IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NEIGHBORHOOD ALLIANCE OF SPOKANE COUNTY, a non-profit corporation,	)	No. 84108-0
Petitioner,	)	En Banc
v.	)	
COUNTY OF SPOKANE, a political subdivision of the state of Washington,	)	
Respondent.	)	Filed September 29, 2011

C. JOHNSON, J.—This Public Records Act (PRA) case asks us to define the scope of discovery allowed in PRA-provoked lawsuits, what constitutes an adequate search for requested records, and whether a party may be prevailing when it possesses some responsive documents at the time suit is filed. We hold discovery in a PRA case is the same as in any other civil action and is therefore governed only by relevancy considerations, reversing the Court of Appeals' decision. We hereby adopt Freedom of Information Act (FOIA) standards of reasonableness regarding an adequate search, consistent with the Court of Appeals' decision. *Neighborhood Alliance of Spokane County v. County of Spokane*, 153 Wn. App. 241, 224 P.3d 775 (2009) (*NASC*). Finally, since the harm is done at the time the request is made

and refused, we hold that a party may be entitled to recover costs and fees if the agency wrongfully fails to disclose documents in response to a request, reversing the Court of Appeals on this issue.

FACTS AND PROCEDURAL HISTORY

At its core, this case involves PRA requests that sought to uncover suspected illegal hiring practices in Spokane County's Building and Planning Department (the BPD).[1] On February 16, 2005, a copy machine at the BPD printed copies of an undated office seating chart. Clerk's Papers (CP) at 283-84. The print request came from the BPD employee Pam Knutsen's computer. This chart showed cubicle arrangements of employees at the BPD, but it also included (central to this case) two names within a cubicle, who had not yet been hired, designated "Ron & Steve." CP at 283-84. This caused quite a stir among the BPD employees, many of whom already suspected the BPD of illegal hiring practices. CP at 130, 283, 289. Mark Holman, an Assistant Director of the BPD, saw the chart, cancelled the print job from Knutsen's office, and unplugged the copy machine. CP at 284.

On February 19, 2005, the seating chart and an accompanying letter were anonymously transmitted to the Neighborhood Alliance of Spokane County (the Alliance). CP at 127-28. The Alliance is a nonprofit, community-based organization

[1] When the requests were made, the PRA was called the Public Disclosure Act. Former ch. 42.17 RCW (2003). Effective July 1, 2006, the act was renamed and recodified. Laws of 2005, ch. 274, § 103. Although the former act applies to these requests, the relevant provisions are identical and therefore we cite only to the current version.

that emphasizes government accountability. The letter stated the positions assigned to Ron and Steve had not been posted yet, and alleged other "appointment" positions in violation of county policy and employment law. CP at 130.

The Alliance took interest in this matter when Steve Harris, son of Commissioner Phil Harris, and Ron Hand, a former employee, were hired in March. CP at 91, 257-75. Steve is evidently the third son of Commissioner Harris to be hired by Spokane County (the County), and it was reported in a local newspaper in April 2005. CP at 91, 286. The Alliance first sent a PRA request to the County seeking all records created in January, February, and March 2005 displaying current or proposed office-space assignments for the BPD's planning officials. CP at 277-80. The County provided three iterations of the same seating chart, two of which were dated, and a third, matching the one the Alliance had anonymously received, which was not dated. CP at 277-80. This led to the next PRA request, which is the subject of this case.

Essentially, the Alliance wanted to know when the "Ron & Steve" seating chart was created. It sought to prove, using the BPD's own records, that the undated chart was created prior to job postings for the positions later filled by Ron and Steve. To that end, it sent the following PRA request to the County:

> 1) The complete electronic file information logs for the undated county planning division seating chart provided by Ms. Knutsen to the Neighborhood

> Alliance on May 13th. This information should include, but not necessarily be limited to, the information in the "date created" data field for the document as it exists on the specific Microsoft Publisher electronic document file created for the referenced seating chart. The requested information should also include, but not be limited to, the computer operating system(s) data record indicating the date of creation and dates of modification for the referenced seating chart document.
>
> 2) The identities of "Ron & Steve" individuals who are situated near the center of the seating chart referenced in item # 1. Also, the identity of the individual listed as "Steve" in the cubicle with the number 7221 at the top of the chart.

