

71052-4

71052-4

No. 71052-4-I

Filed 3-14-14

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF MARYSVILLE,

Appellant,

v.

CEDAR GROVE COMPOSTING, INC.,

Respondent.

BRIEF OF APPELLANT

Philip A. Talmadge, WSBA #6973
Thomas M. Fitzpatrick, WSBA #8894
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Jeffrey S. Myers, WSBA #16390
Law, Lyman, Daniel, Kamerrer &
Bogdanovich, P.S.
PO Box 11880
Olympia, WA 98508-1880
(360) 754-3480
Attorneys for Appellant
City of Marysville

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii-vii
A. INTRODUCTION	1
B. ASSIGNMENTS OF ERROR	2
(1) <u>Assignments of Error</u>	2
(2) <u>Issues Pertaining to Assignments of Error</u>	5
C. STATEMENT OF THE CASE	5
D. SUMMARY OF ARGUMENT	21
E. ARGUMENT	22
(1) <u>Cedar Grove Lacked Standing to Present the Allegations of PRA Violations by the City in Connection with Cappel's PRA Requests</u>	22
(2) <u>The PRA Does Not Extend to the Records of a City's Private Consultant</u>	28
(a) <u>Strategies Is Not a Public Agency under RCW 42.56.010(1)</u>	30
(b) <u>Strategies' Documents by and between Third Parties Were Not Public Records As the City Did Not "Use" Them</u>	35
(c) <u>The Application of Attorney-Client Privilege to Strategies Does Not Make Its Documents the City's Public Records</u>	40

(d)	<u>At a Minimum, Questions of Fact Preclude a Finding that the 173 Documents Were Public Records and that the Failure to Provide the 19 Documents Was a Violation of the PRA</u>	46
(e)	<u>The PRA Precludes Recovery For Documents Produced Prior to Litigation Following Requested Review</u>	48
(3)	<u>The Trial Court Erred in Imposing PRA Penalties On, and Awarding Fees Against, the City</u>	49
(a)	<u>The Trial Court Abused Its Discretion In Setting Penalties Here</u>	51
(b)	<u>The Trial Court Abused Its Discretion in Excluding Declarations Submitted in Connection with Its Decision on Reconsideration</u>	57
F.	CONCLUSION	58

Appendix

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Ameriquest Mortgage Co. v. Wash. State Office of Att'y Gen.</i> , 170 Wn.2d 418, 241 P.3d 1245 (2010).....	41
<i>Automotive United Trades Organization v. State</i> , 175 Wn.2d 218, 285 P.3d 52 (2012).....	26
<i>Beal v. City of Seattle</i> , 150 Wn. App. 865, 209 P.3d 872 (2009).....	25
<i>Bonamy v. City of Seattle</i> , 92 Wn. App. 403, 960 P.2d 447 (1998), <i>review denied</i> , 137 Wn.2d 1012 (1999).....	25, 35
<i>Brower v. Pierce County</i> , 96 Wn. App. 559, 984 P. 2d 1036 (1999).....	49
<i>Building Industry Ass'n of Wash. v. State, Dep't of Labor & Indus.</i> , 123 Wn. App. 656, 88 P.3d 537, <i>review denied</i> , 154 Wn.2d 1030 (2004).....	41
<i>Burt v. Wash. State Dep't of Corrections</i> , 168 Wn.2d 828, 231 P.3d 191 (2010).....	26
<i>Chen v. State</i> , 86 Wn. App. 183, 937 P.2d 612, <i>review denied</i> , 133 Wn.2d 1020 (1997).....	57
<i>City of Federal Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009).....	41
<i>Clarke v. Tri-Cities Animal Care & Control Shelter</i> , 144 Wn. App. 185, 181 P.3d 881 (2008).....	33
<i>Concerned Ratepayers Ass'n v. Public Utility District No. 1 of Clark County, Wash.</i> , 138 Wn.2d 950, 983 P.2d 635 (1999).....	36, 38
<i>Cornu-Labat v. Hosp. District No. 2 of Grant County</i> , 177 Wn.2d 221, 298 P.3d 741 (2013).....	52
<i>Dep't of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	36
<i>Dietz v. Doe</i> , 131 Wn.2d 835, 935 P.2d 611 (1997).....	42
<i>Dowler v. Clover Park Sch. Dist. No. 400</i> , 172 Wn.2d 471, 258 P.3d 676 (2011).....	22
<i>Dragonslayer, Inc. v. Wash. State Gambling Comm'n</i> , 139 Wn. App. 433, 161 P.3d 428 (2007).....	36

<i>Francis v. Wash. State Dep't of Corrections</i> , 178 Wn. App. 42, 313 P.3d 457 (2013).....	25
<i>Germeau v. Mason County</i> , 166 Wn. App. 789, 271 P.3d 932 (2012).....	24
<i>Hangartner v. City of Seattle</i> , 151 Wn.2d 439, 90 P.3d 26 (2004).....	42
<i>Hollingbery v. Dunn</i> , 68 Wn.2d 75, 411 P.2d 431 (1966).....	34
<i>Hubbard v. Spokane County</i> , 146 Wn.2d 699, 50 P.3d 602 (2002).....	20-21
<i>In re Disciplinary Proceeding Against Schafer</i> , 149 Wn.2d 148, 66 P.3d 1036 (2003).....	42
<i>In re Estate of Becker</i> , 177 Wn.2d 242, 298 P.3d 720 (2013).....	22-23
<i>Kleven v. City of Des Moines</i> , 111 Wn. App. 284, 44 P.3d 887 (2002).....	23, 25
<i>Livingston v. Cedeno</i> , 164 Wn.2d 46, 186 P.3d 1055 (2008).....	41
<i>Martini v. Post</i> , ___ Wn. App. ___, 313 P.3d 473 (2013).....	57
<i>Mohawk Indus., Inc. v. Carpenter</i> , 558 U.S. 100, 130 S. Ct. 599, 175 L. Ed.2d 458 (2009).....	42
<i>N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints</i> , 175 Wn. App. 517, 307 P.3d 730 (2013).....	21
<i>O'Neill v. City of Shoreline</i> , 170 Wn.2d 138, 240 P.3d 1149 (2010).....	23
<i>Smith v. Okanogan County</i> , 100 Wn. App. 7, 994 P.2d 857 (2000).....	25, 35
<i>Smoke v. City of Seattle</i> , 132 Wn.2d 214, 937 P. 2d 186 (1997).....	49
<i>Soter v. Cowles Pub'g Co.</i> , 162 Wn.2d 716, 174 P.3d 60 (2007).....	42
<i>Spokane Research & Defense Fund v. West Central Community Development Association</i> , 133 Wn. App. 602, 137 P.3d 120 (2006), <i>review denied</i> , 160 Wn.2d 106 (2007).....	33
<i>Telford v. Thurston County Bd. of Commissioners</i> , 95 Wn. App. 149, 974 P.2d 886 (1999).....	31, 32, 34
<i>West v. State</i> , 162 Wn. App. 120, 252 P.3d 406 (2011)	32
<i>West v. Thurston County</i> , 144 Wn. App. 573, 183 P.3d 346 (2008).....	22
<i>West v. Thurston County</i> , 168 Wn. App. 162, 275 P.3d 1200 (2012).....	37, 52
<i>Wood v. Lowe</i> , 102 Wn. App. 872, 10 P.3d 494 (2000)	25

<i>Yousoufian v. Office of King County Exec.</i> , 152 Wn.2d 421, 98 P.3d 463 (2004).....	51, 53, 56
<i>Yousoufian v. Office of Ron Sims</i> , 168 Wn.2d 444, 229 P.3d 735 (2010).....	52

Federal Cases

<i>Feinman v. Fed. Bureau of Investigation</i> , 680 F. Supp.2d 169 (D. D.C. 2010).....	26
<i>F.T.C. v. GlaxoSmithKline</i> , 294 F.3d 141 (D.C. Cir. 2002).....	44
<i>In re Bieter Co.</i> , 16 F.3d 929 (8th Cir. 1994)	43, 44
<i>In re Cooper Market Antitrust Litigation</i> , 200 F.R.D. 213 (S.D.N.Y. 2001)	44
<i>McCaugherty v. Siffermann</i> , 132 F.R.D. 234 (N.D. Cal. 1990)	44
<i>McDonnell v. United States</i> , 4 F.3d 1227 (3rd Cir. 1993).....	25
<i>Mt. Hawley Ins. Co. v. Felman Prod., Inc.</i> , 271 F.R.D. 125 (S.D. W. Va. 2010).....	44
<i>United States v. Graf</i> , 610 F.3d 1148 (9th Cir. 2010).....	44
<i>Wetzel v. U.S. Dep't of Veterans Affairs</i> , 949 F.Supp.2d 198 (D. D.C. 2013).....	26

Statutes

RCW 5.60.060	41
RCW 42.56.010(1).....	31
RCW 42.56.010(3).....	30, 35, 36, 37
RCW 42.56.070(1).....	41
RCW 42.56.520	12, 48
RCW 42.56.540	27
RCW 42.56.550	24, 27
RCW 42.56.550(1).....	23, 25, 27
RCW 42.56.550(4).....	21, 49
RCW 43.21C.030(2)(c).....	9
RCW 43.21C.031	9

Codes, Rules, and Regulations

CR 1921, 26, 27
RPC 3.9.....24
RPC 7.124
RPC 8.4.....24
5 U.S.C. § 552.....25
WAC 44-14-030(4).....25
WAC 197-11-350(2).....9
WAC 197-11-360(1).....9

Other Authorities

Jeffrey A. Ware, *Clarke v. Tri-Cities Animal Care & Control Shelter: How Did Private Businesses Become Government "Agencies" under the Washington Public Records Act?*,
33 Seattle U. Law Rev. 741 (2010).....31

A. INTRODUCTION

This is a Public Records Act, RCW 42.56, ("PRA") case relating to three discrete categories of documents, representing a small number of documents out of the thousands produced by the City of Marysville ("City") to a requestor. Three significant PRA issues are present here. First, the trial court permitted plaintiff Cedar Grove Composting, Inc. ("Cedar Grove") to file an action to obtain records and for penalties and attorney fees against the City under the PRA in connection with requests made to the City by a third person. Cedar Grove was not the requestor and thus lacked standing.

Second, the trial court also determined that the PRA applied to records prepared by a consultant of the City that were communications between the consultant and third parties, including the Tulalip Tribe, which was also a separate client of the consultant. The City never received or reviewed any of these documents. The consultant and the Tulalip Tribe asserted ownership of them. The City never used such documents in its decisionmaking. The records were not public records within the PRA's definition.

Finally, the trial court imposed excessive penalties, including, for example, penalties and attorney fees for documents produced prior to litigation that the City initially withheld subject to a claim of privilege,

and for failing to produce inconsequential documents such as an email saying “thank you,” or emails forwarding documents, when the balance of the email string with its substance was produced. Its most draconian penalties were imposed against the City for its failure to produce the consultant's documents it never possessed. The trial court's award of penalties and fees was an abuse of discretion.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its July 2, 2013 summary judgment order.

2. The trial court erred in entering its penalty order on September 9, 2013, as revised by its October 18, 2013 penalty order.

3. The trial court erred in entering its order denying the City's motion for reconsideration on October 18, 2013.

4. The trial court erred in its order awarding costs and attorney fees to Cedar Grove on October 18, 2013.

5. The trial court erred in entering findings of fact number 1 from the order dated October 18, 2013.

6. The trial court erred in entering findings of fact number 5 from the order dated October 18, 2013.

7. The trial court erred in entering findings of fact number 6 from the order dated October 18, 2013.

8. The trial court erred in entering findings of fact number 7 from the order dated October 18, 2013.

9. The trial court erred in entering findings of fact number 8 from the order dated October 18, 2013.

10. The trial court erred in entering findings of fact number 9 from the order dated October 18, 2013.

11. The trial court erred in entering findings of fact number 12 from the order dated October 18, 2013.

12. The trial court erred in entering findings of fact number 13 from the order dated October 18, 2013.

13. The trial court erred in entering findings of fact number 14 from the order dated October 18, 2013.

14. The trial court erred in entering findings of fact number 15 from the order dated October 18, 2013.

15. The trial court erred in entering findings of fact number 16 from the order dated October 18, 2013.

16. The trial court erred in entering findings of fact number 17 from the order dated October 18, 2013.

17. The trial court erred in entering findings of fact number 18 from the order dated October 18, 2013.

18. The trial court erred in entering findings of fact number 19 from the order dated October 18, 2013.

19. The trial court erred in entering findings of fact number 20 from the order dated October 18, 2013.

20. The trial court erred in entering findings of fact number 22 from the order dated October 18, 2013.

21. The trial court erred in entering findings of fact number 23 from the order dated October 18, 2013.

22. The trial court erred in entering findings of fact number 25 from the order dated October 18, 2013.

23. The trial court erred in entering findings of fact number 26 from the order dated October 18, 2013.

24. The trial court erred in entering findings of fact number 27 from the order dated October 18, 2013.

25. The trial court erred in entering findings of fact number 28 from the order dated October 18, 2013.

26. The trial court erred in entering findings of fact number 29 from the order dated October 18, 2013.

27. The trial court erred in entering findings of fact number 30 from the order dated October 18, 2013.

28. The trial court erred in entering findings of fact number 31 from the order dated October 18, 2013.

(2) Issues Pertaining to Assignments of Error

1. Where a requestor of public records under the PRA does not file an action under RCW 42.56.550 to produce records, or to seek penalties and attorney fees, does the party for whom the requestor sought the records have standing to pursue the action where the requestor never identified that party and the requestor is an indispensable party to such an action under CR 19(b)? (Assignments of Error Number 1)

2. Did the trial court err in concluding that the City violated the PRA when it produced prior to litigation documents that it initially believed were covered by attorney-client privilege or attorney work product and therefore were exempt from the PRA? (Assignments of Error Numbers 2-28)

3. Did the trial court err in concluding that the consultant's records were public records under the PRA even though such records were never in the possession of the City, nor even seen by municipal officials, were in the possession of third parties, and constitute communications between the consultant and third parties who asserted they owned such records? (Assignments of Error Numbers 2-28)

4. Did the trial court err in awarding excessive penalties and attorney fees under the PRA to Cedar Grove where it failed to properly follow the Supreme Court's *Yousoufian* penalty protocol? (Assignments of Error Numbers 2-28)

C. STATEMENT OF THE CASE

Cedar Grove has a commercial composting facility located at 3640 34th Avenue Northeast, within Everett's city limits that handles food scraps, yard waste, and other compost materials. CP 1560, 1699. The Everett facility is located west of Interstate 5 on the south side of Steamboat Slough in an area of relatively flat land and few trees. CP 1699. Marysville's city limits are located a mere 0.6 miles northeast of Cedar Grove's facility, CP 1560, and the Tulalip Indian Reservation is also in close proximity and downwind from Cedar Grove. CP 236.

From 2007 to 2010, the City received a total of 117 odor complaints, most of which cited Cedar Grove as the problem. CP 1560, 1566-74. Additionally, hundreds of citizens prepared a petition demanding action by the City to redress the odors that disturbed their lives and made them fear for their health and well-being. CP 1576, 1577-1645.

The City believed that the odors from Cedar Grove threatened the well-being of the region and the City's ability to safeguard public health and welfare, would have a serious ongoing impact on City residents, and would have a serious impact on implementation of the City's future land use plans. CP 1561.

To address the public outcry caused by the Cedar Grove odors, and a proposed expansion of the facility, the City assembled a policy and legal team to evaluate its options to respond and redress the odor problem. CP

1561-63. The City retained outside legal counsel to work with the City Attorney, first the law firm of Gordon Thomas Honeywell, and then the Perkins Coie law firm. CP 1562, 1648.

In addition to outside counsel, the City retained a consulting firm to assist in communicating with the public and developing legislative, policy, and legal options to respond to the Cedar Grove odor. CP 1561-62. Strategies 360 ("Strategies") is an outside consulting firm with numerous clients throughout the region and the United States; it contracts with clients and the City has had a relationship on a variety of intergovernmental issues since 2007; Strategies was retained as an independent contractor. CP 1647. Strategies was experienced in communication with the public, private interests, and other governmental entities on a variety of policy issues, including odor issues. CP 1562.

