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NO. ~~06-2-00141-6~~

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

**(Thurston County Superior  
Court No. 06-2-00141-6)**

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**Arthur S. West, and Walter R. Jorgensen, and Eve Johnson,**

**Appellants (Plaintiffs)**

**v.**

**The Port of Olympia,**

**Respondent (Defendant)**

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**APPELLANTS JORGENSEN AND JOHNSON'S REPLY BRIEF**

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## I. INTRODUCTION

Plaintiffs and Appellants Eve Johnson and Walter Jorgensen and Plaintiff and Appellant Arthur West made public disclosure requests to the Port of Olympia for documents concerning the lease the Port entered into with the Weyerhaeuser Company. Though the requests were worded differently, the universe of responsive documents was the same: “public records regarding, relating to, or reflecting the Weyerhaeuser lease.” CP 1270.

The Port of Olympia released a few documents directly to Mrs. Johnson and Mr. Jorgensen and Mr. West, but disclosed the vast majority of responsive documents to the Trial Court for in-camera review, only after the plaintiffs had filed their separate lawsuits, claiming various privileges and exemptions. After the Trial Court had ruled on the privileges and exemptions and the case had gone up on appeal and back down again, plaintiffs learned that yet another category of documents existed: *the Port had a lot of documents that were clearly responsive to both public disclosure requests that it neither provided to plaintiffs nor to the Judge for in camera review.*

The Wetlands Delineation Report recently uncovered by Mr. West and now part of the record on review by order of this Court is just another example. It is clearly responsive to the public disclosure requests but the

Port refused to disclose it to the plaintiffs and even hid it from the Trial Court, not producing it for *in camera* review.

This most recent discovery of a non-disclosed responsive document is further support for Mrs. Johnson's and Mr. Jorgensen's contention: *treating all the documents as a single document for purposes of assessing the penalty is absurd*. The failure of the Port to produce all these responsive documents to *anyone* makes the point: even if the Trial Court had not erred in failing to rule that the non-disclosed documents were responsive to both requests and had said, "yes, they were responsive and should have been produced," by treating all documents as a single document and just adding them to the existing stack, it would have made no difference in the remedy. The sanction would have been the same and there would be zero deterrent effect. This means that a public agency like the Port can ignore the law with impunity because there would be no sanction available, or no increase in sanction.

In a case like this, where documents were produced in dribs and drabs in a time spanning two and a half years (*see* Disclosure Log at CP 1426-1442), the deterrent aim of the public records act would best be served by dividing up the documents into packets and imposing a daily per packet penalty, just as the trial court did in the Yousoufian case.

This Court should reverse the Trial Court's determination that the non-disclosed documents were not responsive to the public records request, should reverse the Trial Court's imposition of a more lenient rather than a more stringent penalty in violation of the law of the case, and should impose a daily per packet penalty as proposed by plaintiffs and appellants Mrs. Johnson and Mr. Jorgensen.

## II. REPLY IN SUPPORT OF STATEMENT OF THE CASE

In the Port's "Introduction/ Respondent Port's Restatement of Facts" (Response at 3), the Port states that Mrs. Johnson and Mr. Jorgensen requested an award in excess of thirty-eight million dollars, ignoring the Supplemental Memorandum filed by counsel, stating, "Plaintiff does not seek \$38 million in penalties. Attached [as] Exhibit A is an illustrative exhibit that will be offered at today's hearing which sets forth on page 2 the basis for a minimum penalty of \$268,220." CP 1421-1423. The Port's statement also ignores the oral argument made by counsel at the hearing, where counsel again argued for a penalty in the amount of \$268,220. *See* Verbatim Report of Proceedings, August 25, 2010, pp. 35-36.

The Port also states that it "immediately" released records after the decision by the Division I Court of Appeals holding that the deliberative

process exemption did not apply. *See* Response at 4. The release was not *immediate*. Division I's decision was issued on July 21, 2008. On September 18, 2008, two months later, the Port notified Mr. Jorgensen that it was releasing the records. *See* Response at 49. On October 7, 2008, nearly one month more, the Port actually sent the records to Mrs. Johnson and Mr. Jorgensen. *See* Response at 4.

