

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

CITY OF LAKEWOOD, *Respondent,*

v.

DAVID KOENIG
Appellant.

STATE OF WASHINGTON
BY WJ
CITY

10 JUN -1 AM 10:32

FILED
COURT OF APPEALS

SUPPLEMENTAL BRIEF OF APPELLANT

WILLIAM JOHN CRITTENDEN
Attorney for Appellant

William John Crittenden
Attorney at Law
927 N. Northlake Way, Ste 301
Seattle, Washington 98103
(206) 361-5972
wjcrittenden@comcast.net

01-82-5 WJ

TABLE OF CONTENTS

I. SUPPLEMENTAL ARGUMENT.....	1
A. The PRA does not authorize an agency to submit discovery requests to a records requestor.	1
1. Agencies may not consider the identity of a requestor or the purpose of a request.....	3
2. A requestor’s economic loss is a penalty factor only if (i) such loss was a foreseeable result of the agency’s misconduct, and (ii) such loss may be determined without asking the requestor to provide information about the purpose of the request.	4
3. <i>Yousoufian V</i> does not require discovery into the identity of the requestor or the purpose of a request.	6
4. New cases that address discovery by requestors to agencies are inapplicable.....	8
B. In the alternative, the City’s discovery requests are not reasonably calculated to lead to the discovery of admissible evidence.	9
C. In the alternative, discovery relating to penalties should not be permitted until after an agency has been found liable for penalties under RCW 42.56.550(4).	9
D. Koenig is entitled to attorney’s fees for this appeal.....	10
II. CONCLUSION.....	10

TABLE OF AUTHORITIES

CASES

<i>Amren v. City of Kalama</i> , 131 Wn.2d 25, 929 P.2d 389 (1997).....	9
<i>Building Industry Ass'n v. McCarthy</i> , 152 Wn. App. 720, 218 P.3d 196 (2009),.....	8-9
<i>Burt v. Dep't of Corrections</i> , _ Wn.2d _, _ P.3d _ (2010).....	1-2, 9
<i>ETCO v. Dept. Labor & Indus.</i> , 66 Wn. App. 302, 831 P.2d 1133 (1992).....	3
<i>Hearst v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978).....	3, 9
<i>Koenig v. Pierce County</i> , 151 Wn. App. 221, 211 P.2d 423 (2009).....	2-3
<i>Neighborhood Alliance of Spokane v. County of Spokane</i> , 153 Wn. App. 241, 224 P.3d 775 (2009).....	8-9, 10
<i>Yousoufian v. Sims</i> , 168 Wn.2d 444, 229 P.3d 375 (2010).....	3, 4-8

STATUTES

5 USC § 552.....	8, 9
Chap. 42.56 RCW.....	<i>passim</i>
RCW 42.56.080.....	1, 3, 5, 6, 9, 10
RCW 42.56.550.....	4, 8, 9

I. SUPPLEMENTAL ARGUMENT

Pursuant to this Court's order dated April 20, 2010, appellant David Koenig submits the following supplemental argument.

A. The PRA does not authorize an agency to submit discovery requests to a records requestor.

Koenig has explained that allowing an agency to submit intrusive and burdensome discovery to a requestor violates the spirit and letter of the PRA. "The intimidation, delay, and burden imposed on the average requestor by useless discovery is unacceptable in light of the purpose of the PRA, and violates a requestor's right to request public records without an agency inquiring into the requestor's identity or the purpose of a request. RCW 42.56.080." *App. Br.* at 13.

Burt v. Dep't of Corrections, __ Wn.2d __, __ P.3d __ (May 13, 2010), held that the requestor was a necessary party that should have been joined under CR 19(a) in an action brought by parties opposing the disclosure. Four justices dissented, noting that a lawsuit under the PRA places a significant burden on the requestor.

[T]here may be instances where a records requestor may not wish to intervene in a case. Indeed, requiring mandatory joinder of the records requestor in every injunction action may actually cause prejudice to the person whose joinder is sought and could result in either withdrawal of the records request or grudging participation in what could turn out to be an expensive action. Because ... a records requestor does not suffer automatic prejudice

by not being joined in an injunction proceeding, such persons should not be haled [into] court in every injunction action. A contrary result, in my judgment, does not promote the goal of public access to records. (Citations omitted).

