

No. 71052-4-I

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

CEDAR GROVE COMPOSTING, INCORPORATED,

Respondent/Cross-Appellant,

v.

CITY OF MARYSVILLE, Appellant/Cross-Respondent.

BRIEF OF RESPONDENT/CROSS-APPELLANT
CEDAR GROVE COMPOSTING, INCORPORATED

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@corrchronin.com
stilstra@corrchronin.com

Howard M. Goodfriend, WSBA No. 14355
SMITH GOODFRIEND, P.S.
1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974 Phone
(206) 624-0809 Fax
howard@washingtonappeals.com

Attorneys for Respondent/Cross-Appellant
Cedar Grove Composting, Incorporated

2014/07/23 PM 4:41
COURT OF APPEALS
STATE OF WASHINGTON
CLERK

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESTATEMENT OF ISSUES	3
III.	STATEMENT OF THE CASE.....	4
	A. Marysville Is Caught Attempting to Solicit Odor Complaints Against Cedar Grove in a Mailer	4
	B. Cedar Grove’s PRA Requests and Marysville’s Response	5
	C. Cedar Grove Challenged Marysville’s Privilege Claims.....	7
	D. After Cedar Grove Filed This PRA Action, Marysville Admitted That It Improperly Withheld Records From The Fifth Installment.....	8
	E. The Trial Court Accepted Marysville’s Position That Strategies Was Acting as the “Functional Equivalent” of Marysville’s Employee	10
	F. The Nineteen Records Previously Not Produced by Marysville	11
	G. Cedar Grove Obtained the Remaining Strategies Emails, Confirming That Marysville Used Strategies To Shield Its Campaign From Public Disclosure	13
	1. The August 2013 Records.....	15
	H. The Trial Court Entered Summary Judgment Finding A Violation of the PRA And Assessing Penalties Under the Yousoufian Factors, Then Denied Marysville’s Motion for Reconsideration.....	18
	I. Cedar Grove’s Motion for Fees.	21
IV.	ARGUMENT	22
	A. Cedar Grove Has Standing to Bring This Lawsuit.	22

B.	The Trial Court Properly Found a PRA Violation for the 173 Strategies Records.....	28
1.	The Court Should Not Consider Marysville’s “Public Agency” Arguments on Appeal	28
2.	The Trial Court Correctly Determined That the 173 Records Were Subject to the PRA Because Strategies Was Acting as the Functional Equivalent of a Marysville “Employee” at the Time These Records Were Generated.....	30
3.	Marysville “Used” the 173 Records at Issue	34
4.	The Trial Court Properly Granted Summary Judgment In The Absence of Material Fact Disputing That the 173 Records Were Subject to Disclosure Under The PRA.....	42
C.	The Trial Court Properly Found a PRA Violation for the Nineteen Records and the Fifteen Records.....	45
1.	The Nineteen Records Were Improperly Withheld	46
2.	The Fifteen Records Were Improperly Withheld	47
D.	The Trial Court Properly Applied the <i>Yousoufian</i> Factors in Assessing Penalties	48
E.	The Trial Court Did Not Abuse Its Discretion in Striking the Three New Declarations Submitted on Reconsideration	54
V.	CROSS-APPEAL	56
A.	Cross-Assignment of Error	56
B.	Issue Pertaining to Cross-Assignment of Error	56
C.	Argument on Cross-Appeal	56
1.	The Trial Court Abused Its Discretion in Reducing Cedar Grove’s Attorney Fees by 40 Percent.....	56
VI.	REQUEST FOR ATTORNEY FEES.....	61
VII.	CONCLUSION.....	61

TABLE OF AUTHORITIES

CASES

<i>ACLU v. Blaine Sch. Dist.</i> , 86 Wn. App. 688, 937 P.2d 1176 (1997).....	24
<i>Allstot v. Edwards</i> , 114 Wn. App. 625, 60 P.3d 601 (2002).....	46
<i>Anfinson v. FedEx Ground Package Sys.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012).....	30
<i>Bricker v. Dept. of Labor & Indus.</i> , 164 Wn. App. 16, 262 P.3d 121 (2011).....	51, 54
<i>Brower v. Pierce County</i> , 96 Wn. App. 559, 984 P.2d 1036 (1999).....	48
<i>Burt v. Dept. of Corr.</i> , 168 Wn.2d 828, 231 P.3d 191 (2010).....	27, 28
<i>Concerned Ratepayers Ass'n v. Public Util. Dist. No. 1</i> , 138 Wn.2d 950, 983 P.2d 635 (1999).....	34, 35, 38, 39
<i>Evertson v. City of Kimball</i> , 767 N.W.2d 751 (Neb. 2009).....	41
<i>Fisher Props., Inc. v. Arden-Mayfair, Inc.</i> , 115 Wn.2d 364, 798 P.2d 799 (1990).....	60
<i>Forum Publ'g Co. v. City of Fargo</i> , 391 N.W.2d 169 (N.D. 1986)	41
<i>Germeau v. Mason County</i> , 166 Wn. App. 789, 271 P.3d 932 (2012).....	26
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978).....	23

<i>King v. Rice</i> , 146 Wn. App. 662, 191 P.3d 946 (2008).....	44, 55
<i>Kitsap County Prosecuting Attorney's Guild v. Kitsap County</i> , 156 Wn. App. 110, 231 P.3d 219 (2010).....	56
<i>Kleven v. City of Des Moines</i> , 111 Wn. App. 284, 44 P.3d 887 (2002).....	passim
<i>Lindell v. City of Mercer Island</i> , 833 F. Supp. 2d 1276 (W.D. Wash. 2011).....	43, 51, 52
<i>McDonnell v. U.S.</i> , 4 F.3d 1227 (3 rd Cir. 1993).....	26
<i>Mechling v. City of Monroe</i> , 152 Wn. App. 830, 222 P.3d 808 (2009).....	30
<i>Meyer v. Univ. of Wash.</i> , 105 Wn. 2d 847, 719 P.2d 98 (1986).....	43
<i>Mitchell v. Dept. of Corr.</i> , 164 Wn. App. 597, 277 P.3d 670 (2011).....	27
<i>Morgan v. City of Federal Way</i> , 166 Wn.2d 747, 213 P.3d 596 (2009).....	57
<i>Neighborhood Alliance of Spokane County v. Spokane County</i> , 172 Wn.2d 702, 261 P.3d 119 (2011).....	47
<i>O'Neill v. City of Shoreline</i> , 170 Wn.2d 138, 240 P.3d 1149 (2010).....	35
<i>San Juan Agricultural Water Uses Assoc. v. KNME-TV</i> , 257 P.3d 884 (N.M. 2011).....	24
<i>Sanders v. State</i> , 169 Wn.2d 827, 240 P.3d 120 (2010).....	56

<i>Sargent v. Seattle Police Dept.</i> , 167 Wn App. 1, 260 P.3d 1006 (2011), <i>reversed in part on other grounds</i> , 179 Wn.2d 376, 314 P.3d 1093 (2013).....	60
<i>Sligar v. Odell</i> , 156 Wn. App. 720, 233 P.3d 914 (2010).....	54
<i>Smoke v. City of Seattle</i> , 132 Wn.2d 214, 937 P.2d 186 (1997).....	48
<i>Spokane Research & Defense Fund v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005).....	47, 48, 51
<i>State ex rel. Gannett Satellite Info. Network v. Shirey</i> , 678 N.E.2d 557 (Ohio 1997).....	42
<i>Stroud v. Beck</i> , 49 Wn. App. 279, 742 P.2d 735 (1987).....	23
<i>Telford v. Thurston County Bd. of Commissioners</i> , 95 Wn. App. 149, 974 P.2d 886 (1999).....	28, 44
<i>Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland</i> , 95 Wn. App. 896, 977 P.2d 639 (1999).....	55
<i>West v. Thurston County</i> , 168 Wn. App. 162, 275 P.3d 1200 (2012)	40, 53
<i>Wilcox v. Lexington Eye Institute</i> , 130 Wn. App. 234, 122 P.3d 729 (2005).....	29
<i>Wisner v. City of Tampa Police Dept.</i> , 601 So.2d 296 (Fla. Ct. App. 1992).....	42
<i>Wood v. Lowe</i> , 102 Wn. App. 872, 10 P.3d 494 (2000).....	26

Yousoufian v. Office of King County Exec.,
168 Wn.2d 444, 229 P.3d 735 (2010)..... passim

STATUTES

RCW 64.40.030 48
WAC 44-14-00003..... 27

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY 1541 (6th ed. 1990) 36
WEBSTER'S THIRD NEW INTERNATIONAL
DICTIONARY 2523 (1969)..... 35

I. INTRODUCTION

Respondent Cedar Grove Composting, Inc., made the Public Records Act requests at issue to determine who was behind a smear campaign that attempted to blame Cedar Grove for all odors in the Marysville area. This campaign included mailers distributed throughout Marysville blaming Cedar Grove for those odors, as well as other alleged “grass roots” efforts purportedly orchestrated by a local resident named Mike Davis. After nearly two years and extensive litigation, Cedar Grove finally secured records establishing that appellant City of Marysville was behind the public relations campaign launched against Cedar Grove, that Marysville had financed that campaign with public tax dollars, and, most importantly, that Marysville *intentionally* attempted to hide that fact from Cedar Grove and the public by repeatedly failing to produce documents in response to Cedar Grove’s PRA requests.

The trial court properly rejected Marysville’s attempts to justify that conduct by claiming that many of the documents at issue were “in the possession of third parties,” concluding that these documents were created to further Marysville’s political vendetta against Cedar Grove, that Marysville paid for the creation of these documents, that Marysville openly admitted that the alleged “third party” at issue – the public relations firm that Marysville engaged to lead the campaign against Cedar

Grove – was acting as what Marysville itself *admitted* was the “functional equivalent” of a Marysville “employee” when it generated the documents at issue, and that the only reason these documents were not sent on to Marysville was a conscious and intentional attempt to circumvent the reach of the PRA and Cedar Grove’s then-pending PRA requests.

This Court should affirm. Cedar Grove had standing to bring this lawsuit. There is no dispute that Cedar Grove’s agent made the PRA requests on Cedar Grove’s behalf and there is nothing to indicate that Cedar Grove did not have a personal stake in the lawsuit that resulted from Marysville’s failure to produce responsive documents. The PRA’s mandate is broad and the case law establishes that the hyper-technical reading of the PRA urged by Marysville is incorrect.

On the merits, the trial court correctly found that the 173 records that Cedar Grove received from Strategies 360 (“Strategies”) were “public records” subject to the PRA’s disclosure requirement on three alternative grounds. Marysville admitted that Strategies was acting as the “functional equivalent” of a Marysville employee at the time it created these documents, the evidence conclusively established an agency relationship between Marysville and Strategies during that period, and the uncontroverted evidence established that Marysville “used” these documents within the meaning of the PRA.

