

**FILED**

OCT 08 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 275965

[Consolidated with 281124]

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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JEFF ZINK and DONNA ZINK, husband and wife, *Appellants*

v.

CITY OF MESA, a Washington Municipal Corporation, *Respondents*

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REPLY BRIEF OF APPELLANTS/CROSS RESPONDENTS JEFF and DONNA  
ZINK

---

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WSBA No. 31713

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## I. OVERVIEW OF RESPONSE

### *A. Imposition of Penalties Was Necessary for the City to Take the PRA Seriously*

To the City of Mesa, this appeal is all about money. All about “mitigating” the size of the per-day penalties our Supreme Court has determined are mandatory if violations of the Public Records Act (PRA) occur. See *Yousoufian v. Office of King County Executive*, 152 Wn.2d 421, 437-438, 98 P.3d 463 (2004) (*Yousoufian II*). To the Zinks, this appeal is all about strengthening the PRA so the next concerned citizen does not have to fight the long arduous legal battle the Zinks have been fighting for more than seven years.

Throughout their briefing, the City compares the PRA penalties to gaming; winning a lottery; or extracting a pound of flesh. The City claims it was third parties, the requester, or the Courts who caused this problem; not the City of Mesa. They claim the “City” should not be held accountable for “others” actions. The City describes the PRA is an indispensable tool for citizens, yet argues it should not be held accountable for intentional violations.<sup>1</sup>

The facts in this case clearly show that to the City of Mesa, responding to public records requests is not an essential part of their agency. (RP (May 11, 2005) 436:16-438:6; 440:3-25; (May 12, 2005) 6:15-8:1; 13:8-16:23). However, the PRA is a core function of any public agency.

The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. RCW 42.17.251. **Without tools such as the Public**

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<sup>1</sup> The Zinks have provided a full recitation of the facts of this case, with citations to the record, in their statement of facts and their arguments in their initial briefing to the court.

**Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests.** In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." Letter to W.T. Barry, Aug. 4, 1822, 9 The Writings of James Madison 103 (Gaillard Hunt ed., 1910).

*PAWS v. UW*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (emphasis added). This is what happened in Mesa. By their actions the City has shown that the possibility of penalties for violations of the PRA was not a deterrent. Only now that the trial court has imposed actual penalties has the City taken this matter seriously, further demonstrating the need for the imposition of penalties. The City would now like to re-litigate the case in order to present evidence which they already had opportunity to present, but declined to do so because they did not take this matter seriously. The City is not entitled to a re-trial, and the Zinks now demand justice under the law.

***B. This Case is of Great Public Import***

The decisions made by this court are not just about the "City of Mesa" and its "taxpayers." The decisions made in this case will affect how the PRA is applied to all public agencies across the State of Washington. The Zinks ask this court to find, based on the mitigating and aggravating factors found in the "extensive factual record" already provided to the court, that the City of Mesa intentionally and repeatedly, acting in the worst bad faith, violated the PRA in their responses to the Zinks' requests. The Zinks ask the court to determine the legal issues raised by the parties based on state statutes, case law, and legal authority; not bravado and sympathy.

Although the court should not construe statutory language so as to result in absurd or strained consequences, see *Wright v. Engum*, 124 Wn.2d 343, 351, 878 P.2d 1198 (1994), **neither should the court question the wisdom of a**

**statute even though its results seem unduly harsh**. See *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993).

*Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997) (emphasis added).

***C. The City Has Misstated the Factual Record, and Has Done So Without Citations***

Furthermore, the Zinks object to the City's recitation of the facts in this case. The City has failed to provide any citations to the record as required by RAP 10.3(a)(5).

As a general principle, an appellant's brief is insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation. It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument. See RAP 10.3.

*Estate of Lint*, 135 Wn.2d 518, 531-532, 957 P.2d 755 (1998). The Zinks object to any statements of fact that are unsupported by the record on appeal and request these statements be stricken.

## II. STATEMENT OF THE CASE

***A. This Case Is More Akin to Yousoufian 2010 Than The Younger and Future Cases Yousoufian 2010 Was Intended to Impact***

The *Yousoufian 2010* Court, based on the paucity of published cases, determined that the appellate court needed to provide a framework to guide courts in calculating PRA penalty amounts to allow for meaningful appellate review and, based on the procedural history of the case, set the penalty amount of forty-five dollars (\$45) per day.

Furthermore, more than 12 years have passed since Armen Yousoufian submitted his PRA request to the county and 9 years have gone by since he filed this lawsuit. This suggests to us that we need to provide additional guidance on the setting of PRA penalty amounts. Hence, this review provides an appropriate opportunity to set forth relevant factors for trial courts to consider in their penalty determination. ... Appellate courts frequently set forth multifactor frameworks to provide guidance to trial courts exercising their

discretion so as to render those decisions consistent and susceptible to meaningful appellate review.

*Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 464-465, 229 P.3d 735 (2010)

(*Yousoufian 2010*).

Where an appellate court holds that a trial court abused its discretion in awarding a PRA penalty, the usual procedure is to remand to the trial court for imposition of the appropriate penalty. Nevertheless, in light of the unique circumstances and procedural history of this case, we are inclined to set the daily penalty amount in order to bring this dispute to a close.

(*Id.* 468) (emphasis added). In setting the per day penalty amount at forty-five dollars (\$45) per day the Court relied on the trial court's findings<sup>2</sup> and conclusions that King County's conduct in responding to Yousoufian's requests amounted to gross negligence.

*Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 78, 151 P.3d 243 (Div. I, 2007)

(*Yousoufian III*).

The circumstances surrounding this case are the same. It has been over eight (8) years since the first document request at issue in this appeal. It has been well over seven (7) years since the lawsuit was originally filed. This is the Zinks' second appeal to this appellate court.<sup>3</sup> There is an "extensive factual record" provided to the court for review. The City does not dispute the presentation of the facts surrounding this case as provided by the Zinks. Rather they claim that the Court must remand this case back to the trial court

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<sup>2</sup> The factors utilized by the trial court in *Yousoufian* to categorize the County's actions as gross negligence were agency personnel: 1) lacked coordination with other departments; 2) had no oversight; 3) only had a basic understanding of PRA responsibilities; 4) were not trained in how to locate or retrieve documents; 5) didn't take the trouble to locate the documents; 6) did not read the requests; 7) claimed confusion but did not ask for clarification; 8) believed the requester was being unreasonable. The trial court found that there was a lack of good faith on the County's part but did not find any intentional withholding of public records indicating "bad faith." *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 72-73, 151 P.3d 243 (Div. I, 2007).

<sup>3</sup> *Zink v. Mesa*, 140 Wn. App. 328, 166 P.3d 738 (Div. III, 2007).

once again for a new hearing and new evidence so that the record can be supplemented with additional evidence they had no opportunity to present in the last seven years. This Court should decline to grant the City a new hearing and should instead, like the *Yousoufian 2010* Court, set the penalties at the appellate level based upon the full, complete, and extensive record before it. (See Appendix D).

***B. The City Has Failed to Challenge Many Findings and Conclusions***

As neither party assigns error to many of the findings of facts (FOF), they are now verities on appeal and are the facts of the case.

Finally, appellant has not assigned error to any finding of fact entered by the trial court. Thus, it is unnecessary to determine whether there is substantial evidence to support the findings. They are the established facts of the case.

*Goodman v Bethel School* Dist. 403, 84 Wn.2d 120, 124, 524 P.2d 918 (1974).

It is well-established law that an unchallenged finding of fact will be accepted as a verity upon appeal. In re Riley, 76 Wn.2d 32, 33, 454 P.2d 820, cert. denied, 396 U.S. 972, 24 L. Ed. 2d 440, 90 S. Ct. 461 (1969); Tomlinson v. Clarke, 118 Wn.2d 498, 501, 825 P.2d 706 (1992). ...Defendant's failure to assign error to the facts entered by the trial court precludes our review of these facts and renders these facts binding on appeal.

*State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Neither party assigned error to the following findings of fact and they are now binding on appeal:

**CP 111** (FOF 1, 2, 3, 4, 5, 7); **CP 112** (FOF 10, 11, 12, 13, 16, 17, 19); **CP 113** (FOF 22, 23, 26, 27); **CP 114** (FOF 28, 29, 31, 32, 33, 34, 35, 36); **CP 115** (FOF 39, 41, 42); **CP 116** (FOF 46, 47, 48, 52, 53); **CP 117** (FOF 54, 55, 58); **CP 118** (FOF 62, 63, 64, 65, 66); **CP 119** (FOF 69, 70, 72, 73, 75); **CP 120** (FOF 78, 80, 81, 82, 83); **CP 121** (FOF 86, 87, 88, 89); **CP 122** (FOF 93, 94, 95, 99); **CP 123** (FOF 100, 101, 102, 103, 104); **CP 124** (FOF 109, 110, 111, 112); **CP 125** (FOF 113, 114); **CP 126** (FOF 119, 120, 121, 124, 125, 126); **CP 127** (FOF 130); **CP 128** (FOF 134, 136, 138, 140); **CP 129** (FOF 142, 144, 146, 147, 148); **CP 130** (FOF 151, 152, 154, 155, 157); **CP 131** (FOF 158, 159, 160, 162, 163, 164); **CP 132** (FOF 166, 167, 168, 169, 170, 171, 172, 173, 175, 176); **CP 133** (FOF 177, 178, 181, 182); **CP 134** (FOF 184, 186, 188, 190); **CP 135** (FOF 193, 194, 196, 197); **CP 136** (FOF 200, 202, 203,

205, 206); **CP 137** (FOF 208, 209, 211, 214); **CP 138** (FOF 216, 217, 219); **CP 139** (FOF 222, 224, 225, 227); **CP 140** (FOF 230, 231, 232, 235, 238); **CP 141** (FOF 240, 243, 245, 246).

### III. RESPONSE TO CROSS APPELLATE/RESPONDENTS

#### A. *The City Is Not Entitled to Additional Hearings (Mesa Br. § 5.1 at 33)*

The City claims that the “Supreme Court’s 2010 opinion in [*Yousoufian 2010*] dramatically re-shaped the rules for how PRA penalties are to be determined...” (Mesa Br. 33)(emphasis added). The *Yousoufian 2010* decision only addressed how per day penalties for violations of the PRA are to be calculated. The City overstates the effect of the *Yousoufian 2010* decision.

In August 2007, this court mandated further proceedings by the trial court (CP 269-294).

We direct the trial court on remand to enter findings on whether the City strictly complied with the PDA in every instance identified by the Zinks.

Where the City has violated the PDA, we leave it to the sound discretion of the trial court to award penalties, costs, and attorney fees to the Zinks, including costs and fees incurred in this appeal. *Amren*, 131 Wn.2d at 37-38.

*Zink v. City of Mesa*, 140 Wn. App. 328, 349, 166 P.3d 738 (Div. III, 2007)(emphasis added). The *Yousoufian 2010* decision does not affect the trial court’s findings of fact, conclusions of law, and order entered November 7, 2008 (CP 110-166) pertaining to whether the City violated the PRA in every instance identified by the Zinks, the number of penalty days per violation, or the award of costs and attorney fees, including on appeal. The City has not provided any basis for this Court to vacate the entire trial court’s decision based on the *Yousoufian 2010* decision.

**1. *The City Has Already Had Opportunity to Request Additional Factors To Be Considered in Setting Penalties (Mesa Br. § 5.1.1 at 33)***

On July 16, 2008, the trial court reopened the hearings and gave each party an opportunity to supplement the record.

**Court:** My contemplation ..., is that we go through them one at a time, give each side an opportunity to argue to the court what's in the record, give either side an opportunity to supplement the record if you want with any new or different information on a particular record or point. ...I'm going to have to get to that phase two of whether or not they were reasonable and whether or not they acted in good faith...

(RP (July 16, 2008) 3:1-18). Though the trial court adopted the *Yousoufian III* (2007) standard, the evidence and argument solicited by the trial court was not limited to evidence of good faith and bad faith. The City responded that they had no additional evidence to present and felt comfortable with allowing the trial court to base its decision on the evidence already in the record.

**Tanner:** Your honor at this point and time I don't know what additional evidence we could present that wasn't already presented in the record and that we gave you. [You] heard everything that we had to offer and that was offered at that time with regard to all... the issues whether or not it was timely complied, whether it or not there was faith or lack of good faith all.. of those issues have been submitted and you've reviewed the record again so .. I would feel quite comfortable with you going through those and either making a determination as to whether or not it was ...under the ruling of the Court of Appeals, it was wrongfully denied or it was denied and then to what extent I think ... your over all ruling in the case kind of set forth what ...[our] position was... that nothing was done in bad faith. [B]ut in any event ... I think the records already been. [W]e had however many, five days of trial so... [t]o go through all of that again and either submit new evidence on that I'm just not sure what I,

(RP (July 16, 2008) 4:20-5:10).

The trial court was required to apply the authority in effect at the time of its ruling and could not have applied the culpability factors outlined in *Yousoufian 2010* because they did

not exist at the time of litigation (*Sanders v. State*, No. 82849-1, 2010 WL 3584463, at\* 15 (Wash. Sup. Ct. March 25, 2010)). Even so, the trial court encouraged the presentation of additional factors from both parties to use in its determination of : 1) whether violations occurred; 2) the number of penalty days; and 3) a daily penalty award per withheld document.

**Court:** ... My plan would be to decide as to each one whether or not they were either wrongfully withheld, delayed or never given and whether [or] not any exemptions applied and then as to each one... categorize them as to any such finding of... a failure to comply with the PDC was it negligence, was it gross negligence was it wanton or was it willful. Three are four grades, does anybody object if I use those four grades, gradations? To categorize each of the failures to comply?

**Tanner:** I think putting them in categories would be helpful.

**Court:** ... City's counsel any alternative suggestion, ... to negligence means good faith, I mean if they didn't comply there were supposed to but they exercised good faith, I think that it's clear that, that comes under the negligence category but then there are other gradations that the court has to consider as well, certainly for a number of the documents.

**Tanner:** That's fine your honor.

(RP (July 16, 2008) 11:11-12:8)(emphasis added).

Though the City has already had opportunity to present additional factors to the trial court, now, relying upon *Yousoufian 2010*, they would like an additional opportunity to present factors which they previously failed to suggest. This request should be denied.

**2. Remand to Consider Aggravating and Mitigating Factors is Futile (*Mesa Br. § 5.1.1 at 33*)**

Throughout the proceedings, the Zinks presented evidence of the aggravating factors as outlined in their brief. These were largely ignored by the court in favor of the mitigating factors presented by the City of Mesa (RP (July 16, 2008) 14:7-19; 50:14-51:3). After entry of the judgment the Zinks filed for reconsideration based in part on the court's failure

to consider the evidence of bad faith and hold the City culpable for their actions (CP 79-106). The motion for reconsideration was denied (CP 76). On November 25, 2008, the Zinks filed this appeal. The *Yousoufian IV* case was decided in January 2009 and was re-decided on March 25, 2010. Whether the trial court used the *Yousoufian III, IV* or *Yousoufian 2010* to assess penalties, the outcome would be the same. The trial court ignored evidence of bad faith (aggravating factors) and sought out any factor that decreased penalties (mitigating factors).

**Court:** Well then I either charge you through that day or I charge [you] through today, **I'm trying to mitigate your lose here just a little bit.**

(RP (July 17, 2008) 33:20-23) (emphasis added) (see also RP (July 16, 2008) 67:11-25).

The Zinks request review of the trial court's decisions to award minimal penalties in many instances, regardless of which culpability scale or set of factors is utilized to calculate per day penalties. The appellate court should set the penalties, as was done in *Yousoufian 2010*, using the extensive record before it.

### ***3. Mesa Already Presented Evidence of their New Mitigating Factors (Mesa Br. § 5.1.2 at 34)***

The Zinks have outlined the aggravating factors presented to the trial court in their brief to this court and will only review issues pertaining to the City's appeal in this response. In contrast to Zink's appeal, the City has not identified any of the mitigating factors as outlined by the *Yousoufian 2010* court because they don't exist. Instead the City claims this court should reverse the judgment and remand back to the trial court for new hearings and new presentment of evidence related to other mitigating factors not found in *Yousoufian 2010*. Specifically the City asks this court to allow them to present new argument and evidence to the trial court related to:

- small size and limited resources (5.2.1);

- high volume of requests (5.2.2);
- conduct of the requesters (5.2.3); and
- reliance on third-party contractors (5.2.4).

(Mesa Br. § 5.2, 36-43) All of the “new evidence” of “mitigating factors” offered by the City for consideration on remand were offered and considered in the nine days of hearings conducted by the trial court. In fact, the trial court based most of its decisions on these four factors as discussed below. It is now up to the appellate court to decide if the trial court abused its discretion in the application of these mitigating factors.

#### ***4. The Trial Court Allowed Mesa to Supplement the Record on Remand (Mesa Br. § 5.1.2 at 34)***

The City claims that it would be an injustice if this court were to determine daily penalties without remanding to the trial court to allow Mesa to present additional evidence of mitigating factors and argue what penalties are appropriate. But the City has already had the opportunity to present mitigating factors (testimony, evidence and argument) during nine (9) days of hearings.<sup>4</sup> Furthermore, the City is not entitled to a new hearing.

The PRA explicitly states, "The court may conduct a hearing based solely on affidavits." ...Our supreme court has stated that trial court rulings **under the PRA are trial "management decisions" that are designed to avoid making "public disclosure act cases so expensive that citizens could not use the act for its intended purpose.**

*O'Neill v. City of Shoreline*, 145 Wn. App. 913, 938, 187 P.3d 822 (Div. I, 2008)

(footnotes removed)(emphasis added).

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<sup>4</sup> The trial court heard testimony and entertained presentment of exhibits on February 8, 2005, February 9, 2005, May 11, 2005, May 12, 2005 and May 13, 2005 (RP February 8, 2005; February 9, 2005; May 11, 2005; May 12, 2005; May 13, 2005). The trial court heard arguments on February 8, 2005 and May 13, 2005 (RP February 8, 2005; May 13, 2005). The trial court took additional evidence, heard testimony and oral argument as directed by this court on August 30, 2006 (RP August 30, 2006). The trial court entertained additional evidence and heard additional arguments on July 16 and 17, 2008 (RP July 16, 2008; July 17, 2008). The trial court took additional argument on November 7, 2008 (RP (November 7, 2008).

RCW 42.56.550(3); *see also* WAC 44-14-08004(1) ("**To speed up the court process**, a public records case may be decided merely on the 'motion' of a requestor and 'solely on affidavits.'" (quoting RCW 42.56.550(1), (3)).

(*Id.* n. 71)(emphasis added). The Zinks submitted two affidavits (CP 332-556; 628-1012) and 233 exhibits (CP 214, 301, 327-331). The trial court heard nine (9) days of testimony and argument (RP February 8, 2005; February 9, 2005; May 11, 2005; May 12, 2005; May 13, 2005; August 30, 2006; July 16, 2008; July 17, 2008; November 7, 2008). Nonetheless the City claims that after seven (7) years they have had no opportunity to present their side. The facts of this case speak for themselves. The City should not be allowed to extend the review of their violations of the PRA indefinitely. That defeats the purpose of the PRA, which is release of the records. Remanding this case back to the trial court again would be an injustice to the Zinks and the taxpayers of Mesa.

***B. Mitigating Factors Beyond Yousoufian 2010 (Mesa Br. § 5.2 at 36)***

***1. Agency Size and Limitation of Resources (Mesa Br. § 5.2.1 at 37)***

The City argues that RCW 42.17.290/42.56.100 implies that requests for public records would be more disrupting to core functions of a small agency than to core functions of a large agency. (Mesa Br. 37-38). The City is reading meaning into the statute that is simply not there.<sup>5</sup> Using the City's figures (1.5 clerks and 440 people) there are 293 people per clerk in the City of Mesa. King County has approximately 1.9 million people<sup>6</sup>. King County would need 6,485 clerks to have the same ratio of clerks to people

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<sup>5</sup> In enacting RCW 42.17.290/42.56.100 our legislature recognized that responding to public records requests is an essential function of a public agency. "Agencies shall adopt and enforce reasonable rules and regulations... consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency, ... RCW 42.17.290/42.56.100 (emphasis added). ...

<sup>6</sup> U.S. Census Bureau, "State and County Quick Facts, King County Washington", <http://quickfacts.census.gov/qfd/states/53/53033.html>, last accessed September 28, 2010

(1,900,000/293). If 10% of the population of King County requested a public record each month the County would receive 190,000 requests per month. It would stand to reason that an agency the size of King County would have larger requests, from more people, affecting more departments than the City of Mesa. In this case, agency size cannot be compared and is not relevant to culpability. For example, the City claims the decision in *Yousoufian 2010* promotes their theory by using RCW 42.56.100 to justify a mitigating factor; ***how helpful the agency was to the requestor*** (*Id* at 467 n 12)(emphasis added). Using this argument, smaller agencies could be excused from being helpful to the requester simply by virtue of their size.

