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KEVIN STOCK  
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The Honorable G. Helen Quinn  
No. 16-2-05416-7

Hearing date: May 17, 2018

9:00 A.M.

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

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

Plaintiffs,

v.

CITY OF TACOMA, a municipal corporation,

Defendant.

No. 16-2-05416-7

**PLAINTIFFS' BRIEF IN SUPPORT OF  
PROPOSED ORDER ON CROSS  
MOTIONS FOR SUMMARY  
JUDGMENT AND FOR PENALTIES,  
FEES, AND COSTS**

**I. Introduction**

The Court has before it Defendant's Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment. At the conclusion of oral argument on April 13, 2018, the Court found that Defendant's search for public records was inadequate, that Exhibits 4-13 and 15 to Plaintiffs' Motion for Partial Summary Judgment were wrongfully withheld, and that Defendant's disclosed redactions and withholdings were proper. Plaintiffs now request that the Court enter their Proposed Order on the Motions for Summary Judgment, including ordering Tacoma Police Department ("TPD") to conduct an additional search for responsive documents to

1 remedy the inadequacy of the original search and granting Plaintiffs' request for fees, costs, and  
2 penalties.

## 3 **II. Penalties for Failure to Provide Eleven Public Records**

4 The Court found on April 13, 2018, that Defendant violated the PRA when it failed to  
5 provide Exhibits 4-13 and 15 to Plaintiffs in response to their public records request. For many  
6 of these documents, Plaintiffs would never have known that these public records—which are  
7 directly responsive to the PRA Request—existed if Plaintiffs had not brought this case.

8 The PRA gives the court discretion to award a party who prevails against an agency in an  
9 action seeking a public record “an amount not to exceed one hundred dollars for each day that he  
10 or she was denied the right to inspect or copy said public record.” RCW 42.56.550(4).

11 Determination of a PRA per diem penalty involves two steps: (1) determining the amount of  
12 days the party was denied access to the public record and (2) determining the appropriate amount  
13 of the penalty. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459, 229 P.3d 735 (2010).

14 Although the existence or absence of an agency's bad faith is the principal factor for  
15 consideration, no showing of bad faith is necessary before a penalty may be imposed on an  
16 agency. *Amren v. City of Kalama*, 131 Wn.2d 25, 36–38, 929 P.2d 389 (1997).

17 In *Yousoufian*, the court set forth guidelines for determining appropriate PRA violation  
18 penalties. Aggravating factors that may increase the penalty are:

19 (1) a delayed response by the agency, especially in circumstances making time of  
20 the essence, (2) lack of strict compliance by the agency with all the PRA  
21 procedural requirements and exceptions, (3) lack of proper training and  
22 supervision of the agency's personnel, (4) unreasonableness of any explanation for  
23 noncompliance by the agency, (5) negligent, reckless, wanton, bad faith, or  
24 intentional noncompliance with the PRA by the agency, (6) agency dishonesty,  
25 (7) the public importance of the issue to which the request is related, where the  
26 importance was foreseeable to the agency, (8) any actual personal economic loss  
to the requestor resulting from the agency's misconduct, where the loss was  
foreseeable to the agency, and (9) a penalty amount

1 necessary to deter future misconduct by the agency considering the size of the  
2 agency and the facts of the case.

3 *Yousoufian*, 168 Wn.2d at 467–68 (footnotes omitted). Mitigating factors that may decrease the  
4 penalty are

5 (1) a lack of clarity in the PRA request, (2) the agency's prompt response or  
6 legitimate follow-up inquiry for clarification, (3) the agency's good faith, honest,  
7 timely, and strict compliance with all PRA procedural requirements and  
8 exemptions, (4) proper training and supervision of the agency's personnel, (5) the  
9 reasonableness of any explanation for noncompliance by the agency, (6) the  
10 helpfulness of the agency to the requestor, and (7) the existence of agency  
11 systems to track and retrieve public records.

12 *Yousoufian*, 168 Wn.2d at 467 (footnotes omitted).

13 The number of days Plaintiffs were denied each of the public records the Court has found  
14 were wrongfully withheld is detailed in the Declaration of John Midgley in support of Penalties  
15 and New Search, filed in conjunction with this brief. Based on these calculations, we request  
16 PRA penalties as follows.

17 In light of the *Yousoufian* factors, Plaintiffs ask for \$70 a day for Exhibits 4-9, 11-13, and  
18 15. We are not asking for the maximum amount per day for these records, as they may not have  
19 been intentionally withheld. However, the failure to provide these records in response to the PRA  
20 request was a result of the search the Court has held was inadequate and in this case amounts to  
21 gross negligence given that so many documents were not provided and had to be found by  
22 Plaintiffs. Indeed, many of the *Yousoufian* factors are implicated: Beyond negligence (factor 5),  
23 the records are of great public interest (factor 7), the explanations for failure to produce are  
24 questionable (factor 4), there are reasons to doubt TPD's PRA methods and supervision as  
25 exhibited in the inadequate search (factors 2 and 3), and there needs to be deterrence of future  
26 inadequate searches (factor 9). Therefore, the penalty for these records should be substantial.

Further, Plaintiffs request \$100 a day for Defendant's withholding of Exhibit 10, in light  
of Defendant's willful and bad faith withholding. As a template that references cell site

1 simulators many times and is used to create all warrants that authorize the use of cell site  
2 simulators, this document is clearly of central importance and could not be more responsive to  
3 the PRA request. Yet TPD did not identify it in response to the PRA request, and, even up to and  
4 including the summary judgment hearing in this case, Defendant continued to claim it was not  
5 responsive. Defendant should pay the maximum penalty of \$100 per day for deliberately  
6 withholding this responsive public record.

7 Based on the penalty amounts requested and the days Plaintiffs were deprived of these  
8 public records as documented in the Declaration of John Midgley in support of Penalties and  
9 New Search, the total amount of penalties requested is \$218,020.

### 10 **III. TPD Possesses Additional Responsive Public Records That It Must Identify and** 11 **Provide**

12 In addition to the documents Defendant withheld that Plaintiffs have subsequently been  
13 able to acquire, there is very good reason to believe that Defendant possesses numerous  
14 responsive documents that it has not identified and that Plaintiffs have not received. These  
15 documents have not been identified, disclosed, or produced due to Defendant's inadequate search  
16 for responsive records. Accordingly, Defendant should be ordered to search for further  
17 responsive documents in places that have been identified as likely to contain responsive  
18 documents, and either provide all responsive documents or disclose them and justify their  
19 withholding.

#### 20 **A. TPD's Search for Records Was Inadequate**

21 On motion for summary judgment in a Public Records Act case, the "agency bears the  
22 burden, beyond material doubt, of showing its search was adequate." *Neighborhood Alliance of*  
23 *Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 721, 261 P.3d 119 (2011). The adequacy of  
24 a search under the PRA is judged by a standard of reasonableness—"the search must be  
25 reasonably calculated to uncover all relevant documents." *Id.* at 720 (citing *Weisberg v. U.S.*  
26 *Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). "What

1 will be considered reasonable will depend on the facts of each case.” *Neighborhood Alliance*,  
2 172 Wn.2d at 720. An agency must search every place where responsive records are “reasonably  
3 likely to be found.” *Id.* (emphasis omitted). “[A]n inadequate search is comparable to a denial  
4 because the result is the same, and should be treated similarly in penalty determinations, at least  
5 insofar as the requester may be entitled to costs and reasonable attorney fees under RCW  
6 42.56.550(4).” *Id.* at 721.

8 Plaintiffs have identified several categories of documents that Defendant’s witnesses  
9 testified exist or likely exist, but that were not searched for responsive records. *See* Plaintiffs’  
10 Opposition to Defendant’s Motion for Summary Judgment (“Pls.’ Opp’n”). This Court found  
11 that TPD’s search was inadequate at oral argument on April 13, 2018. The following categories  
12 of documents are examples of how TPD’s search was inadequate.

