

COURT OF APPEALS  
DIVISION II

NO. 41085-1-II

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COURT OF APPEALS STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
DEPUTY

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ARTHUR S. WEST, individual,

Appellant,

v.

THURSTON COUNTY,

Respondent.

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RESPONDENT'S OPENING BRIEF

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**ORIGINAL**

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## I. NATURE OF THE CASE

Plaintiff/Appellant Arthur West alleges that Defendant/Respondent Thurston County (hereinafter “County”) violated the Public Records Act.

This case was previously considered by this Court and was remanded back to the trial court for determination of three issues: (1) whether the County produced copies of all attorney fee invoices in its possession regarding a previous lawsuit against the County, *Broyles v. Thurston County*, (2) whether the County’s redactions were justified as work product or privileged information, and (3) for a determination of the costs and penalties to be assessed against the County. *West v. Thurston County*, 144 Wn. App. 573, 584, 183 P.3d 346 (2008).

The trial court, after considering these three issues, determined that (1) by July 9, 2008, the County had produced for West copies of all invoices in its possession regarding the defense of the *Broyles* case, (2) redactions made by the County in the documents produced to West on July 9, 2008, were justified, and (3) a penalty of \$16,020 and an award of fees and costs against the County in the amount of \$26,354.86 (a total of \$42,374.86) was appropriate.

## II. RESTATEMENT OF THE ISSUES

1. Did the trial court properly find that the County disclosed to West all attorney fee invoices in its possession regarding defense of the *Broyles* case by July 9, 2008?

2. Did the trial court properly find that the County's redactions to copies of documents provided to West were justified?

3. Did the trial court properly determine the costs and penalties to be imposed upon the County?

## III. RESTATEMENT OF THE CASE

### A. Facts occurring prior to this Court's remand decision.

On January 22, 2007, Plaintiff made a public records request to Thurston County for attorney fee invoices in the defense of *Broyles v. Thurston County*. CP 163. On January 26, 2007, the County denied Plaintiff's request pursuant to RCW 42.56.290 and RCW 42.56.070(1). CP 164. Plaintiff filed suit against the County on February 12, 2007, alleging that the County's refusal to produce the attorney-fee invoices violated the Public Records Act ("PRA"). *Id.*

On February 24, 2007, the County advised Mr. West by letter that its position remained that the attorney fee invoices he had requested were exempt from disclosure, but that it was nevertheless producing redacted copies of the *Broyles* invoices in its possession. CP 164-65. On that day,

all *Broyles* attorney fee invoices in the possession of Thurston County were produced with heavy redactions. CP 165-71. The invoices were redacted to remove the name, address and other contact information of the person or entity to whom the invoice was sent, the file number and description of the matter, all descriptions of work performed and all descriptions of costs or disbursements as well as personal or financial information such as tax identification numbers. CP 182.

On March 26, 2007, the trial court dismissed West's PRA claim. CP 165. West appealed. *Id.*

During the 2007 legislative session, the Legislature enacted SHB 1897, which purported to "clarify" the legislature's intent that attorney invoices may not be withheld in response to a PRA request and that any exemptions are to be narrowly construed. *Id.* The legislation became effective July 22, 2007, and was codified as RCW 42.56.904. *Id.*

The County argued that RCW 42.56.904 should not apply retroactively. *West*, 144 Wn. App. at 583. However, this Court rejected that argument. *Id.*

In its May 13, 2008, opinion, this Court held that "the trial court erred in ruling that the County was not required to disclose the attorney invoices at issue." 144 Wn. App. at 584. This Court remanded the case to the trial court for a determination of three issues: (1) "whether the

County has, in fact, disclosed all of the invoices in its possession,” (2) whether its redactions are justified as work product or privileged information,” and (3) “for a determination of the costs and penalties to be assessed against the County.” *Id.*

**B. Facts occurring after this Court’s remand decision.**

1. *Shortly after remand, on July 9, 2008, Thurston County provided plaintiff with minimally redacted copies of all Broyles attorney fee invoices in its possession.*

Shortly after this Court issued its decision remanding this case, on July 9, 2008, the County provided West with copies of all *Broyles* attorney fee invoices in its possession. CP 178. While the documents provided to West had some redactions, the redactions were limited to personal and financial information and to attorney work descriptions to protect attorney-client privilege and work-product privilege. CP 184. A total of 303 pages of documents were produced. CP 171. Most of these documents were copies of the same documents produced by Thurston County on February 24, 2007, but in a significantly less redacted form. *Id.*

2. *Although Thurston County never had possession of invoices in excess of the \$250,000 deductible (those documents had been submitted directly to the Risk Pool by various law firms and service providers), counsel for the County obtained copies of the invoices from the Risk Pool and provided them to West on October 15, 2009.*

Thurston County never saw or possessed invoices for legal work related to the *Broyles* matter in excess of \$250,000. CP 178-82, 582-85.

Thurston County contracted with the Washington Counties Risk Pool for insurance coverage. CP 172, 582. The deductible for the coverage was \$250,000. *Id.* Thurston County was only responsible for the first \$250,000 of defense fees and costs. CP 172, 582-83.

During the *Broyles* litigation, bills for fees and costs were sent to the Washington Counties Risk Pool by five law firms and many service providers.<sup>1</sup> CP 46, 172-74. For bills up to the \$250,000 deductible, the Risk Pool then paid the firms and service providers and forwarded copies of the invoices to the County for reimbursement. CP 173. After the \$250,000 deductible was satisfied, the Risk Pool ceased forwarding the bills to the County. CP 583. Under the coverage agreement, the County

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<sup>1</sup> Four involved law firms submitted their invoices directly to the Risk Pool, including:

- Cable, Langenbach, Kinerk & Bauer, LLP
- Garvey, Schubert & Barer
- Law Offices of John Francis Kennedy
- Lee Smart Cook Martin and Patterson.

CP 172-73.

A fifth involved law firm, Bullard Smith Jernstedt Harnish, billed to the County with invoices dated October 1, 2001, December 3, 2001, February 1, 2002 and March 1, 2002. Because this time period was early in the *Broyles* litigation and the \$250,000 deductible had not yet been satisfied, Thurston County forwarded the Bullard Smith invoices to the Risk Pool for payment. CP 173-74.

After the \$250,000 deductible was satisfied, the four law firms listed in the bulleted initial paragraph above continued to submit invoices to the Risk Pool. The law firm of Bullard Smith Jernstedt Harnish had no further involvement with the case. In June 2007, a new firm, Patterson Buchanan Fobes Leitch & Kalzer, Inc., P.S., began doing business after Mr. Patterson left the Lee Smart firm. CP 577-78. The Patterson Buchanan firm submitted its invoices related to *Broyles* directly to the Risk Pool for payment. *Id.*

Thus, after the time the \$250,000 deductible was satisfied, there was a total of five law firms submitting invoices to the Risk Pool for work on the *Broyles* litigation.

had no obligation to pay the invoices once the deductible was satisfied. *Id.* Thus, because the Risk Pool did not forward the invoices, the County never saw them and never had possession of them. *Id.*; CP 585. No Thurston County official ever reviewed, evaluated, or considered the invoices in excess of the \$250,000 deductible. CP 179, 583, 585.

