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No. 59172-3-II

COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

SHELDON SOULE, an individual, Petitioner/Appellant

v.

STATE OF WASHINGTON BY AND THROUGH BOB FERGUSON AND HIS OFFICE OF ATTORNEY GENERAL,

a public agency, Respondent.

PETITION FOR REVIEW

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I. INTRODUCTION

Division II approved an unprecedented two-year, four-month response time for the Attorney General ("AGO") to produce public records. The Public Records Act's ("PRA") presumptive five business day standard for prompt PRA responses has been nullified. Agencies will even more uniformly respond via drawn out installments fearlessly. AGO, and other agencies who choose to follow its precedent, may redeploy AGO's antiquated and time-consuming snail mail methods to transmit public records to requestors. Supreme Court review is needed to reconcile PRA promptness requirements with exceptions for larger productions that do not consume promptness. Without further judicial review, constitutionally grounded open government provisions like Wash. Const. art. I Sec. 1 that vests political power with the people through informed consent will be practically ineffective. Free and democratic society will suffer the harm of untimely or delayed production of public records.

Regarding agency searches, Division II has disregarded Division I and III precedent that measures agency diligence – or the adequacy of its search - from an objective requestor's viewpoint. Division II discounted the requestor's efforts to cross-examine agency declarants giving the trial court unfair discretion to defer to the AGO. Soule's objective evidence that agency declarants were not thorough and omitted facts relevant to its search were ignored. AGO was permitted to limit searches for communications to e-mail, no texts nor chats, using search terms that were ineffective and without involving employees known to have generated responsive records or their technologies in any search. If left unchallenged, public agencies will not be deterred from inadequate searches.

As to show cause hearings, the AGO and other agencies may now reliably predict and strategically ensure that their insufficient declarations at a merits hearing will not be subjected to any meaningful scrutiny to put them at any risk of penalties. It defies meaningful enforcement when Soule may be denied cross

examination through expedited and unreasonable time limits on discovery set over his objections and by interjecting a judicially created time requirement that he demand live testimony and prove why it is needed prior to agency disclosure of its declarants' testimony and evidence. Per the ruling, show cause hearings may well be purely perfunctory. Supreme Court review is needed to restore balance to the PRA that requires not only an expeditious outcome but a just determination.

The Supreme Court should grant discretionary review to reconcile review standards giving weight to the requestor's viewpoint and to ensure meaningful merits hearings with cross examination of agency declarants via deposition or live testimony to protect constitutionally grounded open government.

II. IDENTITY OF PETITIONER

Sheldon Soule, appellant public records requestor, seeks review of the Division II decision identified in Part III below.

III. DIVISION II DECISION

Division II of the Court of Appeals issued an unpublished decision in Cause No. 59172-3-II on April 1, 2025, upholding the trial court's dismissal on the merits of Soule's PRA enforcement action against AGO.

IV. ISSUES PRESENTED FOR REVIEW

A. Whether AGO may prolong for an unlimited duration production of public records via installments? Is AGO's two years four months producing 30,000 pages of form consumer complaints prompt or consistent with PRA policy objectives of transparency?

B. Whether AGO may limit searches for communications to a remote email search without adequate search terms and without involving actual involved employees and their technologies?

C. Whether Thurston County Superior Court's Unreasonable Emphasis on Expedited Proceedings Undermines PRA policies and government transparency grounded in Washington Constitution?

V. STATEMENT OF THE CASE

Between December 1, 2010, and June 30, 2013, Wells Fargo offered mortgage modifications to qualified homeowners

delinquent or facing imminent default on their home mortgage and infused $1.6 million dollars into a foreclosure relief fund. Washington State Office of the Attorney General, *Enforcement Actions*, https://www.atg.wa.gov/enforcement-actions (last visited May 1, 2025). Sheldon Soule contacted AGO to access these benefits. CP Vol.1 at 1. Soule sought public records to educate himself on what happened to his request for benefits. CP Vol. 3 331.

On January 3, 2020, Soule asked for the following public records, CP Vol. 3 95:

A. All communications between Wells Fargo Representative Mark Elliot or any other Wells Fargo employee or representative and the below listed employees, or any other employee at the Washington State Attorney General's office in relation to the 2010 Assurance of Discontinuance (AOD) and the National Mortgage Settlement (NMS) Wells Fargo made with Washington State.

B. All records in the personnel files of the following current or former employees of the Washington State Attorney General's office:

1. David Huey
2. Rich Zwicker
3. Shannon Smith
4. Any and all employees, paralegals, legal assistants, analysts, accountants or lawyers who had any involvement with the 2010 Assurance of Discontinuance (AOD) and the National Mortgage Settlement(s) (NMS) Wells Fargo made with Washington State. This should include all communications between AGO employees about the AODor National Mortgage Settlement and any communications to or from Wells Fargo representatives about the AOD or National Mortgage Settlement.

On January 10, 2020, AGO acknowledged receipt of the PRR. CP Vol. 3 88. AGO engaged in an exchange with Soule through March without producing any records. The public records officer urged him to narrow his request on the personnel records, which he did. CP Vol. 3 88. In May, five months later, AGO sent its first installment. *Id.* On December 15, 2020, a year after his request, AGO finally produced in its fifth installment approximately nine e-mail threads, minus duplicates. CP Vol. 3 333-334, 366, 413-417 (exemplars). The only other communications produced were from its consumer complaints data system. CP Vol. 3 401-412 (exemplars). There were obvious missing public records never produced that pertain to the negotiations with the banks to include terms and related discussions. *See* 2011 e-mail at CP 413. After two years and four months, AGO gave Soule seventeen installments of mostly form consumer complaints. Soule filed an enforcement action over the prolonged response and inadequate search for the

information that would have informed him why AGO failed to secure his home from foreclosure.

VI. WHY REVIEW SHOULD BE ACCEPTED

Supreme Court should grant review because Division II's holding conflicts with Division I and II holdings. RAP 13.4(b)(2). Division II did not adhere to the objective standard from the requestor's perspective Division I and III have applied when analyzing promptness or the adequacy of a search. The decision conflicts with PRA policy objectives grounded in Washington Constitution where transparency is essential to preserving political power with the people through informed consent, art. I Section 1, because it over emphasizes expeditious outcomes at the expense of due process and holding agencies accountable under the PRA via meaningful show cause merits hearings. RAP 13.4(b)(3), (4).

A. Prolonged Installments Undermine Transparency

The people responsible for Washington's Public Records Act emphasized agencies must respond with a sense of urgency, RCW 42.56.080(2). RCW 42.56.520 (1): "Responses to requests for public records shall be made **promptly** by agencies…." Five business days is presumptively prompt. RCW 42.56.520. reportedly, the average number of days to respond is 20 days of those agencies reporting to the Joint Legislative Audit Review Committee ("JLARC").[1]

Division II acknowledged PRA requires a five-business day response but then cited RCW 42.56.520 and RCW 42.56.080(2) as exceptions that give unlimited extension to agencies to respond. In contravention to prompt standards, so long as the agency says it is clarifying the intent of the request, locating and assembling the information requested, notifying third persons, applying exemptions, and producing in installments, agency diligence in prompt production would be

[1]JLARC, Briefing Report: 2021 Public Records Reporting, https://leg.wa.gov/jlarc/reports/2023 (January 2023)

moot despite the PRA requiring "the most timely possible action." RCW 42.56.100. Unconvincingly, Division II relied heavily upon the number of pages as justification holding based upon "sheer volume" alone (30,000 pages) more than two years was necessary as if it takes two plus years to process 30,000 pages. AGO did not disclose the quantity of time spent processing the request. CP 87, 238, 253, 255, 257, 259, 359, 363, 365, 370. In reality, 30,000 pages is a nominal sum that could be processed in a matter of days not years.[2] The installments were for the most part uniform consumer complaints that required little to no redaction. CP 335, 401-411 (examples).

AGO avoided scrutiny of its time investment because Soule did not get the time he requested and needed for discovery, RP 6/2/23 10-11, CP 275, and he was denied cross examination and any live testimony. CP 292, 393.

[2] Google AI says a "rough estimate for a casual read-through could be around 30-60 hours, assuming an average reading speed of 1-2 pages per minute." "Most people can read 20 pages within 30 minutes."

No other court has approved an agency taking two plus years to produce 30,000 pages of uniform records. Two plus years is inexcusable for an agency the size and competence level of the AGO. AGO should be faster than any other agency.

