discussing Jeffrey Chen, the current Chief of Police of the City of Medina. This request includes any and all investigative reports prepared by any investigator retained by the City of Medina, including, but not limited to Michael Bolasina and Ellen Lenhart, any and all documents reviewed by the Medina City Council concerning or about Chief Jeffrey Chen, any and all emails of or about Chief Jeffrey Chen, received, or sent, and any and all information in whatever form which discusses in any manner the rationale for placing Chief Chen on administrative leave on December 27, 2010.

CP 43-44. (Emphasis added).

In response, the City first provided Chen an unredacted copy of the Lenhart report on March 31, 2011. CP 218. On April 1, 2011, the City responded within 5 business days of the request as required by RCW 42.56.520, by requesting clarification of this request and direction as to what specific identifiable records were being sought. CP 46-47. The City asked whether the request was limited to the ongoing employment dispute. *Id.*

Chen's attorney refused to limit or focus the massive request, insisting that it covered:

> "all records in which Chief Jeff Chen's name and/or position is referenced in all documents concerning the City of

Medina's business since 2/1/2004."

CP 46-47.

On April 27, 2011, Chen was formally terminated by the City Manager, Donna Hanson, for dishonesty in his interviews with the City's legal counsel and subsequent investigator, for abusing his position as police chief, for improper access and use of city resources, improperly accessing City e-mail archives and for the loss of confidence in his subordinates resulting from his actions. CP 215, ¶7. Chen subsequently filed a damage claim and federal lawsuit seeking at least $14,000,000.00. *Id.*

C. THE CITY WAS BOMBARDED BY PUBLIC RECORDS REQUESTS CONCERNING CHEN'S TERMINATION.

After March 2011, the City was inundated with records requests concerning the Chen employment dispute. Since March 1, 2011, the City received 131 records requests, including the plaintiffs' March 29 request. CP 445, ¶9. Of these, 44 requests, including plaintiff's request related specifically to the Chen employment situation. The City was required to respond to these requests in addition to Chen's broad request. CP 449-463.

Shortly before Thomas made her March 29 request, the City received two requests for records concerning the Chen employment dispute. These were requests from Heija Nunn for:

1. All email communications between Jeff Chen and city employees, and legal counsel representing City of Medina between December 1, 2010 and Monday March 28; and

2. Any and all documents, emails, or other communications regarding the investigation, and personnel matter of Police Chief Chen dating between December 1, 2010 and Monday March 28, 2011.

CP 446, 454.

Additionally, on March 29, 2011, a request was received from Nat Levy of the Bellevue Reporter for the following documents:

> all available documents related to the employment and investigation of Police Chief Jeffrey Chen, including memos, emails, text messages, City Council minutes and any other materials relating to the chief's resignation, retraction of resignation, suspension and resulting investigation.

CP 455.

Finally, on April 29, 2011, Ms. Nunn made another request for the following records:

> all documents, emails, and related communications involving the personnel matter, investigation, loudermill, hearing and ultimate termination letter, conclusion, etc in regards to former chief Jeff Chen.

CP 456.

Because the records responsive to the Nunn and Levy requests were necessarily also responsive to Chen's request, the City decided to provide the

records responsive to these requests as an initial installment to Chen. CP 203, ¶4. Because of the large number of requests in addition to the massive request from Chen, Baker needed assistance from MX Logic, the consultant that established the e-mail archive, in order to search the e-mail system and locate responsive records. CP 203, ¶5. She first obtained financing approval to have MX Logic assist in searching for responsive e-mails. *Id.* Because of the litigation sensitivity surrounding these matters, the City entered into a confidentiality agreement with MX Logic on July 14 and began searching for e-mails responsive to the Nunn, Levy and Chen requests in the City e-mail archive. *Id.*

MX Logic worked with Baker to conduct word searches for the Nunn and Chen requests in July, 2011. CP 207. The results for the Chen search yielded 30,610 separate e-mails that were potentially responsive. CP 203, ¶6. The Nunn request was more focused and concerned the e-mails relevant to the employment investigation. This search yielded 2,860 potentially responsive e-mails. CP 203.

An initial batch was sent for legal review and upon completion, 218 e-mails were determined to be non-exempt and available for the requesters. *Id.* When this review was completed, they were promptly provided to the

requesters on July 30, 2011 as the first installment of responsive records. *Id.* In its July 30 response, the City estimated that an additional installment of records would be available in three months. CP 66.

