NO. 100424-9

SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals, Div. II, 53613-7-II

DAVID O'DEA,

Petitioner,

v.

CITY OF TACOMA and TACOMA POLICE DEPT.,

Respondents.

AMICUS CURIAE MEMORANDUM OF ALLIED DAILY NEWSPAPERS OF WASHINGTON AND THE SEATTLE TIMES IN SUPPORT OF REVIEW

Katherine George, WSBA No. 36288
JOHNSTON GEORGE LLP
2101 Fourth Avenue, Suite 860
Seattle, WA 98121
Phone: 206 832-1820
kathy@johnstongeorge.com

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I. INTRODUCTION

As this Court has noted, trial courts are in the best position to decide how much of a penalty will deter an agency from repeatedly violating the Public Records Act (PRA), Chap. 42.56 RCW. The Legislature gave trial courts broad discretion to impose penalties of up to $100 for each day that an agency unlawfully withheld a public record. This discretion includes assessing a separate penalty for each record or each page wrongfully concealed.

In this egregious case in which the City of Tacoma took *no action* on two records requests for nine months and destroyed responsive records, the Court of Appeals improperly reversed a large penalty based on its own view that a gentler calculation method would be "more reasonable." Specifically, the Court of Appeals held that the trial court abused its discretion by assessing a $10 daily penalty *per record* instead of grouping records together to reduce the total amount. This conflicts with the plain

language of the PRA as well as case law affirming per-record penalties. This Court should grant review in order to restore the broad discretion conferred on trial courts and clarify that the PRA supports a daily penalty for each wrongly withheld record.

II. INTEREST AND IDENTITY OF AMICI

Allied Daily Newspapers of Washington (Allied) is a trade association representing 25 daily newspapers across the state. Allied regularly advocates for strictly enforcing the PRA to ensure full and prompt access to government records. Such access is essential to informing the public about important issues.

The Seattle Times is the state's largest newspaper. Times reporters routinely use the PRA to investigate public concerns. The Times wants to guard against eroding *Wade's Eastside Gun Shop v. Dept. of Labor & Industries*, 185 Wn.2d 270, 372 P.3d 97 (2016), in which the Times was awarded per-page penalties for egregious PRA violations related to worker safety issues.

Allied and the Times are interested in this case because it involves the effectiveness of the PRA penalty provision, the primary tool for enforcing the public's right to know. Allied and the Times believe that agencies are more likely to voluntarily obey the PRA if steep penalties are possible (albeit rare). They support review of the Court of Appeals decision in order to restore the broad penalty discretion which this Court has recognized and clarify that per-record penalties are important to fulfilling PRA goals.

III. STATEMENT OF THE CASE

In November 2017, David O'Dea sued the City under the PRA and attached two unprocessed records requests to the complaint. *O'Dea v. City of Tacoma*, 19 Wn.App.2d 67, 74 (2021). The City answered the complaint, denying that it received the requests when they were mailed in March 2017. *Id*. The City did not begin processing the requests until August 2018,

nine months after receiving them as attachments to the lawsuit. *Id*. at 75.

In November 2018, while the records requests were pending, the City inadvertently destroyed six files containing responsive records. *Id.* at 77. The City closed the requests in February 2019 but, after Mr. O'Dea complained of deficiencies, produced more records in April 2019. *Id*.

The trial court awarded $2.6 million in penalties to Mr. O'Dea after considering the mitigating and aggravating factors outlined in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 449 P.3d 277 (2010) (*Yousoufian II*). *O'Dea*, 19 Wn.App.2d at 76, 78. The court found three aggravating factors: the requests were time-sensitive, the explanation for non-compliance was unreasonable, and a large penalty was necessary to deter future violations. *Id*. at 85. The penalty amount was based on: a) $10 a day for each of 10 records withheld for 395 days; b) $10 a day for each of 536 records withheld for 323 days; and c) $10 a day

for each of 192 records disclosed after the initial penalty award. *Id*. at 85-86.

IV. DISCUSSION

A petition for review will be accepted if: (1) the Court of Appeals decision conflicts with a decision of the Supreme Court; (2) the Court of Appeals decision conflicts with a published decision of the Court of Appeals; (3) a significant question of constitutional law is involved; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). At least two of these conditions, RAP 13.4(b)(1) and (4), warrant review in this case.

