

No. 74536-1-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

**THEODORE ROOSEVELT HIKEL, JR.
resident, citizen, and registered voter,
in the City of Lynnwood, Washington, Appellant**

v.

**CITY OF LYNNWOOD,
a non-charter, municipal code city, Respondent**

BRIEF OF APPELLANT

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I. Assignments of Error

No. 1: The Trial Court Erred by Misinterpreting & Misapplying PRA Sec. .520(3), “Reasonable Estimate” of Time to “Fully Complete” Disclosure to City Letters #1 & #2 & Which Denied Ted’s PRA Rights for Judicial Review.....21

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II. Case Statement

1. Procedure Summary. Eighty-four (**84**) days after Ted Hikel filed his records request, he filed a complaint and RCW 42.56.550 Motion to Show Cause to enforce the Public Records Act (PRA). Hearing was set for September 29, 2015. After four (4) continuances (three (3) requested by Defendant Lynnwood and one (1) due to a judge recusing himself), a hearing was finally held on December 8, 2015. Defendant Lynnwood (City) filed a **response only** to the **amended** RCW 42.56.550 Show Cause Motion on Friday, **December 4, 2015**. The city **never** answered the complaint. Ted Hikel filed and served timely on **December 7, 2015**, a **reply** to Defendant Lynnwood's response as authorized by local court rule **SCLR 6**. See Appendix A-1. The trial court denied relief and dismissed the complaint and motion by memorandum dated **December 9** and filed **December 10, 2015**. CP 8-12. Appeal was filed **January 6, 2016**. CP 1-7.

Case Statement – Context

2A Context: PRA Policy Mandates Reasonable Rules &

Regulations for Disclosure Facilitation & Methods. The PRA requires all “local agencies” like Defendant Lynnwood to adopt and enforce reasonable PRA rules to “facilitate,” and show its “methods,” to process records requests:

RCW 42.56.100: “Agencies shall adopt and enforce reasonable rules and regulations . . . consonant with the intent of this chapter . . .”

Several founders of the state Public Records Officer Association (CP 71, Ex. G) wrote Chapter 6: *How Agencies Should Respond to Public Records Requests, Public Records Act Deskbook* (WSBA 2d.) (2014), they give the following excellent practical advice to ensure city PRA compliance:

“6.3 General Requirements for Records Management and PRA Compliance.

Requirements for agencies to ensure compliance with the PRA are discussed below.

(1) Before the Request

Compliance with the PRA does not begin when someone makes a PRA request. It is more effective for an agency to take proactive measures than to explain to a requestor (or court) after-the-fact fact why it lacked proper rules and procedures.”
Emphasis added.

Twenty-four (24) months before Ted filed his records request, our Supreme Court rendered an opinion in Resident Action Council (RAC) v. Seattle Housing Authority, 177 Wn.2d 417, 431–432, 300 P.3d 376 (2013), that says a court’s role is giving clear and workable guidance to agencies that:

“The PRA requires each relevant agency to **facilitate** the full disclosure of public records to interested parties. An agency **must** publish its **methods** of disclosure and the rules that will **govern** its disclosure of public records. RCW 42.56.040(1). A requester cannot be required to comply with any such rules not published unless the requester receives actual and timely notice. RCW 42.56.040(2).” Emphasis added. See Appendix A-2, #2, Disclosure and Production Under the PRA at 1-2.

Without Defendant Lynnwood setting forth, adopting, publishing, and “prominently” displaying, its *reasonable* rules and regulations show how it **facilitates** PRA requests and the **methods** it uses, it is chaos and confusion for citizens and other requesters. Citizens have no other way to know what and when critical steps, like pre-delivery notification of “available” disclosures will actually happen. Now they are left with relying upon whatever past historical processes they have been subjected to. Accordingly, city compliance is haphazard at best, especially on large or significant disclosures. Non-compliance is clearly symptomatic of the lack of, or the failure to follow or enforce, PRA mandated *reasonable* rules

and regulations, showing city methods and how it facilitates records requests. Without those in place -- **before a request comes in**, it's literally impossible to enforce them, thereby protecting citizen rights to access public records. Without them there is very little criteria for judicial review of agency performance. Defendant Lynnwood's failure to meet its duty to have current, updated, *reasonable* rules and regulations clearly stating its administrative methods of disclosure was properly addressed in Ted's complaint, two (2) motions, and three (3) memorandums.

2B Context: Complaint - City of Lynnwood's PRA Duty:

"Shall" Adopt and Enforce Reasonable Rules & Regulations.

The legal issue of Defendant Lynnwood's failure to adopt and enforce reasonable rules and regulations was properly alleged in the complaint:

"LOCAL AGENCY PUBLIC RECORDS ACT DUTIES, RESPONSIBILITIES AND REMEDIES – Rules and Regulations.

"Rules and Regulations. RCW 42.56.100 expressly requires that a **local agency 'shall adopt and enforce reasonable rules and regulations . . .'** and '[s]uch rules and regulations shall provide the **fullest assistance to inquirers** and the **most timely possible action on requests** for information." Emphasis added. CP 262.

This allegation together with several others, were specifically incorporated by reference and thus included into the section, **“CLAIMS AND CAUSES OF ACTION – Violations of the Public Records Act, RCW 42.56. CP 265.**

Defendant Lynnwood **never** answered this allegation of PRA violations in the **complaint**, **nor** respond to the same issue(s) raised in the **RCW 42.56.550 Motion to Show Cause, and Amended Motion.**

2C Context: No Valid City PRA Procedures. Defendant Lynnwood adopted in **June 2005**, 10 years ago, it's **only** public records disclosure rules and regulations as mandated by the PRA. CP 293-297, Ex B. These old, unreasonable procedures **only cite RCW 42.17 sections** as authority but these were **repealed** effective July 2006. Defendant Lynnwood's **2005** policy/procedures have: **never** been **updated** since.

2D Context: No PRA Mandated Citizen Appeal Process – A Violation. All cities like Defendant Lynnwood have a PRA mandatory duty since 2006 (and for prior decades by RCW 42.17.320), to provide all citizens an administrative appeal procedure for apparent or actual denials of disclosure or inspection of public records. RCW 42.56.520. This is s PRA violation. An

internal appeals process example is Kirkland's *KPRA Rules .160 Steering Committee*.

Case Statement – Chronology

3A June 22, 2015: City Accountability - Ted Hikel's Records

Request. On June 22, 2015, Ted Hikel filed a public records request (PRR) #15PRR0239 to review all emails of an elected official and his staff assistant from January 1, 2014, through June 22, 2015. CP 261, 232, 193. Major city issues involving millions of dollars in taxes, program expenditures, and accountability, were his concerns.

3B City Letter #1: June 29, 2015 – A PRA Violation. On June 29, 2015, the City's "5 Day Letter" (Letter #1 CP 166, Ex 1) *falsely* stated that an automatic computer count determined there were 138,000 disclosable emails. CP 239, 261. This was a huge miscalculation, Public Records Officer (PRO) Karber requested clarification. CP 166, 168. City Letter #1 **failed** to provide Ted with the PRA **mandated:**

*“ . . . **reasonable estimate** of the time the agency [city] . . . will require to respond to the request” RCW 42.56.520(3).*
Emphasis added.

Instead, Defendant Lynnwood's Letter #1 said, "Once we receive your reply we will notify you of an anticipated date of **completion.**"

(Emphasis added. CP 166) thereby **pre-conditioning** Ted's PRA rights to receive in that initial **Letter #1 BOTH** an acknowledgement of his request **AND** a "**reasonable estimate**" (an end date) to **fully complete** his request. **RCW 42.56.520(3)**. Ted **never** received from the city the PRA **mandated "reasonable estimate"** of time until three (3) months later – **after** it was sued. CP 290. The city attorney's **September 18, 2015** email gave an estimate of **October 19th**. CP 290. On **November 24, 2015**, it amended that to **December 18th**. CP 225.

3C July 10, 2015: City Letter #2 – Again a PRA Violation for Refusing to Give a Reasonable Estimate of Time to Fully Complete Disclosure. In **Letter #2**, the City admitted its huge miscalculation. It **failed** to include the date parameters contained in Ted's request. CP 238-239. But for its **own** huge unilateral error, the city already **knew** by at least **June 29, 2015**, **exactly 27,560** emails were disclosable. It **knew exactly** where emails were **located, assembled, and very easily accessible** – in its **own** computer system. CP 170, 239. City **Letter #2** occurred after "clarification" between Ted and the City PRO. CP 168. But, the City **AGAIN failed** to include the PRA **mandated "reasonable estimate"** of time needed to **fully and completely respond** to

Ted's PRR. CP 170, 238. **RCW 42.56.520(3)**. Letter #2 only stated tentatively when installments might begin. CP 238, 170. It was not a pre-delivery notification that any installment was actually "available" or "ready to pick-up." It was, however, the last city communication (CP 233) about Ted's **June 22, 2015**, request (#15PRR0239) before this lawsuit was filed and served (**Sept. 11 & 14, 2015**). The City never sent Ted its normal, regular pre-delivery notification for **August 6th**. As Ted stated:

"Lynnwood's Past And Present Normal Process is to Give Notice of the Availability [of] Records and or Installments. The city has historically and currently maintained as a normal procedure that [it] gives notice of the availability of records and/or installments, and no such "normal" notice was given to me about any records availability on or about August 6, 2015." All emphasis in original text. CP 88.

