

NO. 40064-2-II

2007-06-10 10:07:53
STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

KEN BRICKER,

Appellant/Cross Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent/Cross Appellant.

BRIEF OF RESPONDENT/CROSS-APPELLANT

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ORIGINAL

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I. INTRODUCTION

On October 1, 2007, Ken Bricker requested copies of electrical inspection reports and permits for a residence he owned. This request was sent to an electrical inspector in the Kennewick office of the Department of Labor and Industries (Department). The inspector thought that Mr. Bricker would receive the documents as part of his appeal of the citations that arose out of the inspection and did not respond to the request; rather, he placed it in his file. On July 22, 2008, Mr. Bricker filed a lawsuit to obtain the records. Once the Department's public records unit became aware of the request, the Department immediately produced the records on August 8, 2008, with the exception of three additional documents produced in November 2008.

On appeal there are two issues. First, the trial court declined Mr. Bricker's request to set the penalty using a *per record* per day penalty. Rather, based on Supreme Court precedent, it imposed only a per day penalty. Mr. Bricker appeals to contest this ruling. Second, the trial court set the penalty amount at \$90 a day, almost the top end of the \$5 to \$100 range for penalties provided in RCW 42.56.550. The Department cross-appeals to contest this amount as too high under the *Yousoufian* factors given the findings by the trial court that the Department acted in good faith and did not act in bad faith.

II. ASSIGNMENT OF ERROR

The trial court erred in using a \$90 a day penalty amount for records that were not produced between October 1, 2007, and August 8, 2008 (Conclusion of Law 2.7).

III. ISSUES

1. Did the trial court abuse its discretion in setting the penalty amount using a per day formula and not a per day per record formula?
2. Did the trial court abuse its discretion in setting a \$90 a day penalty where the Department was noncompliant but acted in good faith and not in bad faith?

IV. STATEMENT OF THE CASE

A. Public Records Request

In July 2007, electrical inspector Don Ulmer inspected a house owned by Mr. Bricker in Kennewick, Washington. RP 18¹; CP 94. After the inspection, he cited Trinity Construction for electrical violations related to bathroom fixtures. RP 18, 30. The inspector subsequently learned that Mr. Bricker performed this work and he reissued the citations to Mr. Bricker in August 2007. RP 20-21. Mr. Bricker contested the citations and wanted information about the citations, and he spoke with Mr. Ulmer about the inspection in September, 2007. Defendant's Ex. A. He then sent a certified letter to Mr. Ulmer at the Department's Kennewick office; the letter contested aspects of the citations and

¹ The Verbatim Record of Proceeding for June 10-11, 2010 will be cited as RP.

requested information about them. Defendant's Ex. A. The October 1, 2007 letter also requested "a copy of all permits issued and copies of inspections and correction requests by *all* inspectors on that residence." Defendant's Ex. A; RP 23.

Mr. Ulmer read the letter and placed it in his file. RP 47-48. When he received the letter, it was already open and he assumed the request would be taken care of. RP 49. He stated that "[m]y understanding was that . . . these documents would be supplied through the appeal process, that he was appealing the citations so he would get all that through his appeal." RP 24.

Mr. Ulmer did not provide the records or forward the request to the Department's public records unit. He also did not provide a copy of the letter to his supervisor, having assumed that his supervisor had already seen it. RP 50. Although the Department trains new employees and others on public records requirements, Mr. Ulmer had not received any training. RP 41, 69-70.

In March of 2008, the Department set penalties on the citations and Mr. Bricker appealed them. A hearing on his appeal was originally set for July 2008 before the Office of Administrative Hearings, but Mr. Bricker failed to appear. RP 375. The citations were later vacated after a December 2008 hearing. RP 126.

Having not received his records,² Mr. Bricker filed a lawsuit under the Public Records Act on July 22, 2008, to obtain them. CP 5. The public records unit became aware of the request when Mr. Bricker filed his lawsuit, and the unit immediately worked to obtain the documents. RP 70. The Department responded to Mr. Bricker's request on August 8, 2008, with sixteen responsive records. The Department provided 3 additional records on November 7, 2008. CP 261; RP 73-74. These 3 documents were signed versions of 3 documents that had been produced originally on August 8, 2008. RP (June 12, 2009) 8.