On September 22, 2009, the *Yousoufian 2010* court heard oral arguments concerning the size of the agency four separate times.<sup>7</sup> After weighing the arguments the Court put size of agency in with the aggravating factors. Given that the *Yousoufian* court heard argument on agency size, and specifically included agency size as a factor, but only as an aggravating factor, indicates that agency size is not to be considered as a mitigating factor.

The PRA penalties are about compliance and deterrence. Our legislature determined that some agencies may need to be penalized to insure that all agencies comply with the mandate that their records be available to the public and open to public scrutiny. RCW 42.17.010(6)(11), 42.17.251, 42.17.340(4). The factors utilized by the court are a measure of blameworthiness; a measure of culpability. It was within the City's control to keep the

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<sup>7</sup> Wash. Supreme Court oral argument, *Yousoufian v. Office of Ron Sims*, No. 80081-2 (Sept. 22, 2009) at 14 min., 38 sec., 17 min., 50 sec., 26 min, 50 sec., and 42 min, 44 sec., audio recording by TVW, Washington State's Public Affairs Network, available at <http://www.tvw.org>.

penalties low. The City chose the action they took in responding to Ms. Zink's requests for public records. Their blameworthiness has put them at this point on the scale. The size of the agency should not decrease the amount of blameworthiness and the City should not get credit for being a small agency.

The trial court did consider agency size in its award of penalties and correctly determined that there is no bankruptcy clause in the PRA (RP (July 16, 2008) 61:19-62:2). If a violation occurs there is a minimum daily penalty of five dollars (\$5). Penalties are based on culpability, the agencies actions in responding to requests, and not on the agencies financial status. If the courts allow agencies to claim financial hardship for violations of the PRA the penalty section would be superfluous and only the largest agencies would comply.

The City's small size is not the reason they continued to withhold the records for six years. Had the City released the documents the penalties would be substantially less. For example, the city was penalized \$5 per day for 1,230 days for a total of \$6,150 for wrongfully withholding phone logs. This action was filed 65 days after the Zinks' first request for the phone logs (CP 726-727, 1016-1020). Had the City released the records as their response (CP 1013-1014), and been found to have acted in good faith, the penalty could have been less than \$500 ( $5 \times 95 = 475$ ). A penalty this small would not have any impact on an agency the size of King County.

The City of Mesa caused the penalties they received. Mesa determined they would rather fight a long and grueling battle in the courts than to simply comply with state statutes. Now they want to be let off because they are too small. The City of Mesa must be

held accountable for its actions as a deterrent to other agencies across the State of Washington.

**2. High Volume of Requests (Mesa Br. § 5.2.2 at 39)**

The City never presented any evidence that there was a “high volume of requests” or that the City of Mesa was in any way overwhelmed by Ms. Zink’s requests.<sup>8</sup> In the Zink’s first appeal of this show cause action, this court found that, by the City’s count, there were a total of 172 requests over a 30 month period of time.

The requests, by the City's count, totaled 172 over the period beginning July 30, 2002 and ending January 31, 2005.

*Zink v. City of Mesa*, 140 Wn. App. 328, 333, 166 P.3d 738 (Div. III, 2007). Using this determination by the Court the Zinks submitted fewer than six requests per month to the City of Mesa (172/30 = 5.73). The majority of the requests were for Ordinances, resolutions, minutes of meetings, meeting tapes, resignation letters, or the rules of agency departments. (CP 415; 451; 475; 527; 686-687; 724; 726-727; 734-735; 752; 757; 767; 769; 779; 787; 796-797; 811; 815; 821; 823; 825; 833; 835; 844; 851; 860; 869; 871; 883; 885; 899; 906; 914; 920-921; 955; 971)(see also Mesa Br. 66-67).

The City asks this court to find that a “high volume” of requests should be a mitigating factor in the assessment of penalties; requesting the court to remand this issue back to trial court. The trial court has already considered “high volume of requests” as a major factor in decreasing penalty days and penalty amounts: (RP (July 17, 2008) 59:20-60:8). (Mesa Br.

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<sup>8</sup> The only evidence presented at trial as to how much time was consumed by Ms. Zink's records request were from the full-time clerk who testified that she spent half of her time on Ms. Zink's requests (RP (May 11, 2005) 451:6-12) and the assistant clerk who testified that she also spent half of her time responding to Ms. Zink's records requests. (RP (May 12, 2005) 69:22-70:22).

59).<sup>9</sup> The trial court utilized the “high volume of requests” factor to assess the amount of penalties days concerning Ordinance 01-05. The trial court reduced the penalty days based on a “**perceived**” high volume of requests (RP (July 17, 2008) 13:20-15:25) stating “[n]ot high volume of requests in this particular request, high volume of requests in general” (*Id.* at 14:7-10).

The Zinks provided evidence Ordinance 01-05 was essential to their then pending appeal and time was of the essence. (See Zink Br. 143-144). The court disregarded this fact stating: “I’m sure the City was scrambling to try and find those rules and procedures without success at that time, so. But because there were so many...” (RP (July 17, 2008) 16:5-12). Furthermore, although the City claimed no exemption or legal cause for the additional delay of forty-six (46) days in releasing Ordinance 01-05 (*Id.* at 13:9-13), based solely on “volume of requests” the trial court determined that the violation was mere negligence; assessing a minimum five dollar (\$5) per day penalty (*Id.* at 16:12-22).

The trial court already considered “high volume of requests” to determine the penalty days and penalties for the code violation letters. The City provided testimony that due to the volume of requests the assistant clerk had to work extra hours.<sup>10</sup> (RP (May 11, 2005) 436:16-438:6; (May 12, 2005) 5:10-18). The evidence provided by the Zinks disproves this testimony (Ex 230 pg 2-3).<sup>11</sup> Ms. Stephenson testified that she worked five to six hours a day for a couple of weeks in order to locate the letters (RP (May 12, 2005) 23:2-25:3). Ms.

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<sup>9</sup> This section also addresses the City’s argument that the trial court properly considered the volume of requests (Mesa Br. sec 5.5.5)

<sup>10</sup> Ms. Stephenson worked approximately 17 hours per week RP (May 12, 2005) 4:25-5:9).

<sup>11</sup> 17 hours per week times 52 weeks per year divided by 12 months (17\*52)/12 = 74 hours per month).

Standridge testified she also worked on this request and that it took quite a lot of time to respond to (Id. at 123:7-124:13). She testified that the building department also looked for the letters (Id. at 127:9-17). The Zinks presented evidence disproving this testimony (Ex 232 pg 3). Even so, the trial court found that City had acted reasonably (RP (July 16, 2008) 66:22-67:17).

In fact, the trial court used the “high volume of requests” as a major factor in its disposition of many of the Zink’s complaints: the penalties for concealing the maintenance logs (RP (July 17, 2008) 46:8-48:17: Ex 234) (assessing a penalty of fifteen dollars (\$15) per day )(Id. at 48:17-24); the delay for the Cade Scott reply (decreasing both penalty days and penalty assessed) (RP (July 16, 2008) 112:1-113:18); and delaying a newly passed ordinance for twenty-five (25) days was reasonable (no violation found) (RP (July 17, 2008) 3:2-4:15). Clearly the trial court has already considered the “high volume of requests” to determine both penalty days and penalty amounts. Remand with additional testimony and evidence is not necessary as the record is already replete with evidence of the number of requests.

The trial courts perception of a “high volume of requests” was the major factor used to determine the City had complied with the PRA at the conclusion of the initial hearing. The trial court determined that the City had bent over backwards trying to locate records for Ms. Zink and more than substantially complied with the requests (RP (May 13, 2005) 538:22-24; 540:5-20; 543:15-22; 544:14-20). The evidence presented to the trial court indicates otherwise. Ms. Standridge testified that in responding to Ms. Zink’s request for all billings sent to residents for code violations (CP 833 para. 1: RP (May12, 2005) 130:9-132:2) the only records searched was the accounts receivable file (RP (May12, 2005)

131:1-132:2). Ms. Standridge testified that it is possible that some of the residents had already paid their bill and there were more documents responsive to this request (Id. 131:7-24).<sup>12</sup> This does not indicate that the City bent over backwards in responding to this request. Rather the City Clerk merely reviewed a file that was convenient and then told Ms. Zink no other records were available. These were not simple mistakes made by an agency due to being overwhelmed by a “high volume of requests.” These actions were blatant disregard for state statutes and honesty. The City has provided a fabricated excuse for violations of the PRA.

The City has already presented their evidence of “high volume of requests,” it was already considered by the trial court, and the record does not support a finding of a high volume of requests, even if it were to be considered as a mitigating factor. The City is not entitled to a hearing on remand to present additional evidence of high volume of requests.

### **3. Ms. Zink’s Conduct (Mesa Br. § 5.2.3 at 40)**

The City once again presents the argument that Ms. Zink is culpable for the City’s actions in responding to requests. The City claims that the Zinks are gaming the system (Mesa Br. 40) or winning a lottery (*Id.* at 45 §5.2.7 and at70). The City suggests that penalties for their violations should be reduced because the Zinks delayed filing suit to maximize the penalty days. At the same time City acknowledges that the Zinks filed a very timely action (*Id.* at 46). In filing a timely action, the Zinks had a reasonable expectation

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<sup>12</sup> Though the Zinks did not request review of this request, they do not concede, and the record does not support the City’s contention that they otherwise properly responded to the Zinks’ other requests

that, absent a legitimate exemption, the City would timely release the records. Their failure to do so **is not** Ms. Zink's responsibility.

Tanner: So, the lawsuit that we're here for today on the public records document, public records request, you didn't file that until -- well, did you file that in retaliation for being arrested?

Zink: No. Actually, I was arrested after I filed that suit. I filed the suit because this thing had gotten completely out of hand, and no matter what I said to them they just kept violating the law.

(RP (May 11, 2005) 358:5-12). The Zinks **were not** "gaming the system", attempting to bankrupt the City, or looking to win a lottery. The Zinks filed this lawsuit because they wanted the records.

The City compares Ms. Zink's harassing conduct to that of Parmelee, a violent criminal, who, after being convicted of firebombing two opposing attorneys at their homes, threatened a judge, made threats against people in their homes, and made requests under the PRA with the stated intention of terrorizing others. *DeLong v. Parmelee*, 157 Wn. App. 119, 236 P.3d 936, 943-944 (Div. 11, 2010). The City argues that as the trial court originally found Ms. Zink's irritating requests for public records to show conduct amounting to unlawful harassment, this court should at least allow the trial court to decrease daily penalty amounts based on Ms. Zink's culpability. Nothing in the testimony or evidence indicates that Ms. Zink was doing anything other than legitimately asking for public documents. This court came to this same conclusion in *Zink v. Mesa*. While declining to question the trial court's view of the facts regarding Ms. Zink's conduct, this court found "[t]he record does not support a finding of unlawful harassment" (*Zink v. City of Mesa*, 140 Wn. App. 328, 343, 166 P.3d 738 (Div. III, 2007)). Furthermore, the City's actions indicate they were the harassers. For instance, the City delayed documents for months no matter what record was requested, redacted documents even though they had no

exemptions, restricted Ms. Zink's access to review of public records to one hour per day, refused to release public documents until the Zinks attorney contacted the City Attorney, taped recorded all interactions, and finally, called the sheriff's department to have Ms. Zink removed from City Hall.<sup>13</sup> The City's disparate treatment amounted to harassment of Ms. Zink for trying to access public records.

Finally the City is asking the court to ignore state statute. "Agencies shall not distinguish among persons requesting records" RCW 42.17.270. "[T]he public records act requires agencies to ignore the identity of the requester, and to focus on the information itself in determining whether it is exempt from disclosure." *King County v. Sheehan*, 114 Wn. App. 325, 357, 57 P.3d 307 (Div. I, 2002).<sup>14</sup> The City was irritated by Ms. Zinks requests and complaints (RP (May 11, 2005) 377:15-378:7; 379:10-380:25: CP 944). The City believed Ms. Zink used their own records against them (RP (May 12, 2005) 65:1-69:21) and wanted to keep Ms. Zink away from the "City's" records (CP 413 para. 7-9). In response the City restricted access to public records, violating the PRA.

Regardless of whether Ms. Zink was irritating to the City Officials or they thought she was using the City's own records against them, the City had a statutory obligation to abide by the laws of the State of Washington. It is absurd for the City to claim Ms. Zinks requests for public records caused them to violate the PRA. Moreover, violating the act

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<sup>13</sup> (RP (February 8, 2005) 140:1-142:2; (May 11, 2005) 295:21-298:25; 302:10-303:17; 345:19-347; 16; 381:14-382:13; 432:1-7)

<sup>14</sup> An agencies rules cannot allow the agency to violate other statutes under the PRA by placing limits on access to public documents. RCW 42.17.280/42.56.090; 42.17.270/42.56.080.

based on their feelings concerning Ms. Zink, is bad faith. The City is culpable for the City's behavior, not Ms. Zink.

All the same, the City asks the court to again remand with the mandate that the trial court base penalties on Ms. Zink's culpability rather than on the City's. Not only should the City **not** be allowed to apply a factor (Ms. Zink's conduct) based on a finding that was reversed on appeal, the trial court already weighed the City's perception that Ms. Zink's behavior was harassing (RP (May 13, 2005) 534:14-22). The trial court used this factor to justify the City's response to Ms. Zink's requests for the memos and notes when it awarded minimal daily penalties (RP (July 16, 2008) 50:14-18).<sup>15</sup> The record is complete with regard to the conduct of the parties, and there is no need for an additional hearing on remand on this issue. Ms. Zink's conduct is not properly a mitigating factor under the PRA.

#### ***4. Reliance on Third Party Contractors (Mesa Br. § 5.2.4 at 41)***

The City asserts that the agency personnel responsible for responding to PRA requests should not be expected to know the law. Yet the City admits it was the "Office of Mesa City Attorney" who responded to several of the requests (CP 731-32). The City's attempts to distance itself from its officers, asking the court to find good faith and assess minimal penalties based on "outside expert advice." The "Office of Mesa City Attorney" is not an outside expert. It is a department of the City mandated by statute.

...Provision shall be made for obtaining legal counsel for the city, either by appointment of a city attorney on a full-time or part-time basis, or by any reasonable contractual arrangement for such professional services. ...

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<sup>15</sup> The City's citation to the record is inaccurate.

RCW 35A.12.020. Likewise, the City Clerk and the Building Official<sup>16</sup> are officers of the City.

**The appointive officers** shall be those provided for by charter or ordinance and shall include a city clerk and a chief law enforcement officer. The office of city clerk may be merged with that of a city treasurer, if any, with an appropriate title designated therefor. ...

RCW 35A.12.020. The officers of the City of Mesa are required to perform in the same manner as all other public officers in the State of Washington.

Except as otherwise provided in this title, every officer of a code city shall perform, in the manner provided, all duties of his or her office which are imposed by state law on officers of every other class of city who occupy a like position and perform like functions.

RCW 35A.21.030. It is the "agency" and not the individual department that is culpable for violations of the PRA (RCW 42.17.340 Judicial review of **agency** actions).<sup>17</sup>

The evidence presented to the trial court clearly shows that for many of the Zink's requests it was the "Office of Mesa City Attorney" who responded (CP, 699, 731-732, 738, 755, 759, 761, 777, 781). As Officers of public agencies, City Attorneys are expected to know the intricacies of the PRA and are obligated to investigate the legality of the agency's actions; especially after an action is initiated. Just as the City cannot be excused under the PRA for violations attributed to its officers neither can the City claim this as a showing of good faith. This would have a frightening affect on the PRA. If the simple act

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<sup>16</sup> Mr. Mumma is the building official and was also the Board of Appeals secretary (RP (May 12, 2005) 400:19-25: CP 426, 428).

<sup>17</sup> Agency" includes all state agencies and all local agencies. ... "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency RCW 42.17.020(1).

of naming an offending officer(s) decreased “agency” culpability to good faith and a minimum penalty, RCW 42.17.340/42.56.550 would be meaningless.

The City asserts that on remand they intend to establish that Ms. Standridge was repeatedly told by Mr. Mumma that the tape of the November 13, 2002 BOA meeting could not be found (Mesa Br. 52 n. 12).<sup>18</sup> But the City provided this testimony to the trial court (RP (May 11, 2005) 416:13-418:1) as well as argument (RP (July 16, 2008) 54:20-55:7; 57:6-10). Based on the testimony and argument, the trial court determined that even though a document is not retained at City Hall it is still within the power and control of the agency. (Id. at 55:8-16). The trial court found the City’s actions in withholding the documents related to the November 13, 2002 BOA meeting to be egregious; a Richard Nixon style cover-up (Id. at 60:12-20). The Zinks did not discover a meeting was held until August of 2003 when the record was submitted in the LUPA case and documents related to the November meeting were inadvertently included. (RP (February 8, 2005) 80:2-13; 83:13-84:5; 85:5-86:7). There is no evidence that the Zinks continued to request a tape for a meeting they were told did not happen (CP 799-800). (See Zink Br. sec. J at 80). The City’s assertion that the tape was withheld because they could not obtain it from the Building Official is false.

Furthermore, on remand, the City argued that on November 25, 2002 (CP 796) the minutes of the November 13, 2002 meeting (Ex 222) did not exist stating “**they hadn’t been transcribed...**” (RP (July 16, 2005) 56:20-21)(emphasis added). The evidence presented at trial clearly shows that not only had the minutes of the November 13, 2002

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<sup>18</sup> The City did not assign error to FOF 31 (CP 114) or COL 27 (CP 145).

meeting been transcribed but that they were at City Hall on November 14, 2002 (Ex 222). Ms. Zink's supplemental affidavit (CP 332-556) includes sworn testimony from the Building Official that the City knew about the BOA executive meeting prior to the day it was held (CP 545-548) and that he had discussed the legality of the meeting with Ms. Standridge (CP 794) and sent notification of the meeting to the City attorney (CP 547-548). The sworn deposition of the Building Inspector is in direct conflict with sworn testimony of Ms Standridge. Any new testimony would need to be substantiated necessitating the need for the testimony of the building official as well as the City attorney.<sup>19</sup> But evidence of the City attorney's actions is already well documented in the evidence.

On remand, the City presented evidence and argument concerning the City attorneys actions in responding to requests for the water meter readings (RP (July 16, 2008) 98:18-99:4; CP 731 para. 5; 734 para. 7; 969). The trial court found that as it was the City attorney responding to the request and not the City clerk, he would excuse the City's actions.

**Court:** Had it been a denial letter from the same person that produced the records in the past I'd have sustained your objection, but since it was attorney Tanner I'll let it go.

(RP (July 16, 2008) 99:1-4). Based on this finding, the trial court assessed a minimal penalty of ten dollars (\$10) per day (CP 122). The trial court heard testimony that it was the City attorney's office that limited Ms. Zink's time at City Hall (RP (May 11, 2005)

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<sup>19</sup> Former City attorney, Terry Tanner, was appointed as a Benton County District Court Judge in April 2009 ([http://www.courts.wa.gov/court\\_dir/orgs/263.html](http://www.courts.wa.gov/court_dir/orgs/263.html)).

432:1-13). It is now up to this court to determine whether the trial court abused its discretion in setting the penalty days and in assessing a minimal penalty.

The City claims that it would be manifestly unjust to increase the amount of penalties simply because of outside advice. It is not that the City should be faulted for seeking outside expert advice; rather the issue is whether they acted in bad faith by not heeding the advice sought. For instance, the City contacted Municipal Research Service Center (MRSC) February 2003 to discuss the disclosure of time sheets/cards (CP 460). MRSC's position on release of time cards is clear; time cards are not exempt (CP 458). Nevertheless, the City denied the request (CP 731 para. 4). As the City had released time cards prior to this request (CP 747-748: RP (May 12, 2005) 38:8-10), the City attorney had no reasonable belief that the record was exempt.

The City uses *Miller v. City of Tacoma*, 138 Wn.2d 318, 463 P.2d 617 (1999). In *Miller*, the court found that the City of Tacoma had violated the Open Public Meetings Act (OPMA), awarding attorney fees and costs to Miller under RCW 42.30.120(2).<sup>20</sup> The court could not award penalties under RCW 42.30.120(1)<sup>21</sup> because the council members were unaware they violated the act. In this case the City of Tacoma was held responsible for the violations regardless of the fact that the violation was due to the advice of the City

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<sup>20</sup> Any person who prevails against a public agency in any action in the courts for a violation of this chapter shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action... RCW 42.30.120(2).

<sup>21</sup> Each member of the governing body who attends a meeting of such governing body where action is taken in violation of any provision of this chapter applicable to him, **with knowledge of the fact that the meeting is in violation thereof**, shall be subject to personal liability in the form of a civil penalty in the amount of one hundred dollars... RCW 42.30.120(1).

Attorney. The Zinks are not asking the court to hold individual Officers culpable. Rather they are asking the Court to hold the City culpable.

Next the City uses *State v. Board of Trustees*, 93 Wn.2d 60, 605 P.2d 1252 (1980). In *Board of Trustees*, the Court found the College's reliance on its counsel's advice did not constitute a frivolous defense to an unfair labor practice when the College's actions must be considered as having been honestly debatable. Because an issue is debatable, it is not frivolous (*Reid v. Dalton*, 124 Wn. App. 113, 128, 100 P.3d 349 (Div. III, 2004)). The Zinks are not arguing that the City, in assigning the City Attorney to respond to the requests, was acting frivolously.

