☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set:
Date: August 1, 2025
Time: 9:00 a.m.
Judge: Hon. John C. Skinder
Dispositive Motion Calendar

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

THE U.S. SPORTSMEN'S ALLIANCE FOUNDATION Plaintiff, v. WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE, Defendant.	NO. 25-2-00342-34 WDFW'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff's Motion for Summary Judgment (MSJ) fails to set forth undisputed material facts that entitle Plaintiff to relief. Far from it: the only undisputed facts show that WDFW diligently complied with the Public Records Act (PRA). Further, the limited set of undisputed facts are stripped of all relevant context by Plaintiff's omission of any and all evidence of what WDFW did to process Plaintiff's PRR. WDFW submitted considerable evidence on that point in support of its Merits Brief[1], and WDFW relies on that same evidence here.

[1] The Court previously set a merits hearing on the issue of liability for August 15, 2025: two weeks after this motion is set for hearing. Statement of Issues and Case Schedule Order. That hearing date and briefing schedule was agreed to by the parties. *Id.* Plaintiff made no attempt to amend the briefing schedule, and instead filed this MSJ, thereby creating a staggered briefing timeline, with WDFW having already submitted its Merits Brief.

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Rather than address the substance, Plaintiff makes wild, sweeping claims that are unsupported by evidence, disputed by contrary evidence, and irrelevant to the legal issues. Plaintiff then applies its unsupported version of the facts to a legal argument that overtly asks the Court to ignore governing law. Plaintiff's denial claims fail under the well-established legal principle that denial of access to records is a prerequisite to any claim under RCW 42.56.550(1), and when an agency processes a request in installments, it does not deny records until it has finished producing installments. It is undisputed that WDFW was still processing Plaintiff's sprawling, 22-part public records request (PRR) at the time this lawsuit was filed. At that time, WDFW had already conducted extensive custodian-based searches across multiple programs and regions, had reviewed over 37,000 potentially responsive electronic records for responsiveness and redactions, had produced records in multiple installments, and continued to provide reasonable estimates of time to Plaintiff for further installments. Plaintiff admits these facts. But following the same misguided theory, Plaintiff claims WDFW's search was inadequate solely because it was continuing to progress when this lawsuit was filed. MSJ at 17. As a result, Plaintiff's denial claims fail.

Plaintiff's delay claims fare no better. Plaintiff makes no factual argument that any of WDFW's time estimates were unreasonable. Plaintiff instead openly asks the Court to disregard binding precedent, and then asks the Court to adopt a standard that has been rejected by additional, equally binding precedent. The Court cannot simply ignore binding appellate decisions. The Court should deny this motion, proceed to the scheduled merits hearing, and dismiss this lawsuit.

II. EVIDENCE RELIED UPON

WDFW's Response to Plaintiff's MSJ relies on the same evidence submitted in support of WDFW's Merits Brief, which has not been re-submitted in order to avoid unnecessary duplication; bench copies of all cited declarations will be provided for the summary judgment hearing. Those declarations are as follows: (1) the Declaration of Anne Masias in Support of

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WDFW's Merits Brief (Masias Decl.); (2) the Declaration of Jennifer Brown in Support of WDFW's Merits Brief (Brown Decl.); (3) the Declaration Marissa Young in Support of WDFW's Merits Brief (Marissa Young Decl.); (4) the Declaration of Emilynn Miller in Support of WDFW's Merits Brief (Miller Decl.); (5) the Declaration of Kelly Young in Support of WDFW's Merits Brief (Kelly Young Decl.); (6) the Declaration of Kelly McDermott in Support of WDFW's Merits Brief (McDermott Decl.); (7) the Declaration of Fish and Wildlife Commissioner Barbara Baker (Baker Decl.); (8) the Declaration of Fish and Wildlife Commissioner John Lehmkuhl (Lehmkuhl Decl.); (9) the Declaration of Fish and Wildlife Commissioner Lorna Smith (Smith Decl.); (10) the Declaration of Fish and Wildlife Commissioner Melanie Rowland (Rowland Decl.); and (11) the Declaration of Randy Head in Support of WDFW's Merits Brief (Head Decl.). In further response to this MSJ, WDFW has submitted one additional declaration: the Declaration of Anne Masias in Support of WDFW's Response to Plaintiff's Motion for Summary Judgment (2nd Masias Decl.). WDFW's response is also supported by the attachments to the above-referenced declarations, and in many respects, the attachments to the Declaration of Joel Ard (Ard Decl.).

III. SUMMARY JUDGMENT STANDARD

In a summary judgment motion, the moving party bears the initial burden of showing the absence of a genuine issue of material fact entitling them to judgment as a matter of law. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182, 187 (1989). If, and only if, the moving party meets their initial burden of establishing the absence of a genuine issue of material fact, and only if the undisputed facts would justify relief in their favor, the burden shifts to the non-moving party. *Id.* As Plaintiff correctly notes, the court considers the evidence and reasonable inferences in the light most favorable to the nonmoving party. MSJ at 11. By filing this motion, Plaintiff voluntarily takes on this burden, and fails to meet it.

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IV. COUNTERSTATEMENT OF FACTS

Section IV of Plaintiff's MSJ, "Statement of Facts", is a convoluted smorgasbord of (1) undisputed facts and (2) disputed, unsupported, and immaterial claims which fail to meet the threshold burden of a party moving for summary judgment. In many instances, Plaintiff mischaracterizes the content of cited exhibits. Perhaps most critically, Plaintiff omits nearly all evidence of how WDFW actually processed Plaintiff's PRR (PRR 23276). WDFW has detailed the steps the agency took in responding to PRR 23276 in WDFW's Merits Brief, section IV. Rather than mechanically reciting the same information here, WDFW will attempt to distinguish the undisputed facts from Plaintiff's disputed claims.

