No. 100424-9

Court of Appeals No. 53613-7-II

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

DAVID O'DEA,

Petitioner,

v.

CITY OF TACOMA, a public agency; and TACOMA POLICE DEPARTMENT, a public agency,

Respondents.

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

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INTRODUCTION

The distinguished *amici* appear to be interested in a different appeal. When filing their *amicus* Memo, they did not have access to the City's Answer to O'Dea's Petition, nor (apparently) did they have access to the record, as their Memo bears little resemblance to the facts established there. The facts paraphrased below are footnoted to call attention to the misunderstandings driving *amici*'s Memo.

Not only do *amici* misunderstand the facts, but they appear to misunderstand both the appellate court's actual holding and the applicable law. This is not an "egregious" situation in which the City intentionally withheld or destroyed public records in bad faith. An "extreme" $2.6 million penalty might be justified in such a case. But that would be a *different* case. Here, it is unjustified.

This decision cites and follows controlling law. The "extreme, "astoundingly high," and unprecedented penalty is manifestly unreasonable. Review is unwarranted.

RESTATEMENT OF FACTS[1]

A. After endangering the public in a prior incident, Lt. O'Dea was terminated for shooting at a car *11 times* – endangering both the public and other officers – and the dismissal of his wrongful-termination claim was affirmed on appeal.

As the Court of Appeals held in an unpublished opinion this Court declined to review regarding the underlying action giving rise to O'Dea's PRA requests:

> Former Tacoma Police Department Lieutenant David O'Dea fired 11 shots at a car driven by Jose Manuel Mendoza Davalos as Mendoza Davalos was attempting to flee a group of officers. After an internal investigation, the Tacoma Police Department terminated O'Dea for violating the Department's use of force policy and exhibiting a lack of judgment that caused concern for community safety.
>
> . . . We affirm

O'Dea v. City of Tacoma, No. 54240-4-II, 2021 Wash. App. LEXIS 1236, *1-2 (May 18, 2021), *rev. denied*, 2021 Wash. LEXIS 708 (Dec. 1, 2021).

[1] For this Court's convenience, we paraphrase some of the facts here, using footnotes to identify *amici*'s apparent misunderstandings.

Yet this was not O'Dea's first offense. On "Halloween night 2015," O'Dea "initiated a pursuit" "that caused 'a multi-vehicle collision resulting in significant injuries to citizens and substantial damage to property.'" ***O'Dea***, 54240-4-II at *3 (record citations omitted). "After that incident, the Department found that O'Dea's performance was unsatisfactory and that he violated Department policies relating to vehicle pursuits." *Id*. "The Department suspended O'Dea for 40 hours and notified him that 'any further violation of the Tacoma Police Department Policies . . . may result in more severe discipline, up to and including termination of employment.'" *Id*.

O'Dea's termination was affirmed, his wrongful-termination suit against the City was dismissed, that dismissal was affirmed on appeal, and it is now final. Since O'Dea's underlying suit was meritless, no harm could come to him from properly denying his PRA requests.

B. The trial court nonetheless imposed an unprecedented $2.6 million PRA penalty on the City, yet found no bad faith and failed to address roughly 80% of this Court's *Yousoufian* factors.

Like O'Dea himself, the trial court accepted the fact that the City never received his PRA requests by mail. ***O'Dea v. City of Tacoma***, 19 Wn. App. 2d 67, 71, 493 P.3d 1245 (2021) ("It is undisputed on appeal that the City of Tacoma's public records officer never received these letters and did not respond").[2] The trial court also refused to find bad faith.[3] *See, e.g.,* ***O'Dea***, 19 Wn. App. 2d at 72.

With those two findings, and with the trial court's failure to address most of the 16 factors this Court adopted in ***Yousoufian***,[4] the total penalty, viewed "holistically," was "manifestly unreasonable" under the abuse of discretion

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[2] *Amici* somehow overlook this crucial fact. Amicus Memo ("AM") 3.

[3] *Amici* also miss this crucial fact, even raising an *inadvertent* destruction of six records that O'Dea himself eschews in this Court. AM 4. No bad faith occurred here.

