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No. 571125-I

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**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON, DIVISION I**

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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.

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**REPLY BRIEF OF APPELLANT**

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**I. KING COUNTY'S CORE ARGUMENT: THE LONGER MORE DOCUMENTS ARE WITHHELD, THE LOWER THE PER-DAY PENALTY.**

Reduced to its core, King County's argument is simple: because King County withheld so many documents for so long and therefore generated a large number of penalty days, the trial court is justified in assigning a low per-day penalty in order to reach a penalty that the trial court believes is appropriate. "Faced with an enormous penalty," King County argues that "it was entirely reasonable for the trial court to impose a per-day penalty at the lower end of the scale." (Brief of Respondent at 13). "In this case, a low per-day penalty was warranted given the large number of penalty days. . . ." (Brief of Respondent at 23). In other words, the more extensive the violation of the Public Disclosure Act, the smaller the per-day penalty. Thus if King County withholds ten groups of documents for a period of years, the trial court can ignore the \$5-100-a-day penalty scale and set a low per-day penalty in order to keep the total penalty down.

If the legislature had intended this result, it would have simply given trial courts the discretion to set the penalty for Public Disclosure Act violations. The legislature did not, however, choose this easy alternative. The legislature instead set forth a three-factor penalty formula with each factor independently and rationally determined by the trial court. To set

penalties under the Public Disclosure Act, the trial court determines as an independent matter the length of time documents are withheld, the number of documents or groups of documents withheld, and the per-day penalty based on the agency's culpability. King County's hypothetical example illustrates the flaw in its core argument. (Brief of Respondent at 18). It assumes that a judge should determine an appropriate total penalty and then manipulate the three-part formula established by the legislature in any way convenient to rationalize the pre-judged total penalty. This ignores the fact that the legislature has determined that the number or groups of records withheld, the amount of time the records were withheld, and culpability all matter independently.

The number/groups of records that King County withheld and the amount of time King County withheld those records have been finally established in this case, leaving only the third independent factor to be determined; the degree of culpability on the \$5-to-\$100 penalty scale. King County does not merit a deduction on this third factor because it ran up a large bill on the first two.

King County does not attempt to reconcile its core argument here with its concessions in the trial court that "the legislature intended the courts to use the entire penalty range (\$5 to \$100)" and that "egregious

misconduct” justifies “a per-day penalty at the high end of the range.” (King County’s Brief on Remand, at 7, 8; (CP 103 and 104)).

II. BLAINE SCHOOL DISTRICT IS NOT COMPARABLE TO YOUSOUFIAN.

King County’s continued reliance on ACLU v. Blaine School District, 95 Wn. App. 106, 975 P.2d 536 (1999), as its sole authority is misplaced for two reasons. The law has evolved since the Blaine decision, and the facts of that case are not analogous to those in Yousoufian. As reflected in Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 98 P.3d 463 (2005), the dichotomous either/or, bad faith/good faith thinking in Blaine is incompatible with the legislatively mandated \$5-to-\$100 a day PDA penalty scale. By turning to culpability as the measure of the per-day penalty, the Supreme Court acknowledged that the extent of egregiousness of the offending conduct determines where the pointer comes to rest on the penalty scale.

The reality of agency misconduct under the Public Disclosure Act comes in increments, not on an all-or-nothing basis. Even recognizing that bad faith “is somewhat of an either/or distinction,” King County urges reliance on bad faith as the determinant of the per-day penalty. (Brief of Respondent at 22). Such reliance has led to awkward considerations of degrees of bad faith and the difference between bad faith and “lack of

good faith” considerations more appropriate to the classroom than to judicial decision-making. King County admitted as much on remand when it acknowledged the propriety of applying the full range of the penalty scale based on the egregiousness of the misconduct. (King County’s Brief on Remand, at 8; (CP 104)) The County now seeks to back away from that acknowledgement because of its unwanted implications.

As King County admits, the Blaine case was not about the withholding of documents, but about where the documents could be inspected. (Brief of Respondent at 14). Unlike Yousoufian, the ACLU was never denied access to the documents and was never told that the documents did not exist. Rather, the School District merely told the ACLU that it had to drive two hours north of Seattle to inspect the documents. The fight was over location and convenience, not availability and disclosure. Misrepresentations were made, not to those requesting the documents but in a letter to parents explaining the conduct of the School Board. (Brief of Respondent at 14). The court took the misrepresentations in the letter to parents as an indication that the School Board was not acting in good faith by insisting that the ACLU drive to Blaine to view the documents.