13 Warrants: Detective Christopher Shipp testified that warrants authorizing the use of cell  
14 site simulators were regularly emailed to telecommunications companies from the individual  
15 email accounts of officers in the Special Investigation Unit and from TPD email account(s)  
16 connected to communal printer(s). Ex. B to Plaintiffs’ Opposition to Defendant’s Motion for  
17 Summary Judgment (“Pls.’ Opp’n”), C. Shipp Dep. 30:20-36:6, 116:16-118:15. TPD did not  
18 conduct a search of the email accounts connected to the communal printer(s) or of officers  
19 outside of the Tech Unit that are likely to contain copies of said warrants.  
20

21 Emails: Detective Christopher Shipp also testified that officers would disclose the use of  
22 cell site simulators to prosecutors “verbally or by email,” and that officers might email a  
23 telecommunications company for additional information needed for operating the cell site  
24 simulator. C. Shipp Dep. 53:11-16, 68:3-69:9. Detective Krause indicated that when the cell site  
25 simulator is utilized on behalf of other jurisdictions, the authorizing warrant might be emailed to  
26

1 TPD. Ex. C to Pls.’ Opp’n, Krause Dep. 33:16-34:7. It is not clear that TPD conducted a search  
2 of the email accounts, including Sent mail, for all members of the Tech Unit – for example, Scott  
3 Shaffner and Lieutenant Travis were trained on the cell site simulators, but it is not clear if their  
4 emails were searched. *See* Ex. 8 to Affidavit of Margaret Elofson in support of Defendant’s  
5 Motion for Summary Judgment, Krause Dep. at 37. TPD also failed to search the email accounts  
6 of officers who are not members of Tech Unit, despite testimony that some of these officers  
7 likely sent emails regarding cell site simulators.  
8

9 The Cell Site Simulator(s): TPD’s search was inadequate because it failed to search and  
10 provide any documents or data from the cell site simulator itself and the laptop that is used to  
11 operate it. <sup>1</sup> Plaintiffs’ experts have demonstrated that data is entered into, stored by, and created  
12 by, the cell site simulator every time it is used. Plaintiffs’ experts have also demonstrated that the  
13 software on the cell site simulator is designed to store data to database files that are easily  
14 accessible on the computer and can also be easily exported in a number of formats, including  
15 Microsoft Excel. Ex. E to Pls.’ Opp’n, Expert Report at 3.  
16

17 Despite Detective Krause’s assertion that “there’s no data collected. There’s nothing  
18 retained. There’s nothing to purge,” Ex. C. to Pls.’ Opp’n, Krause Dep. 45:16-18, Detective  
19 Krause provided an affidavit in support of Defendant’s latest briefing that he had searched the  
20 cell site simulator. T. Krause Decl. in support of Defendant’s Reply on Defendant’s Motion for  
21 Summary Judgment at 3-4. Detective Krause’s eleventh hour attempt to show that TPD  
22  
23

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24 <sup>1</sup> In the context of data collection and storage, Plaintiffs use the term “cell site simulator” to  
25 include the associated computer that is used to operate the cell site simulator. Because the laptop  
26 is necessary to operate the cell site simulator, Plaintiffs view the two as an integrated system.  
*See also* Ex. I to Pls.’ Opp’n, J. Shipp Dep. at 115:12-18 (referring to laptop as “part of the [cell  
site simulator] equipment”). Discussions of information and documents available on the cell  
site simulator include information on the associated computer.

1 conducted an adequate search is insufficient. As an initial matter, Detective Krause provides very  
2 little detail of the search, including *when* the search took place.

3 Any search of the cell site simulator and associated laptop must be “reasonably calculated  
4 to uncover all relevant documents.” *Neighborhood Alliance*, 172 Wn.2d at 720. The only  
5 concrete detail about the search that Detective Krause provides is that he searched for file  
6 extensions. A search for certain file extensions (presumably for files ending in, for example,  
7 “.doc” or “.pdf”) is not reasonably calculated to uncover relevant documents if the relevant  
8 information is not stored in Word documents or PDFs, but rather in a database. That the data  
9 may not be in the traditional form of a document is no defense—the PRA defines “public record”  
10 broadly to include “‘existing data compilations from which information may be obtained’  
11 ‘regardless of physical form or characteristics.’” *Fisher Broadcasting v. City of Seattle*, 180 Wn.  
12 2d 515, 524, 326 P.3d 688 (2014) (quoting RCW 42.56.010(4), (3)). This definition includes  
13 electronic information in a database. *Id.* TPD failed to search these records, failed to disclose  
14 these records, and failed to provide these records.

17 Monthly Activity Reports – In paragraph 4 of Captain Fred Scruggs’ Affidavit filed by  
18 the City in support of Defendant’s Motion for Summary Judgment, Captain Scruggs includes  
19 reference to “my ability to oversee the use of the cell site simulator equipment as part of my  
20 general oversight of the Tech Unit. This would include my review of **monthly activity reports**  
21 as well as the pen trap and trace billing log maintained by the Tech Unit.” (Emphasis added.)  
22 Defendant has provided the “billing log” referenced here, but Defendant has never identified or  
23 provided anything called or resembling “monthly activity reports,” even though Captain Scruggs  
24 identifies them as part of his oversight of the cell site simulators. Midgley Declaration in support  
25  
26

1 of Penalties and New Search, paragraph 3. TPD should be ordered to search for and provide any  
2 of these monthly activity reports that refer to cell site simulators.

3       South Sound 911: The City’s search was also inadequate due to its complete failure to  
4 search any documents held for TPD by South Sound 911.<sup>2</sup> South Sound 911 maintains a  
5 reporting system called “Enforcer” that all TPD officers have real-time access to. C. Shipp Dep.  
6 103:21-22. Patrol officers enter initial reports into the Enforcer system, and then supplemental  
7 reports can be added. *Id.* at 105:1-14. These reports can be created and accessed from TPD  
8 computers, including laptops in patrol cars. *Id.* at 105-107. “[A] vast majority of all of the  
9 documents that are the primary source material for an investigation are going to be at South  
10 Sound 911.” Ex. D to Pls. Opp’n, M. Smith Dep. 19:4-6.

11  
12       The City also claims that a search of South Sound 911 was not reasonably likely to turn  
13 up responsive documents, but this is based simply on conclusory statements by Michael Smith  
14 rather than any detailed explanation of why a search of the main platform used by TPD officers  
15 would not have any references to cell site simulators. Defendant’s Motion for Summary  
16 Judgment at 14 (“Def.’s Mot.”). Indeed, Christopher Shipp testified that the investigative files  
17 might indicate that a pen, trap and trace warrant was pursued, and that all pen, trap and trace  
18  
19

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20  
21 <sup>2</sup> The City has previously argued that South Sound 911 is a separate entity and that the City has  
22 no obligation to search for documents in South Sound 911’s possession. *See* Def.’s Mot. at 14;  
23 Ex. D to Pls.’ Opp’n, M. Smith Dep. 34:19-35:7. The PRA defines a “public record” as “any  
24 writing containing information relating to the conduct of government or the performance of any  
25 governmental or proprietary function prepared, owned, used, or retained by any state or local  
26 agency regardless of physical form or characteristics.” RCW 42.56.010(3) (emphasis added).  
The investigation files stored by South Sound 911 for TPD, which are created by TPD, and  
which all TPD officers can access from their computers or patrol cars, are public records within  
TPD’s possession and subject to Plaintiffs’ PRA request. *See Cedar Grove Composting Inc. v.*  
*City of Marysville*, 188 Wn. App. 695, 716, 720-21, 354 P.3d 249 (Wash. Ct. App. Div. 1, 2015)  
(records in possession of public relations firm hired by city were public records for purposes of  
the PRA because the city “used” the records).



1 warrants authorize cell site simulator use. C. Shipp Dep. 26:16-27:8, 42:11-44:3. Plaintiffs, in  
2 our Proposed Order, ask the Court only to order a search for South Sound 911 responsive  
3 documents in cases in which a cell site simulator was used. This would not entail a full search of  
4 South Sound 911, but one reasonably calculated to uncover responsive documents.

5 In sum, TPD did not conduct an adequate search for records in response to Plaintiffs’  
6 PRA Request. TPD failed to search the cell site simulator itself, failed to search for emails with  
7 warrants authorizing the use of cell site simulators, failed to search South Sound 911—which  
8 operates the Enforcer system, TPD’s primary reporting system—for documents related to cell  
9 site simulators, and failed to search non-Tech Unit officers’ email accounts.

10  
11 **B. The Court Should Order an Additional Search for Public Records**

12 In light of the Court having found TPD’s search inadequate, and given the testimony of  
13 several TPD employees that documents almost certainly exist that are responsive, Plaintiffs ask  
14 the Court to order Defendant to conduct a further search for responsive documents.

