No. 84108-0

MADSEN, C.J. (concurring)—I agree with the majority that to determine what constitutes an adequate search for records under the Public Records Act (PRA), chapter 42.56 RCW, we should adopt the federal approach under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2002). However, the majority does not correctly describe the entire federal process nor does the majority follow it.

Under federal case law, if an agency shows that it has satisfied the reasonableness standard for an adequate search and the requester does not adequately rebut that showing, then summary judgment may be granted. If summary judgment is granted to the agency on the issue of an adequate search, then discovery is unnecessary. For this reason, federal courts often delay discovery if a party seeks summary judgment on the ground that the agency engaged (or did not engage) in an adequate search. If summary judgment is not granted in favor of the agency on the issue, discovery should be available as usual.

By implementing the federal approach on the adequacy of search issue, including its relationship to discovery, we would achieve several advantages. If the agency

establishes that it has adequately searched and has disclosed responsive documents it has found, if any, then discovery may be avoided, along with the costs, time, effort, and possible discovery disputes it entails.

This approach not only conforms to federal case law respecting the adequacy of a search, it also follows both the letter and the spirit of the PRA and our cases under the act. In the PRA, the legislature expressly provided a speedy and expedient procedure for resolving disputes, which can be accomplished on affidavits alone. Our case law has added that PRA disputes may be resolved on summary judgment as well. As explained in the analysis below, the federal approach to deciding adequacy of an agency's search for requested records is in keeping with both the purpose and the language of the PRA and its preference for a quick resolution.

However, the majority declines to allow an agency a prediscovery opportunity to submit detailed affidavits under strict standards requiring factually detailed descriptions of how it conducted the search for responsive public records. I disagree on three grounds. First, in declining to permit the opportunity to make an adequacy showing on such affidavits alone, the majority is actually rejecting this part of the federal standard for establishing the adequacy of a search, notwithstanding its adoption of federal case law under FOIA.

Second, the majority also implicitly rejects the federal law because it fails to accord the agency's showing a presumption of good faith.

Third, the majority treats an action claiming an inadequate search for records

requested under the PRA as if it is the same as any dispute between civil litigants. This turns what is supposed to be an expeditious way of obtaining records from our government agencies into full blown civil litigation at the summary judgment stage where the entire matter could be quickly resolved rather than through a lengthy and expensive drawn out process. Full blown civil litigation, however, is not consistent with the narrow, but important, purposes of the PRA to assure that individuals may obtain public records from their government agencies quickly and expeditiously and that individuals may enjoy the same kind of quick and expeditious process to resolve claims like inadequacy of an agency's search. The consequences are increased costs, time, and effort on the part of the requesters and the agencies, which will have to devote taxpayer-funded time and resources to litigation rather than doing the public work of the agency.

This does not mean that discovery should never be allowed or that it has no place in a summary judgment proceeding. But we should not encourage discovery prior to the agency having the opportunity to make its showing on affidavits accorded a presumption of good faith. If the agency does not take the opportunity, or cannot make the detailed showing required, or its showing is rebutted, then obviously it should not prevail on summary judgment and further proceedings will be required. Put another way, the agency's showing has to be detailed and complete to meet all the requirements under federal law, and if it makes that showing, it will establish a prima facie case of adequacy.

Following the federal approach means that this case should be remanded for the trial court to consider adequacy of the agency's search under the analysis used for public

records searches under FOIA. It is likely, as the majority concludes, that summary judgment should not be granted, on the ground that the search was inadequate. However, I would leave it for the trial court to apply the correct legal standard in the first instance.

Discussion

As we have noted on many occasions, our state act "closely parallels" FOIA and therefore judicial interpretations of FOIA are "particularly helpful in construing" the PRA. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978); *see O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 907, 25 P.3d 426 (2001) (cases interpreting FOIA are often considered when interpreting the state act); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 608, 963 P.2d 869 (1998) (same); *Dawson v. Daly*, 120 Wn.2d 782, 791-92, 845 P.2d 995 (1993) (same), *overruled on other grounds by Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994) (*PAWS*). Just as under the PRA, under FOIA there is a doctrine of full disclosure unless information falls under a clearly delineated exemption, the availability of identified records to a member of the public on demand, and a mandate to construe FOIA broadly and its exemptions narrowly. *Hearst*, 143 Wn.2d at 128-29.[1]

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[1] In one area, however, the two acts are quite different. Unlike the PRA, FOIA does not have penalty provisions like those in the PRA, which provides for attorney's fees to a successful requester in the event legal action is necessary to obtain requested records and for daily penalties for the time that a document is wrongfully withheld. *Hearst Corp.*, 90 Wn.2d at 129. In addition, some exemptions in the PRA have no FOIA counterpart, and judicial analysis respecting exemptions under FOIA may therefore not be of help when interpreting exemption provisions under the PRA. *Servais v. Port of Bellingham*, 127 Wn.2d 820, 835, 904 P.2d 1124 (1995). For purposes of what constitutes an adequate search, neither of these areas is implicated. However, the penalty issue may require discovery that is not necessary under FOIA, as discussed later in this opinion.

<u>Adequacy of an agency's search for records; federal approach</u>

As mentioned, I agree with the majority's conclusion that we should adopt for purposes of the PRA the standard of reasonableness that federal courts apply to assess the adequacy of an agency's search for public records. Unfortunately, the majority's summary of federal law does not provide an entirely accurate picture and, in particular, the majority does not explain or follow federal law describing the actual procedure through which an agency can make a showing of an adequate search and when and how discovery is part of the process.