A. Undisputed Facts

Plaintiff's motion reveals that there are a number of undisputed facts. Unfortunately, they offer no help to Plaintiff; their only significance is to tell a small part of the story of WDFW's compliance with the PRA. Those facts are listed in bullet point format below, along with citation to the relevant portions of the record:

1. WDFW received PRR 23276 on September 11, 2023. WDFW issued five-day letter on September 18, 2023, in which the agency acknowledged the request, provided the first installment, and provided Plaintiff with an estimate of time for a future installment of records. MSJ at 4; Kelly Young Decl., Attach. A.
2. Including but not limited to the five-day letter, WDFW communicated the reasonable estimates of time by which the WDFW anticipated providing additional installments of records on September 18, 2023, December 18, 2023, March 14, 2024, June 3, 2024, September 4, 2024, December 16, 2024, March 5, 2025, and May 2, 2025. MSJ at 4-6; Kelly Young Decl., Attach. A; Brown Decl., Attachs. A, B, D, G, I, J, L.
3. WDFW provided records to Plaintiff in installments, both before and after this lawsuit was filed, on September 18, 2023, March 14, 2024, December 16, 2024, March 5, 2025, May 2,

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2025, and May 30, 2025, and closed the request with the final May 30, 2025 installment. MSJ at 4-6; Kelly Young Decl., Attach. A; Brown Decl., Attachs. B, I, J, L, M.

4. Public Records Analyst (Analyst) Jennifer Brown emailed Plaintiff on October 31, 2023, and asked if Plaintiff would like to eliminate duplicates from the production of responsive records; Plaintiff responded and asked to eliminate identical duplicates. MSJ at 4; Brown Decl. ¶ 12, Attach. H.
5. Jennifer Brown emailed Electronic Search Specialist Kelly McDermott on October 31, 2023, explaining that the requester had asked to eliminate duplicative records. Kelly McDermott responded that eliminating duplicates could only be done at the time of export and asked her whether she should accept the search. MSJ at 9; McDermott Decl. ¶ 10, Attach. C.
6. On May 8, 2024, Plaintiff emailed Jennifer Brown, apparently unaware that 77 records were provided on March 14, 2024, stating "I have received a pair emails [sic] with partial fulfillment, but I have not received anything more substantial." Jennifer Brown responded on May 9, pointing Mr. Adkins to the prior installment, and answering his other questions. Mr. Adkins responded "Thank you Jennifer. I look forward to hearing from you again." Ard Decl., Ex 9; Brown Decl., Attach. C.
7. On May 14, 2024, Public Records Coordinator (PRC) Kelly Young emailed Jennifer Brown and Kelly McDermott, and asked for an update on the eDiscovery search. MSJ at 9; McDermott Decl. ¶ 11, Attach. C. On June 17, 2024, Ms. McDermott replied, explaining that she believed she was still waiting on direction from Jennifer Brown. Jennifer Brown explained that she had spoken with Plaintiff about the possibility of amending the PRR, and that Plaintiff had instructed that if WDFW did not hear further from him, WDFW should proceed "as-is." *Id*. Kelly McDermott then rescheduled the search for August 21, 2024, which was the next time slot she had available to run an electronic search, given her other work obligations. *Id*.

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- Of note, Kelly McDermott explains in her declaration that she was out of the office on bereavement leave on May 15, 2025 (and for a period of time thereafter), and again out on leave on August 21, 2025 (and for a period of time thereafter), due to two separate deaths in her family at those times. McDermott Decl. ¶¶ 11-12.

8. Todd Adkins and Jennifer Brown participated in a phone call on June 6, 2024, which was summarized in a follow-up email from Jennifer Brown. In the phone call, Ms. Brown and Mr. Adkins discussed "[w]hy there are so many electronic records search results" and "[h]ow long it will take the fulfill the request beyond November, which is unknown." MSJ at 5; Ard Decl., Ex. 11; Brown Decl., Attach. E. Ms. Brown and Mr. Adkins discussed the process for withdrawing or amending the PRR, and Mr. Adkins instructed that unless he instructed otherwise, WDFW was to "stay the course" and "continue reviewing the 471,000 potentially relevant records." *Id*. Mr. Adkins affirmed Ms. Brown's summary of the conversation, stating "Thank you Jennifer. I appreciate your time and willingness to help." *Id*.
9. Commissioner Smith filled out a search declaration in August 2024. MSJ at 7, Marissa Young Decl. ¶ 20.
10. Commissioner Smith filled out a final search declaration on March 18, 2025. MSJ at 7, Marissa Young Decl. ¶ 31.
11. In January 2024, Commissioner Smith was responding to at least nine PRRs, one of which was PRR 23276. Ard Decl., Ex. 20.
12. WDFW discourages the use of personal emails for agency business. MSJ at 7; Ard Decl., Ex. 23; Masias Decl. ¶ 9.
13. Commissioner Rowland filled out a declaration of search on March 16, 2025. MSJ at 8, Marissa Young Decl. ¶ 30.
14. As of December 12, 2024 (**prior to Plaintiff's lawsuit**), PRC Marissa Young had reviewed 37,193 records from among the eDiscovery search results. MSJ at 18; Ard Decl., Ex 38qq.

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To be clear, while WDFW does not dispute the facts as characterized above, these facts hardly scratch the surface of the effort WDFW went through to process PRR 23276. Again, those facts are organized in WDFW's Merits Brief, section IV, which WDFW incorporates herein by reference. But for purposes of this motion, Plaintiff must set forth sufficient undisputed facts to show entitlement to legal relief, and these facts fail to show that Plaintiff is entitled to any relief whatsoever. Plaintiff's motion should therefore be denied as a consequence of their failure to meet their initial burden as the moving party under CR 56. All of Plaintiff's remaining allegations are either unsupported, immaterial, or disputed, as set forth below.

B. Disputed "Facts", Immaterial "Facts", and "Facts" Which Are Not Facts at All.

Plaintiff makes a number of erroneous claims that WDFW vehemently disputes for the reasons set forth below. On multiple occasions, Plaintiff's claims are legally immaterial, or actually supportive of WDFW's position. In others, contrary evidence disputes the claim, creating a disputed issue of fact that must be resolved in WDFW's favor for purposes of this motion. Finally, in many instances, Plaintiff makes claims without citation to any evidence whatsoever.