Beginning on July 26, 2010, the City entered into a contract for three months with Strategies (in addition to its unrelated on-going contract work with the City) to provide "general communications services, permitting strategies and legislative guidance related to resolving odor impacts created by businesses in north Everett." CP 1562. After that contract term, Strategies' Cedar Grove work was folded into its regular contract work. With respect to the odor issue, there was early recognition by the City Council, Mayor, and City staff that the odor issue was

complicated and highly politicized due to complex regulations and the involvement of multiple layers of local, state and regional agencies, as well as elected officials. CP 1562. In reviewing a similar situation occurring in the Maple Valley area of King County, the City also recognized that efforts to address the odor issues would likely lead to litigation. CP 1648.

Full and open communication between the City's odor management team, including Strategies, was essential for effective legal advice concerning the Cedar Grove odor issue; that advice was coordinated by the City Attorney, and assisted by Perkins Coie attorneys. CP 1648. Strategies provided the City Attorney with necessary information, research, and ideas that enabled him to be fully informed in providing legal advice to the City. CP 1648-49. His communications with Strategies were treated in the same fashion as communications with any other member of the City's odor management team. CP 1649. As such, for purposes of the attorney-client privilege, the City treated Strategies as the equivalent of an employee and considered communications and advice provided between legal counsel and Strategies as privileged. *Id.*

Cedar Grove proposed to expand its Everett facility, exacerbating the odor issue. CP 1687. The City opposed this expansion in permitting proceedings in Everett. CP 1684-85. The City commented on Everett's

SEPA determination with regard to Cedar Grove's expansion and the permits necessary to accomplish expansion. *Id.* On February 29, 2012, Everett and Puget Sound Clean Air Agency ("PSCAA") issued a proposed mitigated determination of non-significance for Cedar Grove's digester project proposal. CP 1684, 1687. Due in part to the opposition from the City and surrounding jurisdictions, on May 23, 2012, Everett and the PSCAA later reversed this preliminary determination and instead issued a determination of significance ("DS") that the expansion would have probable significant environmental impacts. CP 1684-85, 1689-90.¹ Rather than prepare an EIS, Cedar Grove withdrew its application and shelved its Everett expansion plans. CP 1685, 1692.²

¹ A DS requires the permit applicant to submit a full environment impact statement ("EIS"). RCW 43.21C.031; 43.21C.030(2)(c); WAC 197-11-350(2); 197-11-360(1).

² PSCAA, which regulates air quality and issues permits for Cedar Grove's Everett and Maple Valley facilities, imposed large fines on Cedar Grove. On December 31, 2009, PSCAA issued Civil Penalty No. 09-306CP to Cedar Grove for odors from the Everett facility (CP 1704) and on May 26, 2010, PSCAA issued two notices of violation to Cedar Grove based on public complaints from the Everett facility. CP 1713. On October 21, 2010, PSCAA issued Civil Penalty No. 10-253CP to Cedar Grove. *Id.*

Cedar Grove appealed these penalties along with additional fines for Cedar Grove's operations in Maple Valley, to the Pollution Control Hearings Board ("PCHB") which held hearings from February 28 through March 4, 2011. CP 1694-95. Ultimately, on July 24, 2011, the PCHB ruled that Cedar Grove committed all the alleged violations at their properties including allegations that odors were creating a significant impact on personal health or daily activities; the odor was sufficient to establish that Cedar Grove unreasonably interfered with the enjoyment of life or property, of neighbors to its properties, and affirmed fines of \$119,000. CP 1751-52.

The City sought leave to participate as an amicus curiae in the PCHB appeal. PCHB denied that request. CP 1695.

On November 1, 2011, the City received a large public records request for "available" documents from Kris Cappel of the Sebold Group, a consulting and investigative firm. CP 1371-73, 1819-21. Cappel is a lawyer, but is not actively practicing law. CP 600, 1821. She did not identify any client, or any affiliation with Cedar Grove, but requested several large groups of records concerning the Cedar Grove composting facility and the City's efforts to combat the facility's odor. CP 1371-73.

As the Cappel request was sweeping in nature, encompassing ten separate matters, with two of those matters having eight subparts, CP 1823-25, the City had to devote substantial resources to searching for and producing responsive documents.

Amy Hess ("Hess"), the Deputy City Clerk, who usually handles PRA requests for the City, was given the primary responsibility for responding to Cappel. Hess identified which departments and employees may have responsive records. She then e-mailed the designated employee in each department and sent a copy of Cappel's request; she requested that they ask their staff if they might have responsive records. They were directed to search physical files as well as electronic records. The City Attorney was also notified and asked to search the records in the possession of his outside law firm. CP 553-54, 556. The City through Hess responded to Cappel, acknowledging receipt of the request on

November 7, 2011; it estimated that an installment of the records would be available by November 30, 2011. CP 601, 1813, 1827, 1829. Because of the size of the request, the City indicated to Cappel that it wanted to respond in regular monthly installments. CP 554, 1827. Hess then requested clarification of one request for records relating to the Tulalip Tribe and Pacific Topsoil on November 14, 2013. CP 1813, 1829. Cappel instructed the City to hold off searching for these records. CP 1813.

In responding to the records request, Hess used keywords directly from the requests, as well as other terms that might return responsive documents. She searched the City's e-mail system using a system called Barracuda that stores all e-mails sent and received by City employees. CP 554. She worked with the City's information technology manager to learn to set up complex search queries. CP 555. Although she did not use specific names of individuals from Strategies, she used the domain name "@strategies360.com" which could, and did, bring up the communications between Strategies and the City. CP 488, 573. Both the City Administrator and the Mayor were asked to check their personal home computers for responsive documents, which they did. CP 488, 556. Both sent responsive documents for production. CP 494. Based upon the extensive scope of the searches, approximately 10,000 emails were initially returned based upon a search for "Cedar Grove." Once the

electronic search pulled these potentially responsive records, each of those emails had to be reviewed to determine if they were, in fact, responsive to the request. Several thousand emails had to be reviewed. CP 556. After records were determined to be responsive to the request, a second review of each was conducted to determine whether any of the content might be privileged or otherwise exempt. Hess then forwarded those emails potentially subject to privilege to the City Attorney's office for review. CP 556. After the City Attorney's office completed its review, sections found to be privileged were redacted and the documents were prepared for disclosure. As required under the PRA, the City prepared logs that contained the identifying information for each responsive document that had been located that identified the specific exemption and briefly explained whether the documents were exempt because they were communications subject to attorney-client privilege, work product, or another exemption. CP 557.

As promised, the City began by responding to Cappel's request in a first installment on November 30, 2011. CP 1813.³ This installment consisted of easily available records and specific documents that did not

³ The City tried to make access to its records as simple and easy as possible. CP 1814, 1831-32. The records were provided via a secure internet site, as contemplated by RCW 42.56.520. CP 1831. Cappel was provided with a username and password to access this site. *Id.* The City offered alternatives, including a CD or paper format if this caused any issues. *Id.*

require extensive searching or review by the City as to exemption or privilege issues. CP 1831-32.⁴

A second installment was provided to Cappel on December 29, 2011. CP 1814, 1834-35. The City mailed a CD that was returned and was resent on January 5, 2012. CP 1814, 1837, 1839-40. The third installment was provided on February 2, 2011. CP 1824, 1839-40. This installment identified exempt records and provided an exemption log consistent with RCW 42.56.520, the statute requiring the City to set forth the basis for each document withheld. CP 1839.

The City provided a fourth installment for Cappel's request on March 8, 2012. CP 1814, 1842-43. A fifth installment was sent on April 5, 2012. CP 1814, 1845-46. The fifth installment again asked for clarification of the item identified in Hess's November 14 e-mail as needing clarification; it also indicated that the City had otherwise completed its response to Cappel's November 1 request and, importantly, invited Cappel to contact the City if further assistance was needed. CP 1814, 1845-46. Exemption logs were provided for each installment. CP

⁴ These records were located quickly and determined to have no privilege content; they were released first as Cappel chose not to prioritize what types of records she was more interested in. CP 557. This release satisfied some of the more limited and focused requests made by Cappel while the City reviewed the large volume of records that were potentially responsive to the many other items in the request. CP 1813-14, 1831-32. For documents that were in a paper format, they had to be scanned. CP 557.

1814-15. The last installment contained the bulk of the privileged materials because the legal review process requires the document be printed, highlighted, scanned, then redacted if required, rescanned, and a log produced. CP 558.

On June 8, 2012, Cappel made a substantially similar request for additional public records which covered the time subsequent to her prior request. CP 1875, 1886-87.⁶ The City received the request on June 11, 2012 and acknowledged it by an e-mail to Cappel on June 18, 2012. CP 1815. The City's response also provided a first installment responding to several of the items requested. CP 1815, 1889.

For the first time on June 15, 2012 in an email, Cappel raised questions about the City's responses to her original records request. CP 2042.⁷ She asked whether the City correctly identified communications with Strategies as privileged. *Id.* The City responded, by noting that it considered communications between the City Attorney and Strategies to be the equivalent of communications with a City staffer, and invited further discussion of any specific document that remained of concern. CP 2041.

⁶ Again, Cappel did not indicate that her request was made for Cedar Grove. CP 1886-87.

⁷ Ironically, Cappel complimented the City on its responsiveness to her request. CP 2042.

On July 3, 2012, the City received a letter from an attorney, Michael Moore, referring to the Cappel request; that letter was much more confrontational and hostile in tone than Cappel herself had been. CP 2044-47. Moore also did not identify Cedar Grove his client, but he took issue with the fifth installment. *Id.* Moore requested that the City reconsider its response and demanded production of all the e-mails at issue by July 13, 2012. *Id.* The City wrote back acknowledging the letter and asking for additional time to complete the requested reconsideration and respond. CP 1650, 1653.⁸

On August 2, 2012, the City wrote to Moore and provided unredacted versions of the e-mails from the fifth installment as he demanded. CP 1657. The City chose not to claim the exemption for these records, but did not waive the attorney-client privilege with respect to any other records. *Id.* Moore received these documents and asked if they

⁸ The City initially withheld fifteen documents on which attorney-client privilege applied from its fifth production after engaging in the review discussed above and documented what it had done in its privilege log. After Moore questioned what was being withheld and threatened litigation in his July 3, 2012 letter, the City Attorney engaged in another review process. The City hired Jeffrey Myers, outside counsel with a practice emphasis in PRA matters, to again review what was being withheld. After careful review of the additional records demanded by Moore and after consultation with Myers and the City, the City Attorney determined to release the requested documents without waiving the attorney-client privilege. CP 551. The effort was in part to avoid litigation and to show the City's good faith in responding to these massive requests. *Id.* Even though the documents it questioned were produced, Cedar Grove instituted litigation anyway. CP 552.

were inadvertently disclosing privileged records. CP 1659. The City confirmed that it was not inadvertent. *Id.*

Nevertheless, despite having received the documents demanded in Moore's July 3 letter,¹⁰ Cedar Grove, represented by Moore, filed suit in the Snohomish County Superior Court against the City on August 28, 2012, claiming the City violated the PRA in its response to Cappel's requests. CP 1651, 2116-25.¹¹ The case was ultimately assigned to the Honorable Richard T. Okrent for disposition.

Cedar Grove moved for partial summary judgment on November 16, 2012 on the privilege issue. CP 2083-2102. The City responded to Cedar Grove's motion and cross-moved for summary judgment based on Cedar Grove's lack of standing. CP 1662-83.

The trial court considered both motions and entered a July 2, 2013 order, in which without explanation, it concluded that Cedar Grove had standing "to assert claims regarding the public records requests made by

¹⁰ In responding to Cappel's request, the City located and reviewed over 10,000 potentially responsive records. From those, the City produced thousands of responsive records. CP 562. The huge volume of material produced is expressed in "bytes." Over 1 gigabyte of data in five different installments was produced for Cappel's November 1, 2011 request alone. An additional 120 megabytes of data was produced in the June 8, 2012 follow-up request. CP 562.

¹¹ Ironically, Cedar Grove claimed below the City was engaged in a public relations campaign directed against it. However, the documents used by Cedar Grove to press that allegation were produced by the City in responding to the request. CP 539.

Kris Cappel, who was acting as an undisclosed agent of Cedar Grove."

CP 1461. The court further determined:

Communications between legal counsel for the City with either City employees or with Strategies 360, a consultant who was acting as a functional equivalent to a City employee in this matter, are subject to claims of privilege based on the attorney-client privilege and the work product doctrine where the content of the communication relates to legal advice or materials prepared in anticipation of litigation.

Id. But the court, nevertheless, concluded that the City violated the PRA in connection with the withholding of the 15 documents from the initial fifth installment. After finding the City liable under the PRA to disclose documents, it set the matter over for a later hearing on PRA penalties. CP 1461-62.

Cedar Grove then used the PRA case with the City to subpoena records directly from Strategies to obtain materials from private organizations and the Tribe, who are not subject to the PRA. CP 1395-1402. Strategies and the City opposed Cedar Grove's efforts to obtain documents which were not in possession of the City. CP 1377-88, 1406-44. The trial court ordered production of the documents which Strategies then provided to Cedar Grove. CP 708. From that production, the City realized that there were seventeen additional emails which it had not previously produced, plus it located two additional ones from the Mayor's

personal computer, a total of 19 documents, the first group of documents at issue here. All of these were produced by the City pursuant to stipulation. CP 1288-38. The third group of 173 documents produced by Strategies on August 7, 2013, consists of emails between it and third parties including third parties, none of which had ever been sent to the City and none of which were ever in the City's files. CP 663.¹²

Cedar Grove then moved for summary judgment regarding penalties. CP 708-39. The motion sought a determination that the 19 inconsequential documents not produced by the City (17 of which came to light from the Strategies' production) and the 173 Strategies' documents the City never received were public records, the City violated the PRA by not producing them, and for penalties, including the delay in producing the 15 documents the Court previously found was in violation of the PRA. *Id.*

Thus, out of the thousands of documents produced by the City, Cedar Grove's complaint and motions ultimately pertained to a total of 207 documents. Out of the 207 documents, Cappel received 15 of them prior to filing suit, and 173 were never in the possession of the City to be produced. For ease of analysis, the 207 documents should be analyzed in three discrete groups. Group (1) the 19 documents produced pursuant to

¹² The City was unaware of the contents of these documents. CP 243-44. Strategies only produced them after the Court granted Cedar Grove's motion to compel their production. CP 708.

stipulation; group (2) the 15 documents initially withheld on the basis privilege produced on August 2, 2012; and group (3) 173 Strategies' documents, thirteen of which are between the Tulalip Tribe and Strategies relating to a "mailer" in which the City had declined to participate. CP 1367-68.¹³ The Strategies' documents also included internal emails between Strategies' employees, and emails between Strategies and concerned citizens that were never shared with the City.¹⁴

In regard to the Strategies' documents, Al Aldrich, the senior vice president of Strategies, testified Strategies worked with a Mr. Davis from a citizens group and that it also had a separate contract with the Tulalip Tribe. CP 662-68. Strategies asserted it "owned" these documents. CP 663.¹⁵ Aldrich also testified the Tulalip Tribe commissioned and paid for a direct mail piece regarding Cedar Grove odors. CP 665. He also testified that although the City knew of its work with the Tulalip Tribe, "the City did not pay for, preapprove, or review" any mail piece on Cedar

¹³ These three groups are the same as the trial court which used the term "batches" to describe them.

¹⁴ The Strategies emails with third parties are contained in Exhibit Q to the Tilstra declaration, CP 957-1259 and consist of 160 documents. Note: the only thing not produced by the City were portions of the email chain it never received; the underlying emails that went to the City were produced. Exhibit R to the Tilstra declaration, CP 1261-87 consists of 13 documents relating to the "mailer" paid for by the Tulalip Tribe which were not sent to the City, and thus not produced by the City.

¹⁵ The City agreed with Strategies. CP 1381-85.

Grove odors before it was sent out. *Id.* Of the 173 records, the City did not possess, review, or otherwise “use” the documents. CP 243. Martin Napeahi, the General Manager of Quil Ceda Village, a subdivision of the Tulalip Tribe, later testified that Strategies had its own contract with Strategies, and stated: “As a separate sovereign government, the Tribe objects to the utilization of state record laws or state court proceedings to compel disclosure of communications between a federally recognized Indian tribe and its consultants on matters of tribal concern.” CP 238.

