No. 1035209

**IN THE SUPREME COURT OF
THE STATE OF WASHINGTON**

ERIC HOOD,

Appellant,

v.

CITY OF LANGLEY,

Appellee.

CITY OF LANGLEY'S RESPONSE TO AMENDED PROPOSED PETITION FOR REVIEW

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I. INTRODUCTION

This lawsuit concerns a public records request ("PRR") Eric Hood made to the City of Langley nine years ago. Represented by his regular Public Records Act ("PRA") lawyer, Hood litigated before the Superior Court for years and filed two appeals. After all this litigation, the case came down to a calendar containing no substantive information.

In his latest appeal, Hood demanded reversal by Division I of the trial court's comprehensive penalty decision. He appealed a singular *question of law*: Did a decision by Division II in a separate case, with separate facts, decided years after the City disclosed the calendar *require* the trial court to assess a daily penalty higher than five dollars? Pointing to only one of the *Yousoufian*[1] factors considered and explained by the trial court, Hood asked Division I to abandon the prohibition of

[1] *Yousoufian v. Office of Ron Sims,* 168 Wn.2d 444, 229 P.3d 735 (2010).

a piecemeal attack on a comprehensive penalty assessment. He did not challenge any of the trial court's findings of fact.

Upon Division I's rejection of Hood's latest appeal, he dropped his lawyer and filed a *pro se* motion for reconsideration challenging findings of fact he never appealed. Division I properly rejected that motion.

Hood then filed an untimely petition for discretionary review. He asks this Court to review trial court decisions and findings he never appealed and Division I's run-of-the-mill rejection of Hood's narrow appeal.

Because Hood failed to timely seek review and because he cannot satisfy RAP 13.4(b), his proposed petition should be denied.

II. STATEMENT OF THE CASE

A. The City.

Langley has 15 employees, three of whom are part time. CP 821. It does not have a full-time records officer. *Id.*

Responding to PRRs is one of many duties of the City's Clerk-Treasurer. *Id.*

The City's expenses are funded by its 1,170 residents. In December 2021, the City Council passed a General Fund Budget of $1,783,813 which was allocated among the many needs of the City, including training for City employees, the municipal court, utilities for City buildings, the City's police department, emergency dispatch services, and homeless services. CP 1578-1580.

B. The City's Response to Hood's January 5 PRR.

On January 5, 2016, Hood submitted his next in a long line of PRRs to the City. He requested all records "kept or created by former Mayor Fred McCarthy," records "dictated by" McCarthy, records "maintained in the locked cabinet in former Mayor McCarthy's locked office," and all City records "at his home, or on his personal computer or any other personal device[.]" CP 162-163.

City Clerk Debbie Mahler timely responded on January 8, 2016 that "All of Mayor McCarthy's City records are contained in 6 boxes, 25 binders and on a laptop located here at Langley City Hall." CP 162. Mahler responded to another email from Hood:

> I do not know what all is contained in the Mayor's records. They were kept by him in his office while he was Mayor and accessed if needed for a public disclosure request. He then boxed them up and put them alphabetically into file boxes and binders were kept from every meeting. Mayor McCarthy's pocket notebooks are not included as he has stated that they were personal notes and not related to city business.

CP 925.

On January 15, 2016, Hood inspected McCarthy's records. CP 5, 71. Mahler copied the records he requested. CP 5.

During this inspection, Hood changed his focus from the hardcopy records to electronic records on the City laptop. CP 71. Mahler told Hood that he could not directly inspect the

laptop and instead asked him what kind of records he wanted. CP 937-938.