15 The RCW requires agencies to make available for public inspection and copying all  
16 public records, subject to certain exemptions. RCW 42.56.070. The statute also provides for  
17 judicial review of agency actions, stating that a superior court “may require the responsible  
18 agency to show cause why it has refused to allow inspection or copying of a specific public  
19 record or class of records.” RCW 42.56.550(1).

20 While the PRA does not explicitly state that the court can order an agency to produce a  
21 public record, it would be illogical to read the statute as providing the courts with the authority  
22 for review, but not providing the authority to, when no just cause exists for withholding, order  
23 the inspection and copying of the public records. And indeed the Washington Supreme Court has  
24 explicitly endorsed orders requiring production of public records as within the constitutional  
25 equitable powers of the courts. In *Resident Action Council v. Seattle Housing Auth.*, the Court  
26 said:

1 [Plaintiff] has a clear right to appropriate production of requested documents, [defendant]  
2 has refused to produce those documents, and [plaintiff] remains without the public  
3 records it has requested. On numerous occasions we have allowed detailed “disclosure  
4 orders” in PRA cases to remedy an agency’s failure to comply with the PRA. *In re*  
5 *Request of Rosier*, 105 Wash.2d 606, 618, 717 P.2d 1353 (1986); *see also, e.g., PAWS*  
6 *II*, 125 Wash.2d at 250, 884 P.2d 592; *Brouillet v. Cowles Publ’g Co.*, 114 Wash.2d 788,  
7 792, 801, 791 P.2d 526 (1990).

9 *Resident Action Council v. Seattle Housing Auth.*, 177 Wn. 2d 417, 446, 327 P.3d 600 (2013). In  
10 *Resident Action Council*, the Court endorsed an injunction that not only required the production  
11 of records, but also required the housing authority to establish policies relating to redactions and  
12 handling of public records. The Court found that the trial court had not overstepped the bounds  
13 of the PRA because the trial court had found the injunction necessary “in order to ensure that  
14 [the plaintiff] was provided complete relief.” *Id.* at 447.

15 The reason for these holdings is clear. The purpose of the PRA is to provide the public  
16 with access to public records – it cannot be that agencies need only pay a penalty for violations:  
17 such a holding would put public records that agencies do not wish to disclose out of reach of the  
18 public. The PRA requires agencies to disclose public records and the PRA provides the courts  
19 with the power to enforce that mandate, to provide “complete relief.” *Id.* TPD’s search was  
20 inadequate. If more documents are likely to be found with a further search, the Court can order  
21 that search, as it is the only remedy that could provide redress for the violation.

22 Counsel for Defendant suggested at the April 13, 2018 oral argument that the PRA does  
23 not provide for an additional search, but such a holding would leave PRA requestors without a  
24 remedy for a clear violation of the PRA. And as *Resident Action Council* and the cases it cites  
25 make clear, if the courts do not have the authority to order further searches or order that public  
26 records improperly withheld be provided, agencies could simply decide to pay the daily fee and  
not provide certain records. Indeed, the daily penalty is per public record, and therefore requires  
the plaintiff and the court to at least have an idea of what has

1 been withheld in order to calculate the penalty – an agency could disclose nothing, and the court,  
2 not knowing what was withheld, would be able to do nothing more than speculate as to the daily  
3 penalty.

4 Plaintiffs, relying on the testimony of Defendant’s own agents, have shown that several  
5 categories of documents almost certainly exist; Defendant simply needs to search for them.  
6 Plaintiffs ask the Court to order Defendant to conduct an additional search for the documents  
7 identified above.

#### 8 **IV. Plaintiffs Are Entitled to Fees and Costs**

9 As the Court knows, in addition to monetary penalties, the Public Records Act provides  
10 for fees and costs to a party who “prevails” on a claim that she or he has been denied specific  
11 public records. RCW 42.56.550(4). Although Plaintiffs are requesting that this case continue  
12 while Defendant conducts an additional search, we are apprising the Court now of our request for  
13 fees and costs for the violations of the PRA that have already been documented. Our requests are  
14 based on the Declaration of John Midgley in support of Request for Attorneys’ Fees and Costs  
15 and the Declaration of Jennifer L. Campbell in Support of Fee Request.

16 In determining fee awards under the PRA, Washington courts follow the familiar  
17 “lodestar” method. *Sanders v. State*, 169 Wn.2d 827, 869, 240 P.3d 120 (2010). “A court using  
18 this method multiplies a reasonable attorney rate for the prevailing party by a reasonable number  
19 of hours worked, and then has discretion, in rare cases, to adjust the product upward or  
20 downward.” *Id.* (footnote and citation omitted).

21 Based on the Declarations of counsel, Plaintiffs request fees in the amount of  
22 \$130,664.75<sup>3</sup> and costs in the amount of \$5,671.54.

23 The hours counsel are claiming has been greatly reduced from the actual number of hours  
24 spent on the case because the original main counsel working on the case left their positions and

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25 <sup>3</sup> This amount represents \$53,768 for 103.4 hours of work by John Midgley at a rate of \$520 an  
26 hour; \$30,310 for 86.6 hours of work by Lisa Nowlin at a rate of \$350 an hour; \$13,227.50 for  
28.6 hours of work by Jennifer Campbell at a rate of \$462.50 an hour; \$12,573.75 for 47.9 hours  
of work by James Edwards at a rate of \$262.50 an hour; and \$20,785.50 for 55.8 hours of work  
by Jamila Johnson at a rate of \$372.50 an hour.

1 new counsel has taken over. As stated in the declarations, we have taken account of this change  
2 of counsel and also that we did not prevail on one issue—redaction and withholding of some  
3 records—and so are not asking for nearly all of the time that was spent on this matter.

4 The amount of time spent on discovery was necessary to unearth not only Exhibits 4-13  
5 and 15, which the Court has ruled should have been provided, but also to make an adequate  
6 record regarding the very high likelihood that additional documents exist. The failures of  
7 Defendant’s processes and search are the main reason for the hours spent. The requested fees and  
8 costs are reasonable in these circumstances.

9 **V. Conclusion**

10 For the foregoing reasons, and the reasons given in connection with Plaintiffs’ Motion for  
11 Partial Summary Judgment and Plaintiffs’ Opposition to Defendant’s Motion for Summary  
12 Judgment, Plaintiffs request that the Court:

- 13 - Enter an order detailing its summary judgment rulings;  
14 - order TPD to conduct an adequate further search for public records responsive to the  
15 PRA request; and  
16 - award penalties, fees, and costs as requested.  
17

18  
19 Respectfully Submitted this 2nd day of May 2018.

20 By:

21 /s/John Midgley  
22 John Midgley, WSBA #6511  
23 Lisa Nowlin, WSBA #51512  
24 AMERICAN CIVIL LIBERTIES UNION OF  
25 WASHINGTON FOUNDATION  
26 901 Fifth Avenue, Suite 630  
Seattle, WA 98164  
206 624-2184  
jmidgley@aclu-w.org  
lnowlin@aclu-wa.org

1                    /s/Jennifer Campbell  
2                    Jennifer Campbell, WSBA No. 31703  
3                    James R. Edwards, WSBA No. 46724  
4                    Allison K. Krashan, WSBA No. 36977  
5                    SCHWABE WILLIAMSON & WYATT, P.C.  
6                    1420 5th Avenue, Suite 3400  
7                    Seattle, Washington 98101  
8                    (206) 622-1711  
9                    Facsimile: (206) 292-0460  
10                    jedwards@schwabe.com  
11                    jcampbell@schwabe.com  
12                    akrashan@schwabe.com

13                    *Attorneys for Plaintiffs*

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

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

Plaintiffs,

v.

CITY OF TACOMA, a municipal  
corporation,

Defendant.