B. The Supreme Court's Three *Yousoufian* Opinions in the Chronology and Procedural Context of This Case

Analysis of the two penalty calculation issues in this case is guided by two Washington Supreme Court opinions in a long-running Public Records Act dispute between requestor Armen Yousoufian and the King County Executive. In *Yousoufian v. The Office of Ron Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004) (*Yousoufian II*),³ the Washington Supreme Court

² In addition to the letter, Mr. Bricker testified that he called the Department to follow up on the records request. RP 364, 366-67, 370-73. The Department disputed this. *E.g.*, RP 109, 138-37.

³ The Department, as does Mr. Bricker in his Brief of Appellant, adopts the numbering scheme of the Washington Supreme Court for the chain of Court of Appeals and Supreme Court decisions in the *Yousoufian* case. *See Yousoufian v. The Office of Ron Sims*, 168 Wn.2d 444, 450 n.2, 229 P.3d 735 (2009) (*Yousoufian V*). Because there is no need for this Court to consider any of the Court of Appeals decisions in *Yousoufian*, most of the Department's references to the various *Yousoufian* opinions in this brief will be to the three Supreme Court opinions: *Yousoufian II*, *Yousoufian IV*, and *Yousoufian V*.

affirmed in part and reversed in part a Court of Appeals decision (*Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 60 P.3d 667 (2003) (*Yousoufian I*) and issued the first of the three opinions addressing several penalty calculation issues in the case.

Yousoufian II left some penalty calculation issues not fully resolved and provided only limited guidance to the trial court (and trial courts generally) regarding how to determine the amount of penalties. The Court did, however, finally resolve that the former Public Disclosure Act did *not* require the assessment of separate per day penalties *for each requested record*. *Yousoufian II*, 152 Wn.2d at 436. The Court remanded the case for further action consistent with the directions of the Supreme Court on the various per day penalty calculation questions remaining in the case. *Id.* at 440.

On remand, the *Yousoufian* trial court adjusted the per day penalty amount under the recodified Public Records Act (PRA).⁴ On appeal, the Court of Appeals reversed in part (*Yousoufian v. The Office of Ron Sims*, 137 Wn. App. 69, 151 P.3d 243 (2007) (*Yousoufian III*)), and the Supreme Court again accepted discretionary review. On January 9, 2009, before the hearings had begun in Mr. Bricker's case in Thurston County Superior

⁴ The public records provisions of former RCW 42.17 were recodified by the Legislature in 2005 (*see* Laws of 2005, ch. 274) into RCW 42.56.

Court, the Supreme Court issued a new *Yousoufian* opinion reversing the Court of Appeals. *Yousoufian v. The Office of Ron Sims*, 165 Wn.2d 439, 200 P.3d 232 (2009) (*Yousoufian IV*), *opinion recalled* (June 12, 2009).

Yousoufian IV provided detailed guidance to trial courts generally on what to consider in exercising their statutory discretion in setting per day penalties for PRA violations. Included in *Yousoufian IV* were lists of aggravating and mitigating factors that should be considered by trial courts when they are exercising their discretion. *Id.* at 458-59. *Yousoufian IV* remanded the case back to the trial court for further action consistent with the direction of the Court on the various per day penalty calculation issues. *Id.* at 462.

On June 12, 2009, the *Bricker* trial court announced its oral ruling using the factors set forth in *Yousoufian IV* for setting the penalty amount. On that same day, the Supreme Court declared that it was withdrawing *Yousoufian IV* and would reconsider the appeal. As noted *infra* Part IV.D by the time the *Bricker* trial court reduced its judgment to writing, it had revised considerably downward the penalty amount assessed under its *Yousoufian*-based analysis and under its statutory exercise of discretion. This penalty assessment was based in large part on the trial court's interpretation of *Yousoufian II and IV*. CP 258-59.