Last, the City uses *State ex rel. Bain v. Clallam County Bd. of County Comm'rs*, 77 Wn.2d 542, 463 P.2d 617 (1970). In *Clallam*, Relators sought a mandate compelling the Clallam County Commissioners to adopt an oral collective bargaining agreement. (*Id.* at 543). The Commissioners refused to adopt the oral agreement because the prosecuting attorney advised them they could not legally preempt the regularly budgeted funds (*Id.* at 545). The court found, among other things, the board was entitled to accept the good faith advice given in good faith by its lawfully constituted legal adviser (*Id.* at 546). None of these cases are dispositive of the facts of this case at bar and do not support the City's disputation. The City assigned the Office of City Attorney the task of responding to public requests; giving the City Attorney the power and authority to respond to Zinks' requests. The City cannot now claim good faith because the City Attorney's advice was erroneous. The City is its officers and is responsible for their actions.

When dealing with an officer or officers of a municipal corporation, one must be presumed to have knowledge of the official's power and authority ....

(*Id.* at 549). The City has not met its burden of proving that remand is necessary or that they were acting in good faith by having the City Attorney respond to the Zinks requests.

The findings show that whatever agreement was reached would depend upon the prosecuting attorney's opinion as to its legality."

Clallam, 77 Wn.2d at 546. Clallam is distinguishable from this case as there is no finding that the Zinks contractually agreed to forego their public records requests should the City Attorney determine that the records were exempt.

Finally, the most obvious problem with the City's suggestion to use the ignorance of its officers as a mitigating factor is that this exact problem was included as an aggravating factor in *Yousoufian 2010*. "[L]ack of proper training and supervision of the agency's personnel..." is included as an *aggravating* factor in the *Yousoufian 2010* opinion. *Yousoufian 2010* at 467-468. The City is essentially arguing that the fact that its personnel, the City Attorney and the City Building Official, as well as the City Clerk/Treasurer and the Mayor,<sup>22</sup> were improperly trained on the Public Records Act, that the City should be given a pass on penalties. Failure of the City to properly train its personnel is an *aggravating* factor, and the City's request for it to be considered as a mitigating factor should be denied.

##### **5. Court's Consideration of Full Range of Penalties (Mesa Br. § 5.2.5 at 44)**

The City claims that the trial court was free to begin its assessment of the daily penalties at the lowest point on the penalty scale. However, once the trial court determined where on the penalty scale to begin its assessment, it was then required to weigh the

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<sup>22</sup> At the conclusion of the initial hearings, the trial court found that the City Clerks were just "following the instructions of their boss, the mayor" (RP May 13, 2005) 542:12-15).

mitigating and aggravating factors associated with the culpability of the City in violating the PRA. The trial court did not do this. Instead the trial court ignored the evidence presented by the Zinks and only considered the evidence presented by the City (RP (July 17, 2008) 59:20-60:8).

In the initial hearings the trial court found this case was about nothing more than acrimony (RP (February 9, 2005) 202:22-203:5; (May 13, 2005) 542:17-19), blamed the City's culpability on Ms. Zink (RP (May 13, 2005) 537:24-538:14; 544:6-20) and excused any bad faith of the City (*Id.* at 540:5-23; 542:12-19; 543:8-544:5). On remand, although forced to assess minimum penalties for violations, this perception continued (RP (July 16, 2008) 103:15-19; 107:3-20; 112:19-113:19; (November 7, 2008) 7:18-8:20). The trial court consistently awarded penalties at the lowest point on the scale and ignored the City's bad faith because it felt the Zinks had no right to request the records and only requested records to injure the City (RP (May 13, 2005) 537:25-538:14; 540:5-13; 541:10-17). These are not mitigating factors. The penalties for violation of the PRA must be assessed based on the City's culpability and not on limited resources.

**6. Redaction After Review of Records (Mesa Br. § 5.2.6 at 44)**

The City argues that allowing an individual to review public documents in their entirety and then redacting them if copies are sought does not show bad faith. For this premise the City uses *Limstrom v. Ladenburg*. In *Limstrom*, the court reviewed the issue of RCW 42.17.310(1)(j) which exempts from public disclosure records that are relevant to a controversy to which an agency is a party but that would not be available to another party under the rules of pretrial discovery. The court found that 1) the prosecutor had not waived the work product privilege by complying with CrR 4.7 (releasing the documents to the

defense attorney; and 2) under RCW 42.17.310(1)(j). Limstrom was not entitled to the documents because he could not show undue hardship as he had already obtained the documents from another source. *Limstrom v. Ladenburg*, 110 Wn. App. 133, 147, 39 P.3d 351 (Div. II, 2002).

This case is not similar to the Zink case at issue here. First, the City did not claim any exemption for redaction of any of the documents. Second, the City, purportedly believing the documents contained exempt material, released the documents in their entirety. Third, the City only redacted the documents when copies were requested. If the City believed the redacted material was exempt they were acting in bad faith by redacting the documents after providing them in their entirety to Ms. Zink

If an agency discloses documents it believes to be exempt, that agency runs the risk of violating a governmental duty or an individual's right of privacy. RCW 42.17.310.

*Coalition on Gov't Spying v. King County Dep't of Pub Safety*, 59 Wn. App. 856, 864, 801 P.2d 1009 (Div. I, 1990). To find otherwise would allow agencies to provide documents to some requesters while denying release of the same documents to others. *King County v. Sheehan*, 114 Wn. App. 325, 341, 57 P.3d 307 (Div. I, 2002). Under the PRA, "if a record is available to one, it is available to all. The decision must be based on the content of the record itself, not on the 'need to know' of a particular requester" (*Id.* at 341 n 4) (quoting Wa. State. Attorney General publication "Overview of Public Records" 10 (1995).

**7. Total amount of penalty award (Mesa Br. § 5.2.7 at 45)**

The City states that the trial court should consider the total size of the award in setting per day penalties. This would be contrary to RCW 42.17.340(4)/42.56.550(4) and case law. RCW 42.17.340(4) states that the minimum penalty shall be no less that \$5 per day.

Allowing trial courts to decide a total penalty and then apply the penalty days could result in a penalty lower than the minimum set by statute. Furthermore, the *Yousoufian II* Court has already addressed this issue. The Supreme Court determined penalties are to be calculated using a two step process: “(1) determine the amount of days the party was denied access and (2) determine the appropriate per day penalty.” *Yousoufian v. Office of King County Executive*, 152 Wn.2d 421, 438, 98 P.3d 463 (2004).

As the PRA is silent as to any intent to bankrupt agencies, the penalty for violation of the act must be based on the agencies actions in responding to records requests and not on the harshness of the consequences for failure to do so. RCW 42.17.340(4)/42.56.550(4).

Although the court should not construe statutory language so as to result in absurd or strained consequences, see *Wright v. Engum*, 124 Wn.2d 343, 351, 878 P.2d 1198 (1994), **neither should the court question the wisdom of a statute even though its results seem unduly harsh.** See *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993)

*Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997)(emphasis added).

The Courts have determined that PRA daily penalties are

designed to discourage improper denial of access to public records and encourage adherence to the goals and procedures dictated by the statute.

(*Yousoufian 2010* at 459). The PRA penalties are to be based on the culpability of the agency and not on whether an award of penalties will cause financial hardship.

Finally, total penalty is already an aggravating factor established by the *Yousoufian 2010* court. “[A] penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.” (*Yousoufian 2010* at 468).

As total penalty was included specifically as an aggravating factor, and not as a mitigating

factor, it is clear that the intent of the *Yousoufian 2010* court is for total penalty not to be a mitigating factor.

***C. Variable Rate Penalties (Mesa Br. § 5.3 at 45).***

The City states that in *Yousoufian II*, our Supreme Court recognized the principle that the trial court could decrease a per-day penalty amount if it could find the plaintiff could have achieved disclosure sooner (Mesa Br. 46). The court in *Yousoufian II*, was discussing whether a trial court had the authority to decrease penalty days based on when the plaintiff filed suit.

The PDA does not contain a provision granting the trial court discretion to reduce the penalty period if it finds the plaintiff could have achieved the disclosure of the records in a more timely fashion. While the trial court could utilize its discretion by decreasing the per day penalty during this period, the only limitation on the number of days comprising the penalty period is the five-year statute of limitations.

*Yousoufian v. Office of King County Executive*, 152 Wn.2d 421, 437, 98 P.3d 463 (2004).

In other words, the Court found that the trial court lacked the discretion to reduce the penalty period but could reduce the per day penalty during the 527 days Yousoufian waited to file suit.

As the City notes, “the Zinks were very prompt in filing their lawsuit.” (Mesa Br. 46). It is not the plaintiff’s or the Courts responsibility to release public records under the PRA. Rather, this responsibility lies squarely with the public agency. An agency’s culpability for non-disclosure was made clear in *Koenig v City of Des Moines*, 158 Wn.2d 173, 178-179, 142 P.3d 162, (2006) wherein our Supreme Court found a trial court lacks the discretion to decrease penalty days based on a Superior Court injunction. *Id.*, at 178-179. The same is true in this case. Once the action was filed in the court (CP 1016-1020; 628-1012; 332-556; 557-564; 565-598) the City was put on notice that if found in violation of the PRA

they would be assessed daily penalties. Nonetheless, the City continued to improperly withhold the records even though they had no basis for their claimed exemptions (RP (July 17, 2008) 48:14-17). This is not acting in good faith.

The redaction of the documents was intentional and contributed to the limitations placed on the review of the records. (RP (February 8, 2005) 140:1-142:2; (May 11, 2005) 300:18-301:9). The City never provided Ms. Zink with any reasons for the redactions (RP (May 12, 2005) 26:3-12; 136:3-19). Furthermore, as of June 24, 2003, less than two months after this action was filed, the City knew the redactions were erroneous (CP 966-967) yet the City continued to withhold the redacted documents for six more years. The trial court did not abuse its discretion by not applying variable penalty rates for every document request at issue in this appeal over the statutory minimum of five dollars (\$5).<sup>23</sup>

The City was free to release the documents at any time and did not need a court directive to do so. The City has not met its burden of proof that it was acting in good faith by continuing to withhold documents it knew or should have known were not exempt under the PRA and they should not be rewarded for continuing to withhold these documents.

***D. Release of Public Documents Prior to Litigation Does Not Excuse Non-compliance with the Public Records Act (Mesa Br. § 5.4 at 48)***

***1. The Zinks are Entitled to Daily Penalties for Violations of the PRA Even if Records Were Released Prior to Litigation***

The City of Mesa argues that the Zinks are not entitled to penalties where their lawsuit was not necessary to obtain relief because the City released the records prior to the filing of

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<sup>23</sup> As noted by the City, on remand the trial court did consider and apply variable rate penalties (Mesa Br 46 n 14)

their lawsuit (Mesa Br. 48). The City's reliance on *Daines v. Spokane County*, 111 Wn. App. 342, 44 P.3d 909, (Div. III, 2002) as the basis for their argument is seriously misplaced. *Daines* relied on the opinion in *Coalition on Gov't Spying v. King County Dep't of Pub. Safety*, 59 Wn. App. 856, 864, 801 P.2d 1009 (Div. I, 1990) ("*COGS*") for its position that in order to be a prevailing party under the PRA, "the action must be one that could "reasonable be regarded as necessary" to obtain the records." *Daines* at 347-348, quoting *COGS* at 864. This holding in *COGS*, that the lawsuit needed to cause the release of the information to obtain prevailing party status was abrogated by the Supreme Court in *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 102-104, 117 P.3d 1117 (2005), stating:

Penalties may be properly assessed for the time between the request and the disclosure, even if the disclosure occurs for reasons unrelated to the lawsuit.

(*Id.* at 104). The City's reliance on *Daines* is misplaced, and there is clear authority that penalties are available even if the records were released prior to or unrelated to the lawsuit.

Further, the PRA clearly does not uphold the City's premise. On the contrary, the PRA states that agencies must respond promptly to requests or provide a reasonable estimate of time required to respond.

Responses to requests for public records shall be made promptly by agencies... Within five business days of receiving a public record request, **an agency ... must respond by either (1) providing the record; (2) acknowledging that the agency ... has received the request and providing a reasonable estimate of the time the agency ... will require to respond to the request; or (3) denying the public record request...**

RCW 42.17.320 (emphasis added). Furthermore the PRA states that if any person believes the agency has not made a reasonable estimate of time to respond a motion may be filed in the Superior court, placing the burden of proof that the estimate was reasonable on the agency.

Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

RCW 42.17.340(2). Neither of these two statutes indicates that a finding of wrongful delay or withholding is contingent upon a lawsuit being filed prior to the release of the documents. Rather, the PRA provides for court costs, attorney fees, and penalties against agencies for failure to promptly respond to requests for public records.

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or **the right to receive a response to a public record request within a reasonable amount of time** shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, **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 was denied the right to inspect or copy said public record.**

RCW 42.17.340(4) (emphasis added). The statute of limitations is the only restraint on claims of violations of the PRA by a public agency.

Any action brought under the provisions of this chapter must be commenced within five years after the date when the violation occurred.

RCW 42.17.410.

Additionally, in *Yousoufian 2010*, our Supreme Court acknowledged that PRA penalties must be awarded even though records are produced before a lawsuit is initiated. In that case, the court acknowledged that out of ten groups found to be responsive to Yousoufian's requests four of the groups were released to Mr. Yousoufian prior to his

filing a lawsuit. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 456-457, 229 P.3d 735 (2010)<sup>24</sup> Even though the four groups of records were released prior to Yousoufian being forced to resort to litigation, the Supreme Court did not exclude these four groups of records from the daily penalty award.

An agency should not be allowed to silently withhold documents responsive to requests and then claim they cannot be penalized because they released the records once they are flushed out by a requester prior to litigation.

Subsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 103-104, 117 P.3d 1117 (2005). The Zinks were entitled to receive a reasonable response to their records requests per RCW 42.17.320 (which includes release of the documents) within a reasonable amount of time. The Zinks properly filed suit per RCW 42.17.340(2) for the City's violations within the restrictions of RCW 42.17.410. The Zinks are entitled to per day penalties for each day the City was found to have violated the PRA per RCW 42.17.340(4).

Finally, this court has already recognized that penalties may be awarded for unreasonable delays for records produced prior to litigation. The complaint against 109 North Rowell Avenue was disclosed to the Zinks on November 27, 2002, prior to the filing of this lawsuit on April 30, 2003 (CP 1016-1020). Nonetheless, this court determined that the complaint was not exempt from disclosure, reversed the trial courts disposition of this

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<sup>24</sup> See also *Yousoufian II*: the Supreme Court noted that “**Four of the 10 groups did not have 527 days subtracted because these groups of records, although wrongfully withheld, were released before Yousoufian filed suit.**” *Yousoufian v. Office of King County Executive*, 152 Wn.2d 421, 428, fn 5 98 P.3d 463 (2004) (emphasis added).

PRA request, and remanded to the trial court to determine the appropriate remedy for the City's improper denial or delay in responding to this request. *Zink v. City of Mesa*, 140 Wn. App. 328, 344-345, 166 P.3d 738 (Div. III, 2007).

**2. *Challenge to Mesa's Reasonable Time Limitations (Mesa Br. § 5.4.2 at 50)***

For the same reasons discussed above, the Zinks have the right under RCW 42.17.340(2) to challenge the City's "reasonable time estimates" (Mesa Br. 59) for the documents at issue in this appeal. To read RCW 42.17.340(2) otherwise is to add words and meaning that is simply not there. The Zinks' suit was properly filed per RCW 42.17.410 for unreasonable time estimates under RCW 42.17.340(2). The trial court did not err in awarding daily penalties under RCW 42.17.340(4).

**3. *Mesa's correspondence with the Zinks (Mesa Br. § 5.4.3 at 50)***

The City claims that the trial court erred in awarding daily penalties for the City's delay in producing copies of the Zinks' correspondence with the City because the Zinks' presumably already had copies of these records (Mesa Br. 50). The testimony provided at trial was that the City clerk's stamped incoming public document requests with the date received and initialed the requests to show which clerk received the document (RP (May 12, 2005) 32:5-11; 83:15-19; 107:2-4; 109:16-19; 120:6-13: CP 767; 796-797; 823; 860; 871; 883; 906: Ex 232 p.3; 233). This altered the original document to indicate precisely when the City received the document and by whom it was received. Ms. Zink was asking for copies of the "conformed documents" which she did not have at the time of her request. (RP (Feb 8, 2005) 50:4-18; 78:2-5; 113:7-11: RP (Feb 9, 2005) 187:20-188:3; 232:21-24). Furthermore, Ms. Zink testified that she found other documents which the City claimed they had sent to her but she never received (CP 632, 781: RP (Feb 8, 2005) 118:18-7: CP

781). The City's presumption that the Zinks already had copies of the requested documents is not correct, and the Zinks are entitled to per day penalties for the unreasonable delay in the release of these records.

***E. Recalculation of Total Number of Penalty Days (Mesa Br. § 5.5 at 52)***

***1. Statute of Limitations RCW 42.17.410/42.56.550(6) Does Not Limit Penalty Days (Mesa Br. § 5.5.2 at 52).***

The City claims that per the decision in *Yousoufian v Office of King County Executive*, 152 Wn.2d 421, 98 P.3d 463 (2004) (*Yousoufian II*) our Supreme Court limited the number of penalty days to a maximum of five (5) years (Mesa Br. 53). The City has misinterpreted the court's decision. The court in *Yousoufian* was asked

to determine the proper application of a provision in the public disclosure act (PDA), RCW 42.17.340 (4), which provides penalties for the failure to timely produce public records. **Specifically, we must decide whether a trial court that has determined that a violation of the PDA has occurred ... has the authority to limit the number of days against which the penalty is assessed due to the plaintiff's failure to file suit within a "reasonable amount of time."**

*Id* at 424-425 (emphasis added). Although the City has correctly cited to the fact that the court found "the only limitation on the number of days comprising the penalty period is the five-year statute of limitations" (*Id* at 437), that determination was based on the trial court's deduction of penalty days based on when the action was filed. The *Yousoufian II* court determined that the trial court could not deduct days because Yousoufian filed suit within the statute of limitations in effect at the time he filed his suit.

Because the PDA does not include a limitation on the penalty period beyond the statute of limitations, we are of the view that the **PDA does not allow a reduction of the penalty period when the trial court finds the plaintiff could have filed suit earlier than it did.**

*Id* at 438 (emphasis added). The Washington State statute of limitations is found at RCW

4.16.005 **Commencement of actions.**

Except as otherwise provided in this chapter, and except when in special cases a different limitation is prescribed by a statute not contained in this chapter, actions can only be commenced within the periods provided in this chapter after the cause of action has accrued.

RCW 4.16.005. (emphasis added). Under the PRA the statute of limitations at the time the Zinks filed suit was five (5) years after the violation occurred (RCW 42.17.410). The City concedes that the first public records request at issue was made in August, 2002, and the last request at issue was made in April 2003. (RP (May 11, 2005) 371:18-20; 433:23-434:1; 436:16-20; 437:2-13). The Zinks filed this action on April 30, 2003 (CP 1016-1020); approximately eight to nine months after the Zinks began to request the documents at issue in this action. Clearly the Zinks' PRA suit was filed within the statutory limits in effect at the time of filing.

Since the *Yousoufian II* court decision, our legislature revised the PRA statute of limitations for PRA cases. The current statute of limitations (RCW 42.56.550(6)) states that actions must be filed within one year. Under the City's interpretation of *Yousoufian II*, the maximum amount of penalty days that could be assessed against violations of the PRA would now be 365 days no matter how long the agency withholds the records. This creates an absurd result and is in direct conflict with the language in RCW 42.17.340(4)/42.56.550(4).

The Zinks filed this suit within the statutes of limitations (RCW 42.17.410) and are entitled to mandatory daily penalties for each response in violation of the PRA from the date the violation occurred until the date the document is produced. *Sanders v. State*, No. 82849-1, 2010 WL 3584463, at \*18, 22, n 32 (Wash. Sup. Ct. March 25, 2010).

**2. PRA Doesn't Allow Agencies Five Full Business Days to Respond to Every Request (Mesa Br. § 5.5.3.1 at 53)**

The City argues that the court must interpret the more specific “five business day” requirement found in RCW 42.56.520/42.17.320 to control over the more vague “promptly available” requirement in RCW 42.56.080/42.17.270 (Mesa Br. 54). However, the courts are prohibited from doing so. These two statutes can and must be harmonized in order to maintain the truth of both and not render either statute superfluous.

Because the two statutes relate to one another and the same subject matter, we will "read the sections as constituting one law to the end that a harmonious total schema which maintains the integrity of both is derived." *BEACH v. BOARD OF ADJUSTMENT*, 73 Wn.2d 343, 346, 438 P.2d 617 (1968).

*Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 138, 580 P.2d 246 (1978). The courts

[W]ill not interpret statutes in a manner that renders portions of the statute superfluous. *Lutheran Day Care v. Snohomish Cy.*, 119 Wn.2d 91, 829 P.2d 746 (1992) (statutes should not be interpreted in such a way as to render any portion meaningless, superfluous, or questionable), cert. denied, 113 S. Ct. 1044 (1993).

*PAWS v. UW*, 125 Wn.2d, 243, 260, 884 P.2d 592 (1994). Furthermore

... judicial review “shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience ... to public officials.

*Zink v. City of Mesa*, 140 Wn. App. 328, 338, 166 P.3d 738 (2007). The Zinks are not arguing that every request must be made available on demand. The Zinks are not claiming that agencies cannot take five full business days to respond to broad requests that require agencies to clarify intent, locate and assemble the requested information, determine exemptions, or notify third parties or agencies affected by the request (RCW 42.17.320). The Zinks argue that RCW 42.56.520/42.17.320 does not allow agencies to withhold records required by state statutes, the PRA, or that are otherwise readily available or inherently open to the public for five business days regardless of what record is requested.

To narrowly interpret RCW 42.56.520/42.17.320 thus, renders both RCW 42.56.080/42.17.270 and RCW 45.56.100/42.17.290 superfluous. These statutes can be harmonized based on what record(s) are being requested. Allowing agencies to withhold any and all public documents for five full business days defeats the purpose of RCW 42.17.290, 42.17.010(11), and 42.17.251.<sup>25</sup>

Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information.

RCW 42.17.290 (emphasis added). Allowing agencies to wait five business days to respond to all requests is contrary to the requirement that agencies respond with the timeliest possible action.

[F]ull access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.

RCW 42.17.010(11).

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

RCW 42.17.251. Allowing agencies to withhold public documents for five full business days, no matter what record is requested, would effectively prevent citizens from obtaining

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<sup>25</sup> The trial court determined that under RCW 42.17.320 the City could withhold the Council Packet and Vouchers for five business days even though they pertained to a pending meeting. The trial court reasoned that a citizen should request the council information a week before the City Council meeting if they wanted to review the information to be presented to and acted on by the City Council. The trial court found this to be so, even if the request could subsequently be denied if the council packet or vouchers did not exist at the time of the request. (see Zink Br. sec V (1)).

documents related to legislative decisions until after the decision is final, thus allowing no public input. This would have the chilling effect of preventing citizens from knowing what their legislative body is doing, in effect authorizing secret actions and secret meetings, and allowing the agency to determine what is good for the people to know and what is not (CP 413 para 8 & 9). (See Zink Br. sec V(1)).

**3. *When assessing penalties PRA controls (Mesa Br. § 5.5.3.2 at 54)***

The City argues that the PRA lives in a vacuum, untouchable by any other state statute. The City uses RCW 42.56.030/42.17.251<sup>26</sup> to bolster their argument (Mesa Br. 55); claiming that this statute resolves any conflicts with other state statutes. The City misses the point. Our legislature in enacting RCW 42.17.920/42.56.030 (see n 14 supra) envisioned that other chapters, statutes, or acts could interact with the provisions of the PRA. Should this interaction between the two statutes have a negative effect on the PRA then the provisions of the PRA would control. Conversely, should the interaction between the two statutes have a positive effect on the PRA then the statutes would be harmonized. Furthermore, the statute regulating minutes of meetings is found in same title as the PRA, Title 42 RCW. Minutes of meetings must be available upon demand (RCW 42.32.030)(see also RCW 42.17.440 and 42.56.070(7)/42.17.260(7)).

**4. *Grouping of Records (Mesa Br. § 5.5.4 at 55)***

The City argues that the trial court has the discretion to group requests and to treat those requests as one single request (Mesa Br. at 55). The City proposes that this Court remand this case back to the trial court with instructions to group the records according to

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<sup>26</sup> RCW 42.17.251 is misquoted. RCW 42.17.920, which was in effect at the time of this action, was combined with RCW 42.17.251 and re-codified at 42.56.030.

requests involving a common legal error, requests with similar improper redactions, and requests made on the same day regardless of when the documents were released or subject matter. As Mesa did not raise the issues of grouping documents as discussed in their briefing at trial, they are not now entitled to raise this issue on appeal. Furthermore, the City has not provided any authority supporting their argument.

The City states that the trial court would not consider grouping the Zinks' requests because it "was not certain [it had] the authority to do that, even though it had already grouped some requests together"(Mesa Br. at 56).<sup>27</sup> Yet the City argues the requests that were grouped were grouped properly (Mesa Br. 58). These statements are incongruous. Either the court did consider grouping the records or the court did not consider grouping the records. In this case, the trial court did consider grouping the records either by 1) grouping records at the request of the City;<sup>28</sup> 2) grouping the records on its own volition;<sup>29</sup> 3) refusing to group records after argument;<sup>30</sup> or 4) neither party requested grouping of the records. Furthermore, except for the requests at issue in the Zinks' appeal<sup>31</sup> the trial court

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<sup>27</sup> The citation to the record provided by the City of Mesa is inaccurate.

<sup>28</sup> At the request of the City the trial court grouped the documents related to the November 13, 2002 meeting even though they were for different subject matter (RP (July 16, 2009) 57:20-58:4; 60:12-61:4)(Zink br. sec J p 80).

<sup>29</sup> The trial court grouped the request for Municipal Research and the attorney correspondence from two separate request dates of January 28, 2003 and March 19, 2003 (RP (July 16, 2008) 78:3; 78:19-22) (Zink Br. sec M p 86).

<sup>30</sup> The City argued that the vouchers and council packet should be grouped (RP (RP (July 16, 2008) 120:6-23) and that the draft dog ordinance and the tape of the July 14, 2001 council meeting should be grouped. RP (July 17, 2008) 53:20-54:10).

<sup>31</sup> There are two groupings at issue in the Zinks appeal that were not grouped by subject matter and date of request. 1) **The minutes, the audio tape and the rules of the BOA.** The Zinks requested three distinct records (minutes, a tape, and BOA regulations). The trial court grouped all three of these documents based on the amount of the penalty awarded; \$100 per day. Initially the trial court thought it was assessing a penalty of \$250,000 rather than \$25,000. (RP (July 16, 2008) 57:20-58:3; 60:12-61:12)(see also Zink Br. sec J). 2) **The Correspondence Atty/Mesa and MRSC/Mesa.** These documents were requested on different dates. Some

made the determination of whether to group requests based on “subject matter” and “timing of the requests” as outlined by the *Yousoufian II* court. For instance, the trial court based the decision not to group the February 24, 2003 requests because it was a “potpourri” of requests.

**Court:** I Probably Shouldn't. Okay to be honest with you I probably shouldn't of lumped or consolidated three, four and five. But, in as much as it applied to Board of Appeals, minutes, rules regulations a tape, I considered it one request for that limited item and I'm not certain I have the authority to do that. But clearly these items twelve through seventeen here that were asked or requested in exhibit fourteen it's a potpourri of requests which the plaintiff was entitled to make and so I'm not comfortable lumping all of them together.

(RP (July 16, 2008) 104:13-23)(emphasis added). The City requested the Draft Dog Ordinance and the Tape of the July 14, 2001 council meeting be grouped (RP (July 17, 2008) 53:20-54:4). The trial court determined they contained different subject matter (Id. at 54:4-10). The City requested the trial court group the council packet and the vouchers (RP (July 16, 2008) 120:6-20). The trial court determined they contained different subject matter (Id. at 120:21-23). Clearly, in most instances, the trial court determined groupings of records based on Subject matter and timing.

Furthermore, in *Yousoufian* the court found that although the requests were broad, they were clear; not vague or ambiguous. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 454, 229 P.3d 735 (2010) (*Yousoufian 2010*). The court found that there were two distinct groups of records requested: all related records concerning the “Conway Study” and studies related to a single subject matter, the “financing of stadium studies.” *Yousoufian v.*

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of the documents did not exist at the time of the first request. Trial court grouped these document requests based on the fact that the City should not be double charged so the court viewed it as a continuing request (RP (July 16, 2008) 77:10-78:22)(see Zink Br. sec M.(1)).

*Office of King County Executive* 152 Wn.2d 421, 425, 426, 98 P.3d 463 (2004)

(*Yousoufian II*). Yousoufian requested penalties for each of the 228 documents responsive to the two PRA requests (*Id* at 427). The trial court refused and instead awarded penalties for 10 specific groups of records grouped according to the time of production and subject matter. *Id*. Our Supreme Court agreed. *Yousoufian v. Office of King County Executive* 152 Wn.2d 421, 436, 98 P.3d 463 (2004).

In contrast to the Yousoufian case, the majority of the Zinks' requests were for a single identifiable public document such as a time card, the phone logs, a particular complaint or response, or a tape of a meeting. Many of the requests were for inherently public documents related to the core function of any municipality such as an ordinance, a resolution, the minute book, specific minutes, or specific agency rules and regulations. Documents responsive to broader request for multiple documents (i.e. file of correspondence, files for 109 North Rowell Avenue, several months of water meter readings, maintenance logs, twenty-one code violation letters or residential files)<sup>32</sup> were grouped by the Zinks according to subject matter and timing of the request. Clearly both the Zinks and the trial court grouped the records per the decision of the Supreme Court in *Yousoufian II*.

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<sup>32</sup> In making the request for the 18 residential files Ms. Zink requested all documents or records pertaining to a particular address file (Ex 14). Each address file was listed individually. Each address file had at least one, but more often, several documents responsive to that particular address file request. It could be argued that each request for an address file was an individual request for a specific set of records rather than one request for 18 different but related records (the responsive documents were all filed under a particular address).

Finally, the trial court grouped requests in determining whether violations of the PRA occurred, total penalty days and daily penalty awards. For instance in determining whether the City was justified in delaying the release of Ordinance 01-05 the court stated:

**Court:** I don't see anything wrong with the City trying to provide all of the materials at the same time in response to an individual request that contains multiple items requested, even thus that's what the City made her do. How convoluted is that? So I understand where plaintiff is coming from but I rule that the thirty day extension under the totality of the circumstances was valid.<sup>33</sup>

(RP (July 17, 2008) 15:14-19)(emphasis added) (see also Zink Br. sec FF)<sup>34</sup>. The Zinks provided evidence to the court that these documents (Ordinances, Resolutions, Rules and Regulations) were time sensitive due to the Zinks' appeal to the Board of Appeals. (RP (May 11, 2005) 310:10-24; (July 17, 2008) 16:5-24) Nonetheless, based on the way the documents were grouped with other requests, the trial court either found no violation or that it was mere negligence, assessing the minimum penalty stating, "I'm sure the City was scrambling to try and find those rules and procedures without success." (RP (July 17, 2008) 16:9-11) (See also (CP 119) FOF 71; (CP 131) FOF 165; (CP 132) FOF 174; (CP 133-134) FOF 179, 180, 183; FOF 179-180; (CP 141) FOF 242, 244; (CP 155) COL 103, 104; (CP 156) COL 106, 107, 110 (CP 157) COL 112, 114; (CP 160) COL 138, 139, 140; (CP 162) COL 150, 151, 152.

As evidenced by the record, the City had ample opportunity to argue the grouping of requests to the trial court. The City has provided no legal authority allowing a trial court to

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<sup>33</sup> Arguments and decision of the trial court for Ordinance 01-05 (RP (July 17, 2008) 12:9-16:21).

<sup>34</sup> The trial court found no violation of the PRA for refusal to release a newly adopted ordinance on demand because it was requested with a group of records (RP July 17, 2008) 2:20-4:20) or for withhold Ordinance 02-01 because it was requested with a group of records (RP (July 16, 2008) 8:12-16; 83:21-84:22) (Zink Br. sec FF).

group requests based on common legal error or requests made on the same day (Mesa Br. 55-58). Neither of these are permissible under the PRA (see RCW 42.17.340(4)). This court should review the decisions of the trial court in grouping the records based on abuse of discretion, but should not expand the proper bases for grouping records.

***F. Attorney Client Privilege Communications Are Not Moot (Mesa Br. § 5.6 at 59)***

***1. The City's Recitation of the Facts Is False***

The Zinks did not receive the attorney client privilege documents until the clerks papers were provided to this Court for review. The City knows the claim the Zinks received access to the documents prior to the in camera review is false. This is a violation of the Rules of Profession Conduct.

In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.”

RPC 4.1(a). The Zinks respectfully request that the Court strike the City's statement that the Zinks had access to the documents claimed by the City to be protected by the attorney/client privilege prior to the in camera review.

The evidence shows that on April 14, 2009 the City of Mesa provided the privileged documents to the trial court for an in-camera review (CP 1288). On April 20, 2009 an order was entered by the trial court ordering the City to release all documents not marked exempt (CP 1280-1287). At that time the Zinks were only provided with a copy of the trial court's order. The Zinks were not provided notice that any other records were filed with the Clerk. Neither the City nor the trial court filed a motion to seal the records. On April 30, 2009, the Zinks filed a motion for reconsideration of this order (CP 1104-1122). The trial court did not respond. On May 18, 2009, the Zinks timely filed notice of appeal of the order on in-camera review from which they now seek relief (CP 1092-1101). On June 5,

2009 the Zinks filed a motion to consolidate the two cases. This motion was granted by this court on June 16, 2009. On June 24, 2009, per RAP 9.6, the Zinks filed a supplemental designation of clerks papers associated with the appeal of the order on in-camera review (CP 1088-1089); a copy of which was provided to the City attorney (CP 1090-1091). In the Zinks' request to supplement the Clerks Papers, the Zinks specifically requested that the sealed documents be provided to this court for consideration of the claimed exemptions (CP 1088). There was no motion to seal the records so no motion was included under (RAP 9.6(b)(1)(G)). On or about July 23, 2009 the Court and the Zinks received copies of the designated Clerks Papers. Included in the supplementary Clerks Papers the Zinks received from the trial court were copies of the documents the City claimed to be exempt (CP 1280-1287). This was the Zinks first receipt of the documents and their first knowledge that they had been filed without seal.

Furthermore, it was not the City who released these documents to the Zinks. The City submitted the documents to the trial court for an in-camera review. At the time the documents were submitted to the court the City continued to claim the documents were exempt. After the in-camera review **the City only released** the documents found by the court to be non-exempt to the Zinks. Months later, the Zinks received the documents from the trial court in response to their designation of clerks papers (RAP 9.3). A waiver is an intentional act. The City did not waive their claim of exemption or provide the documents to the Zinks. Though the City failed to subsequently file a motion to seal the records, there may not be a waiver of exemption.

A "waiver" is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.

The person against whom a waiver is claimed must have intended to relinquish the right, advantage, or benefit, and his actions must be inconsistent with any other intention than to waive them. *Bowman v. Webster* (1954), 44 Wn. (2d) 667, 269 P. (2d) 960.

To constitute a waiver other than by express agreement, there must be unequivocal acts or conduct of the vendor evincing an intent to waive. *Surry v. Baker* (1925), 132 Wash. 188, 231 Pac. 791.

*Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958).

## ***2. Issues Remain for Review***

The City argues that the issues surrounding the application of the attorney client privilege are moot because the Zinks have all of the records and the trial court has already imposed sanctions. The general rule for determining whether an issue is moot is whether the court can provide effective relief or if the issues present only an academic solution. *Yacobellis v. Bellingham*, 55 Wn. App. 706, 709, 780 P.2d 272 (Div. I, 1989). The Zinks have argued that not all of the documents were released, the privilege log was inadequate, and the assessment of minimum per day penalties is still at issue. Clearly there is more than just an academic solution in this case.

[T]he failure to provide the “brief explanation” may act as an aggravating factor when assessing penalties for wrongfully withholding non exempt documents.

*Sanders v. State*, No. 82849-1, 2010 WL 3584463, at\* 16 (Wash. Sup. Ct. March 25, 2010).

Furthermore, this case raises an argument concerning the use and possible abuse of the attorney/client privilege by agencies believing that all communication to and from an attorney are privileged. For example, the City claims that the January 11, 2002 letter from the City clerk to the City attorney asking him to review, sign and send back an ordinance is

privileged. The PDA and the OPMA are both about transparency and openness in government and their statements of construction mirror each other.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

RCW 42.30.010 and 42.17.251/42.56.030. Under the OPMA, the governing body of a public agency must conduct deliberations openly.

It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

RCW 42.30.010. As noted in the City's brief, RCW 42.30.110(1)(i) controls when a public agency may confidentially confer with their attorney and when they may not. The City may only deliberate with the City attorney in an executive session relating to agency enforcement of actions and to discuss representation of litigation, actual or potential if public knowledge would have an adverse legal or financial consequence. Under RCW 42.30.060 a governing body may not adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public nor can they vote by secret ballot. Hence, had the City attorney attended the meeting on the night Ordinance 02-01 was passed, any review or advice given would have had to be done in the open and not behind closed doors. It is disingenuous to interpret the PRA to allow obscurity and a closed door policy concerning every communication with the City attorney where the OPMA does not. Given the frequency of recent cases involving the issue of the attorney/client privilege exemption, this issue is ripe and may reoccur. Because the issues presented here are of public importance the Zinks ask the court to also consider the

merits of the exemption. *Limstrom v. Ladenburg*, 110 Wn. App. 133, 139, 39 P.3d 351 (Div. II, 2002).

### ***3. A Privilege/Exemption Log Is Required***

The City argues that there is no exemption log required under the PRA and that it is just a “judicially created requirement” (Mesa Br. 61). The City totally ignores the statutory requirements of the PRA.

Denials of requests must be accompanied by a written statement of the specific reasons therefor.

RCW 42.17.320

[A]n agency shall delete identifying details in a manner consistent with RCW 42.17.310 and 42.17.315 when it makes available or publishes any public record; **however, in each case, the justification for the deletion shall be explained fully in writing.**

RCW 42.17.260 (1)(emphasis added). Nothing in these statutes indicates that the privilege log is only for the benefit of the trial court for the in camera review. Our Supreme Court found

If the only remedy for a failure to explain is to sue to compel explanation, the agency has no incentive to explain its exemptions at the outset. This forces requesters to resort to litigation, while allowing the agency to escape sanction of any kind.

*Sanders v. State*, No. 82849-1, 2010 WL 3584463, at\* 7 (Wash. Sup. Ct. March 25, 2010).

An exemption log is mandatory under the PRA and not a judicially created requirement.

Furthermore, the Court in *Sanders* determined that an exemption log must include a brief explanation of how the claimed exemption applies to the withheld documents.

[A]n agency violates the PRA when it fails to provide a brief explanation of how the claimed exemptions apply to the records withheld. This violation is relevant to the agency's lack of compliance with the PRA.

*Sanders v. State*, No. 82849-1, 2010 WL 3584463, at\* 16 (Wash. Sup. Ct. March 25, 2010). The court found that an exemption log containing only the withheld document's author, recipient, date of creation, and broad subject matter along with its specification of the exemption was not good enough and would render the brief-explanation clause superfluous (*Id.* at 6). In this case the City did nothing more than identify each communication by author, recipient, number of pages and date, claiming the Zinks already knew what exemption was claimed (Mesa Br. 62: CP 1281-1287). Clearly the exemption log provided by the City is inadequate and in violation of the PRA.

***G. Complaint against 109 N. Rowell Ave. (Mesa Br. § 5.7 at 63)***

The City claims that Ms. Zink's oral request to review the file at 109 N. Rowell Avenue was not sufficient to put the City on notice that a public record was being requested. This is contrary to this court's findings and mandate to the trial court on remand.

Ms. Zink's initial request was sufficient to notify the City that the internal memo described above fell within the category of documents Ms. Zink was requesting.

*Zink v. City of Mesa*, 140 Wn. App. 328, 229 P.3d 738 (Div. III, 2007). The City of Mesa did not petition for discretionary review of that decision. The determination that the complaint is a public record and that Ms. Zink made a request for it is already the law of the case. See *Coy v. Raabe*, 77 Wash.2d 322, 325 (1970). This was not properly before the trial court on remand, and it is not properly raised before this Court on appeal. When a mandate issues under RAP 12.5, the appellate court loses its power to change or modify its decision. RAP 12.7" *Fulle v. Boulevard Excavating*, 25 Wn. App. 520, 522, 610 P.2d 387 (1980). Thus the determination in *Zink v. City of Mesa*, 140 Wn. App. 328 (Div. III, 2007) is the law of the case and is not subject to modification by the trial court or the appellate

courts. This issue is not properly raised by the City, and the Court should decline to grant a second appellate review.

Next the City argues that a requester must provide the agency with “fair notice” that a request is being made pursuant to the PRA. (Mesa Br 63). Ms. Standridge testified that Ms. Zink was at City Hall on August 29, 2002 to review her property files and she was provided with the files (RP (May 12, 2005) 74:24-75:8). In handing Ms. Zink the files prepared, owned, used and retained by the City, the clerk acknowledged she understood that an oral request for public records had been made and responded to.

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 ... local agency regardless of physical form or characteristics. ...

