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Court of Appeals
Division III
State of Washington

No. 34599-8-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

DONNA and JEFF ZINK, et ux.

v.

CITY OF MESA.

BRIEF OF APPELLANT DONNA and JEFF ZINK

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I. INTRODUCTION

This is a 14-year-old public records case filed against the City of Mesa (Mesa), mere months after PRA violations occurred; which is now on its third appeal. Initially the trial court found that Zink had harassed Mesa using the PRA and dismissed Zink's PRA action finding Mesa had substantially complied despite Zink's behavior. This decision was overturned on appeal by Division III and remanded for proper assessment of whether Mesa had violated the PRA and penalty assessment.

On first remand, the trial court, in assessing penalties for violations of the PRA, found, among other things, that Mesa had held an illegal meeting and had hidden records to covered it up Richard Nixon style. After assessing penalties for each violation, the trial court subtracted over five (5) thousand penalty days. On appeal, Division III overturned the reduction in penalty days, upheld the violations found by the trial court and remanded the case back to the trial court to reassess penalties under the newly established "*Yousoufian Factors*."

On second remand, Mesa motioned the trial court to apply a 2011 Legislative amendment retroactively to this 2003 cause of action. Mesa's request was granted. After an "objective" *Yousoufian* assessment wherein the trial court found Mesa's actions were egregious violations of the PRA, the trial court globally reduced all penalty assessments by over 50% due to Mesa's size, the high number of penalty days and an amount needed to

deter other agencies. It is from these trial court orders that the Zinks seek review.

The Zinks ask this Court to reverse the trial court's orders on retroactive application of SHB 1899 and global reduction in penalties, reinstate the trial court's original penalty assessment and increase all penalties assessed by the trial to no less than $5 per day as mandated by RCW 42.17.340(4)(Appendix B), the law in effect at the time Zinks filed this cause of action (see Appendix A).

II. ASSIGNMENTS OF ERROR

1. The trial court erred and abused its discretion in ordering the application of Substitute House Bill (SHB) 1899 retroactively and setting per diem penalties at less than $5 per day as required by RCW 42.17.550 for violations of the PRA (CP 332:5-8 (Order #1); CP 2489:12-16 (b)).
2. The trial court erred and abused its discretion in ruling that the PRA allows a court to set a lower per-day penalty where an agency has continued to violate the act for a high number of days (CP 2493:10-13 (e)).
3. The trial court erred and abused its discretion in ruling that after an objective *Yousoufian* analysis a court has the authority to globally reduce penalties based on an agency's size, limited resources, and the deterrent purposes of the PRA penalties on other agencies (CP 2430:15-20).

III. ISSUES RELATED TO THE ASSIGNMENTS OF ERROR

1. Did the Legislature intend for courts to apply SHB 1899 retroactively to cases initiated prior to its effective date?

2. Do the Zink's have a vested right in penalty assessments as prescribed by the laws in effect at the time this action was filed in the court?
3. Does retroactive application of SHB 1899 violate constitutional protections against ex post fact law, equal protection, constitutional separation of powers and due process?
4. Is a high number of penalty days an appropriate consideration in decreasing penalty assessments?
5. Are PRA penalties assessed on the culpability of an agency (good and bad faith actions) or on the deterrent effect on other agencies?
6. Does a *Yousoufian* analysis of daily penalties allow a trial court to decrease the total penalty award based on: 1) high number of penalty days; 2) an agency's size; and 3) the deterrent purposes of PRA on other agencies?
7. After an objective *Yousoufian* analysis can a court consider the total penalty award and **globally reduce all penalties**?

IV. STATEMENT OF THE FACTS

1. History of the Case

This case began with the expiration of the Zinks' building permit in August of 2002 by the City of Mesa (CP 447:8-16)(*Zink v. City of Mesa*, 137 Wn. App. 271, ¶1, 152 P.3d 1044 (2007)). Zinks began to request public records surrounding the expiration of their building permit and to investigate actions taken by Mesa associated with other complaints received from other Mesa residents (CP 467: RP (April 12, 2016) 33:23-36:7)(*Zink v. City of Mesa,* 140 Wn. App. 328, ¶3-4, ¶6, 166 P.3d 738 (2007)). Mesa objected to Zink's public record requests claiming unlawful harassment (*Id.*

¶17).[1] On April 30, 2003, Zinks filed this cause of action requesting judicial review of Mesa's actions in responding to requests for access to the City's records (*Zink* 140, at ¶5)).[2]

On June 22, 2005, the trial court found that the Zinks' requests "amounted to unlawful harassment," Mesa had "more than substantially complied" with all requests and dismissed Zinks' claims. (*Zink* 140, ¶7). On appeal, Division III reversed the trial court and remanded back for determination of PDA violations under RCW 42.17.340 (*Id.* ¶2). On remand, the trial court found Mesa committed egregious violations of the PRA, including what the trial court classified as a "Richard Nixon" style cover-up of an illegally held meeting (RP (April 12, 2016) 112:4-113:14). However, after establishing penalty days and assessing per diem penalties, the trial court subtracted over 5000 penalty days (*Zink* 162, ¶13, ¶29). On second appeal, Division III reversed the trial court's deduction of penalty days and remanded back for determination of per diem penalties using the *Yousoufian* Factors (*Id.*, ¶96).

On second remand, the case was reassigned to the Honorable Bruce Spanner. On January 29, 2016, Mesa motioned the court to apply SHB 1899

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[1]In May 2005, Mesa admitted it wrongfully terminated the Zinks' building permit as well as to holding one illegal Board of Appeals (BOA) meeting on November 13, 2002, a violation of the Open Public Meetings Act (OPMA)(Zink 13, at ¶1, ¶4)). The trial court found the City's actions in the expiration of Zinks' permit groundless, frivolous and advanced without reasonable cause (Id. ¶5, ¶6, ¶12).

[2] The act was recodified in 2005 (RCW 42.56.001) and is now called the Public Records Act (PRA)(RCW 42.56.020).

(2011) retroactively (CP 10-25; CP 52-63). The trial court found that because the Zinks had no vested right in penalties and SHB 1899 was remedial it applied retroactively in this case (CP 331-33; 2412:12-16; RP (January 29, 2016)). Zink requested reconsideration (CP 334-36) which was denied by the trial court on March 2, 2016 (CP 368-69).

After three days of testimony and presentment of evidence (RP (May 10, 2016) 1-62), the trial court rendered its objective *Yousoufian* assessment based on the City's actions (*Id.* 15:4-19; 17:16; 51:2-3). The trial court found records were hidden, destroyed and lost, Mesa failed miserably to train staff and should have abandoned invalid claims of exemption to reduce penalties (*Id.* 10:10-17). The trial court found that the size of an agency is an aggravating factor (*Id.* 10:18-20; 15:15-16) and a court is required to consider the deterrence effect on other agencies (*Id.* 10:20-22). The trial court set the vast majority of the penalties at the low end of the scale (CP 2471); with one group being set at $1 per day (*Id.*).

After the objective assessment of penalties (*Id.* 10:10-40:11), the trial court discovered the total penalty award was higher than originally calculated due to a mistake in the excel worksheet (*Id.* 40:11-17; 41:3-5; 42:5-25). The trial court found that while $264,000 made sense, the higher total of $352,954 needed to be reduced due to Mesa's size (RP (May 10, 2016) 41:6-22). On June 29, 2016, the trial court globally reduced the penalty assessment based on the small size of the agency, the high number

of penalty days and the deterrent effect needed to dissuade other agencies (RP (June 29, 2016) 53:25-55:19; 59:5-60:10).

It is from the trial court's decisions to apply SHB 1899 retroactively and the arbitrary and capricious global reduction of the total penalty award that the Zinks' request this third review by this Court.

2. <u>Assessment of Penalties by the Trial Court</u>

After three days of testimony concerning Mesa's actions in withholding the records,[3] the trial court gave oral ruling concerning his objective *Yousoufian* analysis to assess penalties against Mesa for 33 different and separate violations of the PRA (CP 2437-2469; RP (May 10, 2016) 41:6-11).[4] First the trial court clarified that he did not find Zinks' attempts to gain access to the records overly aggressive (Id. 7:23-25). The trial court found that overall factors included: 1) the City "started it" when Zinks' permit was expired without notice or opportunity to be heard; 2) the City held an illegal meeting which was hidden from the Zinks; 3) the Zinks had a right to request access to public records under the PRA; 4) the Zinks never physically threatened or intimidated any staff or elected officials; and 5) no evidence was presented indicating that the Zinks engaged in unacceptable behavior, except for the videotaping which the City started (*Id.* 8:1-13).

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[3] RP (April 12, 2016, April 13, 2016 and April 20, 2016.

[4] Mesa admitted that some of the most egregious violations of the PRA had been committed (RP (May 10, 2016) 3:12-17).

The trial court further found that overall: 1) Mesa failed miserably to train its staff; 2) the Mayor injected herself in decisions regarding release of records; 3) records were hidden; 4) records were destroyed; 5) records were lost and 6) the City could have stopped penalties by abandoning invalid claims and production of the records (*Id.* 10:10-17). The trial court also found: 1) the size of the City is an aggravating factor and not a mitigating factor; and 2) a court is required to consider deterrence affects upon other agencies and not just the agency involved in the case (*Id.* 10:18-25). The trial court used variable rate penalties, setting up four distinct tiers:

1) Primary period – Start date as established in Zink II through June 24, 2003 - the City was acting in reasonably good faith ($5);
2) Secondary period – June 25, 2003 through May 13, 2005 - time period after City was informed exemptions were in error ($20);
3) Tertiary period – May 14, 2005 through August 23, 2007 - time period after Judge Acey found City substantially complied ($1); and
4) Quaternary period – August 24, 2007 through November 7, 2008 - time period after Division III reversed the trial court ($20).

