

No. 50124-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

BRIAN GREEN,

Appellant,

vs.

LEWIS COUNTY,

Respondent.

Appeal from the Superior Court of Washington for Thurston County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By:


ERIC W. EISENBERG, WSBA No. 42315
Civil Deputy Prosecuting Attorney
Of Attorneys for Respondent Lewis County

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. INTRODUCTION

Brian Green appeals the trial court's decision awarding him costs, fees, and penalties as a partially prevailing party in a Public Records Act (PRA) suit. Mr. Green requested all correspondence from the Lewis County Sheriff's Office recommending a certain individual; Lewis County responded promptly, but neglected to give him one relevant record by mistake. Lewis County admitted violating the PRA at the outset of the litigation and provided the record to Mr. Green. Mr. Green subsequently alleged that the violation was part of a conspiracy to harm his chances to win an election for Sheriff, an allegation he eventually stipulated was unfounded. The trial court concluded that he prevailed on only 25% of the case and discounted his fees and costs accordingly. In light of the prompt but incomplete PRA response, the judge applied both the prompt-response mitigating factor and delayed-response aggravating factor to the *per diem* penalty.

Mr. Green challenges the judge's conclusion on these penalty factors, the calculation of days for the *per diem* penalty, and the discount of his costs and fees. The Court should reject all three contentions: the trial court correctly employed its broad discretion on the facts of this case. This Court should affirm.

II. STATEMENT OF THE CASE

On Nov. 19, 2014, Brian Green sent a PRA request to the Lewis County Sheriff's Office, seeking "all correspondence from the Lewis County Sheriff's Office] . . . endorsing, advocating, commending, recommending, or otherwise recognizing Stephanie Shendel¹ [sic]." CP at 186-87 (Findings of Fact, Conclusions of Law, and Order After PRA Hearing); see also VRP at 8; Supp. CP at Ex. 1.² On the same day, the following exchange occurred: (1) Chief Civil Deputy Stacy Brown responded to the request, discussing letters of recommendation and asking if Mr. Green had any other form of recognition in mind; (2) Mr. Green replied that he wanted any and all recommendations, and (3) Chief Brown forwarded Mr. Green the letter of recommendation she had written and told him that she would provide any further relevant records by Nov. 28, 2014. CP at 187; Supp. CP at Ex. 1.

Chief Brown sent emails to LCSO employees seeking other responsive records, but found none. CP at 187; VRP at 9, Supp. CP at Ex. 2. On Nov. 26, 2014, Chief Brown notified Mr. Green that

¹ Stephanie Schendel was a reporter for a Lewis County newspaper. She had reported on a 2014 electoral race in which Brian Green ran for Lewis County Sheriff. She later became an officer with the Bellevue Police Department.

² Lewis County filed a Supplemental Designation of Clerks Papers designating the exhibit list and exhibits from the 12-16-16 hearing on the merits. It will refer to these hearing exhibits as Supp. CP at Ex. 1, etc.

she had located no other responsive records and closed his request. CP at 187; VRP at 9; Supp. CP at Ex. 3. She heard nothing from Mr. Green about being dissatisfied with this response. VRP at 9.

On Nov. 17, 2015, Mr. Green sued Lewis County pro se for a violation of the PRA, claiming that an email responsive to his request was not provided. CP at 187; Supp. CP at Exs. 4-5.

Lewis County determined that Mr. Green was right: Chief Brown neglected to give Mr. Green the additional responsive email. CP at 187-88; VRP at 10-13. It was an email from her to the Bellevue Police Department, attached to which was a 5-page employment reference questionnaire filled out with recommendatory answers. CP at 187; VRP at 10; Supp. Cp. at Ex. 7.

On Nov. 25, 2017, Lewis County filed an answer admitting its violation of the PRA. Chief Brown explained, in a concurrently filed declaration containing the email and questionnaire, that she thought of background questionnaires and letters of recommendation as distinct—it had simply not occurred to her that the questionnaire was responsive to Mr. Green's request. CP at 187; VRP at 10-13; Supp. CP. at Exs. 6-7.

