NO. 1032811

SUPREME COURT OF THE STATE OF WASHINGTON

ERIC HOOD, an individual,

Appellant,

v.

CENTRALIA COLLEGE, a public agency,

Respondent.

RESPONDENT CENTRALIA COLLEGE'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

The Court of Appeals correctly rejected Eric Hood's argument that a discovery request in litigation against an agency is also automatically a Public Records Act (PRA) request. The rule in Washington has long been that a party seeking records under the PRA must provide sufficiently clear notice that the party is requesting records under the PRA, rather than some other authority. Hood now proposes a much broader standard: agencies must consider any request involving records, even when explicitly made pursuant to some other authority, as a request under the PRA. Hood's proposal is contrary to substantial authority of this Court and the Court of Appeals, and he cannot establish that the Court of Appeals' rejection of his theory conflicts with any published decision.

Parties to litigation involving public agencies may, and commonly do, supplement their discovery requests by making separate requests for records under the PRA. However, under Hood's proposed standard, interrogatories and requests for

production propounded in civil discovery, along with other legal filings made pursuant to applicable court rules, would automatically become PRA requests. This unprecedented concept would, as the Court of Appeals recognized, lead to absurd results and "cause discovery disputes and legal briefing in PRA litigation to become an endless breeding ground for new public records requests." *Hood v. Centralia Coll.*, No. 58362-3-II, 2024 WL 1732719, at *9 (Wash. Ct. App. Apr. 23, 2024) (unpublished) (*Hood II*).

Hood's desired new PRA standard is contrary to the well-established purposes of civil discovery and is inconsistent with decades of well-settled PRA precedent. It offers an absurd and chaotic solution to a public records problem that does not exist. Whether discovery pleadings must also be processed as public record requests is an issue that does not warrant review by this Court.

II. COUNTERSTATEMENT OF ISSUES

1. Did the Court of Appeals correctly apply Supreme Court and Court of Appeals precedent requiring fair notice that a request is made pursuant to the Public Records Act?

2. Where the Court of Appeals affirmed the dismissal of this case and Hood was not represented by counsel, did the Court of Appeals correctly deny Hood's request for attorney fees?

III. COUNTERSTATEMENT OF THE CASE

A. The Facts Underlying the Prior PRA Lawsuit in this Matter

1. Hood's September 2019 PRA request

In September 2019, "Hood emailed [Centralia] College [(College)] a public records request for records pertaining to a recent audit" in which he requested "[m]ay I have all records [the College] got from the auditor and all records of any response to the audit or to the audit report?" *Hood v. Centralia College*, No. 56213-8-II, 2022 WL 3043208, at *1 (Wash. Ct. App.

Aug. 2, 2022) (unpublished) (footnote omitted), *review denied*, 200 Wn.2d 1032, 525 P.3d 151 (2023) (*Hood I*). The College's Public Records Officer at the time requested clarification as to the audit that was the subject of Hood's request, and then "conducted a public records search in which she first identified specific employees with information responsive to Mr. Hood's request." *Id*. at *2.

In October 2019, the Public Records Officer provided responsive records to Hood; however, she also informed Hood that his "request is a little big [sic] ambiguous," shared how she was interpreting Hood's request, and asked him to let her know if her interpretation was incorrect. *Id*. Hood responded "that he was unsure what was ambiguous with regard to his email. He repeated his original records request . . ." *Id*. The Public Records Officer again sought more clarity from Hood, to which he replied: "Thanks for the info. I am most interested in records showing the City's [sic] response to the audit. Since I don't know

what [sic] how it responded, I don't know how I can be clearer." *Id*.

In November 2019, the Public Records Officer emailed the responsive documents to Hood after he paid the required fees. "The College received no further communication from Mr. Hood until almost a year later in October 2020, when Hood filed his complaint." *Id*.

2. Hood's 2020 PRA lawsuit

In October 2020, Hood filed a lawsuit against the College alleging violations of the Public Records Act (PRA), chapter 42.56 RCW, in which he "alleged that his request 'encompassed records other than the records [the College] provided him.'" *Id*. at *3.

During his 2020 PRA lawsuit, Hood served the College with three sets of interrogatories and requests for production under the civil rules. In his first set of interrogatories and requests for production, served in November 2020, "Hood requested 'all records *related* to the State Auditor's Office [(SAO)] audit of the

College . . . that have not been previously produced, whether or not the College considers them responsive to the Plaintiff's Request.'" *Id*. (emphasis in original). "In a discovery conference, Hood then requested 'any specific query from the auditor and any response to that query.'" *Id*.

In responding to Hood's discovery requests, the College conducted a broad search for all emails between the SAO and the College from September 2019 through March 2019 which resulted in "574 email messages with various subjects," only some of which related to the audit, and together with accompanying attachments, "comprised of over 2,500 pages . . .," *Id*., of which 1,737 pages were produced during discovery. *Id*. at *6. This search revealed a single email "responsive to Hood's records request and not produced until discovery." *Id*. at *12.

3. The Superior Court's decision in Hood's 2020 PRA lawsuit

In his 2020 PRA lawsuit, "Hood pointed to the . . . records produced by the College during discovery to show that the

College had" either received from or provided to the SAO more records responsive to his request than it had produced in November 2019. *Id*. at *6. The College responded that Hood's public records request (PRR) was ambiguous, that it "had responded to the part of the request that was clear[,]" and "that Hood never stated in his communications . . . that he sought records beyond those . . . identified [by the College's Public Records Officer]." *Id*.