By the term public records, I am invoking a broad definition, consistent with [former] RCW 42.17.020(36) [(2002)] and specifically mean to include records that exist in any electronic form as well as those that exist on paper. This should be read to include, but not be limited to, records preserved in paper correspondence, electronic mail, facsimiles, videotape, and computer files.

Pursuant to [former] RCW 42.17.310 [(2003)], please identify any record covered by the above requests that is being withheld as exempt, and provide a summary of the record's content and the specific reason for the exemption.

CP at 51-52.

The County provided one document in response to Item #1, a log showing the requested fields, but problematically, the "date created" field was later than the "date modified" field for each of the documents. CP at 56. No explanation was offered for this discrepancy. Regarding Item #2, however, the County replied that the PRA "does not require agencies to explain public records. As such, no response is required." CP at 54.

It was eventually revealed that Knutsen's computer, which had evidently generated the seating charts, was replaced in April 2005.[2] When the files were copied from the old hard drive to a new hard drive, the date of copying became the date of creation, rather than retaining the original date of creation. CP at 61-62. When the PRA request was submitted in May, Knutsen only accessed and copied the records from her current, new computer. She did not contact the Information Systems Department to determine whether the hard drive of her old computer had been erased, and she had not backed up the file in any other place. While it is unclear exactly when the computer was wiped of all data, the hard drive had been certainly erased by August 8, 2005, when it was given to another employee. CP at 609-12. Other BPD employees stated that such a file, which would be used administratively, would normally have been copied to a shared server. CP at 287-88, 332. Regarding Item #2, Knutsen did indeed conduct a search, but found "no documents which reference the seating chart and identify the full names of 'Ron and Steve' or 'Steve' therein." CP at 62.

Following extensive correspondence seeking to resolve the issue, the Alliance filed suit against the County on May 1, 2006. Discovery issues immediately erupted. The County objected to every request for admission, though it did respond to a

[2] Worth noting, Knutsen's computer was replaced quickly following the newspaper article questioning the hiring of Commissioner Harris's son, and no work request or problem report was ever produced (following another PRA request) to explain why it was replaced.

handful. But it did not respond to interrogatories or requests for production at all. The Alliance next sought to depose Pam Knutsen, and it was finally agreed this would happen in December 2006. CP at 104-05. Before the deposition occurred, the County moved for summary judgment in November 2006. The Alliance sought a continuance and to compel discovery, and in response, the County sought a protective order.

At the hearing, the Alliance argued a PRA case is no different than any other civil action and the normal court rules applied, so its discovery requests were proper. Verbatim Report of Proceedings (VRP) (Dec. 5, 2006) at 11. But the Alliance agreed to narrow discovery to whether responsive documents existed and the process used to find them, and to delay other potential penalty-related discovery. VRP (Dec. 5, 2006) at 6-7. The hearing on the motion for summary judgment was continued. The trial court ordered the written deposition of Knutsen, narrowed in scope as the Alliance had agreed.

The deposition occurred in October 2007, but the County still refused to allow Knutsen to answer most questions. It claimed many questions to be outside the scope of discovery in a PRA case. The County used its own conclusions to determine what questions were appropriate, and it did not seek a protective order from the trial court to support its refusal to answer.

When the hearing resumed, the parties agreed to present their respective

motions for summary judgment first, delaying the discovery issues. The Alliance argued that the search regarding Item #1 was inadequate because it only included the one place the complete log would not be found, Knutsen's new computer, and the Alliance attached documents that it alleged would have been responsive to the request in Item #2 to demonstrate the inadequacy of the County's response.[3] CP at 232, 239. The trial court granted summary judgment to the County, finding no evidence that responsive documents did in fact exist.

On appeal, the Alliance argued that the County failed to conduct adequate searches for records responsive to both items, and that the trial court erred by limiting the scope of discovery. The Court of Appeals agreed with the Alliance regarding Item #1, that the search for the electronic log was inadequate, because the agency had reason to know the record would be stored somewhere other than the place searched. In regard to Item #2, the appellate court did not discuss the adequacy of the search but held that since the Alliance already possessed items responsive to the request before filing suit, the suit was not reasonably necessary to obtain the documents and therefore the Alliance was not a prevailing party under the PRA. Analogizing to FOIA, where discovery is typically not allowed, the Court of

[3] The documents responsive to Item #2 are e-mails the Alliance received on November 14, 2005, from the County in response to a new request sent October 31, 2005. One e-mail references changes in phone lines due to new employees and references a phone list, which *could* have been responsive. CP at 517. Two others explicitly name Ron Hand and Steve Harris in relation to setting up phones and computers, which the Alliance argues directly relate to cubicle assignments and therefore would have been responsive. CP at 529-30.

