SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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| ISABELLE BICHINDARITZ,<br>Plaintiff,<br>v.<br>UNIVERSITY OF WASHINGTON,<br>Defendant. | No. 12-2-05747-8 SEA<br>**FINDINGS OF FACT AND CONCLUSIONS OF LAW** |

THIS MATTER came on regularly before this Court for a trial held by affidavit pursuant to RCW 42.56.550. The Court having considered the following:

Plaintiff's Trial Brief in Support of Trial by Affidavit;

Plaintiff's Trial Exhibits and Deposition Transcripts Submitted in Support of Trial by Affidavit;

Defendant University of Washington's Trial Brief;

Defendant University of Washington's Submission of Evidence for Trial;

Declaration of Seth J. Berntsen in Support of University of Washington's Trial Submission;

Declaration of Orlando Baiocchi in Support of University of Washington's Trial Submission;

Declaration of Madolyne Lawson in Support of University of Washington's Trial Submission;

Declaration of Larry Wear in Support of University of Washington's Trial Submission;

Declaration of Eliza Saunders in Support of University of Washington's Trial Submission; and,

The record of these proceedings.

Having been fully advised, the Court makes the following findings of fact and conclusions of law.

## I. FINDINGS OF FACT

1.1. Plaintiff Isabelle Bichindaritz was at all times material to this lawsuit a resident of King County, Washington.

1.2. University of Washington University of Washington is an agency of the State of Washington.

1.3. On September 9, 2009, Plaintiff filed a Public Records Act ("hereafter referred to as PRA") request with the University of Washington. Ex. 9. The request asked for a complete copy of all of her personnel files and public records at the University of Washington, at the University of Washington Tacoma, and at the Institute of Technology in Tacoma, where she worked at the time. She also requested every email related to her, including emails to or from Institute of Technology Director Dr. Orlando Baiocchi and colleague Dr. Larry Wear.

1.4. The September 9, 2009 PRA request was assigned #09-11792. Ex. 11

1.5. The University did not disclose certain responsive emails, which Dr. Bichindaritz could have used in the federal court litigation, until November 2011, after discovery had closed in the federal case. Ex. 7 and 8 (national origin emails), Ex. 70, Ex. 76 at 6. These emails criticized Dr. Bichindaritz's French national origin. Ex. 7 and 8. The emails reflect a print date of October 6, 2009, as listed in the bottom right-hand corner, which is consistent with Dr. Baiocchi's memory of printing the emails. *Id.*, Ex. 71

1.6. On or around September 15, 2009, the University sent letters to individuals who may have documents responsive to #09-11792. Ex. 10, 34, 41, 42, 53, see also Ex. 36, 37, 38, 39, 40, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 55, 60. The letters asked the individuals to produce responsive documents by October 8, 2009 or earlier. Ex. 10, 34, 41, 42, 53.

1.7. In a letter dated September 17, 2009, the Office of Public Records and Open Meetings, (hereafter referred to "OPR"), estimated that answering Dr. Bichindaritz's records request, numbered #09-11792, would take approximately twenty-five days. Ex. 11. OPR also notified her that they would make some of the records available to her on a rolling basis to avoid unnecessary delay.

1.8. During her deposition, UWT employee and CR 30(b)(6) witness BrieAnna Bales, who assisted with the 2009 PRA request, testified that boxes of documents responsive to the PRA request were taken up to OPR in Seattle in late September 2009. Ex. 72. Bales testified that a second, much smaller batch of documents was sent via intercampus mail in mid-late October 2009. *Id.* at 13, see also Ex. 35. Bales testified that they received responses from every individual from whom they had requested responses and that these were completed by October 2009. *Id.* Bales' testimony is corroborated by her supervisor at the time, and CR 30(b)(6) witness Mike Wark. Ex. 73. The October 2009 time frame is also consistent with Dr. Baiocchi's testimony that he printed the documents in October 2009 after requesting a short extension when he would be out of the country. Ex. 71, Ex. 2.

1.9. The Court finds that by the end of October 2009, all of the documents responsive to Dr. Bichindaritz's 2009 request were assembled by the University, slightly more than 12,000 documents that were made available to Dr. Bichindaritz in late 2011.