In response, Hood told her that he wished to narrow his request to only those records regarding himself. CP 938, 71. Mahler asked Hood to confirm his modification to his PRR in writing and told him she would search for those records. *Id.*

On January 15, 2016, Hood emailed her: "Please disclose all electronic files that reference Eric Hood or any of his dealings with the City of Langley." CP 178, 70-71, 85. Mahler testified that this was Hood's "amended request after he came in and looked at documents." CP 934. She testified that "electronic files" would include electronic calendars if they "reference[d]" Hood. *Id.*

The City laptop had been reassigned to the new mayor. CP 72. Mayor Tim Callison created a partition within the laptop to isolate the records existing prior to his assuming office. *Id.* McCarthy's emails were segregated into a separate

inbox on the laptop. *Id.* Callison searched the laptop for "Hood," "Eric," and "Eric Hood." *Id.*

In addition, Mahler searched the City computer for records responsive to Hood's narrowed PRR. *Id.* She too ran a search for "Hood," "Eric," and "Eric Hood." CP 939. This keyword search would have revealed any record that mentioned him by name. *Id.* Consequently, she did not read every single record on the laptop. *Id.*

On January 27, 2016, Mahler produced to Hood the records referencing him. CP 7, 57, 73, 87.

C. Hood sued.

Hood sued the City in late January 2016. CP 573.

On February 19, 2016, the City's attorney Jeff Myers wrote to Hood seeking clarification:

> On January 28th, Ms. Mahler provided you with a response to the January 15th request for electronic files which concerned you. Ms. Mahler's understanding of your January 15th request was that it was a follow-up to your much broader request of January 5, 2016 for former Mayor McCarthy's records….

> If Ms. Mahler's understanding was not correct, please clarify what identifiable records you are seeking….
>
> We have conducted searches of the laptop computer that looked for anything with your name on it, as we understood from your January 15 communications…. What further records do you think exist for us to pull off of that laptop?

CP 184-185.

The trial court "has not found any response from Mr. Hood specifying the records that he was still seeking[.]" CP 2435.

Instead, on March 1, 2016, he sent a confusing email to Myers which *did not* reference Myers' February 19 letter nor answer the questions he posed.

> Furthermore, the City's unambiguous responses to my January 5 request are unrelated to my clearly separate and later January 15 request. In short, the City's later purported confusion regarding my January 15 request in no way muddies and cannot be conflated with its unambiguous response to my January 5 request.

> On January 16 and 22, the City provided me unfettered access to the City's hardcopy files for approximately six hours.
>
> On January 27, I requested to "view the computer files on the laptop you mentioned." Since the City's only previous mention of "laptop" was made in reference to my January 5 request, I reasonably expected to (quoting the City) "review those files" on that laptop and make copies "of any documents that [I] identify."
>
> Please clarify: Does the City now claim that certain records responsive to my January 5, 2016 request are exempt?

CP 187-188.

The court found that "Hood's March 1, 2016 email to the litigation counsel was not a model of clarity[.]" CP 2435. "There is certainly no indication from the March 1, 2016 email that what Mr. Hood was requesting in particular was the former mayor's daily appointment calendars." *Id.*

D. The First Appeal.

In July 2017, the court granted summary judgment to the City. CP 762-770.

On January 28, 2019, Division I affirmed in part and remanded in part. On appeal, Hood asserted his demand for McCarthy's calendar. CP 796-797. The Court remanded for a determination of "whether the City performed an adequate search for responsive electronic documents[.]" CP 797-780.

In addition, Division I "conclude[d] there is a genuine issue of fact as to whether Hood intended to narrow his January 5, 2016, request, as the City contends, or whether the January 15, 2016, request was a new request, as Hood contends." CP 798. On this issue, too, the Court remanded. *Id.*

On February 5, 2019, Myers produced the calendar to Hood's lawyer. CP 1532. The calendar did not reference any substantive information. CP 948-979, 985-1179. It simply stated names – of individuals *other than* Hood – and times. CP 941.

E. Litigation on Remand.

Over nine years of litigation, Hood abandoned many baseless arguments. The issues remaining were whether the

City violated the PRA by concluding he only sought any mention of himself in the calendar and, if so, what penalties the trial court should assess.