RCW 42.17.020(36). The evidence and testimony shows that on August 29, 2002 Ms. Zink paid for copies of public records (RP (May 12, 2005) 77:15-78:9; Ex 218). Clearly, by their own actions, the City had “fair notice” that Ms. Zink was making a public record request. The City responded to the request by allowing review of a property files and charged for copies. Ms. Standridge testified that Ms. Zink reviewed the same files on September 13, 2002 (Id 82:10-13) and again on September 30, 2002 (Id at 82:16-83:9). There is no reason why the complaint would not have been in the files on subsequent reviews except that the City did not want Ms. Zink to find a copy of it. The City has not met its burden of proof that the missing complaint was exempt or that it was not responsive to Ms. Zink’s broad request to see all the property files for 109 N. Rowell Avenue on August 29, 2002.(Ex 76).

Next the City argues that the PRA does not dictate how an agency must file its records and as a result the City was not required to file the complaint in the residential property file

for 109 North Rowell Avenue. Although the PRA may not dictate how records are to be filed, the PRA does require that agencies adopt rules to prevent disorganization of public records.

Agencies shall adopt and enforce reasonable rules and regulations,  
...consonant with the intent of this chapter to provide full public access to  
public records, to protect public records from damage or disorganization, and  
to prevent excessive interference with other essential functions of the agency,  
...

RCW 42.17.290 (emphasis added). Ms. Standridge testified that the City files records based on address (Id. 75:4-6). Ms. Standridge stated that after review by the City Council on August 22, 2002, the complaint should have been filed in the files for 109 North Rowell Avenue (RP (May 12, 2005) 73:13-25; 76:1Ex 78). If the policy established by the City requires the complaint to be filed in the residential address files, the City was obligated to file the document per their established policy. The facts are the complaint was never filed so that it could be discovered, the Mayor denied its existence (Ex 67: RP (May 12, 2005) 96:16-97:10), and Ms. Zink had to ferret it out through diligent research. The City of Mesa intentionally withheld the complaint.

[A]n applicant need not exhaust his or her own ingenuity to "ferret out" records through some combination of "intuition and diligent research." *Ackerly v. Ley*, 420 F.2d 1336, 1342 (D.C. Cir. 1969).

*Daines v. Spokane County*, 111 Wn. App. 342, 349, 44 P.3d 909, (Div. III, 2002).

***H. March 5, 2003 BOA meeting minutes Mesa Br. § 5.8 at 64)***

The City claims at the time Ms. Zink requested the March 5, 2003 BOA minutes the record did not exist. However, the response given by Mesa was the minutes would be available on April 11, 2003 (CP 781). See RCW 42.17.340(4). Even if the minutes had not been drafted on March 7, 2003, or March 10, 2003, Ms. Zink renewed her request on April

15, 2003 when she went to get the delayed copies of the draft minutes (RP (February 9, 2005) 191:5-12: CP 689, Ex 212). Certainly, per state statute, the minutes of the March 5, 2003 BOA meeting should have existed at that point in time (RP (May 13, 2003) 466:9-467:14).

The City's position is that even though mandated by other statutes to create a document, if the document is never created, the agency cannot be found in violation of the PRA. Using this logic, agencies need only violate other statutes in order to comply with the PRA. It would then be up to the citizens to file a mandamus action to force compliance with the other statutes. This certainly is inconsistent with the Legislative mandate under the PRA of transparency in government.

***I. Signed Board of Appeals Minutes (Mesa Br. § 5.9 at 65)***

Next the City argues that even if an agency destroys records they cannot be found to have violated the PRA, claiming the burden of proof shifts to the requester if the agency claims the records don't exist. It is undisputed that on March 5, 2003, the City of Mesa Board of Appeals approved and signed their official minutes of several meetings: neither party has assigned error to finding of fact 196 (CP 135) or conclusion of law 121 (CP 158). The City admits the official signed minutes of the BOA meetings existed on March 5, 2003. Nonetheless, the City claims that the minutes did not exist two (2) days later when Ms. Zink requested copies (CP 787). The City asserts that since no evidence was offered as to why these records no longer exist, the burden of proof that the minutes existed at the time of the request rests with the Zinks; citing this court's decision in *Sperr v. City of Spokane*, 123 Wn. App. 132, 96 P.3d 1012 (Div. III, 2004)

In *Sperr*, this court found that the agency did not deny the requester “an opportunity to inspect or copy a public record, RCW 42.17.340(1), because the public record he sought “did not exist” (*Id.* at 137). This Court did not shift the burden of proof as to whether a document exists to the requester; rather this court found the agency had met its burden of proof that the documents never existed. *Id.* at 136-137. In contrast to *Sperr*, the Zinks did more than just assert that they do not believe the agency. The Zinks proved the records existed two days prior to the request. If the Zinks had any burden of proof, clearly that burden has shifted to the City. The burden of proof concerning where these documents are is squarely on the agency.<sup>35</sup>

***J. Post Judgment Interest (Mesa Br. § 5.10 at 68)***

The City contends that under the ruling in *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 798 P.2 799 (1990)(*Fisher II*) the Zinks are not entitled to post-judgment interest since the entire judgment must be vacated based on the decision in *Yousoufian 2010*. The City’s interpretation of *Fisher* is incorrect.

In *Fisher Properties Inc. v. Arden-Mayfiar*, 106 Wn.2d 826, 726 P.2d 8 (1986) (*Fisher I*), the Court, among other things, found “the trial court incorrectly determined Ardens general obligations under the lease provision for restoration of the premises to their original condition.” (*Id* at 15). After clarification from the Supreme Court over what constitutes original condition, the trial court was directed to weigh two alternative measures for **awarding damages** for breach of lease; “diminution in market value” verses

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<sup>35</sup> The evidence presented to the court show that the City has a history of claiming records don’t exist that in fact actually do exist (See Complaint against 109 North Rowell Avenue, Maintenance Logs, Ordinance 01-05; November 13 BOA meeting minutes, meeting tape, and rules and regulations).

“cost of restoration.” (*Id* at 19). As a result, an issue remained to be determined by the trial court necessitating the entry of new findings and a new judgment. The *Fisher* Court reversed the awards for restoration costs, violation of codes, and the award of attorney fees. *Fisher II* at 366-367.

In this case, as mandated by this court, the trial court made determinations as to whether each and every record identified by the Zinks was a public document(s) and, if so, whether the City had violated the PRA in their responses to the request(s). Based on this determination, the trial court entered findings of fact, conclusions of law and judgment in favor of the Zinks, awarding mandatory penalties for violations as well as attorney fees and court costs, including on appeal.

We direct the trial court on remand to enter findings on whether the City strictly complied with the PDA in every instance identified by the Zinks. Where the City has violated the PDA, we leave it to the sound discretion of the trial court to award penalties, costs, and attorney fees to the Zinks, including costs and fees incurred in this appeal. *Amren*, 131 Wn.2d at 37-38.

*Zink v. City of Mesa*, 140 Wn. App 328, 349, 166 P.3d 738 (Div. III, 2007). It is a distinction between this case and that of *Fisher* that here the judgment is based upon an award of penalties, not on damages.

Thus, the act's declaration of policy makes clear that its primary purpose is to promote broad disclosure of public records. It follows that the act's stated purpose is better served by treating the award as a penalty rather than as a damage award. A penalty is specifically designed to insure performance of statutory duties and can be imposed whenever a violation of duty has occurred. A damage award, in contrast, is designed primarily to compensate individuals for personal injuries and requires that an aggrieved party first show actual loss before an award can be made. **A penalty would therefore be more effective than a damage award in deterring governmental agencies from engaging in wrongful denial of public access to public records.**

*Yacobellis v. Bellingham*, 64 Wn. App. 295, 301, 825 P.2d 324. (See also *Amren, v. City of Kalama*, 131 Wn.2d 25, 36, 929 P.2d 389 (1997)).

The underlying judgment on review is made up of multiple penalty awards, as well as reimbursement of the Zinks costs and attorneys' fees. Depending upon this Court's determination, some or all of the penalty awards may be affirmed or remanded for recalculation. Though the penalties may need to be recalculated, *Yousoufian 2010* does not mandate reversal of the judgment for costs or attorneys' fees. *Yousoufian 2010* only affects how courts are to calculate mandatory penalties. The City has not assigned errors to the trial courts: 1) determination that the documents were public records; 2) determination that the City violated the PRA;<sup>36</sup> 3) total number of penalty days; 4) findings and conclusions concerning copy costs; 5) order to release erroneously redacted documents; 6) order to release correspondence with Municipal Research; 7) order to release the time card; 8) order that the City promulgate and adopt written procedures to assure compliance with the PRA; 9) order requiring Resolution 2003-03 to include the statutory statement for the justification of copy charges; 10) order for reimbursement of copy costs; 11) order for in-camera review of attorney correspondence 12) order for entry of judgment for court costs in the amount of \$5,700.36; or 13) order for entry of judgment for attorney fees in the amount of \$72,309.50 (CP 110-166).<sup>37</sup> As none of these issues were addressed by the *Yousoufian 2010* court, the trial courts decisions should not be vacated.

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<sup>36</sup> With the exception of the signed minutes of the BOA (Mesa Br. sec 5.9).

<sup>37</sup> Although the City did assign error to Orders 10 and 11, they did not provide any argument or authority supporting any hypothesis as to why the order for attorney fees and costs should be reversed.

In *Fisher I*, the trial court was directed to re-determine the legal basis for an award. Even though the award remained the same, the legal basis for the award was different requiring new findings and conclusions. The legal basis for an award of penalties in a PRA case is a violation of the act. RCW 42.17.340(4). Once a violation is found the trial court does not have the discretion to determine whether to award a penalty (RCW 42.17.340(4)). *Koenig v City of Des Moines*, 123 Wn. App. 285, 303, 95 P.3d 777 (Div. I, 2004). The Yousoufian court did not change the legal basis for an award under the PRA. Rather the Yousoufian court merely provided a multifactor framework to provide guidance to trial courts in calculating penalties to allow for meaningful appellate review. The issue of whether the trial court should add or subtract penalty days or increase or decrease the per day penalty amount is nothing more than a recalculation of the total penalty; a mathematical computation. If a violation occurred, a penalty of no less than five dollars (\$5) per day must be awarded.

Thus, depending upon the decision on this review, the trial court may be directed to add or subtract penalty days or increase or decrease the per day penalty, resulting in nothing more than a recalculation of the total penalty; a mathematical computation. The distinction is between an order modifying the trial courts decisions and one vacating its decision. *Fulle v. Boulevard Excavating*, 25 Wn. App. 520, 522, 610 P.2d 387 (1980) (*review denied*).

Absent a determination that the trial court erred in finding violations of the PRA by the City, the minimum penalty amount awarded can be no less than five dollars (\$5) for each day a violation occurred. Thus for every instance where a violation was found and that finding is not reversed, there is a minimum penalty. For instance, once the trial court

determined the city had violated the act by wrongfully denying release of the time card (CP 120 (FOF 80-83)),<sup>38</sup> a penalty of no less than five (\$5) per day was mandatory, even if the City is found to be acting in good faith (CP 121 (FOF 85): CP 149 (COL 57)). *Koenig*, 123 Wn. App. at 303. If this decision is affirmed on appeal, the Zinks would be entitled to the post judgment interest under RCW 4.56.110(4). If this decision is remanded, the penalty may need only be increased according to this courts instruction. The Zinks would still be entitled to interest on the amount awarded in the initial judgment under RCW 4.56.110(4) if the remand requires only re-calculation.

This case is distinguished from the *Fisher* case as the determination on remand in *Fisher* may have resulted in no damages whatsoever based upon the loss of value calculation. Here, for every violation, there is a minimum penalty to be awarded. For the violations for which the trial court already awarded five dollars (\$5) per day, that penalty can only be increased. It can be ascertained that those penalties will not be reduced, and the portion of the judgment based on those penalties need not be vacated, only modified.

The trial court found that the November 13, 2002 meeting minutes were public documents (CP 114 (FOF 29): CP 145 (COL 24)), the City violated the act (CP 114 (FOF 29, 37): CP 145 (COL 28)) and the City's actions were egregious behavior, awarding the maximum penalty of one hundred dollars (\$100) per day (CP 115 (FOF 38): CP 145 (COL 30)). Should this court affirm the trial court's decision the Zinks would be entitled to interest on the full award. Alternatively, should the court find error, that there was in

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<sup>38</sup> Neither party assigned error to the trial courts conclusion that the time card was a public record (CP 149 (COL 54)).

improper grouping of these requests, the court would only need to engage in a mathematical calculation to determine the proper penalty, and the Zinks would only be entitled to interest from the date of the original judgment. Where appellate court leaves trial court with nothing more than mathematical calculation and action was not its decision but act performed under direction of appellate court, interest runs from date of original judgment. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 373, 798 P.2 799 (1990). Furthermore, the City has not identified any legal basis for this court to reverse or vacate of the award of attorney fees and costs, including on appeal.<sup>39</sup> This court must affirm this portion of the judgment and the Zinks are entitled to interest on this portion of the judgment under RCW 4.56.110(4).

Neither party assigned error to the following findings of fact, conclusions of law and order:

**CP 111** (FOF 1, 2, 3, 4, 5, 7); **CP 112** (FOF 10, 11, 12, 13, 16, 17, 19); **CP 113** (FOF 22, 23, 26, 27); **CP 114** (FOF 28, 29, 31, 32, 33, 34, 35, 36); **CP 115** (FOF 39, 41, 42); **CP 116** (FOF 46, 47, 48, 52, 53); **CP 117** (FOF 54, 55, 58); **CP 118** (FOF 62, 63, 64, 65, 66); **CP 119** (FOF 69, 70, 72, 73, 75); **CP 120** (FOF 78, 80, 81, 82, 83); **CP 121** (FOF 86, 87, 88, 89); **CP 122** (FOF 93, 94, 95, 99); **CP 123** (FOF 100, 101, 102, 103, 104); **CP 124** (FOF 109, 110, 111, 112); **CP 125** (FOF 113, 114); **CP 126** (FOF 119, 120, 121, 124, 125, 126); **CP 127** (FOF 130); **CP 128** (FOF 134, 136, 138, 140); **CP 129** (FOF 142, 144, 146, 147, 148); **CP 130** (FOF 151, 152, 154, 155, 157); **CP 131** (FOF 158, 159, 160, 162, 163, 164); **CP 132** (FOF 166, 167, 168, 169, 170, 171, 172, 173, 175, 176); **CP 133** (FOF 177, 178, 181, 182); **CP 134** (FOF 184, 186, 188, 190); **CP 135** (FOF 193, 194, 196, 197); **CP 136** (FOF 200, 202, 203, 205, 206); **CP 137** (FOF 208, 209, 211, 214); **CP 138** (FOF 216, 217, 219); **CP 139** (FOF 222, 224, 225, 227); **CP 140** (FOF 230, 231, 232, 235, 238); **CP 141** (FOF 240, 243, 245, 246).

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<sup>39</sup> The Zinks were awarded \$72,309.50 in attorney fees and \$5,700.36 for court costs associated with the initial show cause hearings, appeal, and remand hearings for a total of \$78,009.86.

**CP 142** (COL 2, 4, 6); **CP 143** (COL 12); **CP 144** (COL 16, 17); **CP 145** (COL 24, 25, 26, 27); **CP 146** (COL 32); **CP 147** (COL 39, 43, 44, 46); **CP 148** (COL 50, 248); **CP 149** (COL 54, 58); **CP 150** (COL 62, 66); **CP 151** (COL 70); **CP 152** (COL 74, 78, 82); **CP 153** (COL 86); **CP 154** (COL 94); **CP 155** (COL 98, 102); **CP 156** (COL 105, 109, 111); **CP 157** (COL 113, 115); **CP 158** (COL 121); **CP 159** (COL 125, 126, 129); **CP 160** (COL 133, 137); **CP 161** (COL 141, 145); **CP 162** (COL 149, 153, 154, 155, 156, 157); **CP 163** (COL 158, 159, 160).

**CP 164** (Order 1, 2); **CP 163** (Order 3, 4, 6, 7, 8).

***K. Attorney Fees (Mesa Br. § 5.11 at 69)***

Initially the City claimed that the Zinks were not entitled to penalty days from the date of the courts initial ruling until reversed on appeal (CP 174: RP (November 7, 2008) 13:16-17:15). As a result of this request the trial court decreased the penalty days. The Zinks requested reconsideration and when that failed, filed this appeal. The City now concedes that the trial court erroneously deducted these penalty days (Mesa Br. 52). Furthermore, the City concedes that the trial court erroneously deducted penalty days when requests were denied the same day they were requested (Mesa Br. 55). Unless this court determines otherwise the Zinks are the prevailing party concerning these two issues. As Mesa cannot prevail on any of the issues raised in their appeal, the Zinks respectfully request the Court find the Zinks to be the prevailing party and to award fees and costs under RCW 42.17.340(4)<sup>40</sup> as well as attorney fees and costs under RAP 14.1 and RAP 18.1 and as outlined in their initial briefing.

**IV. CONCLUSION**

Mesa had a responsibility to the people to know, or to investigate, the legality of their compliance with the PRA in their responses to the Zinks' requests. Instead Mesa advised

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<sup>40</sup> Recodified at RCW 42.56.550(4).

the Zinks to seek a legal remedy if they did not like the response. When this action was filed, Mesa had a responsibility to review legal authority to determine if they properly responded to the Zinks requests. They did not do this. Instead, Mesa continued to withhold many of the records for more than six years. To this day Mesa refuses to release some of the records at issue claiming they are gone. Even if Mesa could have argued, “we are just too small to be able to comply” in April of 2003, by April 2009 it is a hollow argument that begs the question of why? Why did Mesa continue to refuse to release documents they knew or should have known were not exempt? There can be no other explanation except hubris. Mesa now plays the sympathy card to gain an advantage.

Mesa’s choice of obstruction of access to public records was their own. They had options. The evidence shows that the clerk wrote out the complaint against 109 North Rowell Avenue and then refused to file it where it could be discovered. The City Clerk, City Attorney, and Building Official knew a BOA meeting was held on November 13, 2002 and yet denied the existence of documents showing evidence of this meeting. Now the City claims they intend to show the trial court that it was the City Building Official who claimed a tape could not be found. Mesa withheld records fundamental to the Zinks appeal of their building permit such as ordinances and the rules of the adjudicating board. The City refused to draft minutes of an agency meeting claiming this is not a violation of the PRA. Official records disappeared, but Mesa never attempts to discern the whereabouts of the missing documents? Instead they claim no violations because the documents are gone and a separate action must be filed. Coupled with the many other transgressions of the PRA as outlined by the Zinks, these actions do not demonstrate the City’s intentions were innocuous. The important questions are:

- Are the penalties high for one of the States smallest agencies? Yes.
- Is there a real possibility Mesa will consider bankruptcy? Yes.
- Do these two factors excuse Mesa’s actions allowing them to escape the “strict compliance” or “be penalized” proclamation outlined by our Legislature? No.

Over the last eight years **Mesa has obstructed access to public documents with no consequences for their actions.** The Zinks were not out to “win a lottery” or “game the system.” On April 30, 2003, the City was given fair notice that the Zinks wanted the documents released. Despite the real possibility of penalties, the City refused. The “pound of flesh” is of the City’s own making. The Legislative directive is clear: absent a legitimate exemption records must be timely released or the agency must be penalized. The Zinks ask the court to uphold this directive and hold Mesa accountable for their actions. Send a clear message: no agency in the State of Washington is exempt from the public records act, no matter how small. Perhaps small agencies will take heed and be properly deterred in the future.

This action needs to end. The continuation of this case weakens the very fabric of the Public Records Act and is a travesty to the people of the State of Washington who demand transparency and openness in our government. Mesa should not be allowed to continue to use the justice system to avoid being held accountable for their actions.

Respectfully submitted this 7<sup>th</sup> day of October, 2010.

LIEBLER, CONNOR  
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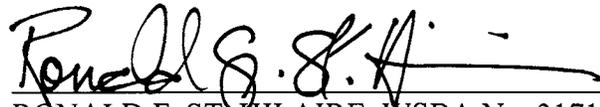
**CERTIFICATE OF SERVICE**

I certify that I mailed a copy of the REPLY BRIEF OF APPELLANTS/CROSS RESPONDENTS JEFF ZINK AND DONNA ZINK to the following, postage prepaid, on the 7<sup>th</sup> day of October, 2010:

Ms. Renee Townsley  
Clerk/Administrator  
Division III, Court of  
Appeals  
500 North Cedar Street  
Spokane, WA 99201-2159

Mr. Lee B. Kerr, Esq.  
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Everett, WA 98201-4067

  
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RONALD F. ST. HILAIRE, WSBA No. 31713  
Attorney for Appellants Jeff Zink and Donna Zink

## APPENDIX A

### RCW 4.16.005

#### **Commencement of actions.**

Except as otherwise provided in this chapter, and except when in special cases a different limitation is prescribed by a statute not contained in this chapter, actions can only be commenced within the periods provided in this chapter after the cause of action has accrued.

### RCW 4.56.110(4)

#### **Interest on judgments.**

Interest on judgments shall accrue as follows:

(4) Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered. The method for determining an interest rate prescribed by this subsection is also the method for determining the "rate applicable to civil judgments" for purposes of RCW 10.82.090.