Appeals found the Alliance's discovery requests overreaching, and held the trial court did not abuse its discretion by denying the motion to compel. The case was remanded for a determination of attorney fees, costs, and penalties against the County for its inadequate search for Item #1. *NASC,* 153 Wn. App. 241.

The Alliance petitioned this court for review, arguing that the Court of Appeals' decision regarding discovery was contrary to case law and that this court has rejected FOIA's "prevailing party" doctrine. The County cross-petitioned. It argues the Court of Appeals' decision creates a new cause of action under the PRA because it significantly heightened the requirements of an adequate search, and such penalties will continue to accrue until the date of final judgment, including all appeals, thereby punishing an agency for exercising its right to appeal.[4]

ISSUES

1. Whether the plaintiff in a PRA action is entitled to the same scope of discovery allowed other civil plaintiffs under Washington's civil discovery rules?
2. What is an adequate search under PRA?
3. Whether a plaintiff is a prevailing party under the PRA if the defendant agency wrongfully holds documents at the time of request but releases them prior to suit in response to a different PRA request?

[4] Amici curiae, newspaper associations Allied Daily Newspapers of Washington and Washington Newspaper Publishers and daily newspapers The Seattle Times, The Tacoma News Tribune and Tri-City Herald support the Alliance in its arguments. They also agree with the County that the decision below creates an independent cause of action for the failure to perform an adequate search and embrace this result.

ANALYSIS

The PRA is a strongly worded mandate for broad disclosure of public records. *Burt v. Dep't of Corr*., 168 Wn.2d 828, 832, 231 P.3d 191 (2010) (quoting *Soter v. Cowles Publ'g Co*., 162 Wn.2d 716, 731, 174 P.3d 60 (2007)). Passed by popular initiative, it stands for the proposition that "full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." *Progressive Animal Welfare Soc'y v. Univ. of Wash*., 125 Wn.2d 243, 251, 884 P.2d 592, 607 (1994) (*PAWS*); RCW 42.17A.001(11). Agencies are required to disclose any public record on request unless it falls within a specific, enumerated exemption. RCW 42.56.070(1).[5] The burden is on the agency to show a withheld record falls within an exemption, and the agency is required to identify the document itself and explain how the specific exemption applies in its response to the request. RCW 42.56.550(1); *Sanders v. State*, 169 Wn.2d 827, 845-46, 240 P.3d 120 (2010).

Agency actions under the PRA are subject to de novo review. RCW 42.56.550(3). On review, we take into account the policy of the PRA that free and open examination of public records is in the public interest, even if examination may

[5] The request at issue here was made in May 2005, before the PRA was recodified at chapter 42.56 RCW, but no substantive change was made by the recodification. Laws of 2005, ch. 274, § 103. Citations are therefore made to the current chapter, unless the current code is substantially different from the former.

cause inconvenience or embarrassment. RCW 42.56.550(3). Interpretations of law are similarly reviewed de novo. *State v. Kintz*, 169 Wn.2d 537, 545, 238 P.3d 470 (2010) (quoting *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)). Grants of summary judgment are reviewed de novo, and we engage in the same inquiry as the trial court. *Lallas v. Skagit County*, 167 Wn.2d 861, 864, 225 P.3d 910 (2009) (citing *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 470, 209 P.3d 859 (2009)).

1. The scope of discovery in a PRA case

As mentioned above, the trial court limited discovery and, in view of limited responses to discovery requests, granted summary judgment to the County. On review, the Court of Appeals affirmed the trial court's ruling and analogized the scope of discovery in a PRA lawsuit to that allowable in a FOIA case. This approach is inconsistent with the civil rules and our cases analyzing this issue.