The Port argues that its release of all the documents for which it had claimed the deliberative process exemption, including those for which it had claimed that another exemption might apply is evidence of its good faith, and points to the Trial Court's finding of "openness and transparency." *See* Response at 4. However, the Port's own argument shows that the Port released these records – the "Court of Appeals records" after plaintiffs and other concerned citizens had nearly exhausted all of their challenges to the Weyerhaeuser lease. *See* Response at 37-52. (*See also* Declaration of Walt Jorgensen, CP 810, stricken by the Trial Court). That is, the Port released the Court of Appeals records after it was too late for plaintiffs and concerned citizens to use them to challenge the lease. This is no evidence of "openness and transparency" but rather of the Port's calculation that it was no longer cost-effective or beneficial to continue to fight compliance with the Public Records Act in the courts, since citizens had already exhausted all possible challenges to the lease.

### III. ARGUMENT

#### A. Appellants Correctly Set Forth the Standard of Review

The standard of review, just as Mrs. Johnson and Mr. Jorgensen set forth in their opening brief, is *de novo*. In this case, the Trial Court, on remand, failed to follow the law of the case as established by Division I, and imposed a more lenient penalty rather than either keeping the penalty the same or by setting a more stringent penalty. That is, the Trial Court, on remand, actually *reduced* the penalty. “In our judgment, the question of whether RCW [42.56.550(4)] authorizes a trial court to reduce the penalty period is a question of law. *De novo*, therefore, is the proper standard of review, not the abuse of discretion standard.” Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 436, 98 P.3d 463 (2004) (*hereinafter* “Yousoufian II” (counting the first Court of Appeals decision as Yousoufian I, the first Supreme Court decision as Yousoufian II, the second Court of Appeals decision as Yousoufian III, and the second Supreme Court decision as Yousoufian IV)).

In Yousoufian II, the Supreme Court held that the trial court impermissibly subtracted days from the penalty period, and impermissibly refused to assess any penalty for those days it subtracted. “The PDA

plainly states that the trial court has ‘discretion’ in setting the penalty at not less than \$5 but not more than \$100. If the trial court refuses to assess any penalty, then it is setting the penalty at less than \$5, which is contrary to the unambiguous language used in RCW [42.56.550(4)].” Yousoufian II, 152 Wn.2d at 433. When the Trial Court here declined to rule that the non-disclosed documents were responsive to Mrs. Johnson’s and Mr. Jorgensen’s and Mr. West’s public records act, it refused to assess any penalty. In refusing to assess any penalty for the plainly responsive records, the Trial Court set the penalty at less than \$5, contrary to the unambiguous language used in the statute. This Court also reviews de novo the Port’s actions in withholding or redacting records. Mechling v. City of Monroe, 152 Wn. App. 830, 841, 222 P.3d 808 (2009). This includes the Port’s decision to refuse to submit the nondisclosed documents to the Trial Court for *in camera review* and the Port’s decision to refuse to produce them to the plaintiffs.

Even though the above case law supports appellants’ argument that the standard of review is de novo, in the event that the abuse of discretion standard of review applies to a portion of the case, appellants were correct to argue that once a higher court has announced the law of the case, as Division I did here where it stated that the Trial Court might impose a more stringent penalty on remand, that a trial court’s discretion is limited

on remand. The “law of the case” concept applies in PRA cases. “This is the law of the case.” Yousoufian v. Office of Ron Sims, 137 Wn. App. 69, 78, 151 P.3d 243 (2007), *reconsideration denied, review granted*, 152 Wn.2d 1011, 175 P.3d 1095, *affirmed as modified*, 168 Wn.2d 444, 229 P.3d 735 (2010) (*hereinafter* “Yousoufian III”). The term “law of the case” means “binding effect of determinations made by the appellate court on further proceedings in the trial court on remand.” Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992), *cited by State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008) (“The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation”), *cited by* Appellant West. *See* West’s Opening Brief at 21. After an appellate court has announced the law of the case, the trial court is bound to follow it on remand, meaning that its discretion is limited.

**B. Appellants Do Not Challenge the Trial Court’s Calculation of Number of Days Withheld For the *Disclosed* Documents**

Mrs. Johnson and Mr. Jorgensen do not challenge the Trial Court’s calculation of the number of days that the Port withheld the documents it disclosed, whether to appellants themselves or to the Trial Court for in camera review. But insofar as the Trial Court held that the non-disclosed documents were not responsive to the public record requests, the Trial

Court implicitly found that the number of days withheld for these non-disclosed documents was *zero*. Mrs. Johnson and Mr. Jorgensen do contest that finding and calculation.