After the *Bricker* trial court had entered its judgment, and after the parties had each appealed to this Court, the Supreme Court issued a new *Yousoufian* opinion. *Yousoufian v. The Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2009) (*Yousoufian V*). The factors in the withdrawn opinion (*Yousoufian IV*) are very similar to the factors used by the Court in *Yousoufian V*. Compare 165 Wn.2d at 458-59 with 168 Wn.2d at 467-68. As the most recent opinion, *Yousoufian V* is of course the controlling case guiding calculation of per day penalties under the Public Records Act.

C. *Yousoufian* Factors for Calculating Per Day Penalties

At superior court, the Department conceded liability under the Public Records Act and the court determined the penalty amount after a trial. As noted above, to determine the per day penalty amount, the superior court used the factors outlined in the withdrawn *Yousoufian IV*. CP 261-63.

The trial court found that “[t]he Department acted in good faith in responding to Mr. Bricker’s public records request, albeit in a belated manner on 8/8/07.” CP 262. The trial court found no bad faith, finding that the Department “did not intentionally or maliciously withhold records from Mr. Bricker.” CP 262. The trial court found no mitigating factors applied. The trial court made a number of findings regarding aggravating

and mitigating factors.

Mitigating Factor 1: *Lack of clarity of request.* The court found the request to be clear on its face. CP 262.

Mitigating Factor 2: *The agency's prompt response or legitimate follow-up inquiry for clarification.* The court found that the Department did not respond, make a follow-up inquiry, or respond to Mr. Bricker's follow-ups. CP 262.

Mitigating Factor 3: *Good faith, honest, timely and strict compliance with all the procedural requirements and exceptions.* The court found that there was no compliance until August 2008. The court found further that "the problem arose in Kennewick with Mr. Koons and Mr. Ulmer. At the top of the chain people were trying, once they were aware of the lawsuit, to provide information and they were trying to comply strictly with the Public Records Act." CP 262.

Mitigating Factor 4: *Proper training and supervision of personnel.* The trial court found that Mr. Ulmer did not receive training, despite a detailed policy of the Department. CP 262.

Mitigating Factor 5: *The reasonableness of any explanation for noncompliance.* The trial court found that "Mr. Ulmer just said well the envelope was already open and I stuck it in my file. Frankly, even if Mr. Ulmer did not know what to do with a public records request, he put the

letter in a file and did not respond to a request for a phone call. He made no attempt to contact Mr. Bricker and at bottom that is what the problem was in this case.” CP 262-63.

Mitigating Factor 6: *Helpfulness of the agency to the requester.* The trial court found that there was no helpfulness until the case went to litigation, and even then there was confusion. CP 263.

Mitigating Factor 7: *Existence of systems to track and retrieve public records.* There was no information to make a finding on this factor. CP 263.

Aggravating Factor 8: *Delayed response, especially in circumstances making time of the essence.* The court found that “Mr. Bricker had citations that he did not think he deserved and he tried to get information so he could get the citations taken care of and if not that then to prepare for an administrative hearing. He never got his information until just before the hearing.” CP 263.

Aggravating Factor 9: *Lack of strict compliance.* The trial court found no compliance. CP 263.

Aggravating Factor 10: *Lack of proper training and supervision of personnel and response.* The court found that Mr. Ulmer and his supervisor did not deal with Mr. Bricker because they ignored his request. CP 263.

Aggravating Factor 11: *Unreasonableness of any explanation for noncompliance.* The trial court found that “[c]alling the explanation as counsel for defense termed it lame is a start. Putting the request in a file and sticking the file away does not make any sense.” CP 263.

Aggravating Factor 12: *Negligent, reckless, wanton bad faith, or intentional noncompliance.* The trial court found that “Mr. Ulmer did not intentionally fail to comply with the Public Records [A]ct; he did not know about it. I am not finding that he exercised any bad faith. There were some significant problems in his office though with a combination of folks and that would include Mr. Koons, Mr. Paradis, and Mr. Ulmer.” CP 263.

Aggravating Factor 13: *Dishonesty.* The trial court found no dishonesty in the communications to Mr. Bricker. CP 263.