(CP 2471; 2423-30; 2414-15; RP (May 10, 2016) 21:8-24). Each individual assessment is set forth below.

Violation #1 – Complaint Against 109 North Rowell Avenue – Citation to Record - CP 2423:23-26; 2437; 435-573: RP (April 12, 2016) 41:11-71:24; (May 10, 2016) 14:7- 15:19.

The trial court found that no written response was provided and a $100 dollar per day penalty was appropriate given Mesa had only one mitigating factor: the existence of a system to track and retrieve public records.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; 5) dishonesty; 6) the public importance was foreseeable to Mesa; 7) Mesa's misconduct caused actual personal economic loss to the Zinks which was foreseeable; and 8) a penalty of $100 was necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case. The trial court clarified that the size of the agency is an aggravating factor and not a mitigating factor, stating that he found the conduct of the City to be egregious which calls for greater deterrence.

The average per day penalty for Violation #1 was initially assessed at $100. Using "global reduction" (GR) the trial court decreased the per day penalty to approximately $50 per day due to agency size and deterrence effect on other agencies.

Violation #2 – City of Mesa Clerk's Memo's and Notes #1

Citation to Record - CP 2424:1-6; 2438; 579-655: RP (April 12, 2016) 71:25-112:3; (May 10, 2016) 15:20-17:3.

The trial court found the City obtained advice but ignored it. The exemption claimed turned on whether the notes were part of the "deliberative process," but that language is not in the statute.

The trial court found the applicable mitigating factors include: 1) a lack of clarity in the PRA request; 2) the agency's prompt response or legitimate

follow-up inquiry for clarification; 3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions; and 4) the reasonableness of any explanation for noncompliance by the agency.

The trial court found the applicable aggravating factors include: 1) a lack of strict compliance with all the PRA procedural requirements and exceptions; 2) a lack of proper training and supervision of personnel; 3) an unreasonable explanation for noncompliance; and 4) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #2 was $9.58. Using global reduction, the trial court decreased the per day penalty to approximately $4.79 per day due to agency size and deterrent effect on other agencies.

Violation #3 – City of Mesa Board of Appeals (BOA) Minutes and Rules and Regulations

Citation to Record - CP 2424:7-10; 2439; 662-789: RP (April 12, 2016) 112:4-125:9; (May 10, 2016) 17:4-18:24.

The trial court found this to be a most egregious violation of the PRA. The trial court noted Judge Acey found bad faith. The trial court found no applicable mitigating factors apply and a deterrence is necessary because of the egregious nature of the violation.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) an

unreasonable explanation for noncompliance; 5) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; 6) dishonesty; 7) the public importance was foreseeable to Mesa; 8) Mesa's misconduct caused actual personal economic loss to the Zinks which was foreseeable; and 9) a penalty of $100 was necessary to deter future misconduct considering the size of the agency and the facts of the case.

The average per day penalty for Violation #3 was $100. Using global reduction, the trial court decreased the per day penalty to approximately $50 due to agency size and deterrent effect on other agencies.

Violation #4 – City of Mesa Board of Appeals Meeting Tape

Citation to Record – CP 2424:11-14; 2440; 794-834: RP (April 12, 2016) 125:10-126:8; (May 10, 2016) 17:4-18:24.

The trial court found this to be a most egregious violation of the PRA. The trial court noted Judge Acey found bad faith. The trial court found no applicable mitigating factors apply and a deterrence is necessary because of the egregious nature of the violation.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) an unreasonable explanation for noncompliance; 5) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; 6) dishonesty; 7) the public importance was foreseeable to Mesa; 8) Mesa's misconduct caused actual personal economic loss to the Zinks which was

foreseeable; and 9) a penalty of $100 was necessary to deter future misconduct considering the size of the agency and the facts of the case.

The average per day penalty for Violation #4 was $100. Using global reduction, the trial court decreased the per day penalty to approximately $50 due to agency size and deterrent effect on other agencies.

Violation #5 – City of Mesa Twenty-One Code Violation Letters (Delay)

Citation to Record – CP 2424:15-18; 2441; 842-962: RP (April 12, 2016) 126:9-145:5; (May 10, 2016) 19:9-20:5.

The trial court found the documents were filed by address but were requested by date. The trial court found the City asked for clarification after improper delay.

The trial court found the applicable mitigating factors include: 1) a lack of clarity in the PRA request; 2) a reasonableness of the explanation for noncompliance; 3) the helpfulness of Mesa in responding to Zink's requests; and 4) the existence of a system to track and retrieve public records.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; and 5) the public importance was foreseeable by Mesa.

The average per day penalty for Violation #5 was $10. Using global reduction, the trial court decreased the per day penalty to approximately $5 due to agency size and deterrent effect on other agencies.

Violation #6 – City of Mesa Twenty-One Code Violation Letters (Redaction)

Citation to Record – CP 2424:19-25; 2442; 970-1065: RP (April 12, 2016) 145:6-166:9; (May 10, 2016) 20:6-21:24.

The trial court found that initially the redactions were in good faith. But in June 2003 the City was advised that the names and addresses should not be generally redacted. Yet, the City did not go back and revisit its decision.

The trial court found no mitigating factors but the City was motivated in good faith to protect privacy. The Zinks were investigating systemic concerns but were not impeded by redactions.

The trial court found the applicable aggravating factors include: 1) a lack of proper training and supervision of personnel; 2) an unreasonable explanation for noncompliance; 3) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; and 4) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #6 was $11.51. Using global reduction, the trial court decreased the per day penalty to approximately $5.75 due to agency size and deterrent effect on other agencies.

Violation #7 – City of Mesa Ordinance 01-05

Citation to Record – CP 2425:1-5; 2443; 1074-1220: RP (April 12, 2016) 166:10-182:16; (May 10, 2016) 21:25-22:13.

The trial court found the real problem was the lack of clarity of the request but the City did not promptly seek clarification.

The trial court found the applicable mitigating factors include: 1) a lack of clarity in the PRA request; 2) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions; 3) the reasonableness of any explanation for noncompliance by the agency; 4) the helpfulness of the agency to the requestor; and 5) the existence of agency systems to track and retrieve public records.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2 an unreasonable explanation for noncompliance; and 3) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA.

The average per day penalty for Violation #7 was $5. Using global reduction, the trial court decreased the per day penalty to approximately $2.50 due to agency size and deterrent effect on other agencies.

Violation #8 – City of Mesa Resignation Letter of Council Members

Citation to Record – CP 2425:6-12; 2444; 1228-1258: RP (April 12, 2016) 182:17-207:9; (May 10, 2016) 22:14-23:22.

The trial court found no written explanation of exemption. The City had a misguided, but good faith, belief that it needed to protect "privacy." Timely, but wrongfully redacted response.

The trial court found the applicable mitigating factors include: 1) the agency's good faith, honest, timely, and strict compliance with all PRA

procedural requirements and exceptions; 2) the reasonableness of any explanation for noncompliance by the agency; and 3) the helpfulness of the agency to the requestor.

The trial court found the applicable aggravating factors include: 1) a lack of strict compliance with all the PRA procedural requirements and exceptions; and 2) a lack of proper training and supervision of personnel.

The average per day penalty for Violation #8 was $11.40. Using global reduction, the trial court decreased the per day penalty to approximately $5.70 due to agency size and deterrent effect on other agencies.

Violation #9 – Municipal Research Services Center (MRSC) Memos

Citation to Record – CP 2425:13-17; 2445: RP (April 13, 2016) 212:4-235:13; (May 10, 2016) 23:23-26:3.

The trial court found this request includes attorney client privilege "ruled to be exempt" and correspondence from MRSC, found to be wrongfully withheld, stating the analysis is only for the latter. The trial court found no exemption log was provided, the City wrongfully asserted attorney client privilege and that relying on bad legal advice is neither good faith, nor reckless, wanton or bad faith, it lies in between.

The trial court found the applicable mitigating factors include: 1) the agency's prompt response or legitimate follow-up inquiry for clarification; and 2) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions.

The trial court found the applicable aggravating factors include: 1) a lack of strict compliance with all the PRA procedural requirements and exceptions; 2) an unreasonable explanation for noncompliance; 3) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; and 4) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #9 was $12.48. Using global reduction, the trial court decreased the per day penalty to approximately $6.24 due to agency size and deterrent effect on other agencies.

Violation #10 – City of Mesa Board of Appeals Rules and Regulations #1
Citation to Record – CP 2425:18-22; 2446; 1422-1486: RP (April 13, 2016) 237:21-258:9; (May 10, 2016) 26:4-19.

The trial court found the Zinks were attempting to appeal a decision of the City to the Board of Appeals, making the rules critical and Mesa had no reasonable basis for the delay. The trial court found that while not dishonest in the sense of misrepresenting facts, the City was clearly delaying just because they could. The trial court found no applicable mitigating factors.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) an unreasonable explanation for noncompliance; 5) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; and 6) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #10 was $65. Using global reduction, the trial court decreased the per day penalty to approximately $32.50 due to agency size and deterrent effect on other agencies.

Violation #11 – City of Mesa Board of Appeals Rules and Regulations #2

Citation to Record – CP 2425:23-26; 2447; 1422-1486: RP (April 13, 2016) 237:21-258:9; (May 10, 2016) 26:20-21.