No. 16-2-05416-7

**CERTIFICATE OF SERVICE**

I, Kaya McRuer, am a legal assistant for the American Civil Liberties Union of Washington Foundation, 901 Fifth Avenue, Suite 630, Seattle, WA 98164. I hereby certify that on the date indicated below, I caused to be served via LINX e-service system and by e-mail a true and correct copy of the *Plaintiffs' Brief in support of Proposed Order on Cross Motions for Summary Judgment and for Penalties, Fees, and Costs, Declaration of John Midgley in support of Request for Attorneys' Fees and Costs, and the exhibits attached thereto, Declaration of John Midgley in support of Penalties and New Search, Declaration of Jennifer L. Campbell in support of Request for Attorneys' Fees and Costs, Proposed Order*, and this *Certificate of Service* on the following:

Margaret A. Elofson  
Deputy City Attorney  
Tacoma City Attorney's Office  
747 Market Street, Suite 1120  
Tacoma, Washington 98402  
margaret.elfson@ci.tacoma.wa.us  
gcastro@ci.tacoma.wa.us

1 I declare under penalty of perjury under the laws of the State of Washington that the  
2 foregoing is true and correct.  
3

4 DATED this 2nd day of May 2018 at Seattle, Washington.

5  
6 

7 Kaya McRuer  
8 Legal Assistant  
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1 THE HONORABLE G. HELEN WHITENER

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7 SUPERIOR COURT OF THE STATE OF WASHINGTON  
8 FOR THE COUNTY OF PIERCE

9 ARTHUR C. BANKS, an individual, TONEY  
10 MONTGOMERY, an individual, WHITNEY  
11 BRADY an individual,

No. 16-2-05416-7

11 Plaintiffs,

12  
13 vs.

14 CITY OF TACOMA, a municipal corporation

15 Defendant.  
16  
17

[PROPOSED] ORDER GRANTING  
PLAINTIFFS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
AND GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT

18 ORDER

19 This matter, having come before the Court on Plaintiffs' Motion for Partial Summary  
20 Judgment and Defendant's Motion for Summary Judgment, and the Court having reviewed  
21 the following pleadings submitted:

- 22
- 23 1. Defendant's Motion for Summary Judgment
  - 24 2. Affidavit of Margaret Elofson in support of Defendant's Motion for Summary  
25 Judgment
  - 26 3. Plaintiffs' Motion for Partial Summary Judgment

[PROPOSED] ORDER



4. Declaration of John Midgley in support of Plaintiffs' Motion for Partial Summary Judgment and the Exhibits attached thereto.
5. Plaintiffs' Opposition to Defendant's Motion for Summary Judgment and the Exhibits Attached thereto.
6. Motion to Seal and corresponding exhibits
7. Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment
8. Affidavit of Michael Smith in support of Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment
9. Affidavit of Margaret Elofson in support of Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment
10. Affidavit of Detective Christopher Shipp
11. Affidavit of Captain Fred Scruggs in support of Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment
12. Supplemental Statement of Interest of the United States
13. Supplemental Declaration of Marcia Sowles
14. Affidavit of Benjamin Inman
15. Plaintiffs' Reply in support of Plaintiffs' Motion for Partial Summary Judgment
16. Reply Declaration of John Midgley in support of Plaintiffs' Motion for Partial Summary Judgment and the Exhibits attached thereto
17. Plaintiffs' Response to Supplemental Statement of Interest of the United States
18. Defendant's Reply regarding Defendant's Motion for Summary Judgment
19. Affidavit of Michael Smith in support of Defendant's Reply regarding Defendant's Motion for Summary Judgment
20. Affidavit of Catherine Journey in support of Defendant's Reply regarding Defendant's Motion for Summary Judgment
21. Affidavit of Margaret Elofson in support of Defendant's Reply regarding Defendant's Motion for Summary Judgment

[PROPOSED] ORDER

1 22. Declaration of Terry Krause in support of Defendant's Reply regarding  
2 Defendant's Motion for Summary Judgment

3 23. Plaintiffs' Brief in support of Proposed Order on Cross Motions for Summary  
4 Judgment and for Penalties, Fees, and Costs

5 24. Declaration of John Midgley in support of Penalties and New Search

6 25. Declaration of John Midgley in support of Request for Attorneys' Fees and  
7 Costs, and the Exhibits attached thereto.

8 26. Defendant's response to Plaintiffs' Brief in support of Proposed Order on  
9 Cross Motions for Summary Judgment and for Penalties, Fees, and Costs, and  
10 all further materials submitted for the hearing on May 17, 2018.

11 On April 13, 2018, the Honorable G. Helen Whitener heard oral argument on these  
12 cross motions. The Court being otherwise fully advised herein, it is hereby:

13 1. ORDERED that Plaintiffs' Motion For Partial Summary Judgment is granted.  
14 There is no issue of material fact and Plaintiffs are entitled to judgment as a matter of law  
15 that the designated public records were wrongfully withheld; it is further

16 2. ORDERED that Plaintiffs be awarded \$\_\_\_\_\_ (\$\_\_\_\_\_ multiplied by 192 days)  
17 for the denial of the right to inspect or copy Exhibit 4 to Plaintiffs' Motion for Partial  
18 Summary Judgment; it is further

19 3. ORDERED that Plaintiffs be awarded \$\_\_\_\_\_ (\$\_\_\_\_\_ multiplied by 192 days)  
20 for the denial of the right to inspect or copy Exhibit 5 to Plaintiffs' Motion for Partial  
21 Summary Judgment; it is further

22 4. ORDERED that Plaintiffs be awarded \$\_\_\_\_\_ (\$\_\_\_\_\_ multiplied by 192 days)  
23 for the denial of the right to inspect or copy Exhibit 6 to Plaintiffs' Motion for Partial  
24 Summary Judgment; it is further

25 5. ORDERED that Plaintiffs be awarded \$\_\_\_\_\_ (\$\_\_\_\_\_ multiplied by 192 days)  
26

[PROPOSED] ORDER

1 for the denial of the right to inspect or copy Exhibit 7 to Plaintiffs' Motion for Partial  
2 Summary Judgment; it is further

3           6.       ORDERED that Plaintiffs be awarded \$\_\_\_\_\_ (\$\_\_\_\_\_ multiplied by 192 days)  
4 for the denial of the right to inspect or copy Exhibit 8 to Plaintiffs' Motion for Partial  
5 Summary Judgment; it is further

6           7.       ORDERED that Plaintiffs be awarded \$\_\_\_\_\_ (\$\_\_\_\_\_ multiplied by 192 days)  
7 for the denial of the right to inspect or copy Exhibit 9 to Plaintiffs' Motion for Partial  
8 Summary Judgment; it is further

9           8.       ORDERED that Plaintiffs be awarded \$\_\_\_\_\_ (\$\_\_\_\_\_ multiplied by 559 days)  
10 for the willful and intentional denial of the right to inspect or copy Exhibit 10 to Plaintiffs'  
11 Motion for Partial Summary Judgment; it is further

12           9.       ORDERED that Plaintiffs be awarded \$\_\_\_\_\_ (\$\_\_\_\_\_ multiplied by 324 days)  
13 for the denial of the right to inspect or copy Exhibit 11 to Plaintiffs' Motion for Partial  
14 Summary Judgment; it is further

15           10.      ORDERED that Plaintiffs be awarded \$\_\_\_\_\_ (\$\_\_\_\_\_ multiplied by 324 days)  
16 for the denial of the right to inspect or copy Exhibit 12 to Plaintiffs' Motion for Partial  
17 Summary Judgment; it is further

18           11.      ORDERED that Plaintiffs be awarded \$\_\_\_\_\_ (\$\_\_\_\_\_ multiplied by 324 days)  
19 for the denial of the right to inspect or copy Exhibit 13 to Plaintiffs' Motion for Partial  
20 Summary Judgment; it is further

21           12.      ORDERED that Plaintiffs be awarded \$\_\_\_\_\_ (\$\_\_\_\_\_ multiplied by 192 days)  
22 for the denial of the right to inspect or copy Exhibit 15 to Plaintiffs' Motion for Partial  
23 Summary Judgment; it is further

24 [PROPOSED] ORDER  
25  
26

1 Summary Judgment; it is further

2 13. ORDERED that Tacoma Police Department's search for responsive records  
3 was inadequate; it is further

4 14. ORDERED that Tacoma Police Department conduct a further search for  
5 documents, including

- 6
- 7 a. A search of all email sent from TPD printers and scanners, including
  - 8 but not limited to emails sent to telecommunications companies;
  - 9 b. A search of the email accounts of all TPD officers who have had a cell
  - 10 site simulator used in a matter they were involved in;
  - 11 c. A search of files stored at or by South Sound 911 for cases in which a
  - 12 cell site simulator was used;
  - 13 d. A search of the cell site simulator(s) and associated laptop(s), in the
  - 14 manner(s) necessary to identify responsive documents, if any. This
  - 15 includes exporting data, running reports, or otherwise accessing
  - 16 relevant public records, from database(s) on the cell site simulator(s)
  - 17 and associated laptop(s); and it is further
  - 18

19 15. ORDERED that Defendant shall identify and produce to Plaintiffs all results  
20 of the further search within 30 days of the date of this Order; and it is further

21 16. ORDERED that any penalties for documents identified in the search for  
22 responsive documents will be determined at a later date upon completion of the search; and it  
23 is further

24 17. ORDERED that the redactions and withholdings listed in Defendant's  
25  
26

[PROPOSED] ORDER

1 privilege logs, including make and model information, were proper; and it is further

2 18. ORDERED that Plaintiffs were the prevailing party on the issues of the  
3 adequacy of the search and the failure to produce Exhibits 4-13 and 15, and are therefore  
4 entitled to fees and costs; and it is further  
5

6 19. ORDERED that, as the prevailing party on the issues of the adequacy of the  
7 search and the failure to produce certain documents, Plaintiffs are entitled to \$\_\_\_\_\_ in  
8 fees and \$\_\_\_\_\_ in costs from Defendant.