Lewis County's answer noted that it was serving Mr. Green with a copy of the relevant record as an attachment to Chief Brown's

declaration. Supp. CP at Ex. 6 ¶10. Chief Brown's declaration specifically notes that the documents are attached. Supp. CP at Ex. 7 p. 2. Lewis County mailed the answer and declaration, which contained the record Mr. Green sought, to Mr. Green on Nov. 25, 2017. CP at 188; Supp. CP at Ex. 8. Because Mr. Green was pro se, Lewis County mailed them to him personally. See *id.* Mr. Green admitted receiving the documents. VRP at 17.

On Jan. 7, 2016, Mr. Green filed a motion for partial summary judgment alleging that Lewis County had failed to provide the record to cover up a "politically motivated back room quid pro quo." Specifically, he alleged that Lewis County had given favorable information about Schendel to Bellevue as a payoff for her writing "political hit pieces" about Mr. Green during his candidacy for Sheriff. CP at 188, Supp. CP at Ex. 9. No supporting evidence accompanied this motion. See *id.* In response to an interrogatory asking for such evidence, Mr. Green said he had none, but that the "circumstances certainly seem suspicious." Supp. CP. at Ex. 10 p. 9.

Mr. Green conducted discovery in an attempt to substantiate these penalty-phase claims. VRP at 17. This included litigation of Mr. Green's allegations that Lewis County had incorrectly claimed privileges in discovery to continue its cover up and was singling him

out because of animus—both claims that did not hold true. CP at 188, 190; VRP at 45-47. Ultimately, Mr. Green stipulated that there was no evidence to support his quid pro quo allegation. CP at 188; Supp. CP. at Ex. 11.

On Dec. 16, 2016, more than a year after Lewis County admitted PRA liability, the parties proceeded to a hearing on the penalty. CP at 186. The trial court credited Chief Brown's claim that she had made a good-faith mistake in not providing the relevant document to Mr. Green. CP at 188; VRP 52-53. The judge rejected Mr. Green's contention that, although he had received the record he sought, it did not "count" because he received it during litigation in a manner different than other requestors. CP at 189; VRP at 46. Based on her findings of a prompt, but deficient response, the judge applied both the delayed-response aggravating factor and the prompt-response mitigating factor when calculating penalties. CP at 189-90. Finally, the Court determined that Mr. Green had prevailed on only 25% of the case: he obtained the wrongfully withheld record by filing suit, but this violation was conceded at the outset, and Mr. Green did not prevail on his penalty-phase claims of bad faith or other violations. The judge discounted Mr. Green's fee and cost awards accordingly. CP at 191; VRP at 61. She awarded him a \$5

per diem penalty for the 369 days between when Lewis County erroneously closed his request and when it provided him the additional record. CP at 191.

Mr. Green filed a timely notice of appeal. See CP at 186 (order entered Feb. 28); *id.* at 193 (appeal filed March 16).

III. ARGUMENT

A. The trial court's allocation of fees and costs was within its discretion.

1. *Standard of Review*

Mr. Green incorrectly argues that the standard of review is *de novo*. Whether to award fees and costs in a PRA case is reviewed *de novo*, but how much to award, including how to allocate fees to a partially prevailing party, is reviewed for abuse of discretion. *Sanders v. State*, 169 Wn.2d 827, 866-68, 240 P.3d 120 (2010). In *Sanders*, the trial court assigned different weights to the issues litigated and determined that the requestor prevailed only to a limited extent, discounting his fee and cost award accordingly. *Id.* at 865-66. On review, the supreme court approved of assigning weight to issues related to the right to receive a response, including the remedy for violations thereof. *Id.* at 868. It concluded, "While we may quibble with some of the trial court's reasoning, on the whole its

award of fees and costs was within its discretion.” *Id.* This is abuse-of-discretion review, employing a deferential standard.