**C. It is Inappropriate to Treat a Group of Different Responsive Documents as a Single Document for Purpose of the Public Records Act.**

It is an abuse of discretion for a trial court to fail to impose a penalty sufficiently proportionate to the public agency's misconduct.

The trial court on remand based its assessment on the county's "gross negligence", but failed to impose a penalty proportionate to the county's misconduct. Instead it imposed a penalty at the low end of the penalty range. As recognized in Yousoufian II, 152 Wn.2d at 439, 98 P.3d 463, such a low penalty is inappropriate and manifestly unreasonable in light of the county's grossly negligent noncompliance with the PRA. We hold that the trial court on remand abused its discretion in imposing a penalty of \$15 per day.

Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 463, 229 P.3d 735 (2010) (*hereinafter* "Yousoufian IV"). In Yousoufian, King County, just like the Port here, disclosed responsive documents in dribs and drabs, making its last disclosure "more than four years after Yousoufian submitted his initial request." Yousoufian IV, 168 Wn.2d at 455. Four years is 1460 days. Yet the Court in Yousoufian IV determined that the trial court abused its discretion in imposing a \$15 per day penalty multiplied by 8,252 days. The reason that the multiplier was 8,252 rather than just over 1460 was that "In determining the penalty period, the trial

court categorized the wrongfully held records into 10 groups.”

Yousoufian IV, 168 Wn.2d at 456. The trial court counted up the days that each of the 10 groups was withheld, thus arriving at a total of 8,252 days. A penalty of \$15 times 8,252, or \$123,780.00, was *insufficient* in Yousoufian given King County’s misconduct. The Supreme Court, in Yousoufian IV, finally awarded a penalty of \$45 per day for King County’s misconduct, for a total of \$371,340.00.

Here, the Trial Court initially awarded a penalty of \$60 per day for 123 days, or \$7380. After Division I held that the deliberative process did not apply, the Trial Court reduced the daily penalty for the Appellate Court records and imposed \$30 per day for the first 123 days, and \$15 per day for the additional 861 days until the Appellate Court records were released, or a total additional penalty of \$16,605. This totals to \$23,985, which pales in comparison with the penalty rejected by the Supreme Court in Yousoufian as being insufficient (\$123,780) given King County’s misconduct. Here, the penalty of \$23,985 is insufficient given the Port’s misconduct. The Port *withheld responsive documents from the Trial Court and from the requestors*. It is an abuse of discretion for the Trial Court to assess such a low penalty, a situation that would be remedied by dividing the documents into packets and imposing a daily per packet penalty, just as proposed by appellants’ counsel. *See* CP 1421-23.

The Trial Court, in its original decision on March 29, 2006, found that the Port's approach was "to maximize what could be kept secret and minimize what is to be made public." See Judge Hicks' "Court's Rulings on Material Reviewed *In Camera*," available at West v. Port of Olympia, 2006 WL 6012649, Wash. Super. (Mar. 29, 2006), p. 2. On appeal, Division I held, "The Court clearly found that the Port had improperly withheld documents and acted contrary to the express purpose of the [Public Records Act]. However, the Court also found the Port's behavior was not so egregious as to mandate the maximum penalty. The trial court chose to impose a daily penalty rather than a per record penalty." West v. Port of Olympia, 146 Wn. App. 108, 121, 192 P.3d 926, *review denied*, 165 Wn.2d 1050, 206 P.3d 657 (2008).

Neither the Trial Court in 2006 nor Division I in 2008 knew that the Port had withheld responsive documents from *in camera* review. The Port's conduct was egregious. This goes beyond the "gross negligence" found by the Yousoufian court and reaches the level of wanton misconduct if not willful misconduct. See Yousoufian III, 137 Wn. App. at 79. "Examples of bad faith would include instances where the agency refused to disclose information it knew it had a duty to disclose in an intentional effort to conceal government wrongdoing and/or to harm members of public. Such examples fly in the face of the PDA and thus deserve the harshest penalties." Yousoufian III, 137 Wn. App. at 80.

Here, the Port intentionally refused to disclose responsive records to the PRA requestors and to the Trial Court for in camera review, in an intentional effort to conceal the scope of the environmental impact the Weyerhaeuser lease inflicts on Puget Sound and to avoid SEPA review. Therefore, it was an abuse of discretion for the Trial Court to not assess a per packet penalty or a daily penalty that is proportionate to the Port's misconduct.