The city PRO admitted in her **September 17th** letter that Ted's "**first installment**" would finally be available for review on Friday, **September 18th** 3 months after he filed his request. CP 204, 158, 290. A second installment would be available for review on Monday, **September 21st**. CP 206, 158, 290. See fact chronology regarding notifications of disclosure readiness, *infra* at 11-13.

3D September 1, 2015: Ted's Respectful Visit & Inquiry to City Hall. On **September 1st**, 70 days after his **June 22** PRR (and **25 days after** Ted *should have* received pre-delivery notification for

the **August 6th** installment), Ted personally visited city hall to inquire about why there had been no pre-delivery notification that a disclosure installment was "**available**". CP 233. The customer service front desk staff, responsible for giving out records disclosures and charging copying fees, told Ted **no disclosures at all were available to pick up.** CP 233. Since no person was available to discuss his inquiry, Ted left a letter in his best polite Nordstrom style asking:

"Please let me know why there has been a delay in your processing of this request." CP 241. Ex. 3. Emphasis added.

Ted **never** received a response from the city or PRO Karber to his visit or letter until two (2) weeks later on **September 16th** – 3 days **after** this lawsuit was served.

3E Defendant Lynnwood's Documented "Normal, Regular 'Pre-Delivery' Notification Process." It is undisputed and very clearly documented in PRO Karber's **December 2, 2015**, declaration and exhibits, what the City's **normal, regular pre-delivery notification** process is (both past and current) using letters, emails, and/or telephone. A series of ten (10) notices (and/or confirmations) that installments were "**available**" or "**ready for**

pickup” was shown to the trial court in Hikel **Exhibit #12**. CP 114, 90, 88. See Appendix A-3.

3F “Pre-Delivery” Notifications: Excerpts & Examples

Excerpts from PRO Karber’s declaration (12/2/15) shows Defendant Lynnwood’s actual normal, regular pre-delivery notifications from September to November 2015, are set forth below.

Notification First Letter (9/17/15). PRO Karber’s declaration explains:

“On September 17, I *wrote* to plaintiff and *informed* him that the ***first installment*** of records was ***available*** for him to *review* on a computer at city hall.” Emphasis added. CP 158. [PRO Karber’s letter states:]

“Your ***first installment*** for your record (sic) request to visual (sic) inspect... [communications] sent by and received by Council President... and Council Assistant... from January 1, 2014 to June 22, 2015. [sic – incomplete sentence.] The records have been placed on a DVD and a computer is ***available*** for ***your use*** at city hall.” Emphasis added. CP 204, Ex. H.

Notification Second Letter (9/17/15). PRO Karber’s declaration explains:

“On the same date, I wrote a ***second letter*** to plaintiff *informing* him that *another installment* of records was ***available***... [and that it]... would be ***available*** on September 21 (Monday), and subsequent *installments* would be ***available*** on a weekly basis.” Emphasis added. CP 158. [PRO Karber’s letter states:]

"An **installment** pertaining to your record (sic) request to visual (sic) inspect... [communications] sent by and received by Council President . . . and Council Assistant . . . from January 1, 2014 To June 22, 2015 is **available** for **your review**.

The records have been placed on a DVD and a computer is **available** for **your use** at City Hall." Emphasis added. CP 206, Ex. I.

Notification Email 10/9/15: "Attached is correspondence from Finance Dir. Springer regarding records request number 15PRR0239 **installment schedule**. I will also send a copy of this to you via **regular mail**." Emphasis added. CP 216-217, Ex. M.

Notification Email 10/16/15: "October 9th the City provided you **notice** that your next **installment** of records... would be **available** on Monday, October 19th. This is **confirmation** that the **installment** will be **available on time** at City Hall." Emphasis added. CP 218.

Notification Email 10/23/15: "This is your **notice** that another **installment** of records... is now **available** . . ." Emphasis added. CP 219.

Notification Email 10/30/15: "This is your **notice** that another **installment** of records... is now **available** . . ." Emphasis added. CP 220.

Notification Email 11/5/15: "Another **installment** of records... is now **available**... you **may pick it up**... at your **convenience**." Emphasis added. CP 221.

Notification Email 11/13/15: "We have another **installment** of records... they are **ready for you to pick up**... at your **convenience**." Emphasis added. CP 223.

Notification Email 11/20/15: "We have another **installment** of records... they are **ready for you to pick up**... at your **convenience**." Emphasis added. CP 224.

Notification Email 11/24/15: “15PRR0239. . . another ***installment*** of these records will be ***available*** for ***you to pick up*** at City Hall on Monday. We believe the ***final installment*** of records for this request will be completed on or before ***December 18th***, 2015.” Emphasis added. CP 225.

This series of actual city “***pre-delivery***” notifications are perfect examples of what the ***current and past*** city practice has been to advise requesters, like Ted Hikel, that disclosures were ***actually*** “***available***” and “***ready for pick up***” despite whatever tentative, informal timelines may have first been given. Pre-delivery notification is **simple common sense**, but no reasonable rules and regulations exist for notifications.

4 So, What Went on in City Hall After Ted's September 1st Visit & Letter ?

4A September 5–7, 2015: Labor Day Weekend PRO Works But No Communication to Ted. After Ted visited city hall and left a written inquiry on **September 1**, 2015, PRO Karber worked 8.5 hrs. overtime on Ted's **June 22nd** PRR on Labor Day Weekend. CP 155. Literally, she says that “during that time” she somehow discovered that the whole “***allegedly ready***” **August 6th** installment would ***not function*** and was ***totally worthless***, because “the **emails could not be viewed** “ CP 155. PRO Karber for a month did ***not*** give Ted any notification that any August installment was

“available” or “ready to pick-up,” For a month, she intentionally did not advise the customer service front desk staff that any installment existed. No August 6th installment disclosure disk was ever shown to the trial court. And, now, conveniently the PRO somehow determines that this “secret” installment was **totally nonfunctional**. – **worthless!** This “story” is bizarre, and not credible. We believe no bona fide August 6th existed.

4B September 8, 2015: AFTER Labor Day Weekend – The PRO Still Will Not Speak with Ted. PRO Karber admits she worked on Ted’s June 22nd (#15PRR0239) during Tuesday, including 2.0 hr. overtime. CP 155. While holding one, two or three, allegedly fully completed June request installments, she then worked on, and completed, out of order, a different, unrelated July records request (#15PRR0273) filed by Ted three weeks after the June 22nd request. Karber then “wrote to him [Ted] regarding that [July] request” taking that **totally out of sequence** and ignoring the **alleged** and **supposedly completed** installment for the June 22nd request, but which was withheld, unknown, and virtually secret. CP 155-156, 177 Ex. F, City Log @ 12. But **again** she still would not contact Ted or respond to his **September 1st**.letter.

4C September 11 & 14, 2015: Lawsuit Filed & Served. Since no statutorily mandated **internal** city administrative *appeal* process was available to help solve the problem, and not knowing any “reasonable estimate” of time when disclosure would be *fully complete*, and given the City’s literal, **willful wall of dead silence**, Ted had no option but to bring this lawsuit to enforce his Public Records Act rights. Service of this action on the City was first attempted late Friday afternoon, **September 11, 2015**. CP 40. No city employee authorized to accept service could be located. Front desk staff said they would notify their supervisor and PRO Karber to be available for service on Monday morning **September 14, 2015**. She was, and she did. CP 40.

4D September 14, 2015: The PROs “Last Minute” Pre-Delivery Notification Letter. PRO Karber who was alerted to expect service of this lawsuit that Monday morning, declares (surprise!) that she was just then sitting down to draft a *pre-delivery notification* letter to Ted to “*inform him* that an *installment* was *available* for his review.” Emphasis added. CP 155.

4E September 14, 2015, Same Day of Lawsuit Service – Finally Real Action Begins to Happen. PRO Karber’s declaration admits the “*same day*” the lawsuit was served, she met with

Information Technology staff to develop a "method" for requesters "to review records before purchasing copies." CP 157.

4F September 16, 2015: 2 Days AFTER Service –

Developing a "Method" for Email Review. PRO Karber met again with Information Technology about developing and "to set up" a "method" for a **computer** to review emails. CP 157.

4G September 17, 2015: 3 Days AFTER Service – New

Computer Set Up. PRO Karber met again with Information Technology staff who "**located** an available computer ... and **set up** the computer in a public area for citizens." CP 157-158. Also, on **September 17th** PRO Karber wrote two (2) pre-delivery notification letters to Ted, which are shown, *supra*, at 11-13.

4H September 16-18, 2015: Post-Lawsuit Disclosure

Schedule. After the lawsuit started, the City Attorney contacted Ted's attorney **September 16-18th** to work out a tentative disclosure schedule. CP 288, 290-292, Ex. A. As expected, the City gave its normal, regular pre-delivery notification of when disclosures were "available" or "ready to pick up" beginning on **September 17th**.

