

**FILED**

**JAN 16 2009**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

84108-0

No. 271846

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

---

NEIGHBORHOOD ALLIANCE OF SPOKANE COUNTY,  
a non-profit corporation,

Petitioner,

v.

COUNTY OF SPOKANE,  
a political subdivision of the State of Washington,

Respondent.

---

**REPLY OF PETITIONER**

---

BREEAN BEGGS, WSBA #20795  
BONNE BEAVERS, WSBA #32765  
Attorneys for Petitioners  
Center for Justice  
35 W. Main Ave., Suite 300  
Spokane, Washington 99201  
Telephone: (509) 835-5211

**TABLE OF CONTENTS**

**I. STATEMENT OF THE CASE** ..... 1

**II. INTRODUCTION** ..... 1

**III. ARGUMENT** ..... 2

    1. The County wrongfully maintains it provided responsive documents to Item # 1 ..... 2

    2. The record shows NASC expressly preserved its discovery issues ..... 2

    3. A requester’s motive for its public records request is immaterial to an agency’s duty to respond to the request as well as to discovery ..... 6

    4. NASC’s discovery comported with the relevant civil rules and subject matter of suits brought under the PRA. .... 9

    5. The County did not meet its burden of showing reasonable searches for Items #1 and # 2..... 14

    6. Under the PRA, the County had a duty to search the places the records requested could reasonably be found, including records stored on Ms. Knutsen’s old computer ..... 17

    7. The emails provided NASC on November 7, 2005 are positive indications of omitted materials ..... 21

    8. The factual declarations submitted by non-party county employees in support of Neighborhood Alliance are admissible ..... 22

**IV. CONCLUSION AND REQUEST FOR RELIEF** .....23

## TABLE OF AUTHORITIES

### Cases

|   |        |
|---|--------|
| <i>Amren v. City of Kalama</i> , 131 Wn. 2d 25, 38, 929 P.2d 389 (1997) ..  | 11, 16 |
| <i>Antonellis v. Bureau of Alcohol, Tobacco, Firearms and Explosives</i> ,<br>2006 WL 367893 (D.D.C.) unreported.).....   | 22     |
| <i>Bernal v. American Honda Motor Co., Inc.</i> 87 Wn. 2d 406, 412,<br>553 P.2d 107 (1976) (citations omitted). ....  | 18     |
| <i>Campbell v. Department of Justice</i> , 164 F.3d 20, 27-28<br>(D.C. Cir. 1998) .....   | 21     |
| <i>Daines v. Spokane County</i> , 111 Wn. App. 342, 349 (2002) .....  | 21     |
| <i>Dawson v. Daly</i> , 120 W. 2 <sup>nd</sup> 782, 845 P.2d 995 (1993).....  | 8      |
| <i>Dragonslayer, Inc. v. Wash. State Gambling Com’n</i> , 139 Wn.<br>App. 433, 446, 161 P.3d 428 (2007).....  | 8      |
| <i>Hangartner v City of Seattle</i> , 151 Wn. 2d 439, 447, 90 P.3d 26 (2004)..  | 24     |
| <i>Hearst Corp. v. Hoppe</i> , 90 Wn. 2d 123, 129 (1978).....   | 11     |
| <i>In re Rosier</i> , 105 Wn.2d 606, 717 P.2d 1353 (1986).....  | 7      |
| <i>Oglesby v. United States Department of the Army</i> , 920 f.2d 57, 68<br>(D.C. Cir. 1990) .....  | 17     |
| <i>Progressive Animal Welfare Soc’y (PAWS) v. Univ. of Wash.</i> ,<br>114 Wn. 2d 677, 687-88 (1990).....  | 11     |
| <i>PAWS v. Univ. of Wash.</i> , 125 Wn. 2d 243, 270 n. 17 (1994) .....  | 12, 16 |
| <i>Smith v. Okanogan</i> , 100 Wn. App. 7, 14-15, 994 P.2d 887 (2000) .....   | 9      |
| <i>Tacoma News, Inc. v. Tacoma-Pierce County Health Dept.</i> , 55 Wn.<br>App.515, 519, 778 P.2d 1066 (1989) .....  | 16     |
| <i>Tacoma Public Library v. Woessner</i> , 90 Wn. App. 205, 212,<br>951 P.2d 357 (1998) amended on other grounds <i>Tacoma Public<br/>Library v. Woessner</i> , 972 P.2d 932 (Wn. App. 1999.) ..... | 7, 9   |
| <i>U.S. v. Project on Gov’t Oversight</i> , 484 F.Supp.2d 56, 68<br>(D.D.C.2007) .....  | 22     |
| <i>Valencia-Lucena v. U.S. Coast Guard</i> , 180 F.3d 321, 326 (citations<br>omitted) (D.C. Cir. 1999) .....  | 25     |
| <i>Weisberg v. United States Department of Justice</i> , 705 F.2d 1344, 1351<br>(D.C. Cir. 1983) .....  | 17     |
| <i>Weisberg v. United States Department of Justice</i> , 745 F. 2d 1476, 1485<br>(D.C. Cir. 1984) .....   | 16     |
| <i>Wood v. Lowe</i> , 102 Wn. App. 872, 878, 10 P.3d 494 (2000) .....   | 24     |
| <i>Wright v. Group Health Hospital</i> , 103 Wash.2d 192, 200, 691 P.2d 564<br>(1984).....  | 26     |

|   |        |
|---|--------|
| <i>Yousoufian v. Office of Ron Sims</i> ,<br>http://www.courts.wa.gov/opinions/pdf/800812.opn.pdf (Wash.<br>Jan. 15, 2009)(No. 80081-2) ..... | 12, 21 |
|---|--------|

**Statutes**

|                     |    |
|---------------------|----|
| RAP 10.4(h) .....   | 19 |
| RCW 42.17.270 ..... | 7  |

**Rules**

|                              |    |
|------------------------------|----|
| Civil Rule 26(b) .....       | 13 |
| D.C.Cir. Rule 36(c)(2) ..... | 19 |
| GR 14.1(b) .....             | 19 |
| RCW 42.17.340(1).....        | 14 |

**Other Authorities**

|   |    |
|---|----|
| Nelson, et al., <i>The Electronic Evidence and Discovery Handbook</i> at 266<br>(ABA 2006)<br>..... | 18 |
|---|----|

## **STATEMENT OF THE CASE**

Petitioner's statement is set forth in the Brief of Petitioners filed October 24, 2008.

### **INTRODUCTION**

The issue before the Court in this appeal is not whether records existed responsive to Neighborhood Alliance of Spokane County's ("NASC") May 16, 2005 request. Rather, it is whether the County conducted a reasonable search for responsive records. Under Washington's Public Records Act ("PRA"), the County bears the burden to show its search was reasonable. It has not done so here.