### RCW 35A.12.020

#### **Appointive officers — Duties — Compensation**

The appointive officers shall be those provided for by charter or ordinance and shall include a city clerk and a chief law enforcement officer. The office of city clerk may be merged with that of a city treasurer, if any, with an appropriate title designated therefor. Provision shall be made for obtaining legal counsel for the city, either by appointment of a city attorney on a full-time or part-time basis, or by any reasonable contractual arrangement for such professional services. The authority, duties and qualifications of all appointive officers shall be prescribed by charter or ordinance, consistent with the provisions of this title, and any amendments thereto, and the compensation of appointive officers shall be prescribed by ordinance: PROVIDED, That the compensation of an appointed municipal judge shall be within applicable statutory limits.

### RCW 35A.21.030

#### **Mandatory duties of code city officers.**

Except as otherwise provided in this title, every officer of a code city shall perform, in the manner provided, all duties of his or her office which are imposed by state law on officers of every other class of city who occupy a like position and perform like functions.

## **RCW 42.17.010(11)**

### **Declaration of policy**

(11) That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.

## **RCW 42.17.020**

### Definitions.

(1) "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

(36) "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. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

## **RCW 42.17.260**

### Documents and indexes to be made public.

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (6) of this section, RCW 42.17.310, 42.17.315, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by RCW 42.17.310 and 42.17.315, an agency shall delete identifying details in a manner consistent with RCW 42.17.310 and 42.17.315 when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.

**RCW 42.17.310**

**Certain personal and other records exempt. (*Expires June 30, 2005.*)**

(1) The following are exempt from public inspection and copying:

(j) Records which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.

**RCW 42.17.410**

**Limitation on actions.**

Any action brought under the provisions of this chapter must be commenced within five years after the date when the violation occurred.

**RCW 42.17.440**

**Statements and reports public records.**

All statements and reports filed under this chapter shall be public records of the agency where they are filed, and shall be available for public inspection and copying during normal business hours at the expense of the person requesting copies, provided that the charge for such copies shall not exceed actual cost to the agency.

**RCW 42.17.920**

**Construction -- 1973 c 1.**

The provisions of this act are to be liberally construed to effectuate the policies and purposes of this act. In the event of conflict between the provisions of this act and any other act, the provisions of this act shall govern.

**RCW 42.30.010**

**Legislative declaration.**

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

**RCW 42.30.060**

**Ordinances, rules, resolutions, regulations, etc., adopted at public meetings — Notice — Secret voting prohibited.**

(1) No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void.

(2) No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot. Any vote taken in violation of this subsection shall be null and void, and shall be considered an "action" under this chapter.

**RCW 42.30.110(1)(i)**

**Executive Sessions**

(1) Nothing contained in this chapter may be construed to prevent a governing body from holding an executive session during a regular or special meeting:

(i) To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.

This subsection (1)(i) does not permit a governing body to hold an executive session solely because an attorney representing the agency is present. For purposes of this subsection (1)(i), "potential litigation" means matters protected by RPC 1.6 or RCW 5.60.060(2)(a) concerning:

(i) Litigation that has been specifically threatened to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party;

(ii) Litigation that the agency reasonably believes may be commenced by or against the agency, the governing body, or a member acting in an official capacity; or

(iii) Litigation or legal risks of a proposed action or current practice that the agency has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the agency;

**RCW 42.30.120**

**Violations — Personal liability — Penalty — Attorney fees and costs.**

(1) Each member of the governing body who attends a meeting of such governing body where action is taken in violation of any provision of this chapter applicable to him, with

knowledge of the fact that the meeting is in violation thereof, shall be subject to personal liability in the form of a civil penalty in the amount of one hundred dollars. The civil penalty shall be assessed by a judge of the superior court and an action to enforce this penalty may be brought by any person. A violation of this chapter does not constitute a crime and assessment of the civil penalty by a judge shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

(2) Any person who prevails against a public agency in any action in the courts for a violation of this chapter shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. Pursuant to RCW 4.84.185, any public agency who prevails in any action in the courts for a violation of this chapter may be awarded reasonable expenses and attorney fees upon final judgment and written findings by the trial judge that the action was frivolous and advanced without reasonable cause.

## **APPENDIX B**

### **RAP RULE 9.3**

#### **NARRATIVE REPORT OF PROCEEDINGS**

The party seeking review may prepare a narrative report of proceedings. A party preparing a narrative report must exercise the party's best efforts to include a fair and accurate statement of the occurrences in and evidence introduced in the trial court material to the issues on review. A narrative report should be in the same form as a verbatim report, as provided in rule 9.2(e) and (f). If any party prepares a verbatim report of proceedings, that report will be used as the report of proceedings for the review. A narrative report of proceedings may be prepared if either the court reporter's notes or the videotape of the proceeding being reviewed are lost or damaged

### **RAP RULE 9.6**

#### **DESIGNATION OF CLERK'S PAPERS AND EXHIBITS**

(a) Generally. The party seeking review should, within 30 days after the notice of appeal is filed or discretionary review is granted, serve on all other parties and file with the trial court clerk and the appellate court clerk a designation of those clerk's papers and exhibits the party wants the trial court clerk to transmit to the appellate court. A copy of the designation shall also be filed with the appellate court clerk. Any party may supplement the designation of clerk's papers and exhibits prior to or with the filing of the party's last brief. Thereafter, a party may supplement the designation only by order of the appellate court, upon motion. Each party is encouraged to designate only clerk's papers and exhibits needed to review the issues presented to the appellate court.

(b) Designation and Contents.

(1) The clerk's papers shall include, at a minimum:

(A) the notice of appeal or the notice for discretionary review;

(B) the indictment, information, or complaint in a criminal case;

(C) any written order or ruling not attached to the notice of appeal, of which a party seeks review;

(D) the final pretrial order, or the final complaint and answer or other pleadings setting out the issues to be tried if the final pretrial order does not set out those issues;

- (E) any written opinion, findings of fact or conclusions of law;
- (F) any jury instruction given or refused that presents an issue on appeal; and
- (G) any order sealing documents if sealed documents have been designated.

(2) Each designation or supplement shall specify the full title of the pleading, the date filed, and, in counties where sub numbers are used, the clerk's sub number.

(3) Each designation of exhibits shall include the trial court clerk's list of exhibits and shall specify the exhibit number and the description of the exhibit to be transmitted.

(c) Format.

(1) Full copies of all designated pleadings shall be included, unless the trial court orders otherwise.

(2) The trial court clerk shall number the papers sequentially from beginning to end, including any supplemental clerk's papers, regardless of which party designated them.

(3) The trial court clerk shall make available a copy of the clerk's papers transmitted to the appellate court to any party, upon payment of the trial court clerk's reasonable expenses. If the trial court clerk generates the clerk's papers in electronic format, the trial court clerk shall make available to any party a copy of the clerk's papers in electronic format, upon payment of the trial court clerk's reasonable expenses.

### **RAP RULE 10.3**

#### **CONTENT OF BRIEF**

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

(1) Title Page. A title page, which is the cover.

(2) Tables. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where cited.

(3) Introduction. A concise introduction. This section is optional. The introduction need not contain citations to the record of authority.

(4) Assignments of Error. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

(5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

(6) Argument. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.

(7) Conclusion. A short conclusion stating the precise relief sought.

(8) Appendix. An appendix to the brief if deemed appropriate by the party submitting the brief. An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).

## **RAP RULE 12.5**

### **MANDATE**

(a) Mandate Defined. A "mandate" is the written notification by the clerk of the appellate court to the trial court and to the parties of an appellate court decision terminating review. No mandate issues for an interlocutory decision of the appellate court.

(b) When Mandate Issued by Court of Appeals. The Clerk of the Court of Appeals will issue the mandate for a Court of Appeals decision terminating review upon stipulation of the parties that no motion for reconsideration or petition for review will be filed. In the absence of that stipulation, and except to the extent the mandate is stayed as provided in rule 12.6, the clerk will issue the mandate: (1) Thirty (30) days after the decision is filed, unless (i) a motion for reconsideration of the decision or a motion to publish has been earlier filed, (ii) a petition for review to the Supreme Court has been earlier filed, or (iii) the decision is a ruling of the commissioner or clerk and a motion to modify the ruling has been earlier filed. (2) If a motion for reconsideration or motion to publish is timely filed, 30 days after expiration of the time for filing a petition for review under rule 13.4(a)(3) If a petition for review has been timely filed and denied by the Supreme Court, upon denial of the petition for review.

(c) When Mandate Issued by Supreme Court. (1) The clerk of the Supreme Court issues the mandate for a Supreme Court decision terminating review upon stipulation of the parties that no motion for reconsideration will be filed. (2) In the absence of such a stipulation, except in a case in which the penalty of death is to be imposed, the clerk issues the mandate twenty days after the decision is filed, unless (i) a motion for reconsideration has been earlier filed, or (ii) the decision is a ruling of the

commissioner or clerk and a motion to modify the ruling has been earlier filed. If a motion for reconsideration is timely filed and denied, the clerk will issue the mandate upon filing the order denying the motion for reconsideration. (3) In a case in which the penalty of death is to be imposed, unless the parties stipulate to earlier issuance of the mandate, the clerk will issue the mandate upon the expiration of the time for applying for review by the United States Supreme Court, or, if such an application is timely filed, upon receipt of the Supreme Court's order disposing of the matter.

(d) Copies Provided in Criminal Case. When the appellate court remands a criminal case to the trial court, the clerk of the appellate court shall transmit a copy of the mandate to the presiding judge of the trial court, to trial counsel of record, and to the clerk of the trial court.

(e) Certificate of Finality. A Certificate of Finality is the written notification by the clerk of the appellate court to the trial court and to the parties of the completion of the proceeding in the appellate court when review is not accepted. The clerk of the Court of Appeals will issue the Certificate of Finality 30 days after the decision is filed unless (i) a motion to modify has been earlier filed or (ii) a motion for discretionary review to the Supreme

## **RAP RULE 12.7**

### **FINALITY OF DECISION**

(a) Court of Appeals. The Court of Appeals loses the power to change or modify its decision (1) upon issuance of a mandate in accordance with rule 12.5, except when the mandate is recalled as provided in rule 12.9, (2) upon acceptance by the Supreme Court of review of the decision of the Court of Appeals, or (3) upon issuance of a certificate of finality as provided in rules 12.5(e) and rule 16.15.(e).

(b) Supreme Court. The Supreme Court loses the power to change or modify a decision of the Court of Appeals upon issuance of the mandate of the Court of Appeals in accordance with rule 12.5, except when the mandate is recalled as provided in rule 12.9. The Supreme Court loses the power to change or modify a Supreme Court decision upon issuance of the mandate of the Supreme Court in accordance with rule 12.5, except when the mandate is recalled as provided in rule 12.9.

(c) Special Rule for Costs and Attorney Fees and Expenses. The appellate court retains the power after the issuance of the mandate or certificate of finality to act on questions of costs as provided in Title 14 and on questions of attorney fees and expenses as provided in rule 18.1.

(d) Special Rule for Law of the Case. The appellate court retains the power to change a decision as provided in rule 2.5(c)(2).

## APPENDIX C

### Rules of Professional Conduct 4.1(a)

#### TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

#### Comment

##### Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

##### Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

##### Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation.

Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

**APPENDIX D**

**Select Compilation of Testimony, Evidence, Argument, and Rational of Decisions**

Record Requested	Trial Court Decision	
COMPLAINT AGAINST 109 N. ROWELL AVENUE	Gross Negligence/Silent Withholding	\$35
<p><b>Evidence Presented:</b></p> <ul style="list-style-type: none"> <li>• Public records are filed by address in the City of Mesa (RP (<u>February 8, 2005</u>) 49:7-22 ; (<u>May 12, 2005</u>) 75:7-77:4: CP 744)</li> <li>• <u>October 24, 2001</u> - Building Inspector asks City if they want him to go after the Zinks (CP 865)</li> <li>• <u>August 7, 2002</u> - Building permit is expired. Zinks are told this was based on complaints from residents RP (<u>February 8, 2005</u>) 45:6-25)</li> <li>• <u>August 8, 2002</u> – Standridge writes out a complaint against 109 North Rowell Avenue and back dates it to August 2, 2002; prior to the expiration of the Zink’s building permit (RP (<u>February 8, 2005</u>) 62:14-20; (<u>May 12, 2005</u>) 97:11-98:7)</li> <li>• <u>August 22, 2002</u> – Complaint against 109 North Rowell Avenue reviewed by City Council (RP (<u>May 12, 2005</u>) 73:1-74:20; 98:8-21) CP 873-874) <ul style="list-style-type: none"> <li>❖ Zinks’ attend Council meeting. The complaint is <b>not openly</b> discussed by the City Council. (RP (<u>February 8, 2005</u>) 61:24-62:7; (<u>May 12, 2005</u>) 74:18-20)</li> <li>❖ Standridge testified the complaint should have been filed in the address files for 109 North Rowell Avenue (RP (<u>May 12, 2005</u>) 76:1-15)</li> </ul> </li> <li>• <u>August 2002</u> – Zink periodically reviews files for 109 North Rowell Avenue (RP (<u>February 8, 2005</u>) 52:11-53:1; (<u>May 12, 2005</u>) 74:21-75:10; 94:2-12: CP 869). <ul style="list-style-type: none"> <li>❖ No complaint found.</li> </ul> </li> <li>• <u>August 29, 2002</u> – Zink reviews files for 109 North Rowell Avenue (RP (<u>May 12, 2005</u>) 74:24-75:6; 77:5-78:13) <ul style="list-style-type: none"> <li>❖ No complaint found</li> </ul> </li> </ul>		

- September 13, 2002 – Zink reviews files for 109 North Rowell Avenue (RP (May 12, 2005) 78:14-22; 82:10-13)
  - ❖ No complaint found.
- September 30, 2002 - Zink reviews files for 109 North Rowell Avenue kept at City Hall. (RP (May 12, 2005) 82:14-83:9).
  - ❖ No complaint found.
  - ❖ Zinks submit written request to review all documents held at the building department for 109 North Rowell Avenue that are not kept at City Hall (RP (February 8, 2005) 47:12-49:6; 50:4-52:2; (May 12, 2005) 83:10-84:2; 90:10-15: CP 860).
  - ❖ Standridge states the City has copies of all documents held at the building department (RP (May 12, 2005) 83:20-84:2).
  - ❖ No complaint found.
- October 9, 2002 – Zink submits another request for all documents pertaining to 109 North Rowell Avenue. (RP (February 8, 2005) 53:5-55:2: CP 869).
  - ❖ Zink verbally asks if all records for 109 North Rowell Avenue have been released. Both Clerks and Mayor state all files have been provided. Zink finds 2 new documents never seen before. (RP (February 8, 2005) 46:1-25)
  - ❖ Standridge states all records kept on 109 North Rowell Avenue had been reviewed by Zink (RP (May 12, 2005) 90:16-91:10: CP 869)
- October 10, 2002 – Zinks go to council meeting, Mayor tells the Zinks the Board of Appeals (BOA) sent more documents and the City now has every document available.
  - ❖ Zink looks through four folders at the meeting (RP (February 8, 2005) 54:25-56:25: (May 12, 2005) 91:11-92:18: CP 742-743).
  - ❖ No Complaint found.
- October 11, 2002 – Zink again reviews files and submits a written request to review all files from the building department (RP (February 8, 2005) 58:11-21; (May 12, 2005) 92:19-94:1: CP 833).
  - ❖ An appointment is scheduled with the building department to review the files (RP (February 8, 2005) 58:22-59:6).
  - ❖ No complaint found. (May 12, 2005) 94:2-12).
- October 24, 2002 – Zink reviewed building department files (CP 871).
  - ❖ No complaint was found (RP (February 8, 2005) 59:7-22)

- ❖ Zink submits a written request to verify all records have been reviewed and asks where is the complaint (RP (February 8, 2005) 59:25-61:1; RP (May 12, 2005) 94:13-96:7: CP 871)
- ❖ Written request for complaint submitted to City Council (RP (May 12, 2005) 91:11-92.
- ❖ Mayor states there is nothing in writing it was a verbal complaint (RP (February 8, 2005) 61:2-18; (May 12, 2005) 96:8-97: CP 846; 848-849; 871)
- ❖ Standridge does not remind the Mayor of the written complaint reviewed by the City Council on August 22, 2002. (RP (May 12, 2005) 96:19-97:10)
- November 21, 2002 – Zink reviews the City Minute Book and discovers an entry that a written complaint was reviewed at the meeting and asks for a copy (RP (February 8, 2005) 61:19-62:14)(CP 873: 876: 879 line 13-880 line 8)(RP (May 12, 2005) 20:9-11; 20:24-22:2: Ex 218)
- November 27, 2002 – Zink provided a copy of the missing complaint against 109 North Rowell Avenue. (RP (February 8, 2005) 62:12-63:23).

**Argument:**

**Zinks**

- Zinks initial request for the complaint against 109 North Rowell Avenue is documented in the evidence by the City of Mesa as August 29, 2002 (RP (July 16, 2008) 19:6-11; 21:17-22-18; )
- City was intentionally hiding the complaint against 109 North Rowell Avenue by not filing the record in the address files for 109 North Rowell Avenue after it was reviewed by the City Council so that it could be found by the Zinks The City was silently withholding this document (RP (July 16, 2008) 27:16-30:6)
- The request received on September 30, 2002 was responded to on September 30, 2002 (RP (July 16, 2008) 23:8-14)
- Zink was requesting a file that should have contained the complaint. (RP (July 16, 2008) 27:10-15)

**Mesa**

- Zink requested files held by the building department and not files kept at City Hall (RP (July 16, 2008) 30:8-9; 31:23-25)
- The building department did not have that record for whatever reason (RP (July 16, 2008) 27:10-15; 30:7-16; 31:23-32:18)
- City should not have to be a mind reader when files are requested and look for records in every City department (RP (July 16, 2008)

- Request to provide testimony tomorrow morning on this request. (RP (July 16, 2008) 37:3-8)

**Trial Court Decision and Rational:**

- City maintains records by address, residential address. Don't look up someone, you look up someone's property file (RP (July 16, 2008) 30:16-19)
- The City of Mesa records/files are maintained by addresses. (RP (July 16, 2008) 30:16-19)
- City knew what record Zink was looking for before she specifically pointed it out in the minutes. Zink made it perfectly clear what she was going after, anything and everything (RP (July 16, 2008) 32:19-25)
- The City was silently withholding the document violating the PRA. The City knew what document Ms. Zink was looking for (RP (July 16, 2008) 32:24-33:24)
- Silently withholding the Complaint is Gross Negligence (RP (July 16, 2008) 34:12-23)
- First request was on September 30, 2002 (RP (July 16, 2008) 34:23-35:1)
- Mandatory to subtract five business days. Just because it can be produced quicker does not mean the City has to produce it (RP (July 16, 2008) 35:1-36:4)
- Penalty days are between October 7 to November 27 is fifty-one days (RP (July 16, 2008) 36:19-24)
- Daily penalty amount of \$35. (RP (July 16, 2008) 36:24-37:2)
- City can provide further testimony tomorrow (RP (July 16, 2008) 37:3-8).

Record Requested	Trial Court Decision	
CLERKS MEMOS AND NOTES - OCTOBER 2002	Good Faith/Mere Negligence	\$5

**Evidence Presented:**

- August 2002 - Mayor instructs City clerks to copy everything Ms. Zink copies or reviews and to keep notes on her activities. (RP (May 12, 2005) 78:21-80:21).
  - ❖ Stephenson testifies note taking started in August or September 2002 (RP (May 12, 2005) 16:24-18:18).

- October 10, 2002 – Zinks attend City Council meeting. D. Zink reviews the files at the Council meeting. Zink discovers the clerks memos and notes kept on her demeanor/behavior at City Hall and reads them in their entirety (RP (February 8, 2005) 56:9-25; 57:10-13; 64:10-22; (May 12, 2005) 98:22-99:13: CP 869).
  - ❖ Zink verbally requests copies of the memos and notes at the meeting (RP (February 8, 2005) 57:10-24).
- October 11, 2002 – Zink verbally requests to review folders of clerks notes and memos and make some copies (RP (February 8, 2005) 57:25-58:9; 64:23-65:3: CP 833 para. 3).
  - ❖ City verbally denies request (RP (February 8, 2005) 57:22-24; 64:23-65:19).
  - ❖ Zink submits a written request to access file of memos and notes (CP 833 para. 3).
  - ❖ City does not respond (RP (February 8, 2005) 65:4-13).
- October 15, 2002 – Zink submits written requests access to file of memos and notes (CP 844 para. 1).
  - ❖ No response from the City.
- October 17, 2002 – Zink submits another written request for access to file with memos and notes (RP (February 8, 2005) 65:20-66:9: CP 835).
- October 24, 2002 - City responded that memos and notes are exempt under RCW 42.17.310(1)(i). (RP (February 8, 2005) 66:10-67:5; 67:16-68:5: CP 837).
  - ❖ Zink submits a written request to reconsider refusal to release of memos and notes and tells the City to read the advice given by Municipal Research (RP (February 8, 2005) 68:6-69:16: CP 844 para. 3; 841-842).
  - ❖ Zinks attend Council meeting that night and City verbally denies release of the memos and notes (RP (February 8, 2005) 69:17-21).
  - ❖ No other response received from City.
- February 4, 2002 – Zinks submit written request that memos and notes be preserved (RP (February 8, 2005) 69:22-70:15: CP 851).
- February 7, 2002 – City responds that the memos and notes are exempt per RCW 42.17.310(1)(i) and were not presented at the meeting; states they are standing by their decision (RP (February 8, 2005) 70:16-71:7: CP 853).
  - ❖ No report was ever made from the memos and notes (RP (February 8, 2005) 67:6-14; 71:8-25).
- May 11, 2005 – J. Zink testifies that D. Zink reviewed the files of the memos and notes at the Council meeting on October 10, 2002, she took approximately 30 minutes to review them and the meeting continued during the review (RP (May 11, 2005))

365:10-366:24; 368:7-22).