Likewise, back on **July 10th (Letter #2)** Ted and the City also worked the same kind of tentative date when disclosure

installments might begin. But, the City did **not** or would **not**, include any mandated "reasonable estimate" of time to **fully complete disclosure**. RCW 42.56.520(3). Then, the City failed, or arbitrarily refused, to give Ted the same past customary normal, regular pre-delivery notification for the **allegedly completed August 6th** installment, but which notice was provided **AFTER** this lawsuit began.

V. Argument: Legal Issues And Analysis

1. Purpose Of The Public Records Act (PRA). In April 2016, our state Supreme Court stated the purpose of the PRA in John Doe A v. Washington State Patrol, ___ Wn.2d ___, ___ P.3d ___ (2016), Docket No.90413-8 at 6:

“In 1972, the people enacted [**Initiative 276**, nka the PRA by 72%], Chapter 42.17 RCW, by initiative. *Dawson v Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993). The public records portion was re-codified at Chapter 42.56 RCW. It is a “strongly worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The PRA’s primary purpose is to foster governmental transparency and accountability by making public records available to Washington’s citizens. See *City Of Lakewood V. Koenig*, 182 Wn.2d 87, 93, 343 P.3d 335 (2014).”

2. Standard Of Review. The trial court heard this case solely on affidavits and without testimony. John Doe A, Id. at 5-6, stated the standard of review for this case:

“We review actions under the PRA . . . de novo. **RCW 42.56.550 (3)**. *Spokane Police Guild*, [112 Wn.2d 30, 34 – 35, 769 P.2d 283 (1989)]. ‘Where the record consists only of affidavits, memoranda of law, other documentary evidence, and where the trial court has not seen or heard testimony requiring it to assess the witnesses’ credibility or competency, we ... stand in the same position as the trial court.’ *Dragonslayer, Inc. v. Washington State Gambling Commission*, 139 Wn.App. 433, 441 – 42, 161 P.3d 428 (2007) [two citations omitted].”

3. “Strict Compliance” Standard for Review of City of Lynnwood’s Lack of PRA Compliance. Since 1978 in Hearst Corp. v. Hoppe, 90 Wn.2d at 131–32, 580 P.2d 246 (1978), our State Supreme Court has held in a long, unbroken line of cases that the measurable standard for judicial review of agency performance is “strict compliance” with the express PRA policies, duties and construction. . **Division III**, Court of Appeals, in Zink v. City of Mesa, 140 Wn. App 328, 337, 166 P.3d 738 (2007) held that the standard of review for agency conduct was “strict compliance” – **NOT** “substantial compliance” or some other lesser standard for PRA compliance. It stated:

“The central issue in this case is whether the trial court erred as a matter of law by applying a substantial compliance standard to its review of the City’s actions in response to the Zink’s public disclosure requests. **We hold this was error.**” Emphasis added.

4. Burden Of Proof. Lynnwood has the **burden of proof** to show a **statutory basis** for delaying its disclose “in accordance with a statute that exempts or prohibits disclosure . . . of specific information or records” regarding Ted Hikel’s PRA records request. **RCW 42.56.550(1).**

5. Model Rules: Role & Purpose, WAC Chapter 44-14.

The legislatively mandated (RCW 42.56.570(2) and (3))

Model Rules and Comments at WAC Chapter 44-14 have

several goals:

“The comments are designed to explain the basis and rationale for the rules themselves as well as provide broader **context and legal guidance**.” WAC 44-14-00002.

“The overall goal of the Model Rules is to establish a *culture of **compliance*** among agencies . . . by ***standardizing best practices throughout the state***.” WAC 44-14-00001. Emphasis added.

Where a city had the PRA duty to handle disclose of digital electronic ***email records*** just like paper records, **Division I**, Court of Appeals, reviewed *Model Rule Comment* WAC 44-14-05001 and concluded: “[W]hile not binding, the model rules adopted . . . in chapter 44 – 14 [WAC] , offer useful guidance.” And, furthermore:

“Although the city has ***no express obligation*** to provide the requested email records in an electronic format, ***consistent*** with the ***statutory duty to provide the fullest assistance and the model rules***, on remand the trial court shall determine whether it is reasonable and feasible for the city to do so.” Emphasis added. Mechling v. City of Monroe, 152 Wn.App. 830, 849-850, 222 P.3d 808 (Div. 1, 2009).

Since 2006 the Model Rules have been cited “numerous” time by courts as good legal guidance in appellate cases. WSBA Public Records Act Deskbook 2d. (2014) Sec. 6.3(1)(a) at 7.

6. Assignment of Error No. 1: The Trial Court Erred by Misinterpreting & Misapplying PRA Sec. .520(3), “Reasonable Estimate” of Time to “Fully Complete” Disclosure to City Letters #1 & #2 & Which Denied Ted’s PRA Rights for Judicial Review.

Facts: The case chronology, *supra* at 7-10, clearly shows that Defendant Lynnwood **never** gave Ted in either **Letter #1 or #2**, the PRA expressly mandated “reasonable estimate” of time (an end date) to fully complete disclosure.

7. Issues & Law. The PRA Expressly Mandates a City Duty to Respond & With Limited Options. The PRA is very explicit in the structured and specifically limited options Defendant Lynnwood has to respond to Ted's PRR in its 5-Day initial response letter. Of four (4) current PRA authorized response options, **#3 is first** examined.

RCW 42.56.520. Prompt responses required.

“Responses to requests for public records shall be made **promptly** ... Within **five** business days ... an agency . . . **must respond by either:**

- ...
(3) acknowledging that the agency ... has received the request **AND providing a reasonable estimate of the time** the agency ... will require to respond to the request;”

All caps and emphasis added.

Division I, Court of Appeals, interpreted exactly on point, PRA Sec. **.520(3)** (formerly “Public Disclosure Act (PDA)” .320(2)) in Ockerman v. King County Dept. of Development, 102 Wn.App 212, 6 P.3d 1214 (2000). The court quoted “PDA” Sec. .320(2) and concluded:

“ . . . We do **not** construe a statute that is clear and unambiguous on its face . . . Id. at 216.

“RCW 42.17. 320 [now 42.56.520] is unambiguous. The only requirements under option (2) [now option .520(3)] are that the agency acknowledge that it received the request **AND** provide a reasonable estimate of the time it will require to comply with the request.” Id. at 217. All caps and emphasis added.

8. Defendant Lynnwood Has an Express Duty & MUST

Respond as Directed by the PRA or It's a Violation. Division

3I, Court of Appeals, in Smith v. Okanogan County, 100 Wn.App 7, 12–13, 994 P.2d 857 (2000) stated:

“When an agency receives a request for disclosure, **it must respond as directed by statute**. . . . When an **agency fails to respond** as provided in RCW 42.17. 320 [now 42.56.520] it **violates** the act and the individual requesting the public record is entitled to a statutory penalty. Doe I v. Washington State Patrol, 80 Wn.App 296, 304, 908 P.2d 914 (1996). All emphasis added.

A9. PRA Sec. .520(3) “Reasonable Estimate” Means Time Needed to “Fully Respond” – Fully “Complete” the City

Response. The Model Rule and WSBA Deskbook both make very clear that a “reasonable estimate” means the **total time** needed to “**fully respond**,” – to **fully “complete”** a response.

“WAC 44–14–04003 Responsibilities of Agencies Processing Requests.

...
(6) Provide a “reasonable estimate” of the time to fully respond.

Unless it is providing the records or claiming an exemption from disclosure within the five business day period, an agency **MUST** provide a reasonable estimate of the time it will take to **fully respond** to the request. RCW 42.17.320, 42.56.520. **Fully responding** can mean **processing the request** [and/or] determining if the records are **exempt** from disclosure.”

...
An estimate can be **revised when appropriate ...**” All emphasis added.

WSBA Public Records Act Deskbook (2d. 2014), Sec. “6.5 Developing a Reasonable Time Estimate, at 16:

“... When an agency cannot **complete** its response within the five day period and needs no clarification, the agency can take a reasonable amount of time to **complete** the request, but **MUST** provide this “reasonable” time estimate **to the requestor**.”

(1) Preliminary steps

The reasonable time estimate should include ... the **date the agency estimates the request will be completed**.” Emphasis added.

Comment: With some larger requests, the **completion date** will be fairly speculative at an early stage, and therefore an exact date is not required. **Nevertheless, some time range should be included**. The agency may want to highlight the

speculative nature of the estimate and provide a date when it would expect to have a more accurate estimate. For any large request, however, original estimates may be revised frequently.” All caps and other emphasis added.

Summary. The trial court *Analysis Item A at CP 10*, confuses the unjustified extension in **Letter #1** with the tentative installment date in **Letter #2**, neither of which strictly comply with the PRA requirement of a “reasonable estimate” of time -- an end date -- for the city to “fully respond” and “complete” were the other provisions of RCW 42.56.520. Failing twice to give Ted a reasonable time estimate means he was denied his PRA rights to have the reasons for an extension and the amount of time, judicially reviewed under RCW 42.56.550(2). Failure to strictly comply and denying a requestor their PRA rights are both violations. Smith, Id. at 12-13.

10. Assignment of Error No. 2: The Trial Court Erred by Misinterpreting & Misapplying PRA Sec. .520, Regarding “Clarification” of Requests & Approving What the City of Lynnwood Did.