DOL produced 50,000 pages of public records in response to a complex and broad request in ten months – less than half the time of the AGO that has sophisticated readers to process the records. *West v. DOL*, 182 Wn. App. 500, 331 P.3d 72 (2014). In *Allphin*, Kittitas County spent 350 hours producing 20,000 pages in 14 months. *Kittitas County v. Allphin*, 31 Wn. App. 2d 1074, *5 (2024) (not reported). In *Kittitas v. Allphin*, Kittitas County took four months producing 14,000 pages. *Kittitas County v. Allphin,* 2 Wn. App. 2d 782, 413 P.3d 22 (2018). In *West v. Mah*, the City produced 31,000 pages of documents in approximately nine months, 170 Wn. App. 1008 (2021), not reported. In *Conklin v. UW*, 25 Wn. App. 2d 1010 (2023), not reported, UW produced 24,095 pages in one installment 307 days, less than a year, from the date of the initial request. In *Wade*, the Supreme

Court held 232 days was too long for an agency response when no exemptions applied to the 5,431 pages. *Wade's Eastside Gun Shop, Inv. v. L&I*, 185 Wn. 2d 270, 372 P.3d 97 (2016).

Prompt means "thorough and diligent" based upon specific facts. *Freedom Foundation v. DSHS*, 9 Wn. App. 2d 654, 445 P.3d 971 (2019). Division III describes this standard as "most consistent with the concept of "fullest assistance" to the inquirer and most timely possible action on requests for information. *Andrews v. WSP*, 183 Wn. App. 644, 334 P.3d 94 (2014), RCW 42.56.100. *Andrews* considered diligence from the viewpoint of the requestor, citing Supreme Court authority *Cantu v. Yakima Sch. Dist. No. 7*, 23 Wn. App. 2d 57, 514 P.3d 661 (2022). In *Andrews* the one-year delay and one year plus delay in production of video with no explanation communicated to the requestor for the delay was not diligence. Division I has applied the viewpoint of the requester. *Thornewell v. Seattle School Dist. No. 1*, 33 Wn. App. 2d 1010 (2029), citing *Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, 59 P.3d 109

(2002). Administrative inconvenience, insufficient allocation of resources, and difficulty in producing records does not excuse lack of diligence in producing records. *C.S.A. v. Bellevue School Dist. No. 405*, 32 Wn. App. 2d 544, 557 P.3d 268 (2024) (citing *Cantu* at 32 Wn. App. at 283). Responding to several requests does not excuse delay. *Id.* Unlike Division I, Division II permitted excuses like these.

Division II was notably dismissive of Soule's perspective. Somewhat sarcastically it labeled Soule's contention that 30,000 pages of same or similar material should have been produced in one installment implausible: Soule "offers no explanation how this type of production was possible (unless no records were produced until the very end of the process)." From Soule's perspective AGO easily could have processed them in 30 days or one installment early on. CP Vol. 3 335. Notes affixed to the Declaration of Lockridge, Director of the Consumer Affairs Division of the AGO, kept in Law Manager contained a reference showing AGO unreasonably limited the size of "scheduled

installments" "6 complaints per batch". CP Vol. 3 362. From the requestor's perspective, deliberately limiting the size of an installment was unreasonable and undermines the PRA's prompt production objectives.

Even installments must be made with reasonable diligence, RCW 42.56.080(2); RCW 42.56.100; *C.S.A.*, 32 Wn. App. 2d 544. Curiously, AGO never located its tracking records for this request that would have provided more detail on its inaction and obvious delays. CP Vol. 3 371.

Division II ignored Soule's complaints about the AGO's antiquated production procedures that delayed production for weeks. AGO demanded payment by check delivered regular mail with return delivery of a CD, sometimes corrupted, another two weeks later. CP Vol. 1 CP 313-314. By design, AGO delayed production through its arcane reliance on regular mail to produce records, and its paper payment methods. CP Vol. 1 4, 7, 313-14. AGO refused to use digital technologies to produce records promptly. Officer Young's table in her declaration showed

consistent delays in production by weeks at a time just to turn over the records. CP Vol. 3 90-93. Other agencies produce instantly using portal or other digital technologies. The AGO had the technology, but intentionally did not use it. CP Vol. 1 327-28. There was no excuse for AGO using such antiquated procedures particularly given its experience producing much larger productions digitally in discovery in litigation.

Soule established that from his objective perspective OAG was not diligent, but Division II has ignored the perspective of the requestor standards adhered to by Division I and Division III. Division II's holding undermines the PRA purposes because two plus years later the records have little to no value. Too much time has passed between the issue of importance and the response.

B. Improper Key Word Searches Undermine Transparency

OAG did not conduct an adequate search for many reasons to include a failure to use meaningful search terms when

conducting a remote digital search on limited archived information. Soule's complaint that OAG used improper and inadequate search terms was valid but was discounted by the trial court and Division II who presumed agency declarations to be made in good faith, without the need for clarification, and without substantive omissions. That presumption was erroneous. Soule could have documented the ambiguities and substantive omissions with direct testimony from the declarants if he had been given access to the declarants for cross examination purposes in deposition or via live testimony, but the trial court refused Soule's demands for more time for discovery at the pre-trial conference, on his motion to extend time for discovery, and on his timely notice to have the declarants attend the show cause hearing for purposes of cross examination. RP 6/2/23 10-11, CP 275, RP 10/27/23, RP 10/17/23. Instead, he was limited to pointing out the deficiencies in AGO's declarations. RP 12/22/23, CP 315.

As to the specific search terms used, Division II held "the declarations of Young, Teng, Ashley, and Gutzmer show that AGO employees used search terms broad enough to potentially include all the individuals named by Soule as they related to the Wells Fargo negotiations and settlements." Op 26. This conclusion makes no sense. No one used the list of names nor involved employees in any search for responsive e-mail.

Young testified to having received a list of names of individuals, but not that she or anyone else used those names to search those individuals' technologies or communications to or from those individuals or otherwise did anything with those names. CP 89. Young's testimony indicates she gave the list of names to Human Resources to locate personnel records that were never made available. CP 89. There was no search of the involved employees' technologies or files for their communications. The most glaring error is that no one searched for communications with "Mark Elliot." Soule specifically

requested communications with "Mark Elliot," but there was no search performed using his name.

The only search terms Young testified to using were limited to the following: "wells fargo" AND ("assurance of discontinuance" OR "national mortgage settlement"). CP Vol. 3 89. Young got those terms from Teng. CP Vol. 3 258. Teng did not search any data base using search terms. Young testified to searching "all AGO emails" using Teng's one search in Outlook 365. Teng apparently reviewed the search results, but did not testify to having produced any responsive email. CP Vol. 3 258.

Evidence that the Outlook 365 database was incomplete and search terms inadequate was the limited number of e-mail actually produced as well as the limited number responsive to the search 5,953. CP 90. Young's testimony omits the fact that only a handful of the e-mail produced came from that key word search. CP Vol. 3 90 ¶ 16. None of the "17 batches" included 5,953 emails from that search. Obviously, the search terms did

not work sufficiently, and they tried no other alternatives and did no other e-mail search on the users' technologies.

The Wells Fargo litigation extended over a decade or so with thousands of claims processed over the years. There should have been more email specific to the negotiations. CP 333, RP 11/17/23 11. There were virtually none.

Documents that were located and produced from other sources like the complaints database showed that "assurance of discontinuance" OR "national mortgage settlement" were not the terms used in conjunction in communications about the Wells Fargo negotiations or settlement. See, CP 401, 404. The acronyms "AOD" and "NMS" were used. Soule referenced those acronyms in his PRR, but AGO did not use the acronyms to search for responsive records. CP 95 AGO did not use search terms that it knew or should have known would locate responsive records. CP. For example: "WA AGO Assistance Request", CP 406, or "Washington Assurance Agreement", CP 414, "WF Statement" or "WF Statement", CP 419.

Gutzmer did not testify to any search terms he used. CP 238-240. He testified to identifying names of employees involved in AOD and NMS to identify personnel files, but not that he did anything with those names. He did not search the technologies those employees used.

Ashley testified to using search terms "wells fargo" and "dave huey" and no others, but did not testify to searching for e-mail or any other communications. Her search was limited to the "F" drive, which was not described with much specificity. She did not use any of the names identified as involved employees in the PRR. CP 260, 95.

Division II decided that "e-mails that were archived and had been migrated from the AGO's old e-mail database were included in the search." Op. 26. Declarant Beusch testified that emails were archived in Discovery Accelerator. Then AGO started using Office 365 and migrated archived emails into Office 365. No one testified to what was archived, or what happened to separated users accounts. No one testified to

searching Office 365 user accounts for each employee who was identified to have been working on the Wells Fargo matters. There was no search of the relevant user accounts for their emails with Wells Fargo.