1.10. In emails produced "on a rolling basis," the discussions about Dr. Bichindaritz's tenure, were produced blank with the explanation that: "Faculty Tenure Review" is exempt from public requests disclosure due to RCW 2.56.230(2)/ 42.56.250(2). Ex. 33. Other documents contained redacted sentences and paragraphs about Dr. Bichindaritz in gray boxes with the explanation "RCW 42.56.230(2)." Ex. 75.

1.11. On November 12, 2009, Dr. Bichindaritz submitted another PRA request, which was assigned #09-11886. Ex. 12, Ex. 3, Ex. 56, 57, 62. On June 7, 2010, Dr. Bichindaritz made another PRA request for one specific email. Ex. 18, see also Ex. 58, 59.

1.12. Over several months, Dr. Bichindaritz paid for and picked up boxes of emails responsive to her 2009 records request, which were made available on several dates in October and December 2009 and January and April 2010, but this was only a fraction of the responsive documents. Ex. 4. Dr. Bichindaritz contacted the OPR in June 2010 to ask when the final documents would be provided to her and was told that the request would be completed in July 2010. Ex. 76.

1.13. According to the University, in its court-ordered response to Plaintiff's Third Set of Interrogatories, dated July 29, 2013, the University offered production of documents to Plaintiff's September 9, 2009 PRA request in four stages, as follows:

- Stage 1: October 13, 2009, which were picked up by the plaintiff on or about November 17, 2009;
- Stage 2: December 23, 2009, which were viewed by the plaintiff between January 25, 2010 and April 1, 2010;
- Stage 3: January 26, 2010, which were picked up by the plaintiff on or about April 1, 2010; Ex. 69.

1.14. On March 11, 2010, Dr. Bichindaritz filed a complaint with the EEOC alleging sex discrimination, retaliation, and national origin discrimination, which gave notice to the University that she was likely going to file a lawsuit. Ex. 63.

1.15. On April 5, 2010, the University offered for production more documents responsive to Plaintiff's September 9, 2009, which University has identified as Stage 4, and which were picked up by the plaintiff on or about May 25, 2010. Ex. 69.

1.16. In a document produced by the University on Friday, May 31, 2013, it appears that by June 9, 2010, there were still 3.5 boxes to review regarding Dr. Bichindaritz's 2009 PRA request. Ex. 1 at UWPR000113.

1.17. Plaintiff was an assistant professor at the University's Tacoma campus at the Institute of Technology, from 2002 to 2010. In 2009, the University denied Plaintiffs third and final application for promotion and tenure ("P&T"). Her employment ended in June 2010, Ex. 78.

1.18. On July 30, 2010, the University offered for production more documents responsive to Plaintiff's September 9, 2009, which University has identified as Stage 5, and which were picked up by the plaintiff on or about September 13, 2010. Ex. 69.

1.19. According to the University, the productions through July 2010 represent only about one-half of the documents that had been assembled by October 2009—so as of July 30, 2010, about 12,000 pages had still not been produced by the University. Ex. 68.

1.20. On August 25, 2010, Dr. Bichindaritz filed a discrimination complaint in federal district court, which did not include national origin discrimination. Ex. 78.

1.21. With 12,000 documents still not produced, even though they had been assembled by October 2009, more than one year passed without any action from the University.

1.22. On November 12, 2010, the federal judge set trial for October 3, 2011 and the discovery cutoff for June 5, 2011. Ex. 64.

1.23. Dr. Bichindaritz was out of the country between mid-June 2010 and February 1, 2011, working in France. Ex. 76. During that time, her former attorney, Rick Gautschi, handled some of the follow-up with the public records requests. *Id.* Dr. Bichindaritz submitted an email to the OPR following-up with them about the advancement of her request for public records on July 28, 2010 and learned that the final emails would be provided in September 2010. *Id.* However, the OPR later informed Dr. Bichindaritz that it was necessary to continue working on her request through October 2010. Ex. 13, 14, 15, 16, 17, 18, 19.

1.24. During one of her conversations with the OPR, Dr. Bichindaritz was informed that the responsive documents were in the possession of the Attorney General's Office at the University of Washington. Ex. 76, Ex. 79.

1.25. The University asserts that in 2010, Dr. Bichindaritz's PRA request #09-11792 was changed to TR-2010-00156. Ex. 70, Ex. 79.