On October 6, 2009, while the parties were awaiting the trial court's decision on the issues presented on remand, counsel for West filed a motion to compel production of all invoices over \$250,000. CP 592-95. Thurston County filed a responsive pleading stating that it never had possession of those invoices, set forth its arguments as to why the documents were not public records, and argued that it had no obligation to produce records it never possessed. CP 586-91. The County's response was supported by the declaration of Thurston County's Risk Manager, Tammy Devlin. CP 581-83. Devlin's declaration described the following facts:

- the Risk Pool has a contractual right to appoint private attorneys to represent the County;
- those private attorneys submit their invoices directly to the Risk Pool for payment;
- the County's deductible is \$250,000;

- the Risk Pool forwards all requests for payment to the County until the \$250,000 deductible is satisfied;
- after the \$250,000 deductible is satisfied, the Risk Pool does not send any additional invoices or requests for payment to the County;
- the County is unaware of what legal expenses, if any, are incurred above the deductible amount as it no longer receives the invoices and is no longer responsible for payment.

*Id.* Also attached to the motion, as an exhibit to a supporting declaration, was an email from Donald Krupp, the County's Chief Administrative Officer, stating that to the best of his knowledge, Thurston County does not possess records of any bills in excess of its \$250,000 deductible. CP 584-85. Krupp also stated that neither he, nor the County Commissioners, had knowledge of what litigation expenses had been incurred in addition to the deductible. *Id.*

Nevertheless, despite the fact that the County never possessed the invoices in excess of \$250,000, in an effort to resolve plaintiff's motion without further inconveniencing the court or unnecessarily protracting this litigation, counsel for Thurston County at Patterson Buchanan Fobes Leitch & Kalzer, Inc. P.S. (Patterson Buchanan) wrote to counsel for West

and indicated that the requested invoices would be provided. CP 577-78. The letter explained that Patterson Buchanan would obtain the invoices from the Risk Pool and would then forward them to West's counsel. *Id.*

More specifically, the letter indicated, first, that the documents were being provided over objection. CP 577-78. The letter stated that “[w]e do not agree with plaintiff’s assertion that Thurston County had an obligation to produce invoices in excess of \$250,000.” CP 577. The letter noted, as had already been addressed at a hearing on February 6, 2009, that plaintiff’s argument he was entitled to the documents based on his interpretation of the statutory terms “owned” and “used” was flawed and without merit. *Id.*

Second, the letter stated, the invoices in excess of \$250,000 were not in the possession of Thurston County, but were in the possession of the Risk Pool, a separate governmental entity. *Id.*

Third, to a significant extent, the requested invoices were not in the possession of the Patterson Buchanan law firm either, given that the firm was a new firm that had only begun doing business in June 2007. Thus, any invoices related to the *Broyles* case that existed prior to June 2007 would not be in the possession of the Patterson Buchanan firm. *Id.*

However, the letter stated, rather than continuing to argue about these matters, the Patterson Buchanan firm agreed to provide West with all

invoices that it possessed, i.e., invoices generated after June 2007. *Id.* Further, the letter indicated that to the extent invoices were generated by other law firms prior to June 2007, those invoices should be in the possession of the Risk Pool. CP 577-78. The letter indicated that the Risk Pool had agreed, as a courtesy, to provide copies of the invoices in its possession and that, once they were received by Patterson Buchanan, they would be forwarded. CP 578.

By email dated October 14, 2009, defense counsel at Patterson Buchanan notified West's counsel that it had obtained copies of all invoices in the possession of the Risk Pool related to the *Broyles* case in excess of the \$250,000 deductible. CP 580. The email also stated that invoices in the possession of Patterson Buchanan for work on the *Broyles* case in excess of the \$250,000 deductible had been gathered. *Id.* The email concluded that the documents were being sent to a vendor for copying and would be produced shortly. *Id.*

On October 15, 2009, the invoices over the \$250,000 deductible were provided (despite continuing objection) to West's counsel without any redactions. CP 554, 571.

Subsequent to production of the invoices exceeding the \$250,000 deductible, counsel for West filed a brief outlining the issues remaining for determination by the trial court and to recalculate the requested

penalties. CP 554-65. By letter dated December 3, 2009, the trial court invited counsel for Thurston County to provide a responsive written argument regarding the invoices over \$250,000. CP 1062. Pursuant to the trial court's request, Thurston County filed a pleading entitled "Defendant's Brief Regarding Status Conference." CP 542-53.

The trial court held a status conference on December 21, 2009. VRP 54-59. The trial court described on the record the process that it had used to review the invoices. VRP 54-57. The trial court stated that it would be providing copies of an eighty-six page chart of its findings to counsel for both parties and that it would then schedule an additional status conference to see if either party wanted to submit additional argument or briefing before it issued its decision. VRP 56-58.

By letter dated December 24, 2009, (CP 199-206) the trial court provided both parties with its chart (CP 207-97) outlining its findings regarding its review of invoices. Copies of the invoices were attached. CP 298-540.

On January 6, 2010, the trial court held another status conference. VRP 60-63. The parties both agreed that it was abundantly clear the trial court had done extensive work, that the trial court was intimately familiar with what had been produced, and that no further argument was necessary. *Id.* The trial court then indicated it would proceed with applying the law

to the factual findings it had previously charted and would issue its opinion. VRP 62.

3. *On April 6, 2010, the trial court filed a memorandum decision deciding each of the three remand issues.*

On April 6, 2010, the trial court filed its memorandum decision deciding each of the three remand issues. CP 162-97. The memorandum decision incorporated the court's earlier December 24, 2009, letter and chart. CP 163.

- a. The trial court concluded that by July 9, 2008, Thurston County had produced for West copies of all invoices in its possession regarding *Broyles*.

After a "tedious and exacting" analysis of the evidence and considering the parties' legal arguments, the court concluded that by July 9, 2008, Thurston County had produced all invoices in its possession regarding *Broyles*. CP 162-178, 199-540.

In regard to the invoices over \$250,000 the trial court noted that West's argument centered on his characterization of the billings in excess of \$250,000 being "owned" and/or "used" by Thurston County. CP 178-79. The trial court analyzed the statutory terms "owned" and "used." CP 179-80. The trial court found that Thurston County had never possessed the invoices in excess of the \$250,000 deductible, and that there was no evidence the County had reviewed, evaluated, referred to, or otherwise considered the defense invoices over \$250,000 in its decision-making

process regarding defense of *Broyles* or for any other purpose. CP 180. Thus, the trial court concluded, because Thurston County did not possess, prepare, own, use, or retain invoices for defense services in *Broyles* over their \$250,000 deductible, these invoices were not within the definition of a “public record” under RCW 42.56.010. CP 181. The trial court further held that Thurston County did not have an obligation to produce or arrange for the production of defense invoices over their \$250,000 deductible. *Id.*

- b. The trial court concluded that the redactions made to copies of documents provided to West were justified.