9 20. DATED this \_\_\_\_ day of May, 2018.

10  
11 \_\_\_\_\_  
12 The Honorable G. Helen Whitener  
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[PROPOSED] ORDER

The Honorable G. Helen Whitener  
Hearing date: May 17, 2018  
9:00 A.M.

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

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

Plaintiffs,

v.

CITY OF TACOMA, a municipal corporation,  
Defendant.

No. 16-2-05416-7

**DECLARATION OF JOHN MIDGLEY  
IN SUPPORT OF PENALTIES AND  
NEW SEARCH**


I, John Midgley, declare as follows:

1. I am over 18 years of age, am of sound mind, and am fully competent to testify to the matters stated herein. I am an attorney with the American Civil Liberties Union of Washington Foundation, and represent Plaintiffs in this matter.
2. As stated in my Declaration in support of Plaintiffs Motion for Partial Summary Judgment, the Tacoma Police Department's ("TPD") last disclosure in response to the public records request at issue in this case was received on December 18, 2015.

- 1 3. In his affidavit, Captain Scruggs refers to “monthly activity reports” in connection with  
2 his review of cell site simulator activity. Nothing called or resembling “monthly activity  
3 reports” were provided in response to Plaintiffs’ public records request.  
4
- 5 4. The dates on which plaintiffs received exhibits 4 through 13 and 15 are set out in  
6 Plaintiffs’ Motion for Partial Summary Judgment at pages 4 to 6. The following penalty  
7 calculations are based on counting days after December 18, 2015, to the date the Exhibit  
8 was received. Neither December 18, 2015 nor the date received is included in these  
9 calculations.
- 10 5. **Exhibits 4 – 9** were received by Plaintiffs as part of discovery disclosures in this case on  
11 June 28, 2016. Therefore Plaintiffs were deprived of each for **192 days**.  
12
- 13 6. **Exhibit 10** was received from opposing counsel on June 30, 2017. Therefore Plaintiffs  
14 were deprived of it for **559 days**.
- 15 7. **Exhibits 11-13** were never to my knowledge provided by TPD or the City of Tacoma,  
16 and it is not clear exactly when Plaintiffs received it. However, Plaintiffs first used it in a  
17 deposition on November 7, 2016, which we will use for calculations. Therefore, Plaintiffs  
18 were deprived of each for **324 days**.
- 19 8. **Exhibit 15** we cannot determine when we first received it, so will include it as one for  
20 which Plaintiffs were deprived for **192 days**, as June 28, 2016, is the earliest date we are  
21 likely to have received it.  
22
- 23 9. Based on these dates, our calculations are:
- 24 a. Request for \$70 per day penalties (Exhibits 4-9, 11-13, 15): 2,316 total days late =  
25 \$162,120
- 26 b. Request for \$100 per day penalty (Exhibit 10 only): 559 days late = \$55,900

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Executed on May 2, 2018

  
John Midgley



The Honorable G. Helen Whitener  
Hearing date: May 17, 2018  
9:00 A.M.

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

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

Plaintiffs,

v.

CITY OF TACOMA, a municipal corporation,

Defendant.

No. 16-2-05416-7

**DECLARATION OF JOHN MIDGLEY  
IN SUPPORT OF REQUEST FOR  
ATTORNEYS' FEES AND COSTS**

I, John Midgley, declare as follows:

1. I am a senior staff attorney at the ACLU of Washington and co-counsel for the Plaintiffs in this case. I acknowledge that the facts set forth herein are true and correct and could testify competently to them if called upon to do so.

2. I graduated with a J.D. from University of Michigan School of Law in 1974 and am admitted to the Washington State Bar Association, the United States District Courts for the Eastern and Western Districts of Washington, the U.S. Court of Appeals for the Ninth Circuit, and the U.S. Supreme Court.

1 attorney between 1975 and 1983 and again between 1989 and 1996. I spent five years in private  
2 practice at the law firm Smith, Midgley & Pumplin with a focus on civil rights and criminal  
3 justice. I then went on to work for Columbia Legal Services as a Regional Director, Statewide  
4 Advocacy Coordinator and Acting Deputy Director, Executive Director, and Advocacy Director  
5 between 1996 and 2015.

6  
7 4. I have extensive complex litigation experience in both state and federal cases,  
8 including, but not limited to *Braam v. State of Washington*, 150 Wn.2d 689 (2004) (class action  
9 establishing constitutional rights of foster children; resulted in comprehensive reform  
10 settlement); *Collins v. Thompson*, 679 F.2d 168 (9th Cir. 1982) (class action prison  
11 overcrowding suit; settled by consent decree); *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982)  
12 (class action omnibus prison conditions suit).

13  
14 5. Lisa Nowlin is a Staff Attorney with the ACLU of Washington. Ms. Nowlin  
15 graduated from New York University School of Law in 2011. She worked for the international  
16 law firm Paul Hastings LLP for three years as a litigation associate, focusing on white collar  
17 litigation and foreign anti-corruption. Prior to joining the ACLU-WA, she served as a judicial  
18 clerk for the Honorable Gladys Kessler at the United States District Court for the District of  
19 Columbia and was a complex litigation associate at Keller Rohrback LLP. She is admitted to  
20 practice in Washington, California, and the District of Columbia, and is in good standing with  
21 the Washington State Bar Association, the State Bar of California, and the District of Columbia  
22 Bar. She is admitted to practice in the United States District Courts for the Western District of  
23 Washington and the District of Columbia, and the United States Court of Appeals for the Ninth  
24 Circuit. Ms. Nowlin currently serves as counsel on *Does v. Trump*, involving a challenge to the  
25 President's ban on the entry of certain refugees, as well as *Enstad v. PeaceHealth*, involving  
26

1 PeaceHealth's employee medical plan's exclusion of coverage for all transition-related care for  
2 transgender individuals.

3 6. Because counsel changed from the beginning of the case, and because we did not  
4 prevail on all issues, ACLU of Washington is not requesting fees for all the time spent on the  
5 case. For example, we have not included time spent by the ACLU-WA Legal Director, our Legal  
6 Assistant/Paralegal or for former ACLU Staff Attorney LaRond Baker, who was counsel of  
7 record and spent considerable time on the case, including discovery work and conducting the  
8 deposition of Detective Krause. We have also exercised billing judgment and have not included a  
9 number of time entries where there was duplication or ancillary activities. Therefore our time  
10 requests are heavily discounted. The hourly rates we request on Exhibits A and B attached are  
11 within the medium to low end of the usual and customary rates ACLU attorneys seek in attorney  
12 fee matters in Western Washington.  
13  
14

15 7. Attached as Exhibit A are time records for my work on this case for which we  
16 request compensation under the Public Records Act. These records reflect contemporaneous  
17 timekeeping.

18 8. Attached as Exhibit B are time records for Ms. Nowlin's work on this case for  
19 which we request compensation under the Public Records Act. These records reflect  
20 contemporaneous timekeeping.  
21

22 9. Attached as Exhibit C is our record of costs for this case with descriptions.

23 I declare under penalty of perjury under the laws of the State of Washington that the  
24 foregoing is true to the best of my knowledge.