Division II ruled that when Young did her search "Any e-mail that contained the relevant search terms "in the body of the email, subject line, to and from and cc/bcc, threads within the email, and attachments" would come up, citing CP 366. Op at 26. That ruling is meaningless as to the validity of the search terms. The terms were improper and it did not matter where the search looked, the search was looking for the wrong words. Division II missed the point that the search was not going to find the requested records because the phrase used was inadequate. There was one search. Division II speculated over Soule's objections that the limited search term "wells fargo" AND ("assurance of discontinuance" OR "national mortgage settlement") worked. But no one testified that it did work. AGO knew or should have known from the records it did locate that

employees did not use those terms in conjunction when communicating in the Wells Fargo negotiations. CP 400-622. Agencies must follow up on obvious leads, which includes reviewing search results to gauge the success of the search. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn. 2d 702, 722, 261 P.3d 119 (2011). Division II relied upon *Cantu*, 23 Wn. App. 2d at 85, Op. at 26, to suggest an agency may at its discretion use limited search terms. But that conclusion excuses AGO's shoddy work. An agency may not deliberately choose search terms that do not work or fail to assess the adequacy of its search terms by testing the results. Search terms must likely produce responsive results. *Neighborhood Alliance of Spokane County*, 172 Wn. 2d at 702. Where a response is knowingly incomplete or "perfunctory" it is insufficient. *Id.* No declarant testified that the search performed located responsive records to the request or that the search would locate responsive records. Most of the email were nonresponsive because very few were produced. CP 333-335. Admittedly none

of the employees' names who were doing the communicating were used in the search. Division II did not apply objective reasonableness from the requestor's perspective when viewing the evidence as to the adequacy of the search terms.

C. Remote Searches Excluding Used Technologies and Involved Employees Undermines Transparency

Searches are incomplete when only one record system is searched if there are others likely to turn up the information requested. *Neighborhood Alliance*, 172 Wn. 2d at 722. Soule's request identified multiple employees who were communicating and involved in the Wells Fargo negotiations. CP 95. Yet there was no search of any of the computers used by the employees creating the content. CP Vol. 3 258, 242. The employees generating the public records did not search for responsive records and were not involved in any search. CP Vol. 3 247-8. There were no declarations from any of the involved employees testifying regarding searches of their computers or whatever technologies they used.

It is reasonable for a requestor to anticipate an agency will involve the employees who are communicating on the topic that is the subject of the request to participate in the search for responsive records and have their technologies searched. Division II rewards the AGO for a search that did not involve the right employees and without searching their technologies. Remote searches are not sufficient, searching technologies used by the involved employees is reasonable, and the failure to do so is inadequate. *Thurura v. DOC*, 15 Wn. App. 2d 104 (2020) (unpublished). *See also, Magana v. Hyundai Motor America*, 167 Wash. 2d 570, 220 P.3d 191 (2009) (Improper to limit search to records held in legal department.) A one-time limited search of email using ineffective terms undermines the objectives of the PRA that is intended to keep citizens informed. Wash. Const. Art. I Sec. 1 dictates that political power rests with the people and their right to exercise informed consent. There can be no informed consent absent access to public records to know what government is doing with the power afforded to it. RCW

42.56.030. Supreme Court review is needed to clarify the AGO must involve employees and their computers or technologies they are using to communicate when searching for responsive communications to a PRA request.

D. Restricting Searches for Communications to E-Mail Undermines Transparency

Division II acknowledged that Soule objected to AGO limiting its search for communications to e-mail, but failed to explain how such a limited search for communications was adequate. It was not. The evidence is undisputed; AGO did not search for texts nor chats despite Soule's clear request for all communications. CP 331. AGO had upgraded to Microsoft 365 with chat features and had staff had text capabilities. Those technologies should have been searched but were not. Requestors should not have to detail what forms of communications are sought. Soule expected to get ALL communications, not just e-mail. His expectation was

reasonable but was erroneously ignored. *See L&I v. Potelco, Inc.,* 33 Wn. App. 2d 1010 (2024) (defining "communications.")

E. Perfunctory Show Cause Hearings

The trial court denied Soule's request to cross examine AGO's declarants live at the show cause hearing, and Division II affirmed. On October 27, 2023, Soule served a notice to have AGO declarants attend the merits hearing set November 17, 2023, at 1:30 p.m., not the Friday motion docket. CP 290. The Notice complied with the time requirements of the rule that dictates notice be served ten days prior to trial. CR 43(f). AGO immediately moved to quash the notice arguing it was entitled to have the case heard solely on its declarations without subjecting its witnesses to cross examination. Division II affirmed and indicated notice to cross examine an agency's witnesses must be made prior to the agency disclosing its witnesses or their testimony. That holding is unsupportable.

PRA enforcement actions require a show cause hearing. RCW 42.56.550(1); *Zink v. City of Mesa*, 162 Wn. App. 688, 700,

256 P.3d 384 (2011). Any person denied public records "may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records." *Id.* Per the plain language of the statute, live testimony or a show cause hearing is the presumption. While a show cause hearing is not typically a full-blown trial, the purpose of a show cause hearing involves due process that includes cross examination of an agency's declarants. Due process may require cross-examination even in a civil proceeding where the confrontation clause is not at issue. *In re Det. of Brock*, 126 Wash.App. 957, 963, 110 P.3d 791 (2005); *see also State v. Dahl*, 139 Wash.2d 678, 990 P.2d 396 (1999). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). It is error to require an advance ruling on any offer of proof prior to a show

cause hearing because then the show cause converts to "perfunctory and purposeless hearings on matters to be decided solely on the pleadings." *Leda v. Whisnand*, 150 Wn. App. 69, 207 P.3d 468 (2009). Live testimony is appropriate in a PRA show cause. *West v. Gregoire*, 184 Wn. App. 164, 336 P.3d 110 (2014). "A show cause proceeding is, in effect, the PRA claimant's trial." *Id.* at 172.

Apparently at the outset, Superior Court decided without informing Soule or his counsel and without review of any evidence that it would decide the merits of Soule's PRA enforcement action solely on briefs and any offered declarations. Nothing in the trial court's pre-trial order indicated the merits hearing was limited to paper and would preclude live testimony absent a motion by Soule before knowing what evidence AGO was offering. CP Vol. 2 370. Nothing in the pre-trial order, rule, or PRA authorizes a trial court to compel a requestor decide whether to call a witness live prior to disclosure of the witness or evidence or witness' testimony set forth in an offered declaration.

Thurston County has erroneously reversed the presumption that a requester gets to put an agency to its proof at a live show cause hearing. While the statute permits a trial court to exercise its discretion whether to decide the case without live testimony, it is silent as to the grounds the court may consider or when. A trial court has no basis to deny live testimony before it or the petitioner know what will be offered. If left unaddressed here, a requestor must now commit to live testimony in advance of the agency disclosing its offered testimony or identifying any declarant or what the declarant will say.

That holding is extremely prejudicial to requestors. AGO will not, in written discovery, identify what witnesses it intends to offer on the merits or what their testimony will be because of work product exceptions. AGO opposed Soule's request for meaningful time to conduct discovery and did not disclose any evidence until its deadline to file merits briefing as set in the pre-trial order. The pre-trial order, unlike civil scheduling orders, did not obligate AGO to disclose any witnesses or their testimony in

advance of the merits hearing. CP Vol. 2 370. In *O'Neill v. City of Shoreline*, 170 Wn. 2d 138, 240 P.3d 1149 (2010), procedurally the requestor designated its show cause hearing without oral argument, which was grounds for upholding the trial court decision to hear the case solely on affidavits. Soule did not similarly or in any way waive his rights to offer live testimony or cross-examine the AGO's witnesses. It is not a show cause hearing if the AGO knows in advance that the testimony it offers will not be subjected to any scrutiny via cross examination. AGOs will offer, as it did here, misleading declarations with key facts omitted knowing its sleights will never be proven. Supreme Court review is needed to ensure requestors are afforded the due process of time for discovery and a meaningful show cause hearing where agency declarants may be subjected to cross examination.

F. Soule Requests an Award of Appellate Penalties, Fees, and Costs

Pursuant to RCW 42.56.550, Soule requests the Court reverse Division II and trial court and award him penalties, fees, and costs for seeking enforcement of the PRA.