On remand, the City moved for judicial review regarding the PRA violation issue. CP 801. Hood *did not* appeal the court's resulting order. CP 2446.

In an *unappealed* finding of fact, the court ruled that:

> in its judgment, the City's initial response to Mr. Hood's January 5 [request] was adequate: the City identified Mayor McCarthy's laptop as well as the physical responsive documents in its initial response, communications between [] Mahler and Mr. Hood suggest that he could have an opportunity to review the contents of the laptop himself once [] Mahler had time to supervise him, the City's later denial of that opportunity was expressly based on the City's understanding that Mr. Hood had narrowed his original request by his email of January 15, 2016, and this Court expressly finds that understanding to have been reasonable until its receipt of Mr. Hood's March 1, 2016 email[.]

CP 1394-1395.

The court further held, in an *unappealed* finding of fact, that "[u]nder the circumstances, it was reasonable for [] Mahler to regard her conversation with Mr. Hood on January 15, 2016, during the hours-long sessions of tangible document production as a clarification and/or modification of his initial" PRR. CP 1392.

In other *unappealed* findings of fact, the court found "that the City had no reason to know that: Mr. Hood had a different idea, or would come to have a different idea, than Ms. Mahler about the significance of his January 15, 2016 email as an initial matter." CP 1392-1393. And the court found that Hood never "state[d], simply and straightforwardly, that he still wanted all of the records that he asked for on January 5, 2016[.]" CP 1393.

The court was guided by *O'Dea v. City of Tacoma* – a Division II decision issued two years *after* the City's lawyer produced the calendar to Hood – in determining whether the City had violated the PRA. 19 Wn. App. 2d 67, 493 P.3d 1245

(2021). In *O'Dea*, the court ruled that Tacoma's receipt in litigation of a PRR the City never previously received required a response to the PRR during the litigation. CP 1394.

In an *unappealed* finding, the trial court concluded:

> Under the circumstances, the Court does not agree that it was or should have been clear to the City that the two requests were, in fact, "unrelated" or "separate" at any time before the City's receipt of Mr. Hood's March 1, 2016 response to the February 19, 2016 letter of the City's litigation counsel. In this Court's judgment, however, Mr. Hood's March 1, 2016 response, directed as it was to an attorney who was responsible for the defense of the City in this PRA case, would have been sufficient to put the City on notice that Mr. Hood had not intended to modify or clarify his [PRR].

CP 1393.

In its *unappealed* ruling on the merits, the court treated the March 1 email as a new PRR. "The City had 5 *business* days from that point – that is, to *March 8, 2016* – to respond to Mr. Hood's 'un-narrowed' request by producing the former

mayor's daily calendars, which the City did not do until February 5, 2019." CP 2190.

F. The Penalty Determination.

The court announced its penalty ruling orally, the transcript of which it incorporated into a subsequent written ruling. CP 2191, 2291. The court assessed a five-dollar daily penalty for the 1,063 days between March 8, 2016 and February 5, 2019, totaling $5,315.00. CP 2292.

The court precisely followed *Yousoufian* in setting the penalty. 168 Wn.2d 444. The court recognized that it must start by considering the entire penalty range established by the Legislature, $0 to $100. CP 2297. The court considered each of the *Yousoufian* mitigating and aggravating factors and identified and explained the relevant factors. CP 2298.

There were "many mitigating factors." *Id.* *First*, the court found the "City promptly responded, followed up with, and was helpful to Mr. Hood." CP 2298-2299.

Second, the court found that the "City acted with good faith and honesty and complied with the PRA's procedural requirements." CP 2299. The court explained:

> "When determining the amount of the penalty to be imposed the existence or absence of [an] agency's bad faith is the principal factor which the trial court must consider." *Yousoufian*, 168 Wn.2d at 460. The evidence amply demonstrates the City's good faith and honesty in responding to Mr. Hood's initial January 5, 2016 request and his January 15, 2016 email.

Id.