D. THE CITY'S STAFF AND RESOURCES AVAILABLE TO PROCESS RECORDS REQUESTS WERE LIMITED AND OVERTAXED BY CHEN'S REQUEST.

The City of Medina is a relatively small city, with 23 employees and 7 police officers. CP 442, ¶2. The City Clerk serves as the public records officer pursuant to RCW 42.56.580, and has limited resources to devote to responding to records requests. CP 442-443, at ¶3. The Clerk's other responsibilities include being the manager of the City Central Services Department and supervisor of two employees. *Id.* One of these is the Development Services Coordinator, who responds to records requests for the Development Services Department. In addition, the Clerk is a key staff support to the City Council and is responsible for preparation fo reports and packets used by the Council. *Id.* The Clerk responds to information requests from the City Council, conducts research and prepares minutes of City Council meetings. *Id.* The Clerk also serves as the City's Human Resources Manager. *Id.*

For the nine months prior to Chen's request, the City government was

housed in temporary quarters while a new city hall was being built. The new City Hall opened at the end of July, 2011. CP 443, ¶4. While construction was ongoing, many of the City's records were placed in offsite temporary storage. *Id.* The City's off-site storage consists of two storage rooms which contain approximately 238 boxes of records. *Id.* All of these records needed to be retrieved from storage and searched to determine if they contain records responsive to Chen's records request. *Id.*

E. CHEN'S REQUEST SOUGHT AN ENORMOUS VOLUME OF RECORDS THAT NEEDED TO BE REVIEWED TO IDENTIFY POTENTIALLY RESPONSIVE RECORDS.

To provide "all" records that may discuss or regard or otherwise mention Jeff Chen or the position of police chief, the City was required to locate and review all electronic and paper records created after February 1, 2004. Chen's request was not limited to the records of the Police Department, which he had supervised since 2004, nor was it limited to records generated by the City Manager and administrative officers concerning the Chen employment dispute.

The City's electronic records are also found in multiple locations, all of which need to be separately searched for responsive records. CP 443-445, ¶¶5-8. In August 2008, the City began using the MX Logic system to archive

and store its e-mails. CP 203, ¶5. The e-mails archived in the MX Logic system since August 1, 2008 included 414,827 messages, totaling 69,930 megabytes of data. CP 444, ¶7. All of these would have to be searched to determine if they are "regarding" Chief Chen.

The paper records subject to review include a room full of boxes in the City storage facility. *Id.,* ¶6. Because the City was transitioning from a makeshift trailer to a new City Hall, it was unable to retrieve and review these records at the outset of the request. *Id.* In addition to these records, the City must review all its administrative files, correspondence, contracts, invoices, billing records, time sheets, policies and other files to determine if any responsive records are present. CP 444-445, ¶8.

The records maintained by the Police Department itself are voluminous and complicated. CP 430-434. As Crum's declaration described, the police department records alone contain numerous categories of records that the City must search for records "regarding" Chief Chen:

- Correspondence
- Administrative Files, including
    - Personnel Orders
    - General Orders
    - Special Orders
    - Concealed Weapons Permitting Files
- Training Files
- Personnel files

- Internal Investigation Files
- Invoices & Billing Records
- Budget Records
- Uniform Crime Reports, each month since 2007
- Case Files

CP 432-433, ¶5.

Because the request at issue asked for "all" records relating to Chief Chen since February 2004, the City was also required to search for electronic records on all the hard drives of the computers it uses. In addition, there are 3 servers that may contain responsive information. Given the large volume of requests pending and the magnitude of Chen's March 29 request, the City's limited staff resources were not been able to fully respond before Chen commenced this lawsuit on August 8, 2011.

F. CHEN'S REQUEST REQUIRED THE CITY TO REVIEW ALL POTENTIALLY RESPONSIVE RECORDS TO IDENTIFY ANY EXEMPT RECORDS AND MAKE A VALID CLAIM OF EXEMPTION.

Once the City has located the enormous volume of records that are responsive, its task is not complete. The City must also review these records to determine if any exemption applies (e.g. attorney-client privilege, necessary for effective law enforcement, protect rights to privacy).[2]

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[2] See RCW 5.60.060 (attorney client privilege); *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 174 P.3d 60 (2009); *Hangartner v. City of Seattle,* 151 Wn.2d 439, 452, 90 P.3d 26 (2004). See also RCW 42.56.240(1) (exempting law enforcement records the

For example, because the City reasonably anticipated the litigation threatened by Chen with litigation as confirmed by his $14 million claim, the City needed to determine if the records are relevant to any "controversy", and whether they would be discoverable under the civil rules of discovery. RCW 42.56.290. This includes identification of any work product and privileged records. Legal review of these documents is essential to assure that these evidentiary privileges are properly claimed during the litigation with Chen and were not waived.

The City would also have to review these records to see if any are exempt investigative records or intelligence information which would be exempt under RCW 42.56.240(1). This exemption applies if disclosure would violate anyone's right to privacy or if non-disclosure is essential for effective law enforcement. Given that the request seeks records for the chief of police, it is highly likely that there would be a large volume of exempt or partially exempt records.

After the City staff locates responsive records, and determines whether an exemption applies, the City must then identify a statutory basis

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non-disclosure of which is essential to effective law enforcement or necessary to protect the right to privacy); *Newman v. King County,* 133 Wn.2d 565, 947 P.2d 712 (1997); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998); *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993).

for any exemptions or redactions for each record withheld and provide a brief description of how each exemption applies to the record withheld. RCW 42.56.210(3). This task must be completed for each document that is subject to a claim of exemption. *Rental Housing Authority v. City of Des Moines,* 165 Wn.2d 525, 539, 199 P.3d 393 (2009); *PAWS v. University of Washington,* 125 Wn.2d 243, 884 P.2d 592 (1994). Chen's massive request did not allow sufficient time to complete the necessary tasks before this lawsuit was commenced.

