

No. 34599-8-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

DONNA and JEFF ZINK, et ux.

v.

CITY OF MESA.

REPLY/RESPONSE BRIEF OF APPELLANT DONNA and JEFF ZINK

DONNA and JEFF ZINK
Pro Se Appellants
P.O. Box 263
Mesa, WA 99343
(509) 265-4417
dlczink@outlook.com
jeffzink@outlook.com

Table of Contents

I. Reply	1
1. Zink’s Right to Penalty Assessment Under RCW 42.17.340(4) Vested Once Judgment Was Initially Entered in 2005	1
2. S.H.B. 1899 Is Not Remedial and Cannot Be Applied Retroactively	4
3. Applying S.H.B 1899 Retroactively Does Not Further Any Remedial Purpose	8
4. S.H.B. 1899 Creates a New Liability or Obligation For the Assessment of Daily Penalties Against Agencies for Violations of the PRA.....	10
5. Legislative Omission of Language Concerning Retroactive Application of is Not Evidence of Intent of Retroactive Application.....	11
6. Hale v. Wellpinit, 181 Wn.2d 494 (2009) Did Not Overrule In re Stewart, 115 Wn, App. 319 (2003).....	16
7. Global Reduction in Penalties is An Abuse of Discretion	16
8. Global Reduction in Penalties Negates the Need to Have a Penalty Range or an Objective Yousoufian Analysis.....	18
1. The Tax Payers Established Penalties For PRA Violations	19
2. Agency Bad Faith Is Not Overemphasized In Determining Penalty Assessments.....	20
3. Deterrence is Not the Most Important Consideration and The Evidence Clearly Shows Mesa Was Never Deterred By the Penalty Assessment Aspects of the PRA	21
II. Response	25
4. Mesa’s Request for This Court to Cap the Total Penalty Amount at 1% of an Agency Budget Line Item Violates the Separation of Powers Doctrine	26
5. Comparison of Total Penalty Awards	29
6. The Trial Court Did Not Abuse Its Discretion in Increasing Penalty Assessment Based on MRSC Memorandum.....	31
7. Statement of Facts For Violations #6, #8, #15, #16 & #22	32
Complaint #6 - Twenty-One Code Violation Letters	32
Complaint #8 - Resignation Letters of Councilmembers	36

Complaint #15 – Eighteen Residential Files	37
Complaint #16 – Eleven Residential Files	39
Complaint #22 – Sharp Complaint	40
8. Mesa’s Facts and Argument	40
III. Conclusion	50
IV. Certification of Service	51

TABLE OF AUTHORITIES

Washington State Supreme Court

1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 146 P.3d 423 (2006) -14

Addleman v. Board of Prison Terms & Paroles, 107 Wn.2d 503, 730 P.2d 1327 (1986) ----- 8, 9, 10

Bailey v. School Dist. No. 49, 108 Wash. 612,185 P. 810 (1919)----- 2

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 259 P.3d 190 (2011) -----49

Carrick v. Locke, 125 Wn.2d 129, 882 P.2d 173 (1994)-----27

Duke v. Boyd, 133 Wn.2d 80, 942 P.2d 351 (1997)-----12

Haddenham v. State, 87 Wn.2d 145, 550 P.2d 9 (1976) ----- 3, 5

Hale v. Wellpinit School Dist., 165 Wn.2d 494, 198 P.3d 1021 (2009)----- 16, 17

Hansen v. W. Coast Wholesale Drug Co., 47 Wn.2d 825, 289 P.2d 718 (1955)----- 3

In re Estate of Hambleton, 181 Wn.2d 802, 335 P.3d 398 (2014)-----28

Jenkins v. Bellingham Mun. Court, 95 Wn.2d 574, 627 P.2d 1316 (1981)-----12

Lummi Indian Nation v. State, 170 Wn.2d 247, 241 P.3d 1220 (2010)----- 28, 30

Marine Power Equipment Co. v. Human Rights Comm'n, 39 Wn. App. 609, 694 P.2d 697 (1985) -----4, 6, 7

Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 132 P.3d 115 (2006)-----17

McGee Guest Home, Inc. v. DSHS, 142 Wn.2d 316, 12 P.3d 144 (2000)-----14

Miebach v. Colasurdo, 102 Wn.2d 170, 685 P.2d 1074 (1984) ----- 5

Rhoad v. McLean Trucking Co., 102 Wn.2d 422, 686 P.2d 483 (1984)-----13

Sanders v. State, 169 Wn.2d 827, 240 P.3d 120 (2010)----- 13, 14

Sargent v. Seattle Police Dep't, 179 Wn.2d 376, 314 P.3d 1093 (2013)-----50

Sargent v. Seattle Police Dep't, 179 Wn.2d 376, 314 P.3d 1093 (2013).-----29

<i>State v. Elmore</i> , 154 Wn. App. 885, 228 P.3d 760 (2010)-----	27
<i>State v. Hodgson</i> , 108 Wn.2d 662, 740 P.2d 848 (1987) -----	2
<i>State v. Humphrey</i> , 139 Wn.2d 53, 983 P.2d 1118 (1999) -----	10, 11
<i>State v. Moses</i> , 145 Wn.2d 370, 37 P.3d 1216 (2002)-----	12
<i>State v. Pillatos</i> , 159 Wn.2d 459, 150 P.3d 1130 (2007) -----	4, 5, 10
<i>Wade Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.</i> , 185 Wn.2d 270, 372 P.3d 97 (2016) -----	49
<i>Yousoufian v. King County Executive</i> , 152 Wn.2d 421, 98 P.3d 463 (2004) ---	11, 14, 17, 29
<i>Yousoufian v. Office of Ron Sims, King County Executive</i> , 165 Wn.2d 439, 200 P.3d 232 (2009)-----	31
<i>Yousoufian v. Office of Ron Sims, King County Executive</i> , 168 Wn.2d 444, 229 P.3d 735 (2010)-----	passim

Washington State Court of Appeals

<i>Bayless v. Community College Dist.</i> , 84 Wn. App. 309, 927 P.2d 254 (1996)--	12, 13
<i>Dep't of Labor & Indus. V. Metro Hauling Inc.</i> , 48 Wn. App. 214, 738 P.2d 1063 (1987) -----	12
<i>In re Dependency of A.M.M.</i> , 182 Wn. App. 776, 332 P.3d 500 (2014)-----	4
<i>In re Stewart</i> , 115 Wn, App. 319, 75 P.3d 521 (2003)-----	16
<i>State v. Maples</i> , 171 Wn. App. 44, 286 P.3d 386 (2012) -----	16
<i>Tacoma Pub. Library v. Woessner</i> , 90 Wn. App. 205, 951 P.2d 357 (1998) -----	47
<i>West v. Thurston County</i> , 144 Wn. App. 573, 183 P.3d 346 (2008)-----	8
<i>Zink v. City of Mesa</i> , 162 Wn. App. 688, 256 P.3d 384 (2011) -----	2, 3, 18
<i>Zink v. City of Mesa</i> , 140 Wn. App. 328, 166 P.3d 738 (2007) -----	1

Washington State Constitution

Washington State Constitution, Article I, §3-----	19
---	----

Washington State Constitution, Article I, §12 -----19

Revised Code of Washington

RCW 4.24.100----- 3
RCW 9.95.009(1)----- 9
RCW 9.95.009(2)----- 9
RCW 10.01.040-----13
RCW 13.34.180(1)(f)----- 1
RCW 42.17.310(1)(v)-----49
RCW 42.17.310(v) -----48
RCW 42.17.340(1) ----- 7
RCW 42.56.330(2) -----48
RCW 42.56.520 -----28
RCW 42.56.550(1) ----- 7
RCW 42.56.550(4) ----- passim
RCW 42.56.565(1) -----13
RCW 42.56.904 -----8, 24, 25

Appellate Court Rules

RAP 10.3(6) -----26

Other Washington State Authorities

Initiate 276 (1972)-----28
Laws of 1917, ch 92, p. 332 ----- 2
Laws of 1955, ch 372, p. 1538 ----- 3
Laws of 2005, ch. 68.1)----- 5

I. REPLY

1. Zink's Right to Penalty Assessment Under RCW 42.17.340(4) Vested Once Judgment Was Initially Entered in 2005

Mesa argues that S.H.B. 1899 was effective prior to the trial court rendering its decision on June 29, 2016 and therefore was the law in effect at the time that decision was made citing to *In re Dependency of A.M.M.*, 182 Wn. App. 776, 332 P.3d 500 (2014). Mesa fails to recognize that the original judgment concerning PRA violations was rendered in 2005 vesting the Zinks' right to penalties under RCW 42.17.340(4)/42.56.550(4).

The Court in *A.M.M.* specified that retroactive application of a statute (RCW 13.34.180(1)(f)) was not at issue in the appeal (*Id.* ¶29, *fn.* 7). In this cause, retroactive application of S.H.B. 1899 is one of the main issues. Next, the Court noted that RCW 13.34.180(1)(f), the statute at issue, became effective on July 28, 2013, five days prior to the "initial" judgment (*Id.* ¶24) which was filed on August 2, 2013 (*Id.* ¶20). Based on these circumstances, the Court opined that:

[A] court is to apply the law in effect at the time it renders its decision and enters judgment, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

(*Id.* ¶29). In this cause of action the "initial" judgment was rendered in June 2005; six years prior to the enactment of S.H.B. 1899. (*Zink v. City of Mesa*, 140 Wn. App. 328, ¶7, 166 P.3d 738 (2007)). While initially, the order and judgment found Zink was harassing Mesa and therefore Mesa did not violate the PRA, that decision was overturned on appeal in 2007.

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

Id. ¶47. At that point in time the Zinks had a favorable judgment rendered in their favor and had a vested right to a penalty assessment under RCW 42.17.340(4), the statute in effect at the time Zink filed this cause of action.