We have previously held that, unless express procedural rules have been adopted by statute or otherwise, the general civil rules control. In *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 105, 117 P.3d 1117 (2005), we considered whether intervention was allowed in a PRA action. We relied on CR 81 to answer this question, which provides that the civil rules govern except where these rules are inconsistent with rules or statutes applicable to special proceedings.[6]

[6] CR 81(a) provides: "Except where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings. Where statutes relating to special proceedings provide for procedure under

What constitutes a "special proceeding" is mostly governed by statute, and the PRA statutes do not create a special proceeding subject to special rules, such as those that apply in proceedings involving garnishment, unlawful detainer, and sexually violent predators. Since the statutes are silent, we held the normal civil rules are appropriate for prosecuting a PRA claim. More specifically, since the PRA statute is silent concerning intervention, we concluded that intervention is therefore allowed in a PRA case. *Spokane Research*, 155 Wn.2d at 104-05. Similarly here, because the PRA is silent about discovery, no reason exists to treat discovery any differently than intervention, especially given the PRA's policy of broad disclosure. We hold, therefore, that the civil rules control discovery in a PRA action.[7]

Under the court rules, what constitutes relevant discovery is broad. "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." CR 26(b)(1). We have previously said that the decision not to disclose records and the reasons behind that decision "are precisely the subject matter of a suit brought under the Public Records Act." *PAWS*, 125 Wn.2d at 270 n.17. And we expanded this in our most recent

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former statutes applicable generally to civil actions, the procedure shall be governed by these rules."

[7] The concurrence would instead foreclose discovery until the requester has shown, by more than mere speculation, that the agency's search was inadequate, but the concurrence neglects to provide guidance to a requester seeking to do so without discovery. The legislature is well aware of how to impose limits on litigation, as evidenced by its allowance for hearings solely based on affidavits, RCW 42.56.550(3), and the examples cited in *Spokane Research*, could just have expressly provided limitations upon discovery, but it did not. We should not assume such limitations were intended, by either the legislature or the voters who enacted the PRA, as the concurrence would, in the complete absence of any mention of discovery.

Yousoufian opinion, which made agency culpability the focus in determining daily penalties, thus making discovery regarding motivation relevant. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 460, 229 P.3d 735 (2010). Of course, it may be within the trial court's discretion to narrow discovery, but it must not do so in a way that prevents discovery of information relevant to the issues that may arise in a PRA lawsuit.

As mentioned, the Court of Appeals held that "[d]iscovery which seeks information concerning 'the policies, procedures, and operational guidelines' for an agency's operations 'far exceeds the limited scope of discovery usually allowed in a FOIA case concerning factual disputes surrounding the adequacy of the search for documents,'" so the Alliance's motion to compel discovery was properly denied. *NASC*, 153 Wn. App. at 264-65 (quoting *Schiller v. Immigration & Naturalization Serv*., 205 F. Supp. 2d 648, 653 (W.D. Tex. 2002)). But the PRA and FOIA are not analogous regarding discovery, because the PRA includes a statutory penalty provision, while FOIA does not.[8] The rules of discovery provide that all relevant information likely to lead to admissible evidence is discoverable. What is relevant in a PRA action will differ from that in a FOIA action, because a PRA action will often involve issues not implicated by FOIA actions.

For example, the agency's motivation for failing to disclose or for

[8] The concurrence seems to take this as the basis for our holding regarding discovery. As discussed above, discovery is not limited in a PRA case by statutes or case law, and it is therefore governed by the civil rules.

withholding documents is relevant in a PRA action. Whether an agency withheld records in bad faith is the principal factor in determining the amount of a penalty. *Yousoufian*, 168 Wn.2d at 460 (quoting *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997)). In addition to good or bad faith, the agency's overall culpability is the focus of the penalty determination. *Yousoufian*, 168 Wn.2d at 460, 467-68 (listing factors to aid in culpability determination). An agency that sought clarification of a confusing request and in all respects timely complied but mistakenly overlooked a responsive document should be sanctioned less severely than an agency that intentionally withheld known records and then lied in its response to avoid embarrassment. Discovery is required to differentiate between these situations. Here, the Alliance attempted to determine why Knutsen's computer was replaced when it was, through both discovery and subsequent PRA requests. It was, after all, the replacement of Knutsen's computer that foiled the agency in obtaining the record it sought, that is, the "complete electronic file information logs for the undated" seating chart. CP at 51. The County's culpability level would be heightened, therefore, if the computer was replaced and its contents destroyed to prevent disclosure. *See* RCW 42.56.100. Relevancy in a PRA action, then, includes *why* documents were withheld, destroyed, or even lost.