1.26. On December 9, 2010, the University offered more responsive documents for production, which were not picked up by the plaintiff. Ex. 69. The University believes that these documents were subsequently produced in the late 2011 production. *Id.* But the University does not know how many documents were included in this production. Ex. 68.

1.27. On January 31, 2011, the University sent Dr. Bichindaritz, through her attorney, a letter referencing TR-2010-00156 stating:

> On December 9, our office mailed you an invoice for stage 6 of the material responsive to your public records request. To date, we have not received payment for these records.

> Please remit payment or call and make an appointment to view these records by February 7, 2011. If we have not heard from you by that date, we will dispose of the copied records and close your request.

Ex. 20. On February 7, 2011, likely in response to the January 31, 2011 letter, Mr. Gautschi called the University and closed TR-2010-00156. Ex. 21.

1.28. The discovery cut-off date in the federal litigation was June 5, 2011. Ex. 64. After still having not received the remaining documents, Dr. Bichindaritz contacted the OPR and asked them to resume request #09-11792. Ex. 22. She sent a letter dated June 6, 2011 to that effect: "This letter informs you that I am asking you to restart processing the documents from my first public records request to you, which is #09-11792." *Id.* Dr. Bichindaritz was told that about half of this request had been processed; she wrote, "You indicated to me that still about 10,000 documents have not been produced. I would like to receive these directly at the following address ..."*Id.* In fact, twelve thousand documents had not been produced at that time. Ex. 79.

1.29. The OPR answered on June 14, 2011, entering a new case number for this request, which became #PR-2011-00286, with the explanation: "I am writing to acknowledge receipt of your public records request received by this office on June 7, 2011. We estimate we will respond to your request by July 20, 2011. As allowed by RCW 42.56.520, if additional time is needed to locate, review or assemble documents or to notify third parties affected by your request, we will contact you." Ex. 23.

1.30. At her deposition, OPR Program Coordinator Madolyne Lawson admitted that she could have simply reopened the request under the old case number. Ex. 74 (Lawson Dep. at 29-30). Dr. Bichindaritz followed-up with a certified letter on June 16, 2011:

> I am only requesting the public records already assembled by you in the above request #09-11792 since you have confirmed to me that these documents are

> available. Therefore I am not requesting a new set of documents, as your letter dated 6/14/2011 seems to indicate. I am not in a situation to be able to wait the years taken by request #09-11792 to assemble the documents.

Ex. 24.

1.31. In her deposition, OPR Director Eliza Saunders testified that OPR already had the documents responsive to Dr. Bichindaritz's 2009 PRA request. Ex. 70 (Saunders Dep. at 36-37). This is why OPR did not send out letters requesting the documents from individuals identified in the request as they had done in 2009 (See Ex. 10 and 35 for sample 2009 letters).

1.32. Trial in the federal court litigation, which was previously scheduled for fall 2011, was rescheduled to March 19, 2012. Ex. 64.

1.33. After several emails notifying her of delays in the availability of the records, the final documents responsive to request #09-11792 were made available to Dr. Bichindaritz electronically in several batches:

> 8/15/2011 Stage 1 at a cost of $661.18
> 10/7/2011 Stage 2 at a cost of $273.58
> 11/3/2011 Stage 3 at a cost of $468.83
> 11/15/2011 Stage 4 at a cost of $420.98

Ex. 4, Ex. 25 (8/15/11 email from Palmer re: first batch of documents and plaintiff's response), Ex. 26 (8/17/11 email notifying plaintiff of delay), Ex. 27 (9/15/11 email notifying plaintiff of delay), Ex. 28 (10/7/11 email from Palmer re: second batch of documents reviewed), Ex. 29 (email exchange between Palmer and plaintiff regarding additional delay and remaining documents), Ex. 30 (11/3/11 email notifying plaintiff of delay and plaintiff's response), Ex. 31 (11/3/11 email from Palmer re: payment for additional records), Ex. 32; *see also* summary of production at Ex. 79. The University charged the plaintiff $0.15 per page even though the University provided electronic copies, not paper copies. Ex. 4. Moreover, the University made

no offer to produce the documents for free on its website as provided by RCW 42.56.520 and WAC 44-14-04004. Ex. 67.