G. CHEN REQUESTS THE NOVEMBER 8, 2010 CITY COUNCIL RECORDING.

On June 16, 2011, Chen's counsel filed a second more specific records request. This request sought the recording of the city Council meeting on November 8, 2010 "in its entirety". CP 57. This recording included a portion of a conversation during a recess in proceedings between a Council member and others. CP 447-448, ¶17. As is customary, when the Council took a recess, the tape was turned off. At the November 8, 2010 meeting, there was a brief delay after the recess until the recording was stopped. *Id.* Chen's claim that the tape was redacted incorrectly assumed that the tape continued during the recess. *Id.*

The City Manager was concerned because the parties to this

conversation had not given permission for it to be recorded. CP 215-216, ¶8. She sought legal review from the City attorney which was ongoing when the original estimated date arrived. When the City informed Ms. Jones on July 16 that the response would be delayed until August 8, 2011, she objected. However, the City was able to respond on July 18, 2011 by providing a full, unredacted copy of the recording. CP 447-448, ¶17; CP 215-216, ¶8.

H. PROCEDURAL HISTORY.

On August 5, 2011, after receiving the initial installment of records, Chen filed a Complaint against the City of Medina for violations of the Public Records Act. Pursuant to RCW 42.56.550(1), Chen obtained an ex parte order for the City of Medina to show cause why the City had not violated the Public Records Act. CP 180-181. The parties stipulated to an expedited briefing schedule and Chen moved the Court for relief under the Public Records Act. Chen filed a brief with supporting declarations and exhibits in support of this motion. CP 182-183. Medina responded and filed declarations opposing the motion. CP 184-201. Chen filed a Reply brief on September 9, 2011. The Court heard these motions at the show cause hearing on September 12, 2011. The Court took the matter under advisement and did not issue its ruling at that time.

On December 5, 2011, the parties received an administrative notice that the case would be transferred to a newly assigned judge effective January 9, 2012, even though Judge Canova had heard a dispositive show cause motion. On December 14, 2011, plaintiff's counsel sent an e-mail asking if a ruling would be issued prior to transfer of this case to a new judge. The Court responded on December 15, 2011 informing the parties that Judge Canova would issue his ruling no later than January 6, 2012, prior to any transfer. Appellant's counsel did not object to that proposed timeline.

At 4:02 p.m. on Thursday, December 22, 2011, the Court requested the parties to submit proposed orders. It clarified this request on December 23, 2011 by directing that the proposed orders be submitted in MS Word format. Plaintiff submitted its proposed order at 1:00 on December 23, 2011, during the time of counsel's claimed "unavailability". The City filed and served its proposed order on Tuesday, December 27, 2011. The court issued its ruling on January 4, 2012, five court days after service of the City's proposed order. CP 90-99.

On January 17, 2012, Chen moved for reconsideration and raised several semantic and minor objections to the Court's findings. CP 100-113. Chen contended that he did not have adequate notice of the proposed order,

CP 104, and that findings were unnecessary. CP 106. However, Chen alternatively requested entry of an amended order correcting the alleged errors in the previously entered order. CP 110.

The Court directed the City to respond to the motion for reconsideration. The City responded and agreed that two minor factual errors should be corrected. CP 327-328. Chen's remaining proposed changes were largely semantic and immaterial to the Public Records Act claims. *Id.* The City demonstrated that the findings issued by the Court were otherwise accurate and refuted Chen's speculative claim of prejudice in his federal employment lawsuit. *Id.*

On April 26, 2012, the Court denied the Motion for Reconsideration, CP 164, and entered Amended Findings of Fact and Conclusions of Law. CP 154. The amended Order expressly directed entry of judgment on all claims on behalf of the City and awarded statutory attorney's fees to the City. CP 163. Chen did not immediately appeal or contest the amended order.

On August 30, 2012, the City requested entry of a judgment in the amount of $200.00 for statutory attorney fees. CP 414. On September 10, 2012, the Court entered the requested judgment against Chen. CP 178-179.

Thereafter, Chen commenced this appeal.[3]

III. ARGUMENT

In his appeal, Appellant does not challenge any of the substantive decisions made by the trial court, namely (1) finding that the City's response to Chen's records request was reasonable; (2) that the City did not violate the Public Records Act in responding to requests for the Lenhart Report, an audio recording of a city Council meeting and in refusing to provide work product shared during an executive session; and (3) awarding $200 judgment to Medina for statutory attorney's fees. Instead, he takes issue solely with the *procedure* used to enter of the findings of fact and conclusions of law under CR 52(c) and CR 54(f), and then the denial of his motion for reconsideration. These issues are reviewed for abuse of discretion. They should be upheld unless manifestly unreasonable or one based on untenable grounds or for untenable reasons. *Sargent v. Seattle Police Dept.*, 167 Wn. App. 1, 23, 260 P.3d 1006, 1017 (2011).