In contrast to the facts in Yousoufian, agency misrepresentations in Blaine did not mislead those requesting the documents, did not indicate the non-existence of the documents, and did not insist that all responsive documents had been disclosed. The misrepresentations in Blaine formed the basis for an inference by the court that the School District was inconveniencing the ACLU for reasons of spite. These almost incidental misrepresentations to a third party did not go to the heart of and purpose of the Public Disclosure Act, the disclosure of records that the public has a right to see.

Because it involves a small bit of a lack of good faith, the Blaine case is a telling example of why per-day penalties need to be based on varying degrees of culpability and not on a good faith/bad faith, either/or basis.

### **III. GUIDELINES ARE NEEDED TO AID DISCRETION OF TRIAL COURTS.**

King County rebuffs Yousoufian's suggestion of guidelines to help steer the discretion of the trial court in determining the per-day penalty. (Brief of Respondent at 19). King County asserts that "Yousoufian asks the court to adopted a six-level culpability scale to determine the penalty amount. . . ." (Brief of Respondent at 19). The legislature, not

Yousoufian, requires that the per-day penalty be established according to a scale.

Yousoufian has only suggested guidelines for application of the scale. These guidelines were intended as nothing but guidelines to help bring about more predictable and consistent results based on the monetary scale written into the Public Disclosure Act. The guidelines are not a matrix to resolve difficult questions or to displace the judgment and discretion of trial courts. Rather, the guidelines would help trial courts balance and weigh considerations. This contrasts with the County's suggestion that trial courts should first decide on a total penalty, and then reason backwards in search of a rationale to support that total penalty.

On a number of occasions, appellate courts have given similar guidance to trial courts' discretion in the interest of achieving more consistent and predictable results. Glover for Cobb v. Tacoma General Hospital, 98 Wn.2d 708, 716-18, 658 P.2d 1230 (1983) (factors for determining the reasonableness of a settlement for purposes of RCW 4.22.040(2) and RCW 4.22.060(2)); State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986) (factors for determining when the Washington Constitution extends broader rights to citizens than the U.S. Constitution); Matter of Disciplinary Proceedings against Blauvelt, 115 Wn.2d 735, 801 P.2d 235 (1990) (factors for Supreme Court to consider in determining

proper sanction on judges); Bowers v. Transamerica Title Insurance Company, 100 Wn.2d 581, 595-98, 675 P.2d 193 (1983) (factors to consider in determining reasonable attorneys' fees).

**IV. THE PRECEDENT OF A LOW PER-DAY PENALTY FOR EGREGIOUS MISCONDUCT DISCOURAGES ENFORCEMENT OF THE ACT.**

King County finds it "difficult to see how the result of this case would discourage attorneys and citizens from pursuing PDA cases." (Brief of Respondent at 23). The discouragement would not come in this case but in the precedent that unusually egregious misconduct merits only a small per-day penalty on the statutory scale. Attorney fees in this case are substantial because of protracted litigation lasting over five years. The large penalty days multiplier was created not by the court and not by Yousoufian. It was created by the prolonged failure of King County to comply with Yousoufian's Public Disclosure request. Only in the rarest of cases will a government agency run up such an unprecedented number of penalty days. The size of the per-day penalty is usually the key to establishing a sufficient penalty to encourage citizen enforcement for egregious misconduct.

At issue here is how the per-day penalty will be set. Can citizens expect a rational process for determining the per-day penalty along the \$5-to-\$100 scale according to the degree of an agency's culpability? This

case will determine whether litigants in the future can reasonably expect that their efforts to enforce the Public Disclosure Act will be fairly repaid in proportion to the culpability of agency misconduct.

**V. YOUSOUFIAN'S WAS NOT AN EXTRAORDINARY REQUEST.**

King County seeks to make much of the extraordinary difficulties of complying with large, complex Public Disclosure Act requests. (Brief of Respondent at 22-23). However, the problems they point out are not present in this case. The County did not follow the statutory process for extending time to comply. The County made no claim that exemptions applied. No third-party rights were at issue.