1.34. In its communications with Dr. Bichindaritz, the University repeatedly referred to the 2011 productions by referencing the 2009 request number, which is strong evidence that the University considered this to be a reactivation of the 2009 request:

- Stage 1: "This letter is provided in response to your public records request for documents prepared, but not yet provided to you in response to your previous public records request #09-11792, Bichindaritz." Ex. 67, Aug. 15, 2011 letter.
- Stage 2: "This letter is provided in partial response to your public records request for further documents from your previous public records request #09-11792." Ex. 67, Oct. 7, 2011 letter.
- Stage 3: "This letter is provided in partial response to your public records request for documents responsive to your previous public records request #09-11792." Ex. 67, Nov. 3, 2011 letter.
- Stage 4: "This letter is provided in final response to your public records request for documents compiled from your previous public records #09-11792." Ex. 67, Nov. 15, 2011 letter.

1.35. University filed a summary judgment motion in federal court on July 5, 2011. Ex. 78 (federal docket). The trial judge denied summary judgment on September 19, 2011. *Id.*

1.36. Dr. Bichindaritz visited the OPR on August 19, 2011 to view all the Stage 1 records identified above, selected some, and received an electronic copy of them on a CD after paying for them. Ex. 76. Because of the events taking place in the federal lawsuit, and her financial situation, she did not request at that time to view or receive the records in Stages 2, 3, and 4. *Id.* However, Dr. Bichindaritz contacted the OPR by email on January 20, 2012 to let them know that she wanted to obtain all of the records, and to ask how much this would cost. *Id.* The University answered by email on January 30, 2012 advising plaintiff that it would make the records available to her without charging for copies: "We are no longer charging for records

responsive to public record requests..." Ex. 6. Dr. Bichindaritz then received a CD in the mail with Stages 2, 3, and 4 on February 1, 2012. *Id.* See also, Ex. 79.

1.37. The Stage 3 production offered to Dr. Bichindaritz by the University on November 3, 2011 includes matters of import in the federal litigation, emails in which peers and management exchanged comments that refer to her French national origin. Ex. 7 and 8, Ex. 70. Dr. Bichindaritz is French and speaks English with an accent. Ex. 76. These emails were not produced by the University during the federal litigation. *Id.* Dr. Bichindaritz also observed that other emails in the production contain new and very important evidence about her tenure candidacy. *Id.* Dr. Bichindaritz's former attorneys deposed Orlando Baiocchi and Larry Wear in 2011. To her knowledge, her attorneys did not have copies of these emails, and have never had copies of these emails. *Id.*

1.38. A bench trial was held from April 9, 2012 to April 16, 2012, and the court entered judgment for the University. Ex. 64.

1.39. The 2011 Stage 1-4 documents were assembled by the University by October or November 2009. As of June 6, 2011, all documents should have been produced, thus, the delay in production was as follows:

Stage 1: 70 days.
Stage 2: 123 days.
Stage 3: 150 days.
Stage 4: 162 days.

1.40. This Court conducted in camera review of the redacted documents and determined that several should have been produced unredacted. Ex. 66. Important to the federal litigation, one of the documents was an email between Wear and Baiocchi revealing that a "nursing person who was on Isabelle's committee hinted that we might be picking on Isabelle's

teaching because she is a woman." Ex. 66 (Bates 006792). It was written on November 14, 2007. *Id.* This is the same time frame that Dr. Bichindaritz's first tenure application was considered. Ex. 77. The document was printed on October 6, 2009, but not produced unredacted until the July 2013, pursuant to the Court's order. Ex. 66 (Bates 006792), Ex. 77. Dr. Bichindaritz never saw this document during her federal litigation or during the adjudication, because it was never produced. Ex. 77. Yet, its absence in the federal litigation permitted the University to argue in the federal litigation that no one had complained that she was a victim of gender discrimination.

1.41. In this PRA proceeding, plaintiff originally filed state discrimination and retaliation claims against the University under the Washington Law Against Discrimination as a "placeholder" to avoid issues with the statute of limitations in the event the Ninth Circuit appeal succeeds and the case is remanded back to federal court. Dkt. #1. On June 4, 2012, plaintiff filed a motion to stay any discovery or other proceedings under those "placeholder" claims pending a favorable outcome of the federal appeal. Record of these proceedings, Dkt. #13.