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[3] It is the appellant's duty to provide an adequate record so the appellate court can review assignments of error. *King County Dept. of Adult & Juvenile Det. v. Parmelee*, 162 Wn. App. 337, 360, 254 P.3d 927, 939 (2011). Chen designated only a partial record from the trial court for consideration in deciding this appeal. Chen failed to provide a certified transcript of the proceedings in the trial court. Chen failed to designate the Motion for an Order to Show Cause, and the City of Medina's briefing and declarations in opposition to Chen's Motion for Relief Under the Public Records Act and its Response to Chen's Motion for Reconsideration. Chen's failure to provide an adequate record precludes the court from adequately reviewing his claims of error on appeal.

A. THE TRIAL COURT'S ORDERS ON THE MOTION FOR RELIEF AS AMENDED ON APRIL 26, 2012 WAS PROPER AND DID NOT PREJUDICE CHEN.

1. Chen was provided with sufficient notice of the proposed Order.

As an initial observation, Chen cites no authority for his argument that he was not timely served with Medina's proposed Order on Motion for Relief Under Public Records Act with Findings of Fact and Conclusions of Law. *Tacoma Recycling, Inc. v. Capitol Material Handling Co.,* 34 Wn. App. 392, 396, 661 P.2d 609 (1983) can be distinguished, because the defendant had appeared and answered, but failed to show up and present evidence at trial due to a mis-communication between the defendant and his attorney. *Id.* The Court entered findings of fact, conclusions of law and a judgment in favor of the plaintiff the day after the scheduled trial date. *Id.* The appellate court held that the defendant was entitled to five days notice of presentation of the judgment under CR 52(c). *Id.* Here, the trial court entered its ruling five days after the City filed and served its proposed order with findings of fact and conclusions of law.

Chen fails to support his argument with any legal authority and has not demonstrated that he was prejudiced by the his claimed "lack of notice". He argues only that he could not have foreseen the court's ruling because it

did not telegraph it in an oral opinion or a preliminary written opinion. However, Chen was in the exact same position as Medina, and thus was not unfairly prejudiced.

More significantly however, Chen was not prejudiced because the trial court actually considered and ruled upon his objections raised in his motion for reconsideration. After the court entered its January 4, 2012 order, Chen moved for reconsideration. The court directed the City to respond and fully considered Chen's objections to the findings of fact and conclusions of law. The Court entered amended findings of fact and conclusions of law on April 26, 2012, thereby creating a new final order. CP 154-163. Appellant's claims of unfair procedure relate solely to the interlocutory January 4, 2012 order and do not affect the validity of the April 26, 2012 order with its amended findings of fact and conclusions of law.

In briefing the motion for reconsideration, Chen acknowledged that the trial court could cure any prejudice by entering amended findings of fact. CP 110. The court entered an amended order proposed by the City which corrected minor factual errors identified in Chen's motion. CP 154-163. After having proposed curing the issue by entering amended findings, Chen cannot now complain that such an action by the Court , as invited by the

plaintiff, was improper. To do so violates the well settled principle under the invited error doctrine, which prohibits a party from setting up an error in the trial court, then complaining of it on appeal. *Humbert/Birch Creek Const. v. Walla Walla County,* 145 Wn. App. 185, 192, 185 P.3d 660 (2008); *In re Tortorelli,* 149 Wn. 2d 82, 94, 66 P.3d 606 (2003); *Colella v. King County*, 14 Wn. App. 247, 251, 539 P.2d 693 (1975). Such "invited error" precludes judicial review. *Prater v. City of Kent*, 40 Wn. App. 639, 642, 699 P.2d 1248, 1250 (1985).

Chen cannot demonstrate any abuse of discretion by the trial court. The trial court did not abuse its discretion in denying Chen's motion to vacate the January 4, 2012 Order on Motion for Relief under Public Records Act with Findings of Fact and Conclusions of Law. Any procedural objection was cured and rendered moot by the court's consideration of Chen's motion for reconsideration. The Amended Findings of Fact and Conclusions of Law should be affirmed.

2. The Court properly entered Findings of Fact and Conclusions of Law to Support its Ruling after the Show Cause Hearing.

Appellant argues, without citing to any authority, that the Court abused its discretion by entering findings of fact and conclusions of law, and

that none should have been entered at all. Appellant is incorrect as a matter of law because the Public Records Act allows the court to decide the case upon a show cause proceeding, which Chen initiated here.

The Public Records Act expressly allows the Court to determine factual issues based upon review of affidavits. RCW 42.56.550(3). In cases filed under the Public Records Act, the trial Court has wide discretion as to the type of proceedings necessary to resolve the individual parties' issue. The Court may hear live testimony, conduct an evidentiary hearing, review the disputed records *in camera*, or decide the issues raised at the show cause hearing. The legislative intent is to provide for expeditious resolution of disputes under the Public Records Act. Trial court discretion as to the exact procedure for each case is necessary to further the statute's intent.

In this case, the trial court did not abuse its discretion by entering findings of fact and conclusions of law. Numerous cases under the Public Records Act have resulted in the entry of findings of fact and conclusions of law after the Court conducts a show cause hearing. See *O'Neill v. City of Shoreline,* 145 Wn.App. 913, 921, 187 P.3d 822 (2008); *Wood v. Thurston County,* 117 Wn.App. 22, 28-29, 68 P.3d 1084 (2003); *Zink v. City of Mesa,* 162 Wn. App. 688, 256 P.3d 384 (2011); *West v. Port of Olympia*, 146 Wn.