The trial court concluded that the “wholesale” redactions to the documents provided on February 24, 2007, were not justified. CP 183. However, the redactions to the documents produced on July 9, 2008 were only limited “spot” redactions and were “justified under specific exemptions in the Public Records Act.” CP 184.

- c. The trial court analyzed all Yousoufian factors and concluded that a penalty of \$30 per day, plus attorney fees and costs, was appropriate.

The trial court analyzed all aggravating and mitigating factors set forth in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d at 444, 229 P.3d 735 (2010). CP 184-96. After its detailed analysis, and after comparing the facts of this case to the “seriously more egregious facts” of the *Yousoufian*

case in which the Supreme Court set a penalty of \$45 per day, the trial court awarded a penalty of \$30 per day for 534 days<sup>2</sup>, as well as attorney's fees and costs. CP 195-96.

4. *The trial court denied Plaintiff's motion for reconsideration.*

On April 16, 2010, plaintiff filed a motion for reconsideration. CP 61-9. Plaintiff asked the trial court to reconsider its determination that the invoices over \$250,000 were not public records and, also, to reconsider its assessment of the penalty amount. *Id.* The County filed a response, arguing that (1) the trial court correctly ruled that the County did not have an obligation to produce invoices over the \$250,000 deductible, and (2) the trial court's analysis of the *Yousoufian* factors was thorough and applied each factor to the facts of the present case, was fair to all parties, and was appropriate. CP 1051-61. On July 28, 2010, after considering the briefing submitted by the parties, the court issued a written decision denying West's motion for reconsideration. CP 45-50.

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<sup>2</sup> The number of elapsed days between January 22, 2007 (when West made his PRA request) and July 9, 2008 (when the County produced the appropriately redacted documents) totaled 534 days. CP 185.

5. *Plaintiff filed a second motion for reconsideration, which the trial court denied.*

On September 28, 2010, plaintiff West (who had by that time become pro se), filed a second motion for reconsideration. CP 974-1044. West asserted that there was “new evidence.” CP 974-77. Thurston County filed a response. CP 965-73. West failed to file a reply and did not attend oral argument. CP 962. On October 25, 2010, the trial court signed an order denying plaintiff’s second motion for reconsideration. CP 963-64.

#### IV. STANDARD OF REVIEW

Review of agency action under the Public Records Act is de novo. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 344, 217 P.3d 1172 (2009). However, a trial court’s determination of appropriate daily penalties is reviewed for an abuse of discretion. *Yousoufian v. Office of Ron Sims*, 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.* A trial court’s decision is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. *Id.*

## V. SUMMARY OF ARGUMENT

The first issue on remand, as stated by this Court, was whether the County disclosed all of the attorney fee invoices in its possession. *West v. Thurston County*, 144 Wn. App. at 584. By July 9, 2008, the County had disclosed all invoices in its possession.

The County never possessed invoices in excess of \$250,000. Rather, those invoices were in the possession of a different governmental agency, the Washington Counties Risk Pool. The Risk Pool never forwarded invoices in excess of \$250,000 to the County. The County had no obligation to produce records it never possessed. Further, the County never saw the invoices, nor did it consider them or rely upon them in any decision making process.

The trial court properly found that the County had no obligation to produce invoices it had never possessed, reviewed, evaluated, referred to, or considered as part of any decision making process. The trial court's determination that the County disclosed all attorney fee invoices in its possession regarding defense of the *Broyles* case by July 9, 2008, was proper and should not be reversed or modified.

The second issue on remand was whether the County's redactions of the documents provided to West were justified. The trial court found

that the redactions to the documents produced on July 9, 2008, were minimal “spot” redactions and that they were all justified under specific exemptions in the Public Records Act. While West challenges this finding, he fails to point to even one specific redaction that, he contends, was improper. West’s argumentative and conclusory assertion that the trial court’s decision was erroneous, made without citation to the record, violates the Rules of Appellate Procedure and does not merit judicial consideration.

The third issue on remand was the question of what fees and costs should be assessed against the County. In considering this question, the trial court analyzed every factor set forth by the Supreme Court in *Yousoufian v. Office of Ron Sims*. In *Yousoufian* the Supreme Court set a penalty of \$45 per day based on “seriously more egregious facts.” In this case, after considering the mitigating and aggravating factors, and after comparing the facts to those of *Yousoufian*, the trial court imposed a penalty of \$30 per day for each of the 534 days that the County had failed to produce the invoices in its possession. The trial court’s decision was well reasoned and did not constitute an abuse of discretion. The trial court should be affirmed.

## VI. ARGUMENT

### A. **The Trial Court Properly Determined That The County Disclosed All Attorney Fee Invoices In Its Possession Regarding Defense Of The *Broyles* Case By July 9, 2008.**

The first issue on remand, as stated by this Court, was whether the County disclosed all of the attorney fee invoices “*in its possession.*” *West v. Thurston County*, 144 Wn. App. 573, 584, 183 P.3d 346 (2008) (emphasis added).

After briefing was submitted by the parties, oral argument was heard, and the trial court undertook an exhaustive analysis, the trial court issued a memorandum decision finding that “by July 9, 2008, Thurston County had produced for Mr. West copies of all invoices in its possession regarding the defense of the *Broyles* case.” CP 178. The trial court’s decision incorporated a letter from the court to counsel dated December 24, 2009, which included a chart compiling the information from the court’s review of documents. CP 162-63, 199-297.

West assigns error to the trial court’s determination that the County had no obligation to produce invoices for legal services in excess of \$250,000. *Appellant’s Opening Brief* at 22-30 (Second assignment of error). West also assigns error to the trial court’s alleged failure to rule on “withheld communications” which, he contends, constitute “newly discovered evidence.” *Appellant’s Opening Brief* at 31-35 (Third

assignment of error). West's assignments of error are without merit for the following reasons:

1. *The County never had invoices for legal work in excess of the \$250,000 deductible in its possession.*

It is undisputed that the County never had invoices for legal work over \$250,000 in its possession. The undisputed fact that the County never possessed the invoices resolves the issue of whether the County was obligated to produce them.

Once the County's deductible of \$250,000 had been satisfied, no invoices were sent to the County. CP 581-83, 584-85. Rather, they were sent by five private law firms and many service providers to the Washington Counties Risk Pool, a separate government entity. *Id.* The Risk Pool had the invoices. CP 46, 172-74, 581-83, 584-85. The County did not. *Id.* The County could not produce invoices it did not possess.

The first issue on remand, as stated by this Court, was whether the County disclosed all of the attorney fee invoices "in its possession." *West*, 144 Wn. App. at 584. Given this Court's framing of the issue, and the undeniable logic that the County could not produce invoices it did not have, this court's analysis should be at an end in regard to invoices for legal work in excess of the \$250,000 deductible.