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 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.

Zink v. City of Mesa, 162 Wn. App. 688, ¶1, *fn.* 1, 256 P.3d 384 (2011). The legal issue of whether a vested right exists has been addressed and developed by our Supreme Court in numerous cases over an extended period of time and depends on the nature of the cause of action (*Compare, e.g., State v. Hodgson*, 108 Wn.2d 662, 667-68, 740 P.2d 848 (1987)(*Id.* ¶40, *fn.* 10).

In *Bailey v. School Dist. No. 49*, 108 Wash. 612, 185 P. 810 (1919) a personal injury action was initiated against the school district on May 3, 1917. On June 6, 1917, the Legislative act of 1917 (ch. 92, Laws of 1917, p. 332) went into effect barring the action. The case was dismissed. On appeal, our Supreme Court opined that “to maintain a tort action against a municipality is not a vested right in property” (*Id.* 613) since the prior law was not a contract (*Id.* 614) and our Legislature has the right to repeal a law giving a party a right of action (*Id.* 615).

Our Supreme Court expounded on the issue of when rights vest in *Hansen v. W. Coast Wholesale Drug Co.*, 47 Wn.2d 825, 289 P.2d 718 (1955). In that case, an action was initiated under RCW 4.24.100 for wrongful death of a spouse. The trial court dismissed the action for failure to state a claim. While an appeal was pending our Legislature enacted chapter 372, Laws of 1955, p. 1538 repealing RCW 4.24.100, the statute upon which appellant's cause of action was based, without incorporating a saving clause as to pending causes of actions. Our Supreme Court determined that an appellant had no vested right until a favorable final judgment had been entered and that the Legislature may take away the right to a tort action at any time (*Id.* 826-27)(emphasis added).

In *Haddenham v. State*, 87 Wn.2d 145, 550 P.2d 9 (1976), the Supreme Court reiterated that “[t]he abolition by the legislature of an accrued cause of action based on statute does not violate any constitutional rights of plaintiffs because a tort cause of action is not vested until it is reduced to judgment” (*Id.* 149-50)(emphasis added). Here a favorable final judgment was rendered by the Court of Appeals in 2007. Furthermore, the trial court entered a judgment favorable to the Zinks in 2008; three years prior to the enactment of S.H.B. 1899.

The court's findings, conclusions, and order entered on November 7, 2008, set the number of penalty days for 37 unlawfully denied, delayed, or limited public record requests (or combinations of requests) and set a per-day penalty for each violation.

(*Zink v. City of Mesa*, 162 Wn. App. 688, ¶11, 256 P.3d 384 (2011)). On June 7, 2011, the Court of Appeals again rendered judgment in favor of Zinks; forty-five (45) days prior to the effective date of S.H.B. 1899 (*Id.* ¶15, *fn.* 3).

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.

Id. ¶96. There can be no doubt that judgment has been rendered in Zinks favor prior to the enactment and effective date of S.H.B. 1899. Therefore, by Supreme Court mandate, the controlling authority in this state, the Zinks have a vested right in assessment of penalties at the rate established by RCW 42.17.340(4); the statute in effect at the time judgment was initially entered *In re Dependency of A.M.M.*, 182 Wn. App. 776, 789, 332 P.3d 500 (2014).

2. S.H.B. 1899 Is Not Remedial and Cannot Be Applied Retroactively

Mesa claims S.H.B. 1899 changed the mandatory per day penalty amount assessed under RCW 42.56.550(4) and is therefore remedial and must be applied retroactively citing to *State v. Pillatos*, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007) and *Marine Power Equipment Co. v. Human Rights Comm'n*, 39 Wn. App. 609, 620, 694 P.2d 697 (1985). While S.H.B. 1899 altered the amount of penalty assessment from \$5-\$100 to up to \$100 that change does not amount to a remedial amendment and retroactive application violates the Zinks vested rights;¹ *supra*.

¹ *Haddenham v. State*, 87 Wn.2d 145, 149, 550 P.2d 9 (1976).

Our Supreme Court has mandated that “[a] statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right.” *Miebach v. Colasurdo*, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984). “Remedial statutes, in general, afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries” (*Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976)). In *State v. Pillatos*, the question before the Court was whether newly enacted legislation (Laws of 2005, ch. 68.1), explicitly giving juries the responsibility to find facts justifying “an upwards departure from standard-range sentences” (*Id.* ¶1) could be applied to causes of action where the defendants had each plead guilty prior to the effective date of the new statute (*Id.* ¶2). The Supreme Court opined that:

We hold that the Laws of 2005, chapter 68, by its terms, **applies only to cases where trials have not begun or guilty pleas have not been accepted**, and that Washington courts lack inherent power to empanel sentencing juries outside of that new act. ... The Pierce County Superior Court is affirmed in *State v. Butters* and *State v. Pillatos*. **We hold that the new statutory proceedings do not apply to those defendants.**

Id. ¶46 (emphasis added). Rather than support Mesa’s argument *Pillatos* clearly demonstrates that S.H.B. 1899 should not be applied retroactively to this cause of action.

Mesa argues that in *Marine Power Equipment Co. v. Human Rights Comm’n*, 39 Wn. App. 609, 694 P.2d 697 (1985) the Court of Appeals opined that amendments to statutory penalties are remedial. Mesa’s interpretation of the decision in *Marine Power* is taken out of context. The Court in *Marine Power* did not discuss the legal question of whether an amendment to

statutory penalties is remedial. The question before the Court in *Marine Power* was whether a 1983 legislative amendment applied retroactively because it was remedial and clarified the original statute; correcting an erroneous judicial interpretation of the Legislature's original intent (*Id.* 611-13). The Court found that because the 1983 amendment added language to provide for an award of "damages" for humiliation and suffering it was clearly a remedy intended to compensate an injured party.

[T]he new section is remedial because it creates a supplemental remedy for enforcement of a preexisting right.

(*Id.* 617). That is not the case here. S.H.B. 1899 does not affect the practices, procedures, or remedies previously established by the PRA for initiating an action in the court. For instance, the language providing the authority for a requester to initiate action for violations of the PRA did not change.

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.

RCW 42.17.340(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.

RCW 42.56.550(1). Although S.H.B. 1899 did change the amount of penalty assessment from \$5-\$100 to up to \$100, the practice, procedure, and remedy for PRA violations that a court must assess a penalty for each day a record is wrongfully withheld was not altered and does not affect the form of the remedy (*Marine Power*, 39 Wn. App. at 616-17).

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. **In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he was denied the right to inspect or copy said public record.**

RCW 42.17.340(4)(emphasis added).

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 to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.**

RCW 42.56.550(4)(emphasis added). S.H.B. 1899 speaks to the actual penalty assessment and does not affect the practice, procedure or remedy previously established by our Legislature for violations of the PRA.

Finally, Mesa cites to *West v. Thurston County*, 144 Wn. App. 573, 583-84, 183 P.3d 346 (2008) in support of their argument. Again, Mesa takes the Court's decision out of context. The Court in *West v. Thurston County* was discussing whether RCW 42.56.904 should be applied retroactively as a remedial statute. The Court found that RCW 42.56.904 was specifically enacted to clarify that attorney invoices were not exempt under the PRA. That Court opined that RCW 42.56.904 was intended to apply retroactively because the legislature acted during a controversy regarding the meaning of the law and the timing reflected the Legislature's intent to cure or clarify that the attorney invoices were not exempt from disclosure.

RCW 42.56.904 was expressly intended to clarify the Public Records Act's applicability to records of public funds expended on private legal counsel. The new statute clarified that attorney invoices held by a public agency may not be withheld in their entirety and that any work product redactions must be justified.

Id. ¶21. The decision in *West v. Thurston County* is not dispositive of this case since it did not involve a new duty or obligation and it clarified the meaning of an existing statute in controversy at the time of its enactment.

3. Applying S.H.B 1899 Retroactively Does Not Further Any Remedial Purpose

Mesa cites to *Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986). In *Addleman*, petitions were filed directed at RCW 9.95.009(1) alleging an ex post facto infirmity by the abolition of the Board of Prison Terms and Paroles in 1988 (*Id.* 504-5). The Court found that eliminating the Board that implements mechanisms which shorten time in prison did violate constitutional prohibitions against ex post facto law.

However, the Court found that our legislature corrected the ex post facto concern by creating a transitional agency, the indeterminate sentence review board, to review such decisions until 1992 when the superior courts of the state of Washington will take over those duties (*Id.* 506-7).

The Legislature in the SRA did not repeal the parole system but only made it inapplicable to those committing felonies after 1984. RCW 9.95.900. The Legislature had until 1988 to establish a mechanism whereby the still applicable functions of the Board for pre-July 1, 1984 prisoners could be performed.

Id. 507. The *Addleman* Court also found that a remedial statute favorably reducing punishment laws applied to previously convicted criminal defendants. RCW 9.95.900 relates specifically to a practice, procedure or remedy leading to a possibility of a reduced sentence through due process but does not set any specific penalty. This is obvious when looking at the second issue before that Court which was whether SRA sentence ranges should apply to persons convicted and sentenced prior to July 1, 1984. RCW 9.95.009(2)(*Id.* 507). The Court opined that under the circumstance of that case, Board decisions on duration of confinement must be made in accordance with the requirements of RCW 9.95.009(2)(*Id.* 511-12). In contrast to the opinion in *Addleman*, S.H.B. 1899 does not relate to a practice, procedure or remedy but does set specific penalty amounts.