1.42. On June 8, 2012, the University filed a motion for partial summary judgment and for sanctions. Record of these proceedings, Dkt. #18. In the motion, the University of Washington argued that the statute of limitations had run on the claims before June 2011 because plaintiff's former counsel withdrew the 2009 PRA claim in February 2011. *Id.* The University did not reveal to the Court or to the plaintiff that all of the 12,000 documents had been assembled in 2009 but not produced until 2011. *Id.* This Court ultimately granted University's summary judgment motion and awarded costs and fees as a sanction totaling $20,266.16, at 12 per cent interest. Record of these proceedings, Dkt. #67.

1.43. Without sufficient explanation, the University withheld entire documents instead of redacting those portions of documents withheld that were claimed to be exempt under a particular theory. Ex. 67.

1.44. The University admits that the documents listed in its withholding index contained the wrong citation. This is also a violation of the PRA. Saunders claimed:

> In response to Dr. Bichindaritz's 2011 Request, the OPR stamped some documents as redacted under "RCW 42.56.230(2)" and further cited that provision in the production cover letters (Exhibits 4, 9, 12, and 15) and the withholding inventory (Exhibit 15). In the midst of the OPR's production, however, the Washington Legislature amended RCW 42.56.230 by adding a new subsection .230(2). This resulted in former subsection .230(2), an exemption concerning employee privacy, being bumped down to, and renumbered, as new subsection (3). When the OPR redacted documents citing subsection .230(2), it intended those redactions to be based upon the employee-privacy exemption currently codified at subsection 23 230(3).

Ex. 67. The amendment to RCW 42.56.230 was approved by the legislature on April 27, 2011 and became effective July 22, 2011. PUBLICATION--EXEMPTIONS--PERSONAL INFORMATION, 2011 Wash. Legis. Serv. Ch. 173 (S.S.B. 5098) (WEST).

## II. CONCLUSIONS OF LAW

2.1. "Agencies are required to disclose any public record on request unless it falls within a specific, enumerated exemption. RCW 42.56.070(1). 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." *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 19, 125 (2011) (citing RCW 42.56.550(1) and *Sanders v. State*, 169 Wash.2d 827, 845–46, 240 P.3d 120 (2010)).

> Fed.R.Civ.P. 54(b) (providing that interlocutory orders that resolve fewer than all claims are "subject to revision at any time before the entry of [final] judgment"). Said power is committed to the discretion of the district court, *see Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 12, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (noting that "every order short of a final decree is subject to reopening at the discretion of the district judge").

*Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514-15 (4th Cir. 2003).

2.2. The PRA "'is a strongly worded mandate for broad disclosure of public records.'" *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). "The PRA's purpose is to increase access to government records." *Sanders v. State of Washington*, 169 Wn.2d 827, 849, 240 P.3d 120 (2010). To that end, the legislature has declared:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030 (Emphasis added).

2.3. Under the PRA, each agency must make their records available for public inspection unless, "the record falls within the specific exemptions . . . of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.040. The statute permits the State to redact certain information "to prevent an unreasonable invasion of personal privacy interests protected by this chapter," but "the justification for the deletion shall be explained fully in writing." *Id.*

2.4. If the University fails to provide requested documents in violation of the PRA, the University must pay attorney fees, costs, and penalties to the person who requested the documents:

> 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 to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

RCW 42.56.550(4). "The PRA penalty is designed to discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute." *Yousoufian v. Sims,* 168 Wn.2d 444, 229 P.3d 735 (2010) (internal quotations and citations omitted). A penalty "is not dependent upon a showing of an agency's good or bad faith in its claim of exemptions under the Act." *Amren v. City of Kalama*, 131 Wn.2d 25, 37, 929 P.2d 389 (1998).

2.5. "Records are either 'disclosed' or 'not disclosed.' A record is disclosed if its existence is revealed [by the State] to the requester in response to a PRA request, regardless of whether it is produced." *Sanders v. State of Washington*, 169 Wn.2d at 836. "Disclosed records are either 'produced' (made available for inspection and copying) or 'withheld' (not produced)." *Id.* "A document not covered by one of the exemptions is, by contrast, 'nonexempt.' Withholding a nonexempt document is 'wrongful withholding' and violates the PRA." *Id.* (citing *Yousoufian* at 429).