2. *In addition to properly determining that the County did not have invoices over \$250,000 in its possession, the trial*

*court found that the County neither “owned” nor “used” those invoices.*

In addition to the fact that this Court’s analysis regarding invoices for work over the \$250,000 deductible is concluded because of the simple fact that the County never possessed those invoices, it is also the case that the County had no obligation to produce them because it neither “owned” nor “used” them.

After remand to the trial court, West argued that the County had an obligation to produce invoices in excess of the \$250,000 deductible in the possession of private law firms retained by the Risk Pool to represent the County because, he argued, the records were “owned” or “used” by the County. CP 592-95; 640. The County did not agree that it had an obligation to produce the invoices and filed a brief opposing plaintiff’s motion to compel. CP 586-91. Nevertheless, in an effort to demonstrate good faith, to avoid further inconveniencing the court, and to avoid further protracting this litigation, the County’s Patterson Buchanan attorneys obtained copies of all the invoices from the Risk Pool and produced them without redactions on October 15, 2009. CP 554, 571, 577-78.

Thus, while the County did not agree with West’s assertion that it had an obligation to produce invoices in excess of \$250,000, they were provided. The fact that they were provided was a demonstration of good

faith. Further, the fact that they were provided cuts off as of October 15, 2009, any accruing penalties should this court determine (it should not) that the County had an obligation to produce the invoices for work in excess of the \$250,000 deductible.

On November 30, 2009, West filed a “Brief Regarding Status Conference” arguing a recalculation of his requested penalties based on the fact that the invoices for legal fees over \$250,000 had been produced on October 15, 2009. CP 554-65. West argued that the County had an obligation to produce documents in the possession of law firms retained by the Risk Pool to represent the County because the County “owned” or “used” those invoices. *Id.* West now makes the same argument before this Court. *Appellant’s Opening Brief* at 22-30.

West’s argument before the trial court that the County was obligated to produce invoices over the \$250,000 deductible was premised on the statutory definition of “public record,” which provides as follows:

“Public record” includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics ....

CP 558 (citing RCW 42.56.010(2)).

It is undisputed that the Washington Counties Risk Pool is a separate governmental entity. Nothing in the record establishes that West ever made a public records request to the Risk Pool for the invoices in excess of \$250,000.

Before the trial court, in response to West's contention that he was entitled to a penalty for the County's "failure" to produce invoices in excess of the \$250,000 deductible, one of the five private law firms involved with the *Broyles* litigation after the \$250,000 deductible was satisfied (the Patterson Buchanan firm) filed a responsive pleading on the County's behalf entitled "Defendant's Brief Regarding Status Conference." CP 542-53. In that pleading, the County argued that the private firms who provided legal services to the County worked as independent contractors. CP 546. Further, the law firms were not acting as independent contractors to the County, but to a separate government entity, the Risk Pool *Id.* In addition to the fact that it had never possessed the invoices, the County argued, it also neither "owned" nor "used" them:

- a. The County did not "own" invoices over the deductible of \$250,000.

The County argued to the trial court that, in cases involving independent contractors, Washington courts do not consider the ownership

argument because, as a practical matter, it cannot be disputed that documents maintained by an independent contractor are not owned by the agency. CP 544-45. For example, the County argued, in *Concerned Ratepayers v. PUD 1 of Clark County*, 138 Wn.2d 950, 983 P.2d 635 (1999), plaintiffs made a public records request for technical specifications created and maintained by a contractor hired by the PUD relating to construction of a power plant. *Id.* The technical specifications were never possessed by the PUD. CP 545. The *Concerned Ratepayer* court never considered whether documents maintained by the independent contractor could be “owned” by the PUD. *Id.* Instead, the court only considered the “use” argument. *Id.*

The County further noted that the term “own” is not defined in the PRA. *Id.* However, that issue was raised in *O’Neill v. City of Shoreline*, 145 Wn. App. 913, 925, 187 P.3d 822 (2008). The court in that case applied the dictionary definition of “own” from the American Heritage Dictionary, which is “to have or possess as property.” *Id.*

The County argued that it never “had or possessed” the invoices above the deductible amount. CP 545. Thus, it argued, it did not “own” the invoices. *Id.* The invoices were created by private counsel as independent contractors to the Risk Pool and provided to the Risk Pool (an entirely different governmental agency from the County) for payment. *Id.*

West offered no Washington authority before the trial court to support the assertion that attorneys' fees invoices created by a private attorney independent contractor, and provided to a different government entity for payment, were "owned" by the County.

West cited a North Carolina case, *Womack Newspapers, Inc. v. Town of Kitty Hawk*, 181 N.C. App. 1, 639 S.E.2d 96 (2007), to support his contention that attorneys' fees invoices maintained by private counsel are "owned" by the County. CP 559.

The County argued in response that the *Womack* case actually supported an opposite finding. CP 545-46. In *Womack*, pursuant to a North Carolina statute, the defendant town contracted with a private firm to serve as its City Attorney. CP 545 (Citing *Womack*, 181 N.C. App. at 3). A newspaper made a public disclosure request to the town for "all detailed billing statements from the town attorney for legal fees incurred in 2003 and 2004." CP 545 (Citing *Womack*, 181 N.C. App. at 4). The North Carolina Court of Appeals held that the records must be produced because "the defendants have not disputed the fact that *the Town paid for the records* related to the engineering, surveying, and other professional services rendered in connection with the Town's pending oceanfront condemnation litigation." CP 545-46 (Citing *Womack*, 181 N.C. App. at 14) (emphasis added).

The County noted it was undisputed that, past the deductible amount, the County did not pay the invoices. CP 546. Rather, the Risk Pool paid. *Id.* The invoices from the involved law firms were sent directly to the Risk Pool, and the County never saw them. CP 582-83, 584-85, 573-75. The County was not responsible for payment. *Id.* The County argued that if the trial court was to give the *Womack* case any weight at all, it should be in favor of the County. CP 546. Even under the authority cited by West, the County argued, it did not “own” the invoices above the deductible amount. *Id.*

Despite the fact that the question of whether the County “owned” invoices in excess of \$250,000 was an expansion of the remand issues as stated by the Court of Appeals, the trial court dutifully considered the question.

The trial court considered the arguments of the parties and, in its memorandum decision, noted that the PRA does not define “owned.” CP 179. However, the trial court noted, when the issue was addressed in *O’Neill*, 145 Wn. App. 913 at 925, the court applied the dictionary definition of “own,” that is, “to have or possess as property.” *Id.* Applying this definition to defense billings over Thurston County’s \$250,000 deductible, the trial court found that it was “clear that Thurston County did not own the invoices for defense services over their \$250,000

deductable.” *Id.* The trial court supported its determination with the finding that “it has not been disputed that Thurston County did not receive these billings, did not pay these billings, nor did Thurston County have responsibility to reimburse the Washington Counties Risk Pool for any payments made toward these billings.” *Memo Id.*

- b. The County did not “use” invoices over the deductible of \$250,000.