In this case, the County, in response to most requests, refused discovery completely, as it did not respond to the interrogatories or requests for production at

all. This was improper. Under our rules, answers to interrogatories are to be served within 30 days of service, CR 33(a), and the same is true for requests for production, CR 34(b), or else the party must seek a protective order. The County was required to respond to the Alliance's requests. The County additionally objected to and refused to answer deposition questions as being outside the scope of a PRA action, relying on its own interpretations of the PRA statutes and case law. A party must answer deposition questions unless instructed not to because of privilege or discovery abuse. CR 30(d), (h). As in any other civil suit, the County should have responded to the interrogatories and allowed Knutsen to answer the deposition questions or else sought a protective order.

Since discovery was not allowed to proceed, the record is incomplete, and we remand to the trial court for appropriate discovery. More expansive discovery will likely lead to information or records relevant to the PRA requests made in this case. Although the arguments have focused on the seating chart with the names of Ron and Steve, discovery should predictably reveal who inserted those names into the chart, and whether any documents, communications, or other written materials exist that prompted the inclusion. Discovery that was not so limited would also have revealed what the County did in order to find those documents. The discovery the Alliance was able to obtain shows that the County's search for the requested documents was inadequate, bringing us to the next issue.

2. An adequate search under the PRA

The PRA is silent about what constitutes an adequate search, and this court has not had reason to address it. The Court of Appeals relied on judicial interpretations of FOIA to answer this question. *NASC*, 153 Wn. App. at 256 (citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978) ("The state act closely parallels the federal Freedom of Information Act . . . and thus judicial interpretations of that act are particularly helpful in construing our own.")). Both acts promote open government and FOIA is construed broadly, with its exceptions narrowly tailored, similar to the PRA. *Hearst Corp*., 90 Wn.2d at 129. Both make virtually every document generated by an agency available to the public unless an exemption applies. *Hearst Corp*., 90 Wn.2d at 128 (quoting *N.L.R.B. v. Sears, Roebuck & Co*., 421 U.S. 132, 95 S. Ct. 1504, 1509-10, 44 L. Ed. 2d 29 (1975). It follows that standards governing the adequacy of a search will also mirror each other. We agree with the Court of Appeals' approach and hold that the adequacy of a search for records under the PRA is the same as exists under FOIA.

Under this approach, the focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate. *Citizens Comm'n on Human Rights v. Food & Drug Admin*., 45 F.3d 1325, 1328 (9th Cir. 1995); *Weisberg v. U.S. Dep't of Justice*, 240 U.S. App. D.C. 339, 745 F.2d 1476, 1485 (1984) (quoting *Weisberg v. U.S. Dep't of Justice*, 227 U.S. App. D.C. 253,

705 F.2d 1344, 1350-51 (1983)). 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. *Weisberg*, 705 F.2d at 1351. What will be considered reasonable will depend on the facts of each case. *Weisberg*, 705 F.2d at 1351. When examining the circumstances of a case, then, the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found. *Truitt v. Dep't of State*, 283 U.S. App. D.C. 86, 897 F.2d 540, 542 (1990); *Meeropol v. Meese*, 252 U.S. App. D.C. 381, 395, 790 F.2d 942, 956 (1986) ("a search need not be perfect, only adequate").

Additionally, agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. *Valencia-Lucena v. U.S. Coast Guard*, 336 U.S. App. D.C. 386, 180 F.3d 321, 326 (1999). The search should not be limited to one or more places if there are additional sources for the information requested. *Valencia-Lucena,* 180 F.3d at 326. Indeed, "the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Oglesby v. U.S. Dep't of Army*, 287 U.S. App. D.C. 126, 920 F.2d 57, 68 (1990). This is not to say, of course, that an agency must search *every* possible place a record may conceivably be stored, but only those places where it is *reasonably likely* to be found.

As the concurrence discusses, many FOIA cases are resolved on motions for summary judgment concerned with the adequacy of the search.[9] In such situations, the agency bears the burden, beyond material doubt, of showing its search was adequate. *Valencia-Lucena*, 180 F.3d at 325. To do so, the agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. These should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched. An agency may wish to include such information in its initial response to the requester, since doing so may avoid litigation.