1. Plaintiff's claim: WDFW asserted that it had identified 471,000 responsive records. MSJ at 5-6.

This assertion is belied by all evidence, and borders on frivolous. WDFW never claimed that 471,000 records were responsive to Plaintiff's PRR. In fact, WDFW repeatedly informed Plaintiff that the electronic search results would have to be reviewed for relevance. *See* Ard Decl., Ex. 5 ("The search resulted in approximately **471,000 electronic records to review for relevance.**"); Brown Decl., Attach. D. ("Program staff are **reviewing approximately 471,000 electronic records for relevance to this request**."); Brown Decl., Attach. E ("If I do not receive correspondence from you, **then the intention is to stay the course and our public records folks will continue reviewing the 471,000 potentially relevant records.**"); Brown Decl., Attach. H ("The search resulted in approximately 471,000 electronic records **to review for relevance.**").

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Plaintiff was thus informed *at least four times*, *including in the communication Plaintiff cites for the contrary proposition*, that WDFW would have to review the search results for relevance. Plaintiff's unreasonable assumption to the contrary nonetheless permeates their legal arguments to this day. MSJ at 5, 6, 13, 17. To the extent there is any question on that point, this evidence and any inferences from it must be construed in WDFW's favor for purposes of Plaintiff's MSJ. CR 56.

For clarity, the 471,000 number was a pre-collection estimate generated in O365. McDermott Decl. ¶ 9. Ms. McDermott's declaration shows that WDFW staff attempted to develop narrower search terms, but could not do so due to the broad and complex language of Plaintiff's 22-part PRR. McDermott Decl. ¶ 7. The evidence also shows that Jennifer Brown met with Plaintiff, discussed the breadth of the electronic search, and Plaintiff elected to "stay the course", with WDFW staff reviewing broad search results. Brown Decl., Attach. E. After the search was accepted, the final search results were added to a review set. McDermott Decl. ¶ 13. In the review set, these records were grouped by parent records, and resulted in 114,913 records when so grouped. *Id.* After the de-duplication filter was applied, the review set contained 90,424 unique records grouped by parent records. *Id.* Kelly McDermott's review of the eDiscovery review set for PRR 23276 reveals over half of those 90,424 unique records were false positives. McDermott Decl. ¶ 16. Staff reviewing the set grouped records by conversations and applied tags to duplicates at the same time, but nonetheless had to review the entire review set, as duplicates cannot be eliminated from the review set until records are exported for production. *Id*. ¶ 10, Marissa Young Decl. ¶ 21. Plaintiff goes to great lengths to characterize WDFW's search as overbroad, claiming that the agency's response only produced "1/12th of the 'potentially' responsive records." MSJ at 17. Yet Plaintiff was aware that a broad search was required, and as shown above, the search was as targeted and organized as possible, given the scope of the request.

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2. Plaintiff's claim: WDFW "intentionally misled Adkins" by somehow implying that WDFW's eDiscovery search would apply outside to external email systems. MSJ at 6.

This claim (1) is not backed by any evidence, (2) defies logic, and (3) is irrelevant. Plaintiff cites only an email by which WDFW informed Plaintiff of its initial search terms. MSJ at 6, Adkins Decl., Ex. 5. That email states that WDFW conducted an "all agency electronic search." By that language alone, Plaintiff asserts WDFW conspired to mislead him into believing the agency was conducting an electronic search of systems outside of the agency O365 system. MSJ at 6. *The agency* did conduct an initial "*all agency*" search of *the agency's* systems using eDiscovery. McDermott Decl. WDFW's search terms included commissioners' private email addresses (meaning they would pick up any emails in the agency system to or from those external accounts), but by logical necessity, *WDFW cannot electronically search email servers that are not within its system*. For example, several commissioners have private Gmail accounts. Ard Decl., Ex 5. Plaintiff apparently thought WDFW could electronically search Google's servers as part of the agency's eDiscovery search. How Plaintiff reached that unreasonable conclusion is not clear, but there is nothing misleading about WDFW's email.

Moreover, the claim is legally immaterial. State employees and volunteers are not legally compelled to submit their private devices to the agency to conduct an electronic search. *See, e.g., Valderrama v. City of Sammamish*, 33 Wn. App. 2d 318, 332, 561 P.3d 288 (2024) ("[O]ur Supreme Court has not specifically addressed whether an agency suspecting bad faith must sue to forensically examine an employee's personal device, it has suggested that such an infringement on employees' privacy rights is unnecessary to conduct an adequate search."). Where employees (or in this case, volunteers) store agency records on private devices, the courts "interpret the PRA to balance the employee's privacy rights with the public's interest in government accountability." *Valderrama*, 33 Wn. App. 2d at 326 (citing *Nissen v. Pierce Cnty.*, 183 Wn.2d 863, 884, 357 P.3d 45, 56 (2015)). In those instances, the agency demonstrates an adequate search by obtaining "*Nissen* Declarations" which demonstrate that the employee (or here, the volunteer) conducted an appropriate search of

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their private records and disclosed any public records that were responsive to the request. *Valderrama*, 33 Wn. App. 2d at 327. WDFW has an established process for determining whether private email accounts or phones might contain public records, including an electronic form that required declarants to certify under penalty of perjury that such accounts have been searched. Masias Decl. ¶ 9. All commissioners followed that process. *Id.*; *see also* Marissa Young Decl. ¶ 9-10, 12, 15, 20, 26, 30-31. All commissioners who had any public records on private devices have submitted declarations to the Court, explaining their searches, and declaring that all responsive records were turned over to WDFW. Baker Decl.; Smith Decl.; Lehmkuhl Decl.; Rowland Decl. The fact that WDFW did not conduct an electronic search of servers outside of its systems (which would, after all, be impossible) is immaterial. WDFW followed the process required by *Nissen* in order to search for public records on private devices, and provided all such records located in those searches to Plaintiff.

3. Plaintiff's Claim: Barbara Baker improperly deleted records. MSJ at 6, 25.

Plaintiff cites text messages as the basis for this claim. MSJ at 6, citing Ard Decl., Ex. 17-18. These messages clearly were *not deleted*, as they were disclosed to Plaintiff, who now cites them. *Id.*, *see also* MSJ at 25 (claiming WDFW "did not produce the records that Commissioners Baker and Lehmkuhl deleted."). Plaintiff offers no evidence that any record was actually deleted, only a text message that shows a discussion about possible deletion. These records were in fact produced from a set of text messages that Commissioner Baker provided to the WDFW for preservation in August of 2023. *See* Baker Decl. ¶ 6; 2nd Masias Decl. The assertion that Commissioner Baker destroyed the text is therefore objectively false, and this argument is meritless. *Id.* Further, even if the messages had been deleted (again, they were not), such deletion would be immaterial for the reasons set forth in section V(A)(3); namely, and such hypothetical deletion would have pre-dated Plaintiff's PRR.