Third, the court found that the "City promptly brought in a lawyer to assist." *Id.* The court relied on *West v. Thurston County*, in which the Court of Appeals approved the trial court's finding that "the County demonstrated adequate training and supervision of the County's personnel with respect to PRA requests because the County assigned the responsibility to respond to Mr. West's PRA request to a licensed, practicing attorney who has specific knowledge of the issues presented in" the case. 168 Wn. App. 162, 190, 275 P.3d 1200 (2012)

(cleaned up); CP 2299. The court noted that the City had "engaged a PRA lawyer to look at the January 15, 2016 email and provide Clerk Mahler advice." CP 2299-2300.

Fourth, the court found "[t]he City's explanation for noncompliance is reasonable" based on its prior, *unappealed*, findings of fact. CP 2300.

> This Court found the City's explanation for noncompliance before March 1, 2016 eminently reasonable. 7/28/22 Letter Ruling.[2] "Mr. Hood's January 5, 2016 public records request is fairly characterized as seeking everything but the kitchen sink related to Mayor McCarthy." *Id.* at 6. "[I]t was reasonable for [] Mahler to regard her conversation with Mr. Hood on January 15, 2016, during the hours-long sessions of tangible document production as a clarification and/or modification of his initial [PRR]." *Id.* "[T]his Court also finds that the City had no reason to know that Mr. Hood had a different idea, or would come to have a different idea, than Ms. Mahler about the significance of his January 15, 2016 email as an initial matter." *Id.* at 6-7. *See also Hood v. S. Whidbey School Dist.*, … 195 Wn. App. 1058, *17 (unpublished) (Sept. 6, 2016) (approving the trial court's finding that the

[2] Hood did not appeal the referenced order. CP 2446.

> agency's "explanations for particular oversights in its searches and productions were reasonable and fully understandable in light of the numerous broad and overlapping requests with which it was faced''), *review denied*, 187 Wn.2d 1020 (2017). This Court also recognized that in March 2016 and thereafter, the former mayor's calendar was "fairly regarded as a minor point" as "the principal bone of contention between the parties in the 2017 summary judgment brief was the production (and destruction) of Mayor McCarthy's personal journals," 7/28/22 Letter Ruling at 7, issues on which Mr. Hood lost in this lawsuit.

CP 2300.

The court found "there are no aggravating factors." *Id.*

First, the court found "that the City did not act with any

dishonesty." *Id.*

> This Court was guided by *O'Dea*, 19 Wn. App. 2d 67, which it found to be persuasive of the conclusion that an agency can be notified during a lawsuit of the meaning of a never-received or previously unclear PRA request. 7/28/22 Letter Ruling at 8…. Notably, *O'Dea* was decided more than two years after the City produced the calendar that is the sole issue remaining from Mr. Hood's lawsuit. The City itself could not have been guided by *O'Dea*.

CP 2300-2301. The court explained "[i]t's not agency dishonesty to have failed to anticipate what a court would consider to be appropriate or dispositive some four years in the future when everyone involved, including Mr. Hood in 2022, had the benefit of the analysis in *O'Dea*." CP 2306.

Second, the court found the "calendar was of no foreseeable public importance." CP 2301.

Third, the court found that "Mr. Hood did not experience any foreseeable personal economic loss as a result of the delay in receiving the calendar." *Id.*

Fourth, the court found "[t]he City did not act with negligence, recklessness, wantonly or in bad faith, nor did it intentionally fail to comply with the PRA. The City was not intransigent." *Id.*

Fifth, the court found that "[n]o penalty above the lower end of the statutory range is necessary to deter future

misconduct considering the City's size and the facts of this case." *Id.*

> "[T]he PRA penalty is intended to discourage improper denial of access to public records and to encourage adherence to the goals and procedures dictated by the statute." *Zink*, 4 Wn. App. 2d at 123-24 (quotation marks, brackets & citations omitted). In the case of a small city, the "trial court does not abuse its discretion by treating the ninth 'deterrence' *Yousoufian* aggravating factor as the most important aggravating factor …." *Id.* at 123. The Supreme Court has "explicitly recognized that an agency's smallness and limited resources can matter." *Id.* at 126 (citing *Yousoufian*, 168 Wn.2d at 462-63); *see also id.* at 129 ("The trial court did not err or abuse its discretion in concluding that the penalty amount needed to deter the city is not the same as presented in cases involving Washington jurisdictions or agencies with much larger budgets and resources.").