“The abuse of discretion standard is not, of course, unbridled discretion. Through case law, appellate courts set parameters for the exercise of the judge's discretion. At one end of the spectrum the trial judge abuses his or her discretion if the decision is completely unsupported, factually. On the other end of the spectrum, the trial judge abuses his or her discretion if the discretionary decision is contrary to the applicable law.” In re Jannot, 110 Wn. App. 16, 22, 37 P.3d 1265 (2002) *aff'd sub nom. In re Parentage of Jannot*, 149 Wn.2d 123, 65 P.3d 664 (2003). Here, it was completely unsupported factually for the Trial Court to conclude that the non-disclosed documents were not responsive to the public record requests. Likewise, the decision to reduce the penalty was contrary to the law of the case (Division I gave the Trial Court discretion to impose a more *stringent* penalty, not to reduce the penalty) and also contrary to Yousoufian III and IV, which mandate a penalty in proportion to the public agency's degree of culpability.

**D. The Court Erred in Reducing the Penalty Rate**

Whether the Public Records Act authorizes a Trial Court to reduce the penalty period for violation of Act is a question of law, and *de novo* review is the proper standard, not the abuse of discretion standard. Yousoufian II, 152 Wn.2d at 436. Even if abuse of discretion is the appropriate standard, it is an abuse of discretion for a trial court, on remand, to exceed the discretion mapped out by the “binding” law of the case as set forth by the appellate court. *See* Lutheran Day Care, 119 Wn.2d at 113. Here, Division I held, “Here, however, we are unable to determine whether the trial court would have assessed that same penalty had it applied the correct legal standard in reviewing the documents reviewed by the Port. Thus, on remand, the trial court may choose to impose a more stringent penalty.” Port of Olympia, 146 Wn. App. at 122. In this case, the Trial Court *reduced* the penalty.

This Court should impose a more stringent penalty. This case has already been reviewed and remanded once already, with the Trial Court intentionally disregarding Division I’s binding law of the case, imposing an idiosyncratic standard of “community spiritedness” as a trump over the proper legal standard of governmental responsiveness to citizen inquiry and oversight. There is ample precedent for this Court imposing a more stringent penalty itself rather than remanding the case back to the Trial

Court: Yousoufian III, 137 Wn. App. 69, and Yousoufian IV, 168 Wn.2d 444.

**E. The Court Erred in Failing to Recognize Additional Responsive Documents Identified by Appellants as Nondisclosed Documents under the Public Records Act.**

In its Response, the Port argues that the non-disclosed records are not responsive to the public records requests because they concerned the Port's Cargo Yard Paving Project, which the Port argues was *not part of the Weyerhaeuser lease because the Port would have paved the Cargo Yard anyway*. Response at 31-32. But the public records requests did not ask for all documents concerning the Weyerhaeuser lease "save for any documents concerning projects that the Port would have undertaken in any event." *NO*. Mrs. Johnson and Mr. Jorgensen requested: "Public records regarding, relating to, or reflecting the Weyerhaeuser lease with the Port."

CP 1270. Now, consider the plain language of the lease itself:

IMPROVEMENTS BY PORT: This exhibit is intended to provide a brief description of the improvements the Port of Olympia will be responsible for constructing in conjunction with a lease between the Port and Weyerhaeuser...IMPROVEMENT #1: Camels...; IMPROVEMENT #2: Pave 3.4 Acre Northern Site...; IMPROVEMENT #3: Pave 5.3 Acre Staging Area...; IMPROVEMENT #4: Paving of Railway East of Staging Area...; IMPROVEMENT #5: Construct Lighting...; IMPROVEMENT # 6: Utilities for Future Shop/Office/Crew Lunchroom at North Side of Lease Site...; IMPROVEMENT #7: Paved Cargo Yard East of

Franklin Street Extended...; IMPROVEMENT #8:  
Underground Utilities and Structures...

CP 729-730. By the plain language of the lease, even the paving of the cargo yard, which the Port argues it would have done anyway, was one of the “improvements the Port of Olympia will be responsible for constructing in conjunction with a lease between the Port and Weyerhaeuser.” The Port argues that Judge Tabor held that the cargo yard paving project, since the Port was planning on doing it anyway, did not need to be considered when determining whether SEPA review was required for the Weyerhaeuser lease. That is all very well and good, but *that is a different inquiry than whether a document concerning the cargo yard paving project is responsive to a public records request asking for “Public Records regarding, relating to, or reflecting the Weyerhaeuser lease with the Port”* when the lease itself states that the Port of Olympia will be responsible for the cargo yard paving project!