The trial court did not abuse its discretion in its award of PRA penalties with respect to the three groupings of PRA records. The trial court made extensive findings expressly addressing the *Yousoufian* factors, which were well within its discretion and supported by the record.

The trial court did, however, abuse its discretion in arbitrarily reducing Cedar Grove's attorney fee award by forty percent. This decision was manifestly unreasonable and based on untenable grounds. With the exception of the fee award, this Court should affirm and grant Cedar Grove its fees on appeal.

II. RESTATEMENT OF ISSUES

1. Does a plaintiff have standing to sue under the PRA when its agent makes the PRA requests, the record indicates that the recipient of the PRA request knows who the agent represents, the plaintiff/principal has a personal stake in the outcome of the case, and the legislative intent of the PRA and the relevant case law establish that the PRA is to be liberally construed and hyper-technical barriers to suit are not permitted?

2. Did the trial court correctly determine that the 173 records were subject to the PRA because Marysville admitted that Strategies was the "functional equivalent" of its employee, because Marysville "used" the records within the meaning of the PRA, and because there were no genuine issues of material fact as to that issue?

3. Did the trial court correctly determine that Marysville violated the PRA with respect to the fifteen records initially withheld due to privilege when it is undisputed that the records were not privileged and the Supreme Court has already confirmed that the pre-litigation production of records initially withheld improperly does not insulate an agency from liability under the PRA?

4. Did the trial court correctly determine that Marysville violated the PRA with respect to the nineteen records when Marysville stipulated that the records were responsive to the PRA requests and were not timely produced?

5. Did the trial court act within its discretion in assessing penalties based on its assessment of the factors set forth in *Yousoufian v. Office of King County Exec.*, 168 Wn.2d 444, 229 P.3d 735 (2010)?

III. STATEMENT OF THE CASE

Cedar Grove is one of the largest “green” companies in Washington, turning what would otherwise be tons of landfill waste into nutrient-rich compost used throughout the state. CP 2084. Cedar Grove’s operations reduce Washington’s carbon by the equivalent of 20,000 homes or 27,000 cars on the road each year. *Id.*

A. **Marysville Is Caught Attempting to Solicit Odor Complaints Against Cedar Grove in a Mailer.**

In 2010, Cedar Grove became aware of a public relations campaign aimed at spreading disinformation about Cedar Grove, including the false allegation that Cedar Grove was the primary source of odors in the Marysville area. CP 2084. For example, Marysville residents received anonymous mailers attempting to blame Cedar Grove for odors and encouraging residents to complain about Cedar Grove’s operations to regulatory agencies. *Id.*

Marysville drafted and distributed a similar document in August of 2009 (“August Mailer”). *See* CP 740, 751. Titled “Need to report a foul-

smelling odor complaint?” the August Mailer directed Marysville residents to the Puget Sound Clean Air Agency (“PSCAA”) to lodge complaints about odors they believed “originate[d] from Cedar Grove composting in Everett or another industrial activity.” CP 751. The August Mailer included PSCAA’s logo and contact information, and created the completely false impression that PSCAA itself had created the August Mailer to solicit complaints against Cedar Grove. *Id.*; *see also* CP 1470 (PSCAA employee noting that August Mailer was “designed to look like it comes from us but does not”).

B. Cedar Grove’s PRA Requests and Marysville’s Response.

Cedar Grove sought to determine who was behind this harmful public relations campaign. After learning that some of the mailers originated from a mailing address and printing company linked to a political public relations firm, Strategies 360, Cedar Grove served a series of requests for the production of documents on Marysville under the PRA in November of 2011 (“PRA Requests”) through its agent, Ms. Cappel of the Seabold Group. *See* CP 1985-87. The PRA Requests called for the production of any documents relating to Cedar Grove, including all communications between or among the City of Marysville, Strategies 360, local citizen Mike Davis, as well as all documents relating to the mailers.

Id. Cedar Grove made another, similar PRA request on June 8, 2012. CP 1988-89.

Despite the fact that Marysville understood the PRA Requests to call for the production of emails relating to the requested topics, it failed to produce or even acknowledge the existence of emails to and from Strategies for several months. CP 2001.¹ Indeed, the majority of Marysville's productions consisted of Cedar Grove's own documents or documents produced to Marysville from other agencies, a fact that Marysville fails to note when discussing the "thousands" of documents produced in this litigation. *See* CP 2003, 2008-09.

Marysville's February 2, 2012 production, its third "installment" of records, identified a series of emails sent between Kristin Dizon of Strategies and Grant Weed, Marysville's City Attorney. Marysville redacted the contents of each of the Strategies emails, leaving them blank. CP 2032-37. The corresponding entries on the redaction log provided by Marysville with the third installment indicated that Marysville had redacted the contents of each of the Strategies emails "under Attorney Client Privilege/Work Product." CP 2039.

¹ Marysville designated its Public Records Officer, Amy Hess, under Rule 30(b)(6) as the person most knowledgeable about Marysville's response to the PRA Requests. Ms. Hess confirmed her understanding that the PRA Requests called for the production of responsive emails like Strategies emails in her deposition. CP 2001.

Marysville produced a fourth installment of documents on March 8, 2012 and a fifth installment of documents on April 5, 2012, each accompanied by another redaction log. The logs confirmed that Marysville was withholding additional Strategies emails from the fourth and fifth installments under the same claim that these emails allegedly contained “Attorney Client Privilege/Work Product.” CP 1980-81.

C. Cedar Grove Challenged Marysville’s Privilege Claims.

Cedar Grove’s representative, Ms. Cappel, sought clarification as to the basis for Marysville’s assertion of privilege, noting that the emails with Strategies involved “communications to and among Strategies 360 representatives” and asking if the City had “inadvertently redacted” the Strategies emails. CP 2042. The City refused to produce the Strategies emails in an unredacted form and reiterated its claims that the Strategies emails were protected “Work Product/Attorney Client communications” that allegedly contained “legal advice, direction and input related to the project the City Consultant was working on for the City and within the scope of work product and attorney client privilege.” CP 2041.

Cedar Grove challenged Marysville’s claim that the Strategies emails were allegedly exempt from disclosure under the PRA for a second time on July 3, 2012, stating that Cedar Grove would commence litigation

under the PRA if Marysville did not voluntarily produce the Strategies emails by July 13, 2012. CP 2044-47.

D. After Cedar Grove Filed This PRA Action, Marysville Admitted That It Improperly Withheld Records From The Fifth Installment.

Marysville failed to respond to Cedar Grove by July 13, 2012. Instead, on August 2, 2012, without any substantive explanation, Marysville produced the previously withheld Strategies emails from the fifth installment nearly a month later and a full nine months after Cedar Grove served its PRA Requests. *See* CP 2049-82 (emails and privilege log produced). The content of these emails proved beyond a shadow of a doubt that: (a) Strategies and Marysville *intentionally* attempted to hide their communications from public view and Cedar Grove by improperly routing non-privileged communications through the Marysville City Attorney's office and later falsely claiming that these emails allegedly contained "legal advice"; and (b) there was in fact no defensible basis whatsoever for Marysville's claim, as none of the Strategies emails contained or referenced legal advice or work product of any kind.

For example, emails from Strategies employees confirmed that they were sending documents to Marysville's City Attorney (Mr. Weed) for the sole purpose of improperly attempting to claim that these communications were protected by the attorney-client privilege, including

emails from Strategies asking the City Attorney to forward otherwise non-privileged information on to City employees such as Mayor Nehring “so it comes as privileged information from you,” further indicating that Strategies was improperly routing documents in this manner only because it did “not want Cedar Grove to see the trail on this.” CP 2053-55. Again, *none* of these documents actually contained any communications that even arguably qualified as protected work product or legal advice, a fact that Marysville only admitted after Cedar Grove was forced to file this lawsuit.

Cedar Grove filed this Public Records Act action in Snohomish County Superior Court on August 28, 2012 (CP 2114-30) and conducted discovery. Marysville’s Rule 30(b)(6) witness Amy Hess subsequently admitted under oath that: (1) Marysville knew that the fifth installment emails at issue were responsive to Cedar Grove’s PRA Requests (CP 2001); (2) Marysville knew that asserting unsupported exemptions regarding responsive documents violated Washington law (CP 2000); (3) Marysville knew that it was improper to withhold emails based on the claim of privilege where the underlying emails did not actually contain a discussion of legal advice (CP 2012-13); (4) Mayor Nehring and the City’s Chief Administrator, Gloria Hirashima, nevertheless made the decision to withhold the Strategies emails from Cedar Grove (CP 2011); (5) Ms. Hess subsequently drafted the redaction logs at issue after the

Mayor and Ms. Hirashima reached that decision (*see* CP 2005-06); (6) the Strategies emails produced from the fifth installment did not contain attorney-client privileged communications or work product; and (7) Marysville’s claim it was withholding emails under the attorney-client and work product exemptions was false. CP 2026.²

E. The Trial Court Accepted Marysville’s Position That Strategies Was Acting as the “Functional Equivalent” of Marysville’s Employee.

In response to Cedar Grove’s motion for partial summary judgment (CP 2083-2105), *Marysville repeatedly and unequivocally took the position that Strategies was acting as the “functional equivalent” of a Marysville employee when it generated the documents at issue. See, e.g.,* CP 1664, 1678 (“the City treats Strategies as the equivalent of an employee” and “Strategies 360 is the functional equivalent of an employee for the City of Marysville”).³ Judge Richard Okrent (“the trial court”)

² Q. We went through email after email in [Marysville’s revised production of Installment 5]. The privilege log that was given to us before you revised it asserted that those emails were redacted because “content is attorney advice to client.” Do you remember that, ma’am?

A. Yes.

Q. In fact, that’s not true, is it? None of the redacted content was, in fact, attorney advice to client.

A. Not in the emails that we were reviewing.

CP 2026 (emphasis added); *see also generally* CP 2019-21; CP 2026.

³ Marysville also argued that Cedar Grove lacked standing to bring this lawsuit because Ms. Cappel was not an attorney representing Cedar Grove when she made the requests.

accepted Marysville's representations and ruled that Strategies was acting as the functional equivalent of Marysville. CP 1461 ("Strategies 360, a consultant who was acting as a functional equivalent to a City employee in this matter . . ."). In addition, the trial court ruled that Marysville "violated the Public Records Act by withholding" fifteen records from the fifth installment and partially granted Cedar Grove's Motion for Partial Summary Judgment. CP 1461-62.