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4. Plaintiff's claim: Commissioner Lehmkuhl acknowledged improperly deleting public records from his personal email account. MSJ at 7, 25.

Plaintiff cites a fraction of a sentence from part of an email in support of this assertion, stating that Commissioner Lehmkuhl deleted emails "before I knew of the importance of retaining such emails..." MSJ at 7. A simple review of the full sentence strips this claim of any legal relevance. The full sentence states: "They may have been deleted early in my tenure as a Commissioner before I knew of the importance of retaining such emails *and had not been the subject at that time of a PRR.*" Ard Decl., Ex. 19. As set forth in section V(A)(3) *supra*, emails deleted prior to Plaintiff submitting PRR 23276 are irrelevant to this lawsuit. Further, Commissioner Lehmkuhl signed a declaration earlier this year stating that he ceased using his personal email for agency communications in late 2022, *forwarded the public records on his personal email to his WDFW email* (where they could be searched by staff), and *then* deleted them from his personal email thereafter. Lehmkuhl Decl. ¶ 6-7. When Commissioner Lehmkuhl was asked to search for records in response to PRR 23276 in 2023, he therefore filled out an electronic search declaration on December 26, 2023, stating that WDFW staff would search his agency email and that he had no records other than those that would be located in the O365 search. Marissa Young Decl. ¶ 12. Plaintiff's assertion is therefore unsupported by the cited evidence and is likewise immaterial.

5. Plaintiff's claim: "The evidence from WDFW also shows that, contrary to the impression it hoped to give by its quarterly emails to Adkins, it had hardly progressed on his request before suit." MSJ at 8.

Notably, Plaintiff spends half a page making this argument, but cites none of the evidence as to how WDFW actually processed PRR 23276 before the lawsuit was filed. MSJ at 8:8-21. Instead, Plaintiff (1) cites an email showing that WDFW shared its initial search terms with Plaintiff, (2) argues, based on an erroneous citation, that WDFW discouraged the use of personal email for agency business (a fact which is undisputed), and (3) argues that staff knew commissioners would take a long time to search their records. *Id.,* citing Ard Decl. This, Plaintiff claims, is the evidence that WDFW's search had "hardly progressed" before the lawsuit was filed. This evidence shows

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next to nothing about the status of WDFW's search at that time. Again, for purposes of an MSJ, Plaintiff has voluntarily taken on the burden of proving such a broad assertion, and fails to do so.

Moreover, WDFW's declarations demonstrate that the claim is false, as more fully set forth in section IV of WDFW's Merits Brief. To briefly illustrate, by the time Plaintiff filed the lawsuit, WDFW had provided a timely five-day letter, and then provided reasonable estimates of time on September 18, 2023, December 18, 2023, March 14, 2024, June 3, 2024, September 4, 2024, December 16, 2024. § IV, *supra*, undisputed facts 1 and 2. WDFW had provided Plaintiff with installments of records on September 18, 2023, March 14, 2024, December 16, 2024. § IV, *supra*, undisputed fact 3. Those records were gathered from a combination of custodian-based and electronic searches. Months before Plaintiff filed the lawsuit, Kelly McDermott had run a rescheduled eDiscovery search, and Marissa Young had reviewed over 37,000 electronic search results. McDermott Decl. ¶¶ 13 and 15, Marissa Young Decl. ¶ 21. PRC Emilynn Miller had followed up with all known custodians in WDFW's Wildlife Program, obtaining electronic search declarations from Anis Aoude, Cynthia Wilkerson, Julia Smith, Eric Gardner, Richard Yarborough, Katherine Backman, Mick Cope, Hannah Anderson, and Donny Martorello. Miller Decl. ¶¶ 7-15. Each and every one of those staff members was required to conduct a search of their records as part of WDFW's search process. Masias Decl. ¶ 9. Similarly, PRC Kelly Young had followed up with all relevant staff in the Director's Office and the Communications and Public Engagement (CAPE) Office, and obtained search declarations from all of them. Kelly Young Decl. In addition to reviewing over 37,000 O365 results, PRC Marissa Young had followed up with WDFW commissioners extensively, obtaining records where they existed. Marissa Young Decl. ¶¶ 8-22. Former Commissioner Ragen, Commissioner Lehmkuhl, and Commissioner Baker had completed their electronic declarations of search more than six months before the lawsuit was filed. *Id.* ¶ 10, 12, 15. Commissioner Baker had located responsive records on her personal accounts, and provided them to WDFW. Baker Decl. Commissioner Smith had already filled out two search declarations due to an apparent misunderstanding about which PRR

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she was responding to. Marissa Young Decl. ¶ 20. It is true that Plaintiff filed suit while WDFW's response was not yet complete, but it is wildly inaccurate to claim that WDFW's search had "hardly progressed."

6. Plaintiff's claim: "WDFW documents also show that staff first crafted search protocols for Commissioners' private email in spring 2025!" MSJ at 10.

Plaintiff supports this fallacious claim by citing a record that shows that PRC Marissa Young assisted commissioners Rowland and Smith with search terms in March of 2025. Ard. Decl., Ex 40. That much is true, but the fact that Marissa Young communicated about search protocols with two commissioners in 2025 does not establish that WDFW *first* communicated with commissioners about how to conduct searches in March 2025. Ms. Young's declaration details how she communicated with commissioners, including email, providing a spreadsheet of open PRRs, and meeting commissioners in-person or via phone to go over the search process. Marissa Young Decl. ¶ 7. It is undisputed that three commissioners completed their searches prior to this lawsuit, after Marissa Young's engagement. Marissa Young Decl. ¶¶ 7-27. Ms. Young's declaration details at least 18 pre-lawsuit instances of her communicating with commissioners about their response to PRR 23276. Marissa Young Decl. ¶ 8-20, 22.

As to each of the above claims, Plaintiff fails to demonstrate the absence of a genuine issue of material fact, and therefore fails to meet its threshold burden on summary judgment. Critically, Plaintiff relies heavily on each of these unsupported claims in its legal arguments, which fail as a matter of law as outlined below.