CP 2301-2302.

The court further found:

> The sole PRA violation here arose from Mr. Hood's unclear communications with the City (or his after-the-fact interpretations of those communications), not with the City's process for responding to PRA requests. The City responded to the request nearly seven

> years ago by way of a City Clerk who long ago left her job with the City. *Hoffman*, 194 Wn.2d at 232 (This factor mitigated the penalty because the problem was attributed solely to an employee who had retired and that employee's "negligence was due to her idiosyncratic understanding of a particular PRA provision rather than to systemic lapses in training, supervision, or work flow."); *Hoffman*, 4 Wn. App. 2d 489, 499, 422 P.3d 466 (2018) ("When it comes to liability, an agency's weakest link can cause a PRA violation. But because the question of penalty is guided by an overarching concern for deterrence, it is appropriate for a trial court to consider an agency's overall level of culpability, not just the culpability of the worst actor.") (citation omitted), *aff'd*, 194 Wn.2d 217 (2019).

CP 2302.

The court explained that "Langley is a small city" and

> the penalty needed to deter a small city and that necessary to deter a larger public agency is not the same. [*Yousoufian*, 168 Wn.2d] at 463; *Hoffman*, 194 Wn.2d at 232 (penalty assessed cost $0.34 per county resident); *Yousoufian*, 168 Wn.2d at 470 (penalty assessed cost $0.19 per resident); *O'Dea*, 19 Wn. App. 2d at 86 (reversing penalty that amounted to almost $12 per resident).

CP 2303.

The court exercised its broad discretion "[b]ased on consideration of all of these factors, the entire penalty range, the facts as found by this Court, and the City's size[.]" *Id.*

Following the oral ruling setting the penalty award, the City informed the court of the City's April 6, 2022 CR 68 Offer of Judgment in the amount of $5,650.00 plus costs and attorney's fees, which Hood had rejected. CP 2292. Because the court's eventual penalty ruling was less than the Offer of Judgment, the court ruled that "Hood may not recover from the City any costs, including attorney's fees, he incurred after April 6, 2022[.]" *Id.* Hood *did not* appeal that ruling. CP 2446.

G. Hood's Baseless Reconsideration Motion.

Hood moved for reconsideration of the penalty assessment based on the same arguments he had made before. He said the court was required to rule that the City acted with dishonesty upon its former lawyer's receipt of the March 1 email, that the City could have been guided in 2016 by the 2021

O'Dea decision, and that the Court must impose a $100 daily penalty. CP 2320-2321.

The court denied this motion. CP 2430. Again, the court reiterated its prior holding.

> Hood asserts that it is clear, as a matter of law, that this is a case of dishonesty: that it is clear, as a matter of law, that the City's first litigation counsel … was dishonest. But this Court has already determined that the City reasonable believed that Mr. Hood had narrowed his request for electronic records on January 15, 2016.

CP 2434. The court further explained:

> [T]his Court's determination that the City violated the PRA was expressly based on *O'Dea*: i.e., presented with fair notice that Mr. Hood then wanted all electronic public records that were responsive to his January 5, 2016 request via Mr. Hood's March 1, 2016 email, the City had to produce them, even if the City reasonably believed that Mr. Hood had narrowed the request on January 15th. Indeed, and more precisely, this Court has determined, based on *O'Dea*, that the City had to produce the public records to which Mr. Hood was entitled that he requested on January 5, 2016, even if Mr. Hood did narrow his January 5, 2016 request on January 15, 2016, but thereafter changed his mind. But

> that is hindsight: *O'Dea* was not decided until after the [first] appellate decision in this case was issued.