F. The Nineteen Records Previously Not Produced by Marysville.

Because of Marysville's failure to provide responsive documents, Cedar Grove served a document subpoena directly on Strategies that sought the production of all "communications" and "internal documents" relating to "Mike Davis," "odor issues," or "Cedar Grove," and any Mailers ("and mailing inserts, direct mail pieces, or advertising") relating to those topics. *See* CP 1395-1402.⁴ A comparison of the records produced by Marysville to the records subsequently produced by Strategies revealed that Strategies produced an additional seventeen records (more emails between Marysville and Strategies) that Marysville had not produced in response to Cedar Grove's PRA Requests. Marysville

CP 1683. The trial court rejected this argument and held that Cedar Grove had standing "regarding the public records requests made by Kris Cappel, who was acting as an undisclosed agent of Cedar Grove." CP 1461.

⁴ Cedar Grove also reviewed documents produced by other entities, including PSCAA.

did not produce these same records until February 2013, only after Strategies first produced them in response to the subpoena and a full fifteen months after Cedar Grove served the PRA Requests. There is no reason to believe that Cedar Grove would have received any of these records if it had not filed suit or served its subpoena on Strategies.⁵

In an effort to curb discovery costs and streamline the issues before the trial court, the parties negotiated a stipulation regarding these seventeen records. *See* CP 1288-1338. During the course of the negotiation of this stipulation, Marysville disclosed two additional responsive documents from the Mayor's personal email account that had not previously been produced, and produced those documents on June 14, 2013. *See* CP 1332-38. The July 22, 2013 stipulation stated that "The following records responsive to Plaintiff Cedar Grove Composting, Inc.'s PRA requests were not released by either being produced to Cedar Grove or disclosed in an exemption log by Defendant City of Marysville prior to the dates indicated below." CP 1288. The stipulation summarized the additional nineteen records produced by Marysville on either February 21, 2013 or June 14, 2013 ("the nineteen records") and attached copies of those records. CP 1288-1338.

⁵ A complete listing of the February 2013 records is detailed at CP 1288-1338.

G. Cedar Grove Obtained the Remaining Strategies Emails, Confirming That Marysville Used Strategies To Shield Its Campaign From Public Disclosure.

Cedar Grove continued to be concerned that Marysville had not completely and fully responded to its PRA Requests. This concern was based on references to two categories of documents in Marysville's productions.

The first category of documents related to Strategies' work with Mike Davis, the leader of the alleged "grass roots" campaign against Cedar Grove. While documents in Marysville's productions confirmed that Marysville specifically engaged Strategies to assist Mike Davis on Marysville's behalf and paid Strategies for that work, neither Strategies nor Marysville produced emails showing exactly what activities Strategies subsequently performed for Davis. *See, e.g.*, CP 860 (email from Strategies to Marysville noting "I talked with Mike Davis afterwards, explained who I was and told him that Strategies 360 wanted to help them, with the City's blessing and paying us. He appreciated that and said he would call me next week to set up a meeting").⁶

⁶ A subsequent email between Marysville and Strategies confirmed that Strategies was following through and meeting with Mr. Davis on the City's behalf ("I'm having breakfast with Mike Davis . . . let me know if you want to discuss this further). CP 862. Another email several months later from Strategies to the PSCAA reflected that Strategies was advising Marysville and Strategies was facilitating Mr. Davis to be allowed to speak at an upcoming meeting. CP 866.

The second category of missing documents related to the Mailers created by Strategies. Again, while documents produced by Marysville appeared to indicate that Strategies was working on the Mailers, the documents showing exactly what Strategies had done in that regard were largely absent from the productions. For example, emails between Strategies and Marysville suggested distributing “informational flyers” attacking Cedar Grove, discussed information to be included “in the direct mailer piece” created and distributed by Strategies during the period at issue, and stated that a Seattle Times reporter “does not know about the mail piece that will likely be hitting mailboxes on Saturday and Monday in Marysville, Everett, and Tulalip.” *See* CP 864, 868, 871. Once again, however, both Marysville’s and Strategies’ document productions contained virtually no documents relating to the Mailers.

Strategies eventually confirmed that it had withheld documents relating to these two issues after Cedar Grove inquired about these anomalies. Strategies refused to produce these documents, forcing Cedar Grove to move to compel. CP 873-77. Both Strategies and Marysville opposed Cedar Grove’s motion. CP 1505-18, 1357-1459. The trial court granted Cedar Grove’s motion and ordered Strategies to produce the missing documents. CP 2167-68. As noted below, the resulting production confirmed that Marysville and Strategies intentionally

conspired to avoid the reach of Cedar Grove's PRA Requests.

1. The August 2013 Records.

On August 8, 2013, Strategies produced over 3,200 pages of new documents that included 797 separate records ("the August 2013 records"), none of which had ever been previously produced or disclosed by Marysville. CP 743. The August 2013 records contained at least 160 records relating to Strategies' and Marysville's work with Mr. Davis and an additional thirteen separate records relating to the Mailers ("the 173 records"). CP 743, 747.⁷

The August 2013 records confirmed that Marysville (through Strategies) used Mr. Davis as the City's proxy in its fight against Cedar Grove, essentially treating Mr. Davis as the City's publishing arm for purposes of attacking Cedar Grove. Strategies, paid by Marysville to work with Mr. Davis, ghost wrote numerous letters to the editor and other correspondence for Mr. Davis or his associates to sign and subsequently publish, all of which furthered Marysville's political vendetta against Cedar Grove. *See, e.g.*, CP 880-894. Strategies also drafted talking points and press releases for Mr. Davis to use and distribute. *See, e.g.*, CP 896-900. Strategies went so far as to orchestrate political theatre in support of

⁷ Complete copies of the 173 records are at CP 957-1287.

Marysville's efforts against Cedar Grove, requesting that Mr. Davis attend City Council meetings to publicly endorse Mayor Nehring's and Ms. Hirashima's activities, to providing these Marysville officials with political cover to continue their attacks on Cedar Grove. CP 902-03. Strategies also acted as an information conduit between Mr. Davis and Marysville, telling him not to share certain information with the press because Marysville intended to do so. CP 905-06. In short, these documents prove that Marysville through Strategies was running Mr. Davis's alleged "grass roots" campaign against Cedar Grove, all of which was created by Strategies to further Marysville's political agenda.

The August 2013 records also established that Marysville had coordinated Mr. Davis's activities and, in some cases, provided direct assistance to Mr. Davis. For example, Ms. Hirashima personally attempted to coordinate Marysville's activities with those of Mr. Davis to achieve maximum political impact in front of Marysville's City Council. *See* CP 934 (email indicating that Marysville's plan for having Mr. Davis appear before the Council shifted after Ms. Hirashima called Strategies regarding the timing of this appearance). Mr. Davis also met with both Ms. Hirashima and Mayor Nehring directly to discuss tactics. *See* CP 936. Marysville also helped Mr. Davis seek funding for the mailers. *See* CP 938 (Ms. Hirashima personally filled out a grant application).

Most importantly, the August 2013 records reveal that Marysville conspired with Strategies to avoid the reach of Cedar Grove's PRA Requests (and discovery of Marysville's activities) by offloading tasks associated with Mr. Davis and the Mailers to Strategies with the understanding that Strategies would not communicate about those activities to Marysville in writing. This tactic was intended to hide these activities from Cedar Grove and (in Strategies' own words) provide Mayor Nehring and Gloria Hirashima of Marysville with "**plausible deniability**" of those activities. Internal emails from Strategies confirmed that Strategies and Marysville sought to discuss Strategies' activities over the phone (and only over the phone) to avoid generating emails that Marysville would have to produce to Cedar Grove in response to Cedar Grove's then pending PRA requests. *See, e.g.*, CP 946-47 (Strategies indicating that it would discuss Cedar Grove-related issue with Ms. Hirashima by phone "so it doesn't get caught up in CG's public records request on Marysville") (emphasis added); CP 949-50 (Strategies to have a phone discussion with Ms. Hirashima and Mayor Nehring because "their emails are all being reviewed by CG under a Public Records request") (emphasis added). Strategies also believed it could avoid the reach of the PRA by routing emails to Mayor Nehring's personal email address. CP 952-53

These emails also confirmed that Marysville *knew* that Strategies was in possession of responsive documents from the very first day that Cedar Grove made its PRA Requests. *See, e.g.*, CP 955-56 (email indicating Ms. Hirashima called Strategies the day the PRA requests were served, confirmed her knowledge that Strategies might possess documents responsive to various topics identified therein, and expressed her concern that Cedar Grove might try to “bootstrap” its PRA requests into Strategies’ emails). In addition, and in direct contrast to Marysville’s prior representations to the trial court, the emails confirmed that Marysville was involved in the generation of the mailers. *See, e.g.*, CP 938 (demonstrating that Ms. Hirashima attempted to help Mr. Davis get outside funding for the mailers); CP 940-41 (confirming that the mailers would come from Mr. Davis’ group); CP 943 (confirming that the only reason that Strategies was “trying not to share the draft” of the Mailer “with Gloria and Marysville folks, primarily to give them ‘plausible deniability’ about the mailer and its contents”) (emphasis added).

H. The Trial Court Entered Summary Judgment Finding A Violation of the PRA, Assessed Penalties Under the *Yousoufian* Factors, Then Denied Marysville’s Motion for Reconsideration.

Cedar Grove moved for summary judgment on the issue of liability and sought PRA penalties. The trial court subsequently

determined that the 173 records were public records subject to the PRA (CP 443-455) for three separate reasons, holding that: (1) “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 of a Marysville employee” during this period; (2) “Strategies and Marysville were enmeshed in what was essentially an employer-employee-like relationship;” and (3) alternatively, the records were “‘used’ by Marysville . . . [because] Strategies generated these records to further the political goals and interests of Marysville, . . . 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” CP 445-46. With regard to the use issue, the trial court also determined that:

- “Strategies generated these records to further the political goals and interests of Marysville;” (CP 446)
- “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;” (CP 446) and
- Strategies’ activities were “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” CP 447.

In terms of penalties, the trial court addressed the *Yousoufian* factors with respect to the three groups of documents that Marysville had improperly withheld (the fifteen records, the nineteen records, and the 173 records) and assessed penalties under the PRA. CP 450-51. As aggravating factors, the trial court found that the delay of over 300 days was significant, that Marysville provided little or no explanation with respect to seventeen of the nineteen records, that Marysville's conduct had a significant economic impact on Cedar Grove, and that Marysville acted in bad faith in employing Strategies to create "plausible deniability" and to insulate records from disclosure. CP 452-53. The trial court calculated penalties of between \$40 and \$90 per day, finding that these amounts were "necessary to deter future misconduct." CP 453, 455.

The trial court calculated a 360 day period for those of the 173 records that were responsive to the June 8, 2012 PRA request⁸ and a 560 day period for those of the 173 records that were responsive to the November 1, 2011 PRA request.⁹ For the nineteen records, the penalty

⁸ This number is determined by calculating the number of days from June 8, 2012 to August 7, 2013 (the date the 173 records were produced), minus the 65 day tolling period.