As noted, in many cases, resolution of the adequacy issue at the summary judgment stage makes it unnecessary to consider discovery issues. To explain why, I provide a more extensive discussion of federal law respecting adequacy of a search for responsive public records and how this issue affects discovery. I then explain how the federal approach is entirely consistent with the PRA.

As federal cases show, the issue of whether an agency has adequately searched for public records under FOIA arises quite frequently. An agency responding to a request under FOIA has a duty to conduct a search for responsive records. *Williams v. U.S. Dep't of Justice*, 177 F. App'x 231, 233 (3d Cir. 2006) (unpublished). "An improper withholding may arise from an agency's failure to conduct an adequate search, which 'is "dependent upon the circumstances of the case."'" *Maydak v. U.S. Dep't of Justice*, 254 F. Supp. 2d 23, 44 (D.D.C. 2003) (quoting *Weisberg v. U.S. Dep't of Justice*, 705 F.2d

1344, 1351 (D.C. Cir. 1983) (quoting *Founding Church of Scientology of Wash. D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979))); *see Budik v. Dep't of Army*, 742 F. Supp. 2d 20, 29 (D.D.C. 2010). The agency must make a good faith effort to conduct a search for the records requested. *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998).

"The adequacy of an agency's search is measured by a 'standard of reasonableness.'" *Weisberg*, 705 F.2d at 1351 (quoting *McGehee v. C.I.A.*, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983) (internal citation and quotation marks omitted); *accord Campbell*, 164 F.3d at 27–28; *Maynard v. C.I.A.*, 986 F.2d 547, 560 (1st Cir. 1993); *Gillin v. I.R.S.*, 980 F.2d 819, 822 (1st Cir. 1992). "FOIA does not require a perfect search, only a reasonable one." *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 362 (4th Cir. 2009); *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986).

When a requester brings suit under FOIA and claims that an agency has failed to adequately respond to a public records request, the agency has the burden of establishing that its search for the requested records was adequate. *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 547 (6th Cir. 2001). The agency must show that it has made the required "good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *accord Batton v. Evers*, 598 F.3d 169, 177 (5th Cir. 2010); *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 986 (9th Cir. 2009); *Campbell*, 164 F.3d at 27; *Zemansky v. E.P.A.*, 767 F.2d 569 (9th Cir. 1985); *Weisberg v.*

Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984); *Wolf v. C.I.A.*, 569 F. Supp. 2d 1, 8 (D.D.C. 2008).

This issue is often decided by federal courts on summary judgment. *Rugiero*, 257 F.3d at 544. On a motion for summary judgment, "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (footnote omitted). The affidavits or declarations must be submitted in good faith and provide a reasonably detailed, nonconclusory account of the scope of the search, providing search terms (for electronic searches), describing the type of search performed, and averring that the agency searched all files likely to contain responsive materials, with this information being sufficient to provide an opportunity for the requesting party to challenge the adequacy of the search if the requester wishes to do so. *Lahr*, 569 F.3d at 986; *Rein*, 553 F.3d at 362-63 (citing *Ethyl Corp. v. U.S. E.P.A.*, 25 F.3d 1241, 1246-47 (4th Cir. 1994)); *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999); *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 488-89 (2d Cir. 1999); *Oglesby*, 920 F.2d at 68; *Weisberg*, 745 F.2d at 1485; *Kaminsky v. Nat'l Aeronautics & Space Admin.*, 402 F. App'x 617, 617 (2d Cir. 2010) (unpublished); *see Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982) ("affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA").

The affidavit or declaration must be sufficiently detailed to show what records were searched, by whom, and through what process, *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994); *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980). However, the agency does not necessarily have to produce a declaration or affidavit from the individual employee who actually conducted the search; an affidavit or declaration of the agency employee who is responsible for supervising a FOIA search may be sufficient. *Carney*, 19 F.3d at 814; *Maynard*, 986 F.2d at 560; *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *Meeropol*, 790 F.2d at 951. Further, the agency does not necessarily have to disclose details about the identity or background of the actual individuals who processed the FOIA request. *Maynard*, 986 F.2d at 563.

An affidavit or declaration that supplies facts sufficiently indicating that the agency has conducted a thorough search is accorded a presumption of good faith. *Carney*, 19 F.3d at 812; *SafeCard Servs.*, 926 F.2d at 1200; *Kaminsky*, 402 F. App'x at 617; *Pietrangelo v. U.S. Army*, 334 F. App'x 358, 360 (2d Cir. 2009). Unfortunately, the majority disregards the importance of this presumption.

Significantly, under FOIA the factual question is not whether the agency recovered every document that might be responsive or whether documents might exist that are possibly responsive to the request, but rather whether the search itself was reasonably calculated to discover documents responsive to the request. *Batton v. Evers*, 598 F.3d 169, 176 (5th Cir. 2010); *Trentadue v. F.B.I.*, 572 F.3d 794, 807 (10th Cir. 2009); *Lahr*,

569 F.3d at 987; *Rein*, 553 F.3d at 362; *Grand Cent. P'ship*, 166 F.3d at 489; *In re Wade*, 969 F.2d 241, 249 n.11 (7th Cir. 1992); *Zemansky*, 767 F.2d at 571; *Williams*, 177 F. App'x at 233.

