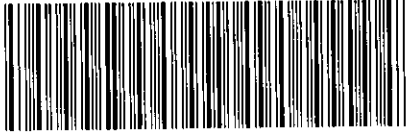


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16-2-05416-7 51536789 CTD 06-26-18



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

ARTHUR C. BANKS, an individual, TONEY MONTGOMERY, an individual, WHITNEY BRADY an individual

Case No. 16-2-05416-7

Plaintiff(s)

COURT DECISION

vs.

CITY OF TACOMA, a municipal corporation
Defendant(s)

THIS MATTER having come on regularly before the above-entitled Court on April 13, 2018 Plaintiffs' Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment and on May 17, 2018 for Jury Trial. The Court heard oral arguments and reviewed the following pleadings submitted¹:

Defendant's Motion for Summary Judgment; Affidavit of Margaret Elofson in support of Defendant's Motion for Summary Judgment; Plaintiffs' Motion for Partial Summary Judgment; Declaration of John Midgley in support of Plaintiffs' Motion for Partial Summary Judgment; Plaintiffs' Opposition to Defendant's Motion for Summary Judgment; Motion to allow filing of two Exhibits under Seal; Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment; Affidavit of Margaret Elofson in support of Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment; Affidavit of Michael Smith in support of Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment Affidavit of Detective Christopher Shipp; Affidavit of Captain Fred Scruggs in support of Defendant's Motion for Summary Judgment; Supplemental Statement of Interest of the United States; Expert Report Exhibit 6 & 7;

¹ Pleadings as identified in the Court's LINX system

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Affidavit of Benjamin Inman; Supplemental Declaration of Marcia K. Sowles; Plaintiffs' Reply in support of Motion for Partial Summary Judgment; Affidavit of Catherine Journey in support of Defendant's Reply Re: Defendant's Motion for Summary Judgment; Affidavit of Margaret Elofson in support of Defendant's Reply Re: Defendant's Motion for Summary Judgment; Defendant's Reply regarding Defendant's Motion for Summary Judgment; Affidavit of Michael Smith in support of Defendant's Reply Re Defendant's Motion for Summary Judgment; Declaration of Terry Krause in support of Defendant's Reply on Defendant's Motion for Summary Judgment; Plaintiffs' Brief in support of Proposed Order on Cross Motions for Summary Judgment and for Penalties, Fees, and Costs; Defendant's Response to Plaintiff request for Penalties and Fees; Affidavit of David Nash-Mendez in support of Defendant's Response to Plaintiff Motion for Penalties and Fees; Affidavit of Lisa Anderson in support of Defendant's Response to Plaintiff Motion for Penalties and Fees; Affidavit of Margaret Elofson in support of Defendant's Response to Plaintiff Motion for Penalties and Fees; Supplemental Affidavit of Detective Christopher Shipp; Plaintiffs' Reply Brief in support of Proposed Order on Cross Motions for Summary Judgment and for Penalties, Fees, and Costs; Declaration of Captain Charles P. Taylor in support of Defendant's Response to Plaintiff Motion for Fees and Penalties and the Supplemental affidavit of Margaret Elofson in support of Defendant's Response to Plaintiff Motion for Penalties and Fees.

DECISION

Strict enforcement of the Public Records Act (PRA) discourages improper denial of access to public records and Washington law is clear that a court shall award attorney fees to a person who prevails against an agency in an action seeking the disclosure of public records.² Records are never exempt from disclosure, only production so an adequate search is required in order to properly disclose responsive documents.³ The PRA "treats a failure to properly *respond* as a denial."⁴ The burden of proof shall be *on the agency* to establish that refusal to permit

² *Amren v City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997); *American Civil Liberties Union of Washington v. Blaine School Dist. No. 503*, 786 Wn.App. 688, 937 P.2d 1176 (1997)

³ *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011), (citing) *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010)

⁴ *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 750, 174 P.3d 60 (2007)

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public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.⁵ PRA is a forceful reminder that agencies remain accountable to the people of the State.⁶

The basic policy of the PRA is prompt access to non-exempt public records and penalizing an agency failing to do so.⁷ Purpose of the PRA's penalty provision is to deter improper denials of access to public records.⁸ Penalty for violation of PRA (PRA) must be an adequate incentive to induce future compliance. When determining the amount of the penalty to be imposed on government agency that violated PRA, the existence or absence of an agency's bad faith is the principal factor which the trial court must consider, however, no showing of bad faith is necessary before a penalty is imposed on a government agency that violates the PRA⁹. Agency culpability, mitigating and/or aggravating is key.¹⁰