On the second summary judgment motion regarding penalties, the trial court ruled in favor of Cedar Grove and imposed penalties of \$143,740 against the City by a September 9, 2013 order. CP 443-55. The City timely moved for reconsideration, CP 258-87, which the court denied by an order entered on October 18, 2013. CP 7-9.¹⁶ The court also entered a revised order on its penalties ruling on October 18, 2013. CP 10-22.¹⁷ The trial court thereafter awarded attorney fees and costs to Cedar Grove in the amount of \$127,644.83. CP 1-6.

¹⁶ The court struck declarations submitted by the City in support of reconsideration. CP 8-9, 236-57. This was an abuse of the trial court's discretion, as will be discussed *infra*.

¹⁷ Although ostensibly entered to address the issue of PRA penalties against the City, the trial court's September 9 and October 18 orders contained extensive findings that pertained to the City's liability under the PRA, in effect, supplementing the court's earlier July 2 order. CP 12-22, 443-53. As this Court knows, such "findings" are superfluous on summary judgment and should be disregarded. *Hubbard v. Spokane*

The City timely appealed the trial court's decisions.

D. SUMMARY OF ARGUMENT

Cedar Grove lacked standing to seek the public records, penalties, and attorney fees under RCW 42.56.550(4) because it was not the requestor of the records. As the requestor of records, Kris Cappel was an indispensable party to the litigation under CR 19.

If Cedar Grove had standing to pursue this action, the trial court erred in ordering the production of the records of Strategies, a City consultant, and finding them to be public records. The trial court erred in conflating its decision on attorney-client privilege with the definition of a record under the PRA. Strategies' records were never provided to the City, never used by the City in its decisionmaking, and are consequently not public records under the PRA. At a minimum, there were questions of fact that precluded summary judgment on the issue.

The trial court further erred in imposing excessive penalties against the City and awarding fees to Cedar Grove under RCW 42.56.550(4) where the City did not violate the PRA as to the Strategies' documents. Moreover, even if the City did violate the PRA, the trial court's penalties

County, 146 Wn.2d 699, 706 n.14, 50 P.3d 602 (2002). It is noteworthy that the trial court's "findings" are replete with evidence of that court making factual determinations and credibility decisions, matters left to a trier of fact to resolve. *N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 537, 307 P.3d 730, *review denied*, 179 Wn.2d 1005 (2013).

were improvident, are not supported by substantial evidence, and are an abuse of discretion where it failed properly to employ the Supreme Court's *Yousoufian* penalty protocol and ignored mitigating factors and the City's good faith efforts to produce records. The City produced over 10,000 records in response to Cappel's request (the group 1 documents were inconsequential as to content and inadvertently missed), and the City produced the group 2 documents before any litigation.

E. ARGUMENT¹⁸

(1) Cedar Grove Lacked Standing to Present the Allegations of PRA Violations by the City in Connection with Cappel's PRA Requests

The City vigorously argued the issue of Cedar Grove's standing to file a lawsuit in connection with Cappel's PRA requests. CP 1683. The trial court concluded that Cedar Grove had standing, but acknowledged that Cappel was, at most, Cedar Grove's *undisclosed* agent. CP 1461.

Standing prohibits a party from asserting another's legal right. *West v. Thurston County*, 144 Wn. App. 573, 578, 183 P.3d 346 (2008). Standing is a threshold issue this Court reviews de novo. *In re Estate of*

¹⁸ As this case was resolved on summary judgment, it is important to note that the traditional analysis by this Court of summary judgment decisions applies. This Court reviews the trial court's decision de novo. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). The Court must review the facts and all reasonable inferences from them in a light most favorable to the City as the non-moving party. *Id.*

Becker, 177 Wn.2d 242, 246, 298 P.3d 720 (2013). This Court must review any PRA issue de novo. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 145, 240 P.3d 1149 (2010).

RCW 42.56.550(1) establishes the basis upon which a litigant may recover penalties and fees when that person is denied public records under the PRA. By the express terms of the statute, the records requestor is the person who has standing under the PRA to obtain penalties and attorney fees:

Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(emphasis added). By its terms, the statute applies *only* to persons who request public records.

The standing issue has arisen in several PRA cases. In *Kleven v. City of Des Moines*, 111 Wn. App. 284, 44 P.3d 887 (2002), this Court acknowledged the general principle that in order for a person to have standing to sue, he/she must have a personal stake in the outcome of a case, *id.* at 290, but, concluded that a person could sue under the then-

Public Disclosure Act to compel production of public records and could recover statutory penalties where the records request was made by the person's attorney. Critically, in that case, unlike here, the attorney disclosed that the request *was made on the client's behalf*. *Id.* at 290-91. For well established policy reasons, an attorney acting on behalf of a client must disclose this fact to a governmental agency to avoid confusion as to whether the attorney is acting in a personal, as distinct from a representative capacity.²⁰ In *Germeau v. Mason County*, 166 Wn. App. 789, 271 P.3d 932, *review denied*, 174 Wn.2d 1010 (2012), a union representative requested certain documents pertaining to a purported internal affairs investigation of a sheriff's detective. The Court of Appeals determined the union representative had standing to bring an action under RCW 42.56.550 even though the records were for the benefit of the representative's union member. The Court noted the representative had a

²⁰ RPC 3.9 requires disclosure of representative capacity in nonadjudicative proceedings. Although not specifically applicable here, its policy basis is that legislative and administrative agencies have a right to expect them to deal with them as they deal with courts. Comment [2]. RPC 7.1 prohibits a lawyer from making a "false or misleading communication about the lawyer or the lawyer's services." It defines false or misleading "if it omits a fact necessary to make the statement considered as a whole not materially misleading." Cappel stated: "Pursuant to the Public Records Act, RCW 42.56, I request..." CP 1823. Cedar Grove is omitted entirely. Likewise, Moore did not disclose his representation of Cedar Grove anywhere in his July 3, 2012 letter. CP 1764. RPC 8.4 prohibits engaging in conduct involving "deceit or misrepresentation." Collectively, these Rules, applicable to Cappel and Moore, evidence a strong public policy requiring a lawyer to disclose when acting in a representative capacity.

personal stake in the records. *Id.* at 803-04. Critically, Germeau was the records *requestor*.

This analysis of RCW 42.56.550(1) is consistent with federal court interpretations of the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") and analogous state statutes.²¹ The seminal case in this regard is *McDonnell v. United States*, 4 F.3d 1227 (3rd Cir. 1993) in which the Third Circuit ruled that while a FOIA requestor need not have a personal stake in the information sought, the language of FOIA and its legislative history mandated that if a person is not a FOIA requestor regardless of that

²¹ The City acknowledges that the *Kleven* court rejected the application of FOIA standing precedents. 111 Wn. App. at 290-93. But FOIA cases may be helpful in interpreting the PRA if the PRA provision is analogous to a FOIA provision. *Francis v. Wash. State Dep't of Corrections*, 178 Wn. App. 42, 313 P.3d 457 (2013). *Kleven* was rendered under RCW 42.17 in a case in which the requestor, an attorney, specifically articulated in the request that it was made on behalf of the plaintiff client. This Court found the fact that under FOIA, unlike RCW 42.17, the requestor had to comply with certain rules with regard to the request, including a requirement that the request be in writing by the requestor, to be significant. 111 Wn. App. at 291-92.

Washington law is now akin to FOIA in regard to the precision by which the request must be made. The Attorney General's model rules for PRA requests sets forth the appropriate contents of a PRA request; the name of the requestor is *required*. WAC 44-14-030(4). Indeed, in *Germeau*, Division II conducted a lengthy analysis of whether a request for a public record gave an agency "fair notice" of the request, a mandatory requirement before the PRA applies. 166 Wn. App. at 804-10. The court noted that the identity of the requestor was a key factor as to whether fair notice was given. *Id.* at 805. *See generally*, *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 412, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012 (1999) (mere request for information as opposed to specific records is not a public records request); *Smith v. Okanogan County*, 100 Wn. App. 7, 12, 994 P.2d 857 (2000) ("An important distinction must be drawn between a request for information about public records and a request for the records themselves. No request was present); *Wood v. Lowe*, 102 Wn. App. 872, 879, 10 P.3d 494 (2000) (request need not mention disclosure law but fair notice is necessary; no request was present); *Beal v. City of Seattle*, 150 Wn. App. 865, 875-76, 209 P.3d 872 (2009) (request need not be in writing, but fair notice is required; no request was present).

person's actual personal interest in the requested documents, that person lacks standing to sue an agency when the agency refuses to disclose the documents. *Id.* at 1236-39. *See also, Wetzel v. U.S. Dep't of Veterans Affairs*, 949 F.Supp.2d 198 (D. D.C. 2013) (courts routinely dismiss FOIA cases for lack of standing where plaintiff's name is not on request or requestor fails to articulate that request is made as plaintiff's representative); *Feinman v. Fed. Bureau of Investigation*, 680 F. Supp.2d 169 (D. D.C. 2010) (FOIA requestor could not assign right to judicial review of request denial).

Perhaps the most significant recent decision of our Supreme Court on PRA standing arose in the context of CR 19 in *Burt v. Wash. State Dep't of Corrections*, 168 Wn.2d 828, 231 P.3d 191 (2010). There, the Court ruled that an inmate who requested public records under the PRA was an *indispensable party* under CR 19²² to any action under RCW

²² The significance of being an indispensable party was addressed by our Supreme Court in *Automotive United Trades Organization v. State*, 175 Wn.2d 218, 227-28, 285 P.3d 52 (2012) wherein the Court stated:

The doctrine of indispensability is rooted in equitable principles. *See Crosby v. Spokane County*, 137 Wash.2d 296, 309, 971 P.2d 32 (1999). Its touchstone is whether the action can proceed without absentees "in equity and good conscience." *Id.* The doctrine favors judicial economy by avoiding redundant proceedings, safeguards judicial dignity by avoiding inconsistent decrees, and preserves the rights of absentees to be heard in controversies affecting their rights.

While the doctrine's evaluation can be traced back several hundred years, the modern rule's formulation has its genesis in the 1854 Supreme Court decision in *Shields v. Barrow*, 58 U.S. (17 How.) 130,

42.56.540 by a governmental agency to enjoin production of the records. As the Court succinctly noted: "Here, no party disputes that [the inmate] has an interest in the subject of the action; he is the requestor of the records." *Id.* at 834. Cappel was an indispensable party, as the records requestor, to any action under RCW 42.56.550(1). Cappel's requests gave *no indication* the request was made in some representative capacity. Thus, as it is undisputed that Cappel is not a party to this action and nowhere indicated in her request that she was acting as Cedar Grove's agent or lawyer, the trial court here lacked the ability to render a judgment in Cedar Grove's favor. Stated another way, Cedar Grove lacked standing to pursue the action under RCW 42.56.550 that only Cappel as the records requestor could pursue, given the language of RCW 42.56.550(1) and CR 19.

In sum, Cedar Grove lacked standing under RCW 42.56.550(1) to assert Cappel's claim that the City failed to produce records under the

15 L.Ed. 158 (1854). There, the Court classified indispensable parties as those "who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. *Id.* at 139. It further noted that parties who are merely "necessary," and not "indispensable," are those whose "interests are separable from those of the parties before the court, so that the court can proceed to a decree, and *do complete and final justice*, without affecting [absentees]." *Id.* (emphasis added).

PRA where Cappel requested the records from the City as the *undisclosed* agent of Cedar Grove.²⁴

(2) The PRA Does Not Extend to the Records of a City's Private Consultant

The trial court here concluded that the City violated the PRA in connection with 207 documents, all but one relating to Strategies.²⁵ As noted above, the documents fall into three separate categories discussed below. Group 1 consists of nineteen documents which the City did receive, but were not initially produced by the City or disclosed in an exemption log. CP 1288. Group 2 consists of fifteen documents identified from the City's fifth installment of records produced on April 5, 2012. CP 1461-62.²⁶ These records were produced *before litigation* without waiving privilege until that issue could be determined by the Court. The third group of 173 documents is the most significant. It is undisputed that *none* of these documents were ever sent or received by the

²⁴ If this Court agrees with the City on standing, it need not address the issue of whether the PRA applies to Strategies.

²⁵ The other one is a document from the Mayor's personal home computer relating to an email with the head of a citizens group. CP 1335. The Mayor sent it, along with one from Strategies to the records officer, for PRA disclosure, but those two were inadvertently omitted from the PRA production. CP 1333.

²⁶ The Court also found that the City did not violate the PRA as to certain privileged documents with Strategies. As the City did not violate the PRA as to those documents and provided 4 installments of records in accordance with Cappel's request, this bears on the propriety of any daily PRA penalties, an issue discussed *infra*.

City, its officers, or employees. All of them are communications between Strategies and third parties, including the Tulalip Tribe, another Strategy client. None of them were located in City files.

The trial court found that attorney-client privilege and the work product doctrine applied to communications between legal counsel with either City employees or with Strategies “who was acting as the functional equivalent to a City employee in this matter” ... "where the content of the communication relates to legal advice or materials prepared in anticipation of litigation." CP 1461.

Later, the trial court would bootstrap its privilege decision to find the 173 Strategies' documents to be public records, even though they were never in the City's possession. CP 13-15 (FF 6-8). Conflating its privilege analysis with its analysis of what constitutes a public record, the trial court found that Strategies' records were subject to the PRA because the City and Strategies "were enmeshed in what was essentially an employer-employee-like relationship." CP 13.²⁷ The court determined that Strategies' records by and between third parties were the City's public records because they were "used" by the City within the meaning of RCW

²⁷ The trial court's rationale for its decision was provided in its decision on the proper PRA penalties. CP 10-22, 443-55.

42.56.010(3). CP 14.²⁸ The trial court's decision represents a *massive* expansion of the PRA far beyond the specific contours of the Act,²⁹ an expansion this Court should reject.

(a) Strategies Is Not a Public Agency under RCW 42.56.010(1)

As a starting point in the PRA analysis, it is important to note that Strategies is *not a public agency subject to the PRA*. In certain rare circumstances, Washington courts have concluded that the records of private contractors doing business with the government are subject to the PRA. But merely because a private consultant or contractor does business with a government agency does not transform such a firm into a public entity whose records are subject to the PRA. By applying the PRA to records held by a contractor, based upon the notion that it is the equivalent

²⁸ The trial court did not find that City officials actually used the records in the sense of reviewing and considering their contents. Instead, it stated:

.... Strategies generated these records to further the political goals and interests of Marysville, that they were employed by Marysville and made instrumental to Marysville's governmental ends or purposes, and that a nexus exists between their use/creation and Marysville's own political goals as a result.

CP 14.

²⁹ While it may seem anomalous for the City to assert that Strategies is not a public agency but that its participation in the City's litigation team on the Cedar Grove project was within the attorney-client privilege, exempting any records from the PRA, the argument is consistent. The privilege at issue is broad, as will be noted *infra*, and can extend to consultants and other independent contractors.

of a City employee, the Court erroneously treats the contractor as the equivalent of an "agency" which Strategies is not.

RCW 42.56.010(1) defines a public agency under the PRA as "all state agencies and all local agencies." A "local agency" includes "every county, city, town, municipal corporation, quasi-municipal corporation or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." *Nowhere* in that statutory definition is there a reference to consultants or contractors with public agencies. Instead, the PRA only applies to public records that are "proposed, owned, used or retained" by an "agency," not records from an agency's contractor that are never provided to the agency, that the agency does not even know exists, or were prepared for other clients.