"The superior court found in favor of the College and dismissed Hood's [2020 PRA] lawsuit with prejudice, ruling that the College did not violate the PRA." *Id*. Hood moved for reconsideration, which was denied, and then filed an appeal to the Court of Appeals. *Id* at *7.

4. The Court of Appeals' decision in Hood's 2020 PRA lawsuit

In August 2022, the Court of Appeals issued an unpublished decision in which it affirmed the superior court's dismissal of Hood's 2020 PRA lawsuit. It determined that "Hood's request left the door open for multiple interpretations,"

and acknowledged that Hood himself had "interpreted [his own] request in multiple ways," before holding that Hood's September 2019 PRA request "was ambiguous and failed to provide assistance . . . in searching for and locating responsive records." *Id*. at *8.

The Court of Appeals also held that the Public Records Officer's "response and interpretation of [Hood's] request was reasonable" based on "the ambiguity of Hood's initial request and his communications in response to [the Public Records Officer's] request for clarification . . ." *Id*. at *10.

The Court of Appeals' decision dismissing Hood's 2020 PRA lawsuit became final on March 8, 2023, when this Court denied his petition for review. *Hood II*, 2024 WL 1732719, at *3. Soon afterwards, Hood served the College with his complaint in the present matter. *Id*.

B. Hood's 2023 PRA Lawsuit

In his March 2023 complaint, Hood identified six requests he made during his 2020 PRA lawsuit ("litigation requests") and

"sought an order requiring the College to respond and disclose the newly requested records." *Id*. at *4. The College responded with a motion to dismiss "under CR 12(b)(6) on the grounds that Hood's complaint was barred by the doctrines of res judicata and collateral estoppel, as well as the PRA's one-year statute of limitations." *Id*.

1. The Superior Court's decision in Hood's 2023 PRA lawsuit

"At a hearing on the College's motion to dismiss, the trial court explained that it planned to base its decision on res judicata, collateral estoppel, and the PRA's statute of limitations." *Id*. The superior court subsequently granted the College's motion to dismiss. Hood filed an appeal to the court of appeals.

2. The Court of Appeals' decision in Hood's 2023 PRA lawsuit

He argued that his six "litigation requests" were separate from his September 2019 PRA request and had identified records during the 2020 PRA lawsuit he wanted the College to produce. He claimed that his civil discovery requests propounded during

his 2020 PRA litigation were new requests for records and should have been processed by the College under the PRA.

The College argued in its response that Hood's six "litigation requests" had not provided it with fair notice he was requesting records under the PRA and, therefore, had not triggered any obligation under the PRA to disclose records. Appendix 1 at A-23. The College argued that Hood had described his "litigation requests" as "discovery demand[s];" served them on the College's legal counsel,[1] rather than the College; and had cited to CR 33 and 34 as the authority for his "litigation requests." Appendix 1 at A-24-A25.

The Court of Appeals applied the fair notice test used by Washington's courts to Hood's "litigation requests" and concluded that they "did not give the College fair notice he was

[1] Hood has not argued, nor has he introduced any evidence demonstrating, that the College authorized its legal counsel to accept or process requests for records under the PRA on behalf of the College. RCW 42.56.040(1)(a) (state agencies shall publish "the employees from whom, and the methods whereby, the public may . . . make submittals or requests[.]").

seeking records under the PRA, and thus, [they] were not public records requests." *Hood II*, 2024 WL 1732719, at *10. Contrary to Hood's repeated assertion, Pet. for Review at 1-2, 7-8, 26, the College fully briefed this standard to the Court of Appeals. Appendix 1 at A-23-A-28.

The Court of Appeals held "[n]one of the factors relating to the characteristics of Hood's requests favors a finding that the requests now at issue were public records requests." *Hood II*, 2024 WL 1732719, at *8. Specifically, the Court of Appeals found the language of Hood's "litigation requests" did not "distinguish [them] as independent of his 2019 public records request[,]" and they "were discovery requests that invoked the civil rules or legal briefing arguing his 2019 request[,]" "expressly labeled as various pleadings or discovery requests, rather than public records requests[,]" and "sent to the College, its counsel, or the courts during active litigation over his 2019 public records request." *Id*. at *9.

The Court of Appeals also found that while the first two factors concerning the characteristics of the requested records favored Hood, it was "dispositive that the College reasonably interpreted Hood's requests as discovery requests or legal arguments pertaining to its initial response to his 2019 public records request." *Id*.

Furthermore, the Court of Appeals rejected Hood's argument that the PRA's command that it be "liberally construed" necessarily required the court "hold that his 'litigation requests' are actually public records requests" because "requiring agencies to interpret discovery requests and legal arguments that are not clearly and expressly labeled as new public records requests would be absurd and unworkable." *Id*. at *10.

IV. WHY REVIEW SHOULD BE DENIED

A. The Fair Notice Test Used by the Court of Appeals is Consistent with Long-standing Precedent

This Court held two decades ago that "a party seeking documents must, at a minimum, provide notice that the request

is made pursuant to the [PRA][2] and identify the documents with reasonable clarity to allow the agency to locate them." *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004). The "fair notice" test developed by Division II of the Court of Appeals utilizes six factors advanced by this Court in *Hangartner*, and Divisions I and III of the Court of Appeals in *Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000); *Parmelee v. Clarke*, 148 Wn. App. 748, 201 P.3d 1022 (2008); and *Beal v. City of Seattle*, 150 Wn. App. 865, 209 P.3d 872 (2009).