VII. CONCLUSION

Division II's opinion undermines the PRA when prioritizing Thurston County's expedited procedures in a PRA enforcement action that benefit the agency and harm the requestor such as unrealistic limits on time for discovery, presumptive merits determinations without live testimony or cross examination, and impossible time limits to request live testimony. There is no transparency when an agency has no practical time restraints when producing records via installments or are afforded unassailable deference to use unsuccessful search terms and never search involved technologies nor engage persons using such technologies to locate the responsive records, and where an agency as sophisticated as the AGO may limit searches for communications to e-mail, omitting texts and chats or other

digital mediums. Recent Division I and III decisions do not similarly view the evidence solely in favor of the agency's viewpoint, a reasonable requestor's viewpoint is controlling. The division disjunct cannot be reconciled without further review. Mr. Soule respectfully requests the Supreme Court grant his petition for review and reverse the decision of Division II and the trial court that dismissed Soule's PRA enforcement action on the merits without meaningful scrutiny of agency testimony and procedural impracticalities. Soule should be awarded penalties, fees, and costs on appeal under the PRA.

CERTIFICATE OF COMPLIANCE

This document contains 4,922 words in conformance with the word count limits of RAP 18.17.

DATED May 1, 2025, at Tucson, Pima County, Arizona.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Kristen L. Comstock, certify as follows:

On May 1, 2025, I e-mailed the above Petition for Review for service to:

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I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

DATED May 1, 2025, at Missoula, Missoula County, Montana.

Kristen L. Comstock
Law Clerk

III BRANCHES LAW, PLLC

May 01, 2025 - 4:18 PM

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SHELDON SOULE, an individual, Appellant, v. STATE OF WASHINGTON BY AND THROUGH BOB FERGUSON AND HIS OFFICE OF ATTORNEY GENERAL, a public agency, Respondent.	No. 59172-3-II UNPUBLISHED OPINION

PRICE, J. — Sheldon Soule appeals the superior court's dismissal of his Public Records Act (PRA)[1] claim against the Attorney General's Office (AGO). Soule alleges that the superior court abused its discretion when it denied his motion to extend discovery and quashed his CR 43(f) notice to AGO representatives to attend the merits hearing. Soule also contends that the dismissal was error because the AGO failed to promptly and adequately search for records responsive to his PRA request. We affirm the superior court.

FACTS

I. SOULE'S INITIAL PRA REQUEST

On January 3, 2020, Soule sent a PRA request to the AGO asking for records related to the 2010 national mortgage settlements between Wells Fargo Bank and the State of Washington. His request specified the following records:

[1] Ch. 42.56 RCW.

> A. All communications between Wells Fargo Representative Mark Elliot or any other Wells Fargo employee or representative and the below listed employees, or any other employee at the Washington State Attorney General's office in relation to the 2010 Assurance of Discontinuance (AOD) and the National Mortgage Settlement (NMS) Wells Fargo made with Washington State.

Clerk's Papers (CP) at 95.

He also requested various personnel records, specifically,

> B. All records in the personnel files of the following current or former employees of the Washington State Attorney General's office:
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> 1. David Huey
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> 2. Rich Zwicker
>
> 3. Shannon Smith
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> 4. Any and all employees, paralegals, legal assistants, analysts, accountants or lawyers who had any involvement with the 2010 Assurance of Discontinuance (AOD) and the National Mortgage Settlement(s) (NMS) Wells Fargo made with Washington State. This should include all communications between AGO employees about the AOD or National Mortgage Settlement and any communications to or from Wells Fargo representatives about the AOD or National Mortgage Settlement.

CP at 95. Among other personnel records, Soule requested "[p]erformance appraisals and reviews" and "[a]ny formal or informal employee evaluations and reports relating to the above listed employee's character, work habits, compensation, and benefits." CP at 95-96.

After receiving Soule's request, the AGO reached out to all employees in the Consumer Protection Division who might have responsive records. Employees searched the AGO's physical files, electronic files, e-mail database, human resources records, and consumer complaint database for records responsive to Soule's request. After reviewing each record to ensure that it was relevant to what Soule was looking for, the employees redacted and organized over 30,000 pages

of records, which they sent to Soule in 17 batches over the course of almost two years, May 2020 through May 2022.[2] The AGO closed the request in May 2022.

II. SOULE'S COMPLAINT FOR ALLEGED VIOLATIONS OF THE PRA

In May 2023, Soule filed a civil suit in Thurston County Superior Court against the AGO for violations of the PRA. Soule alleged that the AGO, among other things, failed to promptly and adequately search for records responsive to his request.

In Thurston County, PRA cases are subject to a local rule that requires the parties to participate in a status hearing early in the case, which results in a scheduling order. THURSTON COUNTY SUPER. CT. LOCAL CIV. R. (TCLCR) 16. Pursuant to this local rule, Soule and the AGO met with the superior court in June 2023, where the court heard from the parties as to the nature of the case. Following the hearing, the superior court issued a scheduling order on June 22. The scheduling order required "[a]ll discovery on the merits" to be completed by September 29, 2023, and set a briefing schedule to follow the discovery. CP at 70-71. The hearing on the merits was scheduled for 1:30 p.m. on November 17, 2023.

A. THE AGO'S MERITS BRIEF AND SUPPORTING EVIDENCE

Discovery closed at the end of September 2023 without Soule having conducted any formal discovery. A few weeks later, in October 2023, the AGO filed its opening brief along with several supporting declarations from various AGO employees who were involved with responding to Soule's PRA request.

[2] Soule contends that only a modest amount of these documents were e-mails and other correspondence.

1. Declarations of Senior Public Records Officer—Kristin Young

Kristin Young, a senior public records officer for the Public Records and Constituent Services Division of the AGO, provided two declarations regarding her involvement as a point of contact between Soule and the agency while it responded to Soule's request.

Young said that she acknowledged receipt of Soule's request on January 10, 2020, five business days after receiving it. She then began communicating with Soule about the scope of his request. Her declaration attached e-mails documenting many of her communications with Soule. For example, Young asked Soule in January and February 2020, and a third time in September 2021, if he could narrow search requests for " 'all files in the personnel records' " of various employees and for " 'all communications.' " CP at 88 (quoting CP at 95). Young told Soule that if he did not narrow his requests, his search would result in thousands of pages in personnel records and consumer complaints and that it would take longer for the AGO to fulfill his request. Young also noted that the personnel records specifically would need to be "heavily redacted." CP at 102.

Soule, in responsive e-mails, pushed back on the need to redact the personnel records, stating that "performance evaluations are not exempt from requests under the PRA when it relates to the performance of a public official," so that his "request for personnel records related to performance evaluations specifically stands as it was originally submitted." CP at 101. But he also told Young that she could ignore his request for other personnel records. Soule further agreed to narrow his request for " '[a]ll communications' " and, instead, gave Young a list of 13 specific categories of consumer complaints that he wanted. CP at 125 (quoting CP at 95).

Young's declaration also explained that while Young was still clarifying Soule's request she began the search for responsive records. A week after acknowledging his request, Young sent

Soule's request to the Consumer Protection Division of the AGO and inquired whether they had responsive records and also asked for assistance in formulating search terms to conduct an e-mail search. She stated that the Consumer Protection Division gave her a list of names of individuals who were involved with the 2010 Assurance of Discontinuance and the National Mortgage Settlement(s) Wells Fargo made with Washington State. They also provided her with the search terms " 'wells fargo' AND ('assurance of discontinuance' OR 'national mortgage settlement')." CP at 89.

Young explained that upon receiving the list of names from the Consumer Protection Division in February 2020, she coordinated with the AGO's human resources office to obtain the relevant personnel records of 13 different AGO employees. Young directly e-mailed the 5 employees still working for the AGO to see if they had records responsive to Soule's request.

Young also described the search that she conducted of the AGO's centralized e-mail database, Outlook 365. Young searched all of the AGO Outlook accounts, e-mails, and e-mail attachments using the search terms provided to her by the Consumer Protection Division. Young explained that she used these search terms because they were "very broad." CP at 366. For example, Young said, "The records resulting from this search necessarily included any records involving Mark Elliot because [he] was an employee of Wells Fargo and the search picked up all emails involving Wells Fargo and assurance of discontinuance or national mortgage settlement. The search was in fact broader than simply searching for Mark Elliot." CP at 366. If the relevant search terms were located anywhere in "the body of the email, subject line, to and from and cc/bcc, threads within the email, and attachments," Young claimed they would come up in her search. CP at 366.