⁹ The numbers are slightly off: the period from November 1, 2011 to August 7, 2013, minus the 65-day tolling period, is actually 580 days, not 560 days. This minor error, however, is in Marysville's favor, as it shortens the period for calculating penalties.

period varied between 306 and 528 days. CP 455. The trial court calculated a 158 day penalty period for the fifteen records.¹⁰ Its PRA award totaled \$143,740 in penalties. CP 453, 455.

Marysville moved for reconsideration on September 19, 2013, raising several new arguments. CP 258-294. Contradicting Marysville's prior representation that Strategies was acting as the "functional equivalent" of a Marysville employee, Marysville asserted for the first time that Strategies was not the "functional equivalent" of a "public agency" during the same period. *See* CP 284-86. Marysville supported its motion with three new declarations, but failed to show that they constituted newly discovered evidence under CR 59(a)(4). CP 236-57. The trial court denied Marysville's motion and struck the three new declarations on the grounds that they could have been submitted at the time the court was considering the original motion. CP 8-9. The trial court also entered a slightly modified order granting summary judgment and penalties to Cedar Grove.¹¹ CP 10-22.

I. Cedar Grove's Motion for Fees.

Cedar Grove filed a timely motion requesting its costs and fees on

¹⁰ From November 1, 2011 to August 3, 201[2], less 119 days. CP 455.

¹¹ The modified order listed items reviewed by and relied upon by the trial court, made some minor structural modifications, and added some clarifying language. *See* CP 233.

September 19, 2013. CP 420-442. While granting the motion, the trial court reduced Cedar Grove's fee request in three ways. First, the trial court reduced Cedar Grove's attorneys' hourly rates. Second, the trial court then reduced time associated with certain tasks. Third, and perhaps most troubling, the trial court then applied an across-the-board reduction of 40 percent to Cedar Grove's fees, resulting in a total award of fees and costs of \$127,644.83. CP 1-6.

IV. ARGUMENT

A. Cedar Grove Has Standing to Bring This Lawsuit.

This Court should reject Marysville's hyper-technical argument that Cedar Grove allegedly did not possess standing to bring this lawsuit because the PRA Requests were made by an undisclosed agent of Cedar Grove, Ms. Cappel of the Seabold Group. Marysville's arguments are meritless for at least four reasons.

First, the facts do not support Marysville's position that it was allegedly unaware that Cedar Grove was the principal behind Ms. Cappel's PRA Requests. Specifically, the internal Strategies email memorializing the discussion between Strategies and Marysville the day after Ms. Cappel first served the PRA Requests at issue expressly confirmed that both Marysville and Strategies knew that the PRA Requests were made on behalf of "Cedar Grove." CP 955 (November 02,

2011 10:31 AM email) (indicating that Gloria Hirashima of Marysville called Strategies to give them a “heads up that after a quiet period, Cedar Grove has picked up their activity level” by serving a “new round of Opens Record Act requests” “this time from the Seabold Group”).

Second, nothing in the language of the statute supports Marysville’s position that only the agent who serves a PRA request can seek recourse when a city like Maryville violates the law. Had the legislature actually intended to undo long-standing Washington common law confirming that principals generally possess standing to sue, it would have done so expressly. *See, e.g., Stroud v. Beck*, 49 Wn. App. 279, 284, 742 P.2d 735 (1987) (plaintiffs, “as principals of the joint venture had privity of contract . . . through their agent,” have standing to sue in Washington); RCW 4.04.010 (common law is rule of decision “so far as it is not inconsistent with the . . . laws . . . of the state of Washington.”).

Third, the policies underlying the PRA do not support Marysville’s position that hyper-technical barriers should be allowed to prevent the public from enforcing the rights granted by the PRA. The PRA is instead “a strongly worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). Courts must liberally construe the PRA’s provisions so as to promote the complete disclosure of public records, not restrict such disclosures.

Kleven v. City of Des Moines, 111 Wn. App. 284, 289, 44 P.3d 887 (2002). As a result, the PRA's "mandate of liberal construction requires the court to view with caution any interpretation of the statute that would frustrate its purpose." *ACLU v. Blaine Sch. Dist.*, 86 Wn. App. 688, 693, 937 P.2d 1176 (1997).

Given the liberal rules of construction that apply to the PRA, a plaintiff need only show some personal stake in the outcome of a case to have standing. *Kleven*, 111 Wn. App. at 290. Cedar Grove obviously meets that requirement here. Moreover, Marysville makes no effort to explain why adopting its restrictive reading of the PRA would further the public interest in full disclosure or the legislature's intent to ensure that the public has adequate access to records of the government's activities. Other courts have squarely rejected Marysville's argument for this policy reason alone. *See generally San Juan Agricultural Water Uses Assoc. v. KNME-TV*, 257 P.3d 884 (N.M. 2011) (rejecting claim that "an undisclosed principal" lacked "standing to enforce an IPRA request made by that principal's agent" because of public policy favoring public disclosure of records).

Fourth, Washington precedent addressing the PRA does not support Marysville's position. The *Kleven* case is especially instructive on this point. *Kleven's* attorney made several PRA requests to the city, none

of which mentioned Kleven.¹² 111 Wn. App. at 288. After some back and forth between the attorney and the city about the requests, Kleven filed a PRA lawsuit against the city and the city argued he lacked standing because his attorney had made the requests. *Id.* at 290.

The Court rejected the city's arguments, noting that it was undisputed that the attorney made the requests on Kleven's behalf and that there was "absolutely nothing in the record to show that Kleven did not have a personal stake in seeking relief under the PDA based on his requests for public records made through his attorney." 111 Wn. App. at 290-91. Additionally, the *Kleven* Court refused to read into the PRA a preclusion from obtaining public records through an agent or a requirement that the agent "must identify the fact of representation or the name of the client when making a request for public records on behalf of a client." 111 Wn. App. at 291.

Like *Kleven*, there is no dispute here that Ms. Cappel made the PRA Requests on Cedar Grove's behalf and therefore nothing in the

¹² Marysville asserts that *Kleven* is distinguishable from this case because the attorney in *Kleven* allegedly disclosed that the request was made on the client's behalf. *See* Appellant's Brief at 24 ("the attorney disclosed that the request was made on the client's behalf"), 25 n.21. This assertion is incorrect. *Kleven* instead clearly states that none of the attorney's PRA requests or communications mentioned his client. 111 Wn. App. at 288 (confirming that "[n]either this request nor any communication that followed mentioned Kleven," the principal at issue). Marysville's reliance on this perceived distinction to distinguish *Kleven* is not well-founded.

record to dispute the fact that Cedar Grove has a personal stake in the outcome of the case.¹³ Cedar Grove had standing as a result.

Other than the incorrect assertion by Marysville that the requesting party actually disclosed the existence of an agency/principal relationship, the only difference between *Kleven* and this lawsuit is that the requesting agent in *Kleven* was also the plaintiff's lawyer. There is nothing in the reasoning of *Kleven* to support the notion that the only type of agent who may make PRA requests on behalf of a principal is that principal's attorney. Again, reading this type of non-existent hurdle into the statute would only serve to create a "'hypertechnical barrier' that would frustrate the PRA's goal of liberal public records disclosure." *Germeau v. Mason County*, 166 Wn. App. 789, 804, 271 P.3d 932 (2012) (citing *Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000)).

Marysville's two additional attempts to sidestep the clear mandate of *Kleven* are equally unavailing. First, Marysville cites to *McDonnell v. U.S.*, 4 F.3d 1227 (3rd Cir. 1993) and other cases ruling that Freedom of Information Act ("FOIA") plaintiffs lack standing to sue if their names

¹³ Marysville does not dispute the fact that Ms. Cappel was acting on Cedar Grove's behalf when she made the PRA Requests at issue. *See, e.g.*, Appellant's Brief at 5 ("does the party for whom the requestor sought the records have standing..."). Moreover, the record supports this conclusion. *See, e.g.*, CP 368 (Cedar Grove attorney time entry reflecting contacting Ms. Cappel regarding records request).

were not on the FOIA request at issue. That argument fails to account for the fact that the *Kleven* Court specifically distinguished *McDonnell* and similar cases on the grounds that the applicable FOIA provisions differed from the PRA provisions at issue. 111 Wn. App. at 291-93. The PRA provisions at issue have not changed since *Kleven* and *Kleven's* rejection of the relevant FOIA case law is still binding on the court.¹⁴

Second, Marysville argues that the holding of *Burt v. Dept. of Corr.*, 168 Wn.2d 828, 231 P.3d 191 (2010) means that Ms. Cappel is an “indispensable party” under CR 19 whose absence prevented the trial court from entering judgment in Cedar Grove’s favor. Marysville’s argument is meritless. The *Burt* Court ruled only that the records requestor (a prison inmate) was an indispensable party in an action

¹⁴ Marysville is incorrect in arguing that Washington law is now “akin to FOIA with regard to the precision by which the request must be made,” citing the Attorney General’s model rules for PRA requests. Appellant’s Brief at 25 n. 21. First, the model rules are nonbinding (*see* WAC 44-14-00003; *see also* *Mitchell v. Dept. of Corr.*, 164 Wn. App. 597, 606-07, 277 P.3d 670 (2011) (model rules are not binding)). Second, the WAC section Marysville cites merely states that a request for public records should be in writing and include, among other things, the name, address, and contact information of the requestor. WAC 44-14-030(4). This information is required so that the agency can communicate with the requestor regarding such things as exemptions, clarification, and availability of documents. WAC 44-14-03006. This, of course, is precisely what occurred here. CP 1812-16 (discussing communications between Ms. Cappel and Marysville). Third, Marysville’s analogy to case law requiring “fair notice” of a PRA request is also not applicable. Requiring that a PRA request be made with sufficient clarity so as to allow the agency to identify it as such is an obvious and necessary threshold for agency compliance; in contrast, agency knowledge of the individual or entity who ultimately desires access to the public records is not such a threshold. To argue otherwise would allow the agency to vary the contents of the public records produced and the vigorousness with which the search for such records is conducted depending on the identity of the requestor.

brought by the employees of a third-party agency to enjoin the agency from disclosing their personnel records, but made no ruling on whether the inmate himself had to be joined or whether a hypothetical agent requesting records on the inmate's behalf could be joined instead. 168 Wn.2d at 835. Neither of those issues were before the *Burt* Court, as the requestor and the party on whose behalf the request was made were one and the same.

In summary, neither the facts of this case, the language of the PRA, the policies underlying that statute, nor the cases cited by Marysville support its claim that Cedar Grove lacked standing. Given the PRA's mandate of liberal construction and the *Kleven* Court's application of that mandate to similar facts, the Court should affirm the trial court's determination that Cedar Grove possessed standing to pursue its claims.