The first group of factors "concern[] the characteristics of the request itself: (1) the request's language. . .; (2) its format . . .; and (3) the recipient of the request." *Germeau v. Mason Cnty.*, 166 Wn. App. 789, 805, 271 P.3d 932 (2012) (citations omitted). The second group of factors

[2] The decision referred to the Public Disclosure Act, which the Legislature amended and recodified as the PRA. Laws of 2005, ch. 274, § 1.

> concern[] the characteristics of the required records themselves: (1) whether the request was for specific records, as opposed to information *about* or *contained in* the records . . .; (2) whether the requested records were actual public records . . .; and (3) whether it was reasonable for the agency to believe that the requester was requesting the documents under an independent, non-PRA authority.

Id. at 807 (citations omitted) (italics in original).

The "fair notice" test applied by Division II in this case is an application of this Court's decision in *Hangartner*, and incorporates factors initially identified by Divisions I and III two decades ago. Therefore, the decision is not, as Hood asserts, contrary to precedent. Pet. for Review at 18 and 20; *see also* RAP 13.4(b)(1)-(2).

Furthermore, like Division II, Divisions I and III also assess whether a request for records provides fair notice that it has been made pursuant to the PRA, rather than some other authority. This is because disclosure under the PRA "is not necessary until and unless there has been a specific request for records." *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409,

960 2.d 447 (1998). Therefore, a requestor must place an agency on notice that a request under the PRA has been made, and the agency's obligations under the PRA have been triggered. "The fair notice requirement is one of the few burdens placed on requestors." *Thomas v. Pierce Cnty. Prosecuting Att'y's Off.*, No. 73360-5-I, 2015 WL 6126474, at *3 n. 6 (Wash. Ct. App. Oct. 19, 2015) (unpublished). If the requestor does not provide such notice, then "it is unreasonable to hold the agency responsible for its lack of response" *Id*.

In *Beal*, Division I of the Court of Appeals held the City of Seattle had not received fair notice plaintiffs were requesting records under the PRA. Plaintiffs sought compilations of information about records or the creation of new documents explaining "why the [plaintiffs' mitigation plan] suggestions were not feasible." *Beal*, 150 Wn. App. at 875. Division I held the plaintiffs had not provided fair notice they were requesting records under the PRA because they could not compel the city to create new records, and "[a] request for information about public

records or for the information contained in a public record is not a PRA request." *Id*. at 876 (citing *Wood*, 102 Wn. App. 872 at 879; *Smith v. Okanogan Cnty.*, 100 Wn. App. 7, 15, 994 P.2d 857 (2000); and *Bonamy*, 92 Wn. App. at 409-10); *see also, Faulkner v. Dep't of Corr.*, 183 Wn. App. 93, 101, 332 P.3d 1136 (2014) ("The DOC did not have a duty to produce a record that was not in existence."). Additionally, Division I held "the City could have responded to [plaintiffs'] demand . . . without producing any public records." *Id*. at 875-76.

Hood argues that a request for public records can be made during the course of litigation, Pet. for Review at 17, and he is correct. But that does not support his assertation that discovery requests and legal filings made during litigation automatically become PRA requests.

Hood's argument is based on an unreasonably broad reading of the Court of Appeals' decision in *O'Dea v. City of Tacoma*, 19 Wn. App. 2d 67, 493 P.3d 1245 (2021). The plaintiff in *O'Dea* clearly labeled their requests as "PUBLIC

RECORDS REQUEST[S]," *Id*. at 72, and referred to them in the attached complaint as requests for public records. *Id*. at 82. Unlike the requestor in *O'Dea*, Hood referred to the civil rules as the authority for his six "litigation requests" and presented them as discovery requests and in legal filings.

In this case, the Court of Appeals expressly reconciled its decision with the decision in *O'Dea*. The *O'Dea* court held that "all three factors related to the characteristics of the request favor O'Dea, as did the characteristics of the records. *Id*. at 81. In *Hood II*, the Court of Appeals provided a thorough analysis of how the six "fair notice" factors applied to Hood's "litigation requests," explained why the characteristics of his requests and the records he sought did not support a finding that his requests "[gave] the College fair notice he was seeking records under the PRA," and explained why Hood's case "is more like *Germeau* than *O'Dea*." *Hood II*, 2024 WL 1732719, at *10 and *8.

O'Dea involved a straight-forward application of the "fair notice" factors to the specific facts of that case. *O'Dea* did not

announce the brightline rule Hood believes it did: that any requests for records made during litigation *automatically* become PRA requests. The *O'Dea* court did not articulate that as the rule, and no court has endorsed Hood's interpretation of *O'Dea*. The Court of Appeals has twice rejected such an expansive interpretation within the past two years: in *Kilduff v. San Juan Cnty.*, No. 82711-1-I, 2022 WL 1763722, at *11 (Wash. Ct. App. May 31, 2022) (unpublished) ("We reject Kilduff's reading of *O'Dea* that would treat every PRA complaint as a new records request when the request had already been submitted."), and *Brittig v. Mason Cnty. Fire Dist. No. 6*, No. 57408-0-II, 2023 WL 5094063, at *9 (Wash. Ct. App. Aug. 8, 2023) (unpublished) (Plaintiff's email notifying Defendant that Plaintiff "intended to add a cause of action to his complaint . . ." was not a PRA request, "but rather a follow-up to a request that, from the [Defendant's] perspective, it had already fulfilled.").