The *Addleman* decision is not dispositive to this case because the issue here is not how to calculate penalties under the PRA since the wording creating the procedure for assessment of penalties remained unchanged. The question in this case is whether the new penalty assessment of up to \$100 per day, which eliminated the requirement of a \$5 to \$100 per day penalty,

creates a new obligation or imposes a new duty in respect to transactions or considerations already past (*Pillatos*, 159 Wn.2d at 471). The answer is yes. By changing the amount of the penalty assessment, the Legislative intent is to impose a new duty or obligation on an agency found to be in violation of the PRA. S.H.B. 1899 is not a remedial statute and does not further any remedial purpose.

4. **S.H.B. 1899 Creates a New Liability or Obligation For the Assessment of Daily Penalties Against Agencies for Violations of the PRA**

Mesa argues that the Court's decision in *State v. Humphrey*, 139 Wn.2d 53, 63, 983 P.2d 1118 (1999) does not support Zinks claims that S.H.B. 1899 creates a new liability. Mesa bases their argument on the facts that 1) *Humphrey* is a criminal case that raises ex post facto issue; and 2) the Court was discussing an amendment that increased the liability provision while S.H.B. 1899 decreased liability provisions (Mesa Open 17). Mesa has cited to numerous criminal cases in support of their argument and their argument is an illogical interpretation of those cases as it relates to "creating a new liability."

Mesa's argument ignores the fact that under RCW 42.17.340(4) the Zinks have a statutory right to penalties assessed against Mesa for violating their right to access public records.

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

RCW 42.17.340(4)(emphasis added). As discussed, this mandate of our Legislature was not repealed and the same right exists in the newer law.

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

RCW 42.56.550(4)(emphasis added). The stated purpose of RCW 42.56.550(4) is to allow a requester to enforce the strict mandates of the PRA against agencies who violate a requestor's right to access public records under the PRA through daily penalties awarded to the requestor.

The PDA plainly states that the trial court has "discretion" in setting the penalty at not less than \$ 5 but not more than \$ 100. If the trial court refuses to assess any penalty, then it is setting the penalty at less than \$ 5, which is contrary to the unambiguous language used in RCW 42.17.340(4). As stated in Sheehan, the legislature limited the trial court's discretion by amending RCW 42.17.340 in 1992 to set a minimum penalty, which the trial court must assess if the agency is found to have violated the PDA.

Yousoufian v. King County Executive, 152 Wn.2d 421, 433, 98 P.3d 463 (2004). Under RCW 42.17.340(4), the Zinks are entitled to an award of penalties between \$5 to \$100 dollars per day. The Legislative amendment in 2011 clearly created a new liability under an already construed statute, is not remedial and cannot be applied retroactively (*Humphrey*, 139 Wn.2d at 63).

5. Legislative Omission of Language Concerning Retroactive Application of is Not Evidence of Intent of Retroactive Application

Mesa's argues that under the decisions in *Bayless v. Community College Dist.*, 84 Wn. App. 309, 314, 927 P.2d 254 (1996) and *Dep't of Labor & Indus. V. Metro Hauling Inc.*, 48 Wn. App. 214, 218-19, 738 P.2d 1063

(1987) Zink must show that the Legislature's refusal to include retroactive language, even after a request was made by Mesa to include such language was rejected, showed an intent for prospective application of S.H.B. 1899 (Mesa Open. pg. 18, 21). Mesa's argument is not well taken.

Legislative intent is derived by the statutory language. *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). 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)). Mesa is asking this Court to read retroactive language into S.H.B. 1899 that simply is not there. Clearly, by not including language clarifying S.H.B. 1899 was to apply retroactively, the Legislature did not intend for S.H.B. 1899 to be applied retroactively and under the rules of statutory construction, this court cannot add those words even if it was accidental.

Mesa argues that the most likely reason the Legislature did not include an emergency clause or retroactive application clause is because S.H.B. 1899 is remedial and therefore there was already a presumption of S.H.B. 1899 would be applied to pending cases. As previously discussed, S.H.B. 1899 does not meet the qualifications for being remedial and the Zinks have a vested right to penalty assessments under the statute in effect at the time this cause was initiated or, if not then, at the time the initial judgment in the Zinks' favor was rendered, *supra*.

Washington courts will not apply a remedial statute retroactively if either a clear legislative intent for prospective application exists or if applying the statute retroactively would affect a vested right.

Bayless v. Community College Dist., 84 Wn. App. 309, 314, 927 P.2d 254 (1996). Furthermore, Mesa's argument is without legal authority and requires the Court to read words into a statute that are not there. "A court may not read into a statute those things which it conceives the Legislature may have left out unintentionally" *Rhoad v. McLean Trucking Co.*, 102 Wn.2d 422, 427, 686 P.2d 483 (1984).

Mesa argues that the Legislature included an emergency clause or retroactive application clause in S.B. 5025 (RCW 42.56.565(1)) because that statute exclusively involves penalty awards in inmate cases. Mesa claims that "[a]mendments to penalty provisions involving criminal defendants potentially implicates the anti-retroactivity savings clause found in RCW 10.01.040." (Mesa Open 22). Mesa's argument fails. An inmate requestor filing an action in the courts under the PRA is not a criminal defendant and any action involving RCW 42.56.565(1) could not possibly implicate RCW 10.01.040.

Mesa goes to great lengths to argue that S.H.B. 1899 is retroactive because it was enacted just months after the Supreme Court noted in *Sanders* that the PRA penalty provisions were harsh (*Sanders v. State*, 169 Wn.2d 827, 864, 240 P.3d 120 (2010))(Mesa Open 20). Mesa argues that our Courts "often apply amendments retroactively "where an amendment is enacted during a controversy regarding the meaning of the law" citing to *McGee Guest Home, Inc. v. DSHS*, 142 Wn.2d 316, 325, 12 P.3d 144 (2000).

In *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006), our Supreme Court addressed the issue of Legislative enactments meant to clarify a statute after a controversy arises concerning interpretation of that statute. The Court opined that an amendment will not be given retroactive application if it contravenes a judicial construction of the statute that is clarified because of separation of powers considerations.” Pursuant to the decision in *1000 Virginia*, S.H.B. 1899 cannot be applied retroactively due to the timing of its enactment for two reasons.

First, RCW 42.17.340(4)/42.56.550(4) was not unclear or ambiguous and it does not cure an ambiguity in a statute through clarification. While the “mandatory nature of the five-dollar- per-day minimum penalty requirement “may seem harsh,” it is the unambiguous meaning of the statute” (*Sanders v. State*, 169 Wn.2d 827, 864, 240 P.3d 120 (2010)).

Second, retroactive application of S.H.B. 1899 would contravene well established judicial construction of RCW 42.17.340(4). “The PDA plainly states that the trial court has “discretion” in setting the penalty at not less than \$5 but not more than \$100.” *Yousoufian v. King County Executive*, 152 Wn.2d 421, 433, 98 P.3d 463 (2004). RCW 42.17.340(4)/42.56.550(4) was not ambiguous or not unclear and retroactive application contravenes established judicial construction. The timing of S.H.B. 1899 is not relevant in this case.

While it is obvious that our Legislature intended for the penalty provision to be applied in cases arising after its effective date, a lack of intent to apply S.H.B. 1899 retroactively is not an indication that our Legislature intended for the newly established penalty provisions to be applied to all cases pending

prior to its effective date. Especially in light of the fact that one person testifying in favor of S.H.B. 1899, the author of Mesa's briefing, requested an amendment to the bill to include a retroactive clause as was done in S.B. 5025 "to make sure Mesa could benefit" from the newly enacted penalty provisions (CP 159-60); a request that was ignored.

The most rational reason our Legislature refused to include the requested retroactive clause is the fact that to do so would violate the Washington State Constitution.

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, **privileges or immunities which upon the same terms shall not equally belong to all citizens**, or corporations.

Washington State Constitution, Article I, §12 (emphasis added). The Zinks are entitled to the same terms of penalty assessment as all other cases initiated prior to the effective date of S.H.B. 1899. Had the Legislature included a retroactive clause in S.H.B. 1899 for the benefit of Mesa, it would violate the constitutional prohibitions against passing laws whose terms are not equal to all citizens and would have granted a municipality immunity. Further, our State Constitution guarantees that:

No person shall be deprived of life, liberty, or property, without due process of law.

Washington State Constitution, Article I, §3 (emphasis added). As previously argued, the Zinks acquired a vested right in the statutory penalties, if not when this action was initiated, then at the time judgment was rendered in their favor. To include a retroactive clause removing Zinks right to penalty assessment under RCW 42.17.340(4) would violate the constitutional

prohibition against depriving a person of property without due process of the law.

6. Hale v. Wellpinit, 181 Wn.2d 494 (2009) Did Not Overrule In re Stewart, 115 Wn, App. 319 (2003)

Finally, Mesa argues that Zinks' separation of powers argument is based entirely on a Court of Appeals decision that the Zinks know has been overruled – *In re Stewart*, 115 Wn, App. 319, 75 P.3d 521 (2003) by the Supreme Court's decision in *Hale v. Wellpinit School Dist.*, 165 Wn.2d 494, 509, *fn.* 6, 198 P.3d 1021 (2009)(Mesa Open 27). While the Court in *Hale v. Wellpinit* disagreed with the reasoning of the Court of Appeals in *Stewart (Id.)*, that Court did not overrule the decision in *Stewart*.

Notably, the Hale decision did not overrule *Stewart*, nor could it, as *Stewart* rested on the bedrock principle that the legislature cannot contravene an existing judicial construction of a statute. Our Supreme Court discussed Hale and *Stewart* in *Lummi Indian Nation v. State*, 170 Wn.2d 247, 241 P.3d 1220 (2010), and again did not overrule *Stewart*, reaffirmed its holding in Hale, and found that a legislative amendment did not violate the separation of powers doctrine. *Lummi Indian Nation*, 170 Wn.2d at 262.