- June 10, 2005 – Zink submits another written request for memos and notes. (Ex 231).
- June 29, 2005 – The bulk of the Memos and notes were released to the Zinks.

**Argument:**

**Zinks**

- Exemption claimed by the City does not apply to the clerks memos and notes. They are not covered under the deliberative process exemption. (RP (July 16, 2005) 40:16-41:21).
- Did not respond to the requests within five days. City claims exemption but never investigates whether exemption applies. City refused to follow legal advice on claimed exemption from Municipal Research. City did not consider redacting and release of nonexempt material. D Zink was allowed review documents in their entirety at a Council meeting and then claimed exemption. Didn't want Ms. Zink to get copies of the notes they made on her activities. (RP (July 16, 2005) 47:24-50:12).
- At what point does the agency have the responsibility to reassess the clerks arrant legal opinion (RP (July 16, 2005) 51:17-19).

**City**

- Internal notes that were not provided were exempt, internal memorandum are exempt. Internal memorandums are not public documents (RP (July 16, 2005) 39:23-40:16).
- The City misread the law (RP (July 16, 2005) 50:13-14).

**Trial Court Decision and Rational:**

- The memos and notes are not exempt under the deliberative process. The City thought they had an exemption but turned out it didn't. (RP (July 16, 2005) 43:5-9).
- Being allowed to merely look at them does not satisfy the request for copies (RP (July 16, 2005) 44:1-3).
- Although some of the notes and memos were not released until June 3, 2008, the production date of June 29, 2005 will be used for assessment of penalty days (RP (July 16, 2005) 45:10-19).
- The staff's position that there was an exemption shows good faith. (RP (July 16, 2005) 50:14-16).
- The City clerk as a lay person applied an incorrect definition to those opinions shows good faith (RP (July 16, 2005) 51:7-17).
- They thought they had something to hang their hat on. (RP (July 16, 2005) 50:21-51:3).

- The City should not have to rely on a lay person's advice; Ms. Zink was a non-lawyer (RP (July 16, 2005) 51:21-53:6).
- Clearly Ms. Zink got under their skin like Bamboo under the fingernails. (RP (July 16, 2005) 50:15-18).
- Mere negligence, the least egregious and the daily penalty is the statutory minimum \$5 (RP (July 16, 2005) 47:9-19; 53:5-9).

Record Requested	Trial Court Decision	
BOA MEETING MINUTES OF NOVEMBER 13, 2002	Egregious and Willful	\$100

**Evidence Presented:**

- October 7, 2002 – The first Board of Appeals (BOA) meeting was held on October 7, 2002. Zinks object to meeting due to due process violations and violations of the OPMA (RP (February 8, 2005) 72:1-73:20).
- October 8, 2002 – Zink submits a written complaint, informing the City of violation of the OPMA by the BOA and asks for meeting notice for subsequent meetings (RP (February 8, 2005) 73:15-74:6; (May 12, 2005) 105:1-8: CP 415).
  - ❖ The Zinks' were not notified that any other meetings were scheduled (RP (February 8, 2005) 74:7-10).
- November 13, 2002 – BOA executive meeting in Richland, Washington (RP (February 8, 2005) : CP 424; 428-431; 791-792).
  - ❖ BOA adopts rules and regulations and instructs the secretary/Building Official to submit them as adopted to the City of Mesa for approval at their next Council meeting (RP (May 12, 2005) 111:7- 23: Ex 222 pg. 1 para. 5 and 6).
  - ❖ Zinks appeal is presented at the BOA executive meeting and the Zinks request for an appeal is denied (Ex 222 pg. 2).
  - ❖ BOA schedules hearing for other appeals on December 5, 2002 (Ex 222 pg. 2).
- November 14, 2002 – Minutes of BOA meeting faxed to City Hall (12:30 p.m.) (RP (May 12, 2005) 110:14-111:15: Ex 222).
  - ❖ Standridge contacts Municipal Research Services Center and is told that the meeting was held illegally (CP 802).
  - ❖ At the council meeting held that night Mayor states BOA not quite ready and will send letter. (RP (February 8, 2005) 74:10-75:7; (May 12, 2005) 115:16-116:5: CP 957-958; 960-961).
- November 21, 2002 – Zinks receive notice from the City concerning scheduling of hearing (RP (February 8, 2005) 75:8-23)
  - ❖ Standridge contacts Building Department about Municipal Research information (May 12, 2005) 116:6-24: CP 794)
- November 24, 2002 – Requested minutes of meeting at which their appeal was presented to the BOA (RP (February 8, 2005) 75:24-76:19; (May 12, 2005) 99:14-100:24: CP 796-797)

- ❖ Standridge drafted minutes of the October 7, 2002 BOA meeting (RP (May 12, 2005) 101:3-103:12; 114:10-13: CP 508-509)
- ❖ Zink specifically states she already has minute of October 7, 2002 meeting and did not need those (RP (May 12, 2005) 103:13-24; 104:11-25; 105:9-106:12: CP 797; 415: Ex 218)
- ❖ Faxed November 24, 2002 request to the City Building Department (RP (May 5, 2005) 120:6-18: CP 946)
- December 2, 2002 – The Building Official denies the request stating that no meetings have been held and there are no documents responsive to the Zink’s request (RP (February 8, 2005) 76:20-79:14: CP 800)
  - ❖ The City knew the building department denied the meeting had been held and did not release the documents related to the November 13, 2002 BOA meeting. (RP (May 5, 2005) 120:18-121:16): CP 799-800).
  - ❖ No other response was provided by the City to the Zinks for this request.
- December 5, 2002 – BOA held another meeting and the board members specifically did not mention the meeting held on November 13, 2002 (CP 521 0010:7-16).
  - ❖ The building official/secretary again presented the Zinks appeal. (RP (February 8, 2005) 79:15-80:1: CP 522 0012:15-0013:2)
- March 5, 2003 – BOA held their last meeting in Richland Washington and approved their minutes (CP 519)
  - ❖ The Zinks objected to the meeting being held in Richland and the draft minutes of the meetings stating they were inaccurate and did not reflect what happened at the meetings (CP 524-525; 531, 533).
  - ❖ The BOA upheld the building departments decision to expire the Zinks permit (RP (May 11, 2005) 255:16-256:8).
  - ❖ The Board members resigned (RP (May 13, 2005) 483:3-10)
- April 4, 2003 – Zinks filed a LUPA action requesting review of the BOA decision to expire their permit (RP (May 11, 2005) 256:1-20)
- August 8, 2003 – Record submitted to the trial court for the LUPA action.
  - ❖ Zinks received agenda of November 13, 2002 BOA meeting (RP (February 8, 2005) 80:2-13; 83:13-84:5: CP 424)
  - ❖ Zinks received minutes of the November 13, 2002 meeting (RP (February 8, 2005) 85:5-86:7)
- May 12, 2005 - Standridge testified she did not know about the BOA meeting of November 13, 2002 at the time of Zink request (RP (May 12, 2005) 106:13-107:8. (CP 796-797; 791-792)
  - ❖ Standridge did not draft minutes of November 13, 2002 BOA meeting (RP (May 12, 2005) 107:9-: CP 791-792)

- ❖ Standridge testified that she did receive minutes of meeting on November 14, 2002 (RP (May 12, 2005) 107:20-110:13; CP 791-792)
- ❖ Standridge testifies that minutes of November 13, 2002 BOA meeting received by the City on November 14, 2002 were responsive to Zinks request (RP (May 5, 2005) 112:2-116:5; 11625-118:4; Ex 222)
- ❖ Standridge testifies that she never told Zinks about November 13, 2002 BOA meeting because she did not understand the request (RP (May 5, 2005) 118:5-18)
- May 13, 2005 – Standridge submitted a copy of the November 13, 2002 BOA meeting to the court. This document contains the fax header clearly showing the minutes were faxed to the City on November 14, 2002 (RP (May 13, 2005) 463:22-464:18)

**Argument:**

**Zinks**

- The City had the minutes of the November 13, 2002 BOA meeting at City Hall on November 14, 2002. The City called Municipal Research that same day about the meeting. The Building Official had them, the BOA had them and therefore the City had them. (RP (July 16, 2005) 56:22-57:6)
- A secret meeting was held by the Mesa Board of Appeals. The records of this meeting were withheld from Ms. Zink because they knew she would give them heck about it. At the meeting the board discussed the Zink's appeal and took an ex-parte vote declining to hear the appeal. The meeting violated the OPMA. Board was tainted and should have recused themselves. Instead they continued on as if nothing had happened. The City knew what was going on, they knew they made a mistake and they covered it up (RP (July 16, 2005) 58:11-59:22)

**City**

- The City did not have the November 13, 2002 BOA meeting materials (RP (July 16, 2005) 55:1-8)
- Board was made up of lay persons not familiar with the rules and regulations. They found out about their mistake and they went back and did it over. The City did not try to secret this. If they were acting in bad faith they certainly would have destroyed any evidence of the meeting. No axe to grind. Obviously they should have produced it but it wasn't. (RP (July 16, 2005) 59:23-60:12)

**Trial Court Decision and Rationale:**

- Even though documents are not at City Hall they are still within the power and control and access of the City. The Board of

Appeals is an extension of the City of Mesa and should have been provided. (RP (July 16, 2005) 55:8-15)

- By law, possession by the Building Inspector and Board of Appeals is possession by the City. (RP (July 16, 2005) 57:6-10)
- Requested item are one request.
- This is a willful and egregious violation of the public records act. The most egregious thus far discussed and probably the most egregious of all. To hold an unlawful meeting and then cover it up Richard Nixon style was just terrible and inexcusable. (RP (July 16, 2005) 60:12-20)

Record Requested	Trial Court Decision	
<b>BOA TAPE OF THE NOVEMBER 13, 2002 MEETING</b>	<b>Egregious and Willful</b>	<b>0/\$100</b>
<p><b>Evidence Presented:</b></p> <ul style="list-style-type: none"> <li>• <u>August 8, 2002</u> – Zinks discovered November 13, 2002 BOA meeting agenda and minutes in documents submitted in the LUPA case, no tape provided (RP (February 8, 2005) 85:5-86:13)</li> <li>• <u>August 20, 2002</u> – Zink submits a second written request for tape of November 13, 2002 BOA meeting (RP (February 8, 2005) 86:14-87:5; (May 12, 2005) 121:17-122:1: CP 811). <ul style="list-style-type: none"> <li>❖ The City did not respond to the request.</li> </ul> </li> <li>• <u>August 28, 2002</u> – Zink contacted City Hall to find out about request for November 13, 2002 tape and is told Stephenson was not available to respond to the request (RP (February 8, 2005) 87:6-87:19).</li> <li>• <u>August 29, 2002</u> – City responds with a ten day letter to assemble and locate the tape (RP (May 12, 2005) 122:2-22: CP 813). <ul style="list-style-type: none"> <li>❖ Zink verbally requests the City to reconsider delay in release of the tape (RP (February 8, 2005) 87:20- 89:20)</li> </ul> </li> <li>• <u>September 3, 2003</u> - Zink goes to City Hall to get a copy of the tape. Standridge tells Zink the tape could not be released until the City Attorney is contacted and he agrees to release the tape. (RP (February 8, 2005) 89:4-14) <ul style="list-style-type: none"> <li>❖ Submits a written request reconsider delay in release of November 13, 2002 BOA meeting tape, the request was denied. (RP (February 8, 2005) 88:11-90:25; May 12, 2005) : 122:15-22: CP 815; 813)</li> </ul> </li> <li>• <u>September 4, 2003</u> – Contacted City Hall to see if tape was ready. Told Tanner had not contacted them. Requested the letter be faxed to City Attorney. City refused to fax letter. (RP (February 8, 2008) ) 91:1-16). <ul style="list-style-type: none"> <li>❖ Zink scanned letter and sent letter to City Attorney (RP (February 8, 2005) 91:17-92:6: CP 815, 821)</li> </ul> </li> </ul>		

❖ Received tape of the meeting at one o'clock that same day (RP ( <u>February 8, 2005</u> ) 92:7-14; ( <u>May 12, 2005</u> ) 122:17-22); CP 796-797)		
<b>Argument:</b>		
<ul style="list-style-type: none"> <li>• August 8, 2002 – Discovered November 13, 2002 BOA meeting minutes and agenda</li> </ul>		
<b>Trial Court Decision and Rational:</b>		
<ul style="list-style-type: none"> <li>• Grouped with November 13, 2002 meeting minutes (see above).</li> <li>• An additional hundred dollars a day for 28 days for withholding the Tape from August 7, 2003 until September 24, 2003 (RP (<u>July 16, 2005</u>) 61:1-9)</li> </ul>		
<b>Record Requested</b>	<b>Trial Court Decision</b>	
<b>TWENTY-ONE CODE VIOLATION LETTERS</b>	<b>Mere Negligence</b>	<b>\$10/\$5</b>
<b>Evidence Presented:</b>		
<ul style="list-style-type: none"> <li>• Began Investigation of Code violations letters sent to residents. (RP (<u>February 8, 20005</u>) 40:41:16; (May 11, 2005) 300:13-301:12)</li> <li>• Finds out Council Member Ferguson is building without a permit complains about disparate treatment (RP (<u>February 8, 2005</u>) 41:16-42:8; (May 11, 2005) 308:5-17).</li> <li>• Ferguson is not charged code violation fees and no bill is submitted by TBD to City for investigation (RP (<u>February 8, 2005</u>) 42:9-16)</li> <li>• Zink finds evidence and Ferguson gets fined and City gets billed. (RP (<u>February 8, 2005</u>) 42:17-25)</li> <li>• <u>November 27, 2002</u> – Requests review of 21 Code Violation letters. (RP (<u>February 8, 2005</u>) 94:7-95:14; RP (May 12, 2005) 123:7-10: CP 914)</li> <li>• <u>December 5, 2002</u> – City delays request for 30 days in order to locate and assemble the documents (RP (<u>February 8, 2005</u>) 95:15-96:3; RP (<u>May 12, 2005</u>)123:11-124:2; 125:6-20: CP 916).</li> </ul> <p style="margin-left: 40px;">Standridge stated clerks went through 120-150 files several times in order to find the 21 letters <u>RP (May 12, 2005) 123:25-124:13</u>: CP 916)</p>		

- January 4, 2003 – Goes to review the Code Violation letters: letters are not available. (RP (February 8, 2005) 96:4-15)
- January 13, 2003 – Goes to City Hall to review Code Violation letters: only half of the documents are available (RP (February 8, 2005) 96:16-97:13)
- January 23, 2003 – Zink attends Council meeting and discusses Building permit investigation (code violation) fees charged to residents (CP 903)
- January 24, 2003 – City denies request for remaining 10 Code Violation letters claiming it was unclear what records were being requested (RP (February 8, 2005) 97:13-17; (May 12, 2005) 125:21- 126:9; 132:20-133:8; 22:3-23:6: CP 918)  
     City filed other half of Code Violation letters and they were not available (RP (February 8, 2005) 97:18-98:1)  
     Standridge testified that she understood Zink got the dates from the Building Departments billing but they could not find them RP (May 12, 2005) 126:10-20: CP 914)
- February 3, 2003 – Reconsideration request for denial of Code Violation letters and clarification of records sought (RP (February 8, 2005) 98:2-23 RP (May 12, 2005) 133:9-134:9: CP 920-921)
- February 10, 2003 – City responds the request is unclear and the request needs to include street addresses (RP (February 8, 2005) 98:24-99:18 RP (May 12, 2005) 134:10-135:5: CP 923)
  - ❖ Zink could not provide street addresses so told City to Contact the Building Official to get the street addresses (RP (February 8, 2005) 99:19-100:7)
  - ❖ Standridge – City called the Building Department but he was not helpful. Figured he could not find them either (RP (May 12, 2005) 127:7-17: Ex 222)
- February 14, 2003 - Allowed to review Code Violation letters (RP (February 8, 2005) 100:8-9)  
     After reviewing the Code Violation letters in their entirety. The City redacted any requested copies (RP (February 8, 2005) 100:9-101:15)  
     May 12, 2005 – Clerk testifies City has always redacted documents containing personal information (RP (May 12, 2005) 135:6-17)
  - ❖ Stephenson testified Standridge or the Mayor told her how to respond to requests and to redact documents (RP (May 12, 2005) 11:8-18)
  - ❖ Stephenson testified that she was the one who looked for the Code Violation letters (RP (May 12, 2005) 22:18-25:8)
  - ❖ Stephenson testified that she spent a couple weeks at 17 hours per week looking through the files (RP (May 12, 2005))

23:11-24:3; 24:18-21)

- ❖ Evidence provided by Zinks show research for 21 Code Violation letters took approximately 13.5 hours (Ex 232 p. 3)
- ❖ Stephenson stated she could not remember calling the Building department (RP (May 12, 2005) 25:9-18)
- ❖ Stephenson stated that if told to do so she would redact documents after Ms. Zink reviewed them and that she never gave a written reason for the redactions (RP (May 12, 2005) 25:19-26:12)
- ❖ No written statement was ever provided to Zink explaining the redactions of the records (RP (May 12, 2005) 135:18-136:14; CP 1010, 1012)
- ❖ Standridge stated Municipal Research to them to delete the information years before this request (RP (May 12, 2005) 136:15-19; CP 966-967)
- ❖ Evidence presented that records received for Council member Ferguson's were received un-redacted in October 2002. Zink filed complaints against Council member Ferguson for building without a permit and not being charged code violation fees (RP (May 12, 2005) 136:20-138:1 : CP 351-354, 356-359)
- ❖ Standridge testified Stephenson released un-redacted copies because Standridge did not know about it. (RP (May 12, 2005) 140:25-141:3)
- ❖ Evidence was presented that other residential records were provided to Zink in un-redacted form in (RP (May 12, 2005) 139:24-140:16; CP 370, 361-362, 364-365)
- Zink started receiving redacted documents after filing a complaint using these documents to show that the residents were being double charged by the City (RP (May 12, 2005) 139:24-140:16; (May 13, 2005) 489:13-22; CP 3674-368, 370)
- Only redacted documents were received after this time (CP 372, 373, 375, 376, 377, 379, 380)
- City knew as of June 2003 that the redacted material was not exempt but continued to withhold the un-redacted documents. (CP 966-967)

**Argument:**

**Zink**

- The PRA requires a specific statement of the exemption your claiming when redactions are made. City never provided a written statement justifying redactions. Can't determine if judicial review is necessary since we don't know what was redacted. These documents were requested by date and not by address. (RP (July 16, 2005) 64:22-65:9)
- City's request for clarification was unreasonable after delaying the request for thirty days (RP (July 16, 2005) 66:10-22)

**City**

- Address or something to do with identification of personal information was redacted (RP (July 16, 2005) 64:20-22)
- The City provided a written response but I don't have that in front of me. There was a response give that cites the RCW (RP (July 16, 2005) 65:12-15)
- The court is aware of all that is going on during this time period, they became confused, lost track of what was going on. They should have responded sooner so they were tardy but he clarification letter is appropriate. It was taking them a long time to respond to all of these (RP (July 16, 2005) 66:23-67:10)
- At sometime the clock has to stop and a judgment entered. Can't keep a case open for 100 years (RP (July 16, 2005) 68:25-69:5)

**Trial Court Decision and Rational:**

- Technically the redactions should not have been done. There is no statutory exemption that applies. (RP (July 16, 2005) 65:15-23)
- Thirty day delay was not in violations of the PRA because of the cumbersome way the City indexes records (RP (July 16, 2005) 66:2-4)
- I estimate between 100 to 150 document requests spread out through the time involved (RP (July 16, 2005) 67:1-3)
- The lack of cross referencing of the files required a manual check of each and every residential file to find these 21 letters so thirty days is okay. The clarification was improper. (RP (July 16, 2005) 67:11-22)
- Ten dollars a day for subsequent delay in production of the records until February 14, 2003 (RP (July 16, 2005) 68:2-13)
- Un-redacted records need to be produced and a minimum of five dollars a day through today. (RP (July 16, 2005) 69:5-8)