The trial court also properly determined that the County had not “used” the invoices over the deductible.

West asserted before the trial court that the County “used” the invoices above its deductible. CP 559. The County argued in response that the *Concerned Ratepayers* court defined “use” as “information that is reviewed, evaluated, or referred to and has an impact on an agency’s decision-making process.” CP 546 (Citing *Concerned Ratepayers*, 138 Wn.2d at 961). The County responded that it had never received, possessed, or even seen the invoices. CP 546-47, 581-83. The County further noted that it had not reviewed the invoices above the deductible amount. *Id.* The County did not evaluate the invoices above the deductible amount. *Id.* The County had never referred to the invoices above the deductible amount. *Id.* Finally, the County never received or relied upon the invoices above the deductible amount in any decision-

making process. CP 546-47. Indeed, according to the declarations of Thurston County's Risk Manager and its Chief Administrative Officer, the County had no say in whether the invoices were to be paid above the deductible amount. CP 581-83, 584-85. Based on these undisputed facts, the County argued that it did not "use" the invoices. CP 546-47.

The trial court rejected West's argument that the County "used" the defense invoices over \$250,000. CP 46, 179-80. The trial court noted West's citation to *Concerned Ratepayers*, in which the Court opined that "an agency may have used a document not in its possession." CP 179-80. However, the trial court then held that West's analysis did not adequately account for the *Concerned Ratepayers* definition of the term "used." CP 180. The trial court cited an extended passage from *Concerned Ratepayers* which stated that the critical inquiry is whether the requested information bears a nexus with the agency's decision making process. CP 180 (citing *Concerned Ratepayers*, 138 Wn.2d at 959-961). The trial court found that Thurston County did not receive invoices for defense services over its \$250,000 deductible. CP 180. Additionally, the trial court found there was no evidence the County reviewed, evaluated, referred to or otherwise considered defense invoices over the \$250,000 deductible in its decision-making process regarding the defense of *Broyles* or for any other purpose. *Id.* The trial court found there was no showing that defense

invoices over Thurston County's \$250,000 deductible had a nexus with Thurston County's decision making process. CP 180-81.

The trial court concluded that Thurston County did not have an obligation to produce or arrange for the production of defense invoices over its \$250,000 deductible. CP 181.

3. *Conclusion of argument regarding attorney invoices.*

Because the County never possessed invoices for legal work in excess of the \$250,000 deductible and because it neither "owned" nor "used" the invoices, it had no obligation to produce those invoices in response to Plaintiff's PRA request. CP 181.

This Court should be mindful of the fact that it did not ask the trial court to decide whether the County "owned" or "used" invoices. Rather, the remand was for a determination of whether the County had "disclosed all of the invoices *in its possession.*" *West*, 144 Wn. App. at 584 (emphasis added). The trial court properly concluded, based on the undisputed evidence, that the County never had invoices for work in excess of \$250,000 in its possession. The trial court properly complied with this court's directive on remand.

The trial court's finding that the County disclosed all of the invoices in its possession by July 9, 2008, should be affirmed.

On appeal, pro se appellant West's arguments are even less cogent than those before the trial court. West makes no denial of the fact that the County never actually possessed the invoices. Instead, he essentially argues that possession may be imputed to the County because Mr. Patterson (the senior partner in the Patterson Buchanan firm) was a "county officer" and was essentially acting as a Thurston County Deputy Prosecuting Attorney. *Appellant's Opening Brief* at 23. Citing *Broyles v. Thurston County*, 147 Wn. App. 409 (2008). West argues that "the officer's actions are the actions of the county itself." *Id.*

However, on appeal, West fails to provide this Court with any analysis of the relevant statutory terms from RCW 42.56.010(2) -- "owned" or "used."

West's argument that Mr. Patterson was a "county officer" is simply wrong. Mr. Patterson is an attorney in a private law firm.

West's argument regarding Mr. Patterson also ignores the fact that there was a total of five law firms involved with the *Broyles* litigation after the \$250,000 deductible was satisfied. Mr. Patterson had no control over other law firms' ability or willingness to produce its invoices to West.

West attempts to establish through a cursory citation to caselaw from the state of Ohio, in a one paragraph argument, that a record that happens to be in the possession of a private attorney can be a government

record. *Appellant's Opening Brief* at 28-29. As a premise to his argument, West asserts, without foundation, that Ohio's "sunshine law" is similar to Washington's.<sup>3</sup> However, West makes no citation to the Ohio statute and fails to identify the specific statutory language that, he claims, is similar. Furthermore, the key case upon which West relies, *State ex rel. Findlay Publishing Co. v. Hancock County Board of Commissioners*, 80 Ohio St.3d 134, 684 N.E.3d 1222 (1997), is easily distinguished. In that case, a government entity had imprudently included a confidentiality provision in a settlement agreement. *Id.* at 135. Then (apparently in an attempt to keep the terms of the agreement hidden from public view), the Ohio government entity forwarded the settlement agreement to a private attorney and did not keep a copy. *Id.* After a public records request was made, the government argued that it no obligation to respond based on (1) the agreement's confidentiality provision and (2) because of the fact that it no longer had a copy of the agreement. *Id.* at 137. The Ohio court disagreed with the government's attempt to conceal the public record. *Id.*

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<sup>3</sup> Washington's Public Records Act, Chapter 42.56 RCW, is statutory law. While this Court has authority to interpret the statute's language, it cannot rewrite or amend the statute. West's failure to identify identical relevant language in the Ohio statute necessarily results in the conclusion that Ohio cases interpreting that statute are irrelevant. West himself admits that the PRA cannot be amended by any judicial act under the doctrine of separation of powers. *Appellant's Opening Brief* at 41.

Here, unlike the government entity in *Findlay Publishing*, Thurston County has made no assertion that any of the invoices in excess of the \$250,000 deductible are protected under the provisions of a confidentiality clause. Second, the invoices were never in the possession of Thurston County and then forwarded to a private attorney in an attempt to keep them hidden. Rather, the County *never* had them. Unlike the Ohio government entity in *Findlay Publishing*, Thurston County has not intentionally sought to conceal a government record.

A far more relevant case is *Koenig v. Pierce County*, 151 Wn. App. 221, 211 P.3d 423 (2009). In *Koenig*, the Court stated:

If we were to hold that the prosecutor's office has a duty to inquire with other Pierce County departments concerning a record request directed only to the prosecutor's office, the effect would be that no department within the state or municipal government could deny a request for public records without having first canvassed all the other departments within that unit of government. The statute does not impose this burden. The Public Records Act "does not require ... an agency to go outside its own records and resources to try to identify or locate the record requested."

*Koenig*, 151 Wn. App. at 233 (citing *Limstrom v. Ladenburg*, 136 Wn.2d 595, 604 n.3, 963 P.2d 869 (1998) (emphasis added)). Following the rationale of this Washington case, if a County is not required to first check with other County offices before it responds to a public records request, it

certainly would not be the case that a County office is obligated to check with outside private entities it may do business with to see what responsive records they may have.