Aggravating Factor 14: *The potential for public harm, including economic loss or loss of governmental accountability.*⁵ The court found that “the key factor established in this case is a loss of governmental accountability.” CP 23.⁶

⁵ The wording in this factor was changed in the final *Yousoufian V* decision to be 14 “the public importance of the issue to which the request is related, where the importance was foreseeable to the agency.” *Yousoufian V*, 168 Wn.2d 468.

⁶ The trial court appears to have omitted discussion of the final two factors, which are now 15 “any actual personal economic loss to the requestor resulting from the agency’s misconduct where the loss was foreseeable to the agency” and 16 “a penalty amount necessary to deter future misconduct by the agency considering the size of the

The trial court assessed a \$90 per day penalty up until the original production of documents on August 8, 2008 and a lesser penalty of \$15 per day thereafter until signed copies of the citations were produced on November 7, 2008. CP 264.

D. Per Record Per Day Issue

In the trial court's oral decision on June 12, 2009, it ordered penalties at \$90 per day, per record. RP (June 12, 2009) 14-15. That order would result in a \$537,615 penalty. See CP 260. The trial court later reconsidered this approach at the Department's urging (CP 346, 258) and ruled that under *Yousoufian II* a per day per record penalty was not required:

As both counsel are well aware, the court was greatly troubled initially in the amount of penalty it felt compelled to impose, based on its incorrect assumption the proper application of the "Yousoufian factors" to the numbers of documents the court found to have been wrongfully withheld in this case After further review of the Act and case law, this court has redetermined the penalty it is imposing in this case

The purpose of imposing a penalty under the Public Records Act is to promote public access to public records; to encourage, and demand, governmental transparency. It is not, in this court's opinion, meant as compensation for damages. Further, that purpose is best served by imposing a penalty at the high end of the possible range, as the court

agency and the facts of the case." *Yousoufian V*, 168 Wn.2d at 487. As discussed below, the Department asks for remand to reconsider the *Yousoufian V* factors, and this would include consideration of these factors.

did in this case in part. Under the facts presented here, there is no appropriate purpose that would be served in imposing a per day *and* per document penalty.

CP 258-59. The trial court then set a per day penalty only, not a per day per record penalty.

The court ordered the Department to pay \$29,445 for the records.⁷

CP 260. The trial court entered its findings of fact, conclusions of law, and judgment on November 9, 2009. CP 260.

V. SUMMARY OF THE ARGUMENT

The Supreme Court in *Yousoufian II* held that RCW 42.17.340, now codified at RCW 42.56.550, does not require the assessment of per day penalties for each requested record. *Yousoufian II*, 152 Wn.2d at 436. This decision was based on policy considerations under the former Public Disclosure Act and on a definition provision in RCW 42.17 that provided that “the singular shall take the plural . . . as the context requires.” RCW 42.17.020.

Subsequent to the *Yousoufian II* decision, public records statutes have been recodified in RCW 42.56, and the definition section in RCW 42.56.010 does not contain the “singular shall take the plural” language. However, the meaning of RCW 42.56.550 as interpreted by the Supreme

⁷ This was set at 312 days (October 1, 2007 – August 8, 2008) x \$90 a day = \$28,080 and 91 days (August 8, 2008 – November 7, 2008) x \$15 a day = \$1,365, totaling \$29,445.

Court in *Yousoufian II* remains the same, because RCW 1.12.050 provides that the singular means the plural in construing statutes. RCW 1.12.050 generally applies to all statutes. There was no need for the Legislature to recodify this principle in the definition section in RCW 42.56.

Accordingly, under *Yousoufian II*, the trial court did not abuse its discretion by not imposing a per record per day penalty.

The trial court, however, abused its discretion by setting the penalty at \$90 a day. This amount is striking in contrast to *Yousoufian*, a case with gross negligence involved and perhaps the worst set of facts in a published decision, and yet the Supreme Court set the penalty at \$45 a day. Here, the Department's inspector did not act on the public records request when he failed to provide the requested records to Mr. Bricker or forward the request to someone in the agency who would provide the records. However, as the trial court found, he did not act in bad faith. CP 262. Moreover, the Department's public records unit promptly provided the records once it learned of the request. The Department did not act in the egregious manner that would justify a penalty at almost the top of the range. The trial court's decision should be reversed and remanded to recalculate the penalty amount.