**Record Requested**

**Trial Court Decision**

ORDINANCE 03-02: SETTING HOURS FOR CITY HALL	No Violation	0
<p><b>Evidence Presented:</b></p> <ul style="list-style-type: none"> <li>• <u>December 11, 2002</u> – Request for Ordinances, resolutions, and procedures for setting hours of operation for Mesa City Hall (RP (<u>February 8, 2005</u>) 101:20-102:19; (<u>May 12, 2005</u>) 26:13-19: CP 899)</li> <li>• <u>December 12, 2002</u> – City releases Resolution 1992-005. Determines there is no Ordinance setting hours of operation (Ex 233 p. 1)</li> <li>• <u>December 17, 2002</u> – Response: production of Ordinance delayed 30 days in order to locate and assemble the document (RP (<u>February 8, 2005</u>) 102:20-103:14: CP 901)</li> <li>• <u>January 10, 2003</u> – City tells Zink the Ordinances doesn't exist (RP (<u>February 8, 2005</u>) 104:4-18 :Ex 233 p. 2)</li> <li>• <u>January 17, 2003</u> – Stephenson contacts Municipal Research concerning samples of ordinances and resolutions (RP (<u>May 12, 2005</u>) 31:1—14: CP 485)</li> <li>• <u>January 23, 2003</u> – Council approves Ordinance 03-02 setting hours of operation (RP (<u>February 8, 2005</u>) 104:4-106:19: CP 903-904)</li> <li>• <u>January 24, 2003</u> – 2<sup>nd</sup> request for Ordinance 03-02 received copy (RP (<u>February 8, 2005</u>) 106:18-107:12: CP 906)</li> <li>• <u>May 12, 2005</u> – <ul style="list-style-type: none"> <li>❖ Stephenson testified that the City has an index of Ordinances and she did not know why it would take thirty days to locate on Ordinance (RP (<u>May 12, 2005</u>) 31:15-25)</li> </ul> </li> </ul>		
<p><b>Argument:</b></p> <p><b>Zinks</b></p> <ul style="list-style-type: none"> <li>• The City knew the day after Ms. Zink requested the document that it did not exist. The response provided is unreasonable (RP (<u>July 17, 2008</u>) 6:2-13: Ex 233)</li> </ul> <p><b>City</b></p> <ul style="list-style-type: none"> <li>• The City didn't think they had it so they needed thirty days to go back and check. When they finally determined they did not have the ordinance they took action in January (RP (<u>July 17, 2008</u>) 8:8-12)</li> </ul>		

<b>Trial Court Decision and Rational:</b>		
<ul style="list-style-type: none"> <li>• Response to request was reasonable (RP (July 17, 2008) 10:9-11:7)</li> </ul>		
<b>Record Requested</b>	<b>Trial Court Decision</b>	
<b>ORDINANCE 01-05 - PUBLIC HEARING NOTICE REQUIREMENTS</b>	<b>Mere Negligence</b>	<b>\$5</b>
<b>Evidence Presented:</b>		
<ul style="list-style-type: none"> <li>• <u>December 11, 2002</u> – Request for Ordinance for publication of public hearing notices (RP (<u>February 8, 2005</u>) 101:20-102:19; (May 12, 2005) 26:13-19; 145:11-20 : CP 899) <ul style="list-style-type: none"> <li>❖ Zink specifically requests the Ordinance for the publication of hearing notices with Stephenson. Told there wasn't one (RP (<u>February 8, 2005</u>) 103:25-104:4; (<u>May 12, 2005</u>) 26:20-27:15)</li> </ul> </li> <li>• <u>December 12, 2002</u> – City releases Resolution 1992-005. Determines there is no Ordinance for the publication of public hearing notice requirements (RP (Ex 233 p. 1)</li> <li>• <u>December 17, 2002</u> – Response: production of Ordinance delayed 30 days in order to locate and assemble the document (RP (<u>February 8, 2005</u>) 102:20-103:14: (<u>May 12, 2005</u>) 29:17-30:17: CP 901)</li> <li>• <u>January 10, 2003</u> – City tells Zink the Ordinance doesn't exist (RP (<u>February 8, 2005</u>) 104:4-18: Ex 233 p. 2)</li> <li>• <u>January 17, 2003</u> – Stephenson contacts Municipal Research concerning samples of ordinances and resolutions (RP (<u>May 12, 2005</u>) 31:1—14: CP 485)</li> <li>• <u>February 13, 2003</u> – City passes Resolution 2003-02 Adopting procedures for Publication of Ordinances and Posting Notices (RP (<u>February 8, 2005</u>) 108:10-109:2) <ul style="list-style-type: none"> <li>❖ Ms. Zink did not feel this document was responsive to her request for Ordinance on public hearing notice so she kept looking for the Ordinance for public hearing notice (RP (<u>February 8, 2005</u>) 109:3-22)</li> </ul> </li> <li>• <u>March 3, 2003</u> – Zink specifically requests Ordinance 01-05 (RP (<u>February 8, 2005</u>) 109:23-110:13: CP 767) <ul style="list-style-type: none"> <li>❖ Ordinance 01-05 is the City Ordinance pertaining to the notification of public hearings for Land Use Decision (RP (<u>February 8, 2005</u>) 110:14-21: CP 487-489)</li> <li>❖ Ordinance 01-05 was enacted in 2001 (RP (<u>February 8, 2005</u>) 111:7-17: CP 487-489)</li> <li>❖ Zink states Ordinance 01-05 was the document she was looking for. It is the policy used by the BOA to publish notice</li> </ul> </li> </ul>		

of the Public Hearing held on their appeal (RP (February 8, 2005) 111:18-112:9)

- ❖ Zink testifies that she was a Councilmember when this was adopted by the City (RP (February 8, 2005) 112:10-18)
- ❖ The Ordinance is signed by Standridge (RP (May 12, 2005) 147:2-5: CP 487-489)

- May 12, 2005 –

- ❖ Stephenson testified that the City has an index of Ordinances and she did not know why it would take thirty days to locate on Ordinance (RP (May 12, 2005) 31:15-25)
- ❖ Standridge testified that after the holidays she searched for the missing ordinances and resolutions (RP (May 12, 2005) 145:21-146:1)
- ❖ Standridge testified that Ordinance 01-05 provides for the notification public hearings (RP (May 12, 2005) 148:3—9)
- ❖ Standridge testified that she did not mention the existence of Ordinance 01-05 to Ms. Zink because it was not her job (RP (May 12, 2005) 148:12-25)

- May 13, 2005 –

- ❖ Standridge testified that she researched the City ordinances and resolutions and found they did not exist. As there are numerous resolutions and ordinance it took some time to complete so she did a thirty day delay (RP (May 13, 2005) 480:4-16)
- ❖ Standridge testified that she notified the mayor and the City took steps to adopt these statutory procedures (RP (May 13, 2005) 480:17-22)
- ❖ Standridge testified that her understanding of Zinks request for publication of upcoming hearings for only the City Council; not for any other City board (RP (May 13, 2005) 481:9-482:7)

**Argument:**

**Zinks**

- Except for Ordinance 01-05 every document requested on December 11, 2002 was provided the next day or did not exist (RP (July 17, 2008) 13:24-14:7)
- This Ordinance pertained to the Zinks appeal before the BOA, notice requirements for their public hearing, and violations of the BOA (RP (July 17, 2008) 16:5-9).

**City**

- High volume of requests caused them to withhold Ordinance 01-05 (RP (July 17, 2008) 15:2-7)

**Trial Court Decision and Rational:**

- Thirty day delay was reasonable due to high volume of request, not high volume of request for this particular request. High volume of requests in general. (RP (July 17, 2008) 14:7-19).
- During that time period there were a lot of requests and there is nothing wrong with the city trying to provide all the documents at the same time (RP (July 17, 2008) 15:7-22).
- Sure the City was scrambling to get those rules and procedures without success at the time. Covered under the umbrella of high volume of request. (RP (July 17, 2008) 16:9-18).
- Mere Negligence penalty of five dollars per day **because it got lost in the shuffle** (RP (July 17, 2008) 16:18-22).

Record Requested	Trial Court Decision	
COUNCIL RESIGNATION LETTERS	Mere Negligence	\$5
<p><b>Evidence Presented:</b></p> <ul style="list-style-type: none"> <li>• Investigated why Leo and Linda got off City Council. (RP (February 8, 2005) 43:17-21)</li> <li>• <u>January 9, 2003</u> – Requested copies of resignation letters told by Standridge they could not be released until the City Council had approved them. Did not receive copies or delay letter (RP (February 8, 2005) 112:19-114:6; 114:17-20: CP 883)</li> <li>• <u>March 10, 2003</u> – 2<sup>nd</sup> request for resignation letters (RP (February 8, 2005) 114:7-16: CP 779)</li> <li>• <u>March 13, 2003</u> – 14 day delay to determine if these records were exempt (RP (February 8, 2005) 116:8-117:21: CP 775)</li> <li>• <u>March 14, 2003</u> – Delay letter delaying request until April 11, 2003 (RP (February 8, 2005) 117:22-118:17: CP 781)</li> <li>• <u>April 4, 2003</u> – Zink’s file LUPA action in the Superior Court contesting BOA decision (RP (May 11, 2005) 318:2-319:4) <ul style="list-style-type: none"> <li>❖ City clerk limits time for review of records to one hour per day without City Attorney authorization (RP (May 11, 2005) 317:1-318:1)</li> </ul> </li> </ul>		

- April 10, 2003 – City begins to audio tape all interactions with Ms. Zink. City states no record will be released until Zink’s attorney contacts City Attorney (RP (February 8, 2005) 119:11-120:12; CP 941-942)
- April 11, 2003 – City refuses to release records without Zink’s attorney contacting City Attorney (RP (May 11, 2005) 302:13-22; May 12, 2005) 51:21-53:4; CP 720-722, 781: Ex 211).
- April 15, 2003 – Zink goes to City Hall to access records and to receive the copies previously scheduled for release by the City of Mesa on April 11, 2003 and receives redacted copies of the resignation letters (CP 462-463; 689-691)
- May 11, 2005 – Standridge testifies that the City began to record all interaction with Ms. Zink because she was threatening them and the City Attorney advised them to record the interactions (RP (May 11, 2005) 381:11-382:13)
  - ❖ Standridge testified that she did not know what record Ms. Zink requested on April 10, 2003 because she was told to go through her attorney to get the records (RP (May 11, 2005) 401:21- 402:7; 403:8-12)
- May 12, 2005 – Stephenson testifies that she was told by Standridge and Ross to not release any records (RP (May 11, 2005) 52:10-23)
- May 13, 2005 – Standridge testifies that redacted resignation letter were given to Zinks. Not sure exactly what was redacted (RP (May 13, 2005) 465:1-17)

- **Argument:**  
**Zinks**

On January 9, 2003 Zink told resignation letters could not be released until after the City Council approved them (RP (July 16, 2008) 71:3-8).

- No written reason for the exemption provided (RP (July 16, 2008) 71:10-15).

**City**

- Records show Zink was provided with something on January 9, 2003 RP (July 16, 2008) 71:16-18)

**Trial Court Decision and Rational:**

- Since the court doesn’t know what was redacted can’t tell if its exempt. I think the City has the burden of proof to claimed exemption. So it is an improper claim of exemption and the redactions were improper. (RP (July 16, 2005) 71:19-25)
- City is order to produce the un-redacted records. Minimum penalty of five dollars per day. (RP (July 16, 2005) 72:4-8)

Record Requested	Trial Court Decision	
MAINTENANCE LOGS	More than Mere Negligence	\$15
<p><b>Evidence Presented at trial:</b></p> <ul style="list-style-type: none"> <li>• Maintenance Logs are used to track daily jobs in order to bill various departments within the city (RP (<u>February 9, 2005</u>) 229:24-230:16: CP 455-456).</li> <li>• Zinks used previously received maintenance logs to complain about high levels of chlorine in the water. Caused mandatory supervision of maintenance personnel by Health Department. (RP (<u>February 8, 2005</u>) 37:22-38:9; (<u>February 9, 2005</u>) 236:8-16).</li> <li>• City sprayed the Zinks bushes claiming they were covering the water meter and causing a dangerous situation for the Maintenance personnel due to the spiders in the bushes. (RP (<u>February 8, 2008</u>) 38:10-39:22)</li> <li>• <u>April 14, 2003</u> – Zink submitted a written request for maintenance logs (RP (<u>February 9, 2005</u>) 228:11-24; : CP 687) <ul style="list-style-type: none"> <li>❖ Stephenson faxes request to City Attorney asking if Maintenance Logs must be released and requests answer “ASAP” (Ex 234).</li> </ul> </li> <li>• <u>April 23, 2003</u> – City responds that the maintenance logs will be released on May 31, 2003 due to “high volume of records requested.” (RP (<u>February 9, 2005</u>) 233:5-17: CP 698-699).</li> <li>• <u>April 26, 2003</u> – City responds to request stating they need five additional days to notify third persons concerning this requests (RP (<u>May 12, 2005</u>) 57:18-58:19: CP 701-702). <ul style="list-style-type: none"> <li>❖ Stephenson testifies that she delayed the request in order to notify third persons at the instruction of the Mayor and Standridge (RP (<u>May 12, 2005</u>) 58:20-59:10).</li> <li>❖ Stephenson testifies that her intention was to release the records on April 26, 2003 (RP (<u>May 12, 2005</u>) 59:11-20).</li> </ul> </li> <li>• <u>May 30, 2003</u> –City denies the release of the maintenance logs claiming they are exempt under RCW 42.17.310 (1)(i) (CP 704) (RP (<u>February 9, 2005</u>) 229:4-11: 233:13-20; (<u>May 12, 2005</u>) 59:24-60:16: CP 704).</li> <li>• <u>May 11, 2005</u> - Standridge testifies the logs do not exist. She asked the maintenance department and they were no longer being kept (RP (<u>May 12, 2005</u>) 421:8-15; (<u>May 13, 2005</u>) 525:23-526:12).</li> <li>• <u>May 12, 2005</u> - Stephenson testifies that it was Mayor Ross who decided the maintenance logs were exempt (RP (<u>May 12,</u></li> </ul>		

2005) 60:8-61:11).

- August 31, 2005 – Zink submits a written request for all maintenance logs for 2001, 2002 and 2003 (RP (August 30, 2006) 21:16-22:15: Ex 225).
- September 8, 2005 – City releases maintenance logs and the missing log entries are found by Zinks (RP (August 30, 2006) 22:15-20: 23:3-24:6: Ex 225, 226).
- August 30, 2006 – Standridge testifies that she was not able to produce the logs on May 11, 2005 because they did not exist in her office at the time of the request. (RP (August 30, 2006) 27:19-27:13; 29:6).
  - ❖ Standridge testified that after the hearing the Maintenance personal brought them to her (RP (August 30, 2006) 29:7-24)
  - ❖ Standridge testified that she looked in 2003 and could not find them and then in 2005 they were there. (RP (August 30, 2006) 30:10-19)

**Argument:**

**Zinks**

- The evidence presented shows the Clerk knew the maintenance logs existed when she contacted the City attorney to find out if they were exempt and the City intentionally withheld these records from the Zinks (RP (July 17, 2008) 46:24-48:6: Ex 234).

**City**

- We claimed exemption under RCW 42.17.310(1)(i). (RP (July 17, 2008) 42:5-6).
- No reason not to provide the maintenance logs. I don't know why they were not provided (RP (July 17, 2008) 448:14-17)

**Trial Court Decision and Rational:**

- There was a huge high volume of requests when this request was made. However, no excuse for not turning over something that exists and is not exempt. Rule it is negligence but more than the smallest negligence. Fifteen dollars a day. RP (July 17, 2008) 48:17-25)

**Record Requested**

**Trial Court Decision**

<b>WATER METER READINGS</b>		<b>\$10</b>
<p><b>Evidence Presented at trial:</b></p> <ul style="list-style-type: none"> <li>• <u>August 22, 2002</u> - City sends letter demanding Zinks remove bushes in the alley along their fence line (CP 449) <ul style="list-style-type: none"> <li>❖ Zinks attend Council meeting and City Council members decide the bushes can stay (CP 873; 880-881).</li> </ul> </li> <li>• <u>September 12, 2002</u> - City sprays the Zinks bushes in the alley claiming they were covering the water meter, causing a dangerous situation for the Maintenance personnel due to the spiders. (RP (<u>February 8, 2005</u>) 38:10-39:22: CP 951).</li> <li>• <u>September 12, 2002</u> - Zinks submit a written request for copies of the Water Meter readings for September 2002 (CP 451).</li> <li>• <u>September 13, 2002</u> - The City contacts Municipal Research and are told the water meter readings are not exempt (CP 969)</li> <li>• <u>September 17, 2002</u> - City responds that water meter readings will be released on September 30, 2002 (CP 453)</li> <li>• <u>February 24, 2003</u> - Zink submits a written request for water meter readings for <b>October 2002, November 2002, December 2002, January 2003, and February 2003</b> (CP 726)</li> <li>• <u>February 28, 2003</u> - City responds to request claiming they need 17 days to locate and assemble the documents (CP 729)</li> <li>• <u>March 4, 2003</u> - City Attorney responds stating that it is unknown what record is being requested and that any water meter readings would be exempt under RCW 42.17.255 and in Mansfield, 133 Wn.2d 332 (1997). (RP (<u>February 8, 2005</u>) 134:22-135:1; 139:7-11: CP 731-732 para. 5)</li> <li>• <u>March 7, 2003</u> - Zink sends a copy of a previously received water meter reading to the City attorney for clarification (RP (<u>February 8, 2005</u>) 138:22-139:6; 139:12-21: Ex 18) <ul style="list-style-type: none"> <li>❖ Zink requests the City attorney reconsider denying the release of the water meter readings and requests the City Attorney to review Hearst v. Hoppe. (RP (<u>February 8, 2005</u>) 135:13-15; 137:7-138:6: CP 734 para. 7 to 735)</li> </ul> </li> <li>• <u>March 7, 2003</u> - City Attorney tells Ms. Zink he will waste no more time on her frivolous requests and to seek legal advice if she does not like the City's decisions (RP (<u>February 8, 2005</u>) 138:7-21; 139:22-140:8: CP 738)</li> <li>• <u>May 11, 2005</u> - Zink testified she never got the requested water meter readings (RP (<u>May 11, 2005</u>) 341:8-11; 349:14-17) <ul style="list-style-type: none"> <li>❖ Standridge testifies that she gave Ms. Zink copies of the water meter readings on March 11, 2003 (RP (<u>May 11, 2005</u>) 423:24-424:17)</li> </ul> </li> <li>• <u>September 28, 2005</u> - Zink again requested the water meter readings the City claimed at trial they had provided to her (RP (<u>August 30, 2006</u>) 24:10-25:16; Ex 227).</li> </ul>		

- September 29, 2005 – City responded that the records were ready to be picked up at City Hall (RP (August 30, 2006) 25:17-25: Ex 227).
  - ❖ Ms. Zink received a letter of denial stating that the water meter readings for **October 2002, November 2002 and January 2003** did not exist. Ms. Zink did receive copies of the December 2002 and February 2003 water meter readings. (RP (August 30, 2006) 26:1-25: Ex 228).
- August 30, 2006 – Standridge testified that she could not recall what happened. Her records (D 216) reflected that Zink had gotten a copy of the water meter readings. (RP (August 30, 2006) 30:22-32:8).

**Argument:**

**Zink**

- The City claimed exemption under privacy issues (RP (July 16, 2008) 91:8-13).
- Exhibit 18 shows that Zink clarified the request when asked to do so. (RP (July 16, 2008) 92:7-9: 93:12-21).
- While the testimony was that the City released the meter readings on March 11, 2003 may of the records did not exist. There should have been a denial letter dated March 11, 2003 the City could have produced indicating the meter readings don't exist. (RP (July 16, 2008) 95:3-97:5).
- City knew what records Ms. Zink wanted because of a previous request and did not need clarification (RP (July 16, 2008) 98:17-22).
- Bring in the receipt showing the meter readings were provided (RP (July 16, 2008) 94:10-15).

**City**

- There was a response within the time frame. I don't know if there was any follow-up. They were provided. We were unclear on what records were requested. We can ask for clarification. I have a receipt that shows the records were received on March 11, 2003. Don't need to bring the receipt to court because the Zinks had an opportunity to review the documents. (RP (July 16, 2008) 90:24-25; 91:14-16; 91:20-92:17)
- The testimony was part of exhibit 216 and shows that the water meter readings were in fact provide on March 11, 2003 and there is a check number. (RP (July 16, 2008) 94:20-24; 97:6-7)
- Object to days. Not only were they produced but there was a delay letter (RP (July 16, 2008) 98:2-5)

**Trial Court Decision and Rational:**

- If the City can come up with a receipt showing the records were produced on March 11, 2003 the court will reconsider decision. But absent proof that Zink got the documents the court finds the records were produced on September 29, 2005 (RP (July 16, 2008) 96:8-14).
- Ten dollars a day for the City's violation (RP (July 16, 2008) 97:24-25).
- City requested clarification on February 28, 2003. Clarification provided on March 6<sup>th</sup> and they were due on March 13, 2003. (RP (July 16, 2008) 98:5-15)
- Since it was the City attorney who responded instead of the City Clerk it is a lesser penalty. (RP (July 16, 2008) 98:22-99:10)