2. *Mr. Green prevailed on only a small portion of the case. The trial court’s award was reasonable.*

The trial court had the discretion to award Mr. Green 25% of his costs and fees because he prevailed on only a small portion of the litigation. Eight days into the case, Lewis County conceded that it failed to produce the record and had violated the PRA. A year’s litigation then ensued in which Mr. Green sought to prove that Lewis County hid the record in bad faith to snub Mr. Green and to cover up a bribe—all of which would aggravate the penalty. At the end of this time, the trial court rejected Mr. Green’s claims, found nothing other than a good-faith mistake, and imposed a modest penalty. Thus, Mr. Green did not prevail on most of the litigation below.

These facts correctly bore on the fee and cost apportionment. Without question, Mr. Green partially prevailed because his suit showed that the record was wrongfully withheld. *See Sanders*, 169 Wn.2d at 867 (defining “prevailing” at least in terms of whether the record should have been disclosed on request). But the issue is more complicated than that. A trial judge may discount the award to reflect who prevailed on issues related to “the right to inspect or copy any public record or the right to receive a response to a public record

request within a reasonable amount of time.” *Id.* at 867, 870. In *Sanders*, the supreme court approved of treating both a failure to provide a brief explanation and the remedy for that violation as separate issues worthy of consideration when determining who prevailed. *Id.* at 868, 870. The remedy for that violation was, ultimately, consideration as an aggravating factor in the penalty phase. *Id.* at 848. Thus, *Sanders* authorizes a trial court to consider litigation over the remedy for a violation of “the right to inspect or copy any public record”—i.e., its consideration in the penalty phase—when determining who prevailed. *Id.* at 867-68, 870.

Subsequent appellate decisions have interpreted this rule to be directory, not merely permissive. See *O'Neill v. City of Shoreline*, 183 Wn. App. 15, 25, 332 P.3d 1099 (2014) (“A party in Public Records Act litigation may recover attorney fees only for work on successful issues.”); *Sargent v. Seattle Police Dep't*, 167 Wn. App. 1, 26, 260 P.3d 1006 (2011) (“Where PRA litigation involves several disputed issues, however, the court should award fees only for work on successful issues. On remand, therefore, the court must limit the fees award to work on the issues upon which Sargent prevails.”), *rev'd in part on other grounds* 179 Wn.2d 376, 314 P.3d 1093 (2013). Under these cases, it would be an abuse of discretion for the trial

court *not* to discount Mr. Green's fees for his unsuccessful claims regarding the remedy.

In arguing to the contrary, Mr. Green cites *Neighborhood All. of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 261 P.3d 119 (2011). The case does not support his argument: the portion cited holds that a PRA requestor may win costs and fees as a prevailing party even if the requestor already possessed the relevant records when it sued. *Id.* at 725-26. This proposition is not in dispute. The question is whether Mr. Green's fees and costs may be discounted if he failed to prevail on some issues related to his right to receive a copy of the record. *Neighborhood Alliance* is silent on this point, but to the extent that it addresses the issue, the opinion appears to be in lockstep with *Sanders*. See *id.* at 724-25 (treating a failure to perform an adequate search in the same manner *Sanders* treated a failure to briefly explain an exemption). Nothing from *Neighborhood Alliance* abrogates the rule articulated in *Sanders* and made mandatory in *Sargent and O'Neill*.

Consequently, the trial court here did not use untenable grounds or apply the wrong legal standard in determining that Mr. Green prevailed on only 25% of the case. She had the discretion to

discount Mr. Green's fee and cost award accordingly. This Court should affirm.