Moreover, records are never exempt from disclosure, only production, so an adequate search is required in order to properly disclose responsive documents. *See Sanders*, 169 Wn.2d at 836. The failure to perform an adequate search precludes an adequate response and production. The PRA "treats a failure to properly respond as a denial." *Soter v. Cowles Publ'g. Co*., 162 Wn.2d 716, 750, 174 P.3d 60 (2007) (citing RCW 42.56.550(2), (4) (formerly RCW 42.17.340)). Thus, an inadequate search is comparable to a denial because the result is the same, and should be treated similarly in penalty determinations, at least insofar as the requester may be

[9] The concurrence would delay all discovery until a hearing regarding the adequacy of the search is held. It is unclear how a requester, without the aid of discovery, will be able to rebut the agency's assertion of a reasonable search. A trial court may, of course, limit initial discovery to the adequacy of the search should the parties wish to follow the federal approach, but may not delay all discovery entirely. Not every requester will have the benefit of agency employees aiding in its search for the truth, as the Alliance did here, and so such discovery will be necessary.

entitled to costs and reasonable attorney fees under RCW 42.56.550(4).

Applying this standard, the County's search for both items was inadequate, though here we are only concerned with the first search.[10] For Item #1, the County's search consisted of the only place a complete electronic record could not be found: Knutsen's new computer, and Knutsen herself noticed the discrepancy of the "date created" field being later in time than the "date modified" field. CP at 61. Additionally, Knutsen knew her computer had been replaced only a few weeks before the request was made, and had some idea that searching only the new computer would prove unfruitful. But she did not search further, despite the indication that her response would be incomplete, since the request asked for the *complete* electronic record. This illustrates why an agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Oglesby*, 920 F.2d at 68; *see also Valencia-Lucena*, 180 F.3d at 325 (agency must follow through on obvious leads).

Rather than following up, the agency's reply was that there were no other

[10] Despite its assertion that no response was necessary for Item #2, identifying Ron and Steve, the County did in fact conduct a search for the information, but this search was also inadequate. Knutsen stated "there are no documents which reference the seating chart and identify the full names of 'Ron and Steve' or 'Steve' therein." CP at 62. But the BPD does not refer to such things as "seating charts," instead, they are called "floor plans," "reconfiguration charts," or "cubicle layouts." The adequacy of this second search is not before us, but it is worth noting that some courts have found searches inadequate when the searcher limits the search to the terms provided by the requester, even though the searcher uses synonyms to refer to those items, and if the synonyms had been used, the search would have proved fruitful. *See Summers v. U.S. Dep't of Justice*, 934 F. Supp. 458, 461 (D.D.C. 1996) (search using "commitment" but not "appointment" or "diary," as those terms used frequently by agency, was evidence of inadequate search).

documents that would be responsive to this request. But this is conclusory because it does not explain why this is; nor does she aver that all places likely to contain responsive documents (such as her old computer, a network drive,[11] or the printer record) were searched or were unavailable to be searched. An adequate response to the initial PRA request where records are not disclosed should explain, at least in general terms, the places searched. In a typical case, this rule presents few problems for the agency as the records responsive to the PRA requests will be readily available. Where, as occurred here, the computer containing the record has been destroyed, the agency must look to other locations.[12] This also translates into a further requirement to explain the adequacy of the search in the response to the request.

The County argues it should not be required to search Knutsen's old computer for requested documents, comparing the old computer to a trash can or recycle bin. But the analogy fails, because the County maintained control over the computer following its transfer to its Information Services Department, unlike trash or recycling that is hauled away.[13] If the agency, after establishing the primary

[11] Other employees informed the Alliance that such a file would normally have been copied to a shared server, thus alerting the Alliance that the County's search was likely inadequate. This again demonstrates why discovery regarding the adequacy of the search will often be necessary.
[12] An agency is forbidden from destroying responsive documents while a PRA request is pending. RCW 42.56.100. Because of this prohibition, an agency must show that any recently destroyed documents were not wrongfully destroyed, and this naturally will require more discovery regarding the destruction, not less, as the County seems to be advocating here.
[13] At oral argument, the County agreed that if a mistake had been made in the file transfer from the old to the new computer and the County had needed a document from the old computer, there was no question that the County

source of requested information, finds that the information is not there, it may not assert the information has been moved so as to avoid its duty to search. The agency must determine where the information has been moved and conduct a search there, where reasonable. Because the County produced nothing to show the old computer was wiped of all data before August 8, 2005, it should reasonably have searched that computer when the Alliance's PRA request was received in May. The Court of Appeals ruled that the County wrongfully withheld documents in violation of the PRA as a result of this inadequate search. We agree and affirm the Court of Appeals reversal of summary judgment in favor of the Alliance as to Item #1.