An agency is not required to search every record system in the agency. *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *see also Rein*, 553 F.3d at 364 (a "'reasonably calculated search' does not require that the agency search every file where a document could possibly exist, but rather requires that the search be reasonable in light of the totality of the circumstances" (citing *SafeCard Servs.*, 926 F.2d at 1201)). "Although agencies must respond to requests under the Act, they are not required to open their doors and invite the public in to peruse their records. For that reason, our review focuses on the adequacy of the agency's search, and not on the chance that additional documents exist." *CareToLive v. F.D.A.*, 631 F.3d 336, 341 (6th Cir. 2011). "The Act does not require that agencies account for all of their documents, so long as they reasonably attempt to locate them." *Id.*

Of course, an agency is not required to create a document that did not exist in order to satisfy a FOIA request. *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1385 (8th Cir. 1985); *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 321 (D.C. Cir. 1982). Further, the filing system that an agency uses is generally designed to serve the agency's internal needs, and although an agency must make a diligent effort calculated to uncover the requested document, it "need not restructure its entire system in order to satisfy" a FOIA request. *Miller*, 779 F.2d at 1385.

How a requester may rebut the agency's showing of an adequate search

Once an agency submits affidavits or declarations in an attempt to show that it conducted an adequate search for records, the requester may respond in several ways (or not at all).

First, if the "agency *fails to establish* through reasonably detailed affidavits *that its search was reasonable*, the FOIA requester may defeat summary judgment merely by showing that the agency might have discovered a responsive document had the agency conducted a reasonable search." *Maynard*, 986 F.2d at 560 (emphasis added).

Second, if the requester identifies "specific deficiencies in the agency's response," summary judgment should not be granted. *CareToLive*, 631 F.3d at 341-42. For example, if the agency's own responses show another place where responsive records might be found without an unreasonable burden on the agency, summary judgment should not be granted. *See*, *e.g.*, *Valencia-Lucena*, 180 F.3d at 326-27 ("if a review of the record raises substantial doubt, particularly in view of 'well defined requests and positive indications of overlooked materials,' summary judgment is inappropriate"; here, the search was inadequate because the record itself revealed "'positive indications of overlooked materials'" (quoting *Founding Church of Scientology*, 610 F.2d at 837)); *Campbell*, 164 F.3d at 28 (search held inadequate where it was evident from the records disclosed by the agency that a search of another records system would be apt to turn up requested documents). However, even if an agency's affidavits or declarations are

initially deficient, "courts generally will request a supplement before ordering discovery." *Reich v. U.S. Dep't of Energy*, __ F. Supp. 2d __, 2011 WL 966602 *8 (D. Mass. 2011); *accord Wolf*, 569 F. Supp. 2d at 9.

Third, if the agency has made a prima facie showing of adequacy, as described, then the burden shifts to the plaintiff-requester to provide "'countervailing evidence' as to the adequacy of the agency's search." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003). For example, if the requester "is able to show circumstances indicating that further search procedures were available without the [agency's] having to expend more than reasonable effort, then summary judgment would be improper." *Miller*, 779 F.2d at 1385. An agency "cannot limit its search" to only one or more places if there are additional sources "that are likely to turn up the information requested." *Oglesby*, 920 F.2d at 68; *see also Campbell*, 164 F.3d at 28. A requester might also produce countervailing evidence that places the agency's identification or retrieval procedure genuinely at issue, thus making summary judgment improper. *Founding Church of Scientology*, 610 F.2d at 836.

However, an agency's failure to turn up a specific document does not, in and of itself, render the search inadequate. *Lahr*, 569 F.3d at 987; *Rein*, 553 F.3d at 364; *Morley v. C.I.A.*, 508 F.3d 1108, 1120 (D.C. Cir. 2007); *Iturralde*, 315 F.3d at 315; *Zemansky*, 767 F.2d at 571. Even if the requester identifies specific documents internally referenced in documents released to the requester, and these are not sent to the requester, this, in and of itself, does not establish that the agency's search is inadequate; attacking

the competency of the search method because it did not turn up "known and identified documents" does not establish the search was inadequate because the standard of reasonableness does not require absolute exhaustion of the files—rather, this standard requires a search reasonably calculated to uncover materials requested. *Miller*, 779 F.2d at 1384-85; *see also Ray v. U.S. Dep't of Justice***,** 908 F.2d 1549, 1558 (11th Cir.1990) ("[t]he adequacy of an agency's search for documents requested under FOIA is judged by a reasonableness standard . . . the agency need not show that its search was exhaustive"), *rev'd on other grounds*, *U.S. Dep't of State v. Ray*, 502 U.S. 164, 112 S. Ct. 541, 116 L. Ed. 2d 526 (1991). That a document once existed does not mean that it presently exists or that the agency that created a file has retained the document. *Miller*, 779 F.2d at 1385; *Williams*, 177 F. App'x at 233.

Moreover, a requester's "'mere speculation that as yet uncovered documents might exist' . . . is not enough to 'undermine the determination that the agency conducted an adequate search for the requested records.'" *Morley*, 508 F.3d at 1120 (quoting *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004)); *accord Steinberg*, 23 F.3d at 552; *SafeCard Servs.*, 926 F.2d at 1201; *Moore v. F.B.I.*, 366 F. App'x 659, 661 (7th Cir. 2010); *Jones-Edwards v. Appeals Bd. Nat'l Sec. Agency*, 196 F. App'x 36, 38 (2d Cir. 2006) (unpublished); *cf. Baker & Hostetler, LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006) (a requester's assertion "that an adequate search would have yielded more documents is mere speculation" insufficient to rebut affidavits describing the agency's search process).