Although Hood claims the Court of Appeals' decision in *Hood II* "conflicts with multiple PRA cases upholding RCW 42.56.550(3) in every division[,]" Pet. for Review at 25, he does not explain how it conflicts, and the cases he cites do not support his argument. Instead, they address questions not at issue in *Hood II*, such as whether certain records were among the records sought under a PRA request, *see, e.g.*, *Zink v. City of Mesa*, 140 Wn. App. 328, 344, 166 P.3d 738 (2007) (initial request for records notified City that a memo concerning neighbors' complaints fell within category of documents requested), and *O'Neill v. City of Shoreline*, 145 Wn. App. 913, 922-24, 187 P.3d 822 (2008) (email and associated metadata were public records subject to PRA); whether a PRA request was for an "identifiable public record[,]" *Belenski v. Jefferson Cnty.*, 187 Wn. App. 724, 740 (2015), *rev'd in part on other grounds*, 186 Wn.2d 452, 378 P.3d 176 (2016); or whether certain documents sought by a requester were protected from disclosure. *Progressive Animal Welfare Soc'y. v. Univ. of Washington*,

125 Wn.2d 243, 884 P.2d 592 (1994). The Court of Appeals' decision in *Hood II* does not conflict with these prior decisions.

B. The PRA is a Statute and Does not Implement a Constitutional Provision. This Case Does not Involve a Substantial Constitutional Question.

Without providing supporting authority or legal analysis, Hood alleges that the underlying decision conflicts with Article I, Section 1 of the Washington Constitution, which says: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."

Declining to require that agencies must automatically respond to clearly labeled discovery requests under both the civil discovery rules and the PRA does not violate this provision. The PRA is a statute; it is not part of the Washington Constitution and does not implement any constitutional provision. Therefore, the PRA does not represent a constitutional command to produce records. To the contrary, this Court has "recognized that the PRA

must give way to constitutional mandates." *Freedom Found. v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013).

The "fair notice" test, and the requirement that requestors provide agencies fair notice they are requesting records under the PRA, does not undermine any constitutional interest and does not present a substantial constitutional question.

C. The Court of Appeals' Decision was Based on Prior Published Decisions and did not Announce any Changes in the Application of the Fair Notice Test, and this Case Does not Involve an Issue of Substantial Public Interest.

Hood claims the "fair notice" test is of substantial public interest, but does not explain why, aside from claiming it is "a judicially administered exhaustion requirement" and "an unlegislated exemption" that "conflicts with law and precedent[.]" Pet. for Review at 28.

However, the "fair notice" test is neither an exhaustion requirement nor an exemption, and it does not conflict with precedent. The test does not establish any conditions or steps which must be exhausted before a requestor can make a PRA

request. Instead, it recognizes that an agency's obligations under the PRA are only triggered if the requestor has made a request for identifiable public records and "state[d] the request with sufficient clarity to give the agency fair notice that it had received a request for a public record." *Wood*, 102 Wn. App. at 878.

The "fair notice" test does not exempt any records from disclosure. It is, however, based on long-standing precedent, including this Court's decision in *Hangartner*. The College produced records responsive to Hood's six "litigation requests" during civil discovery in his 2020 PRA lawsuit; the College did not refuse to produce records during civil discovery in that matter by claiming an exemption under the PRA.

D. The Court of Appeals Affirmed the Dismissal of this Case; Hood did not Prevail, and he was not Entitled to Costs.

Hood incorrectly claims he "prevailed on the *sole* issue under appeal[,]" and therefore must be compensated, including costs and reasonable attorney fees. Pet. for Review at 20-21 (italics in original).

First, Hood misstates the issues on appeal. Whether he sufficiently raised an issue in his briefing was not the sole issue on appeal. While the Court of Appeals did find that "Hood's 2023 complaint, read in context, sufficiently raises the issue argued in his opening brief—that his 'litigation requests' made in the course of the 2020 litigation were also public records requests separate from [his] 2019 public records request[,]" *Hood II*, 2024 WL 1732719, at *5, it ultimately decided that "Hood's 'litigation requests' did not give the College fair notice he was seeking records under the PRA, and thus, these requests were not public records requests." *Id*. at *10. Second, the Court of Appeals explicitly determined that Hood was not entitled to costs or attorney fees because he had "not prevail[ed] in his action against the College and because unrepresented parties are not entitled to attorney fees[.]" *Id*.

A court's refusal to award costs and attorney fees to a pro se party who did not prevail is not, as Hood asserts, contrary to this Court's decision *In re Marriage of Katare*,

175 Wn.2d 23, 283 P.3d 546 (2012). This Court declined to award attorney fees in *Katare* because it determined that one party had not shown that the other party's "conduct crossed the line to intransigence." *Id*. at 43. Hood has not established that the College was intransigent in this matter. While Hood claims the College's arguments that his 2023 PRA lawsuit was barred by "preclusion and statute of limitations" were "frivolous," the superior court "base[d] its decision on res judicata, collateral estoppel, and the PRA's statute of limitations." *Hood II*, 2024 WL 1732719, at *4. And the Court of Appeals ultimately affirmed the trial court's decision dismissing Hood's complaint. Hood was decidedly *not* the prevailing party.

V. CONCLUSION

Review by this Court of the Court of Appeals' order affirming the superior court's order dismissing Hood's 2023 PRA lawsuit is not warranted.

Hood's arguments are without merit, misstate applicable case law, and misrepresent the order on appeal. He urges this

Court to adopt a new public records standard under which interrogatories and requests for production, along with other legal filings made pursuant to applicable court rules, would automatically become PRA requests. Hood's proposed rule would do nothing to advance government transparency. Instead, it would lead to absurd and chaotic results, turning every civil discovery request and dispute, as well as legal filing, into a new PRA request and create "an endless breeding ground for new public records requests." *Hood II*, 2024 WL 1732719, at *9.

This document contains 4,125 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 3rd day of October, 2024.