Notwithstanding the absence of specific language in the PRA on its application to government contractors, Washington courts have applied the PRA to certain otherwise private entities if those private entities are de facto government agencies. Beginning in *Telford v. Thurston County Bd. of Commissioners*, 95 Wn. App. 149, 974 P.2d 886, *review denied*, 138 Wn.2d 1015 (1999), Washington courts have applied the PRA to private entities if they are the "functional equivalent" of a public agency.³⁰ Under

³⁰ The unfairness of applying *Telford's* functional equivalency test to private businesses is articulated in Jeffrey A. Ware, *Clarke v. Tri-Cities Animal Care & Control*

that test, courts must evaluate if a private entity is essentially acting as a de facto public agency by looking to (1) the entity's governmental function; (2) the entity's government funding; (3) government control over the entity; and (4) the entity's origin. *Id.* at 162-63. There, the court found that the Washington State Association of Counties ("WSAC") and the Washington Association of County Officials ("WACO") were subject to the campaign funding portions of the Public Disclosure Act (of which the PRA was then also a part). The court noted both organizations were authorized by the Legislature to act in certain areas, were made up exclusively of elected officials, were funded largely by those officials, and were formed by county officials to further county business. *Id.* at 165-66. *See also, West v. State*, 162 Wn. App. 120, 252 P.3d 406 (2011) (WACO subject to Open Public Meetings Act as it was a public agency given powers entrusted to it by the Legislature, its membership of public officials, and its public financing). Cedar Grove *conceded* below that the public agency analysis was not applicable here, while still arguing *Telford* was a basis to impose liability.³¹

Shelter: How Did Private Businesses Become Government "Agencies" under the Washington Public Records Act?, 33 Seattle U. Law Rev. 741 (2010).

³¹ "By its own admissions, Strategies is *not* this type of pseudo-governmental entity and, again, the question before the Court at the time it ruled that Strategies was the functional equivalent of a Marysville "employee" was *not* whether Strategies was the functional equivalent of an agency under *Telford*." CP 231.

In *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 181 P.3d 881 (2008), the Court of Appeals determined that a contractor providing animal control services by contract for the cities of Richland, Pasco, and Kennewick was subject to the former public records provisions of the Public Disclosure Act because it was providing essential government services under substantial government control. The contractor was primarily government-funded. The court determined that the contractor was effectively a stand-in for a public agency, unlike the situation of Strategies here.

By contrast, in *Spokane Research & Defense Fund v. West Central Community Development Association*, 133 Wn. App. 602, 137 P.3d 120 (2006), *review denied*, 160 Wn.2d 106 (2007), Division III concluded that a community development association was not a public agency although it contracted with the City of Spokane to administer certain grants, with 25% of its funding being private. The court pointedly observed:

The Association is incorporated as a conventional *Internal Revenue Code 503(c)(3)* charity. The Association does not fall within the City's park department as asserted. The City aptly argues "private vendors at Riverfront Park are not 'agencies' just because they sell burritos at the park." City's Resp. Br. at 11. Unlike the *Telford* entities, the Association was not created to fulfill a legislative mandate. The Association does not make policy or legislate. The Association does not execute law or regulate law. The Association does not adjudicate disputes. The Association is not controlled by elected or appointed county officials, is

not government audited, and its employees are not paid by a government or enjoy government health or retirement benefits. In short, the Association possesses no material governmental attributes or characteristics. The Association simply rents space from the City, administers public and private grants, subleases space for its own benefit, and operates apart from government control.

Id. at 608. The City was not involved in the Association's day-to-day operations. *Id.* at 609.

Strategies is not a public agency under *Telford's* 4-part test (assuming that such a test is even appropriate for a contractor like Strategies). Strategies was not providing across-the-board government services that made it the effective stand-in for a regular governmental agency. Rather, it was providing specific services by contract on a specific project. Strategies was a private business, independent of the City, with numerous clients, both public and private. It has corporate offices throughout the country. The City did not control Strategies' operations on a day-to-day basis. It contracted with Strategies for its services designed to achieve an outcome on a specific matter. CP 1562, 1647.³²

³² This is the essence of an independent contractor relationship. This has long been the principle in Washington. *Hollingbery v. Dunn*, 68 Wn.2d 75, 79-80, 411 P.2d 431 (1966) ("an independent contractor ... may be generally defined as one who contractually undertakes to perform services for another, but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in performing the services.").

In sum, Strategies is not a public agency to which the PRA applies. The trial court erred by treating all records of Strategies as public records subject to disclosure, even though it worked independently of City direction, did not provide or inform the City of specific records at issue, and prepared many of them for other clients, namely the Tulalip Tribe.

(b) Strategies' Documents by and between Third Parties Were Not Public Records As the City Did Not "Use" Them

The trial court erred in concluding that the City "used" Strategies' documents rendering them public records under the PRA. CP 14. The trial court's decision *concedes* that the City did not prepare, own, or retain the Strategies' records. Moreover, *nowhere* did the trial court specifically find that the City used such records in its decisionmaking.

RCW 42.56.010(3) defines a public record³³ under the PRA:

any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, or retained by any state or local agency regardless of physical form or characteristics.

Thus, not every record that touches upon a government activity is then necessarily a "public record" for the Act's purpose. The PRA applies only

³³ Under the PRA only *public records* are subject to disclosure. *Smith*, 100 Wn. App. at 12 (plaintiff sought lists and records that did not exist; requests for information, as opposed to records, is outside the PRA); *Bonamy*, 92 Wn. App. at 409 (same).

if the record is in writing and a public agency like the City prepares, owns, uses, or retains it³⁴ for the conduct of the government.³⁵

The case law on when a government agency "uses" a record so as to make it subject to the PRA is sparse. The seminal case on the "use" by a government agency of materials making such materials a public record under the PRA is *Concerned Ratepayers Ass'n v. Public Utility District No. 1 of Clark County, Wash.*, 138 Wn.2d 950, 983 P.2d 635 (1999), a case arising under the Public Disclosure Act's definition of a public record. There, the PUD reviewed, evaluated, and referenced a technical document relating to the design specifications for a turbine generator to be installed in a proposed power plant in Vancouver prepared by the contractor selected by the PUD to provide the plant's turbine generators. Despite reviewing the document to determine the necessary contract requirements, the PUD did not retain the document in question. Our

³⁴ Under traditional principles of statutory interpretation in interpreting RCW 42.56.010(3), this Court should apply the Legislature's plain intent derived from the words of RCW 42.56.010(3). *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

³⁵ In *Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wn. App. 433, 161 P.3d 428 (2007), Division II concluded that financial statements of certain card rooms submitted to the Gambling Commission were not public records simply because they were related to the Commission's regulatory function. The court noted that PRA applied only if the material is in writing, it contained information pertaining to the conduct of government or performance of a governmental function, and the government prepared, owned, used, or retained the material; all three factors must be proved. *Id.* at 444. The court found insufficient evidence of the relevance of the financial statements to the conduct of government or the Commission's decisionmaking process to merit finding such statements to be public records. *Id.* at 445-46.

Supreme Court approved of a definition of "use" that looked to whether the agency applied the document to a given purpose or the document was instrumental to a governmental end or purpose. *Id.* at 959. The Court stated:

Whether information has been "used," should not turn on whether the information is applied to an agency's final work product. Rather, the critical inquiry is whether the requested information bears a nexus with the agency's decision-making process. A nexus between the information at issue and an agency's decision-making process exists where the information relates not only to the conduct or performance of the agency or its proprietary functions, but is also a relevant factor in the agency's action. That is, certain data may still be relevant and an important consideration in an agency's decision-making process even if it is not a part of the agency's final work product. Thus, mere reference to a document that has no relevance to an agency's conduct or performance may not constitute "use," but information that is reviewed, evaluated, or referred to and has an impact on an agency's decision-making process would be within the parameters of the Act.

Id. at 960-61 (citations omitted). The document *must be used in the government's decisionmaking process.*

The decision in *West v. Thurston County*, 168 Wn. App. 162, 275 P.3d 1200 (2012), relating to attorney billing invoices, is also instructive.³⁶ There, Division II carefully examined the attorney billings at issue in light of RCW 42.56.010(3) and concluded that attorney invoices for services

³⁶ The trial court never specifically addressed *West* in its written decision. CP 19.

over the County's deductible limit of \$250,000 were not public records because the records were not used by the agency *where it never received them*. The court noted that the trial court applied *Concerned Ratepayers* in ruling:

Thurston County did not receive invoices for defense services over their \$250,000 deduct[i]ble. Additionally, there is no evidence that Thurston County reviewed, evaluated, referred to or otherwise considered defense invoices over their \$250,000 deduct[i]ble in their decision-making process regarding their defense in *Broyles* or for any other purpose. There is no showing that the defense invoices for services over Thurston County's \$250,000 deduct[i]ble had a nexus with Thurston County's decision-making process.

CP at 180-81. In our view, the superior court properly applied *Concerned Ratepayers* in its "use" analysis. Accordingly, we hold that the County did not "use" the invoices that exceeded its deductible. RCW 42.56.010(2).

Id. at 185-86.

Based on the record here, the trial court erred in concluding that the 173 Strategies' documents were public records. Cedar Grove presented no evidence that the City reviewed, evaluated or applied these documents to any governmental decision. Neither the Court nor Cedar Grove presented any evidence that the City reviewed, evaluated, or applied these documents to any governmental decision. Neither the Court nor Cedar Grove ever identified any governmental decision to which the documents allegedly related. Thus, there is no essential nexus to

governmental decisionmaking as required by *Concerned Ratepayers*. The trial court found that the Strategies' e-mails "were made instrumental to Marysville's governmental ends or purposes," CP 15, but it did not show any connection between any of the specific 173 Strategies' emails and a governmental decision or action. Particularly as to the 13 documents relating to the mailer the only evidence was the City rejected being involved in such a project. It apparently relied on Cedar Grove's speculation that the City was pulling Strategies' strings, which is antithetical to the very definition of an independent contractor.³⁷

The undisputed evidence showed that the City never received the documents or in any way possessed them; it obviously could not "use" documents it never had. No case law extends the PRA's definition of a public record to documents that were by and between third parties and which were never in the possession of a public entity. Here, Cedar Grove seeks not only to extend the PRA to documents the City never received, but to penalize the City for failing to produce documents it had no right to obtain. All of the 173 documents at issue involve communications between Strategies and third parties, including another client of Strategies, a sovereign Indian nation. It is undisputed that both Strategies and the

³⁷ Cedar Grove's argument that if an agency asks a contractor (e.g., lawyer or policy firm) for advice about a public policy issue, any advice they subsequently give to

Tulalip Tribe asserted they owned the documents. The City had no authority to compel Strategies to provide it with documents relating to Strategies' other clients. Plainly, the City has no ability, or means to compel, the Tribe as a sovereign entity, to produce the documents. Significantly, Cedar Grove's request does not even encompass such documents. Cappel's request was for "available information." CP 1823. To hold the 173 Strategies' documents were public records places public agencies in the impossible position of being liable for the production of documents generated by third parties that it does not have, cannot obtain, and does not even know exist.

(c) The Application of Attorney-Client Privilege to Strategies Does Not Make Its Documents the City's Public Records

The trial court also concluded that because the City successfully argued that attorney-client privilege and work product applied to certain communications by the City with Strategies that *every* Strategies' document, even some not relating to Cedar Grove,³⁸ became public records. CP 13, 14, 15. This places a public agency in the untenable position of having to choose between the important privilege that allows

others necessarily serves a governmental purpose. This exponentially expands the reach of the PRA beyond the bounds of the agency and invades the activities of private parties.

³⁸ CP 566, Exs. 9 and 10 relate to the Department of Ecology rules and a composting facility in Thurston County.

the legal system to function and being held liable for PRA violations for an independent contractor's communications with third parties that the public agency never receives, and never knew about. That was error.³⁹

The attorney-client privilege doctrine is central to the functioning of the legal system and the critical importance of this privilege is recognized in regard to the production of public records.⁴⁰

RCW 5.60.060 recognizes attorney-client privilege in Washington. The PRA recognizes that "other statutes" besides the PRA may prohibit the disclosure of what are otherwise public records. RCW 42.56.070(1); *Ameriquist Mortgage Co. v. Wash. State Office of Att'y Gen.*, 170 Wn.2d 418, 439-40, 241 P.3d 1245 (2010). RCW 5.60.060 is one of those "other

³⁹ To be clear, the City is assigning error to the trial court's analysis that the assertion of privilege or work product as to records rendered them public records under the PRA. As will be discussed *infra*, the City is not assigning error to the determination that 15 documents, originally believed by the City to be privileged, which the City subsequently produced before litigation should have been found to be privileged. The City *is* objecting to the trial court's allowing for recovery by Cedar Grove penalties and fees for those 15 documents which were produced after requested review and prior to litigation.

⁴⁰ While the PRA is a strongly worded mandate for disclosure of public records, *City of Federal Way v. Koenig*, 167 Wn.2d 341, 344-45, 217 P.3d 1172 (2009), that statute makes clear which records are subject to its provisions and affords certain statutory exemptions. Courts interpret the disclosure provisions of the PRA liberally and its exemptions narrowly, *Livingston v. Cedeno*, 164 Wn.2d 46, 50, 186 P.3d 1055 (2008), but that liberal construction imperative does not permit courts to ignore the plain language of a specific public disclosure exemption. *Building Industry Ass'n of Wash. v. State, Dep't of Labor & Indus.*, 123 Wn. App. 656, 666, 88 P.3d 537, *review denied*, 154 Wn.2d 1030 (2004) (WISHA direction that ergonomic consultation reports were confidential and not open to public inspections).

statutes." *Hangartner v. City of Seattle*, 151 Wn.2d 439, 450-54, 90 P.3d 26 (2004).

The attorney-client privilege is one of the oldest and most widely recognized principles in our jurisprudence and constitutes a basic foundation for an effective relationship between an attorney and client. It is predicated upon full, frank and open communications between counsel and client. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108, 130 S. Ct. 599, 606, 175 L. Ed.2d 458 (2009).

Washington courts have rigorously safeguarded the confidential communications between attorney and client for the same reasons. Numerous cases hold that the privilege promotes the free, full, open communication between the attorney and client and warn against dire consequences if that communication is chilled. *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611, 615 (1997); *In re Disciplinary Proceeding Against Schafer*, 149 Wn.2d 148, 161-62, 66 P.3d 1036 (2003). *See also, Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 745, 174 P.3d 60 (2007) (PRA case).

The trial court here concluded that Strategies acted in a relationship tantamount to an employment relationship with the City, CP 13-14, and it fully understood the privilege applied to Strategies, rejecting Cedar Grove's assertion that there is no privilege for communication

between a consultant hired by the City to assist in developing policy options and communicating with the public in response to the odor created by their compost facility. CP 1461.⁴³ The trial court was correct in this aspect of its ruling. In *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994), the Eighth Circuit extended privilege to communications between an independent contractor for a real estate partnership and the partnership's counsel. The contractor had interacted on a daily basis with the partnership's principals and was involved in the transaction that gave rise to the suit. *Id.*, 16 F.3d at 938. The court held that "an independent consultant can be a representative of the client for the purpose of applying the attorney-client privilege." *Id.*, 16 F.3d at 936. The court considered it "inappropriate to distinguish between those on the client's payroll and those who are instead, and for whatever reason, employed as independent contractors." *Id.*, 16 F.3d at 937. The court feared that "too narrow a definition of 'representative of the client' will lead to attorneys not being able to confer confidentially with nonemployees who, due to their

⁴³ The trial court stated:

Communications between legal counsel for the City with either City employees or with Strategies 360, a consultant who was acting as a functional equivalent to a City employee in this matter, are subject to claims of privilege based on the attorney-client privilege and the work product doctrine where the content of the communication relates to legal advice or materials prepared in anticipation of litigation.

CP 1461.

relationship to the client, posses just the very sort of information that the privilege envisions flowing most freely." *Id.*, 16 F.3d at 938. The court held that the attorney-client privilege applied to communications between counsel and the outside consultant because the consultant was retained:

to provide advice and guidance regarding commercial and retail development based upon [his] knowledge of commercial and retail business in the State of Minnesota, just as one would retain an outside accountant for her knowledge of, say, the proper accounting practices and taxation concerns of partnerships. *There is no principled basis to distinguish [the Bieter consultant's] role from that of an employee, and his involvement in the subject of the litigation makes him precisely the sort of person with whom a lawyer would wish to confer confidentially[.]*

Bieter, 16 F.3d at 938 (emphasis added).⁴⁴

Despite its correct understanding that the City's was entitled to assert an exemption from PRA disclosure based upon attorney-client privilege and the work product doctrine that extended to Strategies' documents, the trial court erred in concluding that because the City was correct in the proper assertion of such an exemption, this acted as the

⁴⁴ The Ninth Circuit also follows *Bieter*. *United States v. Graf*, 610 F.3d 1148, 1159 (9th Cir. 2010) (an outside consultant's role in the company was that of a functional employee, thus implicating the corporate attorney-client privilege). *See also, McCaugherty v. Siffermann*, 132 F.R.D. 234, 239 (N.D. Cal. 1990) (no principled basis for distinguishing consultant's communications with attorneys and corporate employee's communications with attorneys); *Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 271 F.R.D. 125, 132-33 (S.D. W. Va. 2010). Communications between attorneys and consultants that function as part of the City's management team as the functional equivalent of employees are privileged. Several cases have applied this to a "public relations" firm. *F.T.C. v. GlaxoSmithKline*, 294 F.3d 141 (D.C. Cir. 2002); *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213, 218-19 (S.D.N.Y. 2001).

functional equivalent of an *admission* that all other Strategies' documents were therefore public records, including the 173 documents not sent to the City.