[4] The *amici* incorrectly assert that the trial court considered all the ***Yousoufian*** factors. AM 4.

standard[5] and well-established precedent. 19 Wn. App. 2d at 84-91.[6] That is the correct standard of *review*.

Specifically, the trial court used a *per-record multiplier* for more than 700 records to reach its "extreme" penalty. *Id.* at 86. At $10 per record, it thus reached *$7,000 per day*. *Id*. The appellate court correctly noted that "an extreme per record multiplier" like this one "should be justified with a robust explanation for the severity of the penalty" and "should be reserved for the most extreme cases . . . involving a bad faith withholding of a record subject to intense public interest." *Id*. at 86-87. This is *classic* abuse of discretion analysis.

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[5] *Amici* fail to note ***O'Dea***'s actual *holding*. AM 5-6.

[6] Citing ***Hoffman v. Kittitas Cnty.***, 194 Wn.2d 217, 449 P.3d 277 (2019); ***Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.***, 185 Wn.2d 270, 372 P.3d 97 (2016); ***Yousoufian v. Office of King Cnty. Exec.***, 168 Wn.2d 444, 229 P.3d 735 (2010); ***Zink v. City of Mesa***, 4 Wn. App. 2d 112, 419 P.3d 847 (2018); ***Andrews v. Wash. State Patrol***, 183 Wn. App. 644, 334 P.3d 94 (2014); ***Hobbs v. Wash. State Auditor's Office***, 183 Wn. App. 925, 335 P.3d 1004 (2014).

Yet the trial court here imposed its unprecedented $2.6 million penalty "based on minimal discussion, a total of five sentences, mentioning three aggravating factors." *Id*. at 88. It "did not include any discussion of why mitigating factors did not apply, nor did it say why the circumstances of this case were particularly egregious." *Id*. "The trial court did not find any bad faith." *Id*.

Simply put, the trial court stated no tenable basis for imposing this manifestly unreasonable and "astoundingly high penalty." *Id*. Absent any bad faith on the City's part, three aggravators are grossly insufficient to justify "an amount more than 35 times higher than" a penalty imposed for egregious, bad-faith withholding. *Id*. at 86. And the trial court's silence on many mitigators unjustly leaves the City guessing as to why it suffered such a high penalty.

Amici assert an interest in the "effectiveness of the PRA penalty provision." AM 3. There is no evidence here, however, supporting such an outlandish penalty.

ARGUMENT

A. The appellate decision follows this Court's precedents; it does not conflict with them.

Although O'Dea's own Petition for Review makes no argument that the decision conflicts with this Court's precedents, *amici* try to generate conflicts with ***Yousoufian***, ***Wade's***, and ***Hoffman***, *supra*. AM 5-11. As noted above, the decision's penalty analysis cites, quotes, and follows those (and other) precedents. ***O'Dea***, 19 Wn. App. 2d at 84-91. No conflicts exist.

1. The decision follows *Yousoufian*.

On ***Yousoufian***, *amici* assert that reasonableness should play no part in the penalty analysis. AM 6-8. While this approach might be understandable from *amici* like these – who could well have a prospective financial interest in seeing such "extreme" amounts affirmed – it is patently false under ***Yousoufian*** itself. *See* ***Yousoufian***, 168 Wn.2d at 458 (trial court abuses its discretion if its decision is manifestly *unreasonable*). *That* is what the appellate

court held. ***O'Dea***, 19 Wn. App. 2d at 88 ("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").

The appellate court *did not* hold – as *amici* argue – that penalties may be overturned simply because a "more reasonable" approach might exist or because a per-record multiplier is impermissible. AM 6-8. On the contrary, it noted that generally, "deterrence *is* a permissible goal when setting public record penalties, and the need for deterrence *could* justify a multiplier"; but it concluded that "a far more reasonable course" *in this matter* "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." 19 Wn. App. 2d at 88

(emphases added). No reasonable person would claim this language "outlawed penalties per record." *But see* AM 10.