V. ARGUMENT

Plaintiff's legal arguments rely on fundamental misunderstandings of the Public Records Act. First, WDFW did not deny Plaintiff access to records by processing the request in installments. Plaintiff's denial claims therefore fail as a matter of law. Second, Washington courts are abundantly clear that agencies are only obligated to produce records that exist when a public records request is made, and as a result, Plaintiff's evidence-free assertions that records

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were deleted prior to the submission of PRR 23276 therefore lack any legal significance. Third, Plaintiff makes no fact-based argument that any of WDFW's time estimates were unreasonable, and instead simply asks the Court to disregard established precedent. WDFW has submitted extensive evidence in support of its Merits Brief that establishes all time estimates were reasonable, and continues to rely on that same evidence today. Thus, even if the "facts" Plaintiff relies on were not disputed, Plaintiff's legal theories would nonetheless fail.

A. WDFW Has Not Denied Plaintiff Access to Public Records.

Issue two of the prehearing order arises under RCW 42.56.550(1), which authorizes judicial review of agency denial of public records. Plaintiff's motion should be denied as to any and all denial claims, for three reasons. First, a final action denying access to a public record is a prerequisite to a PRA claim under RCW 42.56.550(1). Plaintiff filed this lawsuit before WDFW completed its response to Plaintiff's PRR, and as a result, Plaintiff's denial claims are not properly before the Court. Second, Plaintiff's hypothetical deletion claim is unsupported by evidence and precluded by law. Finally, the facts clearly demonstrate that WDFW conducted a search that was reasonably calculated to locate and disclose all responsive records, and thereby conducted an adequate search. As a result, the Court should deny Plaintiff's motion.

1. Plaintiff fails to satisfy the prerequisite requirement of final action, and their denial claims therefore fail as a matter of law.

Firmly established caselaw has repeatedly confirmed that "[b]eing denied a requested record *is a prerequisite* for filing an action for judicial review of an agency decision under the PRA." *Cortland v. Lewis Cnty.*, 14 Wn. App. 2d 249, 258, 473 P.3d 272, 277 (2020) (citing RCW 42.56.550(1) (emphasis added)). "**When an agency produces records in installments, the agency does not deny access to the records until it finishes producing all responsive records.**" *Cortland*, 14 Wn. App. 2d at 258. The PRA provides no cause of action under RCW 42.56.550(1) unless the agency has taken a final action denying access to a responsive record. *Id.*, (citing *Hobbs v. State*, 183 Wn. App. 925, 936, 335 P. 3d 1004 (2014)); *see also Freedom*

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Found. v. Washington State Dep't of Soc. & Health Servs., 9 Wn. App. 2d 654, 664, 445 P.3d 971, 977 (2019); *Hikel v. City of Lynnwood*, 197 Wn. App. 366, 379, 389 P.3d 677, 684 (2016). "The plain language of the statute does not support [the] claim that a requester is permitted to initiate a lawsuit before an agency has taken some form of final action in denying the request by not providing responsive documents." *Hobbs*, 183 Wn. App at 937. Thus, as to issue two of the prehearing order, Plaintiff's complaint is legally defective. There is no question that WDFW was continuing to process Plaintiff's request in installments when the complaint was filed in January of 2025. *See* § IV(A), *supra*: undisputed facts 1-3. Plaintiff acknowledged in the complaint that WDFW had produced installments of responsive records before this lawsuit was filed. Complaint ¶¶ 28, 45, and 59. Plaintiff anticipated that WDFW would continue to produce responsive records, but complained of the speed of WDFW's production. Complaint ¶¶ 65-70. While WDFW continued to produce records in installments, Plaintiff acknowledged that further response was forthcoming. Brown Decl. ¶ 7, Attach. C. WDFW continued to search for, review, and provide responsive records until the request was closed on May 30, 2025. Masias Decl. ¶¶ 29-30. There was no denial of records at the time Plaintiff filed this lawsuit, and Plaintiff therefore fails to show any entitlement to relief on Plaintiff's denial claims.

2. There was no "constructive denial."

Plaintiff argues that, notwithstanding the fact that WDFW took no final action closing PRR 23276 prior to the lawsuit, WDFW "constructively denied" their public records request. MSJ at 14-16. "Constructive denial is when the agency has taken so little action that the effect is the same as if they had explicitly denied the request." *Beidler v. Snohomish Cnty.*, 26 Wn. App. 2d 1035 (2023) (unpublished) (citing *Cantu v. Yakima Sch. Dist. No. 7*, 23 Wn. App. 2d 57, 94, 514 P.3d 661, 681 (2022)). [2] Plaintiff relies heavily on *Cantu*, but the factual circumstances under which the *Cantu* court found constructive denial are nothing like the facts of this case.

[2] For the record, WDFW asserts and reserves the right to argue that *Cantu* was wrongly decided. However, this Court need not reach that issue. Even assuming *Cantu* was decided correctly, the facts in this case would not support a finding of constructive denial.

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Cantu addressed an issue arguably left open by the *Hobbs* decision: "the situation where an agency completely ignores a records request for 'an extended period.'" *Cantu*, 23 Wn. App. 2d at 90–91 (citing *Hobbs*, 183 Wn. App. at 937 n. 6). Where a request had been completely ignored for an extended period of time, the *Cantu* court reasoned, a delay claim could ripen into a denial claim. *Cantu,* 23 Wn. App. 2d at 90–91. But "whether an agency was reasonably diligent in responding to a records request or ignored a request for an extended period of time is a factual issue." *Id.* at 88. This case bears no factual resemblance to *Cantu*.

To begin with, *Cantu* did not involve a sprawling, 22-part public records request; Ms. Cantu requested forms and emails about her daughter being bullied. *Id.* at 70. Further, the defendant in *Cantu*, (1) failed to provide a five-day letter pursuant to RCW 42.56.520, (2) wholly ignored inquiries from the requester, (3) lied to the requester (they claimed the school district was "closed", despite knowing this was untrue), (4) provided a link to an empty google drive when purporting to provide an installment of records, and (5) failed to provide any estimate of time for any future installments. *Id.* at 94. The school district repeatedly ignored the public records officer's "numerous requests for assistance" and failed to allocate additional resources to address the volume of requests received. *Id.* at 94-95. Further, the court noted that the district claimed to be overwhelmed by public records requests, but did not appear to be "diligently working on any of them." *Id.* at 96. Finally, the Defendant's public records staff received little to no training in PRA compliance. *Id.* at 76. Under those extraordinary circumstances, the court concluded that the school district had "constructively denied" Ms. Cantu's public records request. *Id.* at 96.

