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SUPREME COURT
STATE OF WASHINGTON
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NO. 80081-2

COURT OF APPEALS NO. 57112-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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,

Petitioner

v.

ARMEN YOUSOUFIAN,

Respondent.

REPLY IN SUPPORT OF PETITION FOR REVIEW

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DANIEL T. SATTERBERG
Acting King County Prosecuting Attorney

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4(d), petitioner King County replies to three new issues raised in respondent Yousoufian's Response to Petition for Review. For the reasons stated below, review of Yousoufian's new issues is unnecessary. King County asks the Court to decline review of these issues.

B. REPLY TO NEW ISSUES

1. Trial courts should have the discretion to consider the absence of a requestor's economic loss in determining PDA penalties.

Yousoufian asks that economic loss be eliminated or minimized as a factor in determining the penalty under the Public Disclosure Act. Answer, at 1. His request is largely unnecessary, however, because economic loss does not appear to be a factor in the vast majority of PDA cases. King County has uncovered only two published decisions in the past 15 years that mention this factor. *See Amren v. City of Kalama*, 131 Wn.2d 25, 37, 929 P.2d 389 (1997); *Yacobelis v. City of Bellingham*, 64 Wn. App. 295, 825 P.2d 324 (1992).

Nonetheless, in certain cases economic loss is an important tool of trial court discretion in determining the penalty. If a requester can demonstrate qualifying economic losses due to an agency's denial of

records, the trial court should be able to consider that factor in determining the penalty. Likewise, if the requester sustained no economic loss, the court should be able to consider that fact as well.

In this case, Mr. Yousoufian had no economic loss. He contends, however, that "[t]he harm to be prevented by the PDA is not economic harm, but harm to the effectiveness of democratic government." Answer, at 17. If that is the objective, then the penalty should not exceed the amount necessary to encourage the agency to correct the disclosure problem and prevent similar violations in the future. In this case, two trial courts have concluded that a penalty in the range of $114,000 to $123,000 is sufficient for these purposes.

There is no sound policy reason for a higher penalty in this case. Awarding more money to Mr. Yousoufian will simply encourage others to use the PDA to seek a similar windfall at public expense. Trial courts should have the discretion to prevent this by considering economic loss in making the discretionary penalty determination.

2. King County's conduct in this case was negligent only.

In 2001, the original trial court characterized King County's conduct as negligent. CP 29-59. The Court of Appeals in the first Yousoufian appeal mistakenly stated that the trial court found "gross

negligence." Yousoufian now asks the Court to compound the error with a appellate-level finding that King County's conduct was "wanton." *See* Answer, p. 18. There is no factual or legal basis for such a determination by this Court.

3. Trial courts may already consider deterrence in setting PDA penalties.

Yousoufian claims that deterrence should be a primary factor in penalty determination. He further claims that trial courts should consider whether a penalty is sufficient to provide requesters with the incentive to enforce the PDA. Answer, at 18.

Courts are free to consider the amount necessary for deterrence. Indeed, that is precisely what the trial court did in this case. CP 55. In any event, Mr. Yousoufian has never shown that the $123,000 penalty imposed is insufficient for deterrence.

Yousoufian contends the amounts awarded in this case serve as a disincentive to PDA enforcement. The facts demonstrate otherwise. All Yousoufian's legal fees -- which are now over $300,000 -- have been paid by the taxpayers. And while there is no evidence of economic loss to Yousoufian, he has collected another $123,000 in public funds as a penalty. His results in this case can hardly be viewed as a disincentive to others.

C. CONCLUSION

For the foregoing reasons, King County asks the Court to decline review of the additional issues raised by Yousoufian.

DATED this 31st of May, 2007.

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Respectfully submitted,

FILED AS ATTACHMENT
TO E-MAIL

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