As to the request for both Items #1 and #2, NASC tendered evidence from declarations based on personal knowledge, experience and training and from the County's own documents and admissions that the County failed to search in places the records could reasonably be found and failed to utilize search terms calculated to succeed. It also tendered positive indications of overlooked materials. Although the County had ample opportunity to rebut this evidence by additional affidavits, it chose not to do so. As a result, there are no genuine issues of material fact regarding whether the County conducted reasonable searches for documents responsive to NASC's May 16, 2005 public records request and a grant of summary judgment for NASC is appropriate.

## ARGUMENT

**1. The County wrongfully maintains it provided responsive documents to Item # 1.**

In its Statement of Facts, the County claims, “In response to what is now referred to as ‘Item # 1,’ Spokane County provided the electronic log that was requested.” (Br. of Resp’t at 5, Dec. 16, 2008.) This is incorrect.

NASC requested “the *complete* electronic file information logs for the undated county planning division seating chart provided by Ms. Knutsen to the Neighborhood Alliance on May 13th.” (emphasis added)(CP 63, 273.) The record requested would have shown the date the undated county planning chart was created and/or modified. The County did not tender that record. Rather, it tendered a log from Ms. Knutsen’s new computer which showed only the date the records from Ms. Knutsen’s old computer were copied into her new one – not the dates the document was created and modified. (CP 61-62, 65.)

**2. The record shows NASC expressly preserved its discovery issues.**

The County maintains NASC waived its discovery motions by allowing argument on the competing summary judgment motions. (Br. of Resp’t at 20, Dec. 16, 2008.) To the contrary, NASC preserved these

issues as shown by the transcript of the May 30, 2008 hearing as well as the trial court's resulting order, drafted by the County.

On May 13, 2008, the trial court had before it ten motions, including NASC's Motion to Compel Discovery and the County's Renewed Motion to Strike Declarations and Motion for Protective Order re: Further Discovery as well as summary judgment motions. (CP 654.) NASC filed its motion to compel in November 2006 in which it requested an order compelling the deposition of Pam Knutsen and answers to "all written and deposition discovery...." (CP 74, 77.)<sup>1</sup> This motion was continued by the trial court on December 5, 2006 and was scheduled for hearing on May 13, 2008. (RP 24, Dec. 5, 2006; CP 654-657). On December 5, the trial court had ten motions before it. Prior to beginning argument, the parties and the court discussed how best to proceed:

Judge: Okay. So, now, as I understand all this, it means that we're gonna hear the motions for summary judgment on both sides? Is that right?

Mr. Risken: Yes, sir.

Judge: And, that everything's – other than that's waived?  
Right?

Ms. Beavers<sup>2</sup>: Well, I'm not so sure that we're waiving our order

---

<sup>1</sup> For the procedural history regarding these discovery motions, see Br. of Pet'r at 11-13, Oct. 24, 2008.)

<sup>2</sup> Although no motion was tendered for correction, the transcription mistakenly shows "Ms. Beavers" as NASC's counsel at this hearing. In fact, it was Mr. Beggs.

to compel further discovery at it, but I think the Court can resolve this case pretty much on summary judgment. We still have some – I think, outstanding discovery disputes. So, if I was gonna try to figure out a rational way to handle it, I would go to the summary judgment first, and then, if the discovery piece becomes relevant to it, then, we might have to go to that.

Judge: Well – you know, just – we – we had this in November, didn't we?

Mr. Risken: We had – we – Spokane County originally filed a motion for summary judgment in November of 2006.

Judge: Yeah. When did we hear that?

Mr. Risken: December of 2006.

Judge: Okay. So it's been December – that's almost six months, right?

Mr. Risken: No, its' seventeen, Your Honor.

Judge: Seventeen months?

Mr. Risken: Yes. December of 2006.

Judge: Oh. Okay. So, the last time we were here, I've authorized the Plaintiff to put in a – you know, interrogatories. So, isn't that it?

Mr. Risken: Correct.

Ms. Beavers: Written –

Judge: Yeah.

Ms. Beavers: --deposition questions.

Judge: Yeah. And so, now, you're telling me you're not done with discovery?

Ms. Beavers: We – we – limited at that point, Your Honor, to try written deposition questions, which we served in September. The County gave us what ones they were not gonna answer. They answered several in October. And, then, we got the final answers in February of this year.

Judge: Okay. But –

Ms. Beavers: But, if you were gonna –

Judge: -- I mean, they've answered your questions, right?

Ms. Beavers: Well, they answered eighteen of fifty-three. So – I think they answered enough that we can go forward to our motion for summary judgment. But if the Court doesn't grant that, there are several other ones that would be – relevant.

Judge: All right. So, now, what I'm waiting to hear is through your motion for summary judgment on both sides.

(RP 7-9, May 13, 2008.)

As is shown by the transcript above, counsel for NASC essentially said that if the trial court granted NASC's summary judgment motion, the court would not need to reach discovery issues. However, the trial court granted summary judgment for the County and denied NASC's.

The resulting court order states: "With the Court's permission the parties agreed to argue the competing Summary Judgment Motions first and then to address the additional motions thereafter, depending on the

result of the competing Summary Judgment motions.” (CP 655.) Thus, NASC agreed to hear the summary judgment motions first and to argue its discovery motions depending on the outcome. In doing so, NASC expressly preserved its discovery issues in the event of a reversal upon appeal.

Nonetheless, NASC still maintains further discovery is not required in order for this Court to grant summary judgment on its behalf on three issues: 1) whether the County violated the PRA by failing to conduct a reasonable search for Item #1, 2) whether the request for Item #2 was for existing, identifiable public records, and 3) whether the County violated the PRA by failing to conduct a reasonable search for Item # 2. Should NASC prevail on appeal, discovery would still be necessary on the issue of penalties.

3. **A requester’s motive for its public records request is immaterial to an agency’s duty to respond to the request as well as to discovery.**

The County argues that NASC’s request was actually a crusade against perceived corruption within Spokane County and that what it really sought was verification of illegal hiring. (Br. Resp’t at 2.)

Accordingly, it regarded NASC’s discovery merely as a gateway to “examine every possible aspect of Spokane County hiring practices....” (Br. of Resp’t at 11.) Because the “County considered this type of

discovery as beyond the spirit and intent of the Public Records Act,” it “did not answer the interrogatories and requests for production.” (Br. of Resp’t at 11.) Similarly, because the County took the position that all NASC sought was verification of Steven Harris and Ron Hand’s names, it claims it had no duty to respond.

Of course NASC’s reason for filing the request was verification of suspected wrongdoing. This is no surprise as it is the very purpose of the PRA – “to provide a mechanism by which the public can be assured that its public officials are honest and impartial in the conduct of their public offices.” *In re Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986).

Nonetheless, NASC’s reason for filing is immaterial. Agencies may not distinguish between persons requesting records nor their purpose in filing a public records request. RCW 42.17.270; *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 212, 951 P.2d 357 (1998) amended on other grounds *Tacoma Public Library v. Woessner*, 972 P.2d 932 (Wn. App. 1999.)