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/s/ Matthew Barber
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Attorney for Centralia College

DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be served via electronic mail on the following:

Eric Hood, *pro se*
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Langley, WA 98260
ericfence@yahoo.com

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

DATED this 3rd day of October, 2024 at Olympia, Washington.

/s/ Matthew Barber
MATTHEW BARBER, WSBA # 53047
Assistant Attorney General

APPENDIX

NO. 58362-3-II

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RESPONDENT CENTRALIA COLLEGE'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Eric Hood (Hood) seeks to turn the Public Records Act (PRA) into a never-ending game of "gotcha." After Centralia College (College) responded to his September 29 PRA request, Hood sued in 2020 and lost. Dissatisfied with the result of the 2020 litigation, Hood filed a new lawsuit in 2023, again contending that the College should be required to more fully respond to his September 2019 PRA request. The superior court below correctly dismissed that claim, which was barred by res judicata, collateral estoppel, and the PRA's one-year statute of limitations.

On appeal, Hood abandons any defense of the claim based on his September 2019 PRA request and, instead, attempts to assert a new claim: that discovery requests and legal briefing in the 2020 litigation were new PRA requests in disguise. But there are three independent problems with Hood's argument. First, his new claim is not before this Court. Hood attempted to amend his complaint to add those claims, but the superior court denied leave

to amend, and Hood disclaims any challenge to the order denying leave to amend. Second, Hood's claims are entirely without merit. Nothing about his discovery requests or legal briefing in the 2020 litigation put the College on notice that he was making a new PRA request. To the contrary, his discovery requests specifically relied on the civil rules. Third, Hood's new claims would be barred by the PRA's one-year statute of limitations. With the exception of his petition for review, everything else Hood seeks to rely on took place more than one year before he initiated his 2023 lawsuit.

This Court should affirm the superior court's order dismissing Hood's complaint.

II. COUNTERSTATEMENT OF ISSUES

1. Hood does not defend the claim asserted in his complaint. Should this Court affirm the superior court's order granting the College's motion to dismiss Hood's complaint?

2. Hood expressly disclaims any challenge to the denial of his motion to amend his complaint. Should this Court decline to address claims presented only in his rejected proposed amended complaint?

3. If this Court reaches Hood's new claims based on discovery requests and briefing from his 2020 lawsuit, are those claims barred by the PRA's one-year statute of limitations?

4. If this Court reaches Hood's new claims based on discovery requests and briefing from his 2020 lawsuit, should this Court reject Hood's attempts to conflate discovery requests and legal briefing with PRA requests?

III. COUNTERSTATEMENT OF THE CASE

A. The Facts Underlying the Prior PRA Lawsuit in this Matter

1. Hood's September 2019 Public Records Request

In September of 2019, "Hood emailed the College a public records request for records pertaining to a recent audit" in which

he requested "[m]ay I have all records [the College] got from the auditor and all records of any response to the audit or to the audit report." *Hood v. Centralia College*, No. 56213-8-II, 2022 WL 3043208, at *1 (Wash. Ct. App. Aug. 2, 2022) (unpublished) (footnote omitted), *rev. denied*, 200 Wn.2d 1032, 525 P.3d 151 (2023). The College's Public Records Officer at the time requested clarification as to the audit that was the subject of Hood's request, and then "conducted a public records search in which she first identified specific employees with information responsive to Mr. Hood's request." *Id.*, at 2.

In October of 2019, the Public Records Officer provided responsive records to Hood; however, she also informed Hood that his "request is a little big [sic] ambiguous," shared how she was interpreting Hood's request, and asked him to let her know if her interpretation was incorrect. *Id*. Hood responded "that he was unsure what was ambiguous with regard to his email. He repeated his original records request . . ." *Id*. The Public Records Officer again sought more clarity from Hood, to which he

replied: "Thanks for the info. I am most interested in records showing the City's [sic] response to the audit. Since I don't know what [sic] how it responded, I don't know how I can be clearer." *Id*.

In November of 2019, the Public Records Officer emailed the responsive documents to Hood after he paid the required fees. "The College received no further communication from Mr. Hood until almost a year later in October 2020, when Hood filed his complaint." *Id*.

2. Hood's 2020 PRA Lawsuit

In October of 2020, Hood filed a lawsuit in Thurston County Superior Court against the College alleging violations of the PRA. Specifically, Hood "alleged that his request 'encompassed records other than the records [the College] provided him.'" *Id*. at *3.

In his 2020 PRA lawsuit, Hood served the College with three sets of interrogatories and requests for production under the civil rules. In his first set of interrogatories and requests for

production, served in November of 2020, "Hood requested 'all records *related* to the State Auditor's Office audit of the College which resulted in Report No. 1023438 that have not been previously produced, whether or not the College considers them responsive to the Plaintiff's Request.'" *Id*. (emphasis in original). "In a discovery conference, [] Hood then requested 'any specific query from the auditor and any response to that query."' *Id*.

The College then conducted a broad search for all emails between the State Auditor's Office and the College from September of 2019 through March of 2019 which resulted in "574 email messages with various subjects," only some of which related to the audit, and together with accompanying attachments, "comprised of over 2,500 pages . . .," *Id*., of which 1,737 pages were produced during discovery. *Id.* at *6. This search revealed a single email "responsive to Hood's records request and not produced until discovery." *Id.* at *12.