The questions of attorney-client privilege for government contractors is *distinct* from the question of whether a government "uses" the records of such a contractor, records the government has never had in its possession or utilized for its decisionmaking. Attorney-client privilege is necessarily broad, to safeguard the litigation process and the client-lawyer relationship. The definition of a public record is necessarily narrower. The trial court's decision conflates the two concepts in a fashion that ultimately will force governments to make the Hobbesian choice of exerting privilege and risking PRA penalties, or foregoing privilege and losing a long-cherished core protection for confidentiality of communications with counsel.

The bottom line effect of Cedar Grove's position adopted by the trial court is pernicious. Virtually all records of government contractors potentially now become public records, even if the records were never sent to, or used by, the government. This is a distortion of the PRA and an unprecedented expansion of its scope.

(d) At a Minimum, Questions of Fact Preclude a Finding that the 173 Documents Were Public Records and that the Failure to Provide the 19 Documents Was a Violation of the PRA

The trial court found the City violated the PRA both for the 173 group 3 Strategies' documents the City never received and for the 19 group 1 documents the City later produced. Questions of fact preclude such a finding. Cedar Grove *conceded* the summary judgment standard applied to the 173 documents. CP 211.

Strategies provided essential and unique services to assist the City in responding to the public outcry caused by the odor emanating from Cedar Grove's adjacent composting facility. There are complex regulatory and intergovernmental issues dealing with federal, state, tribal and local regulations. Strategies brought experience and expertise in dealing with these multiple layers of government to address the public's concern with a cohesive consistent policy response. Its ability to coordinate development of the policy, legal and public communications aspects was essential for the City to act in the public's interest.

However, just because Strategies was a governmental consultant it does not mean every document it created was a public record. The record also disclosed that Strategies was hired as an independent contractor. It has numerous clients and 14 offices in ten Western states. CP 662. The

City does not own Strategies' internal documents or its communications with third parties. CP 663. It acts as a “self-directed independent contractor.” CP 664. It determines how best to fulfill its obligations under the contract. City employees do not direct or generally preapprove specific activities. *Id.* In regard to the mailer prepared for the Tulalip Tribe, although the City was aware of the work Strategies was doing for the Tulalips, it “did not pay for, preapprove, or review or direct this direct mail piece before it was sent out.” CP 665. Strategies acted independently in its dealings with Mike Davis from the citizens group. CP 666. It did so on its own initiative. CP 667. Cedar Grove produced *no* evidence that the City directed any activities by Strategies in connection with Davis or the Tribe. In fact, the City specifically rejected participating in any mailer. CP 1368. At a minimum, this evidence created a question of fact precluding the entry of a finding of a violation of the PRA.

Questions of fact at a minimum should have precluded a PRA violation for almost all of the 19 documents disclosed after litigation commenced that were missed from the City’s earlier production documents. The City produced the following evidence that was not contested by Cedar Grove:⁴⁶ seven of the documents were not responsive

⁴⁶ All of the documents are located at CP 1291-1338. The Court is invited to look at them. The documents are inconsequential, consisting things like saying “Thanks,” or “Wow” when the underlying emails were produced. A detailed summary of

to the PRA request, one was duplicative of a document previously produced, some had no contents (simply forwarding e-mails the City had already disclosed), one involves a facility in Thurston County, one was an appointment notice that was cancelled and then rescheduled with no substantive discussion, and others were just rescheduling meetings. At a minimum, questions of fact preclude a finding of liability under the PRA for almost all of the 19 documents, and they certainly provide no basis for a penalty of \$40 a day for not being produced.

(e) The PRA Precludes Recovery For Documents Produced Prior to Litigation Following Requested Review

The PRA allows agencies to respond to large requests made by Cappel in installments. It also provides for a process by which agencies can internally review decisions to deny inspection of documents withheld in response to objections. *See* RCW 42.56.520.

Through counsel, Cappel asked that documents withheld from the fifth installment be reviewed when it questioned the City's assertion of privilege. The City then engaged in a review process, and hired outside counsel specifically to perform it. The fifteen documents for which

why seventeen of the documents (excepting the two forwarded by the Mayor which were missed) is summarized at CP 565-66.

liability was found were produced by the City prior to litigation. There was no need to sue to obtain the documents. By conducting a requested review and providing documents previously withheld as exempt, the City corrected any error it might have made in asserting the objection. To allow a party to sue to obtain penalties and fees is unjust and eliminates any meaning to the statutory review process.

One of the primary purposes of having an administrative remedy is to provide a more efficient process and allows an agency to correct its own mistakes. *Smoke v. City of Seattle*, 132 Wn. 2d 214, 226, 937 P. 2d 186 (1997). If a mistake is corrected through the review process, judicial remedies are not ordinarily warranted. *Brower v. Pierce County*, 96 Wn. App. 559, 566, 984 P. 2d 1036 (1999).

Here the City corrected its mistakes. Thus, there was no need for any “action seeking the right to inspect or copy any public record.” RCW 42.56.550(4). Any penalties and fees relating to the fifteen records at issue should be reversed, particularly for the excessive amount imposed at \$70 per day.

(3) The Trial Court Erred in Imposing PRA Penalties On, and Awarding Fees Against, the City

For the reasons already enumerated herein, the City did not violate the PRA and any imposition of penalties or an award of Cedar Grove's

fees against it is improper. But even if the City did violate the PRA, the penalties imposed by the trial court were unreasonable and excessive.

The trial imposed excessive penalties on the City. The trial court imposed penalties on the three groups of documents, starting with an excessive penalty amount for the first group and more than doubling the amount for documents the City had never received. CP 455. The three ‘batches’ of documents of documents and the penalties the trial court imposed are as follows:

The first batch was the 19 documents the City inadvertently did not produce which consists of 17 documents and 2 which came from the mayor’s personal home computer. For the seventeen documents (some with no content, some not responsive to the request, some cancelled meeting notices, some saying thanks with the underlying emails produced, some that never hit the City’s servers at the time), the court imposed penalties going back to the day of the record request (ignoring the necessity to produce in installments) with a penalty of \$40 per day for a total of \$49,880.00.

The second batch was the 15 records withheld from the fifth installment (April 5) based upon privilege which the City reviewed upon request and produced prior to litigation on August 3, 2012. Instead of imposing the penalty on the 119 days between the fifth installment and

when the documents were produced, the trial court assessed the days from the date of the original request, reduced by 119 days, and used a per diem rate of \$70 per day for a total of \$11,060.00.

The third batch was the 173 Strategies' documents the City never received that the Court imposed a penalty of \$90 per day. The trial court used two different day counts for documents (560 days for 124 records and 360 days for 49 records), although the written order does not specify how those day counts were determined. The total amount for the third batch is \$82,800.00.

The grand total for all three batches is \$143,740.00 in penalties.

(a) The Trial Court Abused Its Discretion In Setting Penalties Here

The process by which a court must analyze the propriety of penalties against a government agency for withholding public records under the PRA is clear after the Supreme Court's *Yousoufian* decisions. Penalty decisions are entrusted to the discretion of the trial court and reviewed for abuse of that discretion. *Yousoufian v. Office of King County Exec.*, 152 Wn.2d 421, 430-31, 98 P.3d 463 (2004). The core question on PRA penalties, however, is the degree of agency culpability in

withholding the records. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459-60, 229 P.3d 735 (2010).⁴⁷

The *Yousoufian* court established a PRA penalty protocol, identifying seven mitigating factors and nine aggravating factors that may serve to decrease or increase the penalty. *Id.* at 467-68. These factors are nonexclusive, "may not apply equally or at all in every case," and "should not infringe upon the considerable discretion of trial courts to determine PRA penalties." *Id.* at 468. The Court also noted that the "factors may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate considerations." *Id.*

The mitigating factors are:

(1) a lack of clarity in the PRA request; (2) the agency's prompt response or legitimate follow-up inquiry for clarification; (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions; (4) proper training and supervision of the agency's personnel; (5) the reasonableness of any explanation for noncompliance by the agency; (6) the helpfulness of the agency to the requestor; and (7) the existence of agency systems to track and retrieve public records.

Id. at 467.

The aggravating factors include:

⁴⁷ In *Cornu-Labat v. Hosp. District No. 2 of Grant County*, 177 Wn.2d 221, 298 P.3d 741 (2013), for example, our Supreme Court held that sanctions at the low end of the scale were appropriate where the agency acted in good faith. *See also, West*, 168 Wn. App. at 188-92 (trial court properly applied *Yousoufian* analysis and justified daily penalty of \$30 per day based on mitigating factors).

(1) a delayed response by the agency, especially in circumstances making time of the essence; (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions; (3) lack of proper training and supervision of the agency's personnel; (4) unreasonableness of any explanation for noncompliance by the agency; (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency; (6) agency dishonesty; (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency; (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency; and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

Id. at 467-68. Here, the trial court abused its discretion in applying the *Yousoufian* protocol and in assessing the daily penalties it imposed. It is not apparent that the trial court considered *any* significant mitigating factors.

It is clear the City did a comprehensive search of all records in its possession. The person responsible was trained in the PRA and brought in technical expertise for complicated searches as necessary. The City had to deal with a huge PRA request from Cappel. It provided easily obtained documents with no exemption issues immediately. It provided timely installments. It went out of its way to provide easy access to Cappel, setting up the records on-line and giving her access, and extending the access period. Anything that could not be put on line was put on disk and

mailed. It had legal counsel review the documents for privilege, and had its counsel search firm records. It provided descriptive exemption logs. When some exemptions were questioned, it engaged in a review process and hired outside counsel to do it. In response to the review, it provided additional documents before litigation. It had the Mayor and the City's chief administrative officer search their home computers and they provided responsive documents from them, with the exception of two from the mayor that were forwarded but got missed. *Thousands* of documents were produced.

Yet the trial court pilloried the City over a small number of documents and ignored the City's reasonable explanation for why the documents were not produced. Of the fifteen documents initially withheld for privilege, *they were produced prior to litigation after the City's review process*. Nonetheless, the trial court imposed high-end penalties at \$70 per day from the request date even though no lawsuit was required to obtain the documents.

Of the nineteen documents, many are not responsive to Cappel's request, they are not significant, the underlying email chains were disclosed, some have no content at all, and some are meeting cancellations and rescheduling requests. Yet the City is penalized at \$40 per day with respect to such documents, even though they were not reasonably

locatable after the City's diligent search. The trial court abused its discretion by imposing such harsh penalties for these 19 records by stating that the search was inadequate because it did not look for specific Strategies' employees. CP 20. The City's search looked for all e-mails from the Strategies' domain name, and thus was more inclusive than the terms suggested by Cedar Grove. The court ignored this mitigating factor in its findings. The court also seems to have penalized the City because the search of internet e-mail accounts was conducted by the Mayor and City Administrator, who own the accounts and have direct access, rather than by the City's records officer. There is no basis to raise the penalty because the account owners did the search and provided the results to the records officer. In sum, the City located 10,000 potentially responsive records and inadvertently omitted 19 from its production, an error rate of approximately .19%. Yet the Court disregarded these mitigating facts in its penalty calculations.

The most draconian penalty is \$90 per day for the 173 Strategies' records that the City never had in its possession. The court abused its discretion by ordering nearly the maximum penalty for the failure to disclose what the City did not possess or use, and could not have reasonably anticipated would be within the scope of the definition of a public record. The court's extension of the PRA to records held by

Strategies, including internal Strategies' records and those produced on behalf of other clients is unprecedented. It is contrary to *West*, the only published PRA decision on the issue. *Yousoufian* recognizes that the reasonableness of the agency's explanation is a mitigating factor.⁴⁸ Certainly the agency's reliance on prior case law that a record not in its possession is not a public record is a reasonable explanation; this was disregarded by the court in setting its penalty.

It is also obvious that the trial court was swayed not by anything the City said, but by a loose comment from someone at Strategies to a representative of the Tulalip Tribe stating that the mailer was not being sent to the City so that it could have "plausible deniability." CP 28. Thus, the City is penalized for something an independent contractor's employee said to another client of that contractor. The City cannot be charged malevolence under the PRA for statement its staff never made and it could not control.

As the City provided all but 19 inconsequential documents discussed above that it had in its possession, out of about 10,000 documents potentially responsive, it cannot be said the City was

⁴⁸ *Yousoufian* requires the court to evaluate the agency's conduct as either mitigating or aggravating. None of the *Yousoufian* factors allow escalation or the penalty for the words or actions of third parties, such as Strategies. Thus, the trial court's reliance on the e-mail between Strategies and their client, the Tribe, is an abuse of its discretion and a misapplication of *Yousoufian*.

intentionally violating the PRA or acting in a cavalier fashion regarding its public record responsibilities. The City acted in good faith in producing the documents here. The trial court abused its discretion in awarding the penalties it imposed.

(b) The Trial Court Abused Its Discretion in Excluding Declarations Submitted in Connection with Its Decision on Reconsideration

The trial court excluded the declarations of Martin Napeahi, Al Aldrich, and Gloria Hirashima submitted in support of the City's motion for reconsideration as to the trial court's penalty decision. CP 8-9, 236-57.

A trial court's decision to accept additional evidence on reconsideration of a summary judgment decision,⁴⁹ is discretionary. *Chen v. State*, 86 Wn. App. 183, 192, 937 P.2d 612, *review denied*, 133 Wn.2d 1020 (1997). In *Martini v. Post*, 178 Wn. App. 153, 313 P.3d 473 (2013), for example, Division II held that a trial court properly considered additional evidence on reconsideration relating to causation:

Post suffered no prejudice from trial court's consideration of the additional evidence because Post was previously aware of the evidence and of Martini's theory of Abson's cause of death. It was within the trial court's discretion to

⁴⁹ The trial court's penalty decision was a summary decision akin to summary judgment and was not a bench trial, given its resolution of the case on a paper record.

consider this additional evidence. Thus, we hold that the trial court's decision to review the new evidence was not manifestly unreasonable.

Id. at 478.

The trial court here abused its discretion in excluding the three declarations. The declarations should not have been excluded because it is obvious the trial court's decision was predicated upon a visceral reaction to the "plausible deniability" comment and a lack of understanding of the relationship of Strategies with the Tulalip Tribe. The Napeahi declaration made clear the Tribe's concerns about having its communications subject to the PRA as a sovereign entity. The Aldrich declaration explains the circumstances of the deniability comment, in that it had nothing to do with the PRA but was in the context that the mailer the Tribe financed should not be discussed with the City since it did not approve one. The Hirashima declaration discusses why the Court's findings are in error, particularly in regard to ascribing subject issues such as intent to the City. It should have been considered because it demonstrates the existence of fact questions, even from the evidence already in the record that the Court ignored.

The trial court abused its discretion in excluding these declarations.

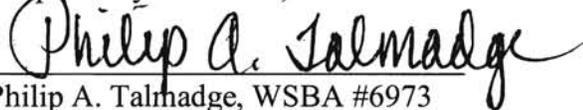
F. CONCLUSION

The trial court erred in ruling that the City violated the PRA and in awarding excessive penalties and attorney fees to Cedar Grove. Cedar Grove lacked standing to assert Cappel's PRA action. Moreover, the trial court erred in concluding that the records of Strategies, a City consultant, were subject to the PRA when the City never possessed or used those documents, and the documents were never used in the City's decisionmaking process.