B. The trial court's treatment of the *Yousoufian* factors was within its discretion and appropriate to the facts.

1. *Standard of Review*

Mr. Green incorrectly argues that the standard of review is *de novo*. A trial court's setting of the penalty is reviewed for abuse of discretion; nothing about the *Yousoufian* factors changes that. See *Yousoufian v. Office of Ron Sims, King Cty. Exec.*, 168 Wn.2d 444, 465, 229 P.3d 735 (2010) (adopting its factors as a "framework" to "guide how such discretion should be exercised"); *id.* at 466 ("Trial courts may exercise their considerable discretion under the PRA's penalty provisions in deciding where to begin a penalty determination."); *id.* at 468 ("These factors should not infringe upon the considerable discretion of trial courts to determine PRA penalties."). As argued above, whether to award penalties is a legal question reviewed *de novo*, but how much to award is reviewed for abuse of discretion. *Sanders*, 169 Wn.2d at 866-67; *accord Neighborhood Alliance*, 172 Wn.2d at 726.

2. *Finding two counterbalancing factors in this case was within the judge's discretion.*

The trial court in this matter used the appropriate legal

standard, to wit, the *Yousoufian* factors. CP at 189. The facts of the case showed that Lewis County promptly responded to Mr. Green's PRA request, but omitted a relevant document by mistake. CP at 187-88. The County did not deliver that document to Mr. Green until it realized the error after Mr. Green sued, about a year later. *Id.* In this context, the trial court concluded that the response was delayed by a year (an aggravating factor), but that the agency promptly responded (a mitigating factor). *Id.* at 189-90. This quite-sensible conclusion was within her discretion in this case. Nothing about it was "manifestly unreasonable or based on untenable grounds." *O'Neill*, 183 Wn. App. at 21.

Mr. Green argues for a hard-and-fast rule that one may never rely on both an aggravating factor and a mitigating factor addressing the same subject matter. Such a rule would directly contravene *Yousoufian's* intent:

We emphasize that the factors may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate considerations. Additionally, no one factor should control. These factors should not infringe upon the considerable discretion of trial courts to determine PRA penalties.

Yousoufian, 168 Wn.2d at 468. The abuse-of-discretion framework for PRA penalties is supposed to afford trial judges flexibility in

fashioning penalties based on the multifarious facts of the case. This Court should not meddle in the trial judge's reasonable take on these two factors. It should affirm.

C. The trial court correctly calculated the number of days Mr. Green was “denied the right to inspect or copy” the record at issue.

1. *Standard of Review*

To the extent that the number of days applicable to a *per diem* penalty turns on a finding of fact about when a record was provided, it is reviewed for substantial evidence. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). Where, as here, the appellant did not assign error to the trial court's finding, there is no review at all—the fact is taken as true. *Id.* at 808.

On the other hand, the legal consequences that may attach to such findings are presumably reviewed *de novo*. See *Neighborhood Alliance*, 172 Wn.2d at 715 (legal interpretations are reviewed *de novo*). Lewis County found no case specifically on this point.

2. *The trial court correctly rejected the claim that it does not “count” if one supplies a document during litigation.*

Here, Lewis County mailed the relevant record to Mr. Green personally on Nov. 25, 2015. CP at 188. Mr. Green admitted receiving it. VRP at 17. So, there is no question that Lewis County produced the record to Mr. Green. The only question is whether this

production “counts” under the PRA if Lewis County does not normally provide documents to PRA requestors through litigation.

The trial court correctly rejected Mr. Green’s argument that it does not count. RCW 42.56.550(4) provides that a prevailing requestor may receive a penalty “for each day that he or she was denied the right to inspect or copy” a wrongfully withheld record. Once Mr. Green received the record from Lewis County, he had the right to inspect or copy it.

Mr. Green counters that providing documents in litigation is different than the normal method by which Lewis County responds to PRA requests, and doing so distinguished amongst requestors in violation of RCW 42.56.080. But, that provision says nothing about nullifying agency actions. The case law interpreting the provision suggests that it is about processing requests equally so as not to advantage or disadvantage one requestor over another based on requestor status or purpose of request. See *SEIU Healthcare 775NW v. Dep’t of Soc. & Health Servs.*, 193 Wn. App. 377, 405, 377 P.3d 214 (2016) (rule prohibiting distinguishing is related to duty not to inquire into purpose of request); *Livingston v. Cedeno*, 164 Wn.2d 46, 54, 186 P.3d 1055 (2008) (Dep.t of Corrections fulfilled inmate and non-inmate requests equally, even if it later prevented requested

records to be delivered to inmate); *City of Lakewood v. Koenig*, 160 Wn. App. 883, 891, 250 P.3d 113 (2011) (unlawful “distinguishing” occurs only if the agency denies access to records to a particular requestor). No case supports Mr. Green’s argument that, if an agency produces a record in a manner different than the manner by which it usually produces records, such production is void.