Look at the documents attached at CP 89-386. Is it not plain that they regard, relate to, or reflect the Weyerhaeuser lease? Consider CP 185: “San Sewer Pump Station to support the Weyerhaeuser Site.” Doesn’t that match improvement #8, underground utilities and structures? What about CP 159-64; doesn’t that match multiple improvements required by the lease? Consider CP 360; doesn’t that email (about

schedule 6.1 to the lease) concern the lease in some way? *Are not these documents responsive to Mrs. Johnson's and Mr. Jorgensen's public records request?* It was error for the Trial Court to fail to determine that these documents were responsive to the public records request.

Moreover, it is immaterial where Mrs. Johnson and Mr. Jorgensen got these records. Availability of records from another source does not affect analysis under Public Records Act (PRA). The PRA does not exempt records that the requester has already received from another source. Tacoma Public Library v. Woessner, 90 Wn. App. 205, 210, 951 P.2d 357 (1998), *review granted, cause remanded* 136 Wn.2d 1030, 972 P.2d 101, *on remand*, 972 P.2d 932. The Port had a duty to respond to Mrs. Johnson's and Mr. Jorgensen's request with the records. Likewise, while the harm that comes from not disclosing the records in response to a public record request is relevant in the penalty phase, whether the records would have been useful or not to appellants or to any concerned citizens in their challenges to the Weyerhaeuser lease is irrelevant to a determination of whether or not the documents are responsive.

The Port asks why Mrs. Johnson and Mr. Jorgensen did not raise the issue of the non-disclosed documents during the first appeal [the record is silent, but the answer is simply that they did not know the non-disclosed documents existed], and argues that they have waived the issue.

Response at 18. However, the Port is wrong as a matter of law. “Because the PDA does not include a limitation on the penalty period beyond the statute of limitations, we are of the view that the PDA does not allow a reduction of the penalty period when the trial court finds the plaintiff could have filed suit earlier than it did.” Yousoufian II, 152 Wn.2d at 437. Likewise, the Port itself argues: “Questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal of the same case if there is no *substantial change in the evidence* at a second determination of the cause.” Response at 18. Here, there is indeed a substantial change in the evidence! Appellants found an additional 298 pages of documents that the Port withheld from the Court in *in camera* review and withheld from Mrs. Johnson and Mr. Jorgensen.

**F. The Trial Court Erred in Setting A Low Penalty, Disproportionate to the Port’s Misconduct, and in Mis-Appling the Yousoufian Factors**

A large portion of the Port’s brief is not responsive to the arguments made in appellants’ opening brief. Be that as it may, Mrs. Johnson’s and Mr. Jorgensen’s “reply” to this section of the brief, addressing the Yousoufian factors, may be found at CP 1263-1278.

**G. Appellants are Entitled to Attorneys' Fees on Appeal.**

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.

RCW 42.56.550(4) (in relevant part).

However, while the award of attorney fees under the Public Records Act is not discretionary, the amount awarded is. Port of Olympia, supra.

Appellants request fees on appeal under this statute pursuant to RAP 18.1.

**V. CONCLUSION**

This is a case where the Port of Olympia chose secrecy over openness and maximized what could be concealed and minimized what could be disclosed. But that is not the most egregious part of the Port's conduct. The Port deliberately withheld responsive public records from the Trial Court, in addition to withholding them from the requestors. The Public Records Act is meant to have a deterrent effect. It is meant to stop public agencies from doing what the Port has done. But the penalty imposed by the Trial Court is so low, and so disproportionate to the Port's misconduct, that it will have the opposite effect; public agencies will be encouraged to withhold public documents when it is in their interest to do

so. The Yousoufian Courts overruled the trial court in that case and increased the daily penalty in that case in order to make the sanction have true deterrent effect; the Yousoufian Courts were aided in that regard by the fact that the trial court had grouped the responsive documents into ten groups. In order to make sure that the penalty here has real deterrent effect, this Court should do the same. The Trial Court made some grievous errors in this case; it imposed a more lenient penalty when Division I gave it discretion to impose a more stringent one, and it held that documents which on their face concerned the Weyerhaeuser lease were not responsive to the public records request. This was abuse of discretion and clear error. Whether this Court applies a de novo standard of review or an abuse of discretion, this Court should reverse the Trial Court and should impose a more stringent, daily per packet penalty that will do what the Public Records Act is meant to do: deter future agency misconduct.

SUBMITTED this 6<sup>th</sup> day of June, 2011.

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