Rather, the decision *confirms that multipliers may be used*. And yet the "far more reasonable approach" language has *nothing to do with the appellate court's actual holding*, which is that the *entire* penalty – $2.6 million – was "manifestly unreasonable" in light of the facts in this case:

- the City *never* received the letters in the mail;
- O'Dea's counsel *never* brought a motion to show cause, and indeed took many months to clarify that his *denied* PRA requests should be treated as *new* PRA requests;
- the City *immediately* began producing over 700 records; and thus,
- the City *never* acted in bad faith in this matter.

Under these facts, the $2.6 million penalty is untenable.

The *amici* credulously assert that "no question" exists "that the trial court applied the correct legal standard." AM 7. On the contrary, it failed to address ~80% of this Court's 16 factors. ***O'Dea***, 19 Wn. App. 2d at 88. The trial decision – not the appellate decision – conflicts with ***Yousoufian***.

2. The decision follows *Wade's & Hoffman*.

The *amici* assert that the appellate decision contradicts "***Wade's*** by constraining how a trial court defines a 'record' for penalty purposes." AM 10 (citing ***Wade's***, 185 Wn.2d at 280; ***O'Dea***, 19 Wn. App. 2d at 88). That is false.

Rather, the appellate decision notes that in ***Wade's***, that trial court kept the *total* penalty amount *within reason* by setting the daily per record penalties *at only a few cents* for the vast majority of the records. ***O'Dea***, 19 Wn. App. 2d at 87. That trial court applied a *$5* per-record penalty *only* to records that "the agency had compiled and yet continued to withhold even after the court ordered them to be produced, and some of which the agency did not provide until the requester threatened a contempt motion." *Id*. at 87-88 (citing ***Wade's***, 185 Wn.2d at 295-96). In other words – and unlike here – that agency was found to have withheld some public records *in bad faith*.

And finally, "because the Department of Labor and Industries is a statewide agency, the per capita taxpayer burden in ***Wade's*** was dramatically lower than" in ***O'Dea***. *Id*. at 88. *Amici* have nothing to say about this *actual analysis* in the appellate decision, which *distinguishes* the conduct in ***Wade's*** in a legally valid fashion.

Yet again, *amici* falsely claim that the appellate decision "outlawed penalties per record (or per page) if grouping records would make the total amount 'more reasonable.'" AM 10. This insulting caricature of the appellate court's reasoning finds no purchase in the decision before this Court.

Similarly disconnected from the realities of this case is *amici's* claim that the appellate decision conflicts with ***Hoffman***'s reminder that appellate courts *review* claims of abuse of discretion, rather than "'exercise such discretion'" themselves. AM 10 (quoting ***Hoffman***, 194 Wn.2d at 227). ***Hoffman*** is there quoting ***Yousoufian I***, which is quoting

Sheehan, which simply reiterates the fundamental principle that appellate courts generally do not substitute their own discretion for the trial court's discretion *as to the amount of the penalty*. ***Hoffman***, 194 Wn.2d at 227 (quoting ***Yousoufian v. Office of King Cnty. Exec.***, 152 Wn.2d 421, 430, 98 P.3d 463 (2004) (quoting ***King Cnty. v. Sheehan***, 114 Wn. App. 325, 350-51, 57 P.3d 307 (2002) ("Accordingly, we summarily reject [the requestors'] invitation to impose the maximum statutory penalty"))). Wholly *consistent* with this essential principle, the ***O'Dea*** decision properly *remands to the trial court* for a reasonable exercise of *its* broad discretion.

Sheehan also notes that the "existence or absence of bad faith is *the principal factor* in determining the amount of penalty to be imposed." ***Sheehan***, 114 Wn. App. at 356 (emphasis added) (citing ***Yacobellis v. City of Bellingham***, 64 Wn. App. 295, 303, 825 P.2d 324 (1992)). That is why the results in ***Wade's*** and ***Hoffman*** are

different from here: the *conduct* was different. And precisely as ***Hoffman*** holds is appropriate, this appellate decision reviewed "the overall penalty decision 'holistically,' 'f[inding] the trial court's assessment inadequate . . . in light of the totality of relevant circumstances." *Compare* ***Hoffman***, 194 Wn.2d at 228 (citation omitted) *with* ***O'Dea***, 19 Wn. App. 2d at 88.