2.6. "Responses to requests for public records shall be made promptly by agencies." RCW 42.56.520. Under this section, an agency has five days to respond to a PRA request by: "(1) providing the requested records, (2) providing a reasonable time in which the requested records will be provided, or (3) denying the request." *Smith v. Okanogan County*, 100 Wn. App. 7, 994 P.2d 857 (2000), *Doe I v. Washington State Patrol*, 80 Wn. App. 296, 908 P.2d 914 (1996). A delayed response, especially when time is of the essence, is an aggravating factor justifying an increased penalty. *Yousoufian v. Sims, Id.* At 467.

2.7. The University knew in March 2010 that Dr. Bichindaritz filed an EEOC Complaint to include the national origin claim. The University was a party to the subsequent federal lawsuit, and delayed the production of documents in this any discovery requests until the

after discovery time limits in the federal lawsuit had passed. Yet, limits set by the trial court under civil rules of discovery, underscore that time was of the essence in the production of the PRA documents. *Yousoufian v. Sims*, *Id.* At 467.

2.8. A summary of salient facts supporting a finding of unreasonable delay are as follows:

(1) The 12,000+ documents were assembled in October or November 2009.

(2) There were 3.5 boxes of documents left to review in June 2010, implying the University languished in their document review between October 2009 and February 2011, and again after June 2011 during the pendency of the federal suit.

(3) Circumstantially, the record reflects the University reviewed and completed the withholding index before the statute changed, explaining why the University cited the wrong section in the index—before July 2011.

(4) Uncontested, the University took between 752 and 744 days to respond to plaintiff's request (stages 1-4).

2.9. Taking over two years to produce documents is bitterly, indeed, grievously unreasonable as a matter of law. "The burden of proof shall be on the agency to show that the estimate it provided is reasonable." RCW 42.56.550(2). The University has not met its burden. The University's reliance on *West v. Wash. State Dept. of Natural Res.*, 163 Wn. App. 235, 258 P.3d 78 (2011), is particularly unjustified. Unlike these facts, in *West*, the court found a six-month delay reasonable because the plaintiff kept on changing the substance of the request, resulting in the University of Washington hiring an outside expert to locate missing documents. *Id.* at 245-46.

2.10. Additionally, "withholding an entire record where only a portion of it is exempt violates the act." WAC 44-14-04004; see also *Seattle Firefighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 132, 737 P.2d 1302 (1987). Ex. 67 shows that on dozens of occasions the University withheld entire documents without explaining why the entire document needed to be withheld. Also, there are dozens of examples in which the University does not sufficiently identify the author, recipient, subject of the document. This is also a violation of the PRA.

> One way to properly provide a brief explanation of the withheld record or redaction is for the agency to provide a withholding index. It identifies the type of record, its date and number of pages, and the author or recipient of the record (unless their identity is exempt). The withholding index need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly invoked the exemption.

WAC 44-14-04004; *see also Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 271, n.18, 884 P.2d 592 (1994) ('*PAWS II*'). Thus, the University failed to properly identify the documents withheld.

2.11. Moreover, the University admits that it cited the wrong statutory basis for a number of withholdings listed in its withholding index Ex. 67 (Saunders Dec., Ex. 15). This is a clear violation which raises some inferences for the penalty phase. First, the University would have cited to the correct provision because OPR is competent and knows the law. Second, the citation to the law before the change in July 2011, properly leads to the conclusion that the University created the withholding index before the law changed, which means the 12,000+ documents could have been produced in June 2011.

2.12. Most importantly, the University violated the PRA in failing to produce 12,000 documents assembled in 2009 until the end of 2011. "Where the PRA is violated, trial courts must award penalties." *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 465, 229 P.3d 735,

747 (2010). The PRA is a forceful reminder that agencies remain accountable to the people of the State of Washington:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

*Id.*, RCW 42.56.030.

2.13. The Washington Supreme Court has left in the hands of trial judges the decision of how large or small a penalty should be, and provided a nonexclusive list of mitigating and aggravating factors the court may consider. *In Yousoufian*, that Court stated, "We emphasize that the factors may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate considerations. Additionally, no one factor should control. These factors should not infringe upon the considerable discretion of trial courts to determine PRA penalties." *Id.* at 468.