The trial court found the Zinks were attempting to appeal a decision of the City to the Board of Appeals, making the rules critical and Mesa had no reasonable basis for the delay. The trial court found that while not dishonest in the sense of misrepresenting facts, the City was clearly delaying just because they could. The trial court found no applicable mitigating factors.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) an unreasonable explanation for noncompliance; 5) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; and 6) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #11 was $65. Using global reduction, the trial court decreased the per day penalty to approximately $32.50 due to agency size and deterrent effect on other agencies.

Violation #12 – City of Mesa Standridge Timecard

Citation to Record – CP 2426:1-6; 2448; 1491-1520: RP (April 13, 2016) 258:10-286:10; (May 10, 2016) 26:22-28:9.

The trial court found there are two violations; the wrongful claim of exemption and the later destruction of the records due to lack of training. The trial court found Mesa wrongfully asserted attorney client privilege because they were relying on advice of attorney.

The trial court found the applicable mitigating factors include: 1) the agency's prompt response or legitimate follow-up inquiry for clarification; and 2) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions.

The trial court found the applicable aggravating factors include: 1) a lack of proper training and supervision of personnel; 2) an unreasonable explanation for noncompliance; 3) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; and 4) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #12 was $12.38. Using global reduction, the trial court decreased the per day penalty to approximately $6.19 due to agency size and deterrent effect on other agencies.

Violation #13 – City of Mesa Water Meter Readings

Citation to Record – CP 2426:7-10; 2449; 1526-1594: RP (April 13, 2016) 286:14-314:10; (May 10, 2016) 28:10-29:1.

The trial court found the City's reliance on poor advice due to relying on advice of attorney. The Zinks were trying to prove falsity of statement by councilman. The City had MRSC's advice that the records were not

exempt as early as September 13, 2002, explaining higher penalty than Violations #9 and #12.

The trial court found the applicable mitigating factors include: 1) a lack of clarity in the PRA request; 2) the agency's prompt response or legitimate follow-up inquiry for clarification; and 3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) an unreasonable explanation for noncompliance; 3) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; and 4) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #13 was $25. Using global reduction, the trial court decreased the per day penalty to approximately $12.50 due to agency size and deterrent effect on other agencies.

Violation #14 – City of Mesa Phone/Fax Log

Citation to Record – CP 2426:11-16; 2450; 1599-1647: RP (April 13, 2016) 314:11-330:15; (May 10, 2016) 29:2-13.

The trial court found there was no exemption log (but implied claim of attorney client privilege in attorney letter) and the violation was because of attorney advice.

The trial court found the applicable mitigating factors include: 1) the agency's prompt response or legitimate follow-up inquiry for clarification;

2) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions; and 3) the reasonableness of any explanation for noncompliance by the agency.

The trial court found the applicable aggravating factors include: 1) a lack of strict compliance with all the PRA procedural requirements and exceptions; 2) an unreasonable explanation for noncompliance; and 3) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA.

The average per day penalty for Violation #14 was $12.33. Using global reduction, the trial court decreased the per day penalty to approximately $6.17 due to agency size and deterrent effect on other agencies.

Violation #15 – City of Mesa Eighteen Residential Files

Citation to Record – CP 2426:17-23; 2451; 1653-1750: RP (April 13, 2016) 335:14-377:19; (May 10, 2016) 29:14-30:16.

The trial court found the violation involves four days of one hour per day restriction and wrongful redaction of names/address. The trial court found that qualitatively, both are poor attorney advice of substantially equal magnitude. Wrongfully asserted attorney client privilege because of attorney advice. This is distinguished from others because of one hour restriction. No exemption log was provided and a higher importance is appropriate because of disparate treatment.

The trial court found the applicable mitigating factors include: 1) the agency's prompt response or legitimate follow-up inquiry for clarification;

and 2) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions.

The trial court found the applicable aggravating factors include: 1) a lack of strict compliance with all the PRA procedural requirements and exceptions; 2) a lack of proper training and supervision of personnel; 3) an unreasonable explanation for noncompliance; 4) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; and 5) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #15 was $11.60. Using global reduction, the trial court decreased the per day penalty to approximately $5.80 due to agency size and deterrent effect on other agencies.

Violation #16 – City of Mesa Eleven Residential Files

Citation to Record – CP 2427:1-7; 2452; 2090-2132: RP (April 20, 2016) 438:16-449:21; (May 10, 2016) 30:17-20.

The trial court found the violation involves four days of one hour per day restriction and wrongful redaction of names/address. The trial court found that qualitatively, both are poor attorney advice of substantially equal magnitude. Wrongfully asserted attorney client privilege because of attorney advice. This is distinguished from others because of one hour restriction. No exemption log was provided and a higher importance is appropriate because of disparate treatment.

The trial court found the applicable mitigating factors include: 1) the agency's prompt response or legitimate follow-up inquiry for clarification;

and 2) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions.

The trial court found the applicable aggravating factors include: 1) a lack of strict compliance with all the PRA procedural requirements and exceptions; 2) a lack of proper training and supervision of personnel; 3) an unreasonable explanation for noncompliance; 4) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; and 5) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #16 was $11.63. Using global reduction, the trial court decreased the per day penalty to approximately $5.81 due to agency size and deterrent effect on other agencies.

Violation #17 – City of Mesa File of Requests, Delays and Denials #1
Citation to Record – CP 2427:9-12; 2453; 1881-1989: RP (April 20, 2016) 449:23-476:23; (May 10, 2016) 30:23-31:8.

The trial court found the City's relying on bad legal advice is neither good faith, nor reckless, wanton or bad faith, it lies in between. The trial court found Mesa lacked proper training due to attorney advice and the one hour limitation to review records was disparate treatment.

The trial court found the applicable mitigating factors include: 1) a lack of clarity in the PRA request; and 2) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions.

The trial court found the applicable aggravating factors include: 1) a lack of strict compliance with all the PRA procedural requirements and

exceptions; 2) an unreasonable explanation for noncompliance; 3) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; 4) the public importance was foreseeable to Mesa; and 5) a penalty of $20 is necessary to deter future misconduct considering the size of the agency and the facts of the case.

The average per day penalty for Violation #17 was $20. Using global reduction, the trial court decreased the per day penalty to approximately $10 due to agency size and deterrent effect on other agencies.

Violation #18 – City of Mesa File of Requests, Delays and Denials #2
Citation to Record – CP 2427:13-17; 2454; 1995-2085: RP (April 20, 2016) 449:23-476:23; (May 10, 2016) 31:9-32:11.

The trial court found the City clerk acted on advice of the City attorney (see exhibits 18C, 18E, 18I), stating the City's relying on bad legal advice is neither good faith, nor reckless, wanton or bad faith. Rather, it lies in between. Plaintiff faced a combination of one hour restrictions, instructions that her attorney had to contact the City attorney and the City initiating the videotaping of the interactions with Ms. Zink are all disparate treatment.

The trial court found the applicable mitigating factors include: 1) a lack of clarity in the PRA request.

The trial court found the applicable aggravating factors include: 1) a delayed response by the agency, especially in circumstances making time of the essence; 2) a lack of strict compliance by the agency with all the PRA procedural requirements and exceptions; 3) a lack of proper training and

supervision of the agency's personnel; 4) unreasonableness of any explanation for noncompliance by the agency; 5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency; and 6) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency.

The average per day penalty for Violation #18 was $20. Using global reduction, the trial court decreased the per day penalty to approximately $10 due to agency size and deterrent effect on other agencies.

Violation #19 – City of Mesa Board of Appeals Signed Minutes

Citation to Record – CP 2427:18-22; 2455; 2163-2263: RP (April 20, 2016) 477:2-494:24; (May 10, 2016) 32:12-24.

The trial court found the records were only four days late; but the Zink's were appealing the decision.

The trial court found the applicable mitigating factors include: 1) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; and 4) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA.

The average per day penalty for Violation #19 was $5. Using global reduction, the trial court decreased the per day penalty to approximately $2.50 due to agency size and deterrent effect on other agencies.

Violation #20 – City of Mesa Council Meeting Minutes

Citation to Record – CP 2427:23-26; 2456: RP (April 20, 2016) 495:9-503:7; (May 10, 2016) 32:25-33:25.

The trial court would have made penalty more severe than #18 because the records were in notebooks, readily accessible, except that Judge Acey found that a coordinated response to the several document types requested was reasonable.

The trial court found the applicable mitigating factors include: 1) a lack of clarity in the PRA request.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) an unreasonable explanation for noncompliance; 5) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; and 6) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #20 was $20. Using global reduction, the trial court decreased the per day penalty to approximately $10 due to agency size and deterrent effect on other agencies.

Violation #21 – City of Mesa Board of Appeals Resignation Letters

Citation to Record – CP 2428:1-5; 2457: RP (April 20, 2016) 503:23-505:15; (May 10, 2016) 34:1-5.

The trial court found the applicable mitigating factors include: 1) a lack of clarity in the PRA request.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) an unreasonable explanation for noncompliance; 5) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; and 6) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #21 was $20. Using global reduction, the trial court decreased the per day penalty to approximately $10 due to agency size and deterrent effect on other agencies.

Violation #22 – Sharp Complaint

Citation to Record – CP 2428:6-11; 2458: RP (April 20, 2016) 505:16-523:15; (May 10, 2016) 34:6-24.

The trial court found the issue is redaction and Judge Acey's account of fault is correct up until the City received the MRSC memo. The trial court determined that a three-tier penalty is appropriate. The trial court found that initially the redactions were in good faith. But in June 2003 the City was advised that the names and addresses shall not be generally redacted. Yet, the City did not go back and revisit its decision.