In every respect, this case stands in stark contrast to *Cantu*. WDFW provided Plaintiff with a compliant five-day letter. Kelly Young Decl., Attach. A. WDFW consistently provided Plaintiff with estimates of time for additional installments of records, and regularly updated Plaintiff on the estimated installment dates. *Id.*, Brown Decl., Attachs. A, B, D, G, I. In every one of those time estimates, WDFW identified the date of its next anticipated installment. *Id.* Plaintiff in fact acknowledged that WDFW's response was ongoing, and *that he expected to hear from WDFW*

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again. Brown Decl. ¶ 7, Attach. C ("Thank you Jennifer. I look forward to hearing from you again."). Plaintiff also expressed gratitude for WDFW's "willingness to help" as of June 6, 2024 (despite now claiming that WDFW "constructively denied" the request three months earlier). Brown Decl. ¶ 9, Attach. E.

Multiple WDFW staff were diligently working on the request, and many other requests, between each and every one of WDFW's time estimates. In September 2023, Kelly Young was processing a total of 264 public records requests (160 in her role as a public records coordinator and 104 as a public records analyst). Kelly Young Decl. ¶ 13. She nonetheless coordinated custodian-based searches among the Director's Office and CAPE program, and Region 1, as shown in her declaration. Kelly Young Decl. Marissa Young was processing 195 public records requests when in September of 2023. Marissa Young Decl. ¶ 5. She nonetheless coordinated the responses from the WDFW commissioners, repeatedly communicating with them, obtaining search declarations, and obtaining records from commissioners' private devices and providing them to Analyst Jennifer Brown. Marissa Young Decl. She also reviewed over 37,000 of the electronic search results, as shown in her declaration. Marissa Young Decl. ¶ 21. Emilynn Miller was assigned 150 requests from the Wildlife Program on November 1, 2023 (her first month on the job). Miller Decl. ¶ 5. She nonetheless coordinated the agency's response from numerous potential custodians in the Wildlife Program, including escalating issues of custodian non-responsiveness where appropriate, obtaining records, and providing them to Analyst Brown. Miller Decl. WDFW provided Plaintiff with responsive records repeatedly throughout that process. Kelly Young Decl., Attach. A; Brown Decl., Attachs. B, I. Analyst Jennifer Brown was handling between 178 and 198 public records requests while processing PRR 23276: the total varied by the dates on which she provided Plaintiff with reasonable time estimates for further installments. Brown Decl. ¶ 5-6, 8, 11, 13. She nonetheless communicated with Plaintiff, answered his questions, offered to clarify the request, and excluded duplicates from their production as Plaintiff requested. Brown Decl. ¶¶ 7, 9, and 12. Unlike the school district in *Cantu*, WDFW has a focused, systematic, and deliberate process in place for

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responding to public records requests. Masias Decl. ¶¶ 4-7. WDFW processes hundreds of PRRs every year. *Id.* ¶ 9. Not only has WDFW filled its empty positions in the PRU, but it has also continued to add new positions and adopt new technology solutions to expedite PRR responses, despite considerable staffing challenges at the time Plaintiff submitted PRR 23276. *Id.* ¶¶ 11-14. And unlike the Defendant in *Cantu*, WDFW public records staff have gone through extensive training in public records compliance, a bullet point summary of which spans *over twelve pages*. Head Decl. ¶ 2, Attach. A. Nothing could be further from the facts of *Cantu*.

Plaintiff has no argument on those points. Instead, Plaintiff argues that WDFW "constructively denied" the public records request *because WDFW did not search for, review, and produce all documents prior to March 14, 2024*. MSJ at 16 ("according to the rule in *Cantu*, WDFW had constructively denied the request even before it produced Tranche 2."); *see also* Brown Decl. ¶ 6 (Phase 2 of WDFW's response sent on March 14, 2024). To be clear, WDFW's response to PRR No 23276 required WDFW to produce records from among 776 custodians. Masias Decl. ¶ 20. It ultimately required the production of 42,684 responsive records, many (but not all) of which were sorted from among the hundreds of thousands of electronic search results. *Id.* It required the gathering of *Nissen* Declarations, review and application of redactions, and the production of exemption logs. *Id.* WDFW ultimately committed approximately 956.8 hours of staff time to processing PRR 23276. Masias Decl. ¶ 18. That effort equates to a full-time state employee working non-stop on Plaintiff's public records request, and nothing else, for approximately 24 weeks at 40 hours per week. *Id.* at 19. To be clear, the Public Records Act does not require Plaintiff's public records request to be the full-time job of a state employee. *But even if PRR No. 23276 had been someone's full-time job, Plaintiff would still claim constructive denial*: if one person worked full time on Plaintiff's PRR beginning on September 18, 2023, they likely could not work 956.8 hours between September 18, 2023 and some undefined time prior to March 14, 2024. Plaintiff's argument that WDFW "ignore[d]" Plaintiff's PRR "for an extended period of time" by not closing the request by March 14, 2024, is wholly unreasonable. MSJ at 16; *Cantu*, 23 Wn. App. 2d at 66.

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Plaintiff next offers a *post hoc* fallacy as evidence: Plaintiff argues that because the request was processed faster after the lawsuit was filed, the request was denied before the lawsuit was filed. MSJ at 14. It is indeed true that in late February to early March 2025, WDFW made the decision to assign additional resources to expedite the response to PRR 23276: they doubled PRC Young's hours, directing her to work exclusively on PRR 23276, and later assigned four additional staff to work exclusively on PRR 23276. Masias Decl. ¶ 22-23. To be clear, the PRA does not require such an extraordinary dedication of agency resources to a single PRR.[3] The fact that WDFW dedicated those resources - above and beyond what the PRA required - is no *post hoc* rationalization for Plaintiff's constructive denial claim. The question of whether an agency has completely ignored a request, as opposed to reasonably diligently processing the request, is an objective standard from the viewpoint of the requester at the time of the lawsuit is filed. *Cantu,* 23 Wn. App. 2d at 94. At the time Plaintiff filed this lawsuit, WDFW had produced three installments, regularly provided estimates as to when they expected to provide further installments, and diligently processed the request, as set forth above. And candidly, if the Court accepts this argument, the Court sends a clear message to agencies: if a lawsuit is filed, don't assign extra resources to process a public records request; doing so means the agency constructively denied the request months prior.