Issues & Law. RCW 42.56.520 only authorizes four (4) options for an initial 5- day response letter. (Options in brief: (1) provide the records; (2) refer the requestor to the city website; (3) acknowledge the request **AND** give an estimate for additional time to respond; and (4) deny the request.) There is no separate, independent 5-

Day “response” option to **only** do a “clarification.” But, Defendant Lynnwood created one more, but unauthorized response option. In its old 2005 “Policy/Procedures” at page 3, para. #4, bullet #4, CP 295, Appendix A-4, the city created an unauthorized response option of “**Request clarification of the request.**” To increase confusion, it also added one entirely different and circular factor to justify a time extension for “clarification.”

PRA Sec. .520 says a factor for additional response time is “the need to clarify the **intent** of the request.” Emphasis added. However, Lynnwood’s old 2005 procedures in bullet #1 of para. #5, page 3, CP 295, Appendix A-4, misquotes PRA Sec. .520, and instead, it unilaterally drops the word “**intent**” leaving it to say just: “the **need** to clarify the request.” But, that is perfect circular reasoning that: if the city has a “need to clarify the request,” then, all it **needs** is the “**need** to clarify the request.” **Not** to clarify the “**intent**” of the request, but apparently any conceivable and unidentified need to clarify the records request will do. This does not “strictly” comply with the PRA. It is not reasonable.

Second, to justify any clarification extension:

“(7) ... An agency can **only** seek **clarification** when the request is **objectively “unclear.”** Seeking a “clarification” of an **objectively**

“clear” request **delays access** to public records.” Emphasis added. WAC 44-14-04003(7).

Ted’s request was for emails during a specific period which were exactly countable, already located and assembled in the city’s own computer system. His request was crystal “clear.” The clarification and resulting access delay was not justified.

Third, there is no “size” of disclosure *factor* in Sec. .520 to justify a delay or extension of time for clarification. “Size” and other relevant factors could be properly adopted and enforced, published and prominently displayed, in the city’s reasonable rules and regulations, but that is not remotely the case here.

This is unreasonable and was not *strict compliance with the PRA*.
It is a violation.

11. “Size” of Disclosure is No Factor for Additional Time for Clarification. PRA Sec. .520 lists only four (4) factors for an extension. (Options in brief: (1) clarify request intent; (2) locate and assemble records; (3) notify third parties; and (4) determine applicable exemptions.) Defendant Lynnwood has only three (3) of four (4) in its procedures.

City **Letter #1** (6/29/15) violates the PRA Sec. .520, because it states, in part:

“Due to the significant number of records (about 137,000 emails) involved with this project, we are asking for a clarification of the records you are seeking. **RCW 42.56.520(4)**. Emphasis in original text. CP 166, Ex. 1.

City **Letter #1** says a clarification is justified because of the size of the disclosure (which was the city's huge miscalculation). **Letter #1** also cites RCW 42.56.520(4) as authority backing up this clarification demand.

12. The “Fatal” Error in Letter #1 Extension of Time - Citing RCW 42.56.520 (4). First, there is nothing in Sec. .520(4) that remotely relates to extensions of time or in the factors related thereto. It is the fourth (4th) response option, and it says: “**denying the public record request.**”

Please remember, Defendant Lynnwood's old **2005** “Policy/Procedures” Have Not Been Updated regarding recodifications in 2006, subsequent legislative PRA amendments like the recently added response option allowing referral to the city website.. So, Defendant Lynnwood has been telling requesters for years that it has authority to have an extension of time for clarification based upon **nonexistent** PRA authority.

Summary. The issues above are all PRA violation for failure to “strictly” comply or engaging in processes not authorized by the PRA. *Zink v. Mesa*, Id. *Smith*, Id.

The trial court erred. by concluding that Defendant Lynnwood was **diligent** in processing public records requests, but that cannot be true: (1) while engaging in request processing **not** authorized by the PRA; (2) during an extension of time: (A) based on false legal authority; (B) **not** based upon any legal factor authorized by the PRA (merely disclosure size); (C) during the time Defendant Lynnwood does **not** have current, reasonable rules and regulations to process public records requests; and shows no meaningful “methods” or ways the city “facilitates” records requests. AS this court has said:

“No interpretation of this [PRA] statute, no matter how liberal, allows this court to modify by **judicial fiat** the plain wording of the statute.” *Ockerman*, Id. At 218.

Defendant Lynnwood’s pubic records “Policy/Procedures” are illegal and unreasonable.

13. Assignment of Error No.3: The City of Lynnwood Failed to Give Ted Hikel Its Customary & Normal Pre-Delivery Notification of Disclosure Availability Which is Not Providing the “Fullest Assistance to Inquirers,” Nor the “Most Timely Possible Action on Requests, and the Trial Court Did Not Consider This Issue. and Wrongfully Dismissed the Complaint & Motion

Facts. The case chronology, *supra* at 11-14, clearly shows what Defendant Lynnwood's, historical and current, normal, regular pre-delivery notification is given to requesters when disclosures are "available" and/or "ready to pick-up."

Issues & Law. PRA policies **expressly** mandates a duty on Defendant Lynnwood shall provide the "*fullest assistance to inquirers*" and the "*most timely possible action on requests.*" PRA Sec. .100. It is undebatable and common sense that notification to requestors that disclosures are "available" and/or "ready for pick-up" is crucial to accomplishing all PRA policies and express duties.. Defendant Lynnwood has no rules or regulations about how, when, and by what methods, notifications are provided to requestors. Requestor's have no official guidance of when notifications are forthcoming, or not. All citizens, including Ted, are eft to rely upon the City's past customary (but arbitrary) normal, regular pre-delivery notification methods. However, no *normal, regular pre-delivery notification* was sent to Ted regarding the **August 6th** installment. See Hikel quote, *supra*, at 11. CP 88.

14. Notification Triggers a Claim/Review Period. Notification of the availability of disclosures is essential to protecting a requestor's rights. PRA Model Rules, WAC 44-14-04005 (1) state

that city notification triggers a “notification period” within which requesters must claim/review disclosures, or a requester’s rights can be negatively affected.

“Obligation of requester to claim or review records. After the **agency notifies the requester** that the records or an **installment** of them are **ready for inspection or copying**, the requester must claim or review the records or the installment. RCW 42.17.300/42.56.120.

...
If a requester fails to claim or review the records or any installment of them within the [claim/review period], the **agency may close the request ...**” Emphasis added, except title.

The trial court’s failure to deal with this issue means its order of dismissal should be reversed and the case remanded.

15. Assignment of Error No. 4: The Trial Court Erred Because It Did Not Consider Whether the City of Lynnwood Failed to Meet Its PRA Duty to “Adopt & Enforce” Reasonable Rules & Regulations to Ensure PRA Policies & Duties Regarding Processing Records Requests; and the Dismissal Order Should be Reversed & the Case Remanded.

Facts: The Case Statement–Context at 4-7 clearly describes the serious lack of City of Lynnwood reasonable rules and regulations as expressly mandated by the PRA to properly process records requests. The Case Statement–Chronology thereafter shows the many instances of failure to have reasonable methods to facilitate requests. This “rules” issue was in the original complaint, two (2)

show cause motions, Plaintiff's reply, and in two (2) evidentiary declarations.

16. Issues & Law. There MUST Be "Reasonable" City PRA Rules. The PRA expressly mandates at least 9 major policies, duties and particular aspects that should be in city PRA rules to both properly process records requests and notify the public. Our Supreme Court made very clear recently that:

"Our **interpretation** of the PRA's provisions will continue to be grounded in the PRA's **underlying policy and standard of construction**. ... [W]e endeavor to provide clear and workable guidance to agencies in so far as possible. [citation omitted.]

The PRA requires **each relevant agency to facilitate** the full disclosure of public records to interested parties. An agency **must publish its methods** of disclosure and the **rules** that will **govern** its disclosure of public records. RCW 42.56 040(1)." *Resident Action Council, Id.* Emphasis added. See full quote in Appendix A-2.

Division I, Court of Appeals, has provided PRA statutory interpretation rules in *Ockerman v. King County Dept. of Development*, 102 Wn.App 212, 216, 6 P.3d 1214 (2000).

"We assume that the legislature means exactly what it says, and we give words their **plain and ordinary meaning**. **Statutes are construed as a whole**, to give effect to all language and to harmonize all provisions." (Four (4) citations omitted.) *Id.* at 216. Emphasis added.

17. Expressly Mandated PRA Policies/Duties. A critical part of the "**whole**" PRA Chapter 42.56 RCW mandates that a city "**shall**

adopt and **enforce** reasonable rules and regulations,” and mandates certain PRA policies and agency duties in Sec. .100 (#1-5 below), along with other PRA requirements (#6-9 below), which *altogether*: (1) provide “full public access to public records; (2) “protect public records from damage or disorganization;” (3) “prevent excessive interference with other [city] essential functions;” (4) *shall* provide the “fullest assistance to inquirers;” (5) the “most timely possible action on requests;” (6) “*shall* establish mechanisms for the most prompt possible review of decisions denying inspection (Sec. .520);” (7) *shall* publish and “*shall* prominently display (Sec. .040 (1));” (8) *shall* “not distinguish among persons requesting records (Sec. .080); and (9) a “person may not in any manner be required to resort to, or be adversely affected by a matter required to be published or displayed (Sec. .040(2)).