Young explained that she then reviewed the 5,953 e-mails that resulted from her search, including "many communications with Mark W. Elliot." CP at 366. Young also reviewed the consumer complaints that were later sent to Soule, stating that they "contain[ed] many communications between and among members of the AGO and Wells Fargo." CP at 366.

Young stated that she provided Soule with his first batch of records in May 2020. After this first batch, Young notified Soule that a new batch of records was ready about every eight weeks. Over the course of nearly two years, Young sent Soule 17 batches of records, totaling to over 30,000 pages.

2. Declaration of Public Records Coordinator—Andrew Gutzmer

The AGO also submitted a declaration from Andrew Gutzmer, who at the time of Soule's request was a public records coordinator in the AGO Consumer Protection Division. He stated that he e-mailed "everyone" in the Consumer Protection Division and instructed them to "review [Soule's] public records request, conduct a search for records and determine if they had responsive records." CP at 239. If the individuals had responsive records, they were directed to indicate this on a tracking list Gutzmer had created.

Gutzmer also stated that he compiled responsive records from two different databases: the AGO's "Constituent Correspondence Tracking Notebook" and "Catalyst," a database of consumer complaints. CP at 239. Gutzmer said that he searched both databases for records and complaints regarding Wells Fargo. CP at 239. He conducted his search by using the 13 categories of consumer complaints provided by Soule.

3. Declarations of Consumer Protection Division Employees—Amy Teng and Lesli Ashley

Amy Teng was the only employee in the Consumer Protection Division who responded that she had records responsive to Soule's request. Teng provided a declaration in which she said that she "worked with Division Chief Shannon Smith, Litigation Support Manager Margaret Farmer, and Paralegal Lesli Ashley regarding where records might be located." CP at 257. The four of them searched for both physical and electronic records that would be responsive to Soule's request. Teng and Smith then reviewed the records, determining which ones were responsive and redacting privileged or exempt information. Teng also stated that she assisted Young by providing appropriate search terms for an e-mail search.

Lesli Ashley, the paralegal in the Consumer Protection Division who worked with Teng, also supplied a declaration. Ashley explained that she searched for responsive physical records and electronic records. For electronic records, Ashley searched "the AGO's electronic folder drive" known as the "F: drive" for "all the electronic files that the AGO had regarding the Wells Fargo national mortgage settlement." CP at 259-60. The searched folders included those labeled "Wells Fargo Assurance of Discontinuance" and "Wells Fargo National Mortgage." CP at 259. Ashley also searched using broad search terms such as "dave huey" and "wells fargo," taking care to search for "a particular communication between [Assistant Attorney General (AAG)] Dave Huey and Wells Fargo that Mr. Soule believed existed." CP at 260. Ashley stated, "I searched everywhere we thought records would still be in existence." CP at 260. Ashley then reviewed all the records resulting from her search to confirm if they were responsive and to mark them for potential redactions.

4. Declaration of Deputy Chief Information Officer—Martin Singleton

Martin Singleton, the deputy chief information officer at the AGO, submitted a declaration in which he discussed the AGO's different databases and electronic data retention policies. He explained that although in the past the AGO used the Discovery Accelerator system to hold archived e-mails, the AGO migrated all archived and new e-mails to Office 365 in 2019. During this shift from Discovery Accelerator to Office 365, "AGO emails themselves were not impacted or altered." CP at 371.

B. SOULE'S LATE DEPOSITION NOTICE AND MOTION TO EXTEND DISCOVERY

About two weeks after discovery closed and around the same time the AGO filed its merits brief and supporting declarations, Soule served the AGO with a notice of deposition. Because the notice was untimely, the AGO filed a motion to quash. Soule responded by filing a "cross motion" to extend discovery.

The superior court heard oral argument on both motions. The AGO argued that Soule's deposition notice and motion to extend discovery were untimely and violated the superior court's scheduling order. The AGO noted that "[d]uring those four months between when the lawsuit was filed and discovery cut-off ended, no discovery was conducted at all" and that "[t]here [was] no reason" that Soule could not have conducted this deposition before the discovery deadline. Verbatim Rep. of Proc. (VRP) (Oct. 27, 2023) at 6-7. The AGO also reasoned that because it carries the burden in PRA cases to prove that there was no violation of the PRA, that Soule "[did] not need a deposition." VRP (Oct. 27, 2023) at 9. The AGO further argued that it would be prejudiced by this delay because "the State is on the hook for penalties that run per day from the

date of withholding. So if there is an inadequate search, then the State is on the hook for these penalties." VRP (Oct. 27, 2023) at 18.

Soule's attorney apologized for missing the superior court's discovery cutoff in the scheduling order and explained that the case involved "a myriad of issues, complicated set of historical facts[] and volumes of records that needed to be digested in a short period of time" and that "four months is a very short time frame for discovery in a sole practitioner's practice where there are multiple cases with competing interests." VRP (Oct. 27, 2023) at 11-12. Soule's attorney said she had multiple professional and personal obligations that were unanticipated which made it difficult to conduct all the discovery that she needed.

Soule also argued that denial of his motion would be a manifest injustice because "[i]t is inherently unjust to deny a plaintiff the opportunity to cross-examine witnesses testifying on behalf of the other party." VRP (Oct. 27, 2023) at 13. Soule further argued that the AGO would not be prejudiced because although Soule sought to depose a representative from the AGO, he did not seek to change the briefing schedule.

Following the arguments, the superior court granted the AGO's motion to quash and denied Soule's cross motion to extend discovery. The superior court explained that granting Soule's extension would prejudice the AGO because of the risk of increased penalty and because, at that point, the State had already prepared and filed its opening brief "with the knowledge of not having gone through the discovery that could have been done." VRP (Oct. 27, 2023) at 20.

The superior court also placed importance on Soule's failure to articulate why additional discovery was needed and the fact that Soule did not ask for a continuance until after the discovery deadline had passed; the superior court explained,

> What's probably the driving consideration is in the response to the motion to quash, there is no mention of what specific issues need to be explored on discovery. The entirety of the response on motion to quash is I didn't appreciate that I had this deadline, I didn't think it was going to apply in this setting, in regular civil context it does—I have some latitude, and I've been really busy.
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> And, again, I'm not unsympathetic to personal and work demands, but as those are interfering with meeting deadlines, you ask for relief informally with opposing counsel and, if necessary, with a motion. But it is not an after-the-fact evidence of manifest injustice, and I don't see any detailed description of now that I'm at this point, here is the specific information that is critical to my case.
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> So thinking about the nature of the case with the State having the burden and the petitioner having to have sufficient grounds when they file the case that they can make an argument, I'm not seeing that there's manifest injustice to extend the deadline to allow the discovery after the discovery deadline.

VRP (Oct. 27, 2023) at 21-22.

C. SOULE'S NOTICE TO ATTEND

Immediately following the denial of the motion to extend discovery, Soule served the AGO with a notice to attend merits hearing, which listed the six AGO employees who submitted declarations. Having lost the ability to take their depositions, Soule apparently intended to cross-examine the employees in person at the November 17 merits hearing. The AGO filed another motion to quash.

At the hearing on the motion, the AGO argued that Soule's notice to attend was "a blatant attempt" to circumvent the superior court's earlier denial of additional discovery. 1 VRP (Nov. 17, 2023) at 5. The AGO also argued that in addition to this notice being a violation of the superior court's scheduling order, "live testimony . . . [was] simply not necessary at all in this case." 1 VRP (Nov. 17, 2023) at 5. The AGO noted,

> [F]rom the start, from the scheduling conference, [we have] only discussed this matter in terms of a hearing on the merits being held on affidavit which the Public Records Act specifically permits. . . . Most of these cases . . . in fact, the majority of them, are heard on affidavit.
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> . . . .
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> Plaintiff never mentioned live testimony during the scheduling conference, did not ask for a witness list, did not ask for additional time. We did not set the . . . hearing date as a trial hearing where witnesses would be present. Witnesses . . . were only mentioned for the first time three weeks ago, and this case was filed five months ago.

1 VRP (Nov. 17, 2023) at 5-6.

Soule responded that "[t]his case was set for trial" and that "[t]he representation that the scheduling order is for the purposes of setting a briefing on the merits without live testimony is completely fictitious." 1 VRP (Nov. 17, 2023) at 8. According to Soule, because CR 42 "basically says, 'At trials, the testimony of witnesses shall be taken orally in open court' " and because Thurston County Superior Court Local Civil Rule 3 specifically refers to a "trial setting date . . . for Public Records Act cases," he was entitled to cross-examine the AGO's declarants. 1 VRP (Nov. 17, 2023) at 8, 13.