This Court should reverse the trial court's order on summary judgment and fee award and remand the case to the trial court for entry of an order dismissing Cedar Grove's complaint with prejudice. Costs on appeal should be awarded to the City.

DATED this 14th day of March, 2014.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Thomas M. Fitzpatrick, WSBA #8894
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98199
(206) 574-6661

Jeffrey S. Myers, WSBA #16390
Law, Lyman, Daniel, Kamerrer &
Bogdanovich, P.S.
PO Box 11880
Olympia, WA 98508-1880
(360) 754-3480
Attorneys for Appellant
City of Marysville

APPENDIX

FILED

13 JUL -2 AH11:29

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

Hon. Richard Okrent



CL16466123

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

CEDAR GROVE COMPOSTING INC.,

NO. 12-2-07577-6

Plaintiff,

ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT

vs.

CITY OF MARYSVILLE,

Defendant.

THIS MATTER came before the Court on the Plaintiff's Partial-Motion for Summary Judgment and City of Marysville's Cross-Motion for Summary Judgment. The Court has reviewed:

1. Plaintiff's Motion for Partial Summary Judgment and supporting declarations of Theresa M. Lapke, and Molly A. Malouf, and exhibits to their declarations;
2. Defendant's Response and Cross-Motion for Summary Judgment, and the supporting declarations of Amy Hess, Grant Weed, Gloria Hirashima and Jeffrey S. Myers, and the exhibits to their declarations;
3. Plaintiff's Response to City's Motion for Summary Judgment;
4. Defendant's Reply in Support of Motion for Summary Judgment; and
5. Plaintiff's Reply in Support of Motion for Partial Summary Judgment;

ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT - 1

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2014 B.W. JOHNSON BLD. TOLMATELOR, WA 98212
P.O. BOX 11880 OLDSMVA, WASHINGTON 98506-1880
(360) 754-3480 FAX (360) 357-3511

59

1 The Court, having heard oral argument of counsel for both parties, and having
2 conducted an *in camera* review of the records that are disputed by the parties, now therefore,
3 the Court ORDERS that (1) Plaintiff's Motion for Partial Summary Judgment is GRANTED in
4 part and DENIED in part; and (2) Defendant's Cross-Motion for Summary Judgment is
5 GRANTED in part and DENIED in part, as follows:

- 6
- 7 1. Plaintiff Cedar Grove Composting has standing to assert claims regarding the public
8 records requests made by Kris Cappel, who was acting as an undisclosed agent of
9 Cedar Grove.
 - 10 2. Communications between legal counsel for the City with either City employees or with
11 Strategies 360, a consultant who was acting as a functional equivalent to a City
12 employee in this matter, are subject to claims of privilege based on the attorney-client
13 privilege and the work product doctrine where the content of the communication
14 relates to legal advice or materials prepared in anticipation of litigation.
 - 15 3. The City of Marysville violated the Public Records Act by improperly withholding the
16 following records in its April 5, 2012 Fifth Installment until the records were produced
17 to Cedar Grove in its amended installment response on August 2, 2012:

- 18
- 19 • 5-1-13
 - 20 • 5-1-14 to 16
 - 21 • 5-1-17 to 18
 - 22 • 5-1-19
 - 23 • 5-1-21 to 22
 - 24 • 5-1-23
 - 25 • 5-1-37
 - 26 • 5-1-40
 - 5-1-42
 - 5-1-43 to 45
 - 5-1-46 to 48
 - 5-1-49 to 50

**ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT - 2**

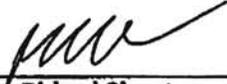
**LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.**
ATTORNEYS AT LAW
2674 B.W. JOHNSON BLVD. TUMWATER, WA 98517
P.O. BOX 11089 OLYMPIA, WASHINGTON 98506-1089
(360) 754-1400 FAX: (360) 857-3311

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

- 5-1-51
- 5-1-53 and
- 5-1-55

- The City of Marysville did not violate the Public Records Act with respect to documents identified as exempt and withheld as privileged from the other installments before the Court in response to Cedar Grove's records requests.
- The Court will hear further argument on the appropriate penalty on August 30, 2013 at 10:00 a.m.

DONE IN OPEN COURT THIS 2 day of Aug, 2013.



 Judge Richard Okrent

Presented by:

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



Jeffrey S. Myers, WSBA No 16390
 Attorney for Defendant City of Marysville

Approved as to form:

CORR, CRONIN, MICHAELSON,
 BAUMGARDNER & PREECE, LLP



Michael Moore, WSBA No. 27047
 Attorney for Plaintiff Cedar Grove

FILED

13 SEP -9 AM 11: 23

THE HONORABLE RICHARD T. OKRENT

SONYA J. KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.



CL16245281

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

CEDAR GROVE COMPOSTING,
INCORPORATED,

Plaintiff,

v.

CITY OF MARYSVILLE,

Defendant.

No. 12-2-07577-6

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
REGARDING PENALTIES

[PROPOSED]

THIS MATTER having come before the Court upon Plaintiff's Motion for Summary Judgment Regarding Penalties, and the Court having reviewed the motion, supporting documents and the submissions from the parties, and the Court, having heard oral argument of counsel for both parties; now, therefore,

The Court hereby ORDERS that Plaintiff's Motion for Summary Judgment Regarding Penalties is GRANTED. Accordingly, the Court finds as follows:

- I have reviewed all of the pleadings, declarations, transcripts and exhibits submitted by the parties, as well as the argument of the parties made in Court on August 30, 2013 and my findings of fact and

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT REGARDING PENALTIES - 1

CORA CHONIN MITCHELSON
BAINGARDNER & FRENCH LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 425-8600
Fax (206) 425-0900

93

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

conclusions of law are based upon my consideration of all of these materials.

2. The policy underlying Washington's Public Records Act is government transparency so that the citizens of this state are aware of what their public officials are doing and why. That transparency is critical to the proper functioning of a democracy and the citizens of this state demanded that right by adopting the Public Records Act.
3. To ensure that this transparency actually occurs, governmental bodies like Marysville have the obligation under Washington law to disclose public records in an efficient and timely manner upon request. They cannot unreasonably delay the production of public records and must instead conduct a reasonable search to locate responsive documents. To do otherwise violates Washington law.
4. Turning to the facts at issue here, Marysville was engaged in what Marysville's own Chief Administrative Officer, Ms. Hirashima, described as "an ongoing regional dispute between Cedar Grove" and Marysville regarding "odor issues" in 2010.
5. Marysville hired Strategies to assist Marysville with regard to this "dispute" in July of 2010. That engagement included having Strategies work with a third party - Mike Davis and his group - as memorialized in the proposal made by Strategies to Marysville (*see* Exhibit F-4), the subsequent emails between the City and Strategies (including emails

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

confirming Strategies' contact with Mr. Davis, the scope of the work that they were performing for Mr. Davis), and the admissions of Marysville itself, including the declarations provided by Ms. Hirashima confirming that Strategies was serving as its "liaison" with Mr. Davis. Marysville also had direct contact with Mr. Davis during this period, including what appear to be an unsuccessful attempt by Ms. Hirashima to assist Davis' efforts to secure a public involvement grant funding activities in opposition to Cedar Grove – including mailers or flyers, and meetings between Mr. Davis, Ms. Hirashima and/or Mayor Nehring.

6. Marysville has previously taken the position in this case in the context of its claim that the attorney-client privilege should apply to communications between the City and Strategies that Strategies was acting as the "functional equivalent" of a Marysville employee during the scope of this engagement, a position adopted by the Court. Even if I were to ignore the statements from Marysville and my prior ruling, however, the record reflects that Strategies and Marysville were enmeshed in what was essentially an employer-employee-like relationship during the period at issue. As a result, for purposes of the Public Records Act, I find that Strategies was acting on behalf of the City of Marysville when communicating with third parties on issues related to Cedar Grove and odors, was acting as a functional equivalent

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

of a Marysville employee during the period at issue, and that the records generated by Strategies as part of its relationship with Marysville (the 173 records attached as Exhibits Q and R to the Tilstra Declaration) were public records for that reason.

7. Regardless of whether an employer/employee-like relationship existed between Marysville and Strategies, however, the Strategies documents also qualify as public records because they were "used" by Marysville within the meaning of the Public Records Act. Specifically, the record indicates that Strategies generated these records to further the political goals and interests of Marysville, that they were employed by Marysville and made instrumental to Marysville's governmental ends or purposes, and that a nexus exists between their use/creation and Marysville's own political goals as a result.

8. Specifically, Strategies assisted Mr. Davis with virtually every aspect of his campaign against Cedar Grove, including drafting the communications later issued by Mr. Davis and directing many aspects of his activities, including activities directly supportive of Marysville's political objectives in its dispute with Cedar Grove (having Mr. Davis appear at City Council meetings to endorse their efforts, attacking Cedar Grove through letters to the editor drafted by Strategies and distributed under the names of Mr. Davis and others that were intended to create the impression that Mr. Davis was the actual author, etc.). Strategies did so

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT REGARDING PENALTIES - 4

CORB CROWN MITCHELSON
BATHGARDNER & PIERCE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 623-8600
Fax (206) 623-0900

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

at the behest of Marysville. These activities clearly furthered the interests of Marysville and documents generated during these activities were made instrumental to Marysville's governmental ends or purposes for that reason. This situation is unlike the situation in the *Concerned Ratepayers* case where the document at issue – a set of specifications – was initially generated for a purpose independent of the interests of the agency at issue. In summary, I find that a nexus between these documents and Marysville's decision-making process and actions clearly exists and that these records independently qualify as public records for that reason.

9. Cedar Grove first served its PRA Requests in November of 2011. The PRA Requests sought, among other items, communications between or among the City, Strategies and Mr. Davis.
10. The City tasked its public records officer, Ms. Hess, with responding to the PRA Requests.
11. The emails subsequently exchanged between Marysville and Strategies include multiple emails confirming both the awareness of Cedar Grove's PRA Requests by Ms. Hirashima of the City and the intention to put in place strategies to avoid the reach of those PRA Requests or delay the production of documents responsive thereto, including what appears to be a practice of not forwarding documents created by Strategies during its engagement on to

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT REGARDING PENALTIES – 5

COLE CRONIN MICHELSON
BALMGARDNER & FREDERICK LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 623-8600
Fax (206) 623-0900

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Marysville in order to attempt to insulate those documents from the reach of the PRA Requests, and to provide Marysville with "plausible deniability" of Strategies' activities.

12. Just by way of one example, Exhibit O-5, an email exchange between Mr. Davis and Strategies, indicates that Strategies was "not" – with the term "not" underlined for emphasis – going to forward copies of the Mailer at issue on to Marysville in order to provide "Gloria and the Marysville folks" with "'plausible deniability' about the mailer and its contents."
13. Apparently confirming both Marysville's knowledge of Strategies' activities and the records in Strategies' possession, Exhibit P-4 indicates that Ms. Hirashima contacted Strategies the same day Cedar Grove's PRA Requests were first served on Marysville, was aware of the fact that Cedar Grove's PRA Requests sought documents relating to communications with Mr. Davis, and was aware of the fact that Strategies possessed those materials.
14. Despite the fact that she was aware of the scope of Strategies' involvement with Mr. Davis and the names of the specific Strategies employees involved in that relationship, Ms. Hirashima apparently never disclosed that information to Ms. Hess– the Marysville employee responsible for responding to the PRA Requests – and the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

materials in the possession of Strategies were not disclosed to Cedar Grove as a result.

15. Based on my review of the materials in Strategies' possession, Strategies generated at least 160 records relating to its activities with Mr. Davis and none of those emails were disclosed or produced to Cedar Grove by Marysville. Strategies also generated the Mailers at issue in this case, and an additional 13 records that were not disclosed or produced to Cedar Grove. These records are the types of records that would have been generated by Marysville itself if it had been conducting these tasks in-house instead of relying upon Strategies to perform them.

16. Again, this information was not disclosed to Ms. Hess by Ms. Hirashima and I find that Ms. Hirashima's silence appears to evidence an intent to, at best, unreasonably delay the production of these materials to Cedar Grove.

17. Ms. Hess did undertake a search for responsive records that did not include the documents in Strategies' possession. There were some unreasonable aspects of that search, including her failure to search for the names of two primary Strategies employees working for Marysville, Al Aldrich and Kristin Dizon. If corrected, these omissions could have located the majority of these records. Ms. Hess also failed to personally conduct a search of the Mayor's computer for responsive records. At

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT REGARDING PENALTIES - 7

CORB CHOPIN MICHELSON
BAIRD GARDNER & FRECKE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1031
Tel (206) 625-8600
Fax (206) 625-0900

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

least 19 records that were responsive to Cedar Grove's request were neither located nor produced to Cedar Grove.

18. In addition to these 19 missed records, Marysville located 15 records that it intentionally withheld from Cedar Grove in the Fifth Installment responding to the November 1, 2011 request for a period of time under the claim that the records were subject to the attorney-client privilege because they allegedly contained what Marysville described as "legal advice." The Court previously granted partial summary judgment in determining that these 15 records were not actually privileged, as I confirmed after an *in camera* review that there was no actual privileged communications contained within these records.
19. Pursuant to my earlier ruling, Marysville violated the Public Records Act by withholding those materials from Cedar Grove.
20. Based on these factors, I hereby grant summary judgment in favor of Cedar Grove on all counts, ruling that Marysville violated Washington law by withholding each of the three groups of records at issue: (1) 15 records withheld from Marysville's Fifth Installment of documents; (2) 19 records that Marysville's search should have located but did not; and (3) an additional 173 records in the possession of Strategies.
21. In considering the amount of the penalty, I looked at the *Yousoufian I* and *Yousoufian II*, *Neighborhood Alliance*, and the *Sanders* cases, as well as other relevant Washington authority. I have grouped the records

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

into batches and have awarded penalties based on those batches. I find as follows with respect to the aggravating factors.

22. Overall delay: Marysville's response to Cedar Grove's record request was delayed with respect to certain documents. The City did not locate and provide the 19 missed records and did not produce documents from Strategies for over 300 days. However, there was not necessarily any urgency as to the date the records were required, as was the case in *Yousouflan*.

23. Lack of strict compliance with the Public Records Act: I also find this factor present with respect to the Fifth Installment records wrongly withheld on the claim of privilege.

24. Lack of proper training: I do not find this factor to be present. Ms. Hess received proper training.

25. Unreasonableness of any explanation by the agency: Marysville provided little or no explanation with respect to 17 of the 19 documents withheld from the middle group. The record indicates that Ms. Hess knew that Aldrich and Dizon were individuals involved, yet did not search for their names. She also did not undertake a personal search of the Mayor's computer for the remaining two records that were not produced. The agency's explanation for the claim of attorney-client privilege was more reasonable given the need to safeguard the attorney-client privilege. That said, the City ultimately made the wrong

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

determination with regard to the 15 records withheld in the Fifth
Installment, as they did not contain privileged communications.

26. Negligent/reckless/bad faith/intentional non-compliance: I find this
factor present with regard to the Strategies documents. Specifically, I
find that Marysville's explanation regarding these documents – that they
were not allegedly within the possession or control of Marysville – was
a situation only created to intentionally provide Marysville with
“plausible deniability” of Strategies’ activities and to attempt to insulate
the documents created during those activities from production.
Marysville knew what Strategies was doing, paid them for those
activities, was generally aware that there were documents in Strategies’
possession created during those activities, and discussed the contents of
some of those documents with Strategies.

27. Agency dishonesty: I do not find dishonesty as much as I find strategic
planning on Marysville’s part to avoid or delay the production of the
documents in Strategies’ possession. To put it simply, Marysville’s
responses were designed to delay or avoid disclosure of the Strategies
documents to Cedar Grove.

28. Public importance: This issue is extremely important both in terms of
the context of the larger odor issues in play within this region and
Marysville’s actions here in relation to its attempts to avoid the reach of

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

the Public Records Act. Simply put, "plausible deniability" of the law should not be a part of our government.

29. Economic loss to the requester: I find that Marysville's conduct has had a significant impact on Cedar Grove.

30. Penalty necessary to deter future misconduct: Given the events at issue here as described above, I find that a penalty is necessary to deter future misconduct.

31. For these reasons, and as detailed in the calculation attached and incorporated herein as Exhibit A, I enter an award to Cedar Grove in the amount of \$143,740.00.