Plaintiff's final claim is, yet again, that WDFW "suggested that it had nearly half a million documents to produce, and that at its pace of production, it would effectively never complete its response." MSJ at 14. WDFW never made this suggestion, and in fact repeatedly provided Plaintiff with contrary information. Ard Decl., Ex. 5l; Brown Decl. Attachs. D, E, H. WDFW informed Plaintiff that the electronic search results were "potentially relevant" and being "reviewed for relevance." *Id*. Plaintiff apparently read those words and concluded that "potentially relevant" records being "reviewed for relevance" were *all responsive records*. This was not a reasonable

[3] *See* RCW 42.56.100 (agency rules and procedures should "prevent excessive interference with other essential functions of the agency"; RCW 42.56.080(2) ("Agencies shall not distinguish among persons requesting records…"; WAC 44-14-04003 ("The agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others.").

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conclusion, and Plaintiff offers no reasonable argument for constructive denial. Again, there was no denial of records in this case. Plaintiff's motion should be denied.

3. Plaintiff has no cause of action for hypothetical, pre-request deletion of records.

Plaintiff makes a variety of claims that WDFW violated the PRA before Plaintiff's public records request was submitted. *See, e.g.,* MSJ at 25 ("WDFW violated the Public Records Act, beginning long before Adkins made the request at issue here…; [WDFW] did not produce the records that Commissioners Baker and Lehmkuhl deleted."). Records either exist or do not exist at the time a PRR is submitted to a state agency. If records exist and are responsive to the request, they must be retained notwithstanding the records retention schedule. But if records have been deleted prior to the submission of a public records request, an agency has no obligation to disclose them. Plaintiff has no cause of action for nondisclosure of nonexistent records under the PRA.

The PRA provides that "[i]f a public record request is made *at a time when such record exists* but is scheduled for destruction in the near future, 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. Considering RCW 42.56.100, courts have found that "there is no agency action to review under the [Public Records] Act where the agency did not deny the requestor an opportunity to inspect or copy a public record, because the public record he sought did not exist." *Bldg. Indus. Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 740, 218 P.3d 196, 206 (2009) (citing *Sperr v. City of Spokane*, 123 Wn. App. 132, 137, 96 P.3d 1012 (2004)). Courts have reached the same conclusion when confronted with the same argument based on the Records Retention Act, Chapter 40.14 RCW. *West v. Washington State Dep't of Nat. Res.*, 163 Wn. App. 235, 242, 258 P.3d 78, 82 (2011) ("An agency has no duty to create or produce a record that is nonexistent."). In an unpublished decision, Division III put it more simply: "[v]iolations of the

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Record Retention Act do not give rise to a cause of action under the PRA." *Thurura v. Washington State Dep't of Corr.*, 15 Wn. App. 2d 1047 (2020).

To be clear, no such violation of the Records Retention Act occurred here. Regarding Commissioner Baker, Plaintiff cites to a record *that was not deleted*, and if it had been deleted, WDFW disputes any claim that such deletion would violate Chapter 40.14 RCW.[4] *See* § IV(B)(3), *supra*. The same goes for Plaintiff's assertions regarding Commissioner Lehmkuhl: Commissioner Lehmkuhl forwarded his agency related emails to his WDFW account (where they could be searched by staff) and deleted them from his personal account thereafter; all before PRR 23276 was submitted. § IV(B)(4), *supra*. But even assuming any records were deleted in 2022, and even assuming such deletion violated the Records Retention Act, Plaintiff would have no cause of action under the PRA.

4. WDFW conducted an adequate search.

Plaintiff asserts that "[o]nly litigation compelled WDFW to conduct an adequate search." MSJ at 17. Thus, ***Plaintiff admits that WDFW conducted an adequate search***. The only question is ***when*** WDFW conducted an adequate search. Plaintiff argues that as soon as a lawsuit is filed, an agency's search is either adequate or inadequate, and the court cannot consider the agency's ongoing search efforts thereafter. If this rule of law existed, it would render any ongoing search inadequate by virtue of the fact that a complaint was filed. Fortunately, there is no such rule: Plaintiff cites no authority for this proposition, which the law does not support.

An inadequate search claim is a type of denial claim under RCW 42.56.550(1). *Neighborhood All. of Spokane Cnty. v. Spokane Cnty.*, 172 Wn.2d 702, 721, 261 P.3d 119 (2011). Again, "[w]hen an agency produces records in installments, the agency does not deny access to

[4]It appears that several of the messages referenced in the exhibit could have been properly deleted pursuant to the State Government General Records Retention Schedule: https://www.sos.wa.gov/sites/default/files/2025-06/state-government-general-records-retention-schedule.pdf
In particular, DAN GS 9026 classifies individual meeting notes and related correspondence/communications of this type as transitory, and properly subject to deletion when no longer needed for agency business.

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the records until it finishes producing all responsive records." *Cortland*, 14 Wn. App. 2d at 258. The adequacy of WDFW's search must therefore be assessed at the time the search was completed; until that time, any alleged inadequacy in the search could still be corrected. *Id.*; *see also Hobbs,* 183 Wn. App. at 935. "The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents." *Neighborhood*, 172 Wn.2d at 720. To demonstrate an adequate search, the defending agency must submit evidence that describes the search and establishes "that all places likely to contain responsive materials were searched.'" *Block v. City of Gold Bar*, 189 Wn. App. 262, 271, 355 P.3d 266 (2015) (citing *Neighborhood*, 172 Wn.2d at 721). No agency could make that showing if the filing of a complaint renders ongoing search efforts irrelevant.