App. 108, 120, 192 P.3d 926 (2008); *Lindberg v. County of Kitsap*, 133 Wn. 2d 729, 739, 948 P.2d 805 (1997) and most recently in *Sargent v. Seattle Police Dept.,* 167 Wn.App. 1, 22, n.51, 260 P.3d 1006(2011) (written findings control over an oral decision).

Pursuant to CR 52(a) and CR 52(b), entry of findings is appropriate because this matter was considered pursuant to a show cause hearing under RCW 42.56.550 where the Court acted as the fact finder. The Public Records Act allows the Court to determine factual issues at a show cause hearing based solely upon the affidavits and declarations presented at the show cause hearing. RCW 42.56.550(3); *O'Neill v. City of Shoreline,* 170 Wn.2d 138, 152-154, 240 P.3d 1149 (2010).

Since the trial court is authorized to make its determination solely upon affidavits, it exercises fact finding authority, making findings and conclusions appropriate under CR 52(a). By explaining the reasoning on the various claims set forth and articulate the factual and legal basis for its decision, detailed findings and conclusions have been found to be "extremely helpful" in facilitating appellate review. *Steele v. Lundgren*, 85 Wn. App. 845, 850, 935 P.2d 671, 673 (1997).

B. CONCLUSIONS OF LAW NOS. 9 & 10 WERE CORRECT DETERMINATIONS OF LAW AND ARE SUPPORTED BY THE TRIAL COURT'S FINDINGS OF FACT.

Chen argues that the trial court abused its discretion when it entered conclusions of law 9 and 10, which concerned documents gathered by the City's attorney to discuss with the City Council in executive session.[4] Chen does not challenge the conclusion that they were properly withheld, but argues only that these findings and conclusions of law could affect the proceedings in parallel litigation he filed in federal district court regarding his termination from employment. This is not a legal basis to conclude that the court's determination was erroneous.

Chen's contentions do not take issue with the substance of Conclusions 9 and 10. Chen speculates as to how the City Manager would

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[4] CP 98. 9. Bolasina's set of gathered documents from this executive session are not "public records" under RCW 42.56.020. They were not "prepared, owned, used or retained" by the City and did not relate to any governmental decision-making by the Council. The Council took no action following the executive session.

10. To the extent that the documents gathered by attorney Bolasina could be considered responsive public records, they constitute attorney work product that was gathered to facilitate attorney-client discussion with the City Council during executive session, as permitted by the Open Public Meetings Act. The documents gathered by an attorney to discuss potential litigation reflect his mental impressions and what he considered to be key elements of possible litigation. As such they would be exempt from disclosure as work product under RCW 42.56.290 which exempts records relevant to a controversy to which an agency is a party that would not be discoverable under the rules of civil discovery.

testify in the parallel litigation, but does not support this claim with any evidence or demonstrate why Chen would be entitled to discover the work product of the City's legal counsel that was shared during a confidential attorney-client executive session. See Opening Brief at 23-24. The only competent evidence on the matter refutes Chen's speculative assertions. CP 214-215, ¶4-7; CP 210-211, ¶8.

Chen cites four cases to support his argument that the entry of these findings and conclusions was an abuse of discretion. None relate to the decision to enter findings and conclusions or to determine whether a document is exempt from disclosure as work product. Three of the cases simply recite the familiar abuse of discretion standard and its definition. *See, Barr v. MacGugan*, 119 Wn. App. 43, 46, 78 P.3d 660 (2003); *Luckett v. Boeing Co.*, 98 Wn.App. 307, 309, 989 P.2d 1144 (1999); *Mayer v. Sto Indus. Inc.,* 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

The fourth cited case is *Yousoufian v. Sims,* 168 Wn. 2d 444, 458, 229 P.3d 735 (2010). Chen omits the applicable language from his brief. The case holds that the applicable standard in "determination of appropriate daily penalties" is the abuse of discretion standard. *Yousoufian* does not address the propriety of entering findings of fact to support the Court's legal

conclusions or determination of the work product exemption under the Public Records Act. As such, *Yousoufian* stands only for the application of the abuse of discretion standard, but sheds no further light on this case.

Finally, Chen contends that the trial court abused its discretion when it entered conclusions of law 9 and 10 without first conducting an *in camera* review of the documents it deemed exempt under the public records act. Chen cites no authority requiring a trial court, in its discretion, to review documents that are in dispute between parties in a public records act case. Indeed, this court recently rejected this argument holding that the decision to review records *in camera* is discretionary with the trial court. *King County Dept. of Adult & Juvenile Det. v. Parmelee*, 162 Wn. App. 337, 360, 254 P.3d 927, 939 (2011) review denied, 175 Wn. 2d 1006, 285 P.3d 885 (2012). RCW 42.56.550(3) provides, in relevant part, "Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits."