In the present case the City asserts that there is no evidence of bad faith and that mitigating factors weigh in favor of no penalty or a minimal penalty. The City describes its noncompliance with the PRA violations as “*overlooking several random documents*,” or as “*misunderstanding*” of the Plaintiff requests. For example, to prove its point the City states it did not see the Plaintiffs’ requests as seeking the “blank form that TPD personnel complete when obtaining a warrant for pen trap and trace or cell site simulator use” and that “the blank form does not reflect any actual use of the cell site simulator, so the City had no reason to interpret this request as seeking the blank form.” This assertion is not persuasive as the City found the requested documents, failed to produce the documents in its entirety as found, did not identify an exemption and did not seek clarification. Instead to justify its noncompliance the City asserts that it also “did not provide blank forms for invoices, blank templates for loan agreements, blank templates for grant applications, blank templates for emails, or any other of the many forms or templates used by the City in relation to the cell site simulator or to conduct other City business,”

⁵ RCW 42.56.080
⁶ *Faulkner v. Washington Dept. of Corrections*, 183 Wn.App. 93 332 P.3d 1136 (2014); *Yousoufian v. Office of King County Exec.* 168 Wn.2d 444, 229 P.3d 735 2010
⁷ *Yousoufian v. Office of King County Exec.*
⁸ *Id.*
⁹ *Id.*
¹⁰ *Id.*

1 in response to the public records requests. Under the PRA the City's failure to produce these
2 documents was deliberate and is treated as a denial.

3 The PRA establishes a *positive* duty to disclose public records unless they fall within
4 specific exemptions. This mandates that the City upon receiving a request for documents must
5 first do an adequate search and then must produce the documents requested if there is not an
6 exemption¹¹. The PRA does not require the City to *analyze the reasons* for why the document is
7 requested or to determine the relevance of the documents requested even if they are blank forms.
8 The blank form taken in context of the other forms may have meaning to the requestor and it is
9 not for the City to analyze its relevance. To adopt the City's interpretation of the PRA would
10 defeat the broad mandate of the PRA to allow *access* to public records¹² not covered by an
11 exemption.

12 Pertaining to Plaintiffs' request Exhibit 4, the City's argument is unreasonable as after
13 conducting its search and after seeking clarification from the Plaintiffs' prior attorney the City
14 then *decided that it was not producing* the entire 2015 spreadsheet with the pen trap and trace
15 entries "because production of the billing spreadsheet led to *misunderstandings in the past*." The
16 City failed to cite an exemption yet argues that it "believes that the billing spreadsheet accurately
17 provided what the plaintiffs requested." Therefore, the City violated the PRA and many
18 aggravating factors are present. **Plaintiffs are awarded \$13,440.00 (\$70 multiplied by 192
19 days¹³) for the denial of the right to inspect or copy Exhibit 4.**

20 As to Plaintiffs' request Exhibit 5, the City identified 37 prior requests and produced all
21 the documents provided to those 37 requesters. Exhibit 5 is an email the City described as

22 *"among the documents produced to prior requesters." Stating that "the*
23 *email has no retention value; it is a "for your information" email from the FBI*
24 *with an attachment that was irrelevant to the City." The City argues that "the*
25 *City is not required to retain such an email though if it is the City's possession at*
the time of a records request, the City must produce it. The City believes that it
had the email at the time of previous requests but that it had been deleted by the
time of these plaintiffs' request. Plaintiffs have not presented any evidence that
the City was in possession of the actual email, other than as one of many
documents contained in the production of documents to previous requesters. To
that extent, the City still had it in its possession. However, it is not reasonable to

¹¹ *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978)

¹² RCW 42.56.010(4)

¹³ The dates used by the Plaintiff were not disputed by the Defendant and will be deemed agreed.

ask the City to search every prior request for public records to locate documents that have since been deleted from employees' computers and no longer exist on employees' computers at the time a request is received. The City receives over 2,500 requests per year. A search of all previous PRA requests and responses, in addition to a search of currently existing documents on individual computers, is simply not possible. Under these circumstances, the City's not providing this email to these plaintiffs is understandable."