B. The Trial Court Properly Found a PRA Violation for the 173 Strategies Records.

1. The Court Should Not Consider Marysville's "Public Agency" Arguments on Appeal.

Ignoring the actual basis for the trial court's decision below, Marysville devotes an entire section of its opening brief to the argument that Strategies was not a "public agency" under RCW 42.56.010(1) and *Telford v. Thurston County Bd. of Commissioners*, 95 Wn. App. 149, 974 P.2d 886 (1999). Appellant's Brief at 30-35. This Court should refuse to consider this argument for several reasons.

First, and most importantly, Cedar Grove never argued below and the trial court did not hold that Strategies was a “public agency” for purposes of PRA liability. Instead, Cedar Grove argued and the trial court held (based on Marysville’s *own prior admissions* to the trial court) that Strategies and Marysville were “enmeshed in what was essentially an employer-employee-like relationship,” that Strategies was acting on Marysville’s behalf during the period at issue, and that Strategies was acting as the “functional equivalent” of a Marysville *employee* during the period at issue. CP 13-14. Marysville’s “public agency” arguments simply have nothing to do with the actual basis for the trial court’s determinations below.

Second, Marysville did not timely raise its “public agency” argument on summary judgment below, only raising that issue for the first time in a motion for reconsideration *after* the trial court’s summary judgment decision. The trial court did not abuse its discretion in refusing to consider this belatedly-raised argument. *See, e.g., Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (“CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision”).

Third, Marysville should be judicially estopped from asserting its “public agency” arguments on appeal. It is patently unfair to allow

Marysville to refute its own prior representations to the trial court that Strategies was acting as the “functional equivalent” of a Marysville employee at the time it generated the written communications at issue – representations that the trial court accepted. That is the exact type of tactical about-face that the doctrine of judicial estoppel was designed to prevent. *See, e.g., Anfinson v. FedEx Ground Package Sys.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012) (“[j]udicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position”).

2. The Trial Court Correctly Determined That the 173 Records Were Subject to the PRA Because Strategies Was Acting as the Functional Equivalent of a Marysville “Employee” at the Time These Records Were Generated

Washington law is clear that records generated or held by an employee of the agency are still subject to the PRA. *See, e.g., Mechling v. City of Monroe*, 152 Wn. App. 830, 843-44, 222 P.3d 808 (2009) (“[e]-mail messages of public officials or employees are subject to a public records request if the e-mails contain information related to the conduct of government”). Thus, responsive records in the possession of an agency “employee” fall under the PRA.

Marysville admitted that Strategies was acting as the “functional

equivalent” of a Marysville “employee” at the time of the creation of the documents now in dispute. *See* CP 1763-64 (Ms. Hirashima “considered [Strategies] to be the functional equivalent of city employees employed to assist City staff and elected officials to identify appropriate policy and legal strategies to resolve the odor nuisances that were impacting the Marysville community”); CP 1664, 1678 (“the City treats Strategies as the equivalent of an employee” and “Strategies 360 is the functional equivalent of an employee for the City of Marysville”). That admission alone should end the inquiry with regard to whether the 173 records falling within this group were subject to the PRA.

Marysville attempts to sidestep that admission by claiming that: (a) “the trial court erred in concluding that because the City was correct in the proper assertion of [the attorney-client exception under the PRA], this acted as the functional equivalent of an admission that all other Strategies’ [sic] documents were therefore public records”; and (b) that this ruling allegedly forces a “Hobbesian choice of exerting privilege and risking PRA penalties or foregoing privilege” Appellant’s Brief at 44-45. Marysville’s arguments are incorrect for four reasons.

First, Marysville’s contention that the trial court’s decision was based only on Marysville’s *assertion* of the attorney-client privilege below is incorrect. The trial court did not rule that the mere act of asserting the

attorney-client exception to the PRA somehow turned Strategies into the functional equivalent of a Marysville employee. The trial court's decision was instead based on admission after admission from Marysville that Strategies was acting as a Marysville "employee" at the time it generated the documents at issue. *See* CP 13, 10-12 (listing materials considered). The fact that Marysville made those admissions in the context of Marysville's attempt to cloak some of the documents with privilege is irrelevant.

Second, Marysville repeatedly mischaracterizes the scope of the trial court's ruling, arguing that "[v]irtually all records of government contractors potentially now become public records." Appellant's Brief at 45. The trial court's ruling does no such thing. The only documents impacted by the trial court's ruling were written communications regarding Strategies' activities, communications generated by Strategies both: (a) during the scope of its engagement by Marysville, and (b) during the period in which Strategies was admittedly acting as Marysville's "employee" for purposes of generating these documents. The trial court accepted Marysville's own admissions that Strategies was acting as a Marysville employee for purposes of these communications (CP 13), regardless of whether those communications were with counsel, with City employees, or with third parties such as Mr. Davis.

Third, Marysville fails to cite any authority indicating that a party can claim status as the “functional equivalent” of an “employee” of a party for purposes of communications with counsel but contradictorily deny that same status when it comes time to analyze communications generated during the same period with parties other than counsel.

Fourth, Marysville’s hyperbole that the trial court’s decision expands the PRA to reach documents held by “independent contractors” is meritless. This argument is based on the faulty premise that Strategies was acting as an independent contractor and not as Marysville’s “employee.” Marysville simply cannot have it both ways, arguing that Strategies was its “employee” for purposes of determining whether certain written communications about Cedar Grove were privileged but contradictorily arguing that Strategies is an “independent contractor” when it comes time to assess whether Marysville had an obligation to turn over unprivileged documents relating to the very same topic.

While Marysville’s brief is long on rhetoric and hyperbole, it fails to provide any reasoned analysis of the text or policy of the PRA that would authorize a public entity to refuse to disclose responsive records held by a party that the agency itself repeatedly admits was acting as its “employee.” In short, the trial court’s decision reflects *exactly* the result intended by the PRA, not some broadening of the act.

In summary, Marysville defined its relationship with Strategies and, by its own admission, conferred upon Strategies the very same expansive “employee” status that it now challenges on appeal. The trial court’s ruling was well-reasoned, limited in scope, and merely confirmed that an agency cannot take inconsistent positions about whether a third-party is an “employee” of that agency in a PRA case.

3. Marysville “Used” the 173 Records at Issue.

The Court need not reach the legal issue of whether Marysville “used” the documents at issue given Marysville’s admission that Strategies was its “employee” during the period at issue. Nonetheless, the trial court’s judgment can be affirmed based on the undisputed fact that Marysville did “use” these records within the meaning of the PRA.

The PRA is clear that a document qualifies as a “public record” if it contains “information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, *used*, or retained” by an agency. RCW 42.56.010(3) (emphasis added). Documents are “used” by a public agency if they are “either: (1) employed for; (2) applied to; *or* (3) made instrumental to a governmental end or purpose.” *Concerned Ratepayers Ass'n v. Public Util. Dist. No. 1*, 138 Wn.2d 950, 960, 983 P.2d 635 (1999). Consistent with the legislature’s “strongly worded mandate for broad disclosure of public

records,” the PRA’s broad definition of a “public record” is intended to encompass “virtually any record related to the conduct of government.” *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 147, 240 P.3d 1149 (2010). Indeed, given that courts must “liberally construe the PRA,” all that is required for a record to meet this broad definition is evidence that the document at issue relates to “the conduct of government or the performance of a governmental function.” *O’Neill v. City of Shoreline*, 145 Wn. App. 913, 925, 187 P.3d 822 (2008) (email metadata qualifies as a “public record” as “the metadata contains information that relates to the conduct of government or the performance of a governmental function” because it “shows the e-mail addresses of persons who may have knowledge of alleged government improprieties,” information that “falls squarely within the statute’s definition of ‘public record’”).

The *Concerned Ratepayers* case is instructive. There, plaintiff sought technical documents no longer in the agency’s possession relating to a turbine design abandoned by the agency. 138 Wn.2d at 953-57. Nevertheless, the Supreme Court held that the agency had “used” documents relating to that design within the meaning of the PRA, holding:

A document relating to a governmental function is “used” by the agency if it is applied to a given purpose or instrumental to an end or process. *See* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2523 (1969) and BLACK’S LAW DICTIONARY 1541 (6th ed.

1990) (defining “use” as employing for or applying to a given purpose or making instrumental to an end or process). Thus, an agency may have used a document not in its possession

Id. at 959. The Court noted the “expansive” definition of the word “use:”

regardless of whether an agency ever possessed the requested information, an agency may have “used” the information within the meaning of the Act if the information was either: (1) employed for; (2) applied to; or (3) made instrumental to a governmental end or purpose. We are thus persuaded that the Court of Appeals' definition is consistent with the Act's purpose of broad disclosure.

Id. at 959-60 (emphasis added).

Similarly, the undisputed facts here establish that the 173 records at issue were employed for the benefit of Marysville for its governmental end or purpose of blaming Cedar Grove for the odors to reduce Marysville’s own liability and silence its critics, limiting Cedar Grove’s activities, and influencing public opinion on these issues. Moreover, a nexus existed between the 173 records and Marysville’s decision-making process because the emails related to Marysville’s conduct and were a relevant factor in Marysville’s actions. These *undisputed* facts include Marysville’s admissions that:

- Marysville was engaged in what it described as “an ongoing regional *dispute* between Cedar Grove” and Marysville regarding “odor issues.” CP 1365 (emphasis added).
- Marysville hired Strategies to aid Marysville with regard to this “dispute” in July of 2010. CP 1365.

- The scope of Marysville’s engagement of Strategies expressly included commissioning Strategies to work with Mike Davis and his group and paying Strategies for that work. *See* CP 860.
- At the behest of Marysville and during the scope of its engagement by Marysville, Strategies assisted Mr. Davis with every aspect of his alleged “grass roots” campaign against Cedar Grove, tasks specifically intended to further Marysville’s interest in shutting down Cedar Grove or otherwise furthering Marysville’s political interest, including drafting the communications later issued by Mr. Davis and directing virtually all aspects of his activities, activities directly supportive of Marysville’s political objectives (having Davis appear at City Council meetings to endorse Marysville’s efforts, having Davis attack Cedar Grove’s perceived ally, Mr. Wolken, having Davis publicly attack Cedar Grove through letters to the editor, etc.). *See* CP 880-903, 911-931.
- Strategies provided regular updates to Ms. Hirashima about its work with Mr. Davis, and Ms. Hirashima had admitted that Strategies served as the “liaison” between Marysville and Mr. Davis. CP 905-06, 1368-69.

These undisputed facts make it clear that each of the documents relating to Strategies’ work with Mr. Davis were both employed for the benefit of Marysville and instrumental to the political goals of Marysville: attempting to shut down Cedar Grove and silence Marysville’s critics (like Mr. Wolken). Indeed, as counsel strenuously argued below, there would have been no logical reason whatsoever for Marysville to engage Strategies to work with Mr. Davis or pay Strategies tens of thousands of dollars for that work if Marysville did not expect that work to further its own political goals and governmental purpose. CP 533.