Here, the trial court was presented with a sufficient description of the disputed records shared by Bolasina during the February 2, 2011 executive session. As in *Parmelee,* the court properly determined that it was able to evaluate the asserted exemptions based upon the information contained in the

written record. The parties' pleadings and affidavits clearly described the nature of the documents requested and the basis for the requested exemptions. *Parmelee,* 162 Wn. App. at 360.

Chen does not contend that these conclusions are not supported by the trial court's amended findings of fact 2 through 5. These findings clearly support Conclusion 9 and 10, even with the trivial objections raised by Chen to their wording.[5] The trial court did not abuse its discretion in entering conclusions of law 9 and 10.

Conclusions of law 9 and 10 were appropriate and based on the information before the trial court. It did not abuse its discretion in entering them. The trial court reviewed the evidentiary material submitted by both parties, including a declaration from Chen, and found the following facts:

> 3. "After Chen resigned and was attempting to reclaim his position, he was placed on administrative leave by the City Manager. Hanson Dec. ¶3. On January 27, 2011, Chen provided a memorandum that contradicted his statements to the City's legal counsel in December and sought protection as a "whistleblower." *Id.* ¶4, Bolasina Dec. ¶7. The City's legal counsel reviewed this memorandum and advised the City Manager in preparing a response. Bolasina Dec. ¶7. It led

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[5] In fact, discrepancies in findings of fact as to minor matters, not relevant to issues on appeal, will be considered harmless error and thus not reversible. *Prager's, Inc. v. Bullitt Co.*, 1 Wn. App. 575, 577, 463 P.2d 217,(1969), *citing McLeod v. Keith*, 69 Wn.2d 201, 417 P.2d 861 (1966); *State ex rel. Carriger v. Campbell Food Markets, Inc.*, 65 Wn.2d 600, 398 P.2d 1016 (1965).

him to believe that litigation with Chen was likely. *Id.*

4. The City's legal counsel then met in an executive session with the City Council on February 2, 2011 to advise them about potential litigation, as authorized by the Open Public Meetings Act. *Id.* ¶8. In preparation for this meeting, Bolasina gathered key documents to assist in his advice to the Council, but did not prepare a written report. *Id.* At the conclusion of the executive session, the documents were collected from the Council members and were not further provided to them or anyone else at the City. *Id.* ¶8.

CP 92.

Chen raised only semantic objections to these findings in his Motion for Reconsideration. Relying of evidence acquired while the court was considering the evidence from the show cause hearing, Chen first alleges that the word "detailed" should be inserted to modify his January 27 memorandum. CP 103. Secondly, Chen urged that the words "except Stephanie Alexander" (outside counsel for the City) should be added to the end of Finding 4. CP 103. The court rejected these inaccurate, immaterial and semantic suggestions by Chen.

The trial court did not abuse its discretion in entering conclusions of law 9 and 10, based on findings of fact 3 and 4. Chen's only argument against the trial court's entry of these findings of fact law is based on his "lack of notice" under CR 52(c) argument, which, as explained above, fails

to demonstrate any prejudice to Chen when he had the opportunity, upon filing his motion for reconsideration, to have the court consider his objections to these findings of fact.

C. CHEN'S OBJECTIONS TO THE FINDINGS OF FACT WERE CORRECTLY REJECTED AS SEMANTIC AND IMMATERIAL.

Chen's objections were considered by the trial court, and rejected. Chen does not argue that the findings of fact were not supported by substantial evidence. Instead, he took issue with the wording used by the trial court in the findings of fact and conclusions of law. Except for the corrections which the City agreed to, Chen's objections to the Findings of Fact were either semantic or immaterial. Plaintiff's objections to Findings 1 and 3 are semantic. The language adopted by the Court's Order is entirely accurate. There was no basis to change Findings 1 or 3.

Chen next suggested changing Paragraph 4 by adding "except Stephanie Alexander". Finding 4 states that the report was not further provided to anyone "at the City". CP 156. The Finding as written is entirely accurate. Ms. Alexander works for a private law firm and is not "at the City". Moreover, adding "except Ms. Alexander" does not materially affect the validity of the Court's conclusions concerning the work product status of the

documents gathered by the City's legal counsel, Michael Bolasina, to discuss during an executive session with the City Council under RCW 42.30.110(1)(i). Disclosure between the City's outside legal counsel does not affect the applicability of the attorney-client privilege or the work product doctrine.

Next, Chen argued that Finding 5 is incorrect because the Lenhart report was provided to Ms. Alexander. As supported by Ms. Hanson's declaration, Finding 5 states in relevant part that:

> Lenhart independently interviewed witnesses and issued a report ("the Lenhart Report") directed to Alexander on March 23, 2011. *Id.*, ¶7. Lenhart was not supervised by the City Manager and did not provide the City with preliminary drafts or notes. *Id.* ¶ *6.* The City was only provided with the final version of this report. *Id.*, ¶7.

CP 156-157.