The trial court correctly ruled that this provision directed Lewis County to treat requests equally when processing them, not to ignore the fact that Mr. Green had sued to bring this error to Lewis County’s attention. CP at 189. Here, Lewis County handled Mr. Green’s request in the normal, workaday fashion initially, and only provided documents to him in litigation because he had sued. See CP at 187; VRP at 46 (“In this case, the evidence shows and the testimony of the witness, which the Court found credible, shows that the officer did in this case what she does in every case.”). Thus, even if actions that distinguish among requestors are void, Lewis County did not distinguish between requestors in this case.

Besides, Mr. Green’s argument is flatly inconsistent with the treatment of the so-called “subsequent production documents” or “SPDs” in *Sanders*. 169 Wn.2d at 849-50. In that case, the Attorney General’s Office produced some of the exempt documents during the

litigation, maintaining that they were exempt but so innocuous that they ought to be disclosed. *Id.* at 838. Because the point of the PRA is to increase access to records, the supreme court declined to penalize agencies for producing documents during litigation. *Id.* at 849. It reasoned:

The appropriate inquiry is whether the records are exempt from disclosure. If they are exempt, the agency's withholding of them was lawful and its subsequent production of them irrelevant. If they are nonexempt, the agency wrongfully withheld the records and the appropriate penalty applies for the numbers of days the record was wrongfully withheld—in other words, until the record was produced.

Id. at 849-50; *see also id.* at 871 & fn 32 (defining the relevant number of days for the SPDs deemed nonexempt on appeal to end when the last of them was produced during litigation). There was no requirement in *Sanders* that the documents be produced via reopening the request, as opposed to providing them directly in the litigation. *See id.* Just the opposite: the case makes clear that outside counsel produced the documents, not the regular public records officers from the Attorney General's office. *Id.* at 837-38. In short, *Sanders* forecloses Mr. Green's argument that Lewis County had to produce the record in this case to him through Chief Brown as part of his PRA request. Production through counsel during the litigation was enough. The Court should affirm.

D. The Court should award neither costs nor fees to Mr. Green for this appeal.

Although a PRA requestor may recover costs and fees on appeal if he or she prevails, Mr. Green's arguments in this appeal are either wrong on the record or foreclosed by applicable law. As a result, the Court should reject his contentions, affirm the trial court, and award Mr. Green neither costs nor fees.

IV. CONCLUSION

Brian Green appeals the trial court's decision in a PRA suit, assigning error to the trial court's determination that he prevailed only 25%, its findings on two *Yousoufian* factors, and its calculation of days for the *per diem* penalty. The trial court had discretion to conclude that Mr. Green failed to prevail on most of the litigation because he raised multiple unfounded allegations. It was also within the trial court's discretion to find that the prompt, but deficient response in this case merited both a delayed-response aggravator and a prompt-response mitigating factor. Finally, the trial court's calculation of days correctly considered when Lewis County actually provided Mr. Green the record at issue—and correctly rejected Mr. Green's claim that this production did not "count" under the PRA. The Court should affirm the decision below.

RESPECTFULLY submitted this 20 day of July, 2017.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by: 
ERIC W. EISENBERG, WSBA 42315
Civil Deputy Prosecuting Attorney
Of Attorneys for Lewis County

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that I served a copy of this Response Brief on the Appellant by emailing it to his attorney, Joseph Thomas, by agreement at his address of joe@joethomas.org.

Executed this July 20 in Chehalis, WA:


Eric Eisenberg

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