As our Supreme Court noted in *Limstrom*, our state's public records act was modeled after the federal Freedom of Information Act. *Limstrom*, 136 Wn.2d at 608. Thus, the Supreme Court noted, our state's courts "often look to judicial constructions of the FOIA in construing our own statute." *Id.* Interpreting FOIA, the Ninth Circuit recently ruled that a federal agency, the Small Business Administration, had no obligation to seek records that it did not possess from a private company, Verizon. *American Small Business League v. United States Small Business Administration*, 623 F.3d 1052, 1053 (9<sup>th</sup> Cir. 2010). Similarly, here, Thurston County should have no obligation to seek records it does not itself possess from other outside private companies.<sup>4</sup>

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<sup>4</sup> If the court were to go down this slippery slope, every private company that transacts business with a government entity would arguably become a repository of government public records. Private companies would presumably become obligated to comply with government record retention laws. These consequences might dissuade private businesses from transacting with the government. At the least, given increased costs to the private businesses, bids to perform work associated with government entities would correspondingly increase. In either event, the consequence would be unfavorable to the public. As a matter of public policy, this Court should refrain from creating law that the records in the possession of a private company are a public record.

4. *West's third assignment of error – that the Court erred in failing to rule on “withheld” communications – is without merit.*

West's third assignment of error is that the trial court failed to rule on “withheld” communications. This assertion challenges the trial court's determination that Thurston County had disclosed all attorney fee invoices in its possession by July 9, 2008.

West asserted before the trial court, as now on appeal, that there was “newly discovered evidence.” Compare *Plaintiff's second motion for reconsideration* at 1:12-16 (CP 974) with *Appellant's Opening Brief* at 31. In ostensible support of his assertion before the trial court that there was “newly discovered evidence,” plaintiff attached to his second motion for reconsideration a number of documents produced by the County in response to a Public Records Act request he made to Thurston County on July 2, 2010. CP 980-1044. Although West's declaration attached a number of documents, in his second motion for reconsideration he made specific reference to only three of those documents: one dated December 30, 2008; one dated January 23, 2007; and one dated March 7, 2007. CP 976-77.

The “newly discovered evidence” now referenced by West in this appeal are two of the documents he asserted before the trial court to be “newly discovered evidence.” Specifically, West references in this appeal

the January 23, 2007, communication and the email message dated December 30, 2008, from Tammi Devlin to Don Krupp. *Appellant's Opening Brief* at 31-32.

As already argued by the County before the trial court, neither of these “new” records have any relevance. CP 967-72.

First, none of the specifically identified documents, (the ones dated January 23, 2007; and December 30, 2008) as well as most of the other “newly discovered” documents, existed at the time of West’s PRA request giving rise to this case – January 22, 2007. The County had no obligation to produce documents that did not exist on January 22, 2007, or that were created after that date. *Smith v. Okanogan County*, 100 Wn. App. 7, 14, 994 P.2d 857 (2000). There is no obligation on the part of a government entity responding to a PRA request to supplement responses or to produce documents created after the date of a request.

Second, as noted by the trial court, plaintiff’s complaint limits the scope of this litigation to a request for attorney fee invoices. CP 188 (citing *Plaintiff's complaint* at 3.1). However, none of the “new” records identified by West are attorney fee invoices. Thus, the “new” records are irrelevant to the claimed PRA violation asserted in plaintiff’s complaint.

Third, as plaintiff conceded before the trial court, some of the documents produced by the County in September 2010, were subject to

attorney-client privilege. CP 976:12-13. West admitted in his second motion for reconsideration that some of the documents produced in response to the July 2010 PRA request “might have been subject to attorney client privilege.” *Id.* After the *Broyles* litigation had long since concluded, any waiver of attorney-client privilege by Thurston County in producing old records is not evidence of bad faith. Rather, it is evidence of good faith on the part of Thurston County in its effort to be open to the public.

Fourth, none of the “new” evidence asserted by West was relevant to the issues before the trial court as framed by this Court in its remand decision. Specifically, this Court ruled in its earlier decision that “the trial court erred in ruling that the County was not required to disclose the *attorney invoices* at issue under the Public Records Act.” *West v. Thurston County*, 144 Wn. App. 573, 584, 183 P.3d 346 (2008) (emphasis added). Thus, this Court remanded the case to the trial court for a determination of whether the County had disclosed “all of the invoices” in its possession. *Id.* However, as stated two paragraphs previously, none of the “newly discovered” documents are invoices. Thus, the “new” documents are irrelevant to the remand directive from this Court to the trial court.

Fifth, plaintiff's assertion that the trial court failed to rule is disingenuous. Indeed, after considering the briefing and after hearing oral argument on October 25, 2010, the trial court did rule. This court should observe that West noted his second motion for reconsideration for oral argument to be heard on October 25, 2010. CP 962. After Thurston County submitted a response to West's second motion for reconsideration, West did not bother submitting a reply. West also did not bother attending oral argument. CP 962. Rather, on October 25, 2010, only counsel for Thurston County appeared. *Id.* On that date, the trial court signed the County's proposed order denying West's second motion for reconsideration. CP 963-64. The Order reflects that West did not file a Reply. *Id.* West's failure to file a reply and his failure to appear for oral argument essentially constituted an abandonment of his argument regarding "newly discovered" evidence.

In conclusion, in its memorandum decision filed on April 6, 2010, the trial court found that "by July 9, 2008, Thurston County had produced for Mr. West, copies of all invoices in its possession regarding the defense of the *Broyles* case." CP 178. None of the "new" documents attached to plaintiff's declaration before the trial provided any basis for alteration of the trial court's finding. Similarly, the two documents now claimed by

West to be “newly discovered evidence” provide this Court with no basis to overturn the trial court’s determination.

**B. The Trial Court Properly Determined That The County’s Redactions Of Documents Provided To West Were Justified.**

The second issue on remand was whether the County’s redactions of the documents that were provided to West were justified. West’s first assignment of error is that “exemptions” asserted by the County were improper.<sup>5</sup> *Appellant’s Opening Brief* at 18. West’s assignment of error is without merit. The trial court properly determined that the County’s redactions of documents provided to West were justified.

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<sup>5</sup> Another focus of West’s first assignment of error (indeed, the primary focus) as stated in his brief at 18-21 is that the trial court took too long in issuing its decision. West asserts that the trial court’s “unreasonable delay” violated Article 1, Section 20, of the State Constitution.

However, Defendant/Respondent Thurston County has no control over the trial court’s speed in issuing decisions.