The County argues, as does amicus, that finding liability for an inadequate search creates a new cause of action under the PRA. Amicus insists that the failure to adequately search for a record is especially egregious because the requester may not know responsive documents exist, and therefore would have no basis to challenge an otherwise seemingly adequate response. Amicus relies on *PAWS*, where we said, "The Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request." *PAWS*, 125 Wn.2d at 270. But we did not explicitly allow the potential silent withholding in *PAWS* to support a freestanding daily-penalty award, as is now requested.

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could obtain the record from the computer while it awaited its fate at the Information Services Department, because the computer remained within the County's control. There is little difference between a document needed by the County for its operations and a document needed by the County to fulfill a public-records request.

Amicus additionally relies on *Sanders* to argue an inadequate search should be considered an independent cause of action. *Sanders*, 169 Wn.2d at 859-61. In *Sanders*, the responding agency listed exemptions to production in its response, but did not explain how the exemptions applied to the documents. We did not allow a freestanding penalty based on the failure to fully explain exemptions, as this went to the adequacy of the response and not the denial of the right to inspect or copy records. In *Sanders*, some documents were wrongfully withheld, necessitating a daily penalty, so the failure to explain exemptions was considered an aggravating factor in setting the penalty determination. We saved for another day the question of whether the PRA impliedly authorizes a penalty if the requester would otherwise have no remedy. Because the Alliance is similarly already entitled to a remedy, as will be discussed in the next section, we now hold that the failure to perform an adequate search is at least an aggravating factor, to be considered in setting the daily-penalty amount.

An adequate search is a prerequisite to an adequate response, so an inadequate search is a violation of the PRA because it precludes an adequate response. But we again put off for another day the question whether the PRA supports a freestanding daily penalty when an agency conducts an inadequate search but no responsive documents are subsequently produced. A prevailing party in such an instance is at least entitled to costs and reasonable attorney fees. *Soter*, 162

Wn.2d at 756; RCW 42.56.550(4).[14]

Finally, the County also argues that the Court of Appeals' imposition of daily penalties punishes an agency for asserting its appeal rights. The County is concerned about a daily-penalty award stretching to the final judgment date of this court. This argument ignores the statute, which makes daily penalties applicable only for the time the requester was "denied the right to inspect or copy said public record." RCW 42.56.550(4). Penalties will not continue to accrue after a document is produced, and daily penalties will not accrue at all if the agency carries its burden of showing an adequate search. Further, the amount of the daily-penalty award is within the trial court's discretion and it may consider several factors when making this determination. *Yousoufian*, 168 Wn.2d at 466-68.

3. Prevailing party under the PRA

The Court of Appeals held that because the Alliance had the allegedly responsive documents to Item #2 at the time the suit was filed, it could not be a prevailing party regarding that item since the suit was not reasonably necessary to

[14] This section of RCW 42.56.550 was recently amended in 2011. Laws of 2011, ch. 273, § 1. When this case arose, however, RCW 42.17.340(4) applied, which was identical to the preamendment version of RCW 42.56.550(4), both of which provide: "Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record." The amendment deletes "not less than five dollars and" from the final sentence, so that "it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record."

cause the disclosure. As discussed above, a party prevailing against an agency in a PRA action may be awarded costs and attorney fees, and may be awarded daily penalties at the discretion of the trial court. RCW 42.56.550(4). But contrary to the Court of Appeals' holding, no causation requirement exists to be a prevailing party in a PRA action. *Spokane Research*, 155 Wn.2d at 103. In *Spokane Research*, we explained,

> Rather, the "prevailing" relates to the legal question of whether the records should have been disclosed *on request*. Subsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time. Penalties may be properly assessed for the time between the request and the disclosure, even if the disclosure occurs for reasons unrelated to the lawsuit.