Analysis. Defendant Lynnwood’s rules are lacking in the most fundamental PRA policies and requirements and are not reasonable. Some specific examples were discussed, *supra*, in Assignment of Error Nos.1-3. See City of Lynnwood procedures in Appendix A-4. CP 293-297, (Ex.. B). The only authority cited for its procedures is RCW 42.17 repealed in 2006. They have not been

updated to keep up with ten (10 years of legislative amendments (examples CP 73-76, Ex. H), and of course, judicial opinions interpretations. They do ***not mention*** even one (1) PRA policy. There are no rules showing city facilitation “***methods*** of disclosure and the comprehensive ***rules*** that will ***govern its disclosures*** of public records.” *RAC Id. at 432.* There are no methods or rules which: (1) establish city ***appeal*** mechanisms for denial and delay of inspection; (2) regarding notifications and communication with requestors; (3) no management approaches or standards to accomplish the PRA policies above, and/or suggested Model Rules guidance, including “protecting” records and “excessive interference” to agency functions (see *Zenk v. Mesa, Id., at 342,* using reasonable rules and regulations to control interference), and standard workload allocation issues; (4) ensure organization-wide operational commitment to PRA policies; (5) facilitate staff conferring about technical issues with requestors WAC 44-14-04003(2); (6) show implementation, facilitation,, and methods controlling and ensuring “promptness” of disclosures; or (7) allocation of adequate public resources (staff time, money and effort. The old **2005** procedures have never been updated usig any suggestions or guidance from the Model Rules adopted in 2006,

which seeks to standardize agency “best practices” statewide and encourage a “culture” of compliance.

18. RCW 42.56.040(1) Duty: Prominently Display PRA

Procedures. Defendant Lynnwood continually fails in its duty (#7 above) that it “**shall prominently display** ... at the *central office*” [city hall] its disclosure “**rules of procedure**.” CP 91. That is a PRA violation.

19. A Quality Comparison with the City of Kirkland. An “open government” seminar in fall 2015 gave the opportunity to compare the City of Kirkland PRA rules (KPRA) with the old, **2005** City of Lynnwood procedures. The Kirkland ordinance, resolution, and KPRA rules were presented to the trial court to show quality PRA rules, and are part of the record here. [See Kirkland Ordinance O-4414 (CP 61-67); Resolution R-4987 CP 68-69; and Kirkland KPRA Rules: .010(2) (Purpose) CP 45; .050 (Processing) CP 48-49; .060 (Managing Queues) CP 50; .070 (Categorization) CP 50; .080 (Standard Time Periods) CP 51-52; .090 (Waiting Factors) CP 52; .160 (Appeal/Steering Committee) CP 62.]

Summary. The old, 2005 City of Lynnwood records procedures are **not reasonable** because they don’t address any PRA policies, except an old RCW 42.17 version of the 5-day letter response

options, but that too is now out of date. That statute was repealed 10 years ago, and much has been amended since then,, i.e. exemptions. The old, unreasonable **2005** rules are “published” on the city website, but are **NOT** prominently displayed in city hall.

The trial court erred by not addressing the “rules” issue. Its order of dismissal should be reversed and the case remanded.

20. Assignment of Error No. 5: The Trial Court Erred Because It Did NOT Consider the Issue of the PRA Duty to “Adopt and Enforce Reasonable Reules and Regulationsz’ Properly Raised in the Complaint and Include and Cross-Reference in Five (5) Other Pleadings Before Plaintiff’s Reply Memorandum and Hearing.

21. Complaint: Lynnwood’s Duty: “Shall” Adopt and Enforce Reasonable Rules & Regulations. Notice of the legal issue of Defendant Lynnwood’s **failure** to **adopt** and **enforce** reasonable rules and regulations was properly alleged in the complaint, including a citation and quote of the applicable PRA Section (see CP 262).

“LOCAL AGENCY PUBLIC RECORDS ACT DUTIES, RESPONSIBILITIES AND REMEDIES – Rules and Regulations.

“Rules and Regulations. RCW 42.56.100 expressly requires that a **local agency ‘shall adopt and enforce reasonable rules and regulations . . .’** and **‘[s]uch rules and regulations shall provide the *fullest assistance to inquirers* and the *most timely possible action* on requests for information.’** Emphasis added. CP 262.

Furthermore, this allegation together with several others, were specifically incorporated by reference into the section, "**CLAIMS AND CAUSES OF ACTION – Violations of the Public Records Act, RCW 42.56**. CP 265. Defendant Lynnwood **never** responded to the complaint allegation of a PRA violation, **nor** did it respond to the same issue(s) raised in the **RCW 42.56.550 First & Amended Motions to Show Cause**.

22. RCW 42.56.550 [First] Motion to Show Cause – Duty:

“Shall” Adopt & Enforce Rules & Regulations. Defendant Lynnwood’s failures to comply with the PRA express mandatory duties, including having reasonable rules and regulations, are set forth **again** in the **RCW 42.56.550 Motion and Memorandum for Show Cause**, CP 251.

23. RCW 42.56.550 Amended Motion to Show Cause – Duty:

“Shall” Adopt & Enforce Reasonable Rules & Regulations. Defendant Lynnwood’s numerous failures to comply with PRA mandated duties are set forth a **third** time, and further discussed, in the **AMENDED RCW 42.56.550 Motion and Memorandum for Show Cause** (CP 312-313) which states:

“Duty: Provide the “Fullest Assistance to Inquirers” & “Most Timely Possible Action on Requests”. RCW 42.56.100

expressly requires that a local agency “shall **adopt** and **enforce** reasonable rules and regulations ... “ and “[s]uch rules and regulations **shall** provide for the **fullest assistance to inquirers** and the **most timely possible action on requests** for information.”

FACTS: Defendant City of Lynnwood’s only adopted “*Policies/Procedures – Disclosure of Public Records*” are those dated June 3, 2005, and are on the city website. In the paragraph #1, on page #1, those rules and regulations state:

“It is the **City’s policy** to handle **all requests** for public records **uniformly, fairly** and **expeditiously** and to ensure that the public interest will be fully protected.”

[PRA Violation] ... Nor does it remotely satisfy the City’s statutory duty to “... **Provide for the fullest assistance to inquirers and the most timely possible action on requests.**” **RCW 42.56.100.** This is a direct violation of Defendants PRA express duties, and Mr.Hikel’s rights under the PRA.” All emphasis in original text.

24. The Complaint was Evidence Relied Upon for Both Show

Cause Motions. Local court rule SCLR 7 requires a general

statement of “Evidence Relied Upon” to support a motion.. Both

Show Cause Motions stated:

“4. **Evidence Relied upon.** (SLCR 7(b)(2)(D)(4)). A. The evidence relied to support this motion includes (1) allegations and information contained in the “***Complaint for Enforcement of the Public Records Act.***” and the exhibits attached thereto, which are hereby incorporated by reference as though fully set forth herein.” See local court rules in Appendix A-1. All emphasis in original text. CP 245, 305.

25. Reply/Rebuttal Memorandum – Duty: “Shall” Adopt &

Enforce Reasonable Rules & Regulations. Defendant

Lynnwood’s numerous failures to comply with the mandatory duties

required by the PRA were addressed for a fourth (4th) time in the **Reply/Rebuttal Memorandum**, timely filed and served. A Reply memorandum on a motion is specifically authorized by Snohomish County local court rule (**SCLR 6**). See Appendix A-1. CP21-38.

26. Defendant Lynnwood's Failure to Meet Its Duty: "Shall"

Adopt & Enforce Reasonable Rules & Regulations

Besides raising the "rules duty" issue in the September Complaint, September motion, October motion, and the December Reply/Rebuttal memo, *evidence* of these old, 2005 unreasonable rules were also before the trial court in two (2) declarations: (1) Gough's **October 2, 2015**, declaration CP 293-297, Ex. B; and (2) Hikel's Declaration #3 in December CP 102-107, Ex 9 (see also city source/location of disclosure rules At CP 94-99, Ex.7.) The trial court in **October** was specifically:

"requested pursuant to the Civil Rules of Procedure, to take judicial notice of the procedures on Defendant City of Lynnwood's website page regarding public records disclosure." CP 288-289.

27. Raising an Issue in Plaintiff's Reply Memorandum After

Defendant Responds to the Show Cause Motion. The trial court seriously erred regarding its Analysis #E, CP 11, that the "rules duty" issue was only in Plaintiff's Reply Memorandum. **Division 2,**

Court of Appeals dealt with this type of issue in 2013 when Mr.

Gronquist:

“[R]aised the *timeliness issue* at the trial court. Gronquist was not aware of the declaration stating that Licensing actually received [his PRA request] letter on July 21 instead of July 31 *until he received Licensing’s response* to his motion to show cause ... After receipt of that information, Gronquist addressed Licensing’s late response [the *initial five business day letter was actually sent in eight days*] in both his reply in support of his show cause motion and his response to Licensing’s summary judgment motion.” Gronquist v. Department of Licensing, 175Wn.App. 729,745-746, 309 P.3d 538 (Div. 2 2013). Emphasis added.

And, Division 2, Court of Appeals, found a PRA violation for the Department’s late initial response letter.