Thus, so long as NASC’s requests were for identifiable public records as a matter of law, the County had a duty to respond in good faith. *Dragonslayer, Inc. v. Wash. State Gambling Com’n*, 139 Wn. App. 433, 446, 161 P.3d 428 (2007). Similarly, so long as NASC’s discovery requests comported with Washington law, the County had a good faith

duty to comply.

As briefed more fully in NASC's opening brief, the request for Item #2 was for public records as defined by Washington law and not a verification request. The definition of a "verification request" comes from *Dawson v. Daly* in which a requestor asked for the personnel file of William Stern, a prosecuting attorney. *Dawson v. Daly*, 120 W. 2<sup>nd</sup> 782, 845 P.2d 995 (1993). The prosecuting attorney's office released the contents of Stern's personnel file with some exceptions, including "requests for verification of employment." *Id.* at 789. The court held that verification requests seeking information about an employee's position, salary, and length of service "relate neither to the conduct of government, nor to the performance of any government function." Similarly, this Court in *Smith v. Okanogan* found that a request for a list of employees, their titles, job descriptions and salaries which did not otherwise exist was a request for information and not public records. *Smith v. Okanogan*, 100 Wn. App. 7, 14-15, 994 P.2d 887 (2000). By contrast, in a 1998 opinion, the Court of Appeals, Division II, ordered the release of existing records from employee personnel files showing employee names, salaries, fringe benefits, and vacation and sick leave pay. *Tacoma Public Library*, 90 Wn. App. at 224, amended on other grounds *Tacoma Public Library v. Woessner*, 972 P.2d 932 (Wn. App. 1999). In that case, the request was

for records – personnel reports - and not information. *Id.* at 209.

As in *Tacoma Public Library*, the request here did not seek information about these employees' positions, salaries or length of service or anything else. It simply sought existing documents containing the complete names of three future and/or current employees listed on a seating chart created and used by the County for administrative purposes. Because it was a request for identifiable public records, the County had a duty to conduct a reasonable search in response.

**4. NASC's discovery comported with the relevant civil rules and subject matter of suits brought under the PRA.**

The County relies on federal case law construing the Freedom of Information Act ("FOIA") for the proposition that discovery under the PRA is narrower than that allowed in other cases but cites to no state law in support thereof. (Br. of Resp't at 23.) These cases limit discovery to "an inquiry of whether complete disclosure has been made by an agency in response to an individual's request for information." *Id.* As the County concedes, this includes inquiry into the adequacy of its search.

Although these cases help establish the minimum discovery necessary in PRA cases, they cannot be used to curtail discovery on issues unique to state law – namely mandatory daily penalties. It is axiomatic that "the state act is more severe than the federal act in many areas,"

*Hearst Corp. v. Hoppe*, 90 Wn. 2d 123, 129 (1978), particularly in providing for mandatory attorney's fees and penalties against an agency that wrongfully withholds records. *Progressive Animal Welfare Soc'y (PAWS) v. Univ. of Wash.*, 114 Wn. 2d 677, 687-88 (1990). As a result, Washington public records litigation involves significant issues that do not arise under federal law.

In particular, the penalty provision requires inquiry into an agency's good faith or lack thereof in responding to a request. *Amren v. City of Kalama*, 131 Wn. 2d 25, 38, 929 P.2d 389 (1997). Accordingly, the Washington Supreme Court specifically rejected the claim that "an agency's decision-making process concerning whether to release a public record is generically insulated from pretrial discovery," noting that the "agency's decision not to disclose records, and the grounds for that decision, are precisely the subject matter of a suit brought under the Public Records Act." *PAWS v. Univ. of Wash.*, 125 Wn. 2d 243, 270 n. 17 (1994). In fact, the "reasons behind agency decisions to withhold records" are so critical in public records litigation as to need no discussion. *Id.*

More recently, the Washington State Supreme Court set forth fifteen factors relevant to penalty considerations, all of which would be appropriate areas for discovery. *Yousoufian v. Office of Ron Sims*, <http://www.courts.wa.gov/opinions/pdf/800812.opn.pdf> (Wash. Jan. 15,

2009)(No. 80081-2) (a copy of this opinion is attached hereto.) These include the lack of proper training and supervision of personnel and response, the unreasonableness of any explanation for noncompliance, the existence of systems to track and retrieve public records, negligent, reckless, wanton, bad faith or intentional noncompliance, and dishonesty. *Id.* at 18-19.

The civil rules allow for broad discovery into the subject matter of a claim with no express limit but relevancy. Contrary to the County's claims, these were precisely the issues inquired into by NASC's discovery - the existence of documents responsive to the request, the County's search, including Ms. Knutsen's ability to identify documents responsive to the request, and its decision-making process including its good faith or lack thereof. (CP 150-188).

For example, interrogatories 1, 2, 3, 4, 5, and 6 concerned the County's procedures for responding to public records requests, including training and policies for responding, and are relevant in determining whether the County followed these in the instant case. Interrogatory 7 asks for the identity of those responding to NASC's request, a question that might lead to relevant information regarding the County's good or bad faith in its response and its search. Interrogatories 8, 9, 10, 11, 12, go to the identification of persons who could have evidence as to the existence

of documents with the full names of "Steve" or "Ron." Interrogatories 15, 16, 17, 18, 19, 20, 21, 22 all go to the existence of the original seating chart, County procedures for preserving electronic data such as that requested. The persons whose names are requested in Interrogatory 23 could reasonably have known whether there were documents existing at the time of the request that would identify "Ron" and "Steve." Question 24 goes to whether documents existed on May 16, 2005 responsive to the request.

If records were destroyed after the request was made, motivation becomes relevant for penalties. Because the seating chart was created and presumably under the custody and control of Ms. Knutsen, whether or not she had anything to do with its possible destruction is relevant, as would be any promotion or other benefit received in relation to the possible destruction of records or an intentionally inadequate search.

Interrogatories 25 and 26 seek information relevant to motivation.

Further, because the request sought information regarding potential violations of hiring policies, discovery requests regarding the County's hiring policies and practices were crafted to lead to relevant information regarding the good faith, or the lack thereof, in responding to the May 16 request. The requests for production attached to these interrogatories were similarly crafted to lead to relevant evidence.

NASC voluntarily withdrew interrogatories 13, 14, 27, 28, 29, 30, 31, and 32 and any requests for production related thereto. (CP 208.)

The County also claims NASC's requests for admissions were "irrelevant and completely invasive." (Br. of Resp't at 27.) To the contrary, as did the other discovery, these addressed the existence of responsive documents, the search process, and agency decision making including motivation. (CP 150-173.)

Requests for admission may address any subject within the scope of Civil Rule 26(b) that relate to statements of fact or opinions of fact or the application of law to fact and must be answered unless the request seeks nonrelevant or privileged information. The County refused to answer requests 3, 4, 5, 8, 9, 10, 22, 12, 13, and 15, all of which asked for admission to fact or opinion as to fact regarding the content of the records provided to the Neighborhood Alliance. It also objected to 15, 16, 17, 18, 19, 20, 21 and 22 claiming the requests were not a proper subject for inquiry in a PRA lawsuit. Each of these requests asked for admissions relating to the existence of records responsive to the May 16 request or the County's actions regarding the same and hence were relevant to the case.