2.14. Listed as follows, the Court has considered all, both mitigating and aggravating factors. The mitigating factors include:

(1) a lack of clarity in the PRA request;

(2) the agency's prompt response or legitimate follow-up inquiry for clarification;

(3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions;

(4) proper training and supervision of the agency's personnel;

(5) the reasonableness of any explanation for noncompliance by the agency;

(6) the helpfulness of the agency to the requestor; and

(7) the existence of agency systems to track and retrieve public records.

*Id.* at 467.

2.15. As to the first factor, there is no evidence that the 2009 request was confusing or needed clarity, nor the resumption of the 2009 request in Plaintiff's 2011 request.

2.16. As to the second, third and fifth factors, the University listed its reasons for not producing 12,000 pages for a two year period, as follows:

> Documents responsive to Plaintiffs PRA requests, including emails, were promptly produced on a rolling basis after they had been assembled and reviewed for potential exempt information. Various factors contributed to the time it took to produce records, including the broad scope of the requests, that the records were in the possession of at least 96 different record holders in at least 11 different departments across 2 different campuses, the massive volume of records assembled by record holders and provided to the OPR (more than 25,000 pages counting records responsive to both Plaintiff s 2009 and 2011 PRA Requests), the nature of the records (including tenure files and faculty emails) contained statutorily exempt information requiring extensive time to review, the volume of work at the OPR during this period and the limited staff available at the OPR. Moreover, Plaintiff closed her 2009 PRA Request on February 7, 2011 and did not purport to re-open it (by initiating another request) for another four months, further delaying the production of records. *See also*, the declarations of Madolyne Lawson and Eliza Saunders and the exhibits thereto. Ex. 68.
>
> These are unsatisfactory under the current case law.

2.17. On the issue of timeliness and reasonableness of delay, the University urged the Court to find that the University's work resources were stretched with fewer personnel; that all documents after the 2011 request were provided within five months, (save those ordered by the court); that the exemptions identified on the redacted documents justified non-disclosure; and that Plaintiff's own delay in retrieving the documents vitiated any delay or showing that "time was of the essence." These reasons are insufficient in this Court's view under the current case law for the following reasons: First, the University's devotion of resources to PDA requests is solely within its discretion and, having fewer personnel is not recognized as a justification because of the strict time statutory

constraints. Second, bad faith or dishonesty are weighty propositions yet applicable here diminish the argument that five months was sufficient. Given the context of ongoing litigation from March of 2010 until disclosure in November of 23011, more than five months are at issue. This litigation was known to the University, thus , this Court is required to consider whether it can rule out the client's self-interest as an over-arching motive or constitutes bad faith.

Without litigation there is arguably no motive for nondisclosure, with it there is the client's self-interest, motive in fact. All documented communications concerning the plaintiff's tenure process were pertinent to the PDA request as well as the federal suit. These issues were not narrow, as only gender or national origin discrimination, but broad because of the ambit of other available claims, as alleged retaliation. The University's liability exposure as a government entity with vast financial resources only heightened the need for a prompt and thorough records review. Yet, the record shows this is was completed by the end of October, 2009.

Thus, because these records were assembled within several weeks of the request despite of their numerousity, that they were not produced to the plaintiff in a timely way required by law, only points to ongoing litigation as motive for delay. Here, the timetable of disclosures reveal circumstantially that the plaintiff's requests were thwarted, and thus failure to produce the documents only skewed in the University's favor.

Upon close scrutiny, such a delay is unreasonable in light of the strict deadlines of the PDA. The Court certainly considered the fact that plaintiff's counsel abandoned the request amid litigation, which ordinarily would have vitiated plaintiff's 2009 claim. Because this court had already granted partial summary judgment, that fact was not dispositive. By reactivating the 2009 PDA request on June 6, 2011, plaintiff's request could have been met the next day, June 7, 2011, given completed assembled documents.

Of lesser concern, as to the second factor, the agency's actions of ongoing communications in the context of litigation were meaningless by continually extending distribution without giving "good" cause, punctuated by an inventory list which was not accurate. Finally, in view of what was ultimately discovered in the second to the last distribution, the two emails of substance, the delayed distributions strongly suggest the interposition of self-interested litigation motives.

Finally, the last factor, unhelpful to the University, the court-ordered interrogatory responses show that the University did not keep track of its records production in 2009. Accordingly, the mitigating factors do not diminish the wrong attended upon the plaintiff here.