25 Executed on May 2, 2018

26  
  
John Midgley

# **EXHIBIT A**

Date	Notes	Hours
6/20/2017	Legal team meeting with co-counsel at Schwabe	2.2
6/28/2017	Travel to and from Tacoma; second chair Krause dep	5.5
7/19/2017	Dep prep and confer with co-counsel about strategy	2
7/19/2017	Review intern memo re documents; meet with intern to discuss	1.5
7/20/2017	Deposition prep	1.5
7/24/2017	Deposition prep	4.7
7/25/2017	Travel to and from Tacoma; conduct Deposition of Ramsdell; second	7.8
8/7/2017	Jared Friend email re discovery responses	0.5
8/9/2017	Review research, meet with co-counsel re strategy	2
8/10/2017	work with co-counsel re expert and planning for meeting with cooperating	1
8/10/2017	Meeting with co-counsel to discuss strategy going forward	1.5
8/14/2017	Research responses to City's discovery requests	3
8/16/2017	Expert call; email to J Campbell	0.9
8/17/2017	Outline of continuance motion; strategy discussion with Lisa Nowlin	2
8/18/2017	Email to opposing counsel; phone call with opposing counsel re	0.7
8/20/2017	Legal research; draft continuance motion	2.5
8/21/2017	Finish motion for continuance and select exhibits	4.2
8/21/2017	Travel to and from Tacoma and meet with clients	3
8/25/2017	Review discovery responses and discuss with Lisa Nowlin	0.9
12/28/2017	Draft, edit and send answers to expert Rogs	1.8
1/10/2018	Review discovery responses to prepare for meeting; meet with co-	1
1/11/2018	Legal research on specific intelligence exception; email re this issue to co-	1.2
1/23/2018	Conf call with PRA expert lawyer	0.5
1/24/2018	Finish draft of 30(b)(6) list of topics, send to city	0.8
	Conference with Lisa Nowlin and Emily Chiang- .6	
	Draft RFA's .5	
1/25/2018	Review Shipp depo .7	1.8
	RFAs revise and finish- 1.5	
	30(b)(6) negotiation emails with City .5	
	Analysis of NDA record issues 1.0	
1/26/2018	Initial draft of MSJ 1.0	4
2/8/2018	Emails to co-counsel prep for strategy meeting; strategy meeting via	2.2
2/9/2018	Legal research; drafting Motion for Partial SJ	2.5
2/12/2018	Selecting and dealing with exhibits; legal research; draft motion for partial	2.5
2/13/2018	Draft Partial SJ motion; draft declaration and work on exhibits	2.2
	Draft supplemental discovery response; prepare documents to send with	
2/14/2018	response; comment on 30(b)(6) dep outline; edit/check motion for partial	3.8
2/15/2018	Travel to and from Tacoma; attend and work with co-counsel on 30(b)(6)	6.2
2/16/2018	Final editing and filing Motion for Partial Summary Judgment	0.8
3/6/2018	Research and draft summary judgment response on redactions	2
3/7/2018	Research and draft summary judgment response on redactions	2.8
3/8/2018	Draft summary judgment response on redactions	2.5
3/15/2018	Edit summary judgment response and fill in fact and other cites	1.3
3/16/2018	Research and Draft motion to seal exhibits	1.2
3/17/2018	Edit Response to Summary Judgment motion	1.8
3/19/2018	Finish Motion to Seal	0.8

3/29/2018	Draft settlement ;proposal; work on fees and costs	1.1
4/4/2018	Draft reply on Motion for Partial Summary Judgment	2.5
4/7/2018	Review and edit response to US Statement of Interest	1.5
4/9/2018	Finalize Reply on Motion for Partial Summary Judgment, Declaration, and	2.2
4/11/2018	Meeting with Nowlin and Chiang to moot oral argument	1.5
4/12/2018	Meet with Lisa Nowlin re oral argument	1
4/30/2018	Review and edit brief and proposed order for May 17th hearing	2.5

<b>TOTAL TIME:</b>	103.4
<b>RATE:</b>	\$520/hour
<b>TOTAL FEE REQUEST:</b>	\$53,768

# **EXHIBIT B**



Date	Notes	Hours
8/21/2017	Meeting with plaintiffs to discuss case	2.2
8/31/2017	Call with potential expert witness	0.3
9/5/2017	Call with potential expert witness	0.5
9/12/2017	Call with potential expert witnesses	0.7
9/13/2017	Call with J. Campbell and J. Midgley re case strategy	0.4
10/11/2017	Confer with J. Midgley re discovery	0.3
10/19/2017	Meeting to discuss litigation strategy with S. Narayan and J. Midgley	0.3
11/1/2017	Call with T. Montgomery re deposition request	0.2
11/8/2017	Call with experts re cell site simulator opinions	0.5
11/21/2017	Confer with S. Narayan and J. Midgley re discovery	0.4
11/27/2017	Call with T. Montgomery re discovery and deposition	0.3
12/4/2017	Mtg with J. Midgley and J. Campbell re discovery strategy	1
12/8/2017	Deposition prep meeting with T. Montgomery	3
12/14/2017	Deposition of Toney Montgomery	3.5
1/10/2018	Confer with J. Midgley re discovery and noting depositions	0.4
1/16/2018	Review draft expert report	1.2
1/17/2018	Call with experts	1.4
1/23/2018	Call with PRA expert	0.6
1/25/2018	Litigation strategy meeting with E. Chiang and J. Midgley.	0.9
1/30/2018	Deposition preparation with P. Ney	1
1/31/2018	Call with J. Midgley re motion for summary judgment	0.3
2/1/2018	Confer with J. Midgley re possible MSJ	0.2
2/5/2018	Deposition of Peter Ney	3.6
2/7/2018	Call with J. Midgley re 30b6 deposition and motion for summary judgment; email M. Elofson re 30b6 deposition	0.7
3/1/2018	Call with M. Elofson re summary judgment and trial	0.4
3/8/2018	Prepare opposition to MSJ	1.4
3/9/2018	Prepare opposition to MSJ	3.5
3/12/2018	Prepare opposition to MSJ	2
3/13/2018	Prepare opposition to MSJ; correspondence with team re same	2.6
3/14/2018	Prepare opposition to MSJ; review and revise J. Midgley sections	4.4



3/15/2018	Prepare opposition to MSJ; incorporate edits from E. Chiang, S. Narayan, and J. Midgley	3.2
3/16/2018	Prepare opposition to MSJ; prepare L. Nowlin declaration; prepare exhibits	5.1
3/18/2018	Review, revise, and finalize opposition to MSJ	1.4
3/19/2018	Finalize and file Opposition to MSJ and accompanying exhibits	1.2
3/21/2018	Prepare for oral argument	3.8
4/4/2018	Prepare response to DOJ brief; correspondence with J. Midgley re same; research case law	3
4/5/2018	Revise Reply brief; prepare Response to DOJ brief; correspondence with Plaintiffs regarding case	3.3
4/6/2018	Prepare response to DOJ brief; correspondence with J. Midgley regarding DOJ response	4.6
4/8/2018	Revise reply briefs	1
4/9/2018	Finalize and file Reply briefs	1.6
4/10/2018	Prepare for oral argument	1
4/11/2018	Prepare notes for oral argument; participate in oral argument moot with E. Chiang and J. Midgley	5.1
4/12/2018	Prepare notes for oral argument; review briefings; meeting with J. Midgley to prepare for oral argument	4.5
4/13/2018	Oral argument on cross motions for summary judgment	1.4
4/18/2018	Meeting with J. Midgley regarding briefing for May 17 hearing	0.5
4/23/2018	Prepare proposed Order for motions for summary judgment	1.8
4/24/2018	Prepare brief in support of proposed order on motions for summary judgment	2.4
4/25/2018	Legal research on injunctive relief in PRA cases	1.3
4/26/2018	Prepare brief in support of proposed order	2.2