VI. ARGUMENT

A. The Public Records Act Does Not Require a Per Record Per Day Penalty for Public Records Violations

1. Case law provides for a per day requirement only

The Public Records Act provides that a party who prevails against a state agency in a public records action shall receive an amount between \$5 and \$100 per day the record was withheld:

it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

RCW 42.56.550(4). It is this provision that is at issue here as it could mean a penalty for each record or for the records request.

Mr. Bricker argues that he is entitled to a per day penalty multiplied by the number of records in dispute. However, the Supreme Court has held the Public Records Act does not require the assessment of per day penalties for each requested record. *Yousoufian II*, 152 Wn.2d at 436. The trial court “has discretion not to impose penalties for each wrongfully withheld document individually.” *Sanders v. State*, ___ Wn.2d ___, ¶ 67, ___ P.3d ___, 2010 WL 3584463 (No. 82849) (2010)

(approving of grouping several documents into two groups, citing with approval *Yousoufian II*, 152 Wn.2d at 435-36).⁸

In *Yousoufian II*, the trial court grouped documents into 10 records based on subject matter and time of production, and it did not use a per record calculation. *Yousoufian II*, 152 Wn.2d at 427, 435-36. The Court considered whether a per record penalty was required instead. The Court examined the language of former RCW 42.17.340(4) that provided that penalties are assessed “for each day that [the plaintiff] was denied the right to inspect or copy said public record” in view of the language of former RCW 42.17.020, which provided that “[a]s used in this chapter, the singular shall take the plural and any gender, the other as the context requires.” *Yousoufian II*, 152 Wn.2d at 433. The Court held that reading the statutes together there was an ambiguity because “record” could be interpreted as “record” or “records.” *Id.* at 434. When a statute is ambiguous, the court looks to principles of statutory construction, legislative history, and case law to determine the Legislature’s intent. *Id.* at 434.

In holding that a per record per day calculation was not required, the Court considered the public policies underlying the Act and concluded

⁸ In the absence of page numbers, *Sanders* will be cited by paragraph numbers.

that the penalty amount should be based on culpability and not size of the request:

Although the [Public Disclosure Act's] purpose is to promote access to public records, this purpose is better served by increasing the penalty based on an agency's culpability than it is by basing the penalty on the size of the plaintiff's request.

Yousoufian II, 152 Wn.2d at 435-36. The holding in *Yousoufian II* that per document penalties are not required has not been overruled by the Supreme Court, and, again, was noted with approval in *Sanders* at ¶ 67. The trial court properly applied *Yousoufian II*'s holding.

2. The meaning of public record as including the plural remains the same after recodification and amendments to the Public Records Act

Mr. Bricker argues that the *Yousoufian II* holding does not apply because the language that the singular shall take the plural is no longer specifically in the definition section of the Public Records Act. AB 17-18. He argues that by not including this provision in the recodified Public Records Act, the Legislature intended to calculate the penalties on a per record basis.

In 2005, the Legislature recodified the public records statutes located in the Public Disclosure Act in RCW 42.17 into the Public Record Act in RCW 42.56. Laws of 2005, ch. 274. At that time, the Legislature enacted RCW 42.56.010, which provided that the definitions in RCW

42.17.020 would apply to define terms in RCW 42.56. Laws of 2005, ch. 274, § 101. RCW 42.17.020 provided the definition of public record as well as other definitions pertinent to both the Public Disclosure Act and the Public Records Act. No changes were made to RCW 42.17.020, including the singular/plural provision applicable to all terms. Laws of 2005, ch. 274, § 101.

In 2007, the Legislature amended the Public Records Act to provide for its own definition section in RCW 42.56.010. RCW 42.56.010 now defines the terms agency, public record, and writing. Laws of 2007, ch. 197, § 1. The definitions in RCW 42.56.010 are essentially identical to those used in the Public Disclosure Act in RCW 42.17.020.