Spokane Research, 155 Wn.2d at 103-04 (emphasis added). We have additionally held that once a trial court finds an agency violated the PRA, daily penalties are mandatory, but the amount is subject to the trial court's discretion. *Yousoufian v. Office of King County Exec.*, 152 Wn.2d 421, 433, 98 P.3d 463 (2004). A violation therefore results in a remedy, with no discussion of what causes the final disclosure, such as when suit was filed.

The Court of Appeals reached the opposite result by relying on its previous

decision in *Daines v. Spokane County*, 111 Wn. App. 342, 44 P.3d 909 (2002).[15] The *Daines* court held that a party could not be "prevailing" and entitled to a remedy under the PRA when it had the record in its possession and knew of that fact at the time of filing, because the action was not necessary to compel disclosure. The *Daines* court, in turn, relied on *Coalition on Government Spying v. King County Department of Public Safety*, 59 Wn. App. 856, 864, 801 P.2d 1009 (1990). However, we expressly rejected this approach in *Spokane Research*, reasoning that the harm occurs when the record is wrongfully withheld, which

[15] In *Daines*, the requesting party was summarily denied his requests for e-mail records. The agency told him none of the e-mails requested had been saved, when in fact the agency had hard copies of those e-mails. The requester discovered some of these in his own files, which had been disclosed via discovery in an earlier action. Knowing the agency had thus violated the PRA by failing to disclose the records in its response, the requester filed suit, at which time the agency sought to comply with his requests.

usually occurs at the time of response or disclosure. *Spokane Research*, 155 Wn.2d at 103 n.10. Contrary to the *Daines* court's holding, the remedial provisions of the PRA are triggered when an agency fails to properly disclose and produce records, and any intervening disclosure serves only to stop the clock on daily penalties, rather than to eviscerate the remedial provisions altogether. To the extent that *Daines* held otherwise, it is overruled.

As will generally be true in many cases, a party does not know with certainty that a document in its possession is the public record it seeks until the agency responds. As we have previously recognized, the PRA requires a response to a request and disclosure of all responsive public records held by the agency.[16] The fact that the requesting party possesses the documents does not relieve an agency of its statutory duties, nor diminish the statutory remedies allowed if the agency fails to fulfill those duties. To the extent the Court of Appeals decision here, as in *Daines*, suggests otherwise, we reject that approach and reverse the Court of Appeals on this issue.

[16] A record is either "disclosed" or "not disclosed." If the record's existence is revealed to the requester, it is "disclosed" regardless of whether it is produced. *Sanders*, 169 Wn.2d at 836. An undisclosed record results in the prohibited silent withholding discussed in *PAWS*, 125 Wn.2d at 270.

In this instance, the agency refused to produce anything at all for Item #2, saying instead that the PRA "does not require agencies to explain public records. As such, no response is required." CP at 54. This violates the PRA. The request sought public records, not explanations, and if the agency was unclear about what was requested, it was required to seek clarification. The Alliance eventually obtained two e-mails that explicitly named Ron Hand and Steve Harris in relation to setting up phones and computers, which directly relates to cubicle assignments and therefore would have been responsive to Item #2. The Alliance was wrongfully denied these public records between the time of the refusal until they were eventually disclosed pursuant to the separate request. We therefore reverse the grant of summary judgment for Alliance regarding Item #2 and remand for a penalty determination.

CONCLUSION

We hold that discovery in a PRA case is governed by the civil rules, reversing the Court of Appeals on this issue. We affirm the Court of Appeals' use of FOIA guidelines in determining what constitutes an adequate search, which is governed by a standard of reasonableness. We hold that an inadequate search may be considered

an aggravating factor in calculating daily penalties, but cannot, given the record before us, create a freestanding daily-penalty award for an inadequate search. We reiterate our prior holding in *Spokane Research*, that litigation need not be the cause of disclosure and a party is entitled to the PRA's remedial provisions when an agency wrongfully refuses to disclose or produce requested records.

In this case, the County performed an inadequate search regarding Item #1 and wrongfully refused to respond to Item #2. We remand to the trial court for a determination of costs, attorney fees, and daily penalties, following any necessary discovery.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:

	Justice James M. Johnson
Justice Gerry L. Alexander	Justice Debra L. Stephens
Justice Tom Chambers	Justice Charles K. Wiggins
Justice Susan Owens	