In short, Marysville offers a definition of public record in a complete vacuum, without any consideration of the facts that confirm that the *only reason* Marysville engaged Strategies and the *only reason* Strategies created the documents at issue was to “assist” Marysville in its “dispute” with Cedar Grove. As expressly noted by the trial court’s order, these documents were, therefore, indisputably created for purposes of “assisting” Marysville in that political dispute and qualify as public records for that reason alone. *See* CP 14-15.

Marysville makes several arguments relating to the use issue, none of which alter the conclusion that Marysville actually used these documents to further its political goals against Cedar Grove.

First, citing *Concerned Ratepayers*, Marysville argues that a document can never be used by an agency unless the agency both receives and considers the document as part of a formal decision-making process. Appellant’s Brief at 37 (“[t]he document *must be used in the government’s decision making process*”) (emphasis in original). Marysville’s argument ignores the fact that the Supreme Court made it clear in *Concerned Ratepayers* that a document qualifies as a public record when that document is employed for the agency’s benefit or made instrumental to its ends or purposes, regardless of whether the agency actually possessed the documents. Thus, an agency may “use” “a document not in its

possession” if the information was either: “(1) employed for; (2) applied to; or (3) made instrumental to a governmental end or purpose.” *Concerned Ratepayers Assoc.*, 138 Wn.2d at 959-60. The only reason the *Concerned Ratepayers* Court went on to call out the “decision-making” issue was because that was the primary basis under which plaintiff claimed that the technical specifications qualified as public records in that particular case. 138 Wn.2d at 959-61. Unlike here, there were no facts in *Concerned Ratepayers* indicating that the technical specifications were created by the “functional equivalent” of an “employee” of the agency or paid for and created at the behest of the agency to further the agency’s own stated political goals.

Marysville’s “no receipt, no review, no liability” argument also contradicts the public policy of full disclosure underlying the PRA. Endorsing Marysville’s position would essentially allow an agency to game the system and circumvent the PRA’s policy of full disclosure merely by taking the steps necessary to ensure that it does not come into possession of documents that it knows are responsive to a PRA request. These policies are manifest here, where the only reason these documents were not sent directly to Marysville by Strategies was a conscious and deliberate attempt to circumvent the PRA and avoid Cedar Grove’s PRA Requests. *See, e.g.*, CP 946-47 (Strategies stating it would discuss Cedar

Grove-related issue with Ms. Hirashima by phone “so it doesn’t get caught up in CG’s public records request on Marysville”) (emphasis added); CP 949-50 (Strategies indicating it would have a phone discussion with Ms. Hirashima and Mayor Nehring because “their emails are all being reviewed by CG under a Public Records request”) (emphasis added).

While Marysville also cites to *West v. Thurston County*, 168 Wn. App. 162, 275 P.3d 1200 (2012) (Appellant’s Brief at 37-38), holding that a County did not “use” law firm invoices for defending the county in litigation, that is readily distinguishable. The invoices at issue in *West* were for amounts over the county’s \$250,000 deductible, were sent directly to the county’s Risk Pool for payment, and there was no dispute that the county did not receive, review, or otherwise benefit from the creation of the invoices. *Id.* In contrast, the 173 records at issue here were created, employed for and made instrumental to Marysville’s political purposes against Cedar Grove. In short, while an attorney fee invoice that a county never sees or pays is not instrumental to a governmental end or purpose, the 173 records at issue here were all admittedly created to “assist” Marysville in its “ongoing regional dispute” with Cedar Grove to further Marysville’s stated political objective of shutting down Cedar Grove. These documents were “used” by Marysville as a result.

In summary, Marysville’s “no receipt, no review, no liability”

argument elevates form over substance and asks the Court determine what constitutes a public record in a complete vacuum – focusing only on whether the records at issue were received by Marysville – without any consideration of *why* those document were created by Strategies in the first place or *how* those documents were quite clearly used to further Marysville’s stated political objectives against Cedar Grove. Again, the record here confirms that the only reason Strategies created the documents at issue was to “assist” Marysville in its “dispute” with Cedar Grove, as well as the fact that the only reason that these documents were not sent directly to Marysville by Strategies was a conscious and deliberate attempt to circumvent the PRA and avoid Cedar Grove’s PRA Requests. The 173 records were indisputably created for purposes of “assisting” Marysville in a political dispute and qualify as “public records” under the PRA. To hold otherwise would allow any government agency to avoid compliance with the PRA by outsourcing sensitive tasks in order to insulate them from the public’s oversight. That is not the law in other states¹⁵ and cannot be the

¹⁵ Other courts have confirmed that an agency may not circumvent the reach and public policy underlying open records laws by delegating sensitive tasks to private entities and then refusing to produce documents held by that entity. *See, e.g. Evertson v. City of Kimball*, 767 N.W.2d 751, 761 (Neb. 2009) (public record laws do “not permit public bodies to conceal public records by delegating their duties to a private party;” “[a]ccepting the City’s argument would mock the spirit of open government”); *Forum Publ’g Co. v. City of Fargo*, 391 N.W.2d 169 (N.D. 1986) (“these documents are not any less a public record simply because they were in the possession of [a private company] . . . [the] purpose of the open-record law would be thwarted if we were to hold that

law of Washington.

4. The Trial Court Properly Granted Summary Judgment In The Absence of Material Fact Disputing That the 173 Records Were Subject to Disclosure Under The PRA.

Making the same argument belatedly raised below,¹⁶ Marysville also argues that issues of fact allegedly preclude a ruling that the 173 records were “used” by Marysville. This argument fails for three reasons.

First, Marysville does not actually dispute *any* of the core facts upon which the trial court’s ruling was based, including the fact that: (1) Marysville was engaged in what it described as “an ongoing regional dispute between Cedar Grove” and Marysville regarding “odor issues” (CP 1365) (emphasis added); (2) Marysville hired Strategies to aid Marysville with regard to this “dispute” in July of 2010 (CP 1365); (3) the scope of Marysville’s engagement of Strategies expressly included commissioning Strategies to work with Mike Davis and his group and paying Strategies for that work (CP 860); (4) at the behest of Marysville

documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity are not public records”); *State ex rel. Gannett Satellite Info. Network v. Shirey*, 678 N.E.2d 557, 561 (Ohio 1997) (city managers may not circumvent the state public records law by hiring a private entity to assist the city in filling a position); *Wisner v. City of Tampa Police Dept.*, 601 So.2d 296, 298 (Fla. Ct. App. 1992) (polygraph chart retained by private entity was public record, and city “may not allow a private entity to maintain physical custody of public records to circumvent the public records chapter”).

¹⁶ Prior to Marysville’s Motion for Reconsideration, Marysville never took the position that factual issues allegedly prevented the trial court from resolving the question of whether the 173 records qualified as public records.

and during the scope of its engagement by Marysville, Strategies assisted Mr. Davis, including drafting the communications later issued by Mr. Davis (CP 880-903, 911-931); and (5) Strategies provided regular updates to Ms. Hirashima about its work with Mr. Davis, and Ms. Hirashima had openly admitted that Strategies served as the “liaison” between Marysville and Mr. Davis (CP 905-06, 1368-69).

Second, under CR 56(e), Marysville had the affirmative obligation below to “set forth specific facts which sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue as to a material fact” *Meyer v. Univ. of Wash.*, 105 Wn. 2d 847, 852, 719 P.2d 98 (1986) (“[i]ssues of material fact cannot be raised by merely claiming contrary facts”); *Lindell v. City of Mercer Island*, 833 F. Supp. 2d 1276, 1283 (W.D. Wash. 2011) (in the context of a PRA claim, “the non-moving party must go beyond the pleadings and identify facts which show a genuine dispute for trial”). Marysville failed to do so.¹⁷ Because Marysville did not meet its burden to present counter evidence to establish a disputed issue of fact on summary judgment on the use issue with regard to the 173 records, the trial court did not abuse its discretion in refusing to

¹⁷ For example, while Ms. Hirashima submitted four separate declarations to the trial court, not a single one of those declarations ever disputed the fact that Marysville engaged Strategies to, at least in part, work with Mr. Davis and that Marysville paid Strategies for that work.

grant its motion for reconsideration, particularly where the “facts” alleged were all available to Marysville in opposing summary judgment. *King v. Rice*, 146 Wn. App. 662, 672, 191 P.3d 946 (2008) (affirming trial court’s ruling that document did not support reconsideration because there was no showing it could not have been offered prior to judgment).

Third, the allegedly “disputed” facts identified by Marysville on appeal have virtually nothing to do with the “use” issue. There is no dispute that Marysville engaged Strategies to assist Marysville with its dispute with Cedar Grove, that the scope of that engagement included working with Mr. Davis and having Strategies serve as Marysville’s “liaison” with Mr. Davis, or that Marysville paid Strategies for that work with Mr. Davis. Marysville instead argues that it did not “direct” particular activities undertaken by Strategies within the scope of its engagement by Marysville relating to “Davis or the Tribe.” Appellant’s Brief at 47. Leaving aside the fact that this argument apparently relates to Marysville’s *Telford* factors argument (as opposed to the “use” issue), the relevant question is not whether Marysville specifically “controlled” or “directed” each and every single one of Strategies’ activities. The question is instead whether those activities generally fell within the scope of Strategies’ engagement by Marysville and whether Marysville benefited from them. The mere fact that Strategies may not have

contemporaneously informed Marysville of each and every detail of what it was doing with Mr. Davis is irrelevant. The “use” test requires only a showing that the documents were “employed for” the benefit of Marysville or “made instrumental to a governmental end or process.” Hiring Strategies to work with Mike Davis to attack Cedar Grove as a second front in Marysville’s own “dispute” with Cedar Grove plainly meets that test, as documents generated during the scope of that engagement furthered the political goals and interests of Marysville on their face.

Fourth, even if Marysville had demonstrated a disputed of material fact here (and it has not), Marysville’s argument ignores the fact that any alleged error on this issue is rendered harmless by virtue of the fact that the PRA itself vested the trial court with authority to conduct a “hearing” based solely on the affidavits and declarations submitted by the parties. RCW 42.56.550(3) (“[t]he court may conduct a hearing based solely on affidavits”). No additional hearing to hear evidence was required.

C. The Trial Court Properly Found a PRA Violation for the Nineteen Records and the Fifteen Records.

The trial court properly held that Marysville violated the PRA with respect to the nineteen records disclosed after litigation commenced and with respect to the fifteen records improperly withheld based on attorney-

client privilege. .

1. The Nineteen Records Were Improperly Withheld.

Marysville stipulated before the trial court that the nineteen records were responsive to Cedar Grove's PRA Requests and were not produced by Marysville prior to February 21, 2013. *See* CP 1288-1338. The trial court was entitled to accept this stipulation and did so. *See* CP 15, FF 9 (granting summary judgment on the nineteen records "that Marysville has stipulated were public records not produced to Cedar Grove"). Marysville's argument on appeal that "questions of fact" allegedly preclude a finding of a PRA violation with respect to most of these nineteen records completely ignores this stipulation.