The change in 2007 was a codification change to provide the Public Records Act with its own definition section. The change plainly was for ease of reference. There is nothing to suggest that the Legislature intended to change the meaning of the penalty statute in RCW 42.56.550.⁹

The fact that the Legislature did not include the phrase that the singular shall take the meaning of the plural when it created the separate

⁹ The Final Bill Report affirms that there was merely a recodification of the definitions. The bill report described the background of then existing statute as: “[a]gency, public record, and writing are defined. Previous references to definitions in Chapter 42.17 RCW are referenced to Chapter 42.56 RCW.” The summary then describes the changes to the statute as: “[a]gency, public record, and writing are defined. Previous references to definitions in Chapter 42.17 RCW are referenced to Chapter 42.56 RCW.” Final Bill Report, Substitute House Bill 1445 (2007).

definition section does not mean that that concept does not still apply. RCW 1.12.050 provides that “[w]ords importing the singular number may also be applied to the plural of persons and things; words importing the plural may be applied to the singular” The Legislature is presumed to be aware of its own laws and would not need to have this principle codified in two places. *Daly v. Chapman*, 85 Wn.2d 780, 782, 539 P.2d 831 (1975). There is no need to have a general principle restated. Restating it would be surplusage.

The Legislature is also presumed to be aware of the Court’s decision in *Yousoufian II* that interprets the penalty provision to not require a per record charge. *Daly*, 85 Wn.2d at 782. The Legislature did not affirmatively change this interpretation by amending the penalty provision. RCW 1.12.050 remains applicable to RCW 42.56.550. Had the Legislature intended to change this construction, it would have specifically amended RCW 42.56.550.

It should also be emphasized that the Supreme Court in *Sanders* has considered whether RCW 42.56.550 (as opposed to RCW 42.17.340) requires a per record per day penalty and held that there is no such requirement. *Sanders* at ¶¶ 24, 67. Although the Court did not expressly consider the recodification issue, it upheld the *Yousoufian II* analysis

under RCW 42.56.550. *Sanders* at ¶ 67 (citing *Yousoufian II*, 152 Wn.2d at 435-36).

3. The Legislature does not intend to create a windfall for voluminous records requests

It makes sense for the Legislature to have kept the *Yousoufian II* interpretation of penalty assessment in relation to the number of records at issue. As discussed in *Yousoufian II*, requiring a penalty based on a per record requirement would base penalty amounts on the size of the request. This would create a windfall for individuals who make voluminous requests. Under a per record interpretation, “agencies that acted in good faith but failed to respond adequately to broad requests for multiple documents would often pay higher penalties than agencies that refused to disclose a single document in bad faith.” *Yousoufian II*, 152 Wn.2d at 435 (quoting *Yousoufian I*, 114 Wn. App. at 848).

The intent of the penalty provision is to compel compliance; it is not to enrich the requestor or to punish the public, the taxpayers. A requirement that there be a per record penalty could foreseeably result in multi-million dollar penalties, as the Supreme Court observed in *Yousoufian II*, where estimates of the penalty using the per document calculation ranged to \$30,000,000. *Yousoufian II*, 152 Wn.2d at 436. There is no clear legislative intent to authorize such enormous amounts,

nor are such large amounts necessary to ensure compliance with the Public Records Act.

As a matter of public policy there must be a balance between the important goal of ensuring compliance with public records requests, and the equally important goal of fiscal solvency. The discretion provided to the trial court to determine penalties based on good faith and culpability—and not on size of the request—allows for this balance to be made. The Legislature has set a penalty to range between \$5 to \$100 on a per day basis. RCW 42.56.550. This is what the Legislature intended as incentive for public agencies to comply with public records requirements, not a per record per day penalty.

4. The trial court properly exercised its discretion to award only on a per day basis

The *Yousoufian II* and *Sanders* decisions do not require a per record penalty; instead, they give discretion to the trial court. *Yousoufian II*, 152 Wn.2d at 436; *Sanders* at ¶ 67. Here, the trial court assessed a \$90 per day penalty up until the original production of documents on August 8, 2008 and a lesser penalty of \$15 per day thereafter until signed copies of the citations were produced on November 7, 2008. CP 264. The trial court properly exercised its discretion to do so, with respect to its per day formula, but not the per day amount as discussed below in Part VI.B. This

Court reviews a trial court's determination of an appropriate penalty for an abuse of discretion. *Yousoufian V*, 168 Wn.2d at 458. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.* at 458. A trial court appropriately looks to the entire award to determine amount of penalties. A huge penalty that does not reflect the culpability of the Department would be an abuse of discretion.