If the requester fails to present any countervailing evidence or apparent inconsistencies in the proof, and provided the agency has submitted appropriate affidavits or declarations, the agency's affidavits or declarations generally will be sufficient to show compliance with obligations under FOIA. *Trentadue v. F.B.I.*, 572 F.3d 794, 807 (10th Cir. 2009); *Rugiero*, 257 F.3d at 547; *Becker v. I.R.S.*, 34 F.3d 398, 405 (7th Cir. 1994); *Grand Cent. P'ship*, 166 F.3d at 489.

However, and finally, the requester can still prevent summary judgment in favor of the agency, once the agency has "demonstrate[d] that it has conducted a reasonably thorough search," by producing evidence "that the agency's search was not made in good faith." *Maynard*, 986 F.2d at 560; *see Pietrangelo v. U.S. Army*, 334 F. App'x 358, 360 (2d Cir. 2009) (requester can rebut agency's adequate affidavits by a showing of bad faith sufficient to impugn the agency's affidavits or declarations). However, a mere assertion of bad faith, alone, is not sufficient to overcome a motion for summary judgment. *Assassination Archives & Research Ctr. v. C.I.A.*, 177 F. Supp. 2d 1, 8 (D.D.C. 2001); *see also Maynard*, 986 F.2d at 560 (the presumption of good faith cannot be rebutted by purely speculative claims about the existence and discoverability of other documents). A mere assertion does not meet the nonmoving party's burden to respond to a moving party's facially adequate affidavits.

As the majority recognizes, this federal framework is appropriate under the PRA. Indeed, it is entirely consistent with the purposes and provisions of the PRA. RCW 42.56.550 provides a speedy remedy for a requester to obtain a court hearing on whether

an agency has violated the PRA. Quick judicial review upon motion and affidavit is authorized, allowing a requester to avoid expensive and prolonged PRA cases that could impede citizens' use of the act. *See O'Neill v. City of Shoreline*, 170 Wn.2d 138, 154-157, 240 P.3d 1149 (2010); RCW 42.56.550(1); WAC 44-14-08004(1); *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 801, 791 P.2d 526 (1990). Under RCW 42.56.550, such a case may be initiated by a motion to show cause, placing the burden on the agency to show cause why it has not violated the PRA. RCW 42.56.550(1). Under RCW 42.56.550(3), a judicial de novo hearing on challenged agency action may be conducted "based solely on affidavits." Like under FOIA, under the PRA the burden of showing compliance with the act is on the agency. RCW 42.56.550(1).

Thus, similar to the procedure described by federal courts, the PRA expressly contemplates an expedited review where the adequacy of an agency's search can be quickly decided.

Moreover, the fact that the summary judgment procedure is used in federal court to decide the adequacy of records search is not an impediment to applying the same procedure in this state. We have held that summary judgment is an appropriate procedure in PRA cases, relying on RCW 42.56.550(1) and (3), the specific PRA sections providing that a trial court may conduct a hearing based solely on affidavits and use of in camera review. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 106, 117 P.3d 1117 (2005). In fact, many Washington cases have involved both a motion to show cause, as provided for in RCW 42.56.550(1), and a grant of summary judgment (in whole

or in part). *See*, *e.g.*, *Spokane Research & Def. Fund*, 155 Wn.2d 89; *Soter v. Cowles Pub'g Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007); *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 618 P.2d 76 (1980); *Gronquist v. Dep't of Corr.*, 159 Wn. App. 576, 247 P.3d 436 (2011); *Guillen v. Pierce County*, 96 Wn. App. 862, 866, 982 P.2d 123 (1999), *rev'd in part on other grounds*, 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003); *cf. Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997) (public records case decided on summary judgment); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994) (same).

Accordingly, when the adequacy of an agency's search for a responsive record is at issue in an action under the PRA, a summary judgment motion on the issue may be made by either party, just as under FOIA, and the agency could submit affidavits or declarations in an attempt to show that it conducted an adequate search and produced all nonexempt responsive records it found. Indeed, the agency itself could commence the action. *See Soter*, 162 Wn.2d at 749-56 (an agency is entitled to seek judicial review of disputed requests for disclosure).

In addition to being consistent with the PRA, the federal approach to determining the adequacy of an agency search is also consistent with summary judgment standards. For example, mere speculation will not suffice to rebut an agency's prima facie showing of an adequate search. "A nonmoving party in a summary judgment may not rely on speculation [or] argumentative assertions that unresolved factual issues remain," rather, "after the moving party submits adequate affidavits, the nonmoving party must set forth

specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986); *see Greenhalgh v. Dep't of Corr.*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011) ("[m]ere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that precludes a grant of summary judgment" to an agency on the issue of whether it has complied with a public records request under the PRA). When an agency makes a prima facie showing it has conducted an adequate search, the requester must rebut that showing, and must do so by more than mere speculation.