<b>TOTAL TIME:</b>	86.6
<b>RATE:</b>	\$350/hour
<b>TOTAL FEES:</b>	\$30,310

# **EXHIBIT C**

INVOICE #	DATE	VENDOR	DESCRIPTION OF CHARGE	SUBTOTAL
1	10/31/2014	Reimbursement	Parking and Lunch with J. Wang	\$26.50
2	2/17/2016	Pierce County Sherriff	PRA Response	\$2.25
3	3/4/2016	Pierce County Clerk	PRA Response	\$9.25
4	3/31/2016	Schwabe (Cooperating Attorney)	Legal Messenger Services, Postage, and Copies	\$421.30
5	7/31/2016	Schwabe (Cooperating Attorney)	Public Records	\$5.00
6	9/21/2016	Schwabe (Cooperating Attorney)	Filing Fee, Records on CDs	\$90.00
7	9/27/2016	Superior Court of CA	Court Records Payment	\$8.48
8	10/13/2016	Seattle Deposition Reporters LLC	Court Reporter and Transcript	\$302.60
9	11/28/2016	YOM Reporters	Court Reporter and Transcript	\$1,019.50
10	1/3/2017	Pierce County Clerk	Court Records Payment	\$9.00
11	1/4/2017	Pierce County Clerk	Working Copies Submission	\$6.00
12	1/13/2017	Reimbursement	Hearing In Tacoma Costs	\$28.15
13	1/20/2017	Kimberly O'Neil	Hearing Transcript	\$282.00
14	1/30/2017	Reimbursement	Parking for Hearing	\$26.00
15	3/7/2017	Schwabe (Cooperating Attorney)	Records Payment	\$13.20
16	7/18/2017	YOM Reporters	Court Reporter and Transcript	\$578.65
17	8/21/2017	Reimbursement	Parking and Drive to Tacoma, Client Mtg	\$51.71
18	9/13/2017	YOM Reporters	Court Reporter and Transcript	\$1,057.05
19	9/15/2017	Pierce County Clerk (Linx)	Working Copies Submission	\$6.50
20	11/1/2017	WA Digital Archives	Court Records Payment	\$6.00
21	1/4/2018	Reimbursement	Parking and Mileage for Deposition and Deposition Prep	\$95.01
22	1/16/2018	Gina M. Clarke	Deposition Court Reporter	\$168.00
23	2/16/2018	Pierce County Clerk (Linx)	Working Copies Submission	\$11.50
24	3/2/2018	Reimbursement	Food, Mileage, Parking for Deposition and Prep	\$163.67
25	3/2/2018	Gina M. Clarke	Court Reporter and Transcript	\$336.00
26	3/20/2018	YOM Reporters	Court Reporter and Transcript	\$852.35
27	3/21/2018	Washington Legal Messengers	Working Copy Delivery	\$65.00
28	4/4/2018	LINX Pierce County	Working Copies	\$6.50
29	4/5/2018	LINX Pierce County	Working Copies	\$6.50
30	4/9/2018	LINX Pierce County	Working Copies	\$6.50
31	4/9/2018	LINX Pierce County	Working Copies	\$6.50
32	2018-04-09	USPS	Service of US Brief to US Attorney	\$4.87
			<b>TOTAL:</b>	<b>\$5,671.54</b>

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF PIERCE

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

Plaintiffs,

vs.

CITY OF TACOMA, a municipal corporation

Defendant.

No. 16-2-05416-7

DECLARATION OF JENNIFER L.  
CAMPBELL IN SUPPORT OF  
REQUEST FOR ATTORNEYS' FEES  
AND COSTS

I, Jennifer L. Campbell, declare as follows:

1. I am an attorney with the law firm Schwabe, Williamson & Wyatt, P.C. ("Schwabe"), and along with my co-counsel from the ACLU represent Plaintiffs in the above entitled action. I make this declaration based upon personal knowledge, and on my review of the file maintained by my law firm in the ordinary course of business related to the above-captioned matter. I am over the age of 18 and am otherwise competent to make the statements herein.

2. Schwabe, Williamson & Wyatt represent Plaintiffs in this lawsuit as Cooperating Attorneys with ACLU. Schwabe attorneys Jamila Johnson (former), James

DECLARATION OF JENNIFER L. CAMPBELL IN  
SUPPORT OF REQUEST FOR ATTORNEYS' FEES AND  
COSTS - 1

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SCHWABE, WILLIAMSON & WYATT, P.C.  
Attorneys at Law  
1420 5th Avenue, Suite 3400  
Seattle, WA 98101-4010  
Telephone: 206.622.1711

1 Edwards, and I have performed work on this matter. Several other individuals such as summer  
2 associates, paralegal and project assistant have worked an additional 145 hours on this matter.  
3 We are not seeking to be awarded fees for the work performed by these individuals.

4 3. I am a graduate of Seattle University School of Law, and have been a member  
5 of the Washington bar since 2001. I am admitted to practice in all state courts in Washington  
6 and Oregon. I am admitted to practice in the Federal Court for the Western District and Eastern  
7 District of Washington and the Ninth Circuit Court of Appeals. James Edwards graduated  
8 from Seattle University School of Law, and has been a member of the Washington bar since  
9 2013. Mr. Edwards is admitted to practice in all state courts in Washington. He is admitted  
10 to practice in the Federal Court for the Western District and Eastern District of Washington.  
11 Jamila Johson is a graduate of University of Washington, and has been a member of the  
12 Washington bar since 2007. She is admitted to practice in the Federal Court for the Western  
13 District and Eastern District of Washington and the Ninth Circuit Court of Appeals.

14 3. My firm accepted this matter pro bono as Cooperating Attorneys with ACLU.  
15 During the time that I have worked on this matter, my billing rate was between \$450.00 and  
16 \$475.00. Mr. Edwards' billing rate was between \$225.00 and \$300.00. Ms. Johnson's rate  
17 was between \$350.00 and \$395.00. For purposes of this fee request, for each timekeeper, the  
18 fees are calculated by their median value.

19 4. The fees that my firm is currently seeking are customarily charged in this area  
20 for the same or similar services for attorneys of our experience, reputation, and ability,  
21 considering the nature of the controversy, the time limitations imposed, and the nature and  
22 length of our relationship with Plaintiffs.

23 5. Attached as Exhibit A are time records for my work on this case for which we  
24 request compensation under the Public Records Act. The information reflected in Exhibit A  
25 is recorded contemporaneously by Schwabe personnel, in the ordinary course of business. It  
26 accurately reflects the time written down by the attorneys who have worked on this matter,

DECLARATION OF JENNIFER L. CAMPBELL IN  
SUPPORT OF REQUEST FOR ATTORNEYS' FEES AND  
COSTS - 2

PDX\119685\163329\JCA\22956794.1

SCHWABE, WILLIAMSON & WYATT, P.C.  
Attorneys at Law  
1420 5th Avenue, Suite 3400  
Seattle, WA 98101-4010  
Telephone: 206.622.1711

1 which again is kept contemporaneously and in the ordinary course. It also reflects the cost  
2 amounts expended by Schwabe during its handling of this case, and which were also incurred  
3 in the ordinary course of litigating this case, and were reasonable and necessary. I redacted  
4 from Exhibit A line items that reveal attorney client communications and/or attorney work  
5 product.

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

8 Dated this 2nd day of May, 2018 at Seattle, Washington.

9  
10 By: 

Jennifer L. Campbell, WSBA #31703

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DECLARATION OF JENNIFER L. CAMPBELL IN  
SUPPORT OF REQUEST FOR ATTORNEYS' FEES AND  
COSTS - 3

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SCHWABE, WILLIAMSON & WYATT, P.C.  
Attorneys at Law  
1420 5th Avenue, Suite 3400  
Seattle, WA 98101-4010  
Telephone: 206.622.1711



<b>DATE</b>	<b>NAME</b>	<b>HOURS</b>	<b>NOTES</b>
<b>05.15.15</b>	<b>Edwards</b>	<b>1.30</b>	<b>Review all PRA responses rec'd from the targeted entities</b>
<b>06.15.15</b>	<b>Edwards</b>	<b>.80</b>	<b>Review documents received from Auburn Police Department</b>
<b>06.25.15</b>	<b>Edwards</b>	<b>1.30</b>	<b>Review SPD production in response to PRA request</b>
<b>07.14.15</b>	<b>Edwards</b>	<b>.40</b>	<b>Email re Seattle PD production</b>
<b>08.11.15</b>	<b>Johnson</b>	<b>2.50</b>	<b>Review pro bono case</b>
<b>08.25.15</b>	<b>Johnson</b>	<b>.50</b>	<b>Prepare for and attend meeting with ACLU</b>
<b>08.25.15</b>	<b>Edwards</b>	<b>.90</b>	<b>Prepare for and attend meeting with J. Friend of ACLU</b>
<b>10.07.15</b>	<b>Johnson</b>	<b>3.60</b>	<b>Draft and finalize memorandum for legal committee on case strategy</b>
<b>10.27.15</b>	<b>Edwards</b>	<b>1.40</b>	<b>Review docs produced by Tacoma</b>
<b>10.28.15</b>	<b>Edwards</b>	<b>.40</b>	<b>Continue reviewing Tacoma documents</b>
<b>11.10.15</b>	<b>Edwards</b>	<b>.50</b>	<b>Call with L. Baker and J. Johnson</b>
<b>11.10.15</b>	<b>Johnson</b>	<b>2.00</b>	<b>Prepare for and attend meeting with La Rond Baker on City of Tacoma's response to records request</b>
<b>12.07.15</b>	<b>Johnson</b>	<b>.20</b>	<b>Communicate with City of Tacoma and with ACLU on status of updates regarding public records request</b>
<b>12.13.15</b>	<b>Johnson</b>	<b>6.10</b>	<b>Draft complaint and review documents</b>