The trial court found the mitigating factors include: 1) the agency's prompt response or legitimate follow-up inquiry for clarification.

The trial court found the applicable aggravating factors include: 1) a lack of proper training and supervision of personnel; 2) an unreasonable explanation for noncompliance; 3) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; and 4) the public importance was foreseeable to Mesa.

The average per diem penalty for Violation #22 was $11.62. Using global reduction, the trial court decreased the per diem penalty to approximately $5.81 due to agency size and deterrent effect on other agencies.

Violation #23 – Scott Reply

Citation to Record – CP 2428:12-18; 2459: RP (April 20, 2016) 523:16-533:25; (May 10, 2016) 35:2-17.

The trial court found this to be a "composite" violation of violations numbers #6 and #18. But, because of the videotaping, the directions to have plaintiff's attorney contact the City attorney, the penalty during the primary period Mesa was not acting in good faith.

The trial court found the applicable mitigating factors include: 1) the agency's prompt response or legitimate follow-up inquiry for clarification.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions;

3) a lack of proper training and supervision of personnel; 4) an unreasonable explanation for noncompliance; 5) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; 6) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #23 was $12.24. Using global reduction, the trial court decreased the per day penalty to approximately $6.12 due to agency size and deterrent effect on other agencies.

Violation #24 – City of Mesa Council Meeting Packet

Citation to Record – CP 2428:19-22; 2460: RP (April 20, 2016) 535:8-545:17; (May 10, 2016) 35:18-22.

The trial court found the City clerk acted on advice of the City attorney (see exhibits 18C, 18E, 18I). The court found the City's reliance on bad legal advice is neither good faith, nor reckless, wanton or bad faith. Rather, it lies in between. Zink faced a combination of one hour restrictions, instructions that her attorney had to contact the City attorney, and the City initiating the videotaping of the interactions with Ms. Zink, which are all disparate treatment.

The trial court found the applicable mitigating factors include: 1) a lack of clarity in the PRA request.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) an

unreasonable explanation for noncompliance; 5) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; 6) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #24 was $20. Using global reduction, the trial court decreased the per day penalty to approximately $10 due to agency size and deterrent effect on other agencies.

Violation #25 – City of Mesa Vouchers

Citation to Record – CP 2428:23-26; 2461: RP (April 20, 2016) 535:8-545:17; (May 10, 2016) 35:23-25.

The trial court found the City clerk acted on advice of the City attorney (see exhibits 18C, 18E, 18I). The court found the City's reliance on bad legal advice is neither good faith, nor reckless, wanton or bad faith. Rather, it lies in between. Zink faced a combination of one hour restrictions, instructions that her attorney had to contact the City attorney, and the City initiating the videotaping of the interactions with Ms. Zink, which are all disparate treatment.

The trial court found the applicable mitigating factors include: 1) a lack of clarity in the PRA request.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) an unreasonable explanation for noncompliance; 5) negligent, reckless,

wanton, bad faith, and intentional noncompliance with the PRA; 6) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #25 was $20. Using global reduction, the trial court decreased the per day penalty to approximately $10 due to agency size and deterrent effect on other agencies.

Violation #26 – Scott Complaint

Citation to Record – CP 2429:1-6; 2462: RP (April 20, 2016) 545:18-550:13; (May 10, 2016) 36:1-11.

The trial court found the City clerk acted on advice of the City attorney (see exhibits 18C, 18E, 18I). The court found the City's reliance on bad legal advice is neither good faith, nor reckless, wanton or bad faith. Rather, it lies in between. Zink faced a combination of one hour restrictions, instructions that her attorney had to contact the City attorney, and the City initiating the videotaping of the interactions with Ms. Zink, which are all disparate treatment.

The trial court found the applicable mitigating factors include: 1) a lack of clarity in the PRA request.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; 5) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #26 was $30. Using global reduction, the trial court decreased the per day penalty to approximately $15 due to agency size and deterrent effect on other agencies.

Violation #27 – City of Mesa Minutes Book

Citation to Record – CP 2429:7-11; 2463: RP (April 20, 2016) 550:14-559:12; (May 10, 2016) 36:12-37:18.

The trial court found the City clerk acted on advice of the City attorney (see exhibits 18C, 18E, 18I). The court found the City's reliance on bad legal advice is neither good faith, nor reckless, wanton or bad faith. Rather, it lies in between. Zink faced a combination of one hour restrictions, instructions that her attorney had to contact the City attorney, and the City initiating the videotaping of the interactions with Ms. Zink, which are all disparate treatment.

The trial court found the applicable mitigating factors include: 1) a lack of clarity in the PRA request.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) an unreasonable explanation for noncompliance; 5) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; 6) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #27 was $25. Using global reduction, the trial court decreased the per day penalty to approximately $12.50 due to agency size and deterrent effect on other agencies.

Violation #28 – City of Mesa Clerk's Memos and Notes #2

Citation to Record – CP 2429:12-16; 2464: RP (April 20, 2016) 559:22-561:5; (May 10, 2016) 37:19-25.

The trial court found the City obtained advice but ignored it. The exemption claimed turned on whether the notes were part of the "deliberative process," but that language is not in the statute.

The trial court found the applicable mitigating factors include: 1) a lack of clarity in the PRA request; 2) the agency's prompt response or legitimate follow-up inquiry for clarification; 3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions; and 4) the reasonableness of any explanation for noncompliance by the agency.

The trial court found the applicable aggravating factors include: 1 a lack of strict compliance with all the PRA procedural requirements and exceptions; 2) a lack of proper training and supervision of personnel; 3) an unreasonable explanation for noncompliance; and 4) the public importance was foreseeable to Mesa.

The average per day penalty for Violation #28 was $9.49. Using global reduction, the trial court decreased the per day penalty to approximately $4.74 due to agency size and deterrent effect on other agencies.

Violation #29 – City of Mesa Council Meeting Minutes

Citation to Record – CP 2429:17-21; 2465: RP (May 10, 2016) 38:1-25.

The trial court found the initial response was not timely. The City was not reasonable to delay production until May 31, 2003. The records were not made accessible until June 3, 2003. The City (wrongly) claimed they needed five days to notify third persons which is clearly wrong.

The trial court found the no applicable mitigating factors.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) an unreasonable explanation for noncompliance; and 5) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA.

The average per day penalty for Violation #29 was $30. Using global reduction, the trial court decreased the per day penalty to approximately $15 due to agency size and deterrent effect on other agencies.

Violation #30 – City of Mesa Maintenance Logs

Citation to Record – CP 2429:22-26; 2466; 1806-1874: RP (April 13, 2016) 378:5-413:11; (May 10, 2016) 39:1-24.

The trial court found there was a timely initial response, a timely follow-up response from the attorney, stating that documents would be produced, and there was a timely claim of an invalid exemption. When the records were produced, the City denied the existence of two that were later

produced. It is apparent that the Mayor involved herself in asserting another invalid exemption.

The trial court found no applicable mitigating factors.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) an unreasonable explanation for noncompliance; 5) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA; 6) dishonesty; 7) Mesa's misconduct caused actual personal economic loss to the Zinks which was foreseeable.

The average per day penalty for Violation #30 was $52.07. Using global reduction, the trial court decreased the per day penalty to approximately $26.04 due to agency size and deterrent effect on other agencies.

Violation #31 – City of Mesa Resolution 2003-03

Citation to Record – CP 2430:1-5; 2467: RP (May 10, 2016) 39:25-40:2.

The trial court found the initial response was not timely. The City was not reasonable to delay production until May 31, 2003. The records were not made accessible until June 3, 2003. The City (wrongly) claimed they needed five days to notify third persons which is clearly wrong.

The trial court found the no applicable mitigating factors.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of

strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) an unreasonable explanation for noncompliance; and 5) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA.

The average per day penalty for Violation #31 was $30. Using global reduction, the trial court decreased the per day penalty to approximately $15 due to agency size and deterrent effect on other agencies.

Violation #32 – Mesa City Council Meeting Tape

Citation to Record – CP 2430:6-9; 2468: RP (April 20, 2016) 563:18-579:2; (May 10, 2016) 40:3-7.

The trial court found the initial response was not timely. The City was not reasonable to delay production until May 31, 2003. The records were not made accessible until June 3, 2003. The City (wrongly) claimed they needed five days to notify third persons which is clearly wrong.

The trial court found the no applicable mitigating factors.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) an unreasonable explanation for noncompliance; and 5) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA.

The average per day penalty for Violation #32 was $30. Using global reduction, the trial court decreased the per day penalty to approximately $15 due to agency size and deterrent effect on other agencies.

Violation #33 – City of Mesa Draft Dog Ordinance

Citation to Record – CP 2430:10-14; 2469: RP (April 20, 2016) 567:5-579:2; (May 10, 2016) 40:8-11.

The trial court found the initial response was not timely. The City was not reasonable to delay production until May 31, 2003. The records were not made accessible until June 3, 2003. The City (wrongly) claimed they needed five days to notify third persons which is clearly wrong.

The trial court found the no applicable mitigating factors.

The trial court found the applicable aggravating factors include: 1) a delayed response in circumstances where time is of the essence; 2) a lack of strict compliance with all the PRA procedural requirements and exceptions; 3) a lack of proper training and supervision of personnel; 4) an unreasonable explanation for noncompliance; and 5) negligent, reckless, wanton, bad faith, and intentional noncompliance with the PRA.

The average per day penalty for Violation #33 was $30. Using global reduction, the trial court decreased the per day penalty to approximately $15 due to agency size and deterrent effect on other agencies.