Burt, at ¶ 36 (Alexander, J., dissenting). The *Burt* majority did not disagree with the dissent's observation that some requestors may not want to be "haled into court." Rather, the majority based its decision on the requestor's right to protect his interest and the public's interest in seeking records, and on the lack of an advocate for the release of records in the absence of the requestor as a party. *Burt*, at ¶¶ 16-17.

Burt did not consider the additional burden on requestors that would result from the "routine" discovery suggested by the City. *Resp. Br.* at 13. The burden of joining the requestor as a defendant is necessary to the proper enforcement of the PRA. Discovery to a requestor, however, is clearly *not* necessary. Indeed, none of the City's discovery requests relate to whether the City has actually violated the PRA.

In its *Supplemental Statement of Authorities* dated July 15, 2009, the City cited *Koenig v. Pierce County*, 151 Wn. App. 221, 211 P.2d 423 (2009), for the proposition that discovery is permitted in PRA cases, and "that [Koenig] apparently believes that there is no bar to discovery in a [PRA] case." *Supp. Statement* at 1. In *Pierce County*, the agency submitted an interrogatory to the requestor to identify the records that

were improperly withheld. In response, the requestor identified a single record. 151 Wn. App. at 228.

The City's reliance on *Pierce County* is misplaced for several reasons. First, that case is not authority on the legal issue of whether discovery is permissible because that issue was not argued by the parties or addressed by the court. *ETCO v. Dept. Labor & Indus.*, 66 Wn. App. 302, 307, 831 P.2d 1133 (1992). There is no indication that the requestor even objected to the agency's limited interrogatory. Second, the City's speculation about Koenig's apparent beliefs is not legal authority, and lacks any basis in fact. Koenig did not object to the agency's narrow interrogatory in *Pierce County* because it was not worth the trouble to do so. Finally, any comparison between the narrow interrogatory in *Pierce County*, which focused on whether the agency had violated the PRA, and the City's useless, burdensome discovery requests in this case is ludicrous.

1. Agencies may not consider the identity of a requestor or the purpose of a request.

In *Yousoufian v. Sims*, 168 Wn.2d 444, 229 P.3d 375 (2010) ("*Yousoufian V*"),¹ the Supreme Court reiterated that PRA requestors "shall not be required to provide information as to the purpose for the request." *Yousoufian V*, at ¶ 32 n. 8 (quoting RCW 42.56.080).

¹ *Yousoufian v. Sims*, 168 Wn.2d 444, __ n.2, 229 P.3d 735 (2010) ("*Yousoufian V*"), establishes a convention for citation to the various published *Yousoufian* opinions.

2. **A requestor's economic loss is a penalty factor only if (i) such loss was a foreseeable result of the agency's misconduct, and (ii) such loss may be determined without asking the requestor to provide information about the purpose of the request.**

Koenig has argued, based on *Yousoufian v. Sims*, 165 Wn.2d 439, 200 P.3d 232 (2009) (opinion withdrawn) ("*Yousoufian IV*"), that a requestor's economic loss, or lack thereof, is not a proper penalty factor under RCW 42.56.550(4). *App. Br.* at 14-18; *Reply Br.* at 8-9. After the parties' briefs were filed, the *Yousoufian* case was re-argued, and on March 25, 2010, the Court issued its new opinion in *Yousoufian V, supra*.

Despite a consensus among the Washington Attorney General, numerous media organizations, and the Washington Coalition for Open Government that economic loss should not be a PRA penalty factor (as Koenig has argued), the Supreme Court elected to limit the consideration of economic loss rather than discard that penalty factor altogether. *Yousoufian V*, at ¶ 32 n. 8. The Court stated:

[I]t is appropriate to increase penalties as a deterrent where an agency's misconduct causes a requestor to sustain actual personal economic loss. **An agency should, though, be penalized for such a loss only if it was a foreseeable result of the agency's misconduct.** In short, actual personal economic loss to the requestor is a factor in setting a penalty only if it resulted from the agency's misconduct and was foreseeable. (Emphasis added).

Yousoufian V, at ¶ 32. Amici pointed out that PRA penalty factors should relate to an agency's culpability. In response, the Court further stated:

[Personal economic loss] may relate to an agency's culpability, and thus is an appropriate factor, where the agency has knowledge that its misconduct could potentially cause economic loss to the requestor. Although an agency may generally not know of the potential for such loss because the PRA provides that requestors "shall not be required to provide information as to the purpose for the request," RCW 42.56.080, it is possible that an agency could acquire such knowledge.