Mr. Bricker argues that it was an abuse of discretion for the trial court to not use a per record formula given the presence of no mitigating factors and several aggravating factors. AB 20.

The trial court, however, was in the best position to judge how to group the records based on the facts present. The trial court believed that the purposes of the Public Records Act were served here by not imposing a per record penalty on the Department. CP 259. The trial court noted that the purpose of the Act is to promote public access to records, however, it is not meant as compensation for damages. CP 259. The trial court believed that the purpose in this case was served by a per day penalty on the high end of the range.¹⁰ And it held that “[u]nder the facts presented here, there is no appropriate purpose that would be served in imposing a per day *and* per document penalty.” CP 259.

¹⁰ The Department contests the amount of this penalty in Part VI.B below.

Asserting that the trial court found “an extraordinarily egregious violation,” Mr. Bricker disputes the trial court’s reasoning that the penalty amount was sufficiently large so as not to require a per record multiplier. AB 21. There was not an “extraordinarily egregious violation” here, nor was there any such finding by the trial court. CP 260-64. As discussed below in Part IV.B, the *Yousoufian* case involved egregious facts, with years of delay and misrepresentation. Yet the Supreme Court held that a per record per day penalty was not required.

Here there are far less egregious circumstances. The Department did commit a public records violation, however, it did not act in bad faith and its lack of response was neither purposeful nor did it rise to the level of the county’s gross negligence in *Yousoufian*. Under these circumstances, the trial court properly declined to set a per document penalty.

B. A Penalty of \$90 a Day Is Excessive

The trial court set the penalty at almost the top of the penalty range at \$90 a day. This is excessive under the case law. When determining the amount of a penalty, the existence or absence of an agency’s bad faith is the principle factor that the trial court must consider. *Yousoufian V*, 168 Wn.2d at 460 (quoting *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997)). Here the trial court found no bad faith.

In *Yousoufian V*, the Court set forth a multiple factor test to determine the amount of a penalty:

In our view, mitigating factors that may serve to decrease the penalty are (1) a lack of clarity in the PRA request, (2) the agency's prompt response or legitimate follow-up inquiry for clarification, (3) the agency's good faith honest, timely, and strict compliance with all PRA procedural requirements and exceptions, (4) proper training and supervision of the agency's personnel, (5) the reasonableness of any explanation for noncompliance by the agency, (6) the helpfulness of the agency to the requestor, and (7) the existence of agency systems to track and retrieve public records.

Conversely, aggravating factors that may support increasing the penalty are (1) a delayed response by the agency, especially in circumstances making time of the essence (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions, (3) lack of proper training and supervision of the agency's personnel, (4) unreasonableness of any explanation for noncompliance by the agency, (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency, (6) agency dishonesty, (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency, (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency, and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

Yousoufian V, 168 Wn.2d at 467-68 (footnotes omitted).¹¹ These factors relate to the basis of determining the penalty amount, namely culpability of the agency. *Id.* at 460. When setting a penalty, the starting point for

¹¹ Essentially the same factors were used by the trial court here based on the withdrawn *Yousoufian IV opinion*. CP 260-64.

determining the amount is \$5 a day, not a mid-way point of \$52.50 a day. *Id.* at 466. Although the existence or absence of bad faith is the principle factor to consider, no showing of bad faith is necessary before a penalty is imposed on an agency; the agency's good faith reliance on an exemption does not insulate the agency from a penalty. *Yousoufian V*, 168 Wn.2d at 460.