State v. Maples, 171 Wn. App. 44, ¶10, 286 P.3d 386 (2012). While in this case, Zink uses *Stewart* to argue a violation of the separation of powers doctrine if S.H.B. 1899 was intended to be retroactive, Mesa's argument that *Stewart* was overruled by our Supreme Court in *Hale* is erroneous.

7. Global Reduction in Penalties is An Abuse of Discretion

A trial court's determination of appropriate per day penalties under the PRA is properly reviewed for an abuse of discretion" (*Yousoufian v. King County Executive*, 152 Wn.2d 421, 431, 98 P.3d 463 (2004)). A trial court

abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons (*Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)). A trial “court’s decision is ‘manifestly unreasonable’ if ‘the court, despite applying the correct legal standard to the supported facts, adopts a view “that no reasonable person would take” (*Yousoufian v. Office of Ron Sims, King County Executive*, 168 Wn.2d 444, ¶25, 229 P.3d 735 (2010)).

In an unsupported argument Mesa claims that after a *Yousoufian* analysis has been performed based on the culpability of the agency, a trial court has the authority to arbitrarily recalibrate a preliminary penalty award to take into account the finances of an agency in relation to its size, the number of days the record was withheld and the deterrence needed to deter future actions. Nowhere does our Legislature authorize a court to exercise its discretion and decrease an award based the financial status of an agency instead of culpability. Courts must base their assessment of per day penalties on the actions of the agency in responding to a request; not financial considerations.

Determining a PRA penalty involves two steps: “(1) determine the amount of days the party was denied access and (2) **determine the appropriate per day penalty between \$ 5 and \$ 100 depending on the agency’s actions.**” *Yousoufian II*, 152 Wn.2d at 438 (citing *Lindberg v. Kitsap County*, 133 Wn.2d 729, 749, 948 P.2d 805 (1997) (Durham, C.J., dissenting)).

Id. ¶26 (emphasis added). In this case, the number of days Zink was denied access was determined on first remand (*Zink v. City of Mesa*, 162 Wn. App. 688, ¶11, 256 P.3d 384 (2011)), which was largely upheld and or increased on appeal, and is now the law of the case (*Id.* ¶96). Only the second step

remained on second remand. After determining a penalty amount based on Mesa's actions, the trial court decreased all penalty assessments due to being "unsettled" by the high award, which the trial court felt was "analogous to an award of millions of dollars in damages for coffee being spilled at McDonald's" and, in the court's opinion, the original award would be a windfall to the requester and financially harm the agency (RP (June 29, 2016) 59:5-10; Mesa Open 31).

It is such an amount that would avoid this windfall to the plaintiffs. It will certainly sting the city but will not, in my judgment, cripple them. And on that **I looked at the budget documents real carefully** to see how it spends its money. And quite frankly I cannot see a lot -- you know, **I believe that any award is necessarily going have an effect, an impact, on the ability of the city to provide services.**

(RP (June 29, 2019) 59:22-60:4)(emphasis added). Clearly the trial court used Mesa's financial status as an important factor in determining penalty assessment. An agency's financial status has nothing to do with the actions of an agency in responding to requests for public records. The trial court's decision to reduce the penalties based on Mesa financial status and the "wind fall" to the Zinks was arbitrary, not founded in law, and an abuse of discretion. The trial courts "Global Reduction" in penalties must be reversed.

8. Global Reduction in Penalties Negates the Need to Have a Penalty Range or an Objective Yousoufian Analysis

If, after an objective analysis of culpability, a court has the authority to reduce the final amount based on an agency's finances and the windfall to the requestor, there is no need for the analysis based on agency actions to begin with. A trial court can simply decide what penalty is appropriate and award

that amount. This is exactly why the Supreme Court established the *Yousoufian* Factors.

The lengthy procedural history of this case is illustrative of the challenge faced by trial courts performing the second step of a PRA penalty analysis. This difficulty arises in part because the PRA provides no specific indication of how a standard range penalty is to be calculated.

Yousoufian v. Office of Ron Sims, King County Executive, 168 Wn.2d 444, ¶27, 229 P.3d 735 (2010)). Based on this determination, our Supreme Court set out 16 mitigating and aggravating factors to be used by trial courts to determine penalty assessments based on an agency's actions (*Id.* ¶44-45).

Our multifactor analysis is consistent with the PRA and our precedents and provides guidance to trial courts, more predictability to parties, and a framework for meaningful appellate review.

Id. ¶46. The trial courts reduction in penalties against Mesa negates the need to even perform a *Yousoufian* analysis and renders the language in RCW 42.17.340(4)/42.56.550(4) as well as the Supreme Court's decision in *Yousoufian v. Office of Ron Sims, King County Executive*, 168 Wn.2d 444, ¶44-46, 229 P.3d 735 (2010) superfluous. The trial court's decision to "globally" reduce penalties is an abuse of discretion, contrary to well established law. The trial court's decision is error of law and must be reversed.

1. The Tax Payers Established Penalties For PRA Violations

Mesa argues that it is the employees of a public agency, and not the agency, who are the ones ultimately violating the PRA. Therefore, an agency should not be held accountable for its actions since the agency receives tax payer money which will ultimately be used by the agency to pay any assessed

penalty. As previously noted, it was the tax payers who established the per day penalty assessment against agencies knowing full well those penalties would be paid for with tax money. Mesa's argument is not supported in law and must be rejected as frivolous and without merit.

2. Agency Bad Faith Is Not Overemphasized In Determining Penalty Assessments

Mesa argues that an agency's bad faith is overemphasized in setting penalties. Mesa hypothesizes that if an employee was found to be hiding records of that employee's theft, the worst type of bad faith, an agency would be unduly penalized and punished under the PRA for being the victim of theft and misconduct (Mesa Open 34). Mesa's hypothetical is nonsensical and does not implicate an overemphasis on bad faith.

First employee theft is not at issue here. In this cause of action, the City clerks were found to be withholding and hiding records for various reasons, none of which pertained to employee theft. Second, PRA penalties are to be assessed on a case-by-case basis. Surely, if the hypothetical of employees hiding records from a requestor showing that employee's theft was to go to trial, the agency's lack of knowledge of the theft could be considered a mitigating factor under a *Yousoufian* analysis. Therefore, the agency who has suffered employee theft could be found to be acting in good faith or at least not in bad faith. That is the purpose of the *Yousoufian* analysis, weighing the factors associated with the agency's actions.

Our Supreme Court has repeatedly mandated that:

When determining the amount of the penalty to be imposed 'the existence or absence of [an] agency's bad faith is the principal factor which the trial court must consider.' " Amren v. City of Kalama, 131

Wn.2d 25, 37-38, 929 P.2d 389 (1997) (alteration in original) (quoting *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 303, 825 P.2d 324 (1992)).

Yousoufian v. Office of Ron Sims, King County Executive, 168 Wn.2d 444, ¶28, 229 P.3d 735 (2010))(emphasis added). Mesa's claims otherwise are erroneous, not based in law and are therefore without merit.

3. Deterrence is Not the Most Important Consideration and The Evidence Clearly Shows Mesa Was Never Deterred By the Penalty Assessment Aspects of the PRA

Mesa argues that deterrence has long been considered the most important role in imposition of penalties. While Mesa is correct that the ultimate goal is to deter agencies away from violations through penalty assessment, culpability is and always has been the most important factor a court must consider in making a penalty assessment determination; *supra*.

Further, deterrence is but one of the nine aggravating factors identified in *Yousoufian v. Office of Ron Sims, King County Executive*, 168 Wn.2d 444, ¶45, 229 P.3d 735 (2010) for increasing penalties on larger agencies.

Furthermore, that Court clearly mandated that:

Additionally, no one factor should control. These factors should not infringe upon the considerable discretion of trial courts to determine PRA penalties.

Id. ¶46. Here, Mesa argues that deterrence should be the only factor considered due to Mesa's financial status. This is clearly an erroneous claim.

If an agency willfully withholds and hides public records showing the

“agency’s” wrong doing (the very worst bad faith), as is the case here,² that agency should be assessed the maximum penalty allowed by law of \$100 per day for every day the agency is found to have violated the act. If the agency violated the act for 100 days, the penalty would be \$10,000. If the agency violated the act for 1000 days, the penalty would be \$100,000. Under a proper *Yousoufian* analysis, the assessed daily penalty amount for intentionally hiding public records showing agency wrong doing should illicit the same penalty awards no matter the size or financial status of the offending agency. To find otherwise, sends the message that small agencies need not heed the strong language of the PRA since they will not be held to the same strict standards under the PRA as larger agencies.

The trial court recognized this when it stated:

[T]he City knew that the Zinks were contesting the decision to, "expire" the building permit and this document was obviously critical; hence the bad faith. And the strong presence of those other factors. And is the penalty amount necessary to deter future misconduct, considering the size of the agency and the facts of the case? **As previously indicated, the size of the city is an aggravating factor not a mitigating factor. But the egregious nature of the conduct calls for greater deterrence here,** and that's what Note 5 says within the context of those comments I've just made.

RP (May 10, 2016) 15:7-19)(emphasis added).

² The trial court found Mesa intentionally hid records showing the City’s Board of Appeals held an illegal executive session while they were making a determination on the City’s decision to terminate Zink’s building permit (CP 2424; RP (May 10, 2016) 17:12-18:19). Mesa was also found to be hiding the complaint against the Zink’s home in relation to the expiration of the building permit (CP 2437; PR (May 10, 2016) 15:4-19).

Here's another one where there was no mitigating factors. All of the aggravating factors were strongly present. And again, **the deterrence is not necessarily because of the size of the City, it's because of the egregious nature of the violation.**

(RP (May 10, 2016) 17:12-16)(emphasis added). Allowing courts to assess the maximum penalty for the most egregious PRA violations in some cases while not in others erodes the public's confidence in our judicial system.

Mesa argues that the overall size of the total penalty award rather than the daily penalty rate is the most important consideration. Mesa claims that the longer an agency withholds production of records the lower daily penalties must be because the total award is inflated by the agency's own actions. Mesa misunderstands and misrepresents the reasoning behind daily penalties which is to force reluctant agencies into releasing public records on demand.

The PRA directs us to liberally construe it "to assure that the public interest will be fully protected." RCW 42.56.030. Its command is unequivocal: "Responses to requests for public records shall be made promptly by agencies" RCW 42.56.520 (emphasis added). Additionally, where the PRA is violated, trial courts must award penalties "at not less than \$ 5 [per day] but not more than \$ 100 [per day]."

Yousoufian II, 152 Wn.2d at 433. The PRA is a forceful reminder that agencies remain accountable to the people of the State of Washington *Yousoufian v. Office of Ron Sims, King County Executive*, 168 Wn.2d 444, ¶42, 229 P.3d 735 (2010). Mesa had the opportunity to release the records at any time; yet failed to do so despite the fact that penalties for violations were assessed on a per day basis and an action was filed against them alleging violations. Obviously, even the threat of a \$5 per day penalty was not enough to deter Mesa.

The evidence does not show that Mesa was deterred. For instance, Mesa claims that the facts that they have had training and no other PRA actions have been filed against them indicates they have been deterred. This argument is ridiculous since even with training, Mesa continued to withhold many of the records for years and many were lost or destroyed by Mesa and were never produced even though they existed at the time of Zink's request (CP 1065). Mesa's actions do not indicate deterrence.

Additionally, on May 18, 2016, Zink requested the attorney billing invoices submitted to the City for payment (CP 2348). Mesa responded five days later by providing Zink with redacted copies of some of the billings (CP 2347). Zink responded, objecting to receiving redacted copies of the billing invoices (CP 2346). Mesa responded that the billing invoices were redacted by the City attorney (CP 2345). Zink requested the unredacted copies of the billing invoices which were submitted for payment by Mesa rather than the copies sent by the city attorney (CP 2344). Zink's objections and request for the copy submitted to the city council were sent to the city attorney who responded that RCW 42.56.904 allows for the redaction of these records (CP 2343). Zink threatened an additional PRA action if she did not receive the unredacted copies of the billing invoices from Mesa (CP 2342). The billing invoices were produced in their entirety on May 31, 2016; thirteen days later.

While this request is not at issue here, this interaction clearly shows that Mesa has not been deterred. Furthermore, and importantly, comparing the redacted billing invoices (CP 2383-2387) to the unredacted billing invoices (CP 2389-2393) clearly shows the redactions were not allowable under RCW

42.56.904. Public records requestors should not have to threaten action just to obtain non-exempt public records.

The evidence clearly shows that Mesa was not deterred even when faced with the prospect of a \$5 per day penalty if found in violation of the PRA. Even with training, Mesa continued to withhold the records for years and then claims some were lost or destroyed. Further, the evidence presented shows that Mesa continues to wrongfully redact public records unless threatened with action.

II. RESPONSE

Mesa's unsupported arguments are, at best, a gross misrepresentation of our Constitution, statutes and well-established case law concerning the Public Records Act (PRA) and assessment of penalties. First Mesa argues that assessment is harmful to tax payers. This argument is disingenuous. The PRA was initially established by Initiative 276 in 1972 by a vote of the people and it is a strongly worded mandate of the tax payers (voters) demanding access to public records in all forms. To assure agencies hesitant to comply with the people's mandate of openness, a section was included addressing mandatory penalties (CP 87, Section 34(3)). The voters of Washington State (tax payers) approved per day penalty assessment against public agencies for violations of the PRA knowing the penalties assessed would be paid with tax money collected by the offending agency. Mesa cannot now argue that the tax payers did not know or need to be protected from a penalty provision of their own creation.

Our Supreme Court has interpreted the mandates of the PRA for an award of penalties to requesters after violations have been established as a two-step process: 1) determine the number of days a violation occurred; and 2) establish a penalty for the violation based on aggravating and mitigating factors associated with the agencies actions (culpability) in responding to a request for access to a public record(s). Despite the clear mandate from our Supreme Court on how to calculate penalties, and under the guise of deterrence and equity, Mesa asks this court to make new law. Mesa asks this Court to base penalty assessment on the financial status of an agency rather than culpability (Mesa only takes in \$175,000 per year in unreserved funds (Mesa Open 6-7); 1%-per-violation cap on all agencies (*Id.* 41-5)).³ There is no language in the statutes or case law giving a court the authority to grant Mesa's request and a decision in favor of Mesa would violate the Separation of Power's doctrine. Mesa's request for this Court to alter the law for Mesa's benefit must be rejected.

Furthermore, Mesa's claim that the trial court abused its discretion in awarding an increased penalty assessment for five redacted records after the City was notified that no exemption applied to the records is false and must also be rejected.

4. Mesa's Request for This Court to Cap the Total Penalty Amount at 1% of an Agency Budget Line Item Violates the Separation of Powers Doctrine

³ Mesa does not define an unreserved general tax fund revenue and the term is ambiguous. Further, Mesa cites to Wikipedia which is not a legal authority (RAP 10.3(6)).

Mesa's argument that the trial court abused its discretion when it refused to make an across the board reduction in penalties so no penalty award would exceed 1% of Mesa's "unrestricted budget." Mesa bases their unsupported argument on the fact that larger agencies faced with similar penalties are not as affected as smaller agencies due to their financial status. While Mesa's arguments and claims may be interesting to the Legislature in enacting future legislation involving penalty assessment under the PRA, they are not appropriate here.

One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments, the legislative, the executive, and the judicial, and that each is separate from the other.

Carrick v. Locke, 125 Wn.2d 129, 134, 882 P.2d 173 (1994). The doctrine of separation of powers is an important check and balance system that "preserves the constitutional division between the three branches of government, ensuring that the activity of one does not threaten or invade the prerogatives of another." *State v. Elmore*, 154 Wn. App. 885, 905, 228 P.3d 760 (2010).

Our Supreme Court in *Hambleton* defined separation of powers as:

The function of the judiciary is to say what the law is, whereas the legislature's function is to set policy and draft and enact law. *Hale*, 165 Wn.2d at 506. It is important to note that although the separate and coequal branches fill different roles, the branches "must remain partially intertwined to maintain an effective system of checks and balances. The art of good government requires cooperation and flexibility among the branches." *Id.* at 507.

In re Estate of Hambleton, 181 Wn.2d 802, ¶27, 335 P.3d 398 (2014).

The legislature violates separation of powers principles when it infringes on a judicial function. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 143, 744 P.2d 1032, 750 P.2d 254 (1987).

Id. Our Supreme Court has opined our legislature makes policy and enacts laws and amends laws already in effect

Indeed, it is wholly within the sphere of authority of the legislative branch to make policy, to pass laws, and to amend laws already in effect. *Hale*, 165 Wn.2d at 509. Courts must exercise care not to invade the prerogatives of the legislative branch lest the judicial branch itself violate the doctrine of separation of powers. Co-equal branches must respect one another's independence.

Lummi Indian Nation v. State, 170 Wn.2d 247, ¶16, 241 P.3d 1220 (2010).

The mandatory per day penalty under the PRA was initially established by our Legislature at the will of the people when they approved Initiative 276 in 1972 (CP 87, Section 34(3)). In order to inspire agencies of all sizes to produce public records as quickly and as expeditiously as possible (RCW 42.56.520) or face daily penalties of up to \$100 (RCW 42.17.340(1)(4)/42.56.550(1)(4)).⁴ The PRA penalty assessment enacted by our Legislature is to apply to all cases; including this action. The upper limit a court is authorized to assess against an agency is well established to be \$100 per day (*Id.*) (RCW 42.17.340(4)/42.56.550(4)).

[T]he legislature limited the trial court's discretion by amending RCW 42.17.340 in 1992 to set a minimum penalty, which the trial court must assess if the agency is found to have violated the PDA.

⁴ Chapter 42.56 RCW in most respects mirrors Chapter 42.17 RCW, the statutes in effect at the time Zink filed this action. Zink uses the latest version of the PRA, Chapter 42.56 RCW in her argument for simplicities sake unless there was a substantial change.

Yousoufian v. King County Executive, 152 Wn.2d 421, 433, 98 P.3d 463 (2004).

In *Yousoufian* 2010, this court established a framework to guide trial courts' determination of penalties within the range provided under the PRA.

Sargent v. Seattle Police Dep't, 179 Wn.2d 376, ¶38, 314 P.3d 1093 (2013).

Despite our Supreme Court's interpretation and construction of the assessment of penalties under the PRA, Mesa asks this court to set aside the mandatory requirements of the PRA and enact new law concerning assessment of penalties; capping the maximum amount of penalty assessment to 1% of an agency budget item.

In order for Mesa's relief to be granted, the Court would have to infringe on the legislatures independence and enact new law.

Courts must exercise care not to invade the prerogatives of the legislative branch lest the judicial branch itself violate the doctrine of separation of powers. Co-equal branches must respect one another's independence.

Lummi Indian Nation v. State, 170 Wn.2d 247, ¶16, 241 P.3d 1220 (2010).

Under the Separation of Powers Doctrine, Mesa's request to cap penalties assessed against them at 1% of a budget line item and limit the total penalty assessment to \$58,000 cannot be granted.

5. Comparison of Total Penalty Awards

Mesa argues that the total penalty award and culpability has little relationship and therefore the trial court's total award was arbitrary (Mesa Open 37). Mesa claims that because the trial court assessed \$100 per day for certain violations, due to the limited number of days Mesa withheld the records, the total penalty is lower than the total penalty award for other less

egregious violations assessed at a lower penalty that were held for a longer period of time. As discussed above, a daily penalty amount is to be based on the actions/culpability of the agency. While the total penalty is based on the number of days the record was withheld.

[T]he steps in determining a PRA penalty: (1) determine the amount of days the party was denied access and (2) determine the appropriate per day penalty between \$ 0 and \$ 100 depending on the agency's actions.

Yousoufian 2010, 168 Wn.2d 444 ¶26, 229 P.3d 735 (2010).

Because Mesa produced the records assessed at \$100 per day at the time of or prior to this action being initiated, the maximum total penalty amount could not exceed the total number of days the records were withheld. Because Mesa refused to produce other records assessed at less than \$100 for a longer period of time, the total penalty assessment of those records is higher. To find otherwise, renders the legislative mandate that “daily” penalties be assessed superfluous.

Had Mesa released all the records at issue in this action at the time Zink requested the records or at the time Zink filed suit, the total penalty awards for less egregious violations would have been well below those assessed at the higher rate but produced sooner.

Mesa argues that because our Supreme Court rejected the idea that the number of penalty days is a justification for reducing daily penalty rates in *Yousoufian 2009* but did not renew this opinion in *Yousoufian 2010*, that Court obviously determined that the number of penalty days is to be taken into consideration when assessing a daily penalty amount. In *Yousoufian 2009*, the Court was addressing an issue brought up by the dissent.

The majority's view that the penalty here was unreasonably low is grounded in its assumption that the per day penalty must be assessed on a sliding scale that metes out progressively higher penalty amounts from \$ 5 to \$ 100 based on the government's "culpability" level. Majority at 15, 17. On the contrary, the \$ 5-\$ 100 penalty range gives the trial court discretion to assess an appropriate penalty for the violation, given all the circumstances, including the number of penalty days and the level of culpability at different points in the penalty period.

Yousoufian v. Office of Ron Sims, King County Executive, 165 Wn.2d 439, ¶71, 200 P.3d 232 (2009). Based on this argument the Majority of that Court stated:

The dissent argues the total penalty of \$ 123,780 serves the PRA's deterrence purpose because “[t]he legislature did not intend to bankrupt government agencies with huge penalties... The dissent's argument seems counterintuitive: that the longer the flagrant violations continued, the smaller the per-day penalty should be.

Id. ¶48. *fn.* 13. The most glaringly obvious reason the same issue was not discussed in *Yousoufian* 2010 is that the dissent did not renew the argument and there was no need for it to be address.

6. The Trial Court Did Not Abuse Its Discretion in Increasing Penalty Assessment Based on MRSC Memorandum

Mesa argues that the trial court erred in assessing penalties against five grouped violations, claiming the trial court increased the penalty assessment from \$5 to \$20 based on the MRSC memorandum concerning redaction of addresses (Mesa Open 46). Mesa makes their argument without any citation to the record to support their claimed facts. In order to rebut Mesa’s argument, it is necessary for the facts to be presented as they were presented to the trial court for use in the *Yousoufian* analysis.

Furthermore, Mesa claims that the trial court's increase based on the MRSC memo affected 5650 penalty days; increasing the penalty assessment by 1/3 or 300% of the total penalty award (Mesa Open 46; 50). This is patently false information.

The secondary period (the time period between the MRSC memorandum and the first trial court's oral ruling) only affected 689 days (June 25, 2003 through May 13, 2005)(CP 2424; 2414-15; RP (May 10, 2016) 21:15-18). Therefore, the total number of penalty days affected by the \$15 increase (\$5 to \$20) is 3445 (689 x 5). The initial total penalty assessment was \$352,954. The total increase in the penalty for that time period for all five requests is \$51,675 (3445 x \$15); which is not a 1/3 or a 300% increase in the total penalty assessment.

7. Statement of Facts For Violations #6, #8, #15, #16 & #22
Complaint #6 - Twenty-One Code Violation Letters

Mesa files records by address (CP 847-48; 851:9-18; 853). In July of 2002, Zink began investigating neighbor complaints concerning Mesa issuing code violations and assessing fines (CP 973; 975; 977; 987; 989). Zink also began to investigate a complaint that one of the Councilmembers had built a porch without a permit (CP 994-95; 997). Zink filed a complaint concerning her investigation of a councilmember building without a permit to Mesa on September 11, 2002 (CP 999). On October 1, 2002, a building permit was

issued (CP 1003). On November 19, 2002, Zink obtained an unredacted copy of the building permit (CP 1007) ⁵

On November 27, 2002, based on billings obtained from the Building Department (CP 889-892), Zink submitted a request for Twenty-one code violation letters (CP 894; 896:13-17). On December 5, 2002, Mesa responded delaying the request for 30 days to locate and assemble the records (CP 897; 900; 902-3; 907; 910-11).

December 12, 2002, Zink submitted a complaint to Mesa concerning the charges assessed against Mesa residents for code violations (CP 922; 1023-24). Zink included copies of some of the unredacted code violation letters she had previously received from Mesa in response to other requests (CP 917-920; 1017-19; 1043-46).

On approximately January 4, 2003, Mesa had not assembled all of the requested code violation letters (CP 926-27). On January 24, 2003, Mesa sent out a second letter of delay stating it was unclear what records Zink was requesting (CP 929; 931; 942-43). Zink responded that since Mesa had been able to locate a portion of the records, the request was not unclear (CP 937). Mesa testified that all 120 residential and commercial files were searched multiple times, which took weeks, and that they did contact the building department, but the code violation letters could not be located (CP 952-954; 956).

⁵ All documents produced by the City in unredacted form, cited to herein, were submitted to the trial court as evidence in February and May 2003. At that time, Mesa was still withholding all unredacted copies of all redacted records at issue in this appeal.

On February 10, 2003, Mesa responded stating that they needed addresses in order to locate the code violation letters (CP 946; 949). After directing Mesa to the billings for addresses of all requested code violations letters, they were located (CP 950; 961-962). On February 14, 2003, Zink was allowed to review the records in their entirety (CP 1023). After the inspection, Zink requested copies (CP 1038). Mesa redacted the names, addresses and phone numbers prior to providing the requested copies (CP 944; 1027; 1029; 1031-32; 1034-1036; 1038-39; 1041-42). Mesa did not provide an exemption log even though Zink had requested one (CP 1039; 1042). On April 3, 2003, Zink filed this action demanding access to unredacted records (CP 1688).

On June 13, 2003, Jeff Zink submitted a request for several different records including the building department and attorney billings (CP 1049; 1051-54). Within a week Mesa produced redacted copies of the building department and attorney billing records (CP 1054; 1057). On June 23, 2003, Jeff Zink demanded that the records be provided in unredacted form or that Mesa provide an identified exemption (CP 1060; 1054-1056). Mesa contacted MRSC to determine whether an exemption existed (1062-63). Jeff Zink was provided with unredacted copies of the records (CP 1057).

In May of 2003, hearings were held concerning the redaction of the records. Mesa testified that the reason the records were redacted is because years prior to Zink's requests Municipal Research (MRSC) had instructed Mesa to redact either the names, addresses or phone numbers (CP 1042). When confronted with the fact that Zink had received unredacted copies of residential documents, including building permits, Mesa stated that due to

untrained staff and new mayor, the unredacted records were erroneously produced (CP 1046-47).

On November 14, 2008, after Mesa was ordered to produce unredacted copies of the code violations, Mesa refused to do so claiming the original documents were lost and that Zink could see through the black marks (CP 1065). Some of these records were never produced in unredacted form.

Based on these facts, the trial court identified that there were no mitigating factors in the erroneous redaction of the records, Mesa's redactions were motivated in good faith to protect privacy and the Zinks' investigation was not impeded by the redactions.

The trial court identified the aggravating factors as: 1) lack of proper training and supervision of the agency's personnel; 2) unreasonableness of any explanation for noncompliance by the agency; 3) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency; and 4) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency. (CP 2424:19-25; 2442; RP (May 10, 2016) 20:6-21:24). Based the fact that in June 2003 the City was advised by MRSC that the names and addresses should not be generally redacted, the trial court increased the penalty assessment from \$5 (tier 1) to \$20 (tier 2) between June 25, 2003 through May 13, 2005 (CP 2414-15; 2423-30; 2424:19-25; 2471; RP (May 10, 2016) 21:8-24) for a total of 689 days for each of the five violations.

At best the actions of Mesa in responding to these requests was gross negligence. Despite the evidence, trial court assessed an initial penalty of \$5 per day.

Complaint #8 - Resignation Letters of Councilmembers

Zink had previously requested and received Councilmember letters and documents in unredacted form (CP 982-83; 985; 1003). On January 9, 2003, Zink requested copies of the resignation letters of Councilmembers Murphy and Erickson (CP 1251; 1253-54). Zink was told that she could not have access of the records until they had been approved by the City Council (CP 1258-59). Having received no responsive records, on March 10, 2003, Zink submitted a second request (CP 1285; 1287).

Even though the resignation letters are in the file cabinet under the resignation file and could be located within a few minutes (CP 1302:18-19; 1308:17-1309:5) Mesa delayed the second request for 14 days in order to determine whether any of the information was exempt (CP 1290; 1292; 1294-95; 1299-1300). Zink received another delay letter stating the records would not be available until April 11, 2003 due to a high volume of requests (CP 1312-1314; 1316). On April 11, 2003, Zink was informed that no records would be produced until her attorney contacted the City Attorney (CP 1318-20; 1325-26; 1328-30; 1332-33; 1335-36; 1341-42). On April 15, 2003, Zink finally received the requested resignation letters in redacted form without a claim of exemption (CP 1256; 1328-30; 1345:17-20; 1352; 1354-55; 1357-58).

Initially, Mesa testified that the resignation letters were provided to Zink on January 9, 2003 (CP 1261). On cross examination, after evidence showing that there was no record of Zink having received these records on January 9, 2003 (CP 1268; 1270; 1272-74), Mesa admitted that the resignation letters

were not provided on January 9, 2003 as originally claimed (CP 1263; 1265-66; 1274).

Based on the evidence provided, the trial court found no written explanation of exemption. That the City had a misguided, but good faith, belief that it needed to protect “privacy.” Mesa was timely, but wrongfully provided a redacted response.

Mitigating factors were identified as: 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 aggravating factors were identified as: 1) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions; and 2) lack of proper training and supervision of the agency's personnel assessing. (CP 2425:6-12; 2444; RP (May 10, 2016) 22:14-23:22).

Despite the evidence that Zink requested these records in January and did not receive them until April, the trial court found Mesa had timely responded and assessed an initial assessment of \$5 per day.

Complaint #15 – Eighteen Residential Files

On February 24, 2003, Zink submitted a request of 18 residential files by address (CP 1655). Mesa maintains files by residential address (CP 847-48; 851:9-18; 853; 1657-58). On February 28, 2003, Zink received a delay letter, stating Mesa needed 17 additional days to locate and assemble the records (CP 1661) even though it would have only taken 20-30 minutes (CP 1663-64).

On March 4, 2003, Zink received another delay letter, delaying the request until March 17, 2003 and informing Zink that she would only be allowed to review the residential address file for one specific hour per day (10:00 a.m. to 11:00 a.m.) (CP 1666-67; 1669-70; 1674; 1687; 1689-91). Zink objected and was told Mesa would not waste any more time on her frivolous requests and to seek a legal remedy (CP 1677; 1670-71; 1680).

On March 17, 2003, Zink began review of the residential files (CP 1682). When her time was up and she asked for the copies Mesa refused to release the copies until they were redacted (CP 1682; 1698-99; 1743-50). Mesa did not provide any explanation for the redaction (CP 1683-84).

In November 2004, Zink requested copies of two distinct building permits, not at issue here. Mesa again provided Zink with redacted copies of building permits. Zink objected specifically telling Mesa to review the MRSC memorandum which should be in their files (CP 1725). Mesa provided her with unredacted copies of those two building permit documents (CP 1727).

On November 14, 2008, Mesa informed Zink's attorney that some of the original unredacted records had been lost (CP 1741).

The trial court found this violation is distinguished from others because of the one-hour restriction was disparate treatment. The trial court also found Mesa had provided no exemption log for the wrongfully redacted names and addresses. 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) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions; 2) lack of proper training and supervision of the agency's personnel; 3) unreasonableness of any explanation for noncompliance by the agency; 4) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency; and 5) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency

Based on these facts the trial court assessed an initial minimum penalty of \$5 per day (CP 2426:17-23; 2451; RP (May 10, 2016) 29:14-30:16).

Complaint #16 – Eleven Residential Files

On March 3, 2003, Zink submitted a request for 11 residential files (CP 2095; 2097). Mesa responded that Zink could review the records starting on March 24, 2003 for one specific hour per day (10:00 a.m. to 11:00 a.m.)(CP 2100; 2102-03). Because Mesa would not release the records in unredacted form, Zink limited her review time to 40 minutes so the redactions could be made in the remaining 20 minutes so she could take the copies with her (CP 2105-06). Mesa never provided any explanation for the redactions (CP 2110-11; 2113; 2115-16). On remand, the trial court refused to group the two residential files requests (CP 104). As with the other residential records, some of the originals were never found (CP 2128-2129; 2132).

The trial court identified mitigating factors as: 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 identified the aggravating factors as: 1) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions; 2) lack of proper training and supervision of the agency's personnel; 3) unreasonableness of any explanation for noncompliance by the agency; 4) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency; and 5) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency. Based on this assessment, the initial penalty was set at \$5 per day (CP 2427:1-7; 2452; RP (May 10, 2016) 30:17-20).

Complaint #22 – Sharp Complaint

The trial court found the issue was again redaction. The trial court determined 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) lack of proper training and supervision of the agency's personnel; 2) unreasonableness of any explanation for noncompliance by the agency; 3) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency; and 4) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency. (CP 2428:6-11; 2458; RP (May 10, 2016) 34:6-24). The trial court assessed an initial penalty of \$5 per day.

8. Mesa's Facts and Argument

Mesa argues that because the none of the records at issue in these five violations are attorney invoices, the MRSC memorandum is not applicable. Mesa's rendition of the facts is false.

The documents requested on June 13, 2003, and referenced in the MRSC memorandum, were for invoices from the City Attorney's Office as well as invoices from the City building department (TBD) (CP 1049). This becomes crystal clear when reviewing the letter of June 23, 2003, objecting to receiving redacted copies:

After a review of the public records I received on June 19, 2003. I question the redacting of some of the documents; specifically the billing from the office of Tanner & Hui, L.L.C. dated April 1, 2003 and invoice number 697, of the same date, from the Building Department Inc. (CP 1060). Furthermore, in the first paragraph, MRSC identifies what type of records and what claim of exemption is being discussed.

This is to confirm what I stated to you over the phone yesterday concern the disclosure of names and/or addresses of private citizens contained in ... city attorney invoices and for invoices from firm with which city contracts for building department services. My basic response to this issue is that there is no ex-emption from public disclosure that applies to the names and/or addresses of private citizens in this context.

(CP 1062)(emphasis added). The MRSC memorandum clearly states that:

There is no exemption in RCW 42.17.310(1) applicable to a city that specifically exempts names of individuals" ...

As to addresses, the only public disclosure exemption that applies to addresses of citizens is RCW 42.17.310(1)(v), which exempts "**residential addresses and residential telephone numbers** of the customers of a public utility contained in the records or lists held by the public utility of which they are customers."

(*Id.*)(emphasis added). These two statements directly address the redactions in these five violations.

The records requested in violation #6-22 were building department records (code-violation letters and residential address files), resignation letters and a complaint (submitted to the City Council for action); *supra*. None of the requested records pertained to utility customers. Furthermore, Mesa never gave any explanation for the redactions.

Q. Did you ever give Donna Zink a letter, note, any sort of written statement telling her why you were redacting?

A. Not to my knowledge, no.

(CP 1039:10-12). At trial Mesa testified that they redacted these records because MRSC had instructed them to.

Q. Did you give Mrs. Zink a written statement for why this document was redacted?

A. No. I told her.

Q. Did you give her a written statement for why any of these documents were redacted?

A. No. I told her.

Q. And what did you tell her?

A. Why they were redacted. She actually asked, and I let her know why.

Q. And what was the reason you told her?

A. **Because we cannot give out an address and a name and a phone number. You can give out one or the other.**

Q. Is that a -- is there a rule unique to the City of Mesa that establishes that policy?

A. **Years ago, I contacted -- I contacted Municipal Research on that, and they told me on that, and they had said that was the case.**

(CP 1042)(emphasis added). The facts clearly show that Mesa was not relying on any exemptions identified by MRSC in the memorandum when they redacted these records. There is no testimony that Mesa ever contacted the City attorney or that the City attorney followed up on the redaction of these records after Zink filed this action in April of 2003. The only testimony was from the City clerk that MRSC had told them to redact the records in a certain fashion years prior. This evidence was refuted by MRSC memorandum of June 24, 2003 (CP 1062-63).

Mesa treated requests differently. When Donna Zink objected to the redaction of the records, Mesa did not investigate their erroneous redactions. When the Zinks filed this action in early April 2003, Mesa did not investigate their erroneous redactions. Mesa could have minimized penalties by releasing the records in unredacted form. A simple investigation into the redaction of this information from the records would have certainly minimized daily penalties. Yet even Mesa's attorney did nothing to decrease daily penalties.

In June 2003, when Jeff Zink objected to similar redactions, Mesa contacted MRSC for advice and provided the unredacted documents to Jeff Zink. Still Mesa did not address the records requested by Donna Zink of a similar nature. In November 2004, when Donna Zink requested other building records, Mesa initially redacted the records until reminded of the MRSC memorandum (CP 1725; 1727). Still Mesa refused to investigate their erroneous redaction of these records to minimize daily penalties.

Mesa simply ignored the Zinks' suit, the requirements of the PRA, and continued to wrongfully withhold the records as if the requirements of the PRA did not apply to them; for approximately six years. Even after the trial

court told Mesa that the records were not exempt, rather than release the records, Mesa continued to withhold the records for approximately four additional months.

Finally, after judgment was entered and Mesa was ordered to release the records, Mesa notified Zink that the records were lost (CP 1065).

Based on these facts, the trial court used its discretion to establish a Secondary Tier/Period (the time between the MRSC memorandum and the initial determination by the trial court that Mesa did not need to strictly comply with the requirements of the PRA. The trial court identified Mesa's actions as "a pattern of stubbornness on the part of the city."

[U]ltimately we know that the redactions of all of these addresses were in error. And so it's -- I'm going stand by my original ruling, because it was part of a pattern of stubbornness on the part of the city, even faced with that memo to not go back and reexamine the whole thing. So it was a more global view from my point of view rather than on each individual type of exemption. So I'll have to deny that one as well.

RP (June 29, 2016) 33:23-34:3. Specifically the court found that "[w]ith respect to the Secondary Tier, the Court finds the City's assertion of certain exemptions after it was told by MRSC that the exemptions were invalid as being more culpable than during periods that preceded the receipt of MRSC advice and warrant higher daily penalties" (Secondary Tier/Period (CP 2414-15; 2423-30; 2471; RP (May 10, 2016) 21:8-24)). The trial court used its discretion to increase the penalty assessment during that specific period of time to \$20 per day.

The trial court used its discretion to establish a "Quaternary Period" for these five grouped violations from August 24, 2007 through November 7,

2008 (the time period after Division III reversed the trial court until judgment was entered).

THE COURT: Let me ask the question this way. What are the terminal dates for the computation of the 2,093 days?

MS. ZINK: Okay. July 16th they were ordered to release the 21 code violation letters.

THE COURT: July 16th of what year?

MS. ZINK: Of 2008. They didn't do it. November 8th -- November 7th, 2008 Judge Acey, again, ordered them to release the records that they hadn't released, still hadn't released, and then on November 14th we got a letter stating that the -- from Judge Tanner stating that, "Copies of all the code violation letters, some of the documents have the original redaction but you can see through the black marks and the copy that was redacted."

(RP (April 12, 2016) 160:15-161:4). The trial court used its discretion to increase the penalty for the Quaternary Period basing its decision on "the City's failure to reexamine and release non-exempt records after remand and orders issued by the Court to release the records" the court viewed this "as being more culpable than other periods" (Quaternary period (CP 2414-15; 2423-30; 2471; RP (May 10, 2016) 21:8-24)). The trial court used its discretion to increase the penalty assessment during that specific period of time to \$20 per day.

The evidence clearly shows that the trial court used its discretion in determining what penalties to assess during the *Yousoufian* analysis and that the findings of the court were not an abuse of discretion in increasing penalties during this period of time. If Mesa was not sufficiently put on notice that daily penalties of no less than \$5 per day would be assessed for any PRA violations found at trial when this action was filed, certainly they

should have been put on notice when they received the MRSC memorandum in June 2003. The trial court did not abuse its discretion in finding this to be a more egregious violation than a \$5 per day penalty and increased the per day penalty during this period to \$20.

Mesa argues that the Councilmember resignation letters were not erroneously redacted (Mesa Open 48). Mesa claims that Councilmembers are employees and their addresses are exempt and could have been redacted pursuant to RCW 42.17.310(1)(u). Councilmembers are elected officials and not volunteers or employees. As elected officials, they must be registered to vote and their residential address must be known to the people in order to qualify to hold a public office.

As noted by Mesa, “every voter's address is available on the Secretary of State's web site” (RP (June 29, 2016) 23:8-9). Exemption for privacy issues under the PRA pertains to whether production (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. (RCW 42.17.255/42.56.050). As elected officials and registered voters there can be no claim of privacy in release of addresses. The information in a resignation letter submitted to a City is information concerning an elected official resigning from an elected position (*Tacoma Pub. Library v. Woessner*, 90 Wn. App. 205, 216, 951 P.2d 357 (1998)). Public records which are available from another source are not exempt (*Id.* 214-15). Further, the memorandum from MRSC specifically states that:

[T]here is an exemption in RCW 42.17.310(1)(u) for "**residential** addresses or residential telephone numbers of employees or volunteers of a public agency which are held by any public agency in **personnel records, public employment related records, or volunteer rosters, or**

are **included in any mailing list of employees or volunteers** of any public agency.

CP 1062-63)(emphasis added). First the requested resignation letters are not held in any of the identified files. The resignation letters are filed in the resignation file (CP 1302:18-19; 1308:17-1309:5). Further, as noted in the MRSC memorandum, the statute specifically states that “residential” addresses are the addresses which are exempt for employees and volunteers. As noted by the trial court, a PO Box is a mailing address and not a “residential” address. (RP (June 29, 2016) 32:22-25; 33:17-18).

Based on this evidence the trial court did not err in finding Mesa was unreasonable not to reexamine their claimed exemption. Especially in light of the fact that Zink had previously been provided unredacted copies of correspondence submitted to the City Council from these two council members (CP 1251; 1253-54) as well as an unredacted building permit for another council member (CP 1003) in response to a request made on November 19, 2002 (CP 1007).

Finally, although the Zinks have not assigned error to the numerous abuses of discretion in setting minimal penalty amounts despite clear evidence of gross negligence and bad faith surrounding these five violations, if the penalty assessment is to be recalculated it must be noted that the trial court assigned minimal penalties and found good faith where none existed. For instance, the trial court found the City had timely responded to Zinks request for the resignation letters. Zink requested the records on January 9, 2003 (CP 1251; 1253-54) but did not receive the records until April 15, 2003

(CP 1256; 1328-30; 1345:17-20; 1352; 1354-55; 1357-58). A delay of over three months for two pages of documents (CP 1354-55) found in a file in the filing cabinet is not a timely response and a \$5 per day penalty is an abuse of discretion.

Mesa argues that they misunderstood the scope of exemption for utility customers under RCW 42.17.310(v)/42.56.330(2) in redacting the code violation letters and requested copies from the residential files. Again, prior to a specific point in time (December 12, 2002 (CP 922; 1046-47)), Mesa provided unredacted copies of building permits (CP 913; 915; 917) and code violation letters (CP 918-20). The testimony from Mesa was that they redacted the records based on the advice of MRSC that they could not give out a name, address or phone number all at one time and must redact one or more of those pieces of information (CP 1042). This was proven to be false (CP 1062-63). Mesa did not provide any reasonable explanation for the redaction of these records and it is disingenuous for Mesa to now claim they redacted the information pursuant to RCW 42.17.310(1)(v) when clearly, they did not.

Mesa claims that they had training (Mesa Open 6; CP2 268 ¶¶4-7; 1¶2) but did not revisit or investigate the redaction of these records. Any training Mesa had, should have alerted them to the fact that they should reexamine their claims of exemption. Especially in light of the fact that they were involved in a PRA action, that, if found in violation, would subject them to minimum daily penalties of \$5 for every day the records were erroneously withheld.

Mesa argues that the Sharp Complaint submitted against the building inspector was justifiably redacted for two reasons (Mesa Open 49). Mesa claims that the complaint is from a utility customer and in the alternative the complaint is a code violation investigation records. The PRA is a strict mandate for the public's right to transparent government. It's provisions are to be construed liberally in favor of production and its exemptions construed narrowly. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 408, 259 P.3d 190 (2011). As noted by Mesa, a complaint submitted for council action against the building inspector is not an investigation record. Further code violation investigations do not qualify as investigation records (*Wade Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, ¶25, 372 P.3d 97 (2016)). Finally, a complaint against a building inspector has nothing to do with being a utility customer.

Unlike in *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, ¶ 39, 314 P.3d 1093 (2013), the trial court in this case did apply the *Yousoufian* analysis as instructed by our Supreme Court and based the increase in the penalty for the Secondary Tier/Period on specific factors associated with Mesa's actions at the time of Zink's request. However, if this Court finds that the trial court abused its discretion, the proper remedy is to remand back to the trial court for imposition of the appropriate penalty (*Id.* ¶ 41).

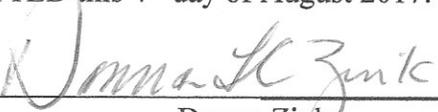
The trial court in this case used its discretion and based its decision to increase penalties on the facts presented and did not abuse its discretion in increasing these penalty amounts after Mesa received the MRSC memorandum.

III. CONCLUSION

The assessment of the majority of the 33 penalty assessments were at the lowest level of \$5 and some went below that to \$1. This was due to the fact that the trial court based its decision on Mesa's size rather than on their actions in responding to Zink's requests. Allowing Mesa to escape the strict mandates of the PRA while holding larger agencies accountable erodes the people's confidence in our judicial system that all are treated equal and that the PRA will be upheld in all circumstances. For all of these reason, the Zinks respectfully request this Court to grant the relief requested in opening briefing.

RESPECTFULLY SUBMITTED this 4th day of August 2017.

By



Donna Zink

Pro se

IV. CERTIFICATION OF SERVICE

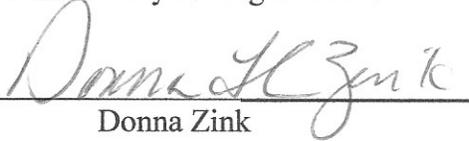
I declare that on the 4th day of August 2017, I did send a true and correct copy of appellant's "*Reply/Response Brief of Appellants Donna and Jeff Zink*" via e-mail service to the following addresses as agreed upon by all parties to this matter:

➤ LELAND BARRETT KERR
WSBA #6059
Kerr Law Group
7025 W. Grandridge Blvd. Suite A
Kennewick, WA 99336-7826
Phone: 509-735-1542/Fax: 509-735-0506
E-mail: lkerr@kerrlawgroup.net; and

➤ RAMSEY RAMERMAN
WSBA #30423
City of Everett
2930 Wetmore Avenue
Everett, Washington 98201-4067
Phone: 425-257-7009/Fax:
E-mail: ramseyramerman@gmail.com.

Dated this 4th day of August 2017.

By



Donna Zink
Pro s

DONNA ZINK - FILING PRO SE

August 04, 2017 - 2:44 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34599-8
Appellate Court Case Title: Jeff Zink, et ux v City of Mesa
Superior Court Case Number: 03-2-50329-3

The following documents have been uploaded:

- 345998_Briefs_20170804143243D3272853_3168.pdf
This File Contains:
Briefs - Appellants/Cross Respondents
The Original File Name was 34599-8-III Zink ReplyResp 080417.pdf

A copy of the uploaded files will be sent to:

- RRamerma@everettwa.gov
- dlczink@outlook.com
- jeffzink@outlook.com
- lkerr@kerrlawgroup.net
- sashley@kerrlawgroup.net

Comments:

Sender Name: Donna Zink - Email: dlczink@outlook.com
Address:
PO Box 263
Mesa, WA, 99343
Phone: (509) 265-4417

Note: The Filing Id is 20170804143243D3272853