The County also claims NASC never pursued its motion to compel. (Br. of Resp't at 9.) This is incorrect. The record shows NASC agreed to defer a ruling on its written discovery requests pending a written

deposition of Ms. Knutsen. (RP at 24-25, Dec. 5, 2006.) Similarly, NASC agreed to move forward on summary judgment because it believed the evidence supported a finding that the County failed to conduct a reasonable search and reserved argument on discovery based on the court's ruling. ( *See supra* at Argument, subsection 2.)

**5. The County did not meet its burden of showing reasonable searches for Items #1 and # 2.**

The County argues that NASC's "complaint herein is driven solely by the fact that it did not receive what it apparently had hoped to find...." (Br. of Resp't at 43.) To the contrary, NASC's complaint herein is that the County has not met its burden to show that it conducted an adequate search for the requested records.

When an agency's search for records is challenged, "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Weisberg v. United States Department of Justice*, 745 F. 2d 1476, 1485 (D.C. Cir. 1984). Where records are not disclosed, it is the agency's burden to show it made a reasonable search. RCW 42.17.340(1); *Tacoma News, Inc. v. Tacoma-Pierce County Health Dept.*, 55 Wn. App.515, 519, 778 P.2d 1066 (1989); *Amren*, 131 Wn. 2d at 32; *PAWS*, 125 Wn. 2d at 251. The County has not done so here.

“An agency prevails on a motion for summary judgment only where it shows ‘beyond material doubt [] that it has conducted a search reasonably calculated to uncover all relevant documents.’ *Weisberg v. United States Department of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). “For purposes of this showing, the agency ‘may rely upon affidavits ..., as long as they are relatively detailed and nonconclusory and ... submitted in good faith.’ (citations and quotations omitted). The required level of detail ‘sets forth the search terms and the type of search performed, and aver[s] that all files likely to contain responsive materials (if such records exist) were searched.’ *Oglesby v. United States Department of the Army*, 920 f.2d 57, 68 (D.C. Cir. 1990).

As to Item # 1, the County relied on affidavits by Ms. Knutsen and Mr. Fiedler to show the nonexistence of documents. In her affidavit, Ms. Knutsen admitted she searched the only place the original electronic log could not be found – her rebuilt computer. Yet, as admitted by the County and argued in NASC’s motions for and against summary judgment below, the County did not know whether the original electronic log was still in Ms. Knutsen’s old computer at the time of the request. The County had ample opportunity to tender affidavits explaining why it would have been futile to make an inquiry as to the status of the computer much less conduct a search. It did not.

Similarly, NASC presented evidence in declarations by county employees that county work is routinely stored in network directories which are backed up. (CP 287- 288, 332.) These declarations satisfied the basic requirements for such declarations – they were made on personal knowledge, set forth admissible facts, and affirmatively showed the affiant was competent to testify to the matters therein. *Bernal v. American Honda Motor Co., Inc.* 87 Wn. 2d 406, 412, 553 P.2d 107 (1976) (citations omitted). The County had ample opportunity to tender rebuttal affidavits by Mr. Fiedler or Ms. Knutsen that in fact, the County does not require employees to store their work on network drives for back-up and retention, that Ms. Knutsen did not store her work on network drives, that the records sought were not the type of records required to be stored on a network drive, or that Ms. Knutsen simply failed to do so in this instance. By failing to rebut this evidence, the County failed to meet its burden of showing its limited search was reasonable.

As to Item # 2, Ms. Knutsen's affidavit does not describe in sufficient detail the search terms used or the places searched. (CP 62.) It is unclear what search terms she actually used and does not state which files she searched. Moreover, as previously briefed, the use of the term "seating chart," was more than likely not a term used by the County as shown by the declaration of Mr. Davenport (CP 330) and as confirmed by

Exhibit B of Ms. Knutsen's affidavit – the electronic log tendered to NASC which refers to a “reconfigure for 2 AD's” and/or “Main Floor Plan” and not a “seating chart.” (CP 65.)

Once more, NASC made these arguments in its summary judgment motions below and the County had ample opportunity to tender a rebuttal affidavit from Ms. Knutsen in which she clarified her search terms, explained why these were sufficient, described the files she searched and why these were the files in which she would reasonably have expected to find responsive documents. In failing to do so, the County failed to meet its burden to show that its search for Item No. # 2 was reasonable.

**6. Under the PRA, the County had a duty to search the places the records requested could reasonably be found, including records stored on Ms. Knutsen's old computer.**

The County argues it had no duty to search the records in Ms. Knutsen's old computer for two reasons – one, because the hard drive from that computer was not a “public document,” and two, because NASC did not expressly request a search of Ms. Knutsen's “hard drive.” (Resp't Br. at 32.)

First, NASC does not argue that the “hard drive” was a public record. A hard drive is merely a place where records, including data, are stored on a computer, similar to a filing cabinet, for example.<sup>3</sup> All NASC

---

<sup>3</sup> A hard drive is “the primary storage unit on PCs, consisting of one or more magnetic

sought was electronic data from the appropriate file and the most logical place to search for this data was in the computer where it was created and stored. NASC's position is simply that it was unreasonable for the County to limit its search for the original electronic file information logs to the only place where they could not be found.

The burden was on the County to search the appropriate files and NASC was not required to "exhaust [its] ingenuity to 'ferret out' records," either by divining the exact terms used by the County for its records or the files in which these records were stored. *Daines v. Spokane County*, 111 Wn. App. 342, 349 (2002). *See also Campbell v. Department of Justice*, 164 F.3d 20, 27-28 (D.C. Cir. 1998) (agency must use methods reasonably calculated to produce information and may not "limit its search to only one record system if there [were] others that are likely to turn up the information requested."

As Ms. Knutsen searched records stored on her personal computer's hard drive and located an electronic log for the "seating chart," she clearly understood NASC's request was for electronic data or records related to the reconfiguration or Main Floor Plan. However, she limited her search to the only place the record sought – the data field showing the dates of creation and modification – could not be found. Once more, the

---

media platters on which digital data can be written and erased magnetically." Nelson, et al., *The Electronic Evidence and Discovery Handbook* at 266 (ABA 2006).

County had ample opportunity below to tender rebuttal affidavits showing why it would have been unreasonable to conduct a search of Ms. Knutsen's old computer or other network directories.

Nevertheless, relying on an unpublished federal case, the County now argues that it had no duty to search hard drives unless expressly asked. (Bf of Resp't at 32 citing *Antonellis v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 2006 WL 367893 (D.D.C.) unreported.) Under Washington's appellate rules, a party may cite an unpublished opinion only if the citation is permitted under the jurisdiction of the issuing court. RAP 10.4(h); GR 14.1(b). "Under the rules of the D.C. Circuit, an unpublished order serves only to dispose of the case under review and has no precedential value." *U.S. v. Project on Gov't Oversight*, 484 F.Supp.2d 56, 68 (D.D.C.2007) citing D.C.Cir. Rule 36(c)(2) (citations omitted.) Thus, although the County may cite to *Antonelli*, it has no binding authority on this Court or any other. Nor is it persuasive on the facts here.