IT SO ORDERED this 9 day of September, 2013.


Richard T. Okrent
Judge

Presented By:

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP


Michael A. Moore, WSBA No. 27047
Sarah E. Tilstra, WSBA No. 35706
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051
(206) 625-8600 Phone
(206) 625-0900 Fax
mmoore@correronin.com
stilstra@correronin.com
Attorneys for Plaintiff

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT REGARDING PENALTIES - 11

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Approved as to Form and Notice
of Presentation Waived:

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


Jeffrey S. Myers, WSRA No. 16390
Attorneys for Defendant

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT REGARDING PENALTIES - 12

OSBORN CRONIN MICHELSON
BAIRD GARDNER & PRINCE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 425-8600
Fax (206) 425-0900

EXHIBIT A

Cedar Grove v. City of Marysville ; 12-2-07577-6

Penalty Assessment

The penalties are to be assessed in three batches; two batches also include sub-groupings. Each sub-grouping within a batch constitutes a "record" per the language of RCWA 42.56.550(4).

1st Batch - The 19 Public Records

- 1.1. Record description: 17 records, requested 11/1/11 and produced 2/21/13
Days assessed: 478 days less 65 = 413 days total
Per diem penalty: 413 days multiplied by the per diem amount of \$40.00 = **\$16,520.00**
- 1.2. Record description: Document 2, requested 11/1/11 and produced 6/14/13
Days assessed: 593 days less 65 = 528 days total
Per diem penalty: 528 days multiplied by \$40.00 = **\$21,120.00**
- 1.3. Record description: Document 3, requested 6/8/12 and produced 6/14/13
Days assessed: 371 days less 65 = 306 days total
Per diem penalty: 306 days multiplied by \$40.00 = **\$12,240.00**

1st Batch Total = \$49,880.00

2nd Batch – The 15 Records from the 5th Installment

- 2.1. Record description: 15 records, requested 11/1/11 and produced 8/3/13
Days assessed: 277 days less 119 = 158
Per diem penalty: 158 days multiplied by \$70.00 = **\$11,060.00**

2nd Batch Total = \$11,060.00

3rd Batch – Strategies 360 Records

- 3.1. Record description: 124 records
Days assessed: 560 days
Per diem penalty: 560 days multiplied by \$90.00 = **\$50,400.00**
- 3.2. Record description: 49 records
Days assessed: 360 days
Per diem penalty: 360 days multiplied by \$90.00 = **\$32,400.00**

3rd Batch Total = \$82,800.00

Grand Total = \$143,740.00

1 THE HONORABLE RICHARD T. OKRENT

2
3
4
5
6
7
8 SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

9 CEDAR GROVE COMPOSTING,
INCORPORATED,

10 Plaintiff,

11 v.

12 CITY OF MARYSVILLE,

13 Defendant.

No. 12-2-07577-6

14 REVISED ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT REGARDING PENALTIES

~~[PROPOSED]~~

15 THIS MATTER having come before the Court upon Plaintiff's Motion for Summary
16 Judgment Regarding Penalties, and the Court having reviewed the motion, supporting
17 documents and the submissions from the parties, and the Court, having heard oral argument of
18 counsel for both parties; now, therefore,

19 The Court hereby ORDERS that Plaintiff's Motion for Summary Judgment Regarding
20 Penalties is GRANTED. Accordingly, the Court finds as follows:

- 21
- 22 1. I have reviewed all of the pleadings, declarations, transcripts and
23 exhibits submitted by the parties, as well as the argument of the parties
24 made in Court on August 30, 2013 and my findings of fact and
25

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT REGARDING PENALTIES - 1

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

1 conclusions of law are based upon my consideration of all of these
2 materials. Those materials include:

- 3
- 4 • Plaintiff's Motion for Summary Judgment Regarding Penalties (Corrected);
 - 5 • Declaration of Sarah Tilstra in Support of Plaintiff's Motion for Summary Judgment
6 Regarding Penalties and exhibits attached thereto;
 - 7 • Response of City of Marysville to Motion for Penalties;
 - 8 • Declaration of Al Aldrich Regarding Plaintiff's Motion for Summary Judgment
9 Regarding Penalties;
 - 10 • Second Declaration of Amy Hess and exhibits attached thereto;
 - 11 • Declaration of Jon Nehring in Response to Motion for Penalties;
 - 12 • Second Declaration of Grant K. Weed in Opposition to Plaintiff's Motion for
13 Summary Judgment Regarding Penalties;
 - 14 • Third Declaration of Jeffrey S. Myers Responding to Motion for Penalties and exhibits
15 attached thereto;
 - 16 • City of Marysville's Appendix of Out-of-State Authorities;
 - 17 • Plaintiff's Reply in Support of Motion re Penalties;
 - 18 • Appendix of Out-of-State Authorities in Support of Plaintiff's Motion re Penalties
 - 19 • Defendant's Surreply to Plaintiff's Reply Memorandum;
 - 20 • Third Declaration of Amy Hess in Surreply to Cedar Grove's Reply Memorandum and
21 exhibits attached thereto;
 - 22 • Declaration of Gloria Hirashima in Surreply to Cedar Grove's Reply Memorandum
 - 23 • Excerpt from Deposition of Amy Hess;
 - 24 • A highlighted version of Exhibit 3 to the Second Declaration of Amy Hess (don't
25 think you need to include this since it was already an exhibit before the court);
 - Plaintiff's Motion for Partial Summary Judgment;
 - Declaration of Theresa M. Lapke in Support of Plaintiff's Motion for Partial Summary
Judgment; Declaration of Molly A. Malouf in Support of Plaintiff's Motion for Partial
Summary Judgment and exhibits attached thereto;
 - GR 14.1(B) Submission of Unpublished Authorities in Support of Plaintiff's Motion
for Partial Summary Judgment;
 - Defendant City of Marysville's Response to Motion for Partial Summary Judgment
and Cross Motion for Summary Judgment;
 - Declaration of Amy Hess and exhibits attached thereto;
 - Declaration of Gloria Hirashima and exhibits attached thereto;
 - Declaration of Grant K. Weed and exhibits attached thereto;
 - Declaration of Jeffrey S. Myers in Response to Motion for Partial Summary Judgment
and exhibits attached thereto;
 - Plaintiff's Response in Opposition to Defendant's Cross-Motion for Summary
Judgment;

- 1 • Reply in Support of City of Marysville’s Motion for Summary Judgment;
2 • Plaintiff’s Reply in Support of Motion for Partial Summary Judgment;
3 • Exhibit A supplied by plaintiff at oral argument; and
4 • Documents filed under seal for in camera review pursuant to Motion to Lodge.

5 2. The policy underlying Washington’s Public Records Act is government
6 transparency so that the citizens of this state are aware of what their
7 public officials are doing and why. That transparency is critical to the
8 proper functioning of a democracy and the citizens of this state
9 demanded that right by adopting the Public Records Act.

10 3. To ensure that this transparency actually occurs, governmental bodies
11 like Marysville have the obligation under Washington law to disclose
12 public records in an efficient and timely manner upon request. They
13 cannot unreasonably delay the production of public records and must
14 instead conduct a reasonable search to locate responsive documents. To
15 do otherwise violates Washington law.

16 4. Turning to the facts at issue here, Marysville was engaged in
17 what Marysville’s own Chief Administrative Officer, Ms. Hirashima,
18 described as “an ongoing regional dispute between Cedar Grove” and
19 Marysville regarding “odor issues” in 2010.

20 5. Marysville hired Strategies to assist Marysville with regard to this
21 “dispute” in July of 2010. That engagement included having Strategies
22 work with a third party – Mike Davis and his group – as memorialized
23 in the proposal made by Strategies to Marysville (*see* Exhibit F-4), the
24 25

1 subsequent emails between the City and Strategies (including emails
2 confirming Strategies' contact with Mr. Davis, the scope of the work
3 that they were performing for Mr. Davis), and the admissions of
4 Marysville itself, including the declarations provided by Ms. Hirashima
5 confirming that Strategies was serving as its "liaison" with Mr. Davis.
6 Marysville also had direct contact with Mr. Davis during this period,
7 including what appear to be an unsuccessful attempt by Ms.
8 Hirashima to assist Davis' efforts to secure a public involvement grant
9 funding activities in opposition to Cedar Grove – including mailers or
10 flyers, and meetings between Mr. Davis, Ms. Hirashima and/or Mayor
11 Nehring.
12

- 13
14 6. Marysville has previously taken the position in this case in the context
15 of its claim that the attorney-client privilege should apply to
16 communications between the City and Strategies that Strategies was
17 acting as the "functional equivalent" of a Marysville employee during
18 the scope of this engagement, a position adopted by the Court. Even if I
19 were to ignore the statements from Marysville and my prior ruling,
20 however, the record reflects that Strategies and Marysville were
21 enmeshed in what was essentially an employer-employee-like
22 relationship during the period at issue. As a result, for purposes of the
23 Public Records Act, I find that Strategies was acting on behalf of the
24 City of Marysville when communicating with third parties on issues
25

1 related to Cedar Grove and odors, was acting as a functional equivalent
2 of a Marysville employee during the period at issue, and that the records
3 generated by Strategies as part of its relationship with Marysville (the
4 173 records attached as Exhibits Q and R to the Tilstra Declaration)
5 were public records for that reason.
6

7 7. Regardless of whether an employer/employee-like relationship existed
8 between Marysville and Strategies, however, the Strategies documents
9 also qualify as public records because they were "used" by Marysville
10 within the meaning of the Public Records Act. Specifically, the record
11 indicates that Strategies generated these records to further the political
12 goals and interests of Marysville, that they were employed by
13 Marysville and made instrumental to Marysville's governmental ends or
14 purposes, and that a nexus exists between their use/creation and
15 Marysville's own political goals as a result.
16

17 8. Specifically, Strategies assisted Mr. Davis with virtually every aspect of
18 his campaign against Cedar Grove, including drafting the
19 communications later issued by Mr. Davis and directing many aspects of
20 his activities, including activities directly supportive of Marysville's
21 political objectives in its dispute with Cedar Grove (having Mr. Davis
22 appear at City Council meetings to endorse their efforts, attacking Cedar
23 Grove through letters to the editor drafted by Strategies and distributed
24 under the names of Mr. Davis and others that were intended to create the
25

1 impression that Mr. Davis was the actual author, etc.). Strategies did so
2 at the behest of Marysville. These activities clearly furthered the
3 interests of Marysville and documents generated during these activities
4 were made instrumental to Marysville's governmental ends or purposes
5 for that reason. This situation is unlike the situation in the *Concerned*
6 *Ratepayers* case where the document at issue – a set of specifications –
7 was initially generated for a purpose independent of the interests of the
8 agency at issue. In summary, I find that a nexus between these
9 documents and Marysville's decision-making process and actions
10 clearly exists and that these records independently qualify as public
11 records for that reason.
12

13
14 9. I hereby grant summary judgment in favor of Cedar Grove on all counts,
15 ruling that Marysville violated Washington law by withholding each of
16 the three groups of records at issue: (1) 15 records withheld from
17 Marysville's Fifth Installment of documents that I have previously ruled
18 on; (2) 19 records that Marysville's search should have located but did
19 not and that Marysville has stipulated were public records not produced
20 to Cedar Grove; and (3) an additional 173 records in the possession of
21 Strategies.
22

23 10. Turning to the issue of my assessment of the appropriate penalties
24 resulting from these violations of the PRA, the record before the Court
25 contains evidence indicating that Cedar Grove first served its PRA

1 Requests in November of 2011. The PRA Requests sought, among
2 other items, communications between or among the City, Strategies and
3 Mr. Davis.

4 11. The City tasked its public records officer, Ms. Hess, with responding to
5 the PRA Requests.

6
7 12. The emails subsequently exchanged between Marysville and
8 Strategies include multiple emails confirming both the awareness of
9 Cedar Grove's PRA Requests by Ms. Hirashima of the City and the
10 intention to put in place strategies to avoid the reach of those PRA
11 Requests or delay the production of documents responsive thereto,
12 including what appears to be a practice of not forwarding
13 documents created by Strategies during its engagement on to
14 Marysville in order to attempt to insulate those documents from the
15 reach of the PRA Requests, and to provide Marysville with "plausible
16 deniability" of Strategies' activities.

17
18 13. Just by way of one example, Exhibit O-5, an email exchange between
19 Mr. Davis and Strategies, indicates that Strategies was "not" – with the
20 term "not" underlined for emphasis – going to forward copies of the
21 Mailer at issue on to Marysville in order to provide "Gloria and the
22 Marysville folks" with "plausible deniability" about the mailer and its
23 contents."
24
25

- 1 14. Apparently confirming both Marysville's knowledge of Strategies'
2 activities and the records in Strategies' possession, Exhibit P-4
3 indicates that Ms. Hirashima contacted Strategies the same day Cedar
4 Grove's PRA Requests were first served on Marysville, was aware of the
5 fact that Cedar Grove's PRA Requests sought documents relating to
6 communications with Mr. Davis, and was aware of the fact that
7 Strategies possessed those materials.
8
9 15. Despite the fact that she was aware of the scope of
10 Strategies' involvement with Mr. Davis and the names of the specific
11 Strategies employees involved in that relationship, Ms. Hirashima
12 apparently never disclosed that information to Ms. Hess—the Marysville
13 employee responsible for responding to the PRA Requests -- and the
14 materials in the possession of Strategies were not disclosed to Cedar
15 Grove as a result.
16
17 16. Based on my review of the materials in Strategies' possession,
18 Strategies generated at least 160 records relating to its activities with
19 Mr. Davis and none of those emails were disclosed or produced to Cedar
20 Grove by Marysville. Strategies also generated the Mailers at issue in
21 this case, and an additional 13 records that were not disclosed or
22 produced to Cedar Grove. These records are the types of records that
23 would have been generated by Marysville itself if it had been
24
25

1 conducting these tasks in-house instead of relying upon Strategies to
2 perform them.

3 17. Again, this information was not disclosed to Ms. Hess by Ms. Hirashima
4 and I find that Ms. Hirashima's silence appears to evidence an intent to,
5 at best, unreasonably delay the production of these materials to Cedar
6 Grove.
7

8 18. Ms. Hess did undertake a search for responsive records that did not
9 include the documents in Strategies' possession. There were some
10 unreasonable aspects of that search, including her failure to search for
11 the names of two primary Strategies employees working for Marysville,
12 Al Aldrich and Kristin Dizon. If corrected, these omissions could have
13 located the majority of these records. Ms. Hess also failed to personally
14 conduct a search of the Mayor's computer for responsive records. At
15 least 19 records that were responsive to Cedar Grove's request were
16 neither located nor produced to Cedar Grove.
17

18 19. In addition to these 19 missed records, Marysville located 15 records
19 that it intentionally withheld from Cedar Grove in the Fifth Installment
20 responding to the November 1, 2011 request for a period of time under
21 the claim that the records were subject to the attorney-client privilege
22 because they allegedly contained what Marysville described as "legal
23 advice." The Court previously granted partial summary judgment in
24 determining that these 15 records were not actually privileged, as I
25

1 confirmed after an *in camera* review that there was no actual privileged
2 communications contained within these records.

3 20. Pursuant to my earlier ruling, Marysville violated the Public Records
4 Act by withholding those materials from Cedar Grove.

5 21. In considering the amount of the penalty, I looked at the *Yousoufian I*
6 and *Yousoufian II*, *Neighborhood Alliance*, and the *Sanders* cases, as
7 well as other relevant Washington authority. I have grouped the records
8 into batches and have awarded penalties based on those batches. I find
9 as follows with respect to the aggravating factors.

10 22. Overall delay: Marysville's response to Cedar Grove's record request
11 was delayed with respect to certain documents. The City did not locate
12 and provide the 19 missed records and did not produce documents from
13 Strategies for over 300 days. However, there was not necessarily any
14 urgency as to the date the records were required, as was the case in
15 *Yousoufian*.

16 23. Lack of strict compliance with the Public Records Act: I also find this
17 factor present with respect to the Fifth Installment records wrongly
18 withheld on the claim of privilege.

19 24. Lack of proper training: I do not find this factor to be present. Ms. Hess
20 received proper training.