Discovery

The majority declines to follow federal cases decided under FOIA on the issue of discovery in a PRA case. Federal courts often prescribe limits on discovery in FOIA cases, but we are here concerned only with the issue of the adequacy of an agency's search and how discovery fits in this context. The reasonableness standard we adopt for establishing the adequacy of a search through an agency's affidavits directly bears on this issue, as I explain in this opinion. We should follow the federal case law under FOIA to determine whether discovery is appropriate when adequacy of the agency's search is at issue.

Contrary to the majority, there are no differences between FOIA and the PRA that dictate we should ignore the federal law in this context. The primary reason that the majority concludes that the PRA and FOIA are not analogous on the issue of discovery is

because the PRA includes a statutory penalty provision and FOIA does not.[2] The majority then explains this premise in detail, posing a number of questions related to penalties that may require discovery.

But the majority's distinction only matters if inquiry into penalties becomes necessary.[3] If a court decides that the agency did not violate the PRA, then penalties are not at issue. More specifically, if a PRA dispute involves the adequacy of the agency's search and this issue is resolved on affidavits by summary judgment in favor of the agency, penalties are never at issue and discovery on this issue is not necessary. Thus, the fact the PRA provides for penalties has no bearing on the question whether adequacy of a search can be resolved on summary judgment without discovery.

The majority also cites two cases for the proposition that discovery must be allowed under the civil rules because the reasons for not disclosing records are the focus of a suit brought under the PRA. Majority at 10-11. But the majority's conclusion is too broad. While discovery was appropriate in the context of the two cited cases, it may not be necessary in a PRA case where the issue of the adequacy of an agency's search can be resolved on affidavits by summary judgment.

The first case the majority cites is *PAWS*, 125 Wn.2d at 270 n.17. In *PAWS*, the

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[2] The majority sys that "a PRA action will often involve issues not implicated" under FOIA, majority at 13, but does not identify any issues unrelated to penalties.

[3] The legislature recently amended RCW 42.56.550(4) to provide that a court may award a daily penalty "not to exceed one hundred dollars for each day" that the requester "was denied the right to inspect or copy" the requested record. Laws of 2011, ch. 273, § 1. Before this amendment, a trial court had to impose a penalty of at least five dollars a day. Former RCW 42.56.550(4) (2010); former RCW 42.17.340 (2005).

issue was whether an agency could "silently withhold" a record. As the court pointed out, this is not authorized by the PRA. An agency must give a statement of the specific exemption authorizing its withholding of any record. *Id*. at 270; *see* RCW 46.56.550(1). The court said, "The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed." *Id*.

In the footnote cited by the majority, the court rejected the idea that a decision whether to release a document is "*generically* insulated from pretrial discovery." *Id*. at 270 n.17 (emphasis added). This conclusion is unassailable; nothing supports the idea that discovery is *never* permissible in a PRA case.

But significantly, in the footnote in *PAWS*, the court also observed: "Of course, the court may decide to conduct a hearing on disputed public records based solely on affidavits," and "[t]his may include affidavits of decisionmakers that they have not silently withheld relevant records." *Id*. Thus, *PAWS* did not open the door to discovery at any time for any purpose, but instead more narrowly rejected the idea that a PAWS suit was "generically insulated" from discovery. Moreover, the court expressly acknowledged that a hearing on affidavits is allowed by the PRA.

The second case cited by the majority is *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 460, 229 P.3d 735 (2010). This is simply an example of a case where

penalties were at issue and as the majority explains, in this context discovery may be necessary.

Unlike these situations, when an agency sufficiently establishes by affidavit, as allowed by the PRA, that it conducted an adequate search and properly produced any nonexempt responsive records it found, summary judgment may be granted with no issue of "silent withholding" and no issue of penalties. As explained above, resolving the adequacy of search issue may effectively resolve the entire dispute between a requester and an agency, and negate any need to engage in discovery. As also explained, the agency has the burden of providing sufficient detail to make the prima facie case that it conducted an adequate search.

Delaying discovery

Because further proceedings may be avoided if summary judgment on adequacy of a search is granted, federal trial courts may and often do delay discovery until after rulings are made on motions in FOIA cases for summary judgment based on the adequacy of the agency's search. *Lane v. Dep't of Interior*, 523 F.3d 1128, 1113-35 (9th Cir. 2008); *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 544 (6th Cir. 2001); *Miscavige v. I.R.S.*, 2 F.3d 366, 369 (11th Cir. 1993). "'[D]iscovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face,' and a district court may forgo discovery and award summary judgment on the basis of submitted affidavits or declarations." *Wood v. F.B.I.*, 432 F.3d 78, 85 (2d Cir. 2005) (quoting *Carney*, 19 F.3d at 812). When

the agency submits affidavits that are reasonably detailed, nonclusory and submitted in good faith, showing an adequate search was conducted, a district court does not abuse its discretion by granting summary judgment without further discovery. *Lovaas v. Bureau of Land Mgmt.*, 393 F. App'x 527 (9th Cir. 2010). Indeed, federal courts have even directed that discovery should be denied if the agency's affidavits or declarations are sufficient. *Schrecker v. U.S. Dep't of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002).