Summary. Given the “rules” issue was raised, addressed, and/or evidence provided in three pleadings, plus two (2) specific incorporations of the *Complaint* into “*Evidence Relied Upon*” in both motions, the trial court seriously erred by stating the “rules” issue was not previously raised before the hearing. CP 11-12, #E.

Respectfully, this appellate court should provide some “*clear and workable guidance*” *RAC*, Id. at 431, reverse the trial court dismissal order, and then remand to the trial court for a proper complete consideration of the “rules” issue.

28. Assignment of Error No. 6: The Trial Court Erred Because It Comes to an Untenable,

Unsupportable & Absurd Conclusion About Ted Hikel's September 1, 2015, Visit to City Hall.

Facts: The Case Statement-Chronology supra, generally deals with why Ted visited city hall on **September 1, 2015**, and then left a letter saying:

Please let me know why there has been a delay in your processing of this request." CP 241. Ex. 3. Emphasis added.

He demanded nothings -- except the common courtesy of a brief contact, response, message – something.

In summary, (A) When a citizen's rights to receive a city "reasonable estimate" of time to **fully complete** disclosures is conditioned and then ignored; (B) When a citizen like Ted is given no communication that disclosure is ready; (C) when there are no current, meaningful, reasonable disclosure rules to advise citizens regarding notification about disclosure installments; (D) when there is no **PRA mandated city appeal mechanism** available to help citizens with with delays and denials of access; (E) when you do everything a reasonable courteous citizen should do to encourage communication; (F) ; and it comes to light that staff will not take 3-4 minutes to do a

short email, leave a phone message or drop a short note to you – it is not the citizen who misperceives the situation or is being unreasonable to seek to enforce his rights. It is the city who has the duty to provide the fullest assistance to requestors” and “the most timely possible action on requests.”

Issues & Law. As explained in the PRA Model Rules, WAC 44-14-04005(1) there is a claim/review period with a consequence to Ted’s rights that his PRR (#15PRR0238) could be closed if he doesn’t seek the records. See Notification issue, *supra*, at 29-30. Ted at twenty-five (25) days, without the customary city “pre-delivery” notification, did politely inquire:

“Please let me know why there has been a delay in your processing of this request.” CP 241. Ex. 3. Emphasis added.

Ted waited in vain for 10 days. No response. But, no real substantial action on his request occurred until **AFTER** he left his letter and the lawsuit happened. See chronology, *supra*, at 10-11, 14-18. It gives a glimpse of what frantic activities were happening inside city hall.

The trial court's conclusions is not supported by the facts, and can't be washed away now by claiming there was undecipherable unilateral mistake on the part of the city ---- for which Ted had absolutely no part, nor any form of control. But, the court apparently seeks to the consequences and blame on him, rather than holding our city government accountable.

One additional matter. The case of Hobbs v. State Auditor's Office, 183 Wn.App 925, 940, 335 P.3d 1004 (2014) is fully distinguishable from this case. In Hobbs, the state auditor had already begun delivering records disclosures when Hobbs commenced litigation. Nothing of the sort happened here. The factual situation and actions of the auditor's PRO are markedly different in that case. In fact, that case should be read to compare it to the facts here. The state auditor PRO deftly communicated, cooperated and sought to work out solutions to a whole host of problems, and to ensure real efforts at meeting the PRA policies of "fullest assistance to inquirers" and the "most timely possible action on requests."

Distinguishing the Andrews Case. *Andrews v.*

Washington State Patrol, 183 Wn. App. 644, 334 P.3d 94 (Div. 3, 2014) is fully distinguishable from, and does not apply to, this case.

Facts: Mr. Andrews made a public records requests to the Washington State Patrol (WSP) on **March 8**, 2012. Id. 647. The complex request involved locating and assembling six (6) months of; dispatch records; incident reports; in-custody digital recordings of attorney–client conversations.”. Id. at 647, 648. WSP’s initial “5 day” response letter gave the mandated “reasonable estimate” of time of 20 days to *fully complete* disclosure. Id. at 647. On **April 11**, 2012 the WSP extended for another 20 days. Id. at 647. WSP’s extended a third time. Id. 648. Mr. Andrews filed suit **May 3**, 2012. Id. 647. Both WSP’ very limited summary judgment motion and Mr. Andrews very limited cross motion for summary judgment, were framed by the trial court as only two (2) issues:

“[W]hether or not the production of the documents were in a *time that [was] reasonable* and that the *estimates were reasonable.*” Id. at 649. Emphasis added.

The trial court held both the time to produce the disclosure and the estimates of time to be reasonable. *Id.* at 650.

Here, Defendant Lynnwood ***never*** gave Ted a “reasonable estimate of time” to ***complete*** disclosure until September 18th ***after*** the lawsuit started. The trial court here ***erred*** by trying to apply the *Andrews*’ very narrow holding only dealing with the reasonableness of both needing an extension and the amount of extension time.

A Non Issue: Trial Court “Item D” (CP 11). Trial court “Item “D” (CP11) relates to an issue (email digital disclosure formats) **resolved between the parties and not raised at the hearing.** Defendant Lynnwood **reversed** its administrative position **October 2, 2015**, regarding email digital format disclosures. CP 210, Ex. K. Plaintiff in two places updated the court about this resolved issue. CP 86-87, 40-41.

PRA Attorneys Reasonable Fees, Costs & Penalty.

RCW 42.56.550(4) authorizes an award of reasonable attorney’s fees, costs and a *per diem* penalty to a ***prevailing*** party requester. ***Yakima County v. Yakima Herald-Republic***, 170 Wn.2d 775, 809,

246 P.3d 768 (2011), Sanders v. State, 169 Wn.2d 827, 860, 240

P.3d 120 (2010). It states:

- (4) Any person who **prevails against an agency** in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time **shall** be awarded **all costs**, including **reasonable attorney fees**, incurred in connection with such legal action. ..." Emphasis added.

"Any Person Who Prevails." RCW 42.56.550(4) provides that a **"person who prevails"** in a PRA action against an agency shall be entitled to reasonable attorney's fees and costs. Our Supreme Court in Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 103-104, 117 P.3d 1117 (2005), said:

*"[N]owhere in the PDA is prevailing party status conditioned on causing disclosure . . . Rather, the **"prevailing"** relates to the *legal question of whether the records should have been disclosed on request*.
[Footnote omitted.]*

Subsequent events do not affect the wrongfulness of the agency's **initial action to withhold** the records *if the records were wrongfully withheld at that time.*

Conclusion. The trial court and the Court of Appeals erred . . . [Plaintiff Connor's] claims are not moot since fees, costs, and penalties are appropriate if he *prevails on the merits*, and **causation of the disclosure is not required to prevail.**" Id at 106.

Ted Hikel is the “Prevailing” Party Here. Ted Hikel is entitled to an award of reasonable and statutory attorney’s fees and costs which will be submitted at the conclusion of this appellate case.

PRA Policy: “Strict Enforcement” of Fees & Costs. For 37 years our appellate courts have clearly and unequivocally held that:

“[T]he policy of the act allows for **award of fees** and fines, where appropriate. **Strict enforcement** of these provisions where warranted should **discourage improper denial of access to public records** and adherence to the goals and procedures dictated by the statute.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 139-140, 580 P.2d 246 (1978). Emphasis added.

The court reinforced the PRA’s policy of **“strict enforcement”** of fees and costs in 1991, because it **“will discourage improper denial of access to public records.”** [PAWS I] 114 Wn.2d at 686 (quoting *Hearst*, 90 Wn.2d at 140),” *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d at 272 Emphasis added. In 1999, Division I, Court of Appeals, followed the PRA’s policy of **“strict enforcement”** and said:

“While the act states that the court has discretion . . . **“strict enforcement” of fees and fines will discourage improper denial of access to public records.**’ [citations omitted.]” *American Civil Liberties Union of Washington v. Blaine School District No. 503*, 95 Wn. App. 106, 111, 975 P. 2d 538 (1999) Emphasis added.

An award of reasonable attorneys fee and costs against Defendant City of Lynnwood will serve the policy of "**strict enforcement**" and the mandatory directive of **RCW 42.56.550(4)** that a prevailing party "**shall** be awarded" such fees and costs.

PRA "ALL Costs" – Liberal Interpretation. RCW

42.56.550(4) authorizes an award of "**ALL costs**" to a prevailing party. In 1999, **Division I**, Court of Appeals, stated:

"The public records act does not contain a definition of what it means by "**all costs**," but the **plain meaning of the word "all" logically leads** to the conclusion that the drafters of the act intended that the prevailing party could recover all of the **reasonable** expenses it incurred in gaining access to the requested records. American Civil Liberties Union of Washington v. Blaine School District No. 503, 95 Wn. App. 106, 117, 975 P. 2d 538 (1999). Emphasis added.

PRA Per Diem Penalty for Denial of Access to Public

Records. This was **not** dealt with by the trial court. But, upon remand it should be considered by the trial court. Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 467-68, 229 P.3d 735 (2010).