2.18. *In Yousoufian,* the Court also listed aggravating factors that may support increasing the penalty which are:

(1) a delayed response by the agency, especially in circumstances making time of the essence;

(2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions;

(3) lack of proper training and supervision of the agency's personnel;

(4) unreasonableness of any explanation for noncompliance by the agency;

(5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency;

(6) agency dishonesty;

(7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency;

(8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency; and

(9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case. *Yousoufian*, 168 Wn.2d at 467-8.

2.19. Under the analysis above in 2.17, the first, fourth, fifth and sixth factors are sufficient to warrant a finding an aggravating factor, The nurse-related email was printed in 2009 and not produced until after the June 2011 discovery cutoff in the federal suit, highly illustrative of intentional delay.

2.20. Actual economic loss, the eighth factor, conceded by plaintiff as not a major aspect of this analysis, because it is difficult to prove, the Court finds that because she was terminated when there were undisclosed documents which may have helped her prove her claim. An economic loss was indeed present; its scope, however remains unrelated to this PDA violation.

2.21. Addressing the ninth factor, deterrence is defined as: "a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case." RCW 42.56.550(4) There are 12,000 documents which should have been produced in 2009 or early 2010 and were not produced until later in 2011. The full extent of the statutory penalty is $100 per day per record. "Trial courts may exercise their considerable discretion under the PRA's penalty provisions in deciding where to begin a penalty determination." *Id.* at 466-7, RCW 42.56.550(4).

Here, this Court finds that a penalty should be awarded from June 7, 2011 until November 15, 2011, so the award will be allocated according the time periods outlined in plaintiff's trial brief. Stage 1-4 documents were assembled by the University by October or November 2009; yet from June 6, 2011, the date of plaintiff's request to resume her initial PDA request the next day, June 7, 2011, the documents should have been produced. Accordingly, the penalty for the delay in production is as follows:

Stage 1: 70 days (after June 7, 2011) x 4,379 pages = $153,265
Stage 2: 123 days x 1,795 = $110,392.50

Stage 3: 150 days 3,112 = $233,400
Stage 4: 162 days x 2,793 = $226,233

At fifty cents per day, per record, the total penalty will be $723,290.50. While the plaintiff urged a two dollar per day per record, resulting in sums of $2,893,162.00 in penalties, the Court declines.

## CONCLUSION

In summary:

1. The University is liable under the PRA for failing to produce 12,000 documents that were assembled and ready for distribution by October 2009;

2. A penalty in accordance with the mitigating and the aggravating factors identified by the Supreme Court should be the sum of $723,290.50;

3. Plaintiff is awarded reasonable attorney fees and costs, which shall be heard by separate motion to be filed within thirty-days from the date of this order.

DATED this 6th day of September, 2013.

Monica J. Benton
King County Superior Court Judge

**SUPERIOR COURT FOR THE STATE OF WASHINGTON FOR KING COUNTY**

SABELLE BICHINDARITZ

Plaintiff,

v.

UNIVERSITY OF WASHINGTON

Defendant

No. 12-2-05747-8 SEA

ORDER GRANTING PLAINTIFF'S MOTION FOR ONE-DAY EXTENSION TO SUBMIT TRIAL BRIEF AND DEFENDANT'S MOTION TO STRIKE UN-TIMELY MOTION FOR RECONSIDERATION

**THIS MATTER**, having come before the Court, and the Court having considered Plaintiff's Motion for One-Day Extension to Submit Trial Brief; the Declaration of John P. Sheridan in Support of the Plaintiff's Motion for One-Day Extension to Submit Trial Brief; the Defendant's Response; the Plaintiff's Reply and considered the records and files herein, and Defendant's Motion to Strike Plaintiff's Untimely Motion for Reconsideration.

**IT IS HEREBY ORDERED** that the Plaintiff's Motion for One-Day Extension to Submit Trial Brief is GRANTED. The deadline is extended from August 12, 2013. Defendant's Motion to Strike Plaintiff's Untimely Motion for Reconsideration is also GRANTED.

DONE IN OPEN COURT this _4th__ day of September, 2013.

MONICA J. BENTON
SUPERIOR COURT JUDGE

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