This does not mean that a requester with good reason for pursuing discovery is denied discovery. If, in response to the agency's prima facie showing, the requester produces countervailing evidence or identifies apparent inconsistencies in the agency's proof, discovery may be in order. *CareToLive*, 631 F.3d at 340-41; *Trentadue*, 572 F.3d at 807; *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982); *Schoenman v. F.B.I.*, 764 F. Supp. 2d 40, 45-45 (D.D.C. 2011). In addition, even though there is a presumption of good faith that attaches to the affidavit or declaration of an agency's supervisor over public records searches, if a requester makes a showing of actual bad faith on the agency's part sufficient to impugn the agency's affidavits or declarations, discovery may be justified. *Carney*, 19 F.3d at 812 (citing *Goland v. C.I.A.*, 607 F.2d 339, 352 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980)).

In short, in many cases an inquiry into the adequacy of a records search under FOIA's reasonableness standard has effectively resolved the issue whether discovery is necessary. If a trial court grants summary judgment on the basis that the agency's affidavits or declarations show the search was adequate and the requester has failed to

sufficiently rebut this prima facie showing, there is frequently no remaining issue on which discovery is necessary or appropriate. And even if summary judgment on adequacy of the search does not effectively resolve the case, it would negate any need for discovery on that issue.

Delaying discovery in these cases can save time, effort, and costs, and can avoid unnecessary litigation and discovery disputes. These significant gains may be achieved at no cost to enforcement of the PRA.

Delaying discovery can also benefit both requesters and agencies. Under the PRA, requesters are entitled to quick responses to their discovery requests. If there is a dispute about adequacy of an agency's search for responsive documents, it should be resolved quickly. Government agencies should be able to obtain a quick determination that they have sufficiently responded to a request, if this is the case, and so avoid unnecessary expenditure of limited resources. If the agency cannot make a sufficient showing that it has adequately searched, then this determination can be made expeditiously as well. Delaying rulings on discovery until after any summary judgment rulings on adequacy of a search are decided should be the practice under our PRA, as it is under FOIA.

Proceeding in this fashion would serve the legislature's obvious preference for deciding PRA cases in an expeditious fashion, as well as its provision for cases to be decided on the basis of affidavits. RCW 42.56.550(1), (3). The legislature's specific approval of in camera review in such summary proceedings also suggests that a simple, expedited approach may resolve such disputes without discovery.[4]

When discovery is necessary

When the agency fails to make a prima facie case or when the requester effectively rebuts the agency's prima facie case or shows bad faith, discovery may be necessary.

When discovery is appropriate, several principles regarding discovery in general can be utilized to ensure that discovery conforms to the rights and obligations under the PRA. In some respects, this can create some tension between the provisions for liberal discovery, and the sometimes narrow reach of the PRA. For example, when a requester

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[4] Federal courts have also noted that permitting discovery based on mere allegations that the agency failed to conduct an adequate search undermines the large body of case law holding that assertions that an agency failed to produce documents are insufficient to preclude summary judgment. *CareToLive*, 631 F.3d at 345. That is, allowing such discovery is not compatible with the federal case law establishing what constitutes an adequate search and how adequacy may be determined. Given that the majority adopts this case law for purposes of the PRA, the court should also adopt the complementary approach that delays discovery when an agency submits affidavits in an effort to show it has conducted an adequate search until the question of summary judgment on adequacy of the search is resolved.

Contrary to the majority's statement that I would delay all discovery until a hearing on the adequacy of a search is held, majority at 17, I do not advocate such a course. What should happen is that the agency should have the opportunity, prior to discovery, to show it has conducted an adequate search. All of the usual rules for summary judgment would apply, and if the agency cannot make an adequate showing sufficient to establish no material question of fact and entitlement to judgment as a matter of law, then the agency cannot prevail. Likewise, if the requester sufficiently rebuts the agency's evidentiary showing to show a material fact question exists or otherwise shows summary judgment is improper, then summary judgment should not be granted to the agency based upon its affidavits. In that event, discovery may very well be necessary to resolve the propriety of the agency's nonproduction of records.

The majority believes that discovery should be permitted to determine whether information may be forthcoming that supports a claim that the agency has withheld nonexempt records that are responsive. This use of discovery is not consistent with the expeditious procedure authorized by the PRA. It is also not consistent with the federal standard for adequacy of a search. As mentioned above, the agency's affidavits are accorded a presumption of good faith. If the agency sets forth information in sufficient detail so as to allow for rebuttal, as required under FOIA, and the requester cannot produce evidence to rebut that showing, the presumption of good faith stands.

Although the majority says that it adopts the federal case law for adequacy of a search, it refuses to actually follow important aspects of this case law.

asks for records of a specific type, this should not serve as a springboard for a broad exploration through discovery into matters not related to the request. There are several principles of discovery that can serve to ensure that discovery is related to the purposes and provisions of the PRA, the specific public records request at issue, and whether additional issues arise, such as motivation if penalties are in question.

These include: When discovery is appropriate, the trial judge may grant or deny a motion to compel discovery in the exercise of sound discretion. *See Rhinehart v. Seattle Times*, 98 Wn.2d 226, 654 P.2d 673 (1982). A discovery request must be relevant to the subject matter of the suit. CR 26(b)(1). A discovery request must be reasonably calculated to lead to the discovery of admissible evidence. *Id*. If improper discovery requests are made, a party can seek a protective order. CR 26(c); *see Rhinehart*, 98 Wn.2d 256-57 (trial court's decision regarding issuance of a protective order is within the trial court's discretion). A trial court may, on its own initiative, act to limit abusive discovery. CR 26(b). A trial court exercises broad discretion in imposing discovery sanctions. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

When granted, discovery should be well managed in PRA cases, as indeed, it should be in all cases.