<b>12.29.15</b>	<b>Johnson</b>	<b>10.00</b>	<b>Continue to draft complaint</b>
<b>01.17.16</b>	<b>Johnson</b>	<b>6.00</b>	<b>Finish draft complaint</b>
<b>01.19.17</b>	<b>Johnson</b>	<b>3.80</b>	<b>Attend, travel to and from, client meeting [Redacted]</b>
<b>01.21.16</b>	<b>Johnson</b>	<b>4.00</b>	<b>Attend, and travel to and from client meeting [Redacted]</b>
<b>02.01.16</b>	<b>Johnson</b>	<b>.40</b>	<b>Draft letter to City Attorney</b>
<b>02.02.16</b>	<b>Edwards</b>	<b>.30</b>	<b>Review of complaint</b>
<b>02.04.16</b>	<b>Edwards</b>	<b>1.50</b>	<b>Revise pro bono complaint</b>
<b>02.06.16</b>	<b>Johnson</b>	<b>.50</b>	<b>Complete complaint edits</b>
<b>02.08.16</b>	<b>Johnson</b>	<b>.80</b>	<b>Edit complaint</b>
<b>03.07.16</b>	<b>Edwards</b>	<b>.50</b>	<b>Draft statement of arbitration</b>
<b>03.11.16</b>	<b>Edwards</b>	<b>1.50</b>	<b>Begin work on discovery requests</b>
<b>03.14.16</b>	<b>Edwards</b>	<b>3.20</b>	<b>Draft discovery requests</b>
<b>03.15.16</b>	<b>Edwards</b>	<b>1.30</b>	<b>Continue drafting discovery requests</b>
<b>03.17.16</b>	<b>Edwards</b>	<b>1.50</b>	<b>Finalize discovery requests</b>
<b>04.01.16</b>	<b>Edwards</b>	<b>.50</b>	<b>Review and analyze answer</b>
<b>04.04.16</b>	<b>Edwards</b>	<b>.50</b>	<b>Send coordinating emails re answer analysis</b>
<b>04.04.16</b>	<b>Johnson</b>	<b>.30</b>	<b>Communicate with ACLU about Tacoma answer</b>
<b>04.05.16</b>	<b>Johnson</b>	<b>.80</b>	<b>Communicate about matter status, review answer further, discuss discovery</b>
<b>04.06.16</b>	<b>Johnson</b>	<b>.80</b>	<b>Communicate with city attorney about answer and discuss discovery scope and [Redacted] ACLU</b>



<b>04.07.16</b>	<b>Edwards</b>	<b>.80</b>	<b>Review discovery requests propounded by Tacoma and review Stingray usage in capture and attempted capture situations</b>
<b>04.08.16</b>	<b>Edwards</b>	<b>1.10</b>	<b>Search for Stingray manual</b>
<b>04.14.16</b>	<b>Edwards</b>	<b>1.5</b>	<b>Generate list of documents Tacoma may not have turned over in its Public Records response</b>
<b>04.15.16</b>	<b>Edwards</b>	<b>2.10</b>	<b>Search and locate potential undisclosed documents</b>
<b>04.25.16</b>	<b>Edwards</b>	<b>2.10</b>	<b>Draft discovery responses</b>
<b>04.26.16</b>	<b>Edwards</b>	<b>2.5</b>	<b>Continue drafting discovery responses</b>
<b>04.27.16</b>	<b>Edwards</b>	<b>2.20</b>	<b>Review pleadings and emails for documents either not propounded or redacted too an improper degree</b>
<b>04.28.16</b>	<b>Edwards</b>	<b>2.30</b>	<b>Complete drafting discovery responses</b>
<b>04.29.16</b>	<b>Edwards</b>	<b>3.50</b>	<b>Revise and supplement responses and review responsive documents</b>
<b>05.02.16</b>	<b>Johnson</b>	<b>1.80</b>	<b>Review and edit discovery responses</b>
<b>05.05.16</b>	<b>Edwards</b>	<b>1.50</b>	<b>Revise discovery responses</b>
<b>05.09.16</b>	<b>Edwards</b>	<b>2.50</b>	<b>Finalize responses Tacoma's First ROGs and RFPs</b>
<b>07.20.16</b>	<b>Edwards</b>	<b>1.00</b>	<b>Attend teleconference re discovery and status update</b>
<b>08.10.16</b>	<b>Johnson</b>	<b>.10</b>	<b>Composed email to Mararet.elofson@ci.tacoma.wa.us about trial scheduling</b>

<b>09.21.16</b>	<b>Johnson</b>	<b>.10</b>	<b>Review Notice of Deposition of Lisa Anderson</b>
<b>09.27.16</b>	<b>Edwards</b>	<b>.50</b>	<b>Research damages factors for PRA violations</b>
<b>09.27.16</b>	<b>Johnson</b>	<b>.50</b>	<b>Address issue regarding Service of third party subpoena</b>
<b>10.03.16</b>	<b>Johnson</b>	<b>.50</b>	<b>Discuss dates Jeffery Shipp may be available for deposition</b>
<b>10.31.16</b>	<b>Edwards</b>	<b>.40</b>	<b>Call re Harris Corp attendance at deposition</b>
<b>11.07.16</b>	<b>Johnson</b>	<b>9.90</b>	<b>Travel to and attend depositions all in Tacoma of Detective Shipp and travel from</b>
<b>11.16.16</b>	<b>Johnson</b>	<b>2.30</b>	<b>Begin drafting primary witness disclosure</b>
<b>11.16.16</b>	<b>Johnson</b>	<b>.50</b>	<b>Conversation on Stingray status and discovery issues</b>
<b>11.18.16</b>	<b>Edwards</b>	<b>1.40</b>	<b>Revise witness disclosure statement</b>
<b>11.30.16</b>	<b>Edwards</b>	<b>.30</b>	<b>Review Tacoma's primary witness list</b>
<b>12.13.16</b>	<b>Edwards</b>	<b>2.10</b>	<b>Draft rebuttal witness disclosure and attend status teleconference</b>
<b>05.17.17</b>	<b>Campbell</b>	<b>.20</b>	<b>Exchange correspondence with City of Tacoma regarding depositions of fact witnesses</b>
<b>05.22.17</b>	<b>Campbell</b>	<b>.30</b>	<b>Exchange correspondence regarding depositions of key witnesses and continuing the trial date</b>
<b>06.07.16</b>	<b>Campbell</b>	<b>.30</b>	<b>Review stipulation to continue trial date and exchange correspondences with opposing counsel regarding same</b>

06.20.17	Campbell	2.00	Strategy meeting with ACLU
06.21.17	Campbell	.40	Revise Confirmation of Joinder and Confirmation of Service
06.27.17	Campbell	1.00	Review and offer input on Deposition of Kraus
07.05.17	Edwards	2.40	Assist in preparation for M. Smith deposition
07.06.17	Edwards	2.30	Review Kraus deposition notes and M. Smith outline
07.06.17	Campbell	1.20	Preparation for deposition of Mike Smith, correspondence with ACLU counsel, correspondences with COT counsel
07.23.17	Campbell	6.90	Prepare Mike Smith deposition
07.24.17	Campbell	6.80	Prepare for deposition of Mike Smith (TPD Legal Advisor)
07.25.16	Campbell	9.20	Take deposition of Mike Smith; attend deposition of Chief Ramsdell
07.26.17	Campbell	.10	Review defendant's disclosure of rebuttal witnesses
08.03.17	Campbell	.20	Review second set of discovery
<b>CAMPBELL TIME: 28.6  RATE: \$462.50  TOTAL: \$13,227.50</b>	<b>EDWARDS TIME:47.9  RATE: \$262.50  TOTAL: \$12,573.75</b>	<b>JOHNSON TIME:55.8  RATE: \$372.50  TOTAL: \$20,785.50</b>	
		<b>TOTAL FEE REQUEST:</b>	<b>\$46,586.75</b>