Moreover, in defense of the trial court, this Court should note that the Supreme Court recalled its mandate on the earlier *Yousoufian* decision on June 12, 2009. By letter dated August 21, 2009, the trial court requested briefing from the parties on the effect of a mandate being recalled. CP 602. The parties submitted briefing indicating that the impact of the Supreme Court’s recall was that the state of the law regarding the *Yousoufian* factors was called into question. CP 1063-74. Because setting of a penalty was one of the key issues set forth in this Court’s remand decision, the trial court was prudent in waiting for a clear final decision on *Yousoufian* before determining the penalty to be imposed. The new *Yousoufian* decision was not filed until March 25, 2010. *Yousoufian*, 168 Wn.2d 444 (March 25, 2010). Thus, approximately nine months of delay was a consequence of factors beyond the control of the trial court.

Shortly after this Court issued its decision remanding this case, on July 9, 2008, the County provided West with minimally redacted copies of all *Broyles* attorney-fee invoices in its possession. CP 183-84. The July 9, 2008, production was redacted only as to personal and financial information, and limited redactions were made to attorney work descriptions to protect attorney-client privilege and work product information. CP 184. This latter July 9, 2008, production was produced by the County for the purpose of complying with the most liberal interpretation possible under RCW 42.56.904.<sup>6</sup> CP 716-17.

The trial court, addressing the appropriateness of the July 9, 2008, redactions, found that two invoices in this group were provided without redaction. CP 183. The trial court also found that the remainder of the invoice copies provided on July 9, 2008, had redactions but that the redactions were greatly reduced. CP 183-84. The trial court stated:

The redactions in the July 9, 2008 copies of invoices were spot redactions rather than the wholesale redactions present in the set of the invoices produced by Thurston County on February 24, 2007. Redactions in the invoices and associated documents such as cover letters and copies of Washington Counties Risk Pool checks for payment provided July 9, 2008 were limited to tax

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<sup>6</sup> West has admitted that no redactions were made to the invoices in excess of \$250,000. CP 571. Thus, West has no possible basis for arguing that any redactions to those records were somehow improper.

identification numbers, bank routing numbers, and entries detailing the subject of a minor amount [of] the work done by defense attorneys including description of legal or other research done, mental impressions, theory and/or opinion.

CP 184.

The trial court also held as follows:

The redactions made by Thurston County in the copies of invoices and associated documents such as cover letters and check copies produced July 9, 2008, were justified under specific exemptions in the Public Records Act such as for personal or financial information, e.g., dates of birth, tax identification and bank routing numbers, or were exempt from disclosure as an attorney's work product, e.g., descriptions of legal or other research done, mental impressions, theory and/or opinion.

*Id.*

West's briefing to this Court does not cite one specific redaction that he claims is improper. Rather, he makes only an amorphous argumentative assertion that there were "302" improper exemptions. *Appellant's Opening Brief* at 21. West apparently expects this Court to comb through the record to ascertain the basis for his assertion.

This is not how our system of advocacy works. Rather, the advocates are responsible to inform the issues before the Court. It is the plaintiff's burden to designate specific facts in the record. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 185-86, 23 P.3d 440 (2001). On appeal,

the Fifth Circuit has held that parties must designate specific facts and their location in the record. *Nissho-Iwai Corp. v. Kline*, 845 F.2d 1300, 1307 (5<sup>th</sup> Cir. 1988). The Seventh Circuit has held that judges need not paw over the files without assistance from the parties. *Huey v. UPS, Inc.*, 165 F.3d 1084, 1085 (7<sup>th</sup> Cir. 1999). In a case adopting the “spaghetti approach” to litigation, the Ninth Circuit noted that appellant “heaved the entire contents of a pot against the wall in hopes that something would stick.” *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9<sup>th</sup> Cir. 2003). The Ninth Circuit noted that, beyond conclusory assertions in appellant's brief, there was little if any analysis to assist the court. *Id.* Expressing its displeasure, the court said “[j]udges are not like pigs, hunting for truffles buried in briefs.” *Id.* (citing *United States v. Dunkel*, 927 F.2d 955, 956 (7<sup>th</sup> Cir. 1991)). The court declined to “sort through the noodles” by conducting its own search to find support for appellant’s claims.” *Id.* at 929-30.

Washington courts are no different. Washington’s RAP 10.3(a)(6) explicitly requires that the argument section of an appellant’s brief must contain “reference to relevant parts *of the record*” (emphasis added). West’s failure to comply with the Rules of Appellate Procedure unfairly prejudices the County’s ability to respond and unnecessarily burdens this Court.

An assignment of error that is not supported by reference to the record should not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). See also *Keever & Assocs. v. Randall*, 129 Wn. App. 733, 741, 119 P.3d 926 (2005) (when issue is not supported by citation to the record it is generally waived).

Any assertion by West that the trial court's determination that redactions made by Thurston County were excessive or improper is unsupported by the record. This Court should affirm the trial court's determination.

**C. The Trial Court Properly Determined The Costs And Penalties To Be Imposed Upon the County.**

The third issue on remand was the question of what costs and fees should be assessed against Thurston County. This issue is also West's fourth assignment of error. *Appellant's Opening Brief* at 36-44.

The standard of review is an abuse of discretion. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d at 458. The trial court's determination should be reversed only if it was manifestly unreasonable or based on untenable grounds. *Id.*

*1. The penalty imposed by the trial court was proper.*

The argument in Appellant's Opening Brief regarding the penalties imposed presents no basis for this Court to find that the trial court abused its discretion. *Appellant's Opening Brief* at 36-44. Indeed, West's

argument is nothing more than a rambling series of argumentative and conclusory assertions, made without citation to the record in violation of RAP 10.3(a)(6). Moreover, West's argument has several instances of frivolity when, for example, first, he compares Thurston County to John Dillinger and his gang of bank robbers; second, he suggests that the trial court's determination of the appropriate penalty in this case is somehow analogous to Lakewood having over 230 police officers who were not shot by Maurice Clemmons; third, he obliquely suggests that this case is similar to the facts of Samuel Clemens' *Great Beef Contract*. *Appellant's Opening Brief* at 38-40.

The County respectfully submits that nothing written by West establishes that the trial court abused its discretion when it determined the measure of the penalty to be imposed. Rather, the decision of the trial court was well reasoned, even-handed, and complied with the guidance set forth in *Yousoufian*, applying every aggravating and mitigating factor.

The trial court, after considering the arguments made by West (who was at that time represented by counsel) in his Brief Regarding Status Conference<sup>7</sup>, and by the County<sup>8</sup>, set forth in a written

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<sup>7</sup> Plaintiff's Brief Regarding Status Conference (CP 554-69).

<sup>8</sup> Defendant's Brief Regarding Status Conference (CP 542-53).

memorandum decision a thorough twelve page analysis of the proper penalty. CP 162-97.

The court analyzed and applied all of the mitigating and aggravating factors articulated in *Yousoufian*, 168 Wn.2d 444. CP 185-96. The trial court's memorandum decision correctly noted that most of the factors appear in two opposite forms for consideration as either mitigating or aggravating factors. CP 186.

The trial court correctly noted that the time delay between January 22, 2007 and July 9, 2008 was 534 days. CP 185. The court explicitly found that the 534 day delay in producing records was an aggravating factor. CP 190.