These findings are accurate and correct. First, Ms. Alexander is outside counsel and is not "the City". Ms. Hanson's declaration stated that the final version of the Lenhart report, which was provided to Chen, is the only version that the City was provided and has in its possession. CP 215, ¶7. It is the only version which was used in Chen's employment decision. *Id.* As such, the plaintiff's objections to paragraph 5 are factually incorrect. Chen offers nothing new to support this argument, except to express

disagreement and to incorrectly argue that it was not supported by the City's declarations. Chen is wrong. The Court's findings were directly supported by the City Manager's declaration. CP 214-215, ¶¶ 6-7.

The City's evidence also supported the Court's finding that Lenhart conducted an independent investigation and issued her report. This language in Finding 5 is supported by ¶¶ 6 & 7 of Hanson's Declaration (CP 213-325) which indicates that she did not supervise or direct Ms. Lenhart's investigation and that Alexander retained Lenhart to conduct "an independent investigation" into the facts surrounding Chen's resignation. It is further supported by the description of the investigation contained in the Lenhart investigation report itself. See CP 219-325.

Finally, Chen objected to a reference in Finding 14, incorrectly claiming that the reference to "Exhibit 1" of the Baker Supplemental Declaration should read ¶ 3. Exhibit 1 of Baker's Supplemental Declaration describes the search terms used by Ms. Baker, which is precisely what is referred to by Finding 14. It is the correct reference. Paragraph 3 of this declaration is simply not applicable.

D. THE COURT CORRECTLY UPHELD THE CITY'S RESPONSES TO CHEN'S SPECIFIC REQUESTS.

1. The Court properly determined that Bolasina did not prepare any report and that any documents gathered by legal counsel for the February 2, 2011 executive session are exempt work product.

Chen's specific requests sought "investigation reports" allegedly prepared by Michael Bolasina and Ellen Lenhart. There can be little dispute that Bolasina's meeting with the City Council was privileged and that the documents he gathered are exempt under the attorney-client privilege and work product rules.

On February 2, 2011, the City's legal counsel, Bolasina met with the City Council to discuss the matter. Bolasina did not prepare any written report. CP210-211, ¶8, at 3:26 - 4:1. Instead, he met with the Council to advise them about potential litigation in an executive session under the Open Public Meetings Act.[6]

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[6] RCW 42.30.110(1)(I) allows executive sessions:

> (I) To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.

(Emphasis added).

These discussions between Bolasina and the City Council are privileged and confidential. RCW 5.60.060(2)(a); RCW 42.56.290. Material gathered by an attorney in anticipation of litigation is also protected from disclosure under the civil rules and is therefore exempt under the Public Records Act. *Soter v. Cowles Publishing Co.,* 162 Wn.2d 716, 174 P.3d 60 (2007); *Limstrom v. Ladenburg,* 136 Wn.2d 595, 604, 963 P.2d 869 (1998), *Koenig v. Pierce County*, 151 Wn.App. 221, 211 P.3d 423 (Div. 1, 2009). These exemptions apply to documents gathered by Bolasina to assist in his privileged discussions with the City Council. CP 211, ¶8, at 4:1-2.

Limstrom expressly interpreted CR 26(b)(4) to include within the definition of work product "formal or written statements of fact, or other tangible facts, gathered by an attorney in preparation for or in anticipation of litigation." *Limstrom,* 136 Wn.2d at 611, 963 P.2d 869. Requests for such documents would necessarily reveal his mental impressions, theories, opinions and conclusions.

> The reason documents gathered in anticipation of litigation are protected under the civil discovery rules is because disclosing the identity of the documents reveals "what information the attorney deemed particularly important and, conversely, what the attorney did not find important.

Soter, 162 Wn.2d at 743-44.

The court also properly determined that these documents do not constitute "public records" of the City, as they were not "prepared, owned, used or retained" by the City in connection with governmental decisionmaking. See *Dragonslayer Inc. v. State Gambling Commission,* 139 Wn.App. 433, 161 P.3d 428 (2007); *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 564, fn. 1, 618 P.2d 76 (1980); *Smith v. Okanogan County*, 100 Wn.App. 7, 11, 994 P.2d 857 (2000).

In order for a document to be a public record, the critical inquiry is whether the requested information bears a nexus with the agency's decision-making process. *Concerned Ratepayers Ass'n v. PUD No. 1 of Clark County*, 138 Wn.2d 950, 960-61, 983 P.2d 635 (1999). No such nexus exists here because the City Council is not the decision-maker in the agency. The City Council took no action after the February 2 executive session after which Bolasina collected the documents and did not further provide them to anyone at the City.

2. The City properly provided the Lenhart Report to Chen.

Chen's Complaint also alleged that the City violated the Act by failing to provide the Lenhart Report. Chen was provided with the only copy of that report that the City had. Chen conceded that he was provided with the final

version of this report. CP 35. Chen speculated that the City had other versions, but offered no support for this conjecture in this case. CP 29. Chen does not assign error to the Court's finding of fact 7 which correctly determined that Chen was provided with the complete Lenhart Report on March 31, 2011.

3. The City properly provided recordings of the November 8, 2010 City Council Meeting to Chen.

Chen next claimed that the City provided a redacted copy of the November 8, 2010 City Council meeting. The Court found that the City provided a full copy of what it had recorded. CP 159 (Finding 16). Again, Chen does not assign error to this determination.