Yousoufian V, at ¶ 32 n. 8. *Yousoufian V* significantly restricts the consideration of economic loss in PRA penalties. A requestor's economic loss is a penalty factor only if (i) such loss was a foreseeable result of the agency's misconduct, and (ii) such loss may be determined without asking the requestor to provide information about the purpose of the request.

Yousoufian V confirms that an agency does not need to conduct discovery in order to address economic loss as a possible penalty factor. Where a requestor's economic loss is not foreseeable, such loss (if any) is not an aggravating penalty factor. *Yousoufian V*, at ¶ 32. The absence of economic loss is not a mitigating factor. *Yousoufian V*, at ¶ 44.

As the Court correctly observed, a requestor is not required to provide information about the purpose of a request, but an agency might still acquire such knowledge. *Yousoufian V*, at ¶ 32 n. 8. In other words, a requestor might choose to notify the agency about possible economic loss, thereby inviting consideration of the purpose of the request in assessing penalties. But an agency is not permitted to *create* the foreseeability

required by *Yousoufian V* by conducting discovery into the purpose of the request. Any such inquiry would be directly contrary to RCW 42.56.080, as the Court clearly stated. *Yousoufian V*, at ¶ 32 n. 8.

In sum, the limited role of economic loss under *Yousoufian V* does not allow an agency to conduct discovery into the purpose of a request. *Yousoufian V* confirms that such discovery violates RCW 42.56.080.

3. *Yousoufian V* does not require discovery into the identity of the requestor or the purpose of a request.

Like the earlier withdrawn opinion, *Yousoufian V* sets forth sixteen PRA penalty factors. The seven mitigating factors were not changed. *Compare* 165 Wn.2d at 458 *with Yousoufian V*, 168 Wn.2d at ¶ 48. Of the nine mitigating factors, only two factors were changed. Those changes are shown here with underline and strikethrough fonts:

(7) ~~potential for public harm, including economic loss or loss of governmental accountability~~ the public importance of the issue to which the request is related, where the importance was foreseeable to the agency, [and]

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

Compare 165 Wn.2d at 459 *with Yousoufian V*, 168 Wn.2d at ¶ 45.

The City previously argued that its discovery of Koenig's litigation history "has a potential impact on several of [the *Yousoufian IV*] factors." *Resp. Br.* at 15. In response, Koenig pointed out that, contrary to the

City's argument, most of the penalty factors in *Yousoufian IV* focus entirely on the agency's conduct. *Reply Br.* at 9. Koenig stated:

Only a few of the *Yousoufian IV* aggravating factors invite any consideration of the nature of the request: (1) delayed response when time is of the essence, (7) potential for public harm, including economic loss resulting from non-disclosure, and (8) personal economic loss. *Yousoufian IV*, 165 Wn.2d at 458-59. Only one of those factors, personal economic loss, depends on the identity of the requester and/or the purpose of the request...

Reply Br. at 9-10. Apart from the question of economic loss, Koenig's original point remains correct. Factor (1) has not changed. Factor (7) has been reformulated from "potential for public harm" to "public importance of the issue," *Yousoufian V*, 168 Wn.2d at ¶ 45. But the focus remains on the "public," and not on the requestor and/or the purpose of the request. In addition, factor (7) now expressly includes the limiting requirement that the public importance must be "foreseeable to the agency." *Id.*

Yousoufian V confirms that PRA penalty factors should be based on the conduct of the agency and not on the identity of the requestor or the purpose of the request—as Koenig has argued all along. By requiring both public importance and economic loss to be "foreseeable to the agency" *Yousoufian V* precludes any consideration of the requestor's subjective purpose in requesting records. *Yousoufian V* gave no consideration whatsoever to Armen Yousoufian's subjective reasons for requesting

records about the stadium financing. Rather, the Court focused on the potential harm to the public, noting that “[t]he importance of the referendum was obvious and foreseeable to the county when Yousoufian made his initial request.” *Yousoufian V*, 168 Wn.2d at ¶ 34.

The penalty analysis in *Yousoufian V* focuses on the facts known to the agency in assessing the culpability of the agency and the appropriate penalty under RCW 42.56.550(4). Facts known only to the requestor are irrelevant. Consequently, *Yousoufian V* does not require any discovery into the identity of the requestor or the purpose of a request where such discovery would violate RCW 42.56.080.