3. The Superior Court's Decision in the 2020 PRA Lawsuit

In his 2020 PRA lawsuit, "Hood pointed to the . . . records produced by the College during discovery to show that the College had" either received from or provided to the SAO more records responsive to his request than it had produced in November of 2019. *Id.*, at *6. The College responded that Hood's public records request (PRR) was ambiguous, that it "had responded to the part of the request that was clear," and "that Hood never stated in his communications . . . that he sought records beyond those . . . identified [by the College's Public Records Officer]." *Id.*

"The superior court found in favor of the College and dismissed Hood's lawsuit with prejudice, ruling that the College did not violate the PRA." *Id.* at *7. Hood moved for reconsideration, which was denied, and then filed an appeal to the Court of Appeals. *Id.*

4. The Court of Appeals' Decision in the 2020 PRA Lawsuit

On August 2, 2022, this Court issued an unpublished decision in which it affirmed the superior court's dismissal of Hood's 2020 PRA lawsuit. This Court determined that "Hood's request left the door open for multiple interpretations," and acknowledged that Hood himself had "interpreted [his own] request in multiple ways," before holding that Hood's September 2019 PRA request "was ambiguous and failed to provide assistance . . . in searching for and locating responsive records." *Id*. at *8.

This Court also held that the Public Records Officer's "response and interpretation of [Hood's] request was reasonable" based on "the ambiguity of Hood's initial request and his communications in response to [the Public Records Officer's] request for clarification . . ." *Id*. at *10.

This Court's decision dismissing Hood's 2020 PRA lawsuit became final on March 8, 2023, CP 29-58, when the Supreme Court denied his petition for review. CP 60. Later that

same day, Hood served the College with his new complaint in the present matter. CP 1-8.

B. The Facts Underlying the Present PRA Lawsuit

In his complaint, Hood alleged that, in discovery in the 2020 PRA lawsuit, he had "identified records that he wanted the College to produce to [him], regardless of whether the College or courts considered them responsive to his September 23, 2019 PRA request." CP 7. His complaint asked the superior court to "order the College to promptly and properly respond to [his] public records request . . ." CP 8.

On March 28, 2023, the College responded to Hood's complaint by filing a motion to dismiss in which it argued that Hood's complaint was "barred by the doctrines of res judicata and collateral estoppel . . ." CP 10. The College also argued that Hood's complaint was barred by the PRA's one-year statute of limitations, RCW 42.56.550(6), because "the College's last production of records in response to [his] September 23, 2019

[PRR]" occurred in November of 2019—three years before he filed his complaint in the present PRA lawsuit. CP 21.

Hood ultimately filed four responses to the College's motion to dismiss, including a motion to amend his complaint. SCP 241-258. In his motion to amend, Hood argued his complaint "[was] *not* based on his September 23, 2019 [PRR], but rather on his subsequent November 16, 2020 [PRR]," SCP 242 (emphasis in original), and this second PRR "triggered [the] College's duty to respond under the [PRA] in accordance with *O'Dea v. City of Tacoma* . . ." CP 243. The November 16, 2020 document that Hood referred to as a "public records request" was actually the first set of interrogatories and requests for production he had served on the College during the 2020 PRA litigation. CP 158 and SCP 362. The superior court subsequently denied Hood's motion to amend because, as the College argued, its "last production of discovery records in response to [Hood's discovery requests] occurred on June 9, 2021. Even if [they] could somehow be recharacterized

as a PRA request, and [Hood]'s Motion to Amend were granted . . . [, Hood] did not file his present lawsuit until March 21, 2023—well over a year after the PRA's one-year statute of limitations had expired" rendering his "proposed amendment futile." CP 367.

During the June 2, 2023 hearing on the College's motion to dismiss, the superior court ruled that it would "defer ruling on this motion until [June 9]," VRP 35. The superior court also gave Hood an opportunity to file a fourth and final response to the College's motion to dismiss to "address[] any potential prejudice" to Hood arising from two issues. VRP 36.

First, when filing its motion to dismiss, the College had inadvertently neglected to provide Hood, a pro se litigant, with a pamphlet published by the Thurston County Superior Court about motions for summary judgment and copies of CR 56 and LCR 56 as required by LCR 56(i).

The second issue concerned an irregularity with the College's service of its reply to Hood's response to the College's

motion to dismiss. While sent "via Fed Ex overnight delivery to Mr. Hood on May 25th," and scheduled to arrive "at Mr. Hood's residence on May 26th at 2:00 p.m.," "Fed Ex did not complete the delivery until May 30th. *Id.*, at 36 and 7.

Although the superior court determined that "it does not appear that there was prejudice" to Hood from these two issues, *Id*. at 35, it "allow[ed] Mr. Hood to file . . . additional briefing . . . by no later than June 7th at noon" to address "any potential prejudice as to the [College's] unintentional failure to follow LCR 56[(i)] and the irregularity associated with the service of the pleading." *Id.*, at 36. The superior court also "ask[ed] the parties to submit proposed orders . . . on June 8th for the court to issue its decision[.]" *Id*.

On June 16, 2023, the superior court issued its order granting the College's Motion to Dismiss, using the proposed order the College had initially filed with its motion to dismiss. CP 222-23 and SCP 237-240. This is the order Hood now claims he "had never reviewed" before. Br. of Appellant at 9.

IV. ARGUMENT

The superior court correctly dismissed Hood's 2023 complaint. His 2023 complaint alleged violations based on his September 2019 PRA request. CP 3-8. Because its response to that PRA request has been litigated to finality, the College identified three independent grounds for dismissal in its motion to dismiss: res judicata, collateral estoppel, and the PRA's one-year statute of limitations. CP 21; VRP 34-35. "[T]hose are the three issues that the [superior] court" said it would "decide the motion based upon," VRP 35, and in its order, the superior court dismissed Hood's 2023 complaint with prejudice after "review[ing] the College's Motion to Dismiss and all records and pleadings on file herein[.]" CP 222. Hood now abandons any argument that the College violated the PRA in response to his 2019 PRA request. This is effectively a concession that the superior court correctly dismissed his 2023 complaint.