Discovery in this case

In the present case, the Neighborhood Alliance of Spokane requested the complete

electronic record of the employee seating charts showing names that did not correspond to then-employed individuals but did correspond to individuals who were subsequently hired. Because the origin of the seating chart that raised the issue of improper hiring was Ms. Knutson's computer, the County searched that computer but found no additional information. Although an apparently logical place to search was Ms. Knutson's old computer, the County did not search Ms. Knutson's old computer prior to its hard drive being destroyed.

The adequacy of the County's search is therefore an important issue in this case. However, rather than an inquiry into the adequacy of the agency's search under the procedure described by federal courts under FOIA, the PRA dispute in this case became a complicated and lengthy process involving discovery requests and refusals to provide information. While I share the majority's skepticism about the County's ability to make a prima facie case that it adequately searched, and have doubts that the requesters would be unable to rebut such a showing if made, these parties have not had the opportunity to address the issue under the federal approach that the court adopts.

Unlike the majority, I would not decide this essentially factual issue on appellate review, but instead would remand. We are an appellate court, not a trial court, and we have frequently concluded that remand is the appropriate course when the original proceedings involved the wrong legal standard. *See*, *e.g.*, *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 227 P.3d 1284 (2010) (remand to the superior court for an adequate cause determination under the proper legal standard); *Antonious v. King County*, 153 Wn.2d

256, 103 P.3d 729 (2004) (remand for implementation of analysis regarding hostile work environment claim adopted pursuant to federal case law). The same should occur here, where neither the parties nor the trial court has had the benefit of our decision that federal case law on adequacy of a public records search establishes the standard in this state.

Before any further discovery issues are addressed, the trial court should provide the county the opportunity to present affidavits or declarations on the issue whether its search was adequate. Of course, the ball is in the county's court on this, so to speak, and it need not take the opportunity. I do not think placing the parties at the starting line will cause any serious difficulty, given the effort already expended in this litigation. And, insofar as the parties have acquired any information unknown at the time the Neighborhood Alliance sought the public records from the county, it would be nonsense to think the parties should ignore that information. But since we have adopted a specific, structured method for determining adequacy, familiar under FOIA but new in this state, the parties and the trial court should have the opportunity to use it.

As I have explained in more detail than the majority, this process can involve shifting burdens—the agency to make the prima facie case, a shift of burden to the requester to rebut the prima facie case if made, and other possible scenarios as well (for example, the agency's failure to make a prima facie case or the requester's ability to make out a case of bad faith). Of course, discovery may prove ultimately necessary in a PRA case involving adequacy of an agency's search, either because the agency is unable to secure summary judgment through affidavits on the issue of having conducted an

adequate search or because penalties become an issue.

Destruction of records

Because there seems to be an issue in this case regarding possible destruction of a hard drive that might have contained responsive records, I briefly comment on destruction of requested records.

The PRA recognizes that records may be destroyed by an agency in the ordinary course of operations. However, once records become subject to a public records request, the agency "shall retain possession of the record, and may not destroy or erase the record until the request is resolved." RCW 42.56.100. An electronic version of a requested record is a public record that cannot lawfully be destroyed once it is requested under the PRA. *O'Neill*, 170 Wn.2d at 149. Destruction of a requested record violates the PRA and can lead to imposition of penalties.

For example, in *Yackobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989), the city refused to produce requested records of raw data collected by the city, claiming that they did not have to be produced because they were reflected in a final report. The city destroyed the raw data records while the request was pending. The court concluded that no exemption applied, that the city's destruction of the records violated the PRA, and that the requester was entitled to attorney fees and penalties for each day he was denied the right to inspect the documents.

Similarly, under FOIA, generally an agency does not have a duty to retrieve or release documents that it legitimately disposed of prior to a FOIA request. *Chambers v.*

U.S. Dep't of Interior, 568 F.3d at 1004; *McGehee*, 697 F.2d at 1103 n.33; *see also SafeCard Servs.*, 926 F.2d at 1201; *Piper v. Dep't of Justice*, 222 F. App'x 1, 1 (D.C. Cir. 2007) (unpublished). FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152, 100 S. Ct. 960, 63 L. Ed. 2d 267 (1980). For example, in *Lechliter v. Rumsfeld*, 182 F. App'x 113, 116 (3d Cir. 2006) (unpublished), the agency's uncontradicted affidavit explained that old papers and folders were regularly purged, e-mail documents were regularly purged when time and attention allowed, and no documents were ever deliberately destroyed in response to the public records request at issue. The court found no improper withholding because the agency was not required to produce documents "'if [it] is no longer in possession of the documents for a reason that is not itself suspect.'" *Id.* (quoting *SafeCard Servs.*, 926 F.2d at 1201).

However, an agency violates FOIA if it intentionally transfers or destroys a document after a FOIA request is made that includes the document. *Chambers*, 568 F.3d at 1004; *Forsham v. Califano*, 587 F.2d 1128, 1136 n.19 (D.C. Cir. 1978) ("a government agency cannot circumvent FOIA by transferring physical possession of its records to a warehouse or like bailee"), *aff'd sub nom. Forsham v. Harris*, 445 U.S. 169, 100 S. Ct. 977, 63 L. Ed. 2d 293 (1980); *see Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 34 F. Supp. 2d 28, 41 (D.D.C. 1998) (magistrate judge told to preside over discovery for the purpose of exploring "the extent to which [the agency] . . . illegally destroyed and

discarded responsive information"); *Landmark Legal Found. v. E.P.A.*, 272 F. Supp. 2d 59, 62 (D.D.C. 2003) (referring to earlier litigation where the EPA was held in contempt and ordered to pay costs and fees "caused by EPA's contumacious conduct," that is, destroying "potentially responsive material contained on hard drives and email backup tapes").