V. ARGUMENT

1. Standard of Review

The PRA's penalty provision grants the trial court "discretion" to determine appropriate per diem penalties under RCW 42.17.340(4) /RCW 42.56.550(4) and is based on the culpability of the agency using the *Yousoufian Factors* as established by our Supreme Court in *Yousoufian v. Office of Ron Sims, King County Executive*, 168 Wn.2d 444, 229 P.3d 735 (2010). A trial court's decisions concerning that assessment is reviewed for abuse of discretion *Yousoufian v. King County Executive*, 152 Wn.2d 421, 431, 98 P.3d 463 (2004).

2. Judicial Interpretation of Statutes Includes Determining Legislative Intent Based on All Provisions Contained in the Act

A Court's purpose in interpreting a statute is to determine and enforce our "Legislature's Intent" (*City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006)). In construing a statute, the Courts are instructed to be vigilant that a statute is construed so as to carry out its purpose as determined by our Legislature. *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996).

Supreme Court decisions mandate that Legislative intent is primarily revealed by the statutory language. *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). The plain meaning controls if it is unambiguous. *Nissen v. Pierce County*, 183 Wn.2d 863, ¶27, 357 P.3d 45 (2015). However, if the Legislature omits language, whether intentionally or accidentally, courts "will not read into the statute the language that it believes was omitted."

(*State v. Moses*, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002) citing to *Jenkins v. Bellingham Mun. Court*, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981)).

Our Courts are required to look at the act in its entirety. *Ockerman v. King County Dep't of Developmental & Envtl. Servs.*, 102 Wn. App. 212, 217, 6 P.3d 1214 (2000). All provisions of an act must be considered, construed together (with all language used) and harmonized in relation to each provision of the act to assure proper construction of each provision. *State ex rel. Royal v. Board of Yakima County Comm'rs*, 123 Wn.2d 451, 459, 869 P.2d 56 (1994). "An interpretation that produces "absurd consequences" must be rejected, since such results would belie legislative intent. *State v. Vela,* 100 Wn.2d 636, 641, 673 P.2d 185 (1983)." *Troxell v. Rainier Pub. Sch. Dist.*, 154 Wn.2d 345, ¶7, 111 P.3d 1173 (2005).

3. Rules of Statutory Construction and the History of the Legislature Compel a Holding that the Legislature did not Intend SHB 1899 to be Retroactive or to Pertain to This Case

Our Legislature has repeatedly shown numerous times that it knows how to make a statute retroactive if that is their intent. For instance, in 2009, our Legislature added a new section to the Public Records Act (PRA)[5] when they passed Substitute Senate Bill (SSB) 5130.

> **NEW SECTION. Sec. 2.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

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[5] RCW 42.56.565.

Session Laws of 2009 Chapter 10, § 2.[6] In passing SSB 5130 our Legislature included words needed to clearly and unambiguously show its intent to make the new law effective immediately and the reasoning for applying the new statute to cases still pending in the courts.

In 2011, our Legislature enacted SSB 5025,[7] amending RCW 42.56.565 which was created by passage of SSB 5120 in 2009. Our Legislature included the following language:

> **NEW SECTION. Sec. 2.** This act applies to all actions brought under RCW 42.56.550 in which final judgment has not been entered as of the effective date of this section.

Session Laws of 2011 Chapter 300, § 1 (CP 145; 148). In enacting SHB 1899, our Legislature included the following language:

> **Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

(CP 166-68). It is clear, based on the language included in SSB 5130 and SSB 5025, that if the Legislature had intended SHB 1899 to be retroactive to this case, they would have included language making SHB 1899 retroactive. The fact that they did not do so indicates that the Legislature did not intend for SHB 1899 to be retroactive or to affect this case. None the less, on remand, the trial court applied SHB 1899 retroactively to this cause

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[6] http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bills/Session%20Laws/Senate/5130-S.SL.pdf?cite=2009 c 10 § 2.

[7] SSB 5025 was presented and adopted in 2011 Legislative session (CP 142-45) and signed by the Governor within days of SHB 1899 (CP 166-68).

of action. This is an abuse of discretion and a violation of constitutional protections and the trial court's decision must be reversed with no penalty assessed at less than $5 per day as mandated by RCW 42.17.340(4), the law in effect at the time of Mesa's violations and the filing of this suit by Zinks.

4. <u>The Decision of Division III was Rendered and Filed Prior to Effective Date of SHB 1899 and is the Law of This Case</u>

Courts are required to apply the law in effect at the time the Court renders its decision (*In re Dependency of A.M.M.,* 182 Wn. App. 776, 789, 332 P.3d 500 (2014)). Here, Division III specifically noted that their decision concerning penalty days and the assessment of penalties against Mesa was filed approximately six weeks prior to the effective date of the change in penalty assessment under RCW 42.56.550(4).[8]

> We note Laws of 2011, ch. 273, $ 1 **<u>(effective July 22, 2011)</u>**, amending RCW 42.56.550(4), eliminates the minimum penalty of $5 per day.

Zink v. City of Mesa, 162 Wn. App. 688, ¶15 *fn.* 3, 256 P.3d 384 (2011). Division III made clear that their decision was based on the 2003 statutes in effect at the time Zink filed this cause.

> The provisions of chapter 42.17 RCW pertaining to public records (called the public disclosure act) were recodified in the Public Records Act (PRA), chapter 42.56 RCW, effective July 1, 2006. LAWS OF

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[8] Division III mandated this Court to assess per day penalties under RCW 42.17.340(4) on June 7, 2011, noting the new amendment to section RCW 42.56.550(4), decreasing the amount of daily penalties to less than $5 per day, did not take effect until July 22, 2011 (Laws of 2011, ch. 273, §1); approximately six weeks after the decision was filed.

> 2005, ch. 274, § 1. This opinion refers to the overall act as the PRA. **We cite to the statutes in effect when the Zinks filed their action in April 2003**.

(*Id.*, ¶1 *fn.* 1) (emphasis added)(see also *Neighborhood Alliance of Spokane County v. Spokane County,* 172 Wn.2d 702, 261 P.3d 119 (2011)(decided September 29, 2011, over two months after SHB 1899 took effect).

After clarifying that Chapter 42.17 RCW are the statutes to be applied to this case, Division III referenced Chapter 42.17 RCW forty-three (43) times throughout the opinion; including a reference to RCW 42.17.340(4) (*Id.* ¶15). Mesa requested reconsideration of Division III's decision to include a mandate that SHB 1899 be applied retroactively to this case (CP 207-212). The request for reconsideration was denied (CP 216-17). Despite this clear mandate from Division III, on second remand, the trial court determined that SHB 1899 was retroactive and must be applied in this case resulting in penalty assessments below the mandatory $5 per diem amount as mandated in RCW 42.17.340(4)(CP 2479:6-8(1)), stating:

> So, for example, you asked the question, and it's a good question, if they -- why did they say that we are deciding this case based upon the former statute RCW 42.17? Well, the reason is, is because there's a recognition in the case that the entire statutory scheme has been amended and recodified, and they just want to make it clear for all future readers, all young lawyers and old lawyers, which particular versions of the statutes that they're construing and making decisions under. That way later attorneys -- later litigants won't be confused as to which statute is being construed.

RP (January 29, 2016) 3:2-12 (emphasis added). The trial court's decision and order is error and an abuse of discretion. Further the trial court's decision and order violates constitutional rights prohibiting the passage of ex post facto law, the separation of powers doctrine as well as Zink's constitutional right to equal protection and due process under state and federal constitutions.

5. **<u>SHB 1899 Contains No Retroactive Language and is Prospective</u>**

Our Supreme Court has made abundantly clear that statutes operate only prospectively unless clearly designated by our Legislature as retroactive.

> It is a fundamental rule in this state that a statute will be presumed to operate prospectively only, and that **it will not** be held to apply retrospectively in the absence of language clearly indicating such legislative intent.

Lynch v. State, 19 Wn.2d 802, 807, 145 P.2d 265 (1944). In enacting SHB 1899, changing the penalty amounts for public records violations (CP 154-156), our legislature declined to include the words necessary for retroactive application despite being asked to do so for the benefit of Mesa in this case (CP 158-160; 38:23-25; 160:5-9). In order for a Court to read SHB 1899 as being retroactive and applicable to this case, the Court must read words into the act that the Legislature clearly decided not to include. This is error of law. Courts are instructed to not add or subtract words when construing the meaning of a legislative amendment (*State v. Edwards*, 104 Wn.2d 63, 68, 701 P.2d 508 (1985)). By refusing to add retroactive language to SHB 1899, even with a request to do so by Mesa, our Legislature made clear its

intention that the amendment was prospective only. *Sterrett v. White Pine Sash Co.*, 176 Wn. 663, 668, 30 P.2d 665 (1934). Despite the lack of wording indicating legislative intent to apply SHB 1899 retroactively to any case still pending in the courts, the trial court determined that retroactive application was necessary and appropriate in this case since it did not infringe on a vested right, stating:

> Then we turn to the statutory construction, and I'm relying mostly on the 1000 Virginia Limited Partnership, the Ballard Square decisions where the general rule is that amendments to statutes will be prospective. One exception is where the legislature says otherwise, which they did not do here. Another is the remedial statutes. So, now we need to go to the remedial – definition of remedial statutes, and it's -- if it relates to practice, procedure or remedies, and that's where you kind of got caught up with the Ballard Square. What that Ballard Square opinion was pointing out was that one party wasn't even trying to interpret a statute. They were trying to interpret an ambiguous common law principle, and you -- you conflated that and ended up with a conclusion that the rule is that remedial means there must be an ambiguous statute.