Soule also contended live testimony was necessary to challenge the credibility of the AGO's declarants:

> [W]hat the Attorney General's Office is proposing is that it be allowed to deceive this court and withhold the opportunity from this court to weigh the credibility of the nine different declarants or seven different declarants whose testimony is put before the court when that testimony in and of itself is disputed and is in question and on its face raises credibility questions about the testimony that is offered.

1 VRP (Nov. 17, 2023) at 8-9. Soule further argued that he could not counter the AGO's evidence with his own declaration and that he specifically needed to cross-examine the AGO's declarants to point out inconsistencies in their testimony.

The superior court asked Soule, assuming that it accepted his argument, how he thought he would be able to examine six witnesses during the two-hour time block for which the hearing was scheduled. Soule responded that he would not need more than 45 minutes to question all six witnesses.

The superior court granted the AGO's motion to quash. The superior court explained that typically PRA merits hearings were heard by declaration and that the parties should have raised the potential for live testimony earlier:

> The major thing is that there is a scheduling order and there was a hearing in June where the court takes input from the parties as to the nature of the case. Most of the time public records cases, because they are to be expedited, and because the law allows it, the issues are addressed on affidavit. That is not required, but parties need to tell the court when we're setting the schedule that this is a different kind of case.
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> . . . .
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> Nobody raised that issue in June in this case, and the scheduling order that the court prepared is a scheduling order contemplating a hearing that is going to last one to two hours, and it has a briefing schedule. It says nothing about testimony, and we have a trial setting process where we would have had an estimated length of trial and would have identified the number of witnesses.

1 VRP (Nov. 17, 2023) at 15-16. The superior court also reasoned that if Soule had actually conducted discovery before the cutoff, the discovery may have resulted in Soule realizing far earlier that he may have wanted a change of the format of the hearing and a timely motion could

have been brought. The court concluded by emphasizing that the merits hearing that was scheduled was not an "evidence[-]taking hearing with witnesses." 1 VRP (Nov. 17, 2023) at 16.

Soule objected to the superior court's ruling, arguing that "[t]here's been procedurally and historically no past practice with this court or any court in the Thurston County rule pretrial scheduling process to identify whether or not the case is going to be heard on live testimony or not when setting the trial." 1 VRP (Nov. 17, 2023) at 17. The superior court "noted" Soule's objection. 1 VRP (Nov. 17, 2023) at 17.

D. PRA HEARING AND SUPERIOR COURT FINDINGS

At the subsequent merits hearing, Soule contended, among other things, that the AGO's search was inadequate and that they "didn't search in the right location using the right technologies," because the AGO did not produce a significant number of e-mails using the search terms that they did. 2 VRP (Nov. 17, 2023) at 40. Soule noted that the AGO's failure was clear because from their search he received only nine e-mail chains as part of his request.

The AGO explained that the modest amount of e-mails was due to the AGO's retention policy. It said that the lead attorney working on the matters with Wells Fargo retired and that even though that attorney's mailbox and old files were searched, responsive documents likely had been deleted per the AGO's retention policy. The AGO explained that internal policy only requires records to be retained for six years.[3] Thus, by 2016, four years before Soule made his PRA request, "all the litigation files [could have been] wiped." 2 VRP (Nov. 17, 2023) at 14.

[3] Following the hearing, the AGO provided the superior court with information regarding this retention policy.

After the merits hearing, the superior court found that the AGO had met its burden of showing that it had conducted an adequate and reasonable search and did not violate the PRA. The superior court also found that although the AGO took two and a half years to complete production for Soule's request, "given the description of what was provided and the need to review for personal identifying information, etc., given the content of the records referring to specific private individuals and their mortgage documents," the AGO's response was timely under the PRA. VRP (Dec. 22, 2023) at 16-17. Based on these findings, the superior court dismissed Soule's case with prejudice.

Soule appeals.

ANALYSIS

Soule argues the superior court erred for several reasons—some reasons are focused on the superior court's prehearing rulings and some are focused on the underlying PRA merits. Specifically, Soule contends that the superior court erred by (1) denying his motion to extend discovery, (2) quashing his notice to attend hearing for the AGO declarants, (3) concluding the AGO's response to the PRA request was timely, and (4) concluding the AGO's search was adequate.

I. PREHEARING RULINGS

We first address Soule's arguments that the superior court abused its discretion in its prehearing rulings that denied his request to extend discovery and quashed his notice to attend hearing.

We review a superior court's discovery and prehearing orders for PRA proceedings for an abuse of discretion. *Gronquist v. Dep't of Corr.*, 32 Wn. App. 2d 617, 643, 557 P.3d 706 (2024),

review denied, ___P.3d ___ (2025); *see Green v. Pierce County*, 197 Wn.2d 841, 858, 487 P.3d 499 (2021) (applying an abuse of discretion standard to review superior court's denial of a motion to compel discovery in PRA proceeding). It is an abuse of discretion for the superior court to make a decision that is manifestly unreasonable or based on untenable grounds. *Gronquist*, 32 Wn. App.2d at 643. " 'A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard . . . .' " *Horvath v. DBIA Servs.*, 31 Wn. App. 2d 549, 563, 551 P.3d 1053 (2024) (internal quotation marks omitted) (quoting *In re Dependency of Z.A.*, 29 Wn. App. 2d 167, 192, 540 P.3d 173 (2023)).

A. MOTION TO EXTEND DISCOVERY

Soule argues that the superior court erred when it denied his motion to extend discovery. He contends that matters should be decided on their merits, not technicalities, and that the extension should have been granted on the equitable standard of excusable neglect. We disagree that the superior court abused its discretion.

"[T]he civil rules control discovery in a PRA action." *Neigh. All. of Spokane County v. Spokane County*, 172 Wn.2d 702, 716, 261 P.3d 119 (2011). The rules grant the superior court broad discretion to manage the discovery process, set deadlines, and set the scope of discovery through a pretrial scheduling order. CR 26(b); *Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 277, 191 P.3d 900 (2008), *review denied*, 165 Wn.2d 1033 (2009).

Soule focuses his argument on an explanation of why his failure to comply with the discovery deadline was excusable. He argues that he did not have time to schedule or conduct the desired depositions within the discovery period (or move to extend discovery prior to the deadline) because his counsel "devoted considerable time early on opposing partial summary judgment on

two of the three requests and appealing that ruling" as well as "unforeseen time restraints of counsel included [a family birth], two significant funerals, summer 4th of July break, a demanding case load, and preparations to list a long-term primary residence for sale." Appellant's Opening Br. at 36.

Soule rejects the superior court's reasoning that "the time constraints should have been better planned out so that an extension could have been sought prior to the cutoff" because "unforeseen events may [not] be planned." Appellant Soule's Opening Br. at 37. Soule also rejects the superior court's reasoning that the AGO would be prejudiced by an extension because "[t]he only risk would be exposing the self-serving and deceptive character of [the AGO's] offered declarant testimonies."[4] Appellant's Opening Br. at 38. Finally, Soule contends that the superior court entered no findings to justify its refusal to grant a brief extension of time.

We are unpersuaded by Soule's arguments. Whether or not the superior court entered findings, the record shows the superior court gave multiple reasons supporting its decision. And it is clear from the record that the superior court acknowledged and was sympathetic to Soule's attorney's "personal and work demands." VRP (Oct. 27, 2023) at 21.

[4] In his reply brief, Soule complains that the superior court also wrongfully suggested that discovery was less critical because a requestor should " 'have sufficient grounds when they file the case that they can make an argument.' " Reply Br. at 13 (quoting VRP (Oct, 27, 2023) at 22). Soule says this statement "is a blatant violation of the applicable discovery rules, CR 26, and [PRA] case authority." Reply Br. at 13. Notwithstanding that this particular argument was made the first time in a reply brief, Soule pulls this singular quotation out of the full context of the superior court's explanation and exaggerates its significance. It appears that the superior court was merely recognizing that the AGO, not Soule, had the burden of proof and that requesters likely have at least some idea of their argument prior to filing a PRA case. We do not view this isolated statement as an indication that the superior court was rejecting the fundamental principle that parties are entitled to discovery in civil cases.

The superior court appears to have largely relied on Soule's failure to request an extension before the discovery period ended (and utter failure to conduct any timely discovery at all). In addition, the superior court noted that Soule's motion for extension made "no mention of what specific issues need to be explored on discovery" or explain why this "after-the-fact evidence" was critical to his case. VRP (Oct. 27, 2023) at 21. The superior court also appears to have considered how the AGO would be prejudiced because it had already conducted its own investigation, prepared its declarations, and filed its opening brief.