The City's failure to produce Exhibit 5 for inspection or copying was unreasonable as the document was provided to 37 prior requestors, therefore it should have been foreseeable that the document was not irrelevant to the public even though it may have been to the City. Failure to retain this document is indicative of a lack of proper training and/or supervision as absent an exemption strict compliance with the PRA is required. At a minimum this document should have been placed on the City's website for retention purposes. **The City violated the PRA and Plaintiffs are awarded \$9,600 (\$50 multiplied by 192 days) for the denial of the right to inspect or copy Exhibit 5.**

Pertaining to Plaintiffs' request Exhibits 6-9 and 15, several emails with the FBI concerning requests made by other entities and an invoice. The City asserts it non-disclosure agreement with the FBI required notification to the FBI when requests for records were received and that it received many requests for records about the cell site simulators. However, the City violation is for *not producing* the nonexempt documents requested under the PRA. The City concedes that it is "unable to say whether these documents still existed at the time the City responded to the Plaintiffs' request other than as part of production to previous requestors. ... It is unknown for certain whether the City simply missed a few emails or whether they no longer existed at the time of these plaintiffs' request." Similar to Exhibit 5, the City's failure to produce Exhibits 6-9 and 15 for inspection or copying was unreasonable as the documents were provided to other requestors, including the media (Muckrock, the Associated Press, and the Tacoma News Tribune). Therefore, it should have been foreseeable that was not irrelevant and failure to retain or locate these documents is indicative of a lack of proper training and/or supervision. At a minimum these documents should have been placed on the City's website. **The City violated the PRA and Plaintiffs are awarded respectively \$48,000 (\$50 multiplied by 192 days multiplied by 5) for the denial of the right to inspect or copy Exhibit 6-9 and 15.**

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Pertaining to Plaintiffs' request number 10, the City asserts that it understood this request was for "completed applications, not a blank template." Under the PRA it is the City's responsibility to clarify any misunderstanding regarding a PRA request¹⁴ and therefore this violation could easily have been remedied with a request for clarification from the Plaintiffs. Instead the City states that it "does not generally provide blank forms and it did not occur to the City that these plaintiffs wanted one." Similar, to the request for the "blank warrant form" discussed above, the City failed in responding to the PRA request. The City's response when reviewed in its totality in responding to these Plaintiffs PRA requests was not misguided or mistaken but appeared to be deliberate as the City decided what it will produce citing to no exemption. In addition, it is important to note that the documents if found are to be produced for "*inspection or copying*," therefore it is for the requestor to decide if he or she will pay for the produced documents and not for the City to decide the value in the requestor's request even if it is "blank forms." **The City violated the PRA and Plaintiffs are awarded respectively \$33,540 (\$60 multiplied by 559 days) for the denial of the right to inspect or copy Exhibit 10.**

Pertaining to Plaintiffs' request number 11-13, the City's failure to produce paper copies of the minutes of two Citizen Review Panel meetings and the agenda for one meeting. According to the City "*these documents were publicly available to the plaintiffs online at the time of their request and remain available to them online to this day. ... The documents are easily obtainable by any member of the public by doing a simple Google search. Alternatively, any person can visit the City's website and obtain these documents.*" This response by the City is the most troubling and runs afoul of the PRA. The PRA does require state and local agencies to 'make available for public inspection and copying all public records, unless the record falls within the specific exemptions of the PRA. Placing a document on the City's website does not alleviate the City of its responsibility to produce the requested documents or at a minimum the City is required to inform the requestor of where it has placed the requested documents. Additionally, the City's argument requiring any member of the public to do a google search is unpersuasive as documents found through a google internet search may have no level of authenticity as that obtained from the guardian of the record – the governmental agency – the City. Therefore, the Plaintiffs were denied the ability to inspect or copy these records. **The City violated the PRA**

¹⁴ RCW 42.56.080

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and Plaintiffs are awarded respectively \$77,760 (\$80 multiplied by 324 days multiplied by 3) for the denial of the right to inspect or copy Exhibit 11-13.

In the Present case assuming the City's assertions are true, it was the City's responsibility after doing an adequate search to produce the documents for the Plaintiffs. In this instance notification by the City of where the City had placed the requested documents so that it could be easily retrieved by the public would have complied with the PRA requirements. The City knowing where the documents requested could be found admits to having produced the same documents to other requestors but for 324 days failed to produce the documents to the Plaintiffs' *or notify* them of where the documents could be found violated the PRA. The purpose of the PRA's penalty provision is to deter improper denials of *access to* public records¹⁵. The penalty must be an adequate incentive to induce future compliance. Strict enforcement of this provision discourages improper denial of access to public records¹⁶ and a showing of bad faith is not required.