21 25. Unreasonableness of any explanation by the agency: Marysville
22 provided little or no explanation with respect to 17 of the 19 documents
23
24
25

1 withheld from the middle group. The record indicates that Ms. Hess
2 knew that Aldrich and Dizon were individuals involved, yet did not
3 search for their names. She also did not undertake a personal search of
4 the Mayor's computer for the remaining two records that were not
5 produced. The agency's explanation for the claim of attorney-client
6 privilege was more reasonable given the need to safeguard the attorney-
7 client privilege. That said, the City ultimately made the wrong
8 determination with regard to the 15 records withheld in the Fifth
9 Installment, as they did not contain privileged communications.

10
11 26. Negligent/reckless/bad faith/intentional non-compliance: I find this
12 factor present with regard to the Strategies documents. Specifically, I
13 find that Marysville's explanation regarding these documents – that they
14 were not allegedly within the possession or control of Marysville – was
15 a situation only created to intentionally provide Marysville with
16 “plausible deniability” of Strategies' activities and to attempt to insulate
17 the documents created during those activities from production.
18 Marysville knew what Strategies was doing, paid them for those
19 activities, was generally aware that there were documents in Strategies'
20 possession created during those activities, and discussed the contents of
21 some of those documents with Strategies.
22

23
24 27. Agency dishonesty: I do not find dishonesty as much as I find strategic
25 planning on Marysville's part to avoid or delay the production of the

1 documents in Strategies' possession. To put it simply, Marysville's
2 responses were designed to delay or avoid disclosure of the Strategies
3 documents to Cedar Grove.

4 28. Public importance: This issue is extremely important both in terms of
5 the context of the larger odor issues in play within this region and
6 Marysville's actions here in relation to its attempts to avoid the reach of
7 the Public Records Act. Simply put, "plausible deniability" of the law
8 should not be a part of our government.

9 29. Economic loss to the requester: I find that Marysville's conduct has had
10 a significant impact on Cedar Grove.

11 30. Penalty necessary to deter future misconduct: Given the events at issue
12 here as described above, I find that a penalty is necessary to deter future
13 misconduct.

14 31. For these reasons, and as detailed in the calculation attached and
15 incorporated herein as Exhibit A, I enter an award to Cedar Grove in the
16 amount of \$143,740.00.

17 IT SO ORDERED this 12 day of September, 2013.

18
19
20
21
22
23 Richard T. Okrent
24 Judge
25

1 Presented By:

2 CORR CRONIN MICHELSON
3 BAUMGARDNER & PREECE LLP

4
5
6 Michael A. Moore, WSBA No. 27047
7 Sarah E. Tilstra, WSBA No. 35706
8 1001 Fourth Avenue, Suite 3900
9 Seattle, WA 98154-1051
10 (206) 625-8600 Phone
11 (206) 625-0900 Fax
12 mmoore@corrcronin.com
13 stilstra@corrcronin.com
14 Attorneys for Plaintiff

11 Approved as to Form and Notice
12 of Presentation Waived:

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

15
16 Jeffrey S. Myers, WSBA No. 16390
17 Attorneys for Defendant

18
19
20
21
22
23
24 132 00007 n300701
25

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT REGARDING PENALTIES - 13

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

The Honorable Richard T. Okrent

SUPERIOR COURT OF WASHINGTON IN AND FOR SNOHOMISH COUNTY

CEDAR GROVE COMPOSTING, INC.,

Plaintiff,

v.

CITY OF MARYSVILLE

Defendant.

Case No.: 12-2-07577-8

**ORDER DENYING DEFENDANT'S
MOTION FOR RECONSIDERATION,
STRIKING THE DECLARATIONS, AND
REVISING THE ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT REGARDING PENALTIES**

**THIS MATTER comes before the Court on Plaintiff's Motion for an Award of
Costs and Attorney's Fees. The Court, having reviewed**

- 1. Defendant's Motion for Reconsideration;**
- 2. Declaration of Gloria Hirashima In Support of Motion for Reconsideration;**
- 3. Declaration of Al Aldrich Regarding Defendant's Motion for Reconsideration;**
- 4. Declaration of Martin Napeahi;**
- 5. Plaintiff's Response to the Defendant's Motion for Reconsideration;**
- 6. Declaration of Michael A. Moore in Support of Plaintiff's Opposition to
Defendant's Motion for Reconsideration;**

**ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION,
STRIKING THE DECLARATIONS, AND REVISING THE ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT REGARDING PENALTIES**

- 1 7. Defendant's Reply in Support of Motion for Reconsideration;
- 2 8. Plaintiff's Motion for Summary Judgment Regarding Penalties;
- 3 9. Declaration of Sarah Tilstra;
- 4 10. Defendant's Response to Motion for Summary Judgment Regarding
- 5 Penalties;
- 6 11. Declaration of Gloria Hirashima;
- 7 12. Declaration of Grant Weed;
- 8 13. Declaration of Jeffrey S. Myers dated December 3, 2012;
- 9 14. Declaration of Gloria Hirashima re Motion to Compel;
- 10 15. Declaration of Jeffrey S. Myers dated July 8, 2013;
- 11 16. Declaration of Kristen Dizon;
- 12 17. Second Declaration of Amy Hess;
- 13 18. Second Declaration of Grant Weed;
- 14 19. Declaration of Al Aldrich;
- 15 20. Declaration of Jon Nehring;
- 16 21. Third Declaration of Jeffrey S. Myers;
- 17 22. Cedar Grove's Reply Memorandum in Support of Motion for Summary
- 18 Judgment Re Penalties;
- 19 23. Surreply to Cedar Grove's Reply Memorandum;
- 20 24. Declaration of Gloria Hirashima in Surreply to Cedar Grove's Reply
- 21 Memorandum;
- 22 25. Third Declaration of Amy Hess;

23 and the records and files therein hereby ORDERS:

24 Defendant City of Marysville's Motion for Reconsideration is DENIED. The Court
25 also hereby STRIKES the Declaration of Gloria Hirashima in Support of Motion for

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION,
STRIKING THE DECLARATIONS, AND REVISING THE ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT REGARDING PENALTIES

1 Reconsideration, the Declaration of Al Aldrich Regarding Defendant's Motion for
2 Reconsideration, and the Declaration of Martin Napeahl. These declarations constitute
3 new evidence that could have been presented at the time the court was considering the
4 original Motion, and the Court therefore refuses to consider them. See Sliger v. Odell,
5 156 Wn. App. 720, 734 (2010).

6 The Court will, however, REVISE its previous Order Granting Plaintiff's Motion for
7 Summary Judgment Regarding Penalties as proposed in Exhibit D of the Declaration fo
8 Michael A. Moore in Support of Plaintiff's Opposition to Defendant's Motion for
9 Reconsideration. The Revised Order Granting Plaintiff's Motion for Summary Judgment
10 Regarding Penalties will also enter at this time.

11
12 Dated this 18th day of October, 2013.

13
14 

15 _____
16 The Honorable Richard T. Okrent
17 Judge
18
19
20
21
22
23
24
25

The Honorable Richard T. Okrent

SUPERIOR COURT OF WASHINGTON IN AND FOR SNOHOMISH COUNTY

CEDAR GROVE COMPOSTING, INC.,

Plaintiff,

v.

CITY OF MARYSVILLE

Defendant.

Case No.: 12-2-07577-6

ORDER GRANTING PLAINTIFF'S
MOTION FOR AN AWARD OF COSTS
AND ATTORNEY'S FEES

THIS MATTER comes before the Court on Plaintiff's Motion for an Award of Costs and Attorney's Fees. The Court, having reviewed

1. Plaintiff's motion for an Award of Costs and Attorney's Fees;
2. Declaration of Michael A. Moore and exhibits thereto;
3. Defendant's Opposition to Motion for Attorney's Fees;
4. Declaration of Jeffrey S. Myers in Response to Motion for Attorney's Fees;
5. Declaration of Bradford S. Cattle;
6. Plaintiff's Reply in Support of Motion for an Award of Costs and Attorney's Fees; and

ORDER GRANTING PLAINTIFF'S MOTION FOR AN
AWARD OF COSTS AND ATTORNEY'S FEES - 1

1 7. Supplemental Declaration of Michael A. Moore In Support of Plaintiff's Motion
2 for an Award of Costs and Attorney's Fees

3 and the records and files therein, and having considered the oral arguments of counsel
4 on October 3, 2013, hereby ORDERS:

5 On April 19, 2013 the Court ruled that the City of Marysville violated the Public
6 Records Act ("PRA") by withholding 15 of the 24 records at issue on that motion. This
7 ruling was memorialized in the Court's order of July 2, 2013. On August 30, 2013, the
8 Court also ruled that the City of Marysville also violated the PRA by failing to provide 19
9 records that it should have previously located but did not and by failing to provide 173
10 documents that were in the possession Strategies 360, a public relations consulting firm
11 hired by the City. The Court imposed a total penalty of \$143,740 for these violations. As
12 a prevailing PRA plaintiff, Cedar Grove moved for a mandatory award of attorneys' fees
13 and costs under RCW 42.56.550(4). Cedar Grove seeks an award of attorney's fees
14 and costs in excess of \$283,000.

15 "The lodestar method is appropriate for calculating attorney fees under the PRA."
16 Sanders v. State, 169 Wn.2d 827, 869 (2010). The lodestar fee is calculated by
17 multiplying the reasonable hourly rate by the reasonable number of hours incurred in
18 obtaining the successful result. Mahler v. Szucs, 135 Wn.2d 398, 434 (1998). A
19 determination of the reasonable number of hours incurred "requires the court to exclude
20 from the requested hours any wasteful or duplicative hours and any hours pertaining to
21 unsuccessful theories or claims." Id. (citing Scott Fetzer Co. v. Weeks, 114 Wn.2d 109
22 (1990)).

23 The Court first looks to the reasonableness of the hourly rate charged by the
24 Cedar Grove's counsel. In determining the reasonableness of a requesting attorney's
25

1 hourly rate, the court can look to RPC 1.5(a), which lists factors to be considered when.
2 determining a reasonable hourly rate. These factors include:

- 3 (1) The time and labor required, the novelty and difficulty of the questions
4 involved, the skill requisite to perform the legal service properly and the
5 terms of the fee agreement between the lawyer and client;
- 6 (2) the likelihood, if apparent to the client, that the acceptance of the particular
7 employment will preclude other employment by the lawyer;
- 8 (3) the fee customarily charged in the locality for similar legal services;
- 9 (4) the amount involved in the matter on which legal services are rendered
10 and the results obtained;
- 11 (5) the time limitations imposed by the client or by the circumstances;
- 12 (6) the nature and length of the professional relationship with the client;
- 13 (7) the experience, reputation, and ability of the lawyer or lawyers performing
14 the services;
- 15 (8) whether the fee is fixed or contingent; and
- 16 (9) the terms of the fee agreement.

17 Where rates are excessive, the proper solution is for the court to reduce the rate to the
18 "prevailing market rate," not to deny the request entirely. Fischer v. SJB-P.D. Inc., 214
19 F.3d 1115, 1122 (9th Cir. 2000).

20 Looking at the rates charged by Cedar Grove's counsel (\$375 per hour for Mr.
21 Moore's time, \$225 - \$275 per hour for associates' time, and \$130 per hour for the
22 paralegal's time), After considering these factors, Court finds that the rates charged by
23 Cedar Grove's counsel were unreasonable for several reasons. First, the fees charged
24 by skilled, experienced attorneys like Mr. Moore in Snohomish County are less than
25 \$300 per hour. See Declaration of Bradford N. Cattle, at 2. Second, the fees charged on
non-contingency matters by some of the top PRA specialist attorneys in the state, such
as William Crittenden, Michael Kahrs, Michele Earl-Hubbard, are not greater than \$300

1 per hour. Third, this case did not involve novel or particularly complex questions but was
2 instead of relatively straightforward application of PRA law and the attorney-client
3 privilege. Finally, the fee was a fixed rather than contingent fee. Given these factors, the
4 Court finds that the appropriate hourly rate for Mr. Moore's work on this case is \$300
5 per hour, for the associates' work is \$200 per hour, and for the paralegal's work is \$100
6 per hour.

7 The Court next turns to the question of whether the amount of hours billed by
8 Cedar Grove's counsel in this case was reasonable. A determination of the reasonable
9 number of hours incurred "requires the court to exclude from the requested hours any
10 wasteful or duplicative hours and any hours pertaining to unsuccessful theories or
11 claims." Mahler, 135 Wn.2d at 434 (citing Scott Fetzer Co. v. Weeks, 114 Wn.2d 109
12 (1990)).

13 In this case, the Cedar Grove's counsel billed a total 862.2 on the case hours
14 through September, 2013, with 434.3 hours billed by Mr. Moore, 180.2 hours billed by
15 associates, and 105.4 hours billed by the paralegal.¹ The City, however, argues that the
16 number of hours requested is excessive and includes wasteful or duplicative hours, and,
17 in the case of the summary judgment motion, hours spent on unsuccessful theories.

18 Looking first at the summary judgment motion, the Court finds that because only
19 15 of the 22 documents in question were deemed to have violated the PRA, the number
20 of hours billed included hours spent on unsuccessful theories. The Court will therefore
21 reduce the number of hours awarded for time spent on the summary judgment motion
22 proportionately – resulting in a reduction of 37.5 percent. After reviewing the billing
23 sheets provided by Cedar Grove's counsel, the Court determined that the total amount
24

25 ¹ The Court is not considering the hours billed by Cedar Grove's counsel for time spent opposing the City's Motion for Reconsideration at this time, as the hours billed for that motion were not included in Cedar Grove's original Motion for Attorney's Fees.

1 of hours spent on the summary judgment motion and the amount of hours spent on the
 2 successful portion of the motion were as follows:

	Mr. Moore	Associates	Paralegal
4 Hours	114.9	27.1	0.3
5 Reduced Hours (37.5% reduction)	78.8	16.9	.2

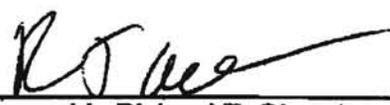
6 The Court also finds that the total number hours of billed in this case warrant a
 7 reduction because they are generally excessive for the type of case and contain
 8 wasteful, duplicative hours. Given the relatively straightforward nature of the case, the
 9 fact that the hours billed by Plaintiff's counsel were double those billed by the City's
 10 counsel, and the large number of hours billed after Cedar Grove was successful on its
 11 summary judgment motion (and therefore knew that it was entitled to an attorneys' fee
 12 award), the Court determines that the total number of hours billed by Cedar Grove's
 13 counsel, included those spent on the successful portion of the summary judgment
 14 motion, should be reduced by 40 percent. This results in a total attorneys' fees award to
 15 the Cedar Grove of \$121,110.00. The details of the fees awarded by the Court are
 16 illustrated in the chart below.

	Mr. Moore	Associates	Paralegal	Total
19 Hours billed	549.2	207.3	105.7	861.9
20 Hours allowed by the Court	303.7	118.3	63.4	485.4
21 Rate allowed by the Court	\$300 per hour	\$200 per hour	\$100 per hour	
22 Fee Total at Reduced Rate and Hours	\$91,110.00	\$23,660.00	\$6,340.00	\$121,110

24 Plaintiff is also entitled to its costs in the amount of \$6,534.83 in this matter, thus
 25 resulting in a total award of costs and fees of \$127,644.83.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Dated this 18th day of October, 2013.



The Honorable Richard T. Okrent
Judge

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Motion to File Over-Length Opening Brief and the Brief of Appellant in Court of Appeals Cause No. 71052-4-I to the following parties:

Michael A. Moore
Sarah E. Tilstra
Corr Cronin Michelson
Baumgardner & Preece LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051

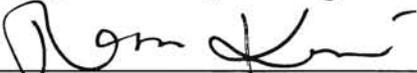
Howard M. Good Friend
Smith Goodfriend, P.S.
1619 8th Avenue South
Seattle, WA 98109

Jeffrey S. Myers
Law, Lyman, Daniel, Kamerrer &
Bogdanovich, P.S.
PO Box 11880
Olympia, WA 98508-1880

Original and a copy delivered by ABC messenger:
Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101-1176

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

DATED: March 14th, 2014, at Tukwila, Washington.



Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 14 PM 4:36