Marysville offered no argument or evidence before the trial court or this Court that the stipulation was ineffective or should otherwise be voided. *See, e.g., Allstot v. Edwards*, 114 Wn. App. 625, 636-37, 60 P.3d 601 (2002) (stipulation between the parties was a contract and the party seeking to amend the stipulation did not show mutual mistake or voidability). Because the parties stipulated that the nineteen records were responsive to Cedar Grove's PRA Requests and were not previously disclosed, the only issue remaining for the trial court to decide was the penalty to be awarded, a decision that is reviewed for abuse of discretion and is addressed *infra* in section D. This Court should affirm the finding

of a PRA violation with respect to the nineteen records.

2. The Fifteen Records Were Improperly Withheld.

Marysville argues that, because the fifteen records withheld from the fifth installment were eventually produced prior to Cedar Grove filing suit, the lawsuit was unnecessary with respect to these documents and penalties imposed on those documents should be reversed. Marysville's argument ignores binding case law that holds precisely to the contrary.

The Supreme Court has already rejected Marysville's argument, holding that "no causation requirement exists to be a prevailing party in a PRA action." *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 726, 261 P.3d 119 (2011). In *Neighborhood Alliance*, the plaintiff had the public records in hand at the time the suit was filed and the lower court therefore reasoned that the plaintiff was not a prevailing party under the PRA because the suit did not cause the disclosure. *Id.* at 725. The Supreme Court reversed, holding that "the remedial provisions of the PRA are triggered when an agency fails to properly disclose and produce records, and any intervening disclosure serves only to stop the clock on daily penalties, rather than to eviscerate the remedial provisions altogether." *Id.* at 727; *see also Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005) ("[s]ubsequent events do not affect the wrongfulness of the

agency's initial action to withhold the records;" penalties may be assessed "for the time between the request and the disclosure, even if the disclosure occurs for reasons unrelated to the lawsuit").

To allow an agency to avoid penalties by subsequently disclosing records that were initially withheld would undercut the policy behind the PRA. *Spokane Research & Defense Fund*, 155 Wn.2d at 104.¹⁸ The trial court did not err in assessing penalties based on the fifteen records.

D. The Trial Court Properly Applied the *Yousoufian* Factors in Assessing Penalties.

The trial court acted well within its discretion and considered the appropriate factors in assessing penalties under the PRA. Marysville cannot establish a manifest abuse of discretion.

In *Yousoufian v. Office of King County Exec.*, 168 Wn.2d 444, 229 P.3d 735 (2010), the Washington Supreme Court set forth the aggravating and mitigating factors that trial courts may consider in assessing penalties under the PRA. Aggravating factors that may support increasing the penalty include:

- (1) a delayed response by the agency, especially in circumstances making time of the essence;
- (2) lack of strict

¹⁸ Marysville cites to *Smoke v. City of Seattle*, 132 Wn.2d 214, 937 P.2d 186 (1997) and *Brower v. Pierce County*, 96 Wn. App. 559, 984 P.2d 1036 (1999), which both addressed RCW 64.40.030's requirement that a plaintiff exhaust administrative remedies prior to bringing suit for damages arising from a land use decision. In contrast, the PRA contains no exhaustion requirement. *Kleven*, 111 Wn. App. at 292.

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.

168 Wn.2d at 467-68 (internal citations omitted). Mitigating factors that may help decrease the penalty include:

(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 (internal citations omitted). *Yousoufian* emphasized 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.* at 468. No one factor should control, and the factors “should not infringe upon the considerable discretion of trial courts to determine PRA penalties.” *Id.*

The trial court did not abuse its discretion in setting penalties here. The trial court made extensive factual findings regarding the records at issue. *See* CP 1460-64, 12-21. The court considered relevant case law on the issue. CP 19 (cases considered in determining the amount of penalty). The court also made an explicit finding regarding each one of the *Yousoufian* aggravating factors. CP 19-21. Marysville’s assertions that the trial court abused its discretion are simply unsupported.

The existence or absence of agency’s bad faith is the principal factor for a trial court to consider in determining penalties, *see Yousoufian*, 168 Wn.2d at 460, and the trial court here explicitly considered that factor. CP 20. Marysville’s argument that the trial court ignored mitigating factors ignores the fact that four of the aggravating factors are, in essence, mirror images of a corresponding mitigating factor.¹⁹ Further, although the trial court was not required to explicitly consider the remaining three

¹⁹ Aggravating factor 1 (“a delayed response by the agency, especially in circumstances making time of the essence”) is the counterpart to mitigating factor 2 (“the agency’s prompt response or legitimate follow-up inquiry for clarification”). Aggravating factor 2 (“lack of strict compliance by the agency with all the PRA procedural requirements and exceptions”) is the counterpart to mitigating factor 3 (“the agency’s good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions”). Aggravating factor 3 (“lack of proper training and supervision of the agency’s personnel”) is the counterpart to mitigating factor 4 (“proper training and supervision of the agency’s personnel”). Aggravating factor 4 (“unreasonableness of any explanation for noncompliance by the agency”) is the counterpart to mitigating factor 5 (“the reasonableness of any explanation for noncompliance by the agency”). *See Yousoufian*, 168 Wn.2d at 467-68. The trial court’s findings as to those four aggravating factors are also findings regarding the corresponding mitigating factors.

mitigating factors, it considered at least some of them implicitly.²⁰

Yousoufian, 168 Wn.2d at 468.

With respect to the fifteen records originally withheld for privilege, the trial court agreed that Marysville's "explanation for the claim of attorney-client privilege was more reasonable given the need to safeguard the attorney-client privilege." CP 20. Yet the trial court found that Marysville ultimately made the wrong determination with respect to these fifteen records. *See* CP 19, 20. Moreover, the testimony secured from Marysville's own Rule 30(b)(6) witness confirmed that Marysville was aware that there was no legitimate basis whatsoever for taking the position that these fifteen records contained "legal advice." CP 2026. Finally, Marysville's eventual production of the fifteen records prior to litigation only serves to stop the clock on penalties, not obviate liability altogether. *See Spokane Research*, 155 Wn.2d at 103-04. As a result, the trial court was well within its discretion in assessing a \$70 per day penalty for the fifteen records. *See, e.g., Lindell v. City of Mercer Island*, 833 F. Supp. 2d

²⁰ The trial court found that Ms. Hess failed to search for the names of the two main Strategies employees, and found that she also failed to personally search the mayor's computer, CP 18, 20; both findings related to Marysville's systems for tracking and retrieving public records, the seventh mitigating factor. Given the trial court's numerous findings relating to the aggravating factors, it is highly unlikely an explicit finding as to clarity of the request or helpfulness of the agency would have reduced the per diem penalties. *See, e.g., Bricker v. Dept. of Labor & Indus.*, 164 Wn. App. 16, 27, 262 P.3d 121 (2011) (no need to remand when consideration of economic loss to the requestor would not have reduced the per diem penalty).

1276, 1288 (W.D. Wash. 2011) (imposing a \$75 per diem penalty on records wrongfully withheld based on privilege).

With respect to the nineteen records, Marysville argues that the documents were “not significant,” that the search was adequate, and that these records were a small fraction of the documents produced in response to the PRA requests. Marysville cites no authority for the proposition that public records an agency deems “not significant” should be treated any different in a PRA request. *See* RCW 42.56.030 (“[t]he people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know”). Moreover, the trial court specifically found unreasonable aspects to Marysville’s search for records and that additional, reasonable searches would have located many of the nineteen records. This finding is amply supported by the record and is well within the trial court’s discretion.

While Marysville makes much of the fact that it produced thousands of documents and went out of its way to make those documents easily accessible to Ms. Cappel, this argument misses the point: the PRA is concerned with penalties for the records an agency did not disclose. *See, e.g., Lindell*, 833 F. Supp. 2d at 1287-88 (“the court does not accept as a mitigating factor that the City, as it claims, went out of its way to make what it determined to be responsive documents available to Ms.

Lindell, when the very question of what it deemed to be responsive is the crux of its failure to disclose”). The trial court’s moderate per diem penalty of \$40 is supported by the factual findings and is well within the court’s discretion.²¹

With respect to the 173 records, Marysville argues that it did not use these records and could not have anticipated that the documents would be considered public records. Nonetheless, the 173 records were public records and the record supports the trial court’s finding that Ms. Hirashima remained silent despite her knowledge of the Strategies documents.²² Given the trial court’s findings regarding Marysville’s bad faith in seeking to avoid producing these documents to Cedar Grove, its purposeful delay/avoidance, the public importance of the issue, the economic loss to Cedar Grove, and the necessity of a penalty to deter future misconduct, the \$90 per diem penalty for this group of records was well within the court’s

²¹ The trial court’s imposition of penalties for the nineteen records, going back to the date of the record request, was not improper. *See, e.g., West v. Thurston County*, 168 Wn. App. 162, 192, 275 P.3d 1200 (2012) (trial court correctly calculated the penalty period going back to the date of the PRA request).

²² The trial court found that Marysville intended to put in place strategies to avoid or delay responding to the PRA requests. While Marysville takes issue with the apparent significance the trial court attached to the comment made by Strategies to the Tulalip Tribe regarding providing Marysville with “plausible deniability,” the comment was merely an example of how that strategy was carried out. CP 16-17. Marysville’s argument that the statement was not made by anyone at Marysville ignores the trial court’s findings that Strategies was acting as the “functional equivalent” of a Marysville employee.

discretion. *See Yousoufian*, 168 Wn.2d at 460 (existence or absence of agency's bad faith is the principal factor for a trial court to consider in determining penalties); *Bricker v. Dept. of Labor & Indus.*, 164 Wn. App. 16, 28-29, 262 P.3d 121 (2011) (\$90 per diem penalty was within court's discretion when almost all of the aggravating factors were found, there was a lack of agency accountability, and the penalty was only assessed as to one group of records as opposed to per record or for multiple groups). The trial court's findings as to the *Yousoufian* factors and the penalty amounts should be affirmed.

E. The Trial Court Did Not Abuse Its Discretion in Striking the Three New Declarations Submitted on Reconsideration.

As Marysville notes, a trial court's decision regarding evidence submitted with a motion for reconsideration is reviewed for abuse of discretion. *See, e.g., Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010) (appellate court reviews a trial court's order on reconsideration for a manifest abuse of discretion). Marysville claims that the trial court abused its discretion in striking the three declarations it filed for the first time in conjunction with its Motion for Reconsideration. But Marysville has never claimed that the information contained in these declarations could not have been provided earlier; indeed, the untimely nature of the declaration was the basis for the trial court's refusal to consider them. CP

8-9 (striking the three declarations as they “constitute new evidence that could have been presented at the time the court was considering the original Motion, and the Court therefore refuses to consider them”).