RP (January 29, 2016) 6:12-7:2 (emphasis added). In *Virginia Ltd. P'ship v. Vertecs*, 158 Wn.2d 566, 146 P.3d 423 (2006)) our Supreme Court emphasized that statutory amendments are presumed to operate prospectively (*Id.*, ¶32). In *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 146 P.3d 914 (2005), our Supreme Court clarified that a statute can only be applied retroactively if the Legislature states an intent to apply a statute retrospectively **and** it does not infringe on a constitutional right (*Id.*, ¶27). Here the trial court correctly determined

that the Legislature did not intend SHB 1899 to be retroactive, but applied SHB 1899 retroactively based on the fact that Zinks did not have a vested right to penalties since the penalty amounts were set by statute and could be removed at any point in time; stating:

> At any rate -- and so clearly here this statute revises the remedies for a violation, and so it will be construed retroactively unless to do so would be to violate the constitution or violate vested rights, and then in the Ballard Square case, I think it's the Ballard Square case -- one of these makes it very clear that when you're relying upon a statutory cause of action, a statutory claim, that you never have vested rights in it until it's finally decided.
>
> So in midstream, and as -- you know, I get your frustration that in midstream they changed the rules, but unfortunately that is the law. So, the amended penalty range of zero to one hundred dollars is what will be applicable here. I'll also suggest to you that I'm not certain having a range that goes down to zero dollars is going to make all that much difference in the outcome of this case.

RP (January 29, 2016) 7:3-19 (emphasis added). This is an erroneous interpretation of the mandatory penalty provision of the PDA and the Legislative intent in enacting the new amendment.

Zinks had a vested right in penalties at the time this cause of action was filed in 2003. Our Supreme Court has made abundantly clear that penalties are not optional and must be assessed once a violation is found.

> Per Diem Penalties. We take this opportunity to clarify our holdings with regard to per diem penalties. The Court of Appeals implied that the agency can be spared per diem penalties if it initiates an action in superior court. Soter, 131 Wn. App. at 907. That reasoning does not

> coincide with our holding that **once a court determines that a requester was entitled to inspect public records, the trial court is required to impose a penalty within the statutory range for each day records were withheld**.

Soter v. Cowles Publ'g Co., 162 Wn.2d 716, ¶63, 174 P.3d 60 (2007). This cause of action was initiated on April 30, 2003, under the statutory authority of RCW 42.17.340(1) and (2); over eight years prior to SHB 1899 (*Zink* 140, ¶5). The law in effect at the time Zinks filed this action mandated per diem penalty awards of no less than $5 and no more than $100 (RCW 42.17.340(4)).

While initially the trial court found no violations of the PDA, that decision was overturned on appeal and remanded for proper determination of PRA violations. Thirty-seven (37) violations were found by the trial court on July 16 and 17, 2008 (*Zink* 162, ¶11). Pursuant to RCW 42.17.340(4)/42.56.550(4), if the Zinks did not have a vested right at the time suit was filed, once violations were found by the court, the Zinks had a vested right to penalties. The trial court's determination of PDA violations by Mesa were upheld by Division III on June 7, 2011; again prior to the effective date of SHB 1899 (*Id.* ¶96). These decisions were final actions concerning violations of the PDA/PRA by Mesa and are not subject to further appeal.

6. **The Amendments Made By Our Legislature in Enacting Substitute House Bill 1899 Were Not Remedial**

The trial court determined that the 2011 amendment (SHB 1899) to RCW 42.56.550(4) was remedial and therefore SHB 1899 was retroactive; stating:

> So, now we need to go to the remedial – definition of remedial statutes, and it's -- if it relates to practice, procedure or remedies, and that's where you kind of got caught up with the Ballard Square. What that Ballard Square opinion was pointing out was that one party wasn't even trying to interpret a statute. They were trying to interpret an ambiguous common law principle, and you -- you conflated that and ended up with a conclusion that the rule is that remedial means there must be an ambiguous statute.
>
> At any rate -- and so clearly here this statute revises the remedies for a violation, and so it will be construed retroactively unless to do so would be to violate the constitution or violate vested rights…

RP (January 29, 2016) 6:18-7:5. The Court of Appeals addressed the definition of remedial amendments in *In re Personal Restraint of Stewart*, 115 Wn. App. 319, 337, 75 P.3d 521 (2003).

> An amendment is curative and remedial if it clarifies or technically corrects an ambiguous statute without changing prior case law constructions of the statute." And, in In re F.D. Processing, decided before Brooks, the court stated: "Curative amendments will be given retroactive effect if they do not contravene any judicial construction of the statute." In Tomlinson v. Clarke, the Court stated: "When an amendment clarifies existing law and where that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive."

In re Personal Restraint of Stewart, 115 Wn. App. 319, 337, 75 P.3d 521 (2003)(emphasis added)(footnotes removed). While initially RCW 42.17.340(4) was recodified at RCW 42.56.550(4) the Legislature retained the exact same language during recodification (*Neighborhood Alliance of Spokane County v. Spokane County,* 172 Wn.2d 702, ¶36, *fn.* 14, 261 P.3d 119 (2011)) neither RCW 42.17.340(4) nor RCW 42.56.550(4) were ever ambiguous. As noted by our Supreme Court in *Sanders v. State*, 169 Wn.2d 827, 864, 240 P.3d 120 (2010), while the mandatory nature of the five-dollar-per-day minimum penalty requirement "may seem harsh, **it is the unambiguous meaning of the statute**." As previously discussed, RCW 42.17.340(4)/42.56.550(4) has been interpreted and construed in numerous Appellate Court cases between 1992 and 2011 with the same results (see above argument). After nearly two decades of case law interpretation, the Legislative purpose of RCW 42.17.340(4)/42.56.550(4) cannot be deemed unclear or in need of clarification.

> Moreover, "[i]n construing statutes which re-enact, with certain changes, or repeal other statutes, or which contain revisions or codification of earlier laws, resort to repealed and superseded statutes may be had, and is of great importance in ascertaining the intention of the legislature, for, where a material change is made in the wording of a statute, a change in legislative purpose must be presumed." Graffell v. Honeysuckle, 30 Wn.2d 390, 399, 191 P.2d 858 (1948).

State v. Edwards, 104 Wn.2d 63, 68, 701 P.2d 508 (1985)(emphasis added). The amendment made by the Legislature in 2011, was a significant material change to the wording of the penalty portion of RCW 42.56.550(4);

changing the liability requirements and the purpose of the statute. Where a court had to award penalties of no less than $5 per day once a violation was found, now the courts can go below that amount. Because SHB 1899 is a statutory amendment that attaches new legal consequences and liabilities for violations of the PRA, it is not remedial and cannot be applied retroactively.

> [I]n deciding whether the increase is remedial or substantive, we look to the effect, not the form of the law. Weaver, 450 U.S. at 31. We find that the increase in the amount of the assessment from $ 100 to $ 500 is more in the nature of a new liability than a remedial increase in an already existing obligation. … Because the 1996 amendment to RCW 7.68.035 appears to create a new liability, we find it is not remedial and will not construe it to apply retroactively. Beneficial Management, 85 Wn.2d at 642.

State v. Humphrey, 139 Wn.2d 53, 63, 983 P.2d 1118 (1999)(emphasis added). The trial court's order that SHB is remedial and retroactive to this case is error and must be reversed.

7. **Retroactive Application of SHB 1899 Violates the Constitutional Separation of Power's Doctrine**

Our Supreme Court has not only construed past cases under RCW 42.17.340(4), that Court has continued to apply penalties based on the statutes in effect at the time a suit was filed even after SHB 1899 became effective. For instance, the Court in *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011), filed on September 29, 2011, three months after the Zink decision on appeal and over two months after SHB 1899 took effect, used RCW 42.17.340(4) to assess penalties.

> When this case arose, however, RCW 42.17.340(4) applied, which was identical to the preamendment version of RCW 42.56.550(4).

(*Id.* ¶36, fn. 14). Clearly, our Courts have constructed the meaning of RCW 42.17.340(4) both prior to and after the effective date of SHB 1899 and found that a party is entitled to penalties based on the law in effect at the time suit is filed. Because the meaning of RCW 42.17.340(4) was construed by our Courts long before the enactment of SHB 1899, retroactive application is unconstitutional as it contravenes previous judicial construction. *American Discount Corp. v. Shepherd*, 129 Wn. App. 345, ¶21-22, 120 P. 3d 96 (2005) upheld on review *American Discount Corp. v. Shepherd*, 160 Wn.2d 93, ¶1, 156 P.3d 858 (2007).

Despite these clear mandates, Mesa successfully argued that they requested the Legislature to change the law on their behalf so penalties could be assessed at less than $5 per day. If the Legislature did, in fact, change the statutory requirements of penalty assessments under the PRA solely for the benefit of Mesa, the Legislature violated the separation of powers doctrine.

> [E]ven a clarifying enactment cannot be applied retrospectively when it contravenes a construction placed on the original statute by the judiciary. OVERTON v. ECONOMIC ASSISTANCE AUTH., 96 Wn.2d 552, 558, 637 P.2d 652 (1981); JOHNSON, at 925-26; STATE v. TAYLOR, 47 Wn. App. 118, 123, 734 P.2d 505 (1987). "Any other result would make the legislature a court of last resort." 1A C. Sands, STATUTORY CONSTRUCTION 27.04 (4th ed. 1985).

State v. Dunaway, 109 Wn.2d 207, 216 n.6, 743 P.2d 1237 (1987).