On appeal, Hood attempts to raise a new claim: that his discovery requests from the 2020 PRA litigation automatically

became PRA requests. This argument was first introduced in a proposed amendment to Hood's 2023 complaint; however, the superior court denied Hood's motion to amend his complaint, and Hood now expressly disclaims any challenge to the superior court's denial of his motion to amend. Br. of Appellant at 9 n. 1. As a result, Hood's claim based on discovery requests made during the 2020 PRA litigation is not before this Court. Even if it were, it is without merit.

This Court should affirm the superior court's order dismissing Hood's 2023 complaint.

A. Hood Effectively Concedes that the Superior Court Correctly Dismissed His Complaint

Hood effectively concedes that the trial court correctly dismissed his 2023 complaint. The relief Hood sought in his 2023 complaint is an order for the College to "promptly and properly respond to Mr. Hood's public records request . . . ." CP 8. The only PRA request mentioned anywhere in his 2023 complaint was his September 2019 PRA request. CP 4-7. The adequacy of the College's response to Hood's September 2019

PRA request has been fully litigated, *see Hood*, 2022 WL 3043208, *10-13.

Hood does not contest this on appeal. To the contrary, he now expressly acknowledges that the "College's response to Hood's 2019 PRA request . . . is not at issue here." Br. of Appellant at 3. Nor could he contest it.

Res judicata bars reconsideration of the College's response to Hood's September 2019 PRA request. This Court's decision in *Hood v. Centralia College*, *supra*, is a valid and final judgment on the merits of Hood's 2020 complaint. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011). Collateral estoppel bars reconsideration of issues of ultimate fact determined by this Court in the 2020 PRA litigation. *State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648 (2002). The reasonableness of the College's interpretation of Hood's ambiguous 2019 PRA request, and the adequacy of the College's search for responsive records, were issues of ultimate fact determined by this Court in the 2020 PRA litigation, and issues

of ultimate fact, "once determined by a valid and final judgment," "cannot be relitigated between the same parties in any future litigation." *Id*.

Hood's 2023 complaint was based on his 2019 PRA request. Hood now concedes—correctly—that he cannot obtain relief for that request. Accordingly, the superior court correctly granted the College's motion to dismiss. For the reasons discussed below, Hood's attempts to re-write his complaint on appeal fail.

B. Hood Expressly Disclaims Review of the Order Denying His Motion to Amend His Complaint

On appeal, Hood seeks to argue claims that are not before this Court. Hood now argues that his 2020 complaint, his November 2020 discovery requests, and his legal briefing in the 2020 PRA litigation each constituted new PRA requests. Br. of Appellant at 3-6. Hood attempted to add these claims to his complaint in the trial court, SCP 241-258, but the superior court denied Hood leave to amend his complaint. SCP 365-368. Hood did not include that order in either his notice of appeal,

CP 224-225, or amended notice of appeal. While these claims conceivably might have been brought up for review under RAP 2.4(b), that does not help Hood. Hood not only failed to assign error to the order, or advance any legal argument that denial of leave to amend was an abuse of discretion, he *expressly disclaims* any challenge to that order: "This appeal does not concern the Order dated June 2, 2023 that denied Hood['s] motion to amend." Br. of Appellant at 9 n. 1.

Hood's claims that his discovery requests and legal pleadings were, in fact, PRA requests in disguise are not before this Court. As a result, none of the arguments in Hood's brief support reversal. This Court should affirm.

C. Even if they Were Before This Court, Hood's Arguments Lack Merit

Even if Hood's arguments were properly before this Court, they lack any merit for two reasons. First, Hood's discovery requests and legal briefs were plainly not PRA requests under any standard. This Court has already rejected, in unpublished decisions, similar arguments to unjustifiably expand the holding

of *O'Dea v. City of Tacoma*, 19 Wn. App. 2d 67, 493 P.3d 1245 (2021). If it were to reach the merits, this Court should do so again here. Second, as the superior court recognized in denying Hood's motion to amend, any complaint based on Hood's discovery requests and legal briefs from the 2020 PRA litigation would be barred by the PRA's one-year statute of limitations.

1. Hood's Discovery Requests and Litigation Briefing Were Not PRA Requests

The discovery requests Hood served on the College during the 2020 PRA litigation "did not provide fair notice to the [College] that he was making a PRA request and, therefore, [they] did not trigger the PRA or obligate the [College] to comply with PRA disclosure requirements." *Germeau v. Mason Cnty.*, 166 Wn. App. 789, 810, 271 P.3d 932 (2012). To be considered a specific request for records, the requester must present the agency with a "'request [of] sufficient clarity to give the agency fair notice that it ha[s] received a request for a public record.'" *Id*. (*quoting Wood*, 102 Wn. App. at 877–78).

A request for public records must "put the agency on notice that she [is] requesting public records," rather than a "request [that] could have been made under another statute . . ." *Beal v. City of Seattle,* 150 Wn. App. 865, 873–74, 209 P.3d 872 (2009). "Washington courts apply a 'fair notice' test to distinguish PRA requests from those arising from some other legal authority." *O'Dea*, 19 Wn. App. 2d at 80. "Fair notice" is comprised of two factors: the "(1) characteristics of the request itself, and (2) characteristics of the requested records." *Germeau,* 166 Wn. App. at 805.