4. New cases that address discovery by requestors to agencies are inapplicable.

Since the parties’ briefs were filed, two new PRA cases have addressed discovery *by requestors to agencies*. *Neighborhood Alliance of Spokane v. County of Spokane*, 153 Wn. App. 241, 264-65, 224 P.3d 775 (2009), upheld the trial court’s denial of a requestor’s motion to compel, holding that the requested discovery exceeded the limited scope of discovery allowed under the Freedom of Information Act, 5 USC § 552 (“FOIA”). *Building Industry Ass’n v. McCarthy*, 152 Wn. App. 720, 729-30, 218 P.3d 196 (2009), affirmed summary judgment for the agency, suggesting that the requestor could have and should have conducted

discovery in order to oppose the agency's motion for summary judgment. These cases are not entirely consistent. *Neighborhood Alliance* relied on FOIA cases for the proposition that the scope of discovery in a PRA case is limited.² 153 Wn. App. at 264-65. *BIAW* suggested no such limits.

These cases are inapplicable to the issue presented in this case: whether an agency may submit discovery requests to a requestor. Discovery to an agency does not create the same burdens that weigh against permitting agency discovery to requestors. Furthermore, the prohibition in RCW 42.56.080 presents no bar to discovery to an agency.

B. In the alternative, the City's discovery requests are not reasonably calculated to lead to the discovery of admissible evidence.

Koenig has not identified any new cases that warrant discussion.

C. In the alternative, discovery relating to penalties should not be permitted until after an agency has been found liable for penalties under RCW 42.56.550(4).

As the dissent in *Burt* noted, a lawsuit under the PRA places a significant burden on the requestor. *Burt*, at ¶ 36 (Alexander, J.,

² *Neighborhood Alliance of Spokane v. County of Spokane*, 153 Wn. App. 241, 224 P.3d 775 (2009), notes that Washington courts may look to judicial interpretations of the Freedom of Information Act, 5 USC § 552 ("FOIA") in construing the PRA. 153 Wn. App. at 256 (citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978)). However, the Supreme Court has also noted that the PRA is more severe to agencies and more favorable to requestors than FOIA in many respects. See *Amren v. City of Kalama*, 131 Wn.2d 25, 35, 929 P.2d 389 (1997); *Hearst*, 90 Wn.2d at 129. Consequently, courts should not rely on FOIA cases without considering how FOIA and the PRA differ.

dissenting). At a minimum, discovery related to penalties should wait until after a determination that the City is liable for penalties.

D. Koenig is entitled to attorney's fees for this appeal.

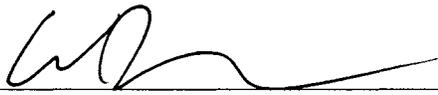
The City has argued that Koenig's request for attorney's fees is premature because Koenig "has yet to prevail on the merits." *Resp. Br.* at 22. Koenig has explained that a requestor is not required to cause the disclosure of records to be awarded fees, and that an agency can violate the PRA without improperly withholding records. *Reply Br.* at 20-25.

Neighborhood Alliance, supra, confirms that Koenig's analysis is correct. In that case, the Court of Appeals awarded attorney's fees to the requestor where the agency violated the PRA by failing to make a reasonably adequate search requested records. *Neighborhood Alliance*, 153 Wn. App. at 265. In this case, the City has violated the well-established rule that agencies may not consider either the identity of the requestor or the purpose of a request. RCW 42.56.080. Accordingly, Koenig is entitled to an award of attorney's fees.

II. CONCLUSION

For all these reasons the Court should reverse the trial court's *Order Compelling Discovery*. This matter should be remanded to the trial court with instructions to quash the City's discovery requests. In addition, Koenig should be awarded his attorney's fees for this appeal.

RESPECTFULLY SUBMITTED this 28th day of May, 2010.

By: 
William John Crittenden, WSBA No. 22033

WILLIAM JOHN CRITTENDEN
Attorney at Law
927 N. Northlake Way, Suite 301
Seattle, Washington 98103
(206) 361-5972
wjcrittenden@comcast.net

Attorney for Appellant David Koenig

Certificate of Service

I, the undersigned, certify that on the 28th day of May, 2010, I caused a true and correct copy of this *Supplemental Brief of Appellant* to be served, by the method(s) indicated below, to the following person(s):

By email (PDF) to:
mkaser@cityoflakewood.us

and First Class Mail to:

Matthew S Kaser
City of Lakewood
6000 Main St SW
Lakewood WA 98499-5027


William John Crittenden, WSBA No. 22033

FILED
COURT APPELLALS
10 JUN -1 AM 10:32
STATE OF WASHINGTON
BY  CLERK