A. The Court of Appeals Decision Conflicts With Supreme Court Precedents.

In reversing the penalty award, the Court of Appeals said:

> Here, the trial court imposed per record penalties based on minimal discussion, a total of five sentences … Reviewed holistically, this more than $2.6 million penalty was an abuse of discretion because the overall amount was manifestly unreasonable, especially in light of the trial court's lack of supporting explanation. While we do not do

> a piecemeal review of the *Yousoufian* factors and they are not to be applied rigidly, the trial court here found only three aggravators and no bad faith, which was not enough to justify the astoundingly high penalty. Although deterrence is a permissible goal when setting public record penalties, and the need for deterrence could justify a multiplier, a far more reasonable course would have been to multiply the per day penalty by the number of days and by the number of requests, or by grouping the records for penalty calculation purposes in another way to achieve a more reasonable multiplier.

O'Dea, 19 Wn.App.2d at 88. This conflicts with several decisions of this Court.

1. Existence of a "more reasonable" approach is irrelevant.

A trial court's penalty award under the PRA is reviewed for abuse of discretion. *Yousoufian II*, 168 Wn.2d at 458, quoting *Yousoufian v. Office of King Co. Exec.*, 152 Wn.2d 421, 431, 98 P.3d 463 (2004) (*Yousoufian I*). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Id*. This Court has said repeatedly that a penalty decision is "manifestly unreasonable" only if the court, despite

applying the correct legal standard, "adopts a view that no reasonable person would take." *Yousoufian II* at 459; *Hoffman v. Kittitas Co*., 194 Wn.2d 217, 229, 449 P.3d 277 (2019). Thus, it does not matter if the penalty could have been "more reasonable," as the Court of Appeals found here. The question is whether **no reasonable person** would take the same view. *Hoffman*, 194 Wn.2d at 229. That cannot be said here, where a strong deterrent was needed to overcome the City's recalcitrance (including waiting nine months after the PRA suit to start processing the requests, destroying requested records, and closing the requests before locating all responsive records.)

There is no question that the trial court applied the correct legal standard, analyzing penalty factors pursuant to *Yousoufian II*. The Court of Appeals simply disliked the result. Reversing the penalty because a lower one would be "more reasonable" is inconsistent with this Court's standard for abuse of discretion.

Hoffman, 194 Wn.2d at 229; *Yousoufian II*, 168 Wn.2d at 459. Therefore, review is warranted under RAP 13.4(b)(1).

2. Discretion rests with the trial court.

RCW 42.56.550(4) provides:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record… 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.

Applying that statute in *Wade's,* 185 Wn.2d at 278, this Court said: "the plain language of the PRA confers great discretion on trial courts to determine the appropriate penalty for a PRA violation." Noting expansions of the penalty range in 1992 and 2011, this Court added: "Since enacting the PRA, the legislature has afforded courts more - not less – discretion in setting penalties for PRA violations." *Id*. The Court said that although *Yousoufian II* outlined non-exclusive factors to consider, "we

have emphasized that 'these factors should not infringe upon the considerable discretion of trial courts to determine PRA penalties.' " *Wade's* at 279, quoting *Yousoufian II*, 168 Wn.2d at 468. This Court stated: "The trial court is in the best position to make an individual, fact-driven inquiry into what PRA penalties are necessary to achieve the penalty provision's goal of deterring unlawful nondisclosure." *Wade's*, 185 Wn.2d at 280.

Wade's held that the trial court did not abuse its ample discretion by awarding a separate daily penalty for each page unlawfully withheld from the Seattle Times, because a "record" can be a page. *Id*. The Court explained: "Limiting trial courts to imposing penalties based on a set definition of 'record' would deny them the flexibility needed to respond appropriately to PRA violations in the age of rapidly advancing technology." *Id*. Thus, this Court declined to limit the definition of "record" to an entire document or group of documents for purposes of RCW 42.56.550(4), stating: "Allowing courts to define 'said public

record' in a way that makes sense for the particular case promotes the most effective implementation of the PRA."