The question of whether to grant Soule's motion to extend discovery was within the superior court's considerable discretion. While Soule's reasons for his failure to comply with the discovery schedule may have successfully persuaded other superior courts to extend discovery, the decision here was "within the range of acceptable choices." *See Horvath*, 31 Wn. App. 2d. at 572. Thus, from our review of the record and the superior court's explanation, the superior court did not abuse its discretion when it denied Soule's motion to extend discovery.

B. NOTICE TO ATTEND

Soule next argues that the superior court erred by quashing his notice to attend hearing for the AGO declarants that he filed under CR 43(f).[5] We disagree.

The process for resolving PRA disputes is meant to be "expeditious" so that members of the public can quickly learn if they are entitled to access the records they seek. *See Kilduff v. San Juan County*, 194 Wn.2d 859, 871, 453 P.3d 719 (2019). We give superior courts deference to make management decisions to avoid encumbering PRA proceedings with unnecessary and costly

[5] Under CR 43(f), a party may compel the adverse party or its managing agents to testify based on a notice to attend in lieu of a subpoena.

procedural barriers. *See O'Neill v. City of Shoreline*, 170 Wn.2d 138, 153, 240 P.3d (2010). Similarly, Thurston County local rules also require PRA proceedings to follow an "expedited scheduling procedure." TCLCR 3; *see also* TCLCR 16.

With this public policy in favor of expeditiousness in mind, the PRA allows for claims to be decided "solely on affidavits." RCW 42.56.550(3); *see O'Neill*, 170 Wn.2d at 153 (" 'To speed up the court process, a public records case may be decided merely on the motion of a requestor and solely on affidavits.' " (internal quotation marks omitted) (quoting former WAC 44-14-18004(1) (2006)). This policy also benefits the public by avoiding unnecessary costs for PRA cases. When discussing the process of deciding PRA cases by affidavits, our Supreme Court has suggested that appellate courts should avoid " 'interfer[ing] with trial courts' litigation management decisions' " so as to avoid making public disclosure act cases " 'so expensive that citizens could not use the act for its intended purpose.' " *O'Neill*, 170 Wn.2d at 153 (quoting *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 801, 791P.2d 526 (1990). Accordingly, courts have repeatedly chosen to resolve PRA cases without live witnesses, basing their decision purely on affidavits or declarations. *See e.g. id.*; *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997); *Brouillet*, 114 Wn.2d at 793; *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 864-65, 288 P.3d 384 (2012), *review denied*, 177 Wn.2d 1002 (2013).

Although Soule acknowledges that the superior court is permitted to resolve PRA claims based on declarations alone, he contends that he "was not given the time he needed to take depositions to obtain paper testimony, impeachment or otherwise." Appellant's Opening Br. at 40. Because of this, he argues, the only way for him to challenge the AGO's "misleading," and "self-serving" declarations was to compel the AGO witnesses to testify during the merits hearing

and to cross-examine them. Appellant's Opening Br. at 40-41. He argues it was an abuse of discretion for the superior court to quash his notice to attend.

Soule also argues that "[t]rial courts and agencies should not be permitted under the PRA to uniformly set merits hearings with the presumption of no live testimony." Appellant's Opening Br. at 43. According to Soule, PRA hearings by default should include live testimony from witnesses, and "a hearing 'solely on affidavits' " is merely the exception. Reply Br. at 21 (quoting RCW 42.56.550). Soule contends that TCLCR 3 characterizes the final hearing as a "trial" and nothing in the superior court's PRA scheduling order overtly limits the hearing to declarations. 1 VRP (Nov. 17, 2023) at 8. Accordingly, the superior court was required to explicitly notify the parties that it planned to decide the case based on affidavits and not live testimony.

Soule's position that PRA hearings should be "by default" conducted with live testimony fails to recognize the connection between the policies of the PRA and holding hearings on affidavits or declarations. By deciding Soule's claim on declarations, the superior court followed common procedure for resolving PRA disputes expeditiously and inexpensively. *See e.g. O'Neill*, 179 Wn.2d at 153; *Forbes*, 171 Wn. App. at 867. In the face of these policy preferences, Soule provides no relevant basis to suggest that the superior court should have presumed, without more initially from Soule, that the case should have been decided based on live testimony or that it had to notify parties that it made "the requisite discretionary choice to hear the case solely on affidavits." Reply Br. at 22. Indeed, the opposite is true, the superior court was entitled to assume the parties would have overtly raised the issue of live testimony, either at the scheduling conference or soon thereafter, if there was a request to depart from the common method of resolution—

especially given that the merits hearing had long been scheduled for a single day, starting at 1:30 p.m.

Under these circumstances, if Soule had wanted to present live witnesses, he should have raised the issue well before he did. Part of the superior court's reasoning in quashing the notice to attend appeared to be that Soule had some level of responsibility to overtly advocate for his desired process. While it is true that the superior court's scheduling order did not specifically say that Soule's PRA hearing would be based solely on declarations, Soule surely understood that the hearing was scheduled for 1 day, starting in the afternoon, yet Soule said nothing. He was also aware that the scheduling order omitted any witness disclosure deadlines, unlike a regular civil case scheduling order, yet Soule said nothing. On these facts, the superior court's expectation that Soule had an obligation to raise the issue of live testimony well prior to his notice to attend for the AGO witnesses was reasonable.

Based on the superior court's reasoning and the fact that its decisions were consistent with the procedures prescribed in the PRA (and the policies behind those procedures of expeditiousness), we conclude that the superior court did not abuse its discretion.[6]

[6] Soule also generally argues that the superior court's decisions are violations of his procedural and substantive due process rights, but he provides no separate analysis for either procedural due process or substantive due process. As for procedural due process, we are unpersuaded, based on the record, that the superior court failed to follow all required procedures under the PRA. RCW 42.56.550; *see also O'Neill*, 170 Wn.2d at 153. And without any authority from Soule supporting his contention that his substantive due process rights were violated, we reject his argument. *See DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

III. THE AGO'S COMPLIANCE WITH THE PRA

Beyond Soule's challenge to the superior court's prehearing rulings, Soule also argues that the superior court erred in dismissing his underlying case. He makes two arguments. First, Soule contends the AGO violated the PRA by failing to provide a prompt response. Second, he contends that the AGO's search was inadequate. We disagree with both arguments.

Challenges to agency actions for violations of the PRA are reviewed de novo. *Neigh. All.*, 172 Wn.2d at 715. It is the agency's burden to show that it complied with the PRA. *Id.* at 720-21; *Cantu v. Yakima Sch. Dist. No. 7*, 23 Wn. App. 2d 57, 79, 514 P.3d 661 (2022). To satisfy its burden, an agency must show that they promptly and adequately identified and disclosed any requested records, absent a specific exception that is enumerated in the statute. *Neigh. All.*, 172 Wn.2d at 715; RCW 42.56.070(1), .080(2), .520.

A. PROMPTNESS OF THE AGO'S SEARCH

Whether an agency has violated the PRA by failing to provide a "prompt" response to a request is a fact-specific inquiry. *Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 653, 334 P.3d 94 (2014), *review denied*, 182 Wn.2d 1011 (2015). Even though the PRA requires an agency to respond to a request within five business days, it allows agencies to take a longer time in order "to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request." RCW 42.56.520. An agency may also disclose the relevant records to the requestor "on a partial or installment basis as [the] records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure." RCW 42.56.080(2).

Soule argues that by taking over two years from his initial request to the final closure of the request, the AGO violated the PRA. Pointing to *O'Dea v. City of Tacoma*,[7] where we held that an agency's 10-month delay in responding to a PRA request was unreasonable, Soule complains that, here, "[t]he [AGO] took more than double that time." Appellant's Opening Br. at 26. He further contends that none of the circumstances listed in RCW 42.56.520 that permit an agency to take longer than five days to respond to a PRA request apply. According to Soule, the agency's delay in getting him records was not due to a need to clarify the intent of his request, a need to locate or assemble the records, a need to notify third parties affected by the request, or a need to determine whether the requested records were exempt from the PRA. Instead, Soule claims the AGO "deliberately chose to limit the volume of each installment [of records] rather than simply turn it all over at once." Appellant's Opening Br. at 27.

To the extent that Soule is suggesting that the AGO had no excuse for not completing his request in five days, the suggestion is unrealistic. As the AGO's declarations explain, the AGO dedicated time to help Soule narrow his search and advised him that using terms that were too broad would make fulfilling his request take longer. These declarations clearly support the need for additional time to "locate and assemble the information requested" and to "determine whether any of the information requested is exempt" as expressly permitted by RCW 42.56.520(2).