The Supreme Court in *Yousoufian V* set the penalty amount at \$45 a day. *Yousoufian V*, 168 Wn.2d at 469. This was based on far more egregious facts than those involved in this case. In June 1997, Mr. Yousoufian requested from King County documents related to the then proposed football stadium. *Id.* at 451. The County responded to these requests by parceling out documents over a period of several years, finally completely responding four years later in June 2001. *Id.* at 451-55. During this time period Mr. Yousoufian made repeated requests for the documents. He was told by one County department that it did not have the requested documents. *Id.* at 455. The superior court, however, found that the County did have the documents. *Id.* at 455. He was told that the records were being searched for when they were not. *Id.* at 456. He was told he had received the requested documents, when he had not. *Id.* at 456. The trial court found that one employee, "incrementally released information, rather than releasing it all at one time, even after he realized

that Yousoufian's request was for more information." *Id.* at 453.

The Supreme Court noted that there were years of "delay and misrepresentation" by the County:

It is fair to say that the unchallenged findings of fact demonstrate that over a period of several years the county repeatedly failed to meet its responsibilities under the PRA with regard to Yousoufian's request. Specifically, the county told Yousoufian that it had produced all the requested documents, when in fact it had not. The county also told Yousoufian that the archives were being searched and records compiled, when that was not correct. In addition, the county told Yousoufian that information was located elsewhere, when in fact that was not the case.

Id. at 456. The Court described the County as acting with gross negligence. *Yousoufian V*, 168 Wn.2d at 463 (citing *Yousoufian II*, 152 Wn.2d at 439). Based on these facts and applying its multi-factor test, the Supreme Court decided that \$45 a day was the appropriate penalty, reversing the \$15 a day penalty of the trial court. *Id.* at 469.¹²

In contrast to *Yousoufian* there are far less egregious facts here. The trial court specifically found that there was no bad faith and the agency "did not intentionally or maliciously withhold records from Mr. Bricker. The Department acted in good faith in responding to Mr. Bricker's public records request albeit in a belated manner" CP 262.

¹² The Supreme Court set the penalty amount in *Yousoufian V* after protracted litigation and to bring the matter to a close. *Yousoufian V*, 168 Wn.2d at 468. The Court emphasized, however, that it is ordinarily the province of the superior court to set the penalty amount *Id.* at 469.

When the public records unit became aware of the request, its employees immediately worked to produce the records. Unlike the dilatory behavior of many county employees and officials in *Yousoufian*, here it was the noncompliant action of one employee that resulted in the records not being produced. It was an unfortunate circumstance that Mr. Ulmer had not received public records training notwithstanding the Department's training procedures.

Admittedly, the reason offered by Mr. Ulmer for not producing the records was weak. He thought the matter would be sorted out on appeal. RP 24. Rather than ensure the records and information were provided to Mr. Bricker, he placed the letter in the file. He did not, however, engage in the years of "delay and misrepresentation" that occurred in the *Yousoufian case*. Nor did the Department act with gross negligence.

A \$90 a day penalty is not warranted by Mr. Ulmer's noncompliance, particularly because it is not representative of the Department's actions as a whole. The trial court found that the problem arose in Kennewick, which also included Mr. Ulmer's supervisors, but that "at the top of the chain people were trying, once they were aware of the lawsuit to provide information and they were trying to comply strictly with the Public Records Act." CP 262. A penalty is to reflect the culpability of the agency; here no bad faith was involved and the penalty

amount should reflect this.

The trial court's decision to impose a \$90 a day penalty should be reversed and the decision remanded to the trial court to set a new penalty more reflective of the culpability and good faith of the Department.¹³

VII. CONCLUSION

This Court should affirm the trial court's decision to not impose a per record per day penalty. The Court should reverse the decision to impose a \$90 day penalty and remand to redetermine the penalty amount.

RESPECTFULLY SUBMITTED this 25th day of October, 2010.

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¹³ The Department does not dispute the \$15 a day penalty for the time between August 8, 2008 and November 7, 2008.

COURT OF APPEALS
DIVISION II

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NO. 40064-2-II

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

KEN BRICKER,

Appellant/Cross Respondent,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent/Cross-Appellant

CERTIFICATE OF
SERVICE

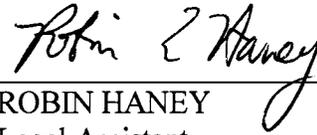
The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on October 25, 2010, she caused to be served the Brief of Respondent/Cross Appellant and this Certificate of Service in the below-described manner:

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