VI. Conclusion & Summary of Requests to the Court

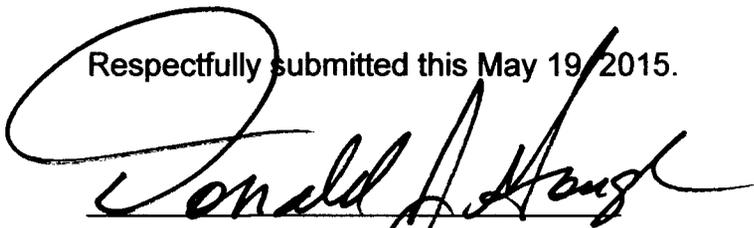
We believe and request that the Court:

- Based upon the issues raised in this appeal that should be adjudged in Ted Hikel's favor, and the express PRA polices, and mandated agency duties, the trial court's order dismissing

Appellant/Plaintiff's Complaint, first and Amended Show Cause Motions should be reversed; and

- The case be remand to the trial court for further proceeding consistent with clear and workable guidance, especially on the express PRA policies, and mandated agency duties that Defendant Lynnwood should be actively seeking to accomplish; and such as developing, adopting and enforcing a quality set of reasonable rules and regulation which have appropriate "methods" and ways to 'facilitate proper records request processing; and
- Remanding for the purpose of considering daily penalties; and
- That Appellant be awarded all PRA reasonable attorney fees, and actual reasonable costs, incurred for this appeal., based upon a submission to the court at the end of this case.

Respectfully submitted this May 19, 2015.



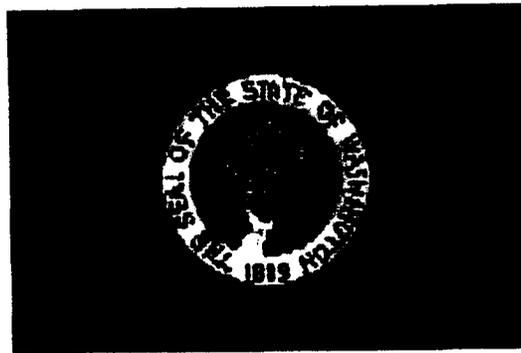
Donald J. Gough, WSBA No. 8905
Attorney for Appellant
4324 192nd St. S.W.
Lynnwood, Washington 98036
(425) 775-9738

APPENDIX A-1

Snohomish County Local Court

Rules: SCLR 6, 7

LOCAL COURT RULES FOR SNOHOMISH COUNTY



Effective September 1, 1989

Including Amendments Effective

September 1, 2015

(a) Petitions to restore firearm rights shall be brought under a civil cause number pursuant to the civil rules.

(b) A party filing a petition to restore firearms rights must serve the Snohomish County Prosecutor, or his or her designee, at least 15 days before the scheduled hearing date. A petition that is not filed within the requirements of this rule will not be heard on the date noted for hearing.

(c) Service on the county prosecutor or his or her designee shall be made by (i) hand delivering a copy to the office of the prosecuting attorney and leaving it with the prosecutor, a deputy prosecutor, or clerk employed by the prosecutor's office or (ii) by mail. If service is by mail the provisions of CR5 (b)(2)(A)&(B) shall apply.

(d) The prosecutor may file a response to the petition to restore firearms rights. A response to the petition shall be filed and served at least two days before the scheduled hearing date.

[Adopted September 1, 2011; Amended September 1, 2014]

RULE 6. TIME

(d) For Motions--Affidavits.

(1) *Notes for Civil Motions Calendar.* Responding documents and briefs must be filed with the clerk and copies served on all parties and the court no later than 12 noon two (2) court days prior to the hearing. Copies of any documents replying to the response must be filed with the clerk and served on all parties and the court not later than 12 noon of the court day prior to the hearing. This section does not apply to CR 56 summary judgment motions. Absent prior approval of the court, responsive or reply materials will not include either audio or video tape recordings.

(2) *Notes for Family Law Motion Calendar.* Any party desiring to bring any family law motion, other than a motion to reconsider (governed by SCLCR 59), on the family law motion calendar must file such motion documents with the Clerk and serve all parties and the court at least twelve (12) days before the date fixed for such hearing. Responding documents and briefs must be filed with the clerk and copies served on all parties and the court no later than 12:00 noon five (5) court days before the hearing. Copies of any additional responding or reply documents must be filed with the clerk and served on all parties and the Court not later than 12:00 noon three (3) court days before the hearing. Absent prior approval of the court, responsive or reply materials will not include either audio or video tape recordings.

[Adopted September 1, 2012]

III. PLEADINGS AND MOTIONS (RULES 7-16)

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS

(b) Motions and Other Papers.

(2) Form.

(A) Notes for Motion. The motion documents must include an order to show cause or a note for motion calendar, the motion, and supporting documents. The note for motion calendar must be on the form approved by the court. The note for motion calendar must be signed by the attorney or party pro se filing the same, with the designation of the party represented. The note for motion calendar must identify the type or nature of relief being sought. The note or other document shall provide a certification of mailing of all documents related to the motion. The certificate shall state the person and address to who such mailing was made, and who performed the mailing. Such mailing may not be made by a party to the action. Absent prior approval of the court, materials will not include audio or video tape recordings.

(B) Working Copies. Working copies of the motion and all documents in support or opposition shall be delivered by the party filing such documents to the judicial officer who is to consider the motion no later than the day they are to be served on all other parties. All working copies shall state, in the upper right corner, the following: the date and time of such hearing, the jurist assigned, if any, and the Department or room number of the department where the motion is to be heard.

(C) Late Filing; Terms. Any material offered at a time later than required by this rule may be stricken by the court and not considered. If the court decides to allow the late filing and consider the materials, the court may continue the matter or impose other appropriate remedies including terms, or both.

(D) Motion; Contents Of. A motion must contain the following (motions shall comply with any applicable mandatory form requirements):

1. Relief Requested.

The specific relief the court is requested to grant;

2. Statement of Grounds.

A concise statement of the grounds upon which the motion is based;

3. Statement of Issues.

A concise statement of the issue(s) of law upon which the court is requested to rule;

4. Evidence Relied Upon.

APPENDIX A-2

Excerpt:

**Resident Action Council v. Seattle Housing
Authority,**

177 Wn.2d 417, 431–432, 300 P.3d 376 (2013)
(Text as amended by the Supreme Court January 10, 2014)
(Republished as amended at 327 P.3d 600 (2014))

Excerpt:

Resident Action Council v. Seattle Housing Authority,

177 Wn.2d 417, 431–432, 300 P.3d 376 (2013)
(Text as amended by the Supreme Court January 10, 2014)
(Republished as amended at 327 P.3d 600 (2014))

2. Disclosure and Production under the PRA

The PRA is a “strongly worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The PRA is to be “liberally construed and its exemptions narrowly construed ... to assure that the public interest will be fully protected.” RCW 42.56 030. Our interpretation of the PRA’s provisions will continue to be grounded in the PRA’s underlying policy and standard of construction. We will also avoid absurd results. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 99 P.3d 26 (2004). In this difficult area of the law, we endeavor to provide clear and workable guidance to agencies in so far as possible. See *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 218 – 19, 189 P.3d 139 (2008).

The PRA requires state and local agencies to “make available for public inspection and copying all public records, unless the record falls within the specific exemptions of [the PRA] or other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56 070. A “public record” is defined broadly to include “any writing containing information relating to the conduct of government or [a governmental function]” that is “prepared, owned, used, or retained” by any state or local agencies. RCW 42.56 010 (3), see also *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 746 – 47, 958 P.2d. 260 (1998).

The PRA requires each relevant agency to facilitate the full disclosure of public records to interested parties. An agency must publish its methods of disclosure and the rules that will govern its disclosure of public records. RCW 42.56 040(1). A requester cannot be required to comply with any such rules not published unless the requester receives actual and timely notice. RCW 42.56 040(2). More generally, an agency's applicable rules and regulations must be reasonable and must provide full

[page 177 Wn.2d 432]

public access, protect public records from damage or disorganization, and prevent excessive interference with other essential functions of the agency. RCW 42.56 100. The agencies rules and regulations also must “provide for the fullest assistance to inquirers and the most timely possible action on requests for information.” Id., see also RCW 42.56 520.. (Agency must respond promptly but can notify requester it needs a reasonable amount of time to determine appropriate further response). An agency must explain and justify any withholding, in whole or in part, of any requested public records. RCW 42.56 070(1). .210(3), .520. Silent withholding is prohibited. Rental housing Association v. City of Des Moines, 165 Wn.2d 525, 537, 199 P.3d 393 (2009); PAWS II, 125 Wn.2d at 270. Finally, agency actions taken or challenged under the PRA are subject to de novo review, and any person “who prevails against an agency” is awarded costs and fees and, in the discretion of the court, a statutory penalty. RCW 42.56 550(4).