If an agency no longer has a document for a reason that is not suspect, however, the agency does not have an obligation to take any further action to produce it, because only improper withholding violates FOIA. *SafeCard Servs.*, 926 F.2d at 1201.

Under the circumstances in this case, it appears likely that the agency had an obligation to search in places other than the computer that replaced Ms. Knutson's old computer. However, the case should be remanded for the parties and the trial court to implement the legal standard adopted by the court in this case.

<u>Whether a cause of action should be recognized or freestanding penalties awardable for an inadequate search</u>

The majority mentions the disagreement about whether there is or should be an independent cause of action for an inadequate search, but does not resolve the matter. The majority addresses the question whether an inadequate search alone supports a "freestanding" daily penalty when an agency conducts an inadequate search followed by an adequate search yielding no responsive documents, but specifically leaves the question for another day. The majority then holds that the agency here conducted an inadequate search and refused to produce responsive records and, therefore, Neighborhood Alliance

is a prevailing party entitled to costs and reasonable attorney fees.

The majority should expressly reject the idea that an inadequate search could form the basis for an independent cause of action under the PRA or support "freestanding" penalties. First, in circumstances where an adequate search would have yielded nonexempt, responsive records, the failure to conduct an adequate search is a failure to properly respond. A failure to properly respond to a public records request is treated as a denial, *Soter*, 162 Wn.2d at 750, which is actionable.

However, a failure to conduct an adequate search cannot form the basis for an action unless nonexempt responsive records exist at the time the public records request was made. If no responsive records exist, then a court cannot order their production, and the requester can never be a "prevailing party" entitled to costs, attorney fees, or penalties under the PRA. RCW 42.56.550(4) provides for an award of costs and attorney fees to "[a]ny person who prevails against an agency" in a PRA action. Similarly, the statute provides for an award of penalties within the court's discretion to "such person." "Such person" refers back to "[a]ny person who prevails against an agency" and therefore penalties are also limited to "prevailing parties." As the majority accurately points out, we have held "'prevailing' relates to the legal question of whether *the records* should have been disclosed *on request*." Majority at 23 (emphasis added) (quoting *Spokane Research*, 155 Wn.2d at 103-04).

But if no responsive document exists, there is no document that could or should have been disclosed on request. Therefore, there is no "prevailing party" when, following

an inadequate search, a party subsequently obtains no documents because no responsive documents exist. Our decision in *Spokane Research* forecloses costs and reasonable attorney fees in such circumstances because the party cannot be a "prevailing party," and without "prevailing party" status, there is no statutory entitlement to costs and attorney's fees. Finally, a court cannot order production of records that do not exist.

The import of this, first, is that there should be no question that "freestanding" daily penalties are not awardable when an agency conducts an inadequate search and ultimately no responsive documents are ever produced/found. No penalties can be awarded at all absent "prevailing party" status. Second, no independent cause of action for inadequacy of a search should exist because there is no possible remedy or relief to be afforded since, if no responsive records exist, there is no possibility that any records can be ordered produced, and no possible attorney fees, costs, or penalties.

Thus, an inadequate search, in and of itself, cannot be the basis of an independent cause of action under the PRA. Rather, as explained, an inadequate search can only be the basis for an action if responsive records exist but are not produced, and in this event, of course, the improper response is treated as a denial, which is actionable.

Rather than leave these questions lurking in the background of any PRA request, I would resolve them. Agencies should not fear being sued under the PRA based solely on whether a search is adequate, or fear having penalties imposed solely based on inadequacy of a search. Only a denial or its equivalent is actionable, and unless an inadequate search results in a failure to produce responsive documents, it is not

equivalent to a denial.

Conclusion

The federal approach to determining adequacy of an agency's search for records in response to a public records request is entirely consistent with the PRA. However, to obtain all of the benefits it entails, we should adopt it in full and allow parties the opportunity to resolve the adequacy of search issue on affidavits before discovery commences. As federal case law shows, many cases can be resolved in part or in full on summary judgment by following this approach. Time, effort, costs, and avoidance of discovery disputes can all be achieved without any harm to the spirit or letter of the PRA. In fact, the PRA includes specific provisions for just this type of speedy, expeditious inquiry. Discovery is not denied, but it is delayed until it becomes necessary.

While the majority correctly adopts the federal reasonableness standard for determining the adequacy of a search, it unfortunately does not fully explain the standard or follow it completely.

This case should be remanded for implementation of the federal standard for adequacy of a search. I would not permit further discovery in this case until the agency has at least an opportunity to make a showing that it conducted an adequate search. Certainly on the record we have, it appears unlikely the attempt would be successful and perhaps the agency will not even make it.

But while the limited record suggests the County failed to conform its responses to the PRA under the federal approach we adopt, we are an appellate court, not a trial court.

We should not in the first instance resolve the issues in this case under the new standard announced.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:
Justice Mary E. Fairhurst