CP 2434. The court reiterated that its "determination as regards an appropriate penalty was based on the City's culpability for what it knew and reasonably should have known; not for its failure to foresee a future court decision." CP 2435.

H. Hood's Narrow Appeal.

Hood appealed *only* the order setting the penalty and the denial of the motion to reconsider the penalty. CP 2446. He argued that, as "a matter of law," the *O'Dea* case required that the Superior Court: (1) find that the City acted with dishonesty; and (2) award penalties of at least $335 more so he could beat the City's Offer of Judgment. Brf. of Appellant at 4, 23, 30. He did not "challenge[] the trial court's factual findings" and, "[t]herefore, the factual findings set forth in the trial court's rulings are verities on appeal." No. 85075-0-I, Slip. Op. at 11 (July 1, 2024) ("CoA Decision").

Division I rejected Hood's "request to engage in a piecemeal de novo review of a single *Yousoufian II* factor[.]" *Id.* at 9.

> Hood challenges only the court's application of law to one out of the nine penalty factors that the court considered in imposing the lower-end penalty. Because we do not conduct piecemeal evaluations of such penalty factors and because, reviewed holistically, the trial court's penalty determination in this matter plainly does not evince a manifest abuse of discretion, we affirm the superior court's ruling.

Id. at 1. The Court ruled:

> Because the legislature has conferred considerable discretion to trial courts when determining [PRA] penalties, because our Supreme Court has repeatedly emphasized that such determination must be viewed holistically for its overall reasonableness and that no one penalty factor should control appellate review of any such determination, and because a holistic review of the trial court's determination in this matter reveals that no abuse of discretion occurred, Hood's assertion fails.

Id. at 5.

Division I also rejected Hood's argument regarding *O'Dea*.

> [T]he trial court properly reasoned that, prior to the *O'Dea* decision, the City could not have reasonably known that it was the state of the law that an e-mail from Hood occurring in the context of litigation constituted a clarification of the scope of his [PRR]. As a corollary, the trial court also reasoned that the City could not have modified the timing of its production of the record in response to the ruling in *O'Dea*. Thus, in determining that there was an absence of "agency dishonesty" in this matter, in reliance on *O'Dea*, the trial court did not incorrectly apply the law.

Id. at 10-11, n.4.

Hood, jettisoning his lawyer and his *O'Dea* argument, moved for reconsideration *pro se*. He asked Division I to consider *unappealed* findings of fact which the Court rejected. Order Denying Mot. for Reconsid. (Aug. 26, 2024).

III. ARGUMENT

Hood's proposed amended petition for review ("PAP"), even had it been timely, fails to satisfy any of the narrow circumstances under which this Court will accept review. RAP

13.4(b). Division I's decision *does not* conflict with any decision of this Court. It *does not* conflict with a published decision of the Court of Appeals. There is *no* significant (or any) question of constitutional law. And there is *no* issue of substantial (or any) public interest.

Rather, Hood asks this Court to review decisions he never appealed, findings of fact he never challenged, and issues he never raised to Division I. His proposed petition should be denied because it was untimely *and* it does not satisfy the narrow criteria for discretionary review.

A. Hood Appealed a Single Issue of Law and No Fact Findings.

Hood appealed *only* the trial court's assessment of penalties, *not* any of the trial court's merits orders. CP 2446. And the sole issue he raised on appeal was his claim that the trial court was required, *as a matter of law*, to find the City acted dishonestly based on the later *O'Dea* case. Brf. of Appellant at 30 ("Hood challenges only the trial court's refusal

to apply *O'Dea* [] retroactively, which is an error of law that this Court reviews *de novo*.").