In *Antonelli*, the plaintiff requested from FBI Headquarters all records pertaining to Nancy and Susan Marie Antonelli. The FBI searched the "automated indices" to the Central Records System ("CRS") at FBI Headquarters in Washington D.C. and its Chicago and Milwaukee Field Offices but located no responsive records. *Id.* at 5. The plaintiff argued

the search was inadequate because the FBI failed to search its “I Files” as well. These were described by the agency as “shared computer [hard drives] used in field offices to hold preliminary work product....” *Id.* The FBI tendered an affidavit in reply stating that it “considers requests for searches of its shared computer drives on a case-by-case basis and only conducts such searches from “very specific requests, [] if such a request is reasonable.” *Id.* at 5-6. The court found the FBI’s search reasonable where the plaintiff did not ask for a search of the “I Files” and the agency’s search was otherwise reasonably calculated to locate responsive records. *Id.* at 6. “Absent plaintiff’s specific request for a search of the hard drives, defendant had no obligation under the FOIA to search them.”

Here, there is no evidence the County utilized a central records system with automated indices such as that relied upon by the FBI in lieu of searching individual employee computers and/or network drives. There is no evidence the County even has one. Nor is there any evidence of the depth of information stored in the FBI’s CRS such that the *Antonelli* court deemed a search there and nowhere else reasonable.

Finally, construing the state public records act to require all requestors to know and name all the places an agency may store documents responsive to their requests would unduly burden the requestor, significantly narrow the scope of the PRA and contradict prior state case

law as well as the legislative mandate for liberal construction. *See Yousoufian*, <http://www.courts.wa.gov/opinions/pdf/800812.opn.pdf> at 5 (trial court found it was ‘not reasonable to ask [Yousoufian] where to search for documents responsive to his request.’”); *Hangartner v. City of Seattle*, 151 Wn. 2d 439, 447, 90 P.3d 26 (2004) (there “is no official format for a valid PDA request” and the requestor need not identify each and every place a record might be found). Rather, the requester must simply “identify the documents with reasonable clarity to allow the agency to locate them.” *Id.* citing *Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000). Here the NASC did just that.

**7. The emails provided NASC on November 7, 2005 are positive indications of omitted materials.**

The NASC argues that the computer maintenance emails provided on November 7, 2005 may have been responsive to its May 16, 2005 request. (Br. of Pet’r at 27; CP 517, 529, and 530). The County counters these could not be responsive as they do not reference a “seating chart.” (Br. of Resp’t at 41.) First, as previously argued, that is undoubtedly because the County did not designate the record a “seating chart.” Second, the reason NASC is unable to determine whether these are definitively responsive is that only the County knows whether the “cubicle layout” and “list” of new staff positions referred to in these emails actually

referred to a list of the new staff and their offices as marked on the “seating chart.”

The County also argues NASC’s uncertainty shows the request was so ambiguous that Ms. Knutsen had to guess what was requested. (Br. of Resp’t at 41- 43.) This argument is without merit. Ms. Knutsen was the Assistant Director of Building and Planning, the creator of the “seating chart” whose duties included assigning employees to work space or cubicles on the chart, and who participated in the hiring of Steve Harris. (CP 60, 61, 330, 325.) It is unreasonable to claim she could not identify documents with the names of the employees on the chart she created.

Whether or not these particular emails are responsive, they are positive indications of overlooked materials and indicate an inadequate search. *See Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (citations omitted) (D.C. Cir. 1999) (Summary judgment inappropriate on behalf of agency where request well-defined and complainant submits positive indications of overlooked materials.)

**8. The factual declarations submitted by non-party county employees in support of Neighborhood Alliance are admissible.**

Employees of corporations are not considered parties in the litigation for attorney communication purposes unless the employee has legally binding speaking authority for the corporation. *Wright v.*

*Group Health Hospital*, 103 Wn. 2d 192, 200, 691 P.2d 564 (1984).

NASC offered factual testimony from three employees via sworn declaration. The complaining witness in the case, Bonnie Mager, also offered a declaration that verified certain documents related to her original request for public records. Defendant did not offer any evidence that these employees had binding speaking authority on behalf of the County on this matter. Nor did the County move to strike these declarations on the basis that as un-named employees they were somehow parties to the litigation. Any attempt to strike these declarations would have been denied under Washington law and has now been waived. In fact, according to *Wright*, the County would be prohibited from requiring these employees to avoid submitting declarations in this case. *Id.* at 203. This Court should therefore give all declarations submitted by NASC the weight they are entitled to under summary judgment analysis.

#### **IV. CONCLUSION AND REQUEST FOR RELIEF**

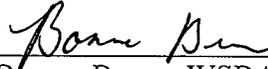
The May 16, 2005 request by NASC asked for existing, identifiable public records. There are no genuine issues of material fact that the County failed to meet its burden to demonstrate its search

//

//

for these records was adequate. Consequently NASC renews its request for relief as set forth in its opening brief.

Respectfully submitted this 16<sup>th</sup> day of January, 2009.



Bfreean Beggs, WSBA #20795

Bonne Beavers, WSBA #32765

Center for Justice

Attorney for Petitioner

Neighborhood Alliance of Spokane

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **REPLY OF PETITIONER** by the following indicated method or methods:

by **hand-delivering** a full, true, and correct copy in a sealed envelopes, addressed to the person shown below, the last-known address of the person on the date set forth below.

**PAT RISKEN  
EVANS, CRAVEN & LACKIE  
LINCOLN BUILDING #250  
818 W. RIVERSIDE AVENUE  
SPOKANE, WA 99201**

by causing full, true, and correct copies thereof to be **hand-delivered** and filed at:

Washington State Court of Appeals  
Division III  
500 N. Cedar Street  
Spokane, WA 99201

**DATED** this 16<sup>th</sup> day of January, 2009.



Mary E. Harvill, Paralegal  
Center for Justice  
35 W. Main, Suite 300  
Spokane, WA 99201  
(509) 835-5211  
Of Attorneys for Petitioner



by imposing a penalty at the low end of the PRA penalty range. Accordingly, we remand to the trial court with directions to recalculate the penalty in accordance with the guidance set forth in part III. A of this opinion.<sup>2</sup> Consequently, we affirm but modify the decision of the Court of Appeals.