> Any attempt by the Legislature to contravene retroactively this Court's construction of a statute 'is disturbing in that it would effectively be giving license to the[L]egislature to overrule this [C]ourt , raising separation of powers problems.'

In re Personal Restraint of Stewart, 115 Wn. App. 319, 337, 75 P.3d 521 (2003)(emphasis added). See also *Barstad v. Stewart Title Guaranty Co.*, 145 Wn.2d 528, 536, 541, 39 P.3d 984 (2002); *Caritas Servs. v. Dep't of Soc. & Health Servs.*, 123 Wn.2d 391, 869 P.2d 28 (1994). The Zinks have a vested right to the same treatment in the courts as all other litigants filing a PRA action prior to the effective date of SHB 1899.

The meaning of RCW 42.17.340(4) has been construed by our Court both prior to and after the effective date of SHB 1899. Because the meaning of RCW 42.17.340(4) was construed by our Courts, SHB 1899 cannot be given retroactive application because it would be unconstitutional as it contravenes previous judicial construction. *American Discount Corp. v. Shepherd*, 129 Wn. App. 345, ¶21-22, 120 P. 3d 96 (2005) upheld on review *American Discount Corp. v. Shepherd*, 160 Wn.2d 93, ¶1, 156 P.3d 858 (2007).

Mesa argued that they requested the Legislature to change the law on their behalf so penalties could be assessed at less than $5 per day. If the Legislature did, in fact, change the statutory requirements of penalty assessments under the PRA solely for the benefit of Mesa, the Legislatures violated of the separation of powers doctrine.

Under the constitutional doctrine of separation of powers, the legislative branch of government cannot retroactively overrule judicial decisions which

have already authoritatively construed statutory language. Interpreting Legislative authority to include changing a well-established law for the benefit of one agency violates the constitutional separation of powers doctrine; essentially making the legislature a "court of last resort." *State v. Dunaway*, 109 Wn.2d 270, 216, fn. 6, 743 P.2d 1237 (1987) and gives the Legislature sole power.

> "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many... may justly be pronounced the very definition of tyranny."

James Madison. The trial court's order that SHB 1899 be applied retroactively violates the Constitutional Separation of Powers Doctrine and must be reversed.

8. <u>Retroactive Application of Statutory Amendments Violates Constitutional Ex Post Facto Clauses</u>

The application of SHB 1899 to this cause of action is a violation of the U.S Constitution Article 1, § 9 and §10 as well as a violation of the Washington State Constitution Article 1, §23. (No … ex post facto law…shall ever be passed). Although our Legislature did not intend for SHB 1899 to be applied retroactively, the trial court retroactively applied the newly enacted amendment to this case in order to change the penalty amounts assessed against Mesa for wrongful withholding of records to this case filed eight years prior to the enactment of SHB 1899.

> A law violates the ex post facto clause if it: (1) is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person

affected by it. See Weaver v. Graham, supra at 29; Collins v. Youngblood, U.S. , 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990).

State v. Schmidt, 100 Wn. App. 297, 299, 301-302, 996 P.2d 1119 (2000). Here it is not the law that is the issue. It is the trial court's retroactive application of that law despite the lack of retroactive language showing this was the intent of our Legislature.

Furthermore, the Legislature originally proposed to not only decrease penalties to $0 but to increase penalties to $500 per day. While in this case the penalty assessment was only decreased to $0 per day, had SHB 1899 increased the amount of penalties to $500 as originally proposed (CP 151), would the trial court have applied SHB 1899 retroactively? Clearly, SHB 1899 is substantive, alters the punitive assessment against Mesa for violations of the PRA and disadvantages the Zinks in application of a new law to an action existing eight years prior to the effective date of the amendment.

9. <u>Retroactive Application of SHB 1899 Violates the Due Process Clauses and Equal Protection Clauses of the State and Federal Constitutions</u>[9]

The Zinks filed this action on April 30, 2003, just months after the violations occurred (*Zink* 140, ¶5). On June 22, 2005, the trial court rendered the first decision finding the records did not need to be released because Mesa had substantially complied. (*Id.*, ¶7). The trial court's

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[9] Section 7 of this brief (Retroactive Application of SHB 1899 Violates the Constitutional Separation of Power's Doctrine) speaks to this issue and is incorporated here in its entirety.

decision was overturned and remanded back for determination of violations and, if a violation was found, determination of the number of penalty days as well as assessment of per diem penalties ((*Id.*, ¶47)

On November 7, 2008, the trial court entered findings and conclusions concerning Mesa's violations of the PRA. (*Zink* 162, ¶11). After grouping and combining requests, the trial court found 37 PRA violations and set per diem penalties for each violation (*Id.*). Whether a protected right to penalties under the PRA vests at the time suit is filed, as of November 7, 2008, the Zinks had a vested right, protected by due process, to a penalty award against Mesa. This right was upheld by Division III on June 7, 2011.(*Id.*).

> A vested right, entitled to protection from legislation, must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.

Godfrey v. State, 84 Wn.2d 959, 963, 530 P.2d 630 (1975)). Once a violation was found by the trial court, the Zinks had more than a mere expectation of property, the Zinks had a vested right to a penalty assessment against Mesa at the rate in effect at the time the trial court determined violations had occurred and assessed penalties.

> "Due process is violated if the retroactive application of a statute deprives an individual of a vested right." ... "We deal here with the idea that government must respect 'vested rights' in property and contract -- that certain settled expectations of a focused and crystallized sort should

> be secure against governmental disruption, at least without appropriate compensation.").

Caritas Servs. v. Dep't of Soc. & Health Servs., 123 Wn.2d 391, 413, 869 P.2d 28 (1994).

Many PRA cases came both before and after the Zinks filed this action and before the trial court set down in writing his findings, conclusions and orders concerning Mesa's violations, the number of penalty days as well as the amount of penalty. All of these cases were decided using the statutes in effect prior to the effective date of SHB 1899 to assess penalties at no less than $5 per day for each violation of the PRA found by a trial court. Zinks have the same right to assessment of penalties for violations of the PRA by Mesa as all other litigants coming before or after them.

> Constitutional equal protection guaranties require similar treatment under the law for similarly situated persons. U.S. Const. amend. 14, § 1; Const. art. 1, § 12; In re Mota, 114 Wn.2d 465, 473, 788 P.2d 538 (1990). Where persons of different classes are treated differently, there is no equal protection violation. Forbes v. Seattle, 113 Wn.2d 929, 943, 785 P.2d 431 (1990).

State v. Ward, 123 Wn.2d 488, 515, 870 P.2d 295 (1994).

Division III's vacation of the penalty amounts for recalculation using the newly enacted *Yousoufian* assessment did not alter the trial court's decision concerning PRA violations and is a final action, attaching rights to PRA penalties.

> We reverse and remand the judgment amount for consideration of Yousoufian 2010. We affirm the remaining findings except for the trial

> court's (1) reduction of penalty days during the period from the trial court's first decision to the overturning of that decision on appeal; (2) allowance of five business days to respond even when Mesa denied some requests within five days; (3) finding that Mesa reasonably delayed production of the Cade Scott reply to May 30, 2003; and (4) finding that all communications between the city attorney and Mesa were exempt, even those released before or during litigation.

(*Zink* 162, ¶96). Zinks have a vested right to per diem penalty assessment under the same statutes used by other litigants that were in effect at the time the Zinks filed this action or at the least, when violations were found by the trial court. The retroactive application of SHB 1899 to this cause of action deprived Zinks of vested rights protected by the due process and equal protections clauses.

10. <u>Global Reduction In Penalties</u>

The PRA is a strongly worded mandate for the disclosure of public records. In order to enforce the PRA, the tax payers included a provision for penalty assessment for wrong doing. This penalty assessment is based on two specific criteria: 1) determine the number of penalty days; and 2) assess an appropriate penalty based on the agency's actions (culpability). *Bricker v. Dep't of Labor & Indus.*, 164 Wn. App. 16, ¶10, 262 P.3d 121 (2011).

In *Bricker*, the trial court grouped the records together rather than imposing a per record penalty (*Id.* ¶14).[10] The trial court assessed $90 per

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[10] In the current case, the records were previously grouped into 33 individual groups by the Honorable William Acey in 2008. (CP 2410:10-2411:15).

day for 16 groups of records and $15 per day for 3 additional groups (*Id.* ¶1). On appeal, the *Bricker* Court determined that "the trial court did not abuse its discretion in refusing to impose a penalty for each individual record" (*Id.* ¶15), stating that "the PDA's purpose of promoting access to public records was better served by increasing the penalty based on the public agency's culpability rather than on the size of the plaintiff's request. *Yousoufian* II, 152 Wn.2d at 435" (*Id.* ¶12)(emphasis added).[11]

In this case, the trial court initially assessed penalties based on the City's culpability (RP (May 10, 2016) 15:4-19) finding Mesa had acted egregiously (*Id.* 15:17-18; 17:16; 51:2-3; (June 29, 2016) 52:20; 58:25-59:4), failed miserably to train staff, records were hidden, records were destroyed and records were lost. (RP (May 10, 2016) 10:10-17). Mesa admitted to "some really egregious violations of the Public Records Act" (*Id.* 3:12-15). The trial court made clear that the size of the agency is an aggravating factor and not a mitigating factor (*Id.* 10:18-20; 15:15-16) and found that a court must consider the deterrence effect on other agencies and not just Mesa (*Id.* 10:20-22). The trial court set the vast majority of the penalties at the low end of the scale (CP 2471); with one group being set at $1 per day (*Id.*).