In this case, the City's responses were troubling in many regards. To support its position that that "*there was no public importance associated with these Plaintiffs' request*" and "*that there is no basis to assess a penalty,*" The City asserts

*"it is significant that although the plaintiffs' request related to an issue that was of interest to the public, the City had already responded to many, many requests about the cell site simulator when these plaintiffs made their request. In fact, the City had already responded to over 30 other requests. These plaintiffs did not seek any documents that had not already been provided to other requesters. All of the documents at issue had been provided to other requesters or had been posted online. In fact, the local newspaper had already retrieved and publicized almost all of the documents at issue. These plaintiffs' request came in after the press release had been issued and the emails did not reveal any further detail about the equipment's acquisition, use, or operation that had already been publicized by the newspaper and the City's voluntary press release. These plaintiffs' request merely piggy-backed on other requests and on a story, that had already been well-publicized. Thus, while the topic of cell site simulators may have been of interest to the public at one point, the documents at issue in this motion did not further that public interest in any way."*¹⁷

¹⁵ *Yousoufian II*, 152 Wn.2d at 429-30, 98 P.3d 463.
¹⁶ *Amren v. City of Kalama*, 31 Wn.2d 25, 929 P.2d 389 (1997)
¹⁷ Defendant's Response to Plaintiffs' Request for Penalties and Fees, Page 6 lines 10 to 19.

1 The City's responses to the Plaintiffs PRA requests resulted in delayed responses, lack of
2 compliance with PRA procedural requirements, showed a lack of proper training and/or
3 supervision, negligence, and unreasonableness in any explanations given for noncompliance. The
4 penalty awarded in this case is an amount necessary to deter future misconduct when considering
5 the City's agency size and the facts of this case.

6 The Plaintiff's requests attorney fees and costs. Strict enforcement of fees and fines will
7 discourage improper denial of access to public records¹⁸. This rule promotes the PDA's broad
8 mandate for broad disclosure of public records.¹⁹ The act's declaration of policy states that it is to
9 be liberally construed to promote "full access to public records so as to assure continuing public
10 confidence [in] ... government processes, and so as to assure that the public interest will be fully
11 protected²⁰. Therefore, the prevailing party is entitled to a "reasonable" **attorneys' fees** award.²¹

12 In the present case the Plaintiffs were the prevailing party regarding Exhibits 4-13 and
13 15. Therefore utilizing the "lodestar" approach²², the requested Plaintiffs attorneys' fees are
14 adjusted²³ to be comparable with those awarded in the Pierce County geographic area for PDA
15 cases. Attorney fees are awarded as follows:

16 John Midgley 103.4 hours at \$450.00/hour, total \$46,530
17 Lisa Nowlin 86.6 hours at \$325.00/hour, total \$28,145
18 Jennifer Campbell 28.6 hours at \$400.00/hour, total \$11,440
19 James Edwards- 43.5 hours²⁴ \$260.00/hour, total \$11,310
20 Jamila Johnson- 35.6 hours \$350.00/hour, total \$12,460

21 COURT ORDER

22 The Defendant's Summary Judgment Motion is **GRANTED in PART** as to the
23 redactions of documents pertaining specifically to the cell site simulator documents.²⁵

24 The Plaintiff Motion for Summary Judgment is **GRANTED**

25 ¹⁸ *Progressive Animal Welfare Soc. v. University of Washington*, 114 Wn.2d 677, 790 P.2d 604 (1990)

¹⁹ *Id*

²⁰ *Id*

²¹ *Id*

²² *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983).

²³ John Midgley- \$450.00 hour; Lisa Nowlin- \$325.00 hour; Jennifer Campbell- \$400.00 hour; James Edwards-
\$250.00 hour; Jamila Johnson- \$325.00 hour

²⁴ Adjustment made for pre-filing work

²⁵ RCW 42.56.240(1)

Pursuant to this Court's decision:

This Court **ORDERS** that Plaintiffs be awarded a Total of \$182,340.00 for violations of the PRA regarding Exhibits 4-13 and 15.

This Court **ORDERS** that Plaintiffs be awarded Attorney Fees in the amount of \$109,885.00.

This Court **ORDERS** that Plaintiffs be awarded Costs in the amount of \$5,645.04²⁶.

DATED this 25th day of June, 2018.


JUDGE G. HELEN WHITENER

²⁶ Adjustment made for deduction of 10/13/2014 charge totaling \$26.50

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