I

The facts found by the original trial judge are unchallenged and the subject of three published opinions. See *Yousoufian v. Office of King County Executive*, 114 Wn. App. 836, 840-46, 60 P.3d 667 (2003) (*Yousoufian I*), *aff'd part, rev'd in part by Yousoufian v. Office of King County Executive*, 152 Wn.2d 421, 98 P.3d 463 (2005) (*Yousoufian II*); *Yousoufian II*, 152 Wn.2d at 425-29; *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 71-75, 151 P.3d 243 (2007) (*Yousoufian III*). Unchallenged findings of fact are “verities on appeal.” *Davis v. Dep’t of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

On May 30, 1997, Armen Yousoufian submitted a PRA request to the Office of the Executive of King County after Yousoufian heard King County Executive Ron Sims speak about the upcoming referendum election in which voters would decide on

---

<sup>2</sup> At oral argument counsel for King County invited this court to calculate the penalty should this court decide the trial court abused its discretion. We decline counsel’s invitation to determine an exact penalty as that is outside the authority of the PRA. See RCW 42.56.550(4) (granting discretion to determine the penalty to the court); *see also Yousoufian v. Office of King County Executive*, 152 Wn.2d 421, 431, 98 P.3d 463 (2005) (viewing discretion to calculate penalty rests with trial court not appellate court) (citing *King County v. Sheehan*, 114 Wn. App. 325, 350-51, 57 P.3d 307 (2002)).

June 17 whether to finance \$300 million for a new football stadium in Seattle. Sims referred to several studies regarding the impact of sports stadiums on the local economy. One of these studies was called the "Conway study." Yousoufian asked to review all material relating to the Conway study and any other such studies, including a restaurant study concerning the effects of a fast food tax. Yousoufian's PRA request was forwarded to office manager Pam Cole for a response.

On June 4, 1997, Cole acknowledged receipt of Yousoufian's PRA request, stating the Conway study was available for review, but archives would have to be searched for other responsive documents. Cole said the archive search would take approximately three weeks; however, before sending this response Cole never inquired into the location of responsive documents. The trial judge found "much of Yousoufian's [PRA] request involved documentation not yet stored in Archives." Clerk's Papers (CP) at 31. On June 10 Yousoufian reviewed the Conway study as well as another study.

The referendum was held on June 17 while most of the requested information was still withheld. On June 20, 1997, Yousoufian sent a letter to the Office of the Executive of King County protesting the three-week delay for the remaining documents responsive to his request. Yousoufian's letter pointed out one study in particular should not be already archived because the tax it analyzed was recently passed. Cole responded and directed Yousoufian to request that study from the

Washington State Restaurant Association. Cole's letter also stated she would contact Yousoufian the following week regarding the rest of his request. The trial judge found nothing to indicate Cole ever followed up with Yousoufian.

Meanwhile, on June 12, 1997, Linda Meachum, who took over responsibility from Cole for managing Yousoufian's PRA request, contacted Susan Clawson in the King County Department of Stadium Administration, asking her to search for responsive documents. Clawson delegated this task to Steve Woo, her administrative assistant. Woo had no knowledge of the PRA or its requirements and was never trained in how to respond to a PRA request. Meachum never followed up with Clawson to ensure an adequate response.

On July 15, 1997, Woo spoke with Yousoufian by telephone, informing him of a second, earlier Conway study. On July 25, 1997, Woo sent Yousoufian the earlier Conway study along with cost information about this Conway study and another study commissioned by King County. Woo did not include any cost documentation, which Yousoufian requested, and the cost information Woo provided was incorrect. The trial judge found it "apparent from the correspondence that [Woo] did not carefully read or reasonably understand [Yousoufian's PRA] request." CP at 35.

On August 21, 1997, Yousoufian wrote the Office of the Executive of King County to reiterate his request for cost documentation. In response to this letter, Woo permitted Yousoufian to view four more studies. The trial judge found Woo

incrementally released information, rather than all at once, even after he realized Yousoufian's request was for all information.

On August 27, 1997, the Office of the Executive responded to Yousoufian's letter stating it interpreted all PRA requests as requests for records located within that office and any coordination with other agencies was a gratuity. The letter stated Meachum was searching the archives and asked if Yousoufian would like the stadium administration to search their archives as well. The trial judge found, "[i]t was not reasonable to ask [Yousoufian] where to search for the documents responsive to his request." CP at 36.

On October 2, 1997, Yousoufian sent yet another letter reiterating his request for cost documentation. Meachum responded on October 9 stating her office had provided all the documents in its possession pertaining to Yousoufian's May 30 request. Meachum admonished Yousoufian to be more specific in future PRA requests. On the same day, Yousoufian received another letter from the Office of the Executive notifying him that the archival search had been performed and responsive documents were being forwarded to King County's attorneys for review. This letter estimated the documents would be available within two weeks. Yet, there was no evidence an archival search was ever performed, or if one was performed why it took so long. Also on October 9 Woo faxed a letter to Yousoufian explaining more studies could be found on the King County web site. On October 10 Woo sent Yousoufian

two more studies, but he again failed to provide cost documentation.

On October 14, 1997, Yousoufian complained about the conflicting communications he was receiving from different county employees. Oma LaMothe, a King County deputy prosecuting attorney, replied to state she had reviewed Yousoufian's original request and believed it had been fully answered. She stated the archive search had been completed and two boxes of documents had been retrieved that she believed were not relevant to Yousoufian's original request, but she invited Yousoufian to view the documents. She ended the letter by commenting on her difficulty in interpreting Yousoufian's PRA request. However, the trial judge found Yousoufian's request was neither vague nor ambiguous, but clear on its face. Additionally, the trial court found at no time did anyone from King County ask Yousoufian to clarify his request.

On October 28, 1997, Yousoufian viewed the two boxes of documents. He made several attempts to arrange a time to view them sooner, but he was allowed to view them only during office hours in the presence of particular staff members.

After determining he had still not received all the documents he requested Yousoufian hired an attorney. On December 8, 1997, Yousoufian's attorney wrote to once again reiterate Yousoufian's original PRA request. This letter reiterated the types of records Yousoufian sought, including contracts and bills for the studies, bidding documents, and memos discussing the consultants who conducted the studies.

On December 10 Cole e-mailed Woo and others to request the documentation. On December 12 Woo responded, listing the documents he had already provided and stating he had completely responded to Yousoufian's request. The trial court found Woo's statement "demonstrated his ignorance of the initial request." CP at 38. Moreover, Woo indicated he would generate the additional information regarding cost documentation, but the trial judge found nothing to indicate Woo ever did so.

On December 15, 1997, John Wilson, Sims's chief of staff, wrote Yousoufian's attorney outlining the documents King County previously disclosed. Wilson told Yousoufian to direct any further requests for information to the public facility district. On December 31, 1997, Yousoufian's attorney responded, requesting disclosure of documents responsive to Yousoufian's original request, protesting the county's unresponsiveness, and warning Yousoufian would file a lawsuit if his request continued to be ignored. On January 14, 1998, LaMothe responded, stating the Office of the Executive was only responsible for providing documents within its office and that "hundreds of hours" had already been spent responding to Yousoufian's PRA request. CP at 39. The trial judge found this response by LaMothe to be "factually and legally incorrect." *Id.*

Yousoufian's attorney again wrote back, reiterating the request for the documents, but this time asking to be directed to the appropriate office if the records were housed elsewhere. LaMothe responded and advised Yousoufian to write the

finance department. On April 29, 1998, Yousoufian's attorney sent a PRA request to the finance department. After receiving no response, he sent another letter on June 8, 1998. On June 22, 1998, LaMothe wrote back, this time on behalf of the finance department, stating the department did not have the requested documents. But the trial judge found the finance department did, in fact, have the records.

Yousoufian filed this lawsuit on March 30, 2000. In February 2001, another county employee, Pat Steel, was asked to assist in locating documents responsive to Yousoufian's request. Steel proceeded to locate a number of records in the Department of Finance not earlier disclosed because of the department's inability to retrieve records by subject. By April 20, 2001, Yousoufian finally received all the studies and cost documentation he originally requested on May 30, 1997.

To summarize, the unchallenged findings of fact demonstrate King County repeatedly deceived and misinformed Yousoufian for years. King County told Yousoufian it produced all the requested documents, when in fact it had not. King County told Yousoufian archives were being searched and records compiled, when in fact they were not. King County told Yousoufian the information was located elsewhere, when in fact it was not. After years of delay, misrepresentation, and ineptitude on the part of King County, Yousoufian filed suit; nevertheless, it would still take another year for King County to completely and accurately respond to Yousoufian's original request, well past the purpose of his request, the referendum on

public financing of a sports stadium.

According to the first trial court, “the County was negligent in the way it responded to [Yousoufian’s PRA] request at every step of the way, and this negligence amounted to a lack of good faith.” CP at 46. “[Yousoufian’s] requests were clear and the County had an obligation to respond to them in a prompt and accurate manner,” yet King County’s personnel were inadequately trained to handle PRA requests, and King County failed to coordinate any effort to comply with Yousoufian’s PRA request. CP at 40. The trial court found King County could have complied with Yousoufian’s PRA request within “five business days” following Yousoufian’s initial request; nevertheless, the trial court found King County did not act in “‘bad faith’ in the sense of intentional nondisclosure.” CP at 45.

The first trial court originally calculated the PRA penalty at \$5 per day, the lowest possible penalty. Yousoufian appealed and the Court of Appeals reversed, holding the trial court abused its discretion to impose the minimum daily penalty in light of King County’s gross negligence. *Yousoufian I*, 114 Wn. App. at 854. On review this court agreed the minimum daily penalty “was unreasonable considering that the county acted with gross negligence.” *Yousoufian II*, 152 Wn.2d at 439. We remanded to the trial court to impose an appropriately higher penalty.

On remand the trial court calculated the PRA penalty at \$15 per day.

Yousoufian again appealed, and the Court of Appeals again reversed. *Yousoufian III*,

137 Wn. App. at 80. The Court of Appeals proposed tiering the penalty scale based on the degrees of culpability found in the *Washington Pattern Jury Instructions*. *Id.* at 78-80. King County petitioned for discretionary review, which we granted. *Yousoufian v. Office of Ron Sims*, 162 Wn.2d 1011, 175 P.3d 1095 (2008).

## II

### A

“[T]he trial court’s determination of appropriate daily penalties is properly reviewed for an abuse of discretion.” *Yousoufian II*, 152 Wn.2d at 431. The 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.’” *Id.* (internal quotation marks omitted) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

### B

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.”<sup>3</sup> *Yousoufian II*, 152 Wn.2d

---

<sup>3</sup> The dissent claims this two-step process “allow[s] the court to consider the length of the violation when determining the [per-day] penalty.” Dissent at 6. But *Yousoufian II* does not support the proposition that the PRA allows a court to set a lower per-day penalty because an agency has continued to violate the act for a high number of days. According

at 438. Step 1 was decided in *Yousoufian II*, 152 Wn.2d at 440. The issue now is whether the \$15 per day penalty is appropriate under these circumstances.<sup>4</sup>

The PRA penalty is designed to “discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute.” *Yousoufian II*, 152 Wn. at 429-30 (alteration in original) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978)). “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)).

However, no showing of bad faith is necessary to penalize an agency, nor does an agency’s good faith reliance on an exemption exonerate the agency from the penalty.

*Id.* at 36-37.

The dichotomy of good faith and bad faith, therefore, merely establishes the

---

to *Yousoufian II*, “[t]he determination of days is a question of fact,” while the PDA’s purpose “is better served by increasing the penalty based on an agency’s culpability . . . .” 152 Wn.2d at 439, 435.

<sup>4</sup> In *Yousoufian II*, eight justices of this court agreed the statutory minimum penalty of \$5 a day was insufficient and unreasonable considering the county acted with gross negligence. 152 Wn.2d at 439 (majority by Alexander, C.J.); *id.* at 440-41 (Fairhurst, J., concurring); *id.* at 441 (Madsen, J., concurring in part, dissenting in part); *id.* at 445-46 (Sanders, J., concurring in part, dissenting in part). It remains unclear why, if a penalty of \$5 a day was an abuse of discretion then, some justices now think \$15 a day is sufficiently different, given the conduct involved, and that the legislature set the maximum fine at \$100 a day.

bookends of the penalty. *Yousoufian II*, 152 Wn.2d at 435, 438. But there are other considerations as well; in *Yousoufian II* eight justices of this court agreed agency culpability is a major factor in determining the PRA penalty. *Id.* at 438 (“determine the appropriate per day penalty . . . depending on the agency’s actions”); *id.* at 441 (Fairhurst, J., concurring) (“the trial court should determine the proper amount of the penalty based on the agency’s culpability”); *id.* at 446-47 (Sanders, J., concurring in part, dissenting in part) (positing a penalty based on factors including culpability).

Setting the penalty at \$15 per day, the trial court analogized King County’s conduct to that of the school district in *American Civil Liberties Union v. Blaine School District No. 503*, 95 Wn. App. 106, 975 P.2d 536 (1999) (*ACLU*). In *ACLU* the Court of Appeals held a penalty of \$10 per day was appropriate where the school district did not act in good faith.<sup>5</sup> *Id.* at 115. The school district refused to mail documents that amounted to 13 pages to the ACLU because it incorrectly interpreted the PRA as not requiring it to mail its response. *Id.* at 109. Instead, the school district made the requested documents available for viewing during business hours. *Id.* To calculate the penalty, the Court of Appeals observed the school district refused to mail the documents because it wished to avoid the cost and inconvenience of complying with the PRA. *Id.* at 114. According to *ACLU*, because the district did not act in good

---

<sup>5</sup> Despite the dissent’s insistence that the trial judge “aptly analogized this case to [ACLU],” we are not bound by opinions of the Court of Appeals. Dissent at 3. Similarly, the trial court should give more weight to Supreme Court precedent.

faith, a \$10 per day penalty was appropriate. *Id.* at 115.