E. CHEN CITES NO AUTHORITY ALLOWING THE COURT OF APPEALS TO AMEND THE TRIAL COURT'S FINDINGS OF FACT.

Chen next demands that the court of appeals amend the trial court's findings of fact. No authority is cited that would allow such a result. This court will not address arguments that are unsupported by citations to legal authority. See RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 368, 112 P.3d 522 (2005).

F. THE TRIAL COURT'S APRIL 26, 2012 ORDER ADDRESSED ALL STATUTORY CAUSES OF ACTION RAISED BY PLAINTIFF'S COMPLAINT AND MOTION.

Chen argues that the Trial Court's Order did not address all the issues raised in the original motion and Chen's Complaint. The trial court substantively addressed all relevant issues and correctly denied Chen's Motion for Relief under the PRA in its entirety. [7]

First, Chen specifically alleged that the Court did not determine the reasonableness of the City's response. This is incorrect. CP 163 (Conclusion 12) Chen's claim was that the City acted unreasonably in responding by stating that it would provide installments. The City's response demonstrated that it was responding promptly in installments due to the large volume of records sought. CP 158-59 (Finding 14). Such a response is directly authorized by the City under RCW 42.56.080; RCW 42.56.120. Under the statute, if an installment of a records request is not claimed or reviewed, the agency is not obligated to fulfill the balance of the request. RCW 42.56.120.

In the motion for reconsideration, Chen acknowledged that the City has made hundreds of additional documents available after the oral argument

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[7] Chen claims to have prevailed and seeks attorney's fees. This is plainly contrary to the Court's order. Chen lost his argument that the City's response time was unreasonable and each argument seeking production of specific records. Chen is not the prevailing party.

in additional installments and that effort is ongoing. CP 102. The Court's ruling correctly found that responding in installments is reasonable and that the City has not violated the Act. CP 163 (Conclusion 12).

Finally, Chen contends that the order should address the "fullest assistance" issue as a separate legal claim. The Public Records Act does not recognize a claim for failing to provide the "fullest assistance" to the requester. See RCW 42.56.550. It recognizes claims for failing to provide a record and failing to provide a reasonable estimate of time. RCW 42.56.550(1), (2). Those claims were fully resolved by the determination that the City responded reasonably to Chen's records request.

There is no "fullest assistance" claim under the Public Records Act. The "fullest assistance" language in the Act appears only in RCW 42.56.100 and provides one standard to guide agency adoption of "rules and regulations" that are authorized in order to establish procedures for review of records. Chen did not challenge any such rules or allege any violation of the City's rules in how it responded to his massive records request.

Significantly, the trial court determined that the City acted reasonably in estimating three months to respond, by asking for additional time and by responding with installments. CP 161, 163 (Conclusions 6, 12). Chen does

not assign error to these determinations, nor to any of the factual findings supporting the need for such time. CP 159-60 (Findings 17-21). This is dispositive of all plaintiff's claims, and inherently rejects the contention that the City failed to provide "fullest assistance".

G. CHEN'S APPEAL FROM THE COURT'S APRIL 26, 2012 ORDER IS UNTIMELY.

Chen's brief acknowledges that the Court determined this case when it issued the Amended Order on April 26, 2012 directing entry of judgment in favor of the City and awarding statutory attorney fees. Chen characterizes this as the "final judgment" of the court. Opening Brief at 32. As such, his appeal after the $200 statutory attorney's fees were reduced to a judgment form is untimely. Pursuant to RAP 2.2(c) and RAP 5.2(a), Chen should have appealed the determinative order by May 26, 2012, thirty days after the entry of the Court's order denying the Motion for Reconsideration and entering the amended Order on the Motion for Relief under the Public Records Act.

H. THE CITY SHOULD BE AWARDED ATTORNEY'S FEES PURSUANT TO RAP 18.9.

Chen does not challenge the underlying facts determined by the trial court, but raises semantic objections to the wording used by the Court's order. Chen does not argue that the facts are unsupported by substantial

evidence or show any legal error by the trial court.

Chen's appeal does not stand any chance of reversing the trial court's ruling and is entirely frivolous. An appeal is frivolous if there are "no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of success." *West v. Stahley*, 155 Wn. App. 691, 700, 229 P.3d 943 (2010). Under RAP 18.9, the City should be awarded its reasonable attorney fees and costs incurred in responding to this frivolous appeal.

IV. CONCLUSION

The appeal in this matter fails to challenge the substantive rulings of the court that the City's responses in installments to the massive records request made by Chen were reasonable and that the City did not violate the Act in responding to the specific requests made by Chen. The trial Court did not abuse its discretion and its April 26, 2012 Order should be affirmed with attorney's fees awarded to the City in this frivolous appeal.

RESPECTFULLY SUBMITTED this 26th day of March, 2013.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.

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Attorneys for Respondent City of Medina

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury under the laws of the State of Washington, that on March 26, 2013, I caused to be served a true and correct copy of *Amended* Brief of Respondent on counsel for the Appellant in this matter:

Marianne K. Jones
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by email pursuant to CR 5 e-service agreement.

DATED this 26th day of March, 2013.

Jeffrey S. Myers

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