The trial court analyzed whether the County demonstrated good faith or bad faith, and found that the County consistently demonstrated good faith.<sup>9</sup> *Id.* The trial court cited multiple reasons for its finding of good faith. First, the County's initial response was timely. *Id.* Second, the County took a broad, as opposed to a narrow, approach to what documents to include in its response. CP 190-91. Third, the County's reason for initially denying West's request was based on specific

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<sup>9</sup> West conceded that "the existence or absence of an agency's bad faith is the principal factor which the trial court must consider." CP 66:12-14 (citing *Yousoufian*).

exemptions the County believed applied after the trial judge in *Broyles* denied the *Broyles* plaintiffs' similar request for disclosure of defense invoices. CP 191. Fourth, although continuing to assert that the records were exempt, the County disclosed redacted versions of the records on February 24, 2007, and copies with significantly less redactions on July 9, 2008. CP 191. The trial court noted that although West argues that making disclosures while still maintaining that records are exempt demonstrates bad faith, the opposite is true – making disclosure while maintaining that an exemption applies demonstrates willingness to err on the side of disclosure. *Id.*

After considering the mitigating and aggravating factors and comparing the facts to those of *Yousoufian*, in which the Supreme Court had set a penalty of \$45 per day based on “seriously more egregious facts,” the trial court imposed a penalty on Thurston County of \$30 per day. CP 195-96. Thus, the total penalty imposed by the trial court was \$16,020 (534 days x \$30 per day penalty). CP 196.

Not satisfied with the award, West filed a motion for reconsideration. CP 61-9. In his motion for reconsideration, West challenged the trial court's analysis of the *Yousoufian* factors. CP 69. The County responded that the court's analysis of the *Yousoufian* factors was

thorough and that the penalty imposed on the County was appropriate and fair to both parties. CP 1053-60.

After considering the arguments of the parties, the trial court issued a written Decision on Plaintiff's Motion for Reconsideration. CP 45-50. The written decision set forth a six page explanation of the court's rationale, and ultimately, denied plaintiff's motion for reconsideration. *Id.*

While West now, on appeal, makes an argumentative assertion that the trial court properly failed to weigh the *Yousoufian* factors, *Appellant's Opening Brief* at 37, he fails to demonstrate specifically how the trial court's analysis was flawed in any regard. West's rambling series of argumentative assertions do not seriously merit judicial consideration.

The Supreme Court in *Yousoufian* set a penalty of \$45 per day. *Yousoufian*, 168 Wn.2d at 468-69. The facts of that case, as noted by the trial court, were far more egregious than those presented here. CP 195. The trial court's award of \$30 per day to West was reasonable, especially given its finding of good faith on the part of the County. The trial court applied the correct legal standard to the supported facts. Any assertion by West that the trial court adopted a view "that no reasonable person would take" is wholly without merit. West fails to show that the trial court

abused its discretion. This Court should not reverse or modify the trial court's determination to set the penalty awarded to West at \$30 per day.<sup>10</sup>

2. *The costs and fees imposed were proper.*

The trial court awarded costs and attorney's fees totaling \$26,354.86. CP 1047-48. Specifically, the trial court ordered defendant Thurston County to pay plaintiff West's former counsel, Gordon Thomas Honeywell LLP, fees in the amount of \$24,073.00 and litigation expenses in the amount of \$2,281.86 (a total of \$26,354.86). *Id.*

Shortly after the trial court entered its order on fees and costs, Gordon Thomas Honeywell LLP withdrew from the case. It then filed a lien. West filed a motion before the trial court asserting that the award of attorney's fees was excessive and asking that the lien be stricken. CP 974, 979.

Thurston County took no position regarding whether Gordon Thomas Honeywell LLP should be paid. However, the County indicated in its Response to Plaintiff's Second Motion for Reconsideration that it did not want to be involved with West's fee dispute with his former attorney. CP 970. The County indicated that, unless the trial court modified its previous directive, it intended to comply. *Id.*

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<sup>10</sup> West has already received from the registry of the court full payment of the \$16,020.00 penalty. CP 950.

Eventually, in order to avoid becoming entangled with the fee disputed between West and his former attorney, the County filed a motion to pay the judgment directly into the registry of the court. CP 959-61. The trial court granted the motion. CP 951-52. That same day, the County fully paid the judgment.

On appeal, West now contends that the trial court's award of costs and fees to his former counsel, whom he refers to as a "non-party," was improper. *Appellant's Opening Brief* at 43-44. As authority, West cites RCW 42.56.550(4), apparently believing that the attorney's fees should go to himself rather than to his former counsel.

First, West's argument ignores the fact that his former attorneys performed work on his behalf. West's assertion that he should be paid for work his former counsel performed for him is nonsensical and does not pass the straight-face test.

Second, even if West himself had performed the work, no Washington authority supports a fee award for a pro se litigant. Lawyers who represent themselves may be awarded fees that are otherwise justified because they must take time from their practices to prepare and appear as any other lawyer would. *Leen v. Demopolis*, 62 Wn. App. 473, 486-87, 815 P.2d 269 (1991). However, no Washington case extends this reasoning to a nonlawyer pro se litigant.

Federal and state courts across our nation hold that non-lawyer pro se litigants are not entitled to attorney's fee awards. Robert L. Rossi, 1 Attorney's Fees § 6:13 (3d ed.) (citing cases from the U.S. Supreme Court, 5<sup>th</sup> Cir., D.C. Cir., 10<sup>th</sup> Circuit, 9<sup>th</sup> Cir., Alaska, Idaho, Ohio and Utah).

As before the trial court, while Thurston County does not believe that West's arguments have merit, the County continues to take no position in regard to West's arguments regarding payment to his former counsel.

#### VII. CONCLUSION

Based on the foregoing reasons, Defendant/Respondent Thurston County respectfully asks that this Court deny the appeal of Plaintiff/Appellant Arthur West and affirm the trial court below.

RESPECTFULLY SUBMITTED this 25 day of March 2011.

PATTERSON BUCHANAN FOBES  
LEITCH & KALZER, INC., P.S.

By:   
Duncan K. Fobes, WSBA No. 14964  
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Attorneys for Respondent Thurston  
County

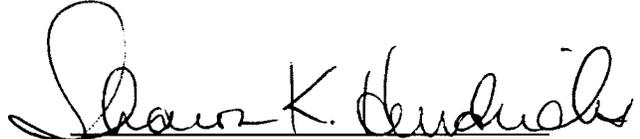
**CERTIFICATE OF SERVICE**

I hereby declare on the date provided below, I caused to be delivered via legal messenger and U.S. Mail the foregoing RESPONDENT'S OPENING BRIEF to the following individual:

Arthur S. West  
120 State Avenue N.E. #1497  
Olympia, WA 98501  
awestaa@gmail.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, on March 25, 2011.

  
Sharon K. Hendricks

COPIES TO SHARON K. HENDRICKS  
11 MAR 25 2011  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY