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NO. 571125-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON
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ARMEN YOUSOUFIAN,

Appellant,

v.

THE OFFICE OF RON SIMS, KING COUNTY EXECUTIVE, a
subdivision of KING COUNTY, a municipal corporation; THE KING
COUNTY DEPARTMENT OF FINANCE, a subdivision of KING
COUNTY, a municipal corporation; and THE KING COUNTY
DEPARTMENT OF STADIUM ADMINISTRATION, a subdivision of
KING COUNTY, a municipal corporation,

Respondents.

ANSWER TO BRIEF OF AMICUS CURIAE

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ORIGINAL

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I. INTRODUCTION

The issue in this case is whether the trial court properly exercised its discretion in assessing a penalty of \$123,780.00 against King County for its delays in responding to a large records request under the Public Disclosure Act. King County acted negligently but not in bad faith. The record requester suffered no economic loss, and there is no evidence of tangible harm to the public. The penalty imposed is nearly 5 times larger than the penalty this court previously found insufficient in 2003, and is the largest in state history.

II. ARGUMENT

1. The Court should limit its review to the record in this case.

Amici seeks to use ER 201 as an avenue to introduce new material at the appellate level. Amici cite to unpublished trial court decisions, websites, audits, and surveys, all for the proposition that Washington government agencies fare poorly in complying with public record laws.¹ Unfortunately, none of these items were introduced at trial. Neither King County nor the

¹See Brief of Amicus Curiae Allied Daily Newspapers of Washington, The Evergreen Freedom Foundation, The Washington Newspaper Publishers Association, The Washington Coalition For Open Government, The Center for Justice, and The Seattle Community Council Federation (hereinafter Amicus Brief), at pp. 7-8; 18-19 (unpublished trial court decisions); 11-12 (audit report, websites, studies, surveys).

trial court has had the opportunity to evaluate the validity or credibility of these sources.

Although ER 201 states that certain facts may be judicially noticed at any stage of a proceeding, RAP 9.11 restricts appellate consideration of additional evidence on review. *King County v. Central Puget Sound Growth Management Hearings Board, et al.*, 142 Wn.2d 543, 549 n. 6, ___ P.3d ___ (2000). In other words, RAP 9.11 applies in addition to the normal judicial notice standard. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 98, ___ P.3d ___ (2005).

The court cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties. *Id.* And it is improper to cite unpublished opinions as authority at either the trial or appellate levels of our courts. *See Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 108 P.3d 1273 (2005).

The unpublished decisions cited by Amici are not properly before the court. Further, none of the audits, surveys, websites, etc., cited by Amici comply with ER 201, and Amici has made no effort to satisfy RAP 9.11. King County asks the court to disregard all citations to these sources.²

²Based on the authority cited herein, King County has filed a separate motion to strike portions of the Amicus Brief and Motion to for Leave to file the Amicus Brief.

Amici also submitted a Motion for Leave to file their Amicus Brief. Appended to this motion are three appendices, A and B and C. Appendix A contains a list of all members of Allied Daily Newspapers of Washington, Inc. Appendix B is a list of Washington Newspaper Publishers Association. Appendix C is a list of all Board members of the Washington Coalition for Open Government. Over 25 current and former Board members are listed, complete with a resume-like synopsis of the member's occupation and career accomplishments.

This is, in effect, an attempt to introduce new evidence against the County on appeal. It goes well beyond what is necessary in a motion for permission to file an amicus brief under RAP 10.6(b). The rule contains the following requirements:

(b) Motion. A motion to file an amicus curiae brief must include a statement of (1) applicant's interest and the person or group applicant represents, (2) applicant's familiarity with the issues involved in the review and with the scope of the argument presented or to be presented by the parties, (3) specific issues to which the amicus curiae brief will be directed, and (4) applicant's reason for believing that additional argument is necessary on these specific issues. The brief of amicus curiae may be filed with the motion. [RAP 10.6(b)].

In this case, Amici are adequately identified at pages 1-3 of the Motion for Leave to File Amicus Curiae brief. There is no need for the additional 13 pages of new information listing the individual members of

each group together with the credentials of each member of the Coalition for Open Government. This unfairly suggests widespread acceptance of Yousoufian's position on appeal, which may not be warranted. The Appendices are not contained in the official court record and should not be appended to Amici's motion or brief. *See Hill v. Cox*, 110 Wn. App. 394, 41 P.3d 495 (2002) (material outside court record cannot be considered and thus cannot be appended to reply brief appendix).

2) RCW 42.17.340(4) and the cases interpreting it provide trial courts with both the guidance and flexibility necessary to impose just penalties under the Public Disclosure Act.

The presence or absence of an agency's bad faith is the principal factor for courts to consider in determining the penalty under RCW 42.17.340(4). Through this factor, courts separate an agency's negligent mistakes from intentional efforts by government to wrongfully withhold records from the public.

The Amici believe penalties have historically been too low. They urge this court to overhaul penalty jurisprudence based on the cynical premise that most PDA violations are due to governments intentionally withholding records in bad faith. But that is not what occurred in this case, and a survey of case law suggests that bad faith denials of record requests are actually rare.

When mistakes do occur, they are often attributable to the extraordinary challenges agencies face in complying with the PDA. *See* Brief of Respondent, at 22-23. A record request could require agency personnel to search for records going back years, or even decades. There are no restrictions on the type of public record a citizen may seek, the volume of records, or the length of time his or her request can cover.