With some apparent pride, King County states that it “actually produced all documents Yousoufian requested in less than four years.” (Brief of Respondent at 13). But only after Yousoufian filed this lawsuit on March 30, 2000, did the wheels at King County slowly begin to turn. At that point, the County began to follow the procedure that “was the appropriate way to handle a PDA request, and the procedure that could and should have been employed in 1997.” (Findings of Fact at 12; (CP 40)). As the trial court observed, “with proper diligence, all the material ultimately provided could and should have been provided in June or December of 1997.” (Findings of Fact at 13; (CP 41)). “When Pat Steele finally reviewed Mr. Yousoufian’s May 30 request, in February of 2001,

she coordinated an effort and located the documents within a few days.” (Finding of Fact at 17; (CP 45)). No evidence in the record supports King County’s claim that this was an unusually large, complex Public Disclosure Act request. Nothing supports a claim of excuse or justification. The trial court ruled that Yousoufian’s request could have been met promptly, “within a few days.”

**VI. THE TRIAL COURT DID NOT CONSIDER DETERRENCE.**

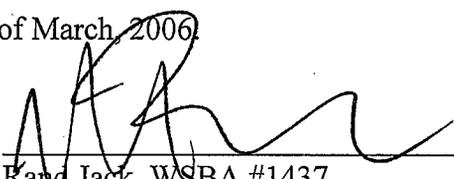
King County’s claim that the trial judge on remand concluded that the penalty imposed was sufficient to deter future misconduct is inaccurate. (Brief of Respondent at 17, fn 11). The trial judge on remand did not mention deterrence. King County cites no authority for its claim.

King County makes the peculiar argument that the deterrence purpose of the PDA penalty provisions apply “to a for-profit corporation like Boeing or Microsoft,” but not to “municipal corporations that collect tax revenues.” (Brief of Respondent at 21). The argument is peculiar because the Act and the admonition that penalties are to deter apply only to governmental agencies, not to the likes of Boeing and Microsoft. A responsible government agency seeking to use tax revenues wisely will presumably be deterred from wasting those revenues on Public Disclosure Act penalties.

**VII. LIBERAL CONSTRUCTION IS A PROMINENT THEME OF THE ACT.**

King County claims that it “is not aware of authority stating that an exercise of judicial discretion must be done liberally.” (Brief of Respondent at 24). The statute and numerous cases repeatedly state that the Public Disclosure Act must be liberally construed to accomplish the purposes of the Act. RCW 42.17.010(11); RCW 42.17.251; RCW 42.17.290. See, e.g., Hearst Corp. v. Hoppe, 90 Wn.2d 123, 128, 580 P.2d 246 (1978); Van Buren v. Miller, 22 Wn. App. 836, 843, 592 P.2d 671 (1979); Nast v. Michels, 107 Wn.2d 300, 310, 730 P.2d 54 (1986); Progressive Animal Welfare Soc. v. University of Washington, 114 Wn.2d 677, 682, 790 P.2d 604 (1990); American Civil Liberties Union of Washington v. Blaine School District, 86 Wn. App. 688, 693, 697-8, 937 P.2d 1176 (1997). The mandate for liberal construction can be most fully implemented where matters are left to the discretion of the court.

DATED this 29<sup>th</sup> day of March, 2006.

  
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IN THE COURT OF APPEALS  
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ARMEN YOUSOUFIAN

Appellant

v.

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No. 57112-5-I

DECLARATION OF SERVICE

I, Michael Brannan, declare as follows:

1) I am over 18 years of age and a U.S. citizen.

2) On March 29, 2006, I caused to be delivered true and accurate copies of the following documents to the following parties as indicated

below:

a. Reply Brief of Appellant, and;

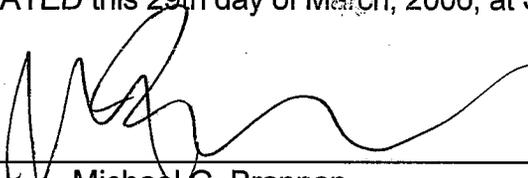
b. This Declaration of Service

Service List

John R. Zeldenrust Office of the Prosecuting Attorney 516 3rd Ave Ste W554 Seattle, WA 98104-2362	<input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Mailed <input checked="" type="checkbox"/> Faxed ((206) 296-0191) <input type="checkbox"/> Emailed:
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of March, 2006, at Seattle Washington.

  
\_\_\_\_\_  
Michael G. Brannan

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