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[11] Although the PDA's purpose is to promote access to public records, this purpose is better served by increasing the penalty based on an agency's culpability than it is by basing the penalty on the size of the plaintiff's request. *Yousoufian v. King County Executive*, 152 Wn.2d 421, 435, 98 P.3d 463 (2004)(emphasis added).

After orally stating the reason for each penalty assessment, the trial court announced a total assessment against Mesa of $264,927 (RP (May 10, 2016) 10:10-40:11).[12] However, due to a mistake in the spreadsheet used by the court, the actual total penalty assessment was $352,954 (*Id.* 41:3-5; 42:5-25). Despite finding egregious violations, including what was classified as a "Richard Nixon" style coverup of an illegally held meeting (RP (April 12, 2016) 112:4-113:14), the trial court stated that while $264,000 made sense, the higher total was unsettling and would need to be reduced due to the size of the agency (RP (May 10, 2016) 41:6-22).

On June 29, 2016, the trial court, based on the decision in *Bricker,* determined it has the legal authority to globally reduce the penalty assessment based on the small size of the agency, the deterrent effect needed to dissuade other agencies and the windfall to the Zinks (RP (June 29, 2016) 53:25-55:19; 59:20-23). The trial court arbitrarily reduced the total penalty from $352,954 to $175,000; a little less than half the original penalty assessment (*Id.* 59:5-60:10). The trial court's decision to decrease the penalty after an objective *Yousoufian* analysis is arbitrary, capricious and abuse of discretion.

Our Supreme Court has made quite clear that after establishing the number of penalty days, penalty assessment is to be based on culpability of

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[12] The trial court erroneously combined violation #4 with violation #3 (RP (May10, 2016) 17:17-18:25; 40:22-41:2).

the agency (*Yousoufian v. King County Executive*, 152 Wn.2d 421, 435, 98 P.3d 463 (2004). There is absolutely no legal authority in the PRA or the plethora of well-established case law allowing a trial court to globally reduce penalties based on the small size of the agency, the deterrence needed to dissuade other agencies or a windfall to those seeking to hold an agency accountable for PRA violations. Further, decreasing penalties based on the small size of the agency is the opposite of a deterrent. For instance, in the case of Mesa, the City continued to withhold the records despite the fact that they could have released the records at any time; decreasing penalty days (RP (May 10, 2016) 10:15-17). Mesa chose not to do so and then argued that due to the high number of penalty days, the penalties should be reduced (RP (June 29, 2016) 24:18-25:13). The trial court agreed that, in certain cases, such as this one, the penalty can be reduced due to a high number of penalty days (*Id.* 29:11-18). Reducing penalties because an agency withholds records for a longer period of time than needed is not a deterrence.

Here, both the City and the trial court noted that Mesa's actions were egregious (May 10, 2016) 3:12-15; 15:17-18; 17:16; 51:2-3; (June 29, 2016) 52:20; 58:25-59:4). While the Court in *Bricker* noted that the trial court had the authority to group records and increase per day penalties for egregious violations. *Bricker v. Dep't of Labor & Indus.*, 164 Wn. App. 16, ¶15, 262 P.3d 121 (2011), that Court did not give a trial court the authority to arbitrarily and capriciously reduce per diem penalties based on the

agency refusing to release records even after the agency determined their exemptions was erroneous. Mesa was also found to be hiding records, destroying records and losing records. The trial court's decision is error and an abuse of discretion and must be reversed.

VI. COSTS

The Zinks request this Court to award them fees and costs under RAP 14. Pursuant to RAP 14.1 the appellate court which accepts review and makes final determination (RAP 14.1(b)) decides costs in all cases (RAP 14.1(a)). As the substantially prevailing party in this cause of action, the Zinks respectfully request this Court to award them fees and costs for this appeal. See *Mount Adams Sch. Dist. v. Cook*, 150 Wn.2d 716, 727, 81 P.3d 111 (2003).

VII. PUBLICATION

The issues addressed in this case concerning: 1) whether a Legislative amendment changing the penalty amounts can be applied retroactively; and 2) whether a court, after an objective application of the *Yousoufian* Factors to the actions of the agency in violating the PRA, is authorized to globally decrease penalties based on the agency's size, a large number of penalty days and a deterrence effect necessary to deter other agencies are of great public importance. The decision in this case will affect all future cases with similar issues. Therefore, publication is appropriate so the issues addressed

by this Court will be available for use by the public in general if similar cases arise.

VIII. CONCLUSION

The trial court's decision to apply a legislative amendment to a statute changing the legal consequences of events completed before its enactment robs the Zinks' of their vested right to penalties assessed at the rate as all other cases coming prior to and after this case and must be reversed.

Despite findings that Mesa's actions in hiding records, destroying records, losing records and refusing to release records were egregious violations of the PRA, the trial court globally decreased the initial assessment of penalties by more than 50%. Courts are required to assess penalties based on the agency's actions in responding to requests for public records. There is no language in the PRA allowing a trial court to "globally reduce" an objectively assessed penalty (based on the *Yousoufian* factors and the culpability of the agency) due to the size of the agency and high number of penalty days. Allowing courts to decrease per diem penalties based on size and high number of penalty days will encourage small agencies to withhold records until final court determination under the assumption they too will receive a favorably adjusted penalty assessment.

The Zinks respectfully request this Court to reverse the trial court on the issues of retroactive application of SHB 1899 and "global reduction" of penalties, reinstate the trial court's original penalty amount objectively

assessed using the *Yousoufian* Factors and increase all per diem penalty assessments to no less than $5 per day (see Appendix A).

RESPECTFULLY SUBMITTED this 1st day of May 2017.

By _____
Donna Zink
Pro se

IX. CERTIFICATION OF SERVICE

I declare that on the 1st day of May 2017, I did send a true and correct copy of appellant's "*Opening Brief of Appellants Donna and Jeff Zink*" via e-mail service to the following addresses as agreed upon by all parties to this matter:

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Dated this 1st day of May 2017.

By Donna L Zink
Donna Zink
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APPENDIX A

No.	Description	Primary Period Penalty Days	Primary Period Penalty Rate ($/day)	Primary Penalty Period Penalty	Secondary Period Penalty Days	Secondary Period Penalty Rate ($/day)	Secondary Penalty Period Penalty	Tertiary Period Penalty Days	Tertiary Period Penalty Rate ($/day)	Tertiary Penalty Period Penalty	Quaternary Period Penalty Days	Quaternary Period Penalty Rate ($/day)	QuaternaryPenalty Period Penalty	Total Penalty for Violation	Total Penalty Days
1	Complaint	51	$100	$5,100										$5,100	51
2	Clerk's Notes	946	$10	$9,460	47	$5	$235							$9,695	993
3	BOA Materials	250	$100	$25,000										$25,000	250
4	BOA Tape	28	$100	$2,800										$2,800	28
5	21 Code Violation 1	42	$10	$420										$420	42
6	21 Code Violation 2	131	$5	$655	689	$20	$13,780	832	$5	$4,160	441	$20	$8,820	$27,415	2093
7	Ordinance 01-05	46	$5	$230									$0	$230	46
8	Council Resignations	167	$5	$835	689	$20	$13,780	832	$5	$4,160	441	$20	$8,820	$27,595	2129
9	MRSC Memo	1271	$20	$25,420	832	$5	$4,160							$29,580	2103
10	BOA Rules	2	$65	$130										$130	2
11	BOA Rules	9	$65	$585										$585	9
12	Timecard	1243	$20	$24,860	832	$5	$4,160							$29,020	2075
13	Meter Readings	931	$25	$23,275										$23,275	931
14	Phone/Fax Log	1230	$20	$24,600	832	$5	$4,160							$28,760	2062
15	18 Residential Files	100	$5	$500	689	$20	$13,780	832	$5	$4,160	441	$20	$8,820	$27,260	2062
16	11 Residential Files	93	$5	$465	689	$20	$13,780	832	$5	$4,160	441	$20	$8,820	$27,225	2055
17	File	1	$20	$20										$20	1
18	File	42	$20	$840										$840	42
19	BOA Signed Minutes	4	$5	$20										$20	4
20	Council Minutes	4	$20	$80										$80	4
21	BOA Resignations	4	$20	$80										$80	4
22	Complaint	97	$5	$485	689	$20	$13,780	832	$5	$4,160	441	$20	$8,820	$27,245	2059
23	Scott Reply	76	$20	$1,520	689	$20	$13,780	832	$5	$4,160	441	$20	$8,820	$28,280	2038
24	Council Packet	50	$20	$1,000										$1,000	50
25	Vouchers	50	$20	$1,000										$1,000	50
26	Complaint	47	$30	$1,410										$1,410	47
27	Minute Book	49	$25	$1,225										$1,225	49
28	Clerk's Notes 2	760	$10	$7,600	47	$5	$235							$7,835	807
29	Council Minutes	43	$30	$1,290										$1,290	43
30	Maintenance Logs	754	$60	$45,240	117	$5	$585							$45,825	871
31	Resolution	39	$30	$1,170										$1,170	39
32	Meeting Tape	39	$30	$1,170										$1,170	39
33	Dog Ordinance	39	$30	$1,170										$1,170	39
	TOTALS			**$209,655**			**$96,215**			**$24,960**			**$52,920**	**$383,750**	**23117**
													Original	$352,954	
													Difference	**$30,796**	
													Average Daily Penalty	$16.60	

XI. APPENDIX B

RCW 42.17.340

Judicial review of agency actions.

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(2) 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.

(3) Judicial review of all agency actions taken or challenged under RCW 42.17.250 through 42.17.320 shall be de novo. Courts 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 or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) 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.