These realities do not excuse government's failure to properly compile enormous, complex public record requests. But they provide a better explanation for PDA violations than Amici's jaundiced views. In truth, simple mistakes lie at the heart of many PDA violations. Penalties at the lower end of the range are appropriate in such cases. Courts can and do impose high per-day penalties where bad faith exists. *See BLAW v. Department of Labor & Industries*, 123 Wn. App. 656, 98 P.3d 537 (2004). But there is little evidence that government withholding of records in bad faith is a common occurrence.

At page 10 of their brief, Amici contend that other states have an official state agency or ombudsman with enforcement authority over public disclosure. The suggestion is that King County has no such safeguard. This is inaccurate. King County maintains an Office of Citizen Complaints, see King County Code Section 2.52, which is empowered to investigate any administrative act of an agency.

Amici next make a series of unsupported assertions that lawyers simply will not take public disclosure cases unless they are assured greater compensation through the PDA penalty provision. Amicus Brief, at 10. The facts of this case do not support this generalization. Yousoufian's three attorneys collected nearly \$300,000.00 in attorney fees for their efforts in this case. This was, of course, in addition to the \$123,780.00 awarded to Yousoufian as a penalty. Amici cannot truly believe that \$123,780.00 is inadequate compensation to a requester who suffered no economic loss from King County's delay in producing records.

Amici assert that without strict enforcement of the penalty provision, agencies are encouraged to withhold records and face a slight penalty for delay, rather than release the records promptly and face the cost of adverse publicity. Amicus Brief, at 13. This is a curious argument given the facts before the court. This case grew out of a *delay* in producing records, not a bad faith withholding. This delay has generated over 6 years of litigation, considerable adverse publicity, and has cost county taxpayers \$420,000.00 in penalties and attorneys fees. This does not even count the time spent on this case by county attorneys and staff. Contrary to Amici's claim, this is a heavy price to pay for withholding records.

Like Appellant, Amici assert that the per-day penalty imposed in this case is not sufficient to punish King County and deter future violations by

King County and other agencies. Amicus Brief, at 14-16. Two superior court judges have found otherwise, concluding that \$114,000 to \$123,000 was a sufficient deterrent.

Combining the penalty days from all 10 penalty periods results in a single penalty period of about 22 years. This is staggering amount of time to penalize an agency that actually produced all records requested in about 4 years. Under these circumstances, a \$15 daily amount was proportionate and fair. Appellant received \$123,780.00 -- the largest penalty in the history of the PDA. This is sufficient for a requester that suffered no economic loss, and any greater amount would be an unjustified windfall at public expense.

Appellant and Amici have suggested that the size of an agency's budget should be a factor in deciding the per-day penalty. Amicus Brief, at 15. There is no evidence, historical or otherwise, that the legislature intended this to be a factor in determining penalties under the PDA. Nor is there any judicial precedent for such an approach. The mere fact that the legislature set the penalty range at \$5 to \$100 per day belies the contention that penalties should be connected to the size of an agency's budget.

At page 18 of their brief, Amici attempt to make a connection between a failure to disclose records and multimillion dollar judgments against the state for "harming Washington residents." What these judgments have to do with this case, or with public disclosure generally, is not clear.

Unpublished trial court decisions are not properly before the court in any event.

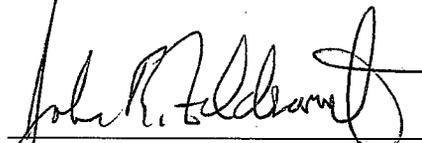
Amici's policy arguments are not appropriate for the facts of this case. Their brief is designed for a case of agency bad faith in withholding of public records. This is not that case.

III. CONCLUSION

For the foregoing reasons, King County asks the trial court's Order on Remand dated August 23, 2005 be affirmed.

DATED this 11 day of September, 2006.

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DIVISION I

ARMEN YOUSOUFIAN,)
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 Appellant,)
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 vs.)
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 THE OFFICE OF RON SIMS, KING)
 COUNTY EXECUTIVE; a)
 subdivision of KING COUNTY, a)
 municipal corporation; the KING)
 COUNTY DEPARTMENT OF)
 FINANCE, a subdivision of KING)
 COUNTY, a municipal corporation;)
 and the KING COUNTY)
 DEPARTMENT OF STADIUM)
 ADMINISTRATION, a subdivision)
 of KING COUNTY, a municipal)
 corporation,)
)
 Respondents,)

No. 57112-5-I

CERTIFICATE OF SERVICE

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STATE OF WASHINGTON
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I, Teri Chase, hereby certify and declare under penalty of perjury under the laws of the state of Washington as follows:

1. I am a legal secretary employed by King County Prosecutor's Office, am over the age of 18, am not a party to this action and am competent to testify herein.

2. On September 11, 2006, I did cause to be delivered in the manner noted below a true copy of the MOTION TO STRIKE PORTIONS OF AMICUS FILINGS, ANSWER TO BRIEF OF AMICUS CURIAE, and this Certificate of Service to:

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

DATED this 11th day of September, 2006 at Seattle, Washington.

NORM MALENG
King County Prosecuting Attorney

By: 
Teri Chase, Legal Secretary to
JOHN R. ZELDENRUST, WSBA #19797
Senior Deputy Prosecuting Attorney
Attorneys for King County