In fact, the sheer volume of responsive documents also belies Soule's position. Even though Soule's request was narrowed through discussions with AGO employee Young, Soule's

[7] 19 Wn. App. 67, 493 P.3d 1245 (2021).

request produced over 30,000 pages of records that were provided to him in 17 installments.[8] As documented in the AGO declarations, compiling these records for production required the AGO to give notice to the Consumer Protection Division and review and redact personal and financial information that is exempt from disclosure under the PRA.[9] *see* RCW 42.56.520(2); RCW 42.56.270.

As for Soule's complaint that the records should have been turned over "all at once," he offers no explanation how this type of production was possible (unless no records were produced until the very end of the process). Indeed, production by installments is expressly permitted by the PRA. RCW 42.56.080(2).

Although the length of time the entire process took may have appeared long, in our review of the record, all of the AGO's actions that contributed to this duration were consistent with what the PRA allows. Nothing in the record supports Soule's contention that the AGO's delay in

[8] These 30,000 plus pages did not include any performance evaluations. While Young searched for personnel records responsive to Soule's request, they were determined to be exempt from disclosure under RCW 42.56.230 and *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993). CP at 366, 369.

[9] It appears that some of the requested information may have implicated protections under federal privacy laws, which apply to the PRA. *See Ameriquest Mortg. Co. v. Off. of the Att'y. Gen.,* 170 Wn.2d 418, 431, 441, 241 P.3d 1245 (2010). These laws restrict an agency's ability to disclose " '[p]ersonally identifiable financial information,' " which includes names, addresses, phone numbers, " '[i]nformation a consumer provides to you on an application to obtain a loan,' " or " '[a]ny information about [a financial institution's] consumer if it is disclosed in a manner that indicates that the individual is or has been [the financial institution's consumer].' " *See id.* (quoting 16. C.F.R. § 313.3(o)(1), (2)(i)) (some alterations in original). "Any information meeting the definition of 'personally identifiable financial information' is nonpublic personal information that may not be disclosed, regardless of whether the information appears in loan files, e-mails, or the AGO's internal work product." *Id.* at 441.

producing his records was somehow deliberate or purposeful. Thus, his argument that the AGO violated the PRA by failing to promptly respond to his request fails.

B. ADEQUACY OF THE AGO'S SEARCH

Finally, in a related argument, Soule contends that the superior court erred in concluding that the AGO conducted an adequate search. Soule contends the AGO's search actually resulted in "meaningless installments" that were unresponsive to his request. Appellant's Opening Br. at 2. We disagree.

When responding to a request, agencies must perform an adequate search for responsive records—an inadequate search is considered a violation of the PRA. *Neigh. All.*, 172 Wn.2d at 721. While an agency must show that its search was adequate, "[t]he PRA does not require agencies to create or produce records that do not exist." *O'Dea v. City of Tacoma*, 19 Wn. App. 2d 67, 79, 493 P.3d 1245 (2021). "The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents." *Neigh. All.*, 172 Wn.2d at 720. Whether or not the agency actually found responsive records is irrelevant so long as its search was reasonable based on the circumstances. *Cantu*, 23 Wn. App. 2d at 84 ("A search may be adequate and still fail to identify responsive records.").

For a search to be reasonable, an agency is only required to search places where it is reasonably likely for responsive records to be found. *Neighb. All.*, 172 Wn.2d at 720. The search does not have to be perfect, it just cannot be "unnecessarily narrower" than the request. *Cantu*, 23 Wn. App. 2d at 85. For example, depending on the nature of a particular request, it may be insufficient for an agency to only search for hardcopy records; they may reasonably need to search additional databases, communications, and e-mails. *Id.* at 85-86. We also measure reasonableness

by looking at the search as a whole, "not on whether the requester can think of alternative search terms that may produce more records." *Id.* at 85.

As discussed above, a claim alleging a PRA violation can be resolved based on declarations alone. RCW 42.56.550. An agency may rely on declarations made in good faith that include the type of the search performed, identify the search terms used, and "establish that all places likely to contain responsive materials were searched." *Neigh. All.*, 172 Wn.2d at 721. Agency declarations will be presumed to be made in good faith. *Forbes*, 171 Wn. App. at 867. A requester's "[p]urely speculative claims about the existence and discoverability of other documents will not overcome an agency affidavit." *Id.*

Soule argues that the AGO's search here was inadequate because it did not search appropriate locations or databases for the records or use reasonable search methods or search terms. According to Soule, when searching for communications, the agency should have searched using "technologies actually utilized by the individuals known to be communicating" and not used a remote search engine or only searched the Office 365 database. Appellant's Opening Br. at 31. Further, according to Soule, the AGO should have searched for all communications, not just e-mails. Soule also challenges the AGO's search terms, asserting that the AGO should have used additional key words that included abbreviations "known by the A[GO] to be used when communicating," like "AOD" and "NMS." Appellant's Opening Br. at 31.

Much of Soule's arguments are rooted in his suspicions that the AGO's declarations are "deceptive" and "self-serving." Appellant's Opening Br. at 18. For example, Soule casts doubt that merely searching Outlook 365 for e-mails was effective because if Deputy Chief Information Officer Singleton was subject to cross-examination, he "likely would have revealed that terminated

or retired users e-mail was not migrated" when the AGO switched its databases in 2019. Appellant's Opening Br. at 17. Soule also appears to express skepticism that Consumer Protection Division employee Teng was the only one to have responsive records and whether Teng ever actually produced the records that she found.

We do not find any support in the record for Soule's allegations. Despite Soule's speculations about the credibility of the AGO's declarations, we presume agency declarations to be made in good faith. *See Forbes*, 171 Wn. App. at 867. With this presumption, the declarations describe an adequate search that meets the demands of the PRA.

While the AGO did not use the specific search terms that Soule argues they should have used, a search is not unreasonable just because an agency did not "think of alternative search terms that may produce more records." *See Cantu*, 23 Wn. App. 2d at 85. The declarations of Young, Teng, Ashley, and Gutzmer show that AGO employees used search terms broad enough to potentially include all the individuals named by Soule as they related to the Wells Fargo negotiations and settlements. And e-mails that were archived and had been migrated from the AGO's old e-mail database were included in the search. Any e-mail that contained the relevant search terms "in the body of the email, subject line, to and from and cc/bcc, threads within the email, and attachments" would come up. CP at 366.

The AGO employees also went beyond searching for e-mails; they searched the AGO's physical files, electronic files complaint database, and "anywhere [they] thought records would still be in existence." CP at 260. They searched the litigation files for "Wells Fargo Assurance of Discontinuance" and "Wells Fargo National Mortgage" and did searches of the databases as a whole in case relevant documents would come up from other places. CP at 259. When searching

the complaint database, they used the 13 categories of complaints that Soule had provided in his request. In both of these physical and electronic locations, they specifically searched for "a particular communication between AAG Dave Huey and Wells Fargo that Soule believed existed." CP at 260. Further, each complaint "contain[ed] many communications between and among members of the AGO and Wells Fargo." CP at 366.

On this record, the AGO's search was reasonably calculated to uncover all relevant documents that were still available. *See Neigh. All.*, 172 Wn.2d at 720. In fact, even though many documents may have been destroyed prior to Soule's request as a result of the AGO's retention policy, over 30,000 records were still produced. Just because Soule speculates that the AGO could have done more, it does not follow that the AGO's search was inadequate. *See Cantu*, 23 Wn. App. 2d at 85 (concluding a search does not have to be perfect). Therefore, AGO met its burden to prove that it complied with the PRA.

IV. COSTS AND ATTORNEY FEES

Soule requests attorney fees and costs for the superior court action and on appeal. RAP 18.1 allows a party to recover attorney fees or expenses so long as "applicable law grants to a party [that] right." And the PRA allows a requestor who prevails against an agency to recover costs and attorney fees. RCW 42.56.550. Because Soule did not prevail below and does not prevail here, we deny his request for costs and attorney fees.

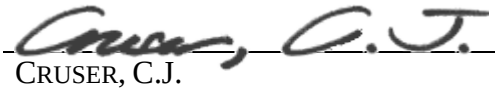
CONCLUSION

We affirm the superior court.

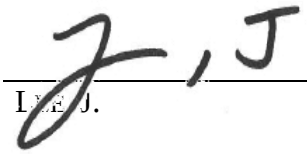
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

PRICE, J.

We concur:



CRUSER, C.J.



LEE, J.