END OF CASE EXCERPT

APPENDIX A-3

Plaintiff Trial Court Exhibit 12

CP 114

Exhibit 12

Communications by e-mail and letters from the City of Lynnwood 6/29/15 to 12/4/15

6/29	Debbie Karber	Email: Record Request #0239e -mails (DK Exhibit B)
7/10	Debbie Karber	Letter: Records Request 0239 (DK Para. 14, Exhibit D)
9/8	Debbie Karber	Letter: <u>Completion</u> of 7/10 Records Request
9/14	<u>LAW SUIT SERVED ON CITY OF LYNNWOOD TO DEBBIE KARBER</u>	
9/17	Debbie Karber	Letter: That "Your <u>first installment</u> " is ready on 9/18
9/17	Debbie Karber	Second Letter: About <u>9/21 installment</u> is ready
9/17	Debbie Karber	Letters stating a City Computer was now available
10/2	Debbie Karber	Letter & e-mail: Installment ready & Replace Disk #3
10/5	Debbie Karber	Installment Ready: Email (Memo says DK Decl. para. 34)
10/9	Karen Fitzhum	Installment Ready: Public Records Request update
10/16	Karen Fitzhum	Installment Ready: PRR2015 0239
10/23	Karen Fitzhum	Installment Ready: 15 PRR0239 10/23/15
10/30	Karen Fitzhum	Installment Ready: 15 PRR 0239
11/5	Karen Fitzhum	Installment Ready: 15 PRR 0239
11/13	Karen Fitzhum	Installment Ready: 15 PRR 0239
11/20	Karen Fitzhum	Installment Ready: 15 PRR 0239
11/24	Karen Fitzhum	Installment Ready: Records Request
12/4	Public Records	Installment Ready: 15 PRR 0239

APPENDIX A-4

City of Lynnwood

2005 Policy/Procedures:

Disclosure of Public Records

Exhibit B

CITY OF LYNNWOOD POLICY/PROCEDURES

Disclosure of Public Records	Supersedes:	Policy Effective Date: June 3, 2005
Mayor: <i>AL 4/5</i>	Finance Director: <i>[Signature]</i>	Mayor: <i>[Signature]</i>

Applicable To: All City Departments

PURPOSE

Citizens have the right to access most public records concerning the conduct of government. It is the City's policy to handle all requests for public records uniformly, fairly, and expeditiously and to ensure that the public interest will be fully protected.

PROCEDURE FOR DISCLOSURE OF PUBLIC RECORDS

The intent of the policy is to promote public access to public records about the conduct of government, while at the same time protecting an individual's right to privacy, all in a manner consistent with applicable laws.

A request can be submitted in person or via e-mail, U.S. mail or facsimile. Persons requesting records are not required to provide information as to the purpose for the request, but, where access to a list of individuals is requested, the person must certify that the list will not be used for commercial purposes. Washington state law (RCW 42.17.260(9)) prohibits cities from releasing public records containing lists of individuals to be used for commercial purposes unless specifically authorized or directed by law. All request forms must be signed by the person submitting the request.

People requesting copies of City records shall first make such request to the City Clerk or the representative of a specific City department that maintains the requested records. If the requestor does not know which department maintains the records, the request shall be made to the City Clerk. The City Clerk will follow through with the request.

People submitting requests have the option of inspecting the records first to determine whether or not he or she wishes to have copies made. Inspection of folder contents will take place in the presence of the City Clerk and/or his or her designee, who will then follow through with the request.

If copies are made by a City department, which does not collect fees or accept cash as a mode of payment, the person submitting the request shall be sent to Administrative Services Department for payment. State law prohibits the City from charging for staff time spent in locating a record or making it available for inspection. The City, in

1

responding to a records request, is not obligated to create a record that does not already exist.

DISCLOSURE OF ELECTRONIC RECORDS

Public records stored in an electronic format (e.g., email messages) are public records under the Public Disclosure Act (RCW 42.17) and the law governing preservation and destruction of public records (RCW 40.14) and will be treated the same as paper records.

PUBLIC USE OF CITY'S GIS

All requests for GIS Maps shall include the following disclaimer:

"This mapping was originally prepared for use by the City of Lynnwood for its internal purposes only, and was not designed or intended for general use by members of the public. Independent verification of all data contained in the mapping should be obtained by any user. The City of Lynnwood makes no representation or warranty as to the accuracy or location of any map features thereon."

REQUESTS FOR ROUTINELY-PRODUCED RECORDS

It is not necessary to complete a Request for Public Records form for the following types of routinely produced records. These records are simply provided to the person making the request after payment of the appropriate fee. Requests for such records may be handled at the departmental level and need not be processed by the City Clerk.

The following types of records constitute routinely produced records:

- Meeting minutes previously adopted by the City Council
- Meeting packets/agendas that are ready to be distributed
- Ordinances and resolutions previously adopted by the City Council
- Copies of Certificates of Occupancy
- Exhibits admitted at a public hearing
- Copies created from microfilm
- Maps
- Such other records as the City Council may deem are to be available at no cost

NON-ROUTINE REQUESTS

A request for any other type of public record not set forth above shall be considered non-routine and shall be processed according to the procedures set forth in chapter 42.17 RCW and the following:

1. The person submitting the request shall complete a Request for Disclosure of Public Records form. These forms should be available in every City department. Once

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the form has been completed, the department employee should immediately forward the request to the City Clerk, who has five business days in which to respond to the request.

2. Requesters will be asked to sign and acknowledge a public records disclaimer if the requested records may be copyrighted. Any requests for employee personnel records or verification of employment will be referred to the H/R Department for review.

3. Request for police and court records are filed at the Lynnwood Police Department and the Lynnwood Municipal Court, respectively. The city Clerk normally does not need to see or know about these requests unless they involve litigation or some matter with citywide implications. In these cases a representative from the Police Department or Court will coordinate with the City Clerk or his designee, a response to the requestor within five business days.

4. Within five business days after the City receives the request (RCW 42.17.320), the City Clerk must take at least one of the following actions:

- Provide the record;
- Acknowledge that the City has received the request and provide a reasonable estimate of the time the City will require in order to respond to the request;
- Deny the request, in which case, a written response is required, citing reasons for denial including the particular legal exemption involved (if applicable), with an explanation of how the exemption applies.
- Request clarification of the request.

5. In determining a reasonable estimate of time, additional time required to respond to the request may be based upon the following factors:

- The need to clarify the request;
- The need to locate and assemble the records,
- The need to notify third persons or agencies affected by the request, or
- The need to determine whether any of the records requested are exempt.

6. If a public records request is unclear, the City Clerk or City department that received the request may ask the requestor to clarify which records they are seeking, along with notice that if no clarification is given, the City Clerk or City department need not respond to the request pursuant to RCW 42.17.320.

7. If the City suspects that a third party might object to the inspection and copying of a public record based upon privacy, copyright, or other valid considerations, the City has the option to notify the third party of the request prior to making the record available.

3

8. A public records request is not continuing in nature. In the event additional records are created after the date of the requestor's original public records request, the requestor will need to submit a new request.

EXEMPTIONS

RCW 42.17.310(1) lists certain personal and other records that are exempt from public inspection and copying and is included with this Policy as Attachment A. This list is not exhaustive, however, as certain public records may be made exempt from disclosure by other statutes.

PROCEDURES FOR INSPECTION AND COPYING

The City shall make copies of records during City Hall office hours, which are from 8:30 a.m. to 5 p.m., Monday through Friday, except legal holidays. The fee charged for copies is .15 cents per page/per side for letter or legal size, black and white copies (doubled-sided copies equal two pages). The fee charged for other types of copies will equal the City's actual cost for duplicating the copies.

In the event that the City contracts with a printing/copying vendor to make copies of requested records, the vendor's charges will be paid by the requestor. If records are sent by certified mail, postage charges will be paid by the requestor.

DEFINITIONS

Public Record. State law defines public record as any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristic. [RCW 42.17.020(36)]

Writing. This means handwriting, typewriting, printing, Photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to letter, words, pictures, sounds, or symbols or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents, including existing data compilations from which information may be obtained or translated. [RCW 42.17.020(42)]

The above definitions include electronic records and e-mails.

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19100 44TH AVE W
PO BOX 5008
LYNNWOOD WA 98046
425-670-6610

City of Lynnwood Request for Public Records

Date of Request: _____
Name of Requestor: _____
Address: _____
Phone: Home () _____ Phone: Work () _____

DESCRIPTION OF RECORD(S) REQUESTED: (Make your request as clear and specific as possible, including the title and date of the record(s) to avoid delays)

REQUESTOR TO READ AND SIGN

I understand that if a list of individuals or businesses is provided to me, it will not be used to promote the election of an official, or promote/oppose a ballot proposition as prohibited by RCW 42.17.130. Nor will it be used for commercial purposes, or to provide access to material(s) to others for commercial purposes as prohibited by RCW 42.17.260 (9). Further, I understand I will be charged .15 cents per letter- or legal-sized, black and white, single-sided document(s) and .30 cents for double-sided documents. The fee charged for other types and sizes of copies will equal the City's actual cost for duplication. Having read the above stated conditions, I hereby consent to each of them.

Signature of Requestor Date

FOR OFFICIAL USE ONLY

NOTE TO RESPONSIBLE STAFF:
RCW 42.17.320 requires the City Clerk's Office to respond to the Request of Public Records within five (5) business days of receipt of the request by providing one of the following: (1) the record(s); or (2) acknowledging receipt of the request and providing a reasonable estimate of when the City can respond; and (3) deny the request and state the reasons for denial.

Records Provided: _____ Request Denied: _____

General Notes (if/for reason for delay or denial to produce records: _____

ACKNOWLEDGEMENT OF RECEIPT UPON COMPLETION OF REQUEST

Signature of Requestor Upon Receipt Date of Receipt/Denial Clerk's Office Representative
Number of copies: _____ Fee: \$ _____ Receipt: # _____

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