Nothing in this appellate decision "restricts" the definition of "record," the application of a per-record multiplier, or any other part of the PRA. The trial court's analysis was inadequate to justify the largest penalty in the history of the PRA, notwithstanding the absence of bad faith. There is no conflict to "fix" here. AM 10.

B. There is no substantial public interest in reviewing this decision based on something it does not do.

Finally, *amici* claim the appellate decision "clashes with the plain language of RCW 42.56.550(4)": "it shall be within the discretion of the court to award [a requestor] 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." AM 11. While *amici* assert a "plain language" argument, this language plainly says the award should not exceed $100 for each day a record is withheld. This award reached *$7,000* per day.

But *amici* correctly note that this language has been *interpreted* to mean $100 a day *per record*, which could mean anything up to and including each *page* of a record. AM 11-13. Nonetheless, just because it is *possible* to impose an outrageous penalty does not mean that it is *reasonable* to do so. Absent bad faith, it manifestly is not.

In any event, the appellate court did *not* "hold" that "the default should be a penalty for each *group* of records." AM 11 (citing nothing). It held only that, viewing this unprecedented $2.6 million penalty as a whole, it was manifestly unreasonable to impose such an "astoundingly high" amount absent a substantial justification, such as

bad-faith withholding of documents having great public interest. ***O'Dea***, 19 Wn. App. 2d at 88.

Amici purport to defend the "public interest." AM 11-12. Yet they say *nothing* about the appellate court's analysis of how *harmful to the public* this penalty would be. *Compare* AM *with* 19 Wn. App 2d at 86-88. It is more than 35 times higher than the per-citizen amount in ***Hoffman***. *Id.* at 86. It also dwarfs the per-citizen amount in ***Wade's***. *Id*. at 88. There is frankly nothing comparable to it in this Court's jurisprudence. That is why the appellate decision wisely followed ***Hoffman*** in noting that courts must not "lose sight of the fact that public records penalty awards are ultimately paid with taxpayer dollars." *Id*. at 86.

These *amici* – as recipients of such involuntary public largess – avoid this point entirely. They cannot *protect* the public by defending such "extreme" and "astoundingly high" penalties – they can only protect their own future interests. That is no basis on which to grant review here.

CONCLUSION

The appellate decision follows this Court's precedents. It does not limit "records" or penalty amounts. It instead requires a proper exercise of discretion to impose a truly massive $2.6 million penalty on the Citizens of Tacoma. This Court should deny review and allow the trial court to appropriately exercise its broad discretion, considering the absence of any bad faith, and the unique circumstances of this peculiar case.

RESPECTFULLY SUBMITTED this 22nd day of February 2022.

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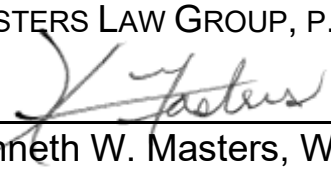

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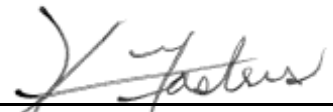
CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to RAP 18.17, the foregoing **RESPONSE TO AMICUS MEMORANDUM OF ALLIED DAILY NEWSPAPERS OF WASHINGTON AND THE SEATTLE TIMES IN SUPPORT OF REVIEW** was produced using word processing software and the number of words contained in the document, exclusive of words contained in any appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images (*e.g.* photographs, maps, diagrams, and exhibits) is 2,531.



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CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **RESPONSE TO AMICUS MEMORANDUM OF ALLIED DAILY NEWSPAPERS OF WASHINGTON AND THE SEATTLE TIMES IN SUPPORT OF REVIEW** on the 22nd day of February 2022 as follows:

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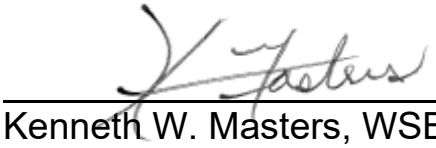

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