Consequently, that is the sole issue Division I decided. CoA Decision at 1 ("Hood challenges only the court's application of law to one out of the nine penalty factors that the court considered in opposing the lower-end penalty."). Because Hood did not challenge any of the trial court's factual findings, "the factual findings set forth in the trial court's rulings are verities on appeal." *Id.* at 11. Division I ruled that "when an appellant does not challenge any of the factual findings underlying the trial court's penalty assessment, our review is limited to the legality of the trial court's approach and overall reasonableness of its selected remedy." *Id.* (quotation marks & citation omitted).

B. Hood May Not Challenge Unappealed Findings of Fact or Unappealed Orders.

The unappealed findings of fact which were verities on appeal, remain verities before this Court. *Matter of Marriage of Watanabe*, 199 Wn.2d 342, 349, 506 P.3d 630 (2022)

(agreeing with the Court of Appeals' holding that the trial court's findings were verities on appeal); *Wood v. Milionis Constr., Inc.*, 198 Wn.2d 105, 122 n.5, 492 P.3d 813 (2021) ("like the Court of Appeals," this Court treats unchallenged findings of fact as verities). Yet Hood improperly seeks review of unappealed findings and orders.

First, he points to the court's finding that the City Clerk "responded to the January 5, 2016 public records request based on" the former Mayor's "direction that counsel for the City had advised the City that his daily calendars were not public records." CP 1957; *see* PAP §E(1)(a). Hood *did not* appeal this trial court decision *or* this finding of fact. CP 2446.

Second, he points to the court's finding that "the City did not unequivocally deny Mr. Hood's request to examine the laptop until after the City had reason to believe that Mr. Hood had narrowed his request." CP 2189; *see* PAP §E(1)(b). Hood *did not* appeal this trial court decision *or* this finding of fact. CP 2446.

Third, Hood offers a laundry list of asserted "violations of the PRA *after* January 8, 2016" by way of acts the City allegedly "failed to" perform. PAP §E(1)(c). He points to nothing in the trial court's penalty determination (the only decision he appealed), nor did he challenge any of these findings of fact before Division I.

Fourth, Hood complains about what he calls improper burden shifting. PAP §E(1)(e). He points to several findings of fact by the trial court which he did not appeal and which remain verities. PAP at 23 (criticizing CP 2302, 2435 n.1). He points to a finding of fact in the trial court's 2017 ruling which was the subject of his first appeal, *not his present appeal*. *Id.* at 21-22 (criticizing CP 687). And he points to a finding of fact in the trial court's July 2022 ruling, *id.* at 22 (criticizing CP 1272), which he never appealed. CP 2446.

Fifth, he disagrees with a footnote in which Division I noted that "neither party brought Hood's March 2016 e-mail to the attention of the trial court" in the 2017 briefing. CoA

Decision at 3 n.3; PAP §E(1)(d). Whether that statement was right or wrong, Division I recognized that the trial court "determined that the City had fair notice of the scope of Hood's request as of March 2016, thereby finding the City liable under the act during the period of March 2016 to February 2019." CoA Decision at 4.

C. Division I's Decision *Does Not* Conflict with Any Appellate Decision.

Hood claims that *O'Dea* required the trial court to find that the City acted with dishonesty under *Yousoufian*. PAP §E(2). Nothing in *O'Dea* excused the trial court from its obligation to find the *facts* in this case and exercise its broad discretion to set a penalty based on the relevant facts and factors. Rather, as required by *Hoffman v. Kittitas County*, 194 Wn.2d 217, 283, 449 P.3d 277 (2019), Division I "decline[d] Hood's request to engage in piecemeal de novo review of a single *Yousoufian II* factor." CoA Decision at 9.

IV. CONCLUSION

Discretionary review is not available to review trial court decisions and findings Hood never appealed, issues he never presented to Division I, and Division I's unremarkable rejection of Hood's narrow appeal.

The City of Langley respectfully requests an end to this lawsuit.

This document contains 4,998 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 15th day of January, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date she caused to be served a copy of the foregoing ***via electronic service*** on the following:

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