Here, the Court of Appeals contradicted *Wade's* by constraining how a trial court defines a "record" for penalty purposes. *Id*.; *O'Dea*, 19 Wn.App.2d at 88. Under the Court of Appeals decision, defining "said public record" as an individual record – as the plain language of RCW 42.56.550(4) suggests – "should be reserved for the most extreme cases" and justified by a "robust explanation." *O'Dea* at 86-87. In effect, the Court of Appeals outlawed penalties per record (or per page) if grouping records together would make the total amount "more reasonable." *Id*. at 88. This conflicts with *Wade's* as well as *Hoffman*, which similarly upheld a per-page penalty and cautioned that the appellate court's function is "to review claims for abuse of trial court discretion" and "not to exercise such discretion ourselves." *Hoffman*, 194 Wn.2d at 227. Review is needed to fix the conflict and restore "the flexibility needed to

respond appropriately to PRA violations." *Wade's*, 185 Wn.2d at 280; RAP 13.4(b)(1).

B. There Is Substantial Public Interest In Interpreting RCW 42.56.550(4) Correctly.

Besides conflicting with this Court's opinions, the Court of Appeals decision clashes with the plain language of RCW 42.56.550(4). The statute authorizes lawsuits seeking the right to inspect "any public record" and allows penalties of up to $100 for each day a requester "was denied the right to inspect…*said public record*." The term "record" is singular. Yet the Court of Appeals held that a penalty per record is only for extreme cases and the default should be a penalty for each *group* of records unlawfully withheld.

This is backwards. The PRA must be liberally construed to assure that the public interest in disclosure will be fully protected. RCW 42.56.030. PRA penalties are designed to discourage improper denial of records. *Yousoufian II*, 168 Wn.2d at 459. When construed liberally to promote the public interest

in deterrence, as required, the term "said public record" must mean a *single* record or page. RCW 42.56.550(4); RCW 42.56.030. If the Legislature intended to dilute penalties across multiple records, instead of treating each one as important, RCW 42.56.550(4) would say "records" instead of "record."

On that point, *Yousoufian I* – approving of penalties per group of record - has been superseded by statute. Decided in 2005, *Yousoufian I* held that even though the penalty statute used the singular term "said public record," PRA penalties "need not be assessed per record." 152 Wn.2d at 425, 433. That interpretation was based on RCW 42.17.020, the PRA definition statute in effect at the time, which said: "[a]s used in this chapter, the singular shall take the plural and any gender, the other, as the context requires." *Yousoufian I* at 433. The Court said the instruction to "interpret terms as either singular or plural" made the term "said public record" ambiguous, adding:

> If the term 'record' is interpreted as 'record,' then the plain meaning would suggest that courts should

> assess penalties for every 'record' that is requested. However, if the term is interpreted as 'records,' then the plain meaning would suggest that courts should assess penalties only for each request regardless of the number of records sought.

Id. at 434.

The language that *Yousoufian I* was based on, "the singular shall take the plural," was repealed by SSHB 2016 which took effect on Jan. 1, 2012. Laws of 2010 c 204 s 101. When the public records law was separated from the campaign finance law and recodified as Chap. 42.56 RCW, the Legislature did not include "the singular shall take the plural" in the definition section. *Id*.; RCW 42.56.010. The repeal and omission from the current law erased the requirement to interpret a singular word as plural, superseding *Yousoufian I* to the extent it interprets "record" in RCW 42.56.550(4) as "records."

This case highlights the need to clarify that a penalty for each record is precisely what the Legislature intended, based on the plain language and liberal construction of the PRA. Nothing

in the current law supports the Court of Appeals interpretation that a per-record penalty should be reserved for the most extreme cases. On the contrary, RCW 42.56.550(4) must be construed to protect the public interest in records disclosure. RCW 42.56.030. Weakening penalties by interpreting "said public record" as "records" has the opposite effect. Review should be granted to address the substantial public interest in correctly interpreting RCW 42.56.550(4). RAP 13.4(b)(4).

IV. CONCLUSION

For the foregoing reasons, this Court should grant review.

Dated this 28th day of January 2022.

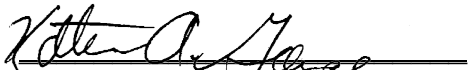
I certify that this response contains 2,257 words except for content excluded by RAP 18.17.

RESPECTFULLY SUBMITTED,

/s Katherine A. George
Katherine George, WSBA No. 36288
Attorney for Amici

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on January 28, 2022, I caused service of the foregoing Amicus Memorandum on registered parties through the electronic filing system.



KATHERINE A. GEORGE

JOHNSTON GEORGE LLP

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