Notably, Plaintiff raises no argument that any particular records were not located in the search and turned over to Plaintiff. Plaintiff only argues that the search was not complete by the time the complaint was filed. MSJ at 16-19. Plaintiff concedes that WDFW searched the commissioners' private email and text messages, but complains that WDFW "did not search *all* commissioners' private email and text messages *until after Sportsmen's Alliance sued*." MSJ at 16 (emphasis added). Plaintiff alternatively argues that WDFW's search was *too broad*, claiming that "staff struggled for over a year to wade through the haystack [the electronic search] produced, finally actually performing the required search for the relevant needles." MSJ at 17. This argument is self-defeating. WDFW cannot be said to have failed to search "all places likely to contain responsive materials" because WDFW searched *too much* and *too broadly*. *Block*, 189 Wn. App. at 271. WDFW's search was indeed broad, but as set forth in section IV(B)(1), the search appropriately reflected the breadth of the request. Plaintiff argues for a page and a half about the pace at which WDFW reviewed the broad search results. MSJ at 18-19. But whether WDFW reviewed the electronic search results quickly enough is not the issue under an adequate search claim: the issue is whether WDFW conducted a search that was reasonably calculated to uncover and disclose all responsive records. Undeniably, WDFW did so.

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B. Throughout the Processing of Plaintiff's Public Records Request, WDFW Consistently Provided Reasonable Estimates of Time for Installments of Records.

Issue one of the case scheduling order asks if WDFW failed to provide a reasonable estimate of time for responding to Plaintiff's PRR. Plaintiff makes no factual argument that any time estimate was unreasonable. Instead, Plaintiff argues (1) that WDFW was required to provide an estimated date for PRR 23276 to be *completed and closed*, and (2) that WDFW was required to provide Plaintiff a detailed explanation of its time estimates, including a prediction of how many records would be included in future installments, how many records would ultimately be produced, and the pace at which WDFW would produce them. MSJ at 21-23. Each of these arguments is directly contrary to established and binding precedent, including but not limited to *Health Pros Nw., Inc. v. State*, 10 Wn. App. 2d 605, 619, 449 P.3d 303, 311 (2019) and *Twin Harbors Fish & Wildlife Advocacy v. Washington Dep't of Fish & Wildlife*, 21 Wn. App. 2d 1003 (2022) (unpublished). Plaintiff's arguments on this issue, which acknowledge some (but not all) binding authority to the contrary, therefore fail.

On at least three occasions, Division II has held that agencies are not required to provide an estimate of when they will fully respond to the request, but rather must provide an estimate for when they will provide an installment. *Health Pros*, 10 Wn. App. 2d at 622; *Twin Harbors*, *supra* (unpublished); *West v. Dep't of Fish & Wildlife*, 20 Wn. App. 2d 1074 (2022) (unpublished). Division I has reached the same conclusion, though only once. *Beidler*, 26 Wn. App. 2d 1035 (unpublished). Plaintiff admits as much, without citing *West* or *Beidler*. MSJ at 21-22. Further, RCW 42.56.550(2) applies "to all time estimates and not just the estimate for the initial installment." *Health Pros*, 10 Wn. App. at 605, 621; *see also Twin Harbors, West,* and *Beidler* (unpublished). Courts must therefore consider "the agency's entire response, including its response after the first installment" in assessing any reasonable estimate of time claim. *Health Pros*, 10 Wn. App. at 605, 621. Plaintiff nonetheless asserts that all these decisions are "plainly wrong." MSJ at 23. Plaintiff's open disregard of established case law requires no further

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attention here: vertical *stare decisis* requires that superior courts follow decisions handed down by higher courts in the same jurisdiction. *See Wash. Election Integrity Coal. United v. Schumacher*, 28 Wn. App. 2d 176, 190–91, 537 P.3d 1058 (2023), *review denied*, 2 Wn.3d 1025 (2024).

Plaintiff further argues that, rather than follow the case law outlined above, the Court should find WDFW's time estimates unreasonable because WDFW's communications to Plaintiff did not sufficiently explain the basis for the time estimates provided. This argument has been rejected by all three divisions of the court of appeals. The PRA "does not require the agency to provide an explanation for its time estimate." *Freedom Found. v. Washington State Dep't of Soc. & Health Servs.*, 9 Wn. App. 2d 654, 665, 445 P.3d 971, 977 (2019); *Ockerman v. King Cnty. Dep't of Dev. and Env't. Servs.*, 102 Wn. App. 212, 217-18, 6 P.3d 1214 (2000); *Andrews v. Washington State Patrol*, 183 Wn. App. 644, 652, 334 P.3d 94, 98 (2014). The Court should not disregard well-established caselaw in order to adopt Plaintiff's misguided legal theory, which is directly contradicted by other, equally well-established caselaw. Plaintiff's argument is meritless, and their motion should therefore be denied.

C. RCW 42.56.100 Does Not Create a Cause of Action, and This Issue Was Not Included in the Case Scheduling Order.

Finally, Plaintiff argues that WDFW failed to adopt and enforce sufficient rules under RCW 42.56.100. To be clear, the only issues in the case scheduling order are (1) whether WDFW failed to provide reasonable estimates of time, and (2) whether WDFW denied Plaintiff access to responsive records. To the extent Plaintiff asserts some new freestanding cause of action here, the Court should disregard arguments that were not raised in the case scheduling order. That said, Plaintiff's only substantive allegation in this section is that certain WDFW commissioners used personal emails and phones for agency business. Again, as much as WDFW has discouraged the use of personal devices for public business, the PRA does not prohibit such use,

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and WDFW followed the guidance of Washington courts in conducting searches of all such records. *Valderrama*, 33 Wn. App. 2d 318; *Nissen*, 183 Wn.2d 863.

VI. CONCLUSION

Plaintiff here moves for summary judgment. Plaintiff must therefore establish undisputed material facts demonstrating that WDFW violated the Public Records Act. Plaintiff wholly fails to meet that burden. The undisputed facts provide no support for Plaintiff's claims. Plaintiff argues strenuously based on heavily disputed facts that, even if true, would not demonstrate that WDFW violated the PRA. Meanwhile, the evidence set forth in WDFW's declarations (and cited both here and in support of WDFW's Merits Brief) demonstrate that WDFW complied with every substantive and procedural requirement of the PRA. Plaintiff's MSJ should therefore be denied.

DATED this 18th day of July, 2025.

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