"The factors relating to the characteristics of the request are (1) its language, (2) its format, and (3) the recipient of the request." *O'Dea*, 19 Wn. App. 2d at 81. In the first of three sets of interrogatories and Requests for Production Hood served on the College by delivery to its legal counsel, he described them as "discovery demand[s]", SCP 276; expressly referred to CR 33 and 34 as the legal basis for his request that the College "produce for inspection and copying the documents described in

each request," SCP 277; and included spaces for the College to respond to his discovery requests. The language of Hood's standard-form discovery requests demonstrates that he was requesting discovery from the College. In them, he cited to the civil rules rather than the PRA as the authority for his requests, and included spaces for the College to respond to his interrogatories, and the College responded to Hood's discovery requests under the civil rules of discovery. *See, e.g.*, SCP 342-43. Hood's discovery requests did not have the characteristics of a PRA request, and he should not be allowed to recharacterize that discovery as a PRA request.

"The factors relating to the characteristics of the records are '(1) whether the request was for specific records, as opposed to information about or contained in the records,' '(2) whether the requested records were actual public records,' and '(3) whether it was reasonable for the agency to believe that the requester was requesting the documents under an independent, non-PRA authority.'" *O'Dea*, 19 Wn. App. at 81 (*quoting*

Germeau, 166 Wn. App. at 807). As in *Germeau*, the "third factor is determinative" here because it was more than reasonable for the College to believe these were discovery requests and briefing, not new PRA requests.

Hood's reliance on *O'Dea* is decidedly misplaced. Hood's discovery requests which referenced the civil rules, are a far cry from *O'Dea*, where the PRA requests, though provided as part of litigation, where unmistakably labeled "PUBLIC RECORDS REQUEST." 19 Wn. App. at 72-74. And the Court of Appeals has rejected the type of expansion of *O'Dea* that Hood seeks here. First, Division I of this Court rejected a different plaintiff's "reading of *O'Dea* that would treat every PRA complaint as a new records request when the request had already been submitted." *Kilduff v. San Juan Cnty.*, No. 82711-1-I, 2022 WL 1763722, *11 (Wash. Ct. App. May 31, 2022) (unpublished). Like Hood, the plaintiff in *Kilduff* argued "that once he filed his PRA lawsuit, the County became aware that it had not provided

the documents Kilduff requested and should have then produced them." *Id*. This Court persuasively rejected that argument.

Second, a different panel of this Court rejected a plaintiff's argument that an email they sent opposing counsel during active litigation constituted a new public records request. *Brittig v. Mason Cnty. Fire Dist. No. 6*, No. 57408-0-II, 2023 WL 5094063, *9 (Wash. Ct. App. Aug. 8, 2023) (unpublished). The Court rejected Brittig's argument because the email "was not itself a PRA request, but rather a follow-up to a request that, from the District's perspective, it had already fulfilled." *Id.*, at *9. Similar logic applies here. Hood's discovery requests and briefing were not new PRA requests; rather, they were litigation-related follow-up to his September 2019 PRA request. This case presents an even less compelling argument for extending O'Dea than either *Kilduff* or *Brittig*.

Hood's litigation requests did not provide the College with fair notice that he was making requests pursuant to the PRA. Even if this issue were before the Court, this Court should reject

it. A party intending to bring an action under the PRA must do so "within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." RCW 42.56.550(6). Assuming arguendo that the discovery requests were PRA requests, the Department's last production of discovery responses took place on June 9, 2021. SCP 342-45. Hood did not file this lawsuit until more than one year later, on March 21, 2023, well beyond the PRA's statute of limitations.

Hood's petition for review was the only document cited in his opening brief that was within one year of his 2023 lawsuit but, for the reasons discussed above, it does not remotely resemble a PRA request.

2. Hood's Claims are Barred by the PRA's One-Year Statute of Limitations

Even if Hood's discovery requests and briefing could be considered PRA requests, his 2023 PRA lawsuit would be barred by the PRA's statute of limitations. A party intending to bring an action under the PRA must do so "within one year of the agency's claim of exemption or the last production of a record

on a partial or installment basis." RCW 42.56.550(6). Assuming arguendo that the discovery requests were PRA requests, the Department's last production of discovery responses took place on June 9, 2021. SCP 260 and 342-45. Hood did not file this lawsuit until more than one year later, on March 21, 2023, well beyond the PRA's statute of limitations.

Hood's petition for review was the only document cited in his opening brief that was within one year of his 2023 lawsuit but, for the reasons discussed above, it does not remotely resemble a PRA request.

V. CONCLUSION

This Court should affirm the superior court's order dismissing Hood's 2023 complaint. Hood offers no argument in support of the claim in his complaint. The claims he *does* argue in his brief are not before this Court and, in any event, have no merit.

Hood did not prevail in one of his many PRA lawsuits. His arguments in this case promote an ambiguous and never-ending

shell game for public records processing and agencies that receive discovery requests which would do nothing to advance government transparency. Dismissal of Hood's 2023 complaint is proper based on multiple grounds, including res judicata, collateral estoppel, tolling of the PRA's one-year statute of limitations, and lack of fair notice to the College that Hood's discovery requests from the 2020 PRA lawsuit were also intended to be public record requests. This Court should affirm the superior court's decision dismissing Hood's Complaint.

This document contains 4,133 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 8th day of November 2023.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's electronic filing system, which will serve a copy of this document to:

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

DATED this 8th day of November 2023, at Olympia, Washington.

/s/ Matthew Barber
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ATTORNEY GENERAL'S OFFICE-EDUCATION DIVISION

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