A party may not rely on new evidence or testimony as a basis for seeking reconsideration when that evidence or testimony could have been provided at the summary judgment phase. *See, e.g., King v. Rice*, 146 Wn. App. 662, 672, 191 P.3d 946 (2008) (affirming trial court’s ruling that document did not support reconsideration because there was no showing it could not have been offered prior to judgment); *Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland*, 95 Wn. App. 896, 907, 977 P.2d 639 (1999) (affirming trial court’s refusal to consider evidence that was available prior to summary judgment but not offered until the filing of the motion for reconsideration). Moreover, given that all of the issues called out in the three stricken declarations – “plausible deniability,” Strategies’ relationship with the Tulalip Tribe, Marysville’s intent – were in play at the summary judgment stage, the trial court did not abuse its discretion in refusing to consider the reconsideration declarations.

V. CROSS-APPEAL

A. Cross-Assignment of Error

The trial court erred in reducing Cedar Grove's fee request by forty percent in its October 18, 2013 Order Granting Plaintiff's Motion for an Award of Costs and Attorney's Fees.

B. Issue Pertaining to Cross-Assignment of Error

Did the trial court err in reducing Cedar Grove's attorney fee award by forty percent when its rationale for doing so was manifestly unreasonable and based on untenable grounds?

C. Argument on Cross-Appeal

1. The Trial Court Abused Its Discretion in Reducing Cedar Grove's Attorney Fees by 40 Percent.

A party who prevails against an agency in a PRA lawsuit "shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action." RCW 42.56.550(4). An award of costs and reasonable attorney fees is mandatory. *Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn. App. 110, 122, 231 P.3d 219 (2010) ("fees and fines under the PRA are mandatory when a government agency wrongfully denies disclosure"). "The lodestar method is appropriate for calculating attorney fees under the PRA." *Sanders v. State*, 169 Wn.2d 827, 869, 240 P.3d 120 (2010). A court using the lodestar method multiplies the reasonable attorney billing rate

for the prevailing party by the reasonable number of hours worked. *Id.* The appellate court reviews the fee award for abuse of discretion. *Id.* A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 758, 213 P.3d 596 (2009).

While it may disagree with the trial court's decision to reduce its counsel's hourly rates or reduce the amount of time that Cedar Grove's counsel spent on particular tasks, Cedar Grove concedes that the trial court had the discretion to do so. The trial court's decision to also reduce the total number of hours billed by Cedar Grove's attorneys across the board by forty percent was, however, manifestly unreasonable and based on untenable grounds. Specifically, the trial court found that:

The total number of hours billed in this case warrant a reduction because they are generally excessive for the type of case and contain wasteful, duplicative hours. Given the relatively straightforward nature of the case, the fact that the hours billed by Plaintiff's counsel were double those billed by the City's counsel, and the large number of hours billed after Cedar Grove was successful on its summary judgment motion (and therefore knew that it was entitled to an attorneys' fee award), the Court determines that the total number of hours billed by Cedar Grove's counsel . . . should be reduced by 40 percent.

CP 5. Each one of these rationales is unreasonable and untenable.

First, a forty percent reduction based on "the relatively straightforward nature of the case" is manifestly unreasonable and based

on untenable grounds. Cedar Grove agrees that this case should have been relatively straightforward. Had Marysville simply produced the requested documents up front or provided timely notice to Cedar Grove of the fact that Strategies was withholding literally thousands of pages of otherwise responsive documents under the theory that those documents were not public records, hundreds of hours in attorney time could have been avoided. That is, unfortunately, not what occurred. Cedar Grove's counsel was instead forced to spend hundreds of hours²³ attempting to determine why Marysville's productions did not contain documents relating to core issues that should have been uncovered by the PRA requests at issue (again, the mailers and Marysville's work with Mr. Davis) and then pursue the documents that it eventually learned were still in Strategies' possession. The fact that Cedar Grove's actions were reasonable is confirmed by the trial court's failure to point to any specific activities pursued by Cedar Grove that were unreasonable or that did not

²³ For example, more than 53 hours were spent researching and drafting the motion to compel, reviewing Marysville's and Strategies' responses to that brief, drafting the reply brief, and related tasks. *See* CP 378-80. More than 96 hours were spent reviewing the nearly 4,000 pages of records produced by Strategies on August 7, and incorporating that material into the penalties motion. *See* CP 380-81. Many more hours were spent subpoenaing Strategies for documents related to Mr. Davis and the mailers, reviewing Strategies' initial November 2012 production in response to that subpoena, reviewing additional document productions in an attempt to locate the missing documents, and conferring with Strategies' counsel regarding the missing documents. *See generally* CP 368-78.

ultimately lead to the successful result achieved by its counsel. Yet the court found the case to be “relatively straightforward.” This was an abuse of discretion.

Second, a forty percent reduction based on the fact that Cedar Grove’s attorneys billed double the number of hours billed by Marysville’s attorney was manifestly unreasonable. The trial court completely disregarded the reasons for this doubling: the procedural posture of the case and Marysville’s and Strategies’ intransigence. Cedar Grove was the moving party for much of the briefing,²⁴ and as such filed both opening and reply briefs, whereas Maryville only filed one brief. In addition, as mentioned above, a large portion of Cedar Grove’s attorney’s hours were spent pursuing the documents in Strategies’ possession, reviewing those documents, and then incorporating the material in those documents into the motion regarding penalties. This was all time that Marysville, as the defendant in the lawsuit, did not have to expend. Therefore, the trial court’s comparison between counsel as a basis for reducing the award was an abuse of discretion.

Third, the court abused its discretion when it reduced Cedar

²⁴ Cedar Grove was the moving party with respect to its Motion to Compel Documents From Strategies 360, filed on June 26, 2013 (CP 1505-1518), and with respect to its Motion for Summary Judgment Regarding Penalties (CP 708-739).

Grove's fees by forty percent based on "the large number of hours billed after Cedar Grove was successful on its summary judgment motion (and therefore knew that it was entitled to an attorneys' fee award)." CP 5.

This rationale simply does not square with the facts or law of this case.

Although Cedar Grove was largely successful at the April 2013 summary judgment hearing,²⁵ obtaining a ruling in its favor with respect to 15 of the 22 documents at issue, the trial court further ruled in Cedar Grove's favor with respect to an additional 192 documents at the August 2013 hearing. *See* CP 15. These post-April 2013 fees, then, were related to successful issues and the trial court abused its discretion in excluding them. *See Sargent v. Seattle Police Dept.*, 167 Wn App. 1, 25-26, 260 P.3d 1006 (2011), *reversed in part on other grounds*, 179 Wn.2d 376, 314 P.3d 1093 (2013) (trial court abused its discretion when it excluded fees relating to successful issues simply because the fees were incurred after the hearing).

²⁵ Cedar Grove assumes that the summary judgment motion to which the trial court is referring in this ruling is the first summary judgment motion that was heard in April 2013, not the second summary judgment motion that was heard on August 30, 2013. Cedar Grove only sought a relatively small amount of fees incurred after the August 30 hearing (\$11,369.00, CP 384-85), and they were all incurred in either drafting the order from the hearing or drafting the fees motion. CP 384-85. Reasonable fees incurred in the drafting of a fee motion are recoverable, *see Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 378, 798 P.2d 799 (1990) ("time spent on establishing entitlement to, and amount of, a court awarded attorney fee is compensable"), and the trial court did not take any issue with this principle. Moreover, given that the entire fee award sought was \$271,711.00, and the fees sought after August 30, 2013 were less than 5 percent of that amount, using those post-August 2013 fees as a basis for a forty percent reduction would have been unreasonable and an abuse of discretion, in any event.

Moreover, the PRA is very clear that a prevailing plaintiff shall be awarded all reasonable attorney fees incurred in connection with the legal action, RCW 42.56.550(4), and the PRA is liberally construed. RCW 42.56.030. Reducing Cedar Grove's fee award based on the fact that a large amount of those fees were incurred after the April 2013 hearing, when those fees were incurred in connection with Cedar Grove's ultimately successful second summary judgment hearing, was an abuse of discretion.

VI. REQUEST FOR ATTORNEY FEES

Pursuant to RAP 18.1 and RCW 42.56.550(4), Cedar Grove requests its costs and fees on appeal. A prevailing person under the PRA is entitled to "all costs, including reasonable attorney fees, incurred in connection with such legal action." RCW 42.56.550(4); *see also Yousoufian*, 168 Wn.2d at 469 (because PRA plaintiff prevailed on appeal, he was entitled to recover reasonable attorneys' fees and costs incurred in connection with the appeal). Because Cedar Grove should prevail on appeal, pursuant to the arguments and authorities presented above, it should also be awarded its costs and attorney fees on appeal.

VII. CONCLUSION

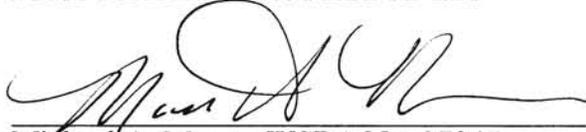
Cedar Grove had standing to assert its PRA claims. The trial court's findings that the fifteen records, the nineteen records, and the 173

records were subject to the PRA and improperly withheld was correct and supported by undisputed evidence. The trial court's findings regarding penalties on those three groups of public records were not an abuse of discretion. This Court should affirm the trial court's orders in these respects.

However, the trial court's reduction of Cedar Grove's attorneys' fees by forty percent was an abuse of discretion, as it was manifestly unreasonable and based on untenable grounds. The Court should reverse the trial court's order in this respect and remand for entry of an order granting Cedar Grove its attorney fees. The Court should also award Cedar Grove its attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 23rd day of May, 2014.

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP



Michael A. Moore, WSBA No. 27047
Sarah E. Tilstra, WSBA No. 35706

Howard M. Goodfriend, WSBA No. 14355
SMITH GOODFRIEND, P.S.

Attorneys for Respondent/Cross-Appellant
Cedar Grove Composting, Incorporated

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys for Respondent/Cross-Appellant Cedar Grove Composting, Incorporated herein.

2. On this 23rd day of May, 2014, I caused the document to which this certificate is attached, Brief of Respondent/Cross-Appellant Cedar Grove Composting, Incorporated, to be filed with the Clerk of the Washington State Court of Appeals, Division I, and served upon counsel of record in the manner indicated below:

Philip A. Talmadge
Talmadge Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
phil@tal-fitzlaw.com
Attorneys for Appellant/Cross-Respondent
Via Email and First Class Mail

Jeffrey S. Myers
Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S.
P.O. Box 1880
Olympia, WA 98508-1880
jmyers@lldkb.com
Attorneys for Appellant/Cross-Respondent
Via Email and First Class Mail

2014 MAY 23 11:14:11
COURT OF APPEALS
STATE OF WASHINGTON

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

DATED this 23rd day of May, 2014 at Seattle, Washington.


Donna Patterson