However, after our decision in *Yousoufian II*, a strict and singular emphasis on good faith or bad faith is inadequate to fully consider a PRA penalty determination. *Yousoufian III*, 137 Wn. App. at 78-79 (noting *Yousoufian II* and stating, “a simple emphasis on the presence or absence of an agency’s bad faith does little more than to suggest what the two poles are on the penalty range and is inadequate to guide the trial court’s discretion in locating violations that call for a penalty somewhere in the middle of the expansive range the legislature has provided”).

Moreover, the conduct in *ACLU*, promptly making records available but refusing to mail them, is fundamentally different from King County’s conduct. The trial court should not have viewed *ACLU* as the guiding precedent to calculate King County’s penalty. In addition to *ACLU* the trial court also considered two factors, economic loss and public harm.

This Court has stated economic loss is a relevant factor. *Amren*, 131 Wn.2d at 38 (citing *Yacobellis*, 64 Wn. App. at 303). As *Yousoufian* points out, however, the harm suffered by PRA noncompliance is the same regardless of economic loss: the denial of access to public records and the lack of governmental transparency. The penalty’s purpose is to promote access to public records and governmental transparency; it is not meant as compensation for damages. *Yousoufian II*, 152 Wn.2d at 429, 435; *see also Yacobellis*, 64 Wn. App. at 301. At most, actual economic loss

calls for a higher penalty, but the absence of economic damages does not call for a lower one.

As to the second factor considered by the trial court, the court correctly reasoned governmental intransigence on an issue of public importance is relevant. King County agrees the penalty should reflect the significance of the project to which the PRA request relates. However, the trial court and King County go too far by requiring *actual* public harm.

The proper formulation of the factor is the *potential* for public harm; assessing a penalty under the PRA should not be contingent on uncovering the proverbial smoking gun, but whether there is the potential for public harm. *See* RCW 42.56.030 (“The people insist on remaining informed so that they may maintain control over the instruments that they have created.”). Here, the requested records dealt with a \$300 million, publicly financed project that was subject to referendum, where time was of the essence. The potential for public harm is obvious; however, the lack of actual public harm is irrelevant to penalizing King County for its misconduct. *See Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 100, 117 P.3d 1117 (2005) (“We interpret the PRA liberally to promote full disclosure of government activity that the people might know how their representatives have executed the public trust placed in them and so hold them accountable.”).

Finally, the trial court failed to consider deterrence as a factor to determine the

penalty. The purpose of the PDA's penalty provision is to deter improper denials of access to public records. *Yousoufian II*, 152 Wn.2d at 429-30. The penalty must be an adequate incentive to induce future compliance. King County agrees deterrence is a factor. Yet nowhere does the trial court mention deterrence.

As Yousoufian points out, the trial court implicitly averted the deterrence factor by analogizing to *ACLU*. In *ACLU* the agency in question was a small school district, but King County is the wealthiest county in the state. What it takes to deter a small school district and what it takes to deter the wealthiest county in the state may not be the same thing.

To conclude, the trial court on remand recognized King County's grossly negligent noncompliance with the PRA but failed to impose a penalty proportionate to King County's misconduct, imposing instead a penalty at the extreme low end of the penalty range. As recognized in *Yousoufian II* such a low penalty is inappropriate and manifestly unreasonable in light of King County's extreme misconduct. *Yousoufian II*, 152 Wn.2d at 439.

### III

#### A

Because we hold the trial court abused its discretion, but decline King County's invitation to set the penalty ourselves, we take this opportunity to provide guidance to the trial court when determining a PRA penalty. This guidance is not meant to limit

the trial court's discretion.<sup>6</sup> To the contrary, appellate courts frequently guide trial court discretion so as to render those decisions consistent and susceptible to meaningful appellate review. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 595, 675 P.2d 193 (1983).

For example, in *Bowers* this Court adopted an analytical framework to calculate reasonable attorney fees under the Consumer Protection Act, chapter 19.86 RCW. 100 Wn.2d at 593-99. Before providing its guidance the Court noted the Consumer Protection Act "provide[d] no specific indication of how attorney fees [were] to be calculated," but recognized the Consumer Protection Act exhorted it "to liberally construe the act, 'that its beneficial purposes may be served'." *Id.* at 594 (quoting RCW 19.86.920).

Similarly, here the PRA provides no specific indication of how the penalty is to be calculated. However, the PRA exhorts us to liberally construe it "to assure that the public interest will be fully protected." RCW 42.56.030. The PRA is a "strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978); *see also* RCW 42.56.030. The PRA's mandate

---

<sup>6</sup> Rather, we provide the considerations below to avoid a *Yousoufian V*, or similar protracted litigation. The dissent characterizes our guidance as a "16-part test" that "endangers trial courts' discretion and will also prove unhelpful for litigants and courts alike." Dissent at 7. But how then are trial courts and litigants supposed to avoid a Goldilocks-like scenario whereby appellate courts find penalties too low or too high but provide no meaningful guidance as to where, on a vast range, they should fall? Here, King County, the party against whom the penalty was assessed, is so ready to put this matter to rest that it asked this court to set the penalty.

is unequivocal: “Responses to requests for public records *shall be made promptly by agencies . . .*” RCW 42.56.520 (emphasis added). The PRA is a forceful reminder that agencies remain accountable to the people of the State of Washington:

[t]he people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030.

To begin, the trial court must consider the entire penalty range established by the legislature. *See* Laws of 1992, ch. 139, § 8 (amending the penalty from a \$25 per day limit to the current \$5-100 per day range). Taking into account the entire penalty range fulfills the legislative objective by reserving the extremes for the most and least culpable conduct, allowing the rest to fall somewhere in between.

In addition, considering the entire penalty range eliminates the perception of bias associated with presuming the lowest penalty. Because the minimum penalty is mandatory for violations regardless of an agency’s good faith efforts, starting from the lowest penalty presumes the least violative conduct. The PRA does not support that presumption. *See* RCW 42.56.550(1) (placing the burden of proof upon the state agency to show its compliance).

Courts should bear in mind the following factors, which may overlap and are

*not* meant to comprise an exclusive list of considerations. Factors that can serve to mitigate the penalty are (1) the lack of clarity of the PRA request; (2) an agency's prompt response or legitimate follow-up inquiry for clarification<sup>7</sup>; (3) good faith,<sup>8</sup> honest, timely, and strict compliance with all the PRA procedural requirements and exceptions; (4) proper training and supervision of personnel; (5) reasonableness of any explanation for noncompliance; (6) helpfulness of the agency to the requestor;<sup>9</sup> and (6) the existence of systems to track and retrieve public records.

Conversely, aggravating factors that increase a penalty are (1) a delayed response, especially in circumstances making time of the essence<sup>10</sup>; (2) lack of strict compliance with all the PRA procedural requirements and exceptions; (3) lack of proper training and supervision of personnel and response; (4) unreasonableness of any explanation for noncompliance; (5) negligent, reckless, wanton, bad faith, or

---

<sup>7</sup> RCW 42.56.520 gives agencies five days to respond either by producing the documents, giving a time needed to produce the documents, requesting clarification of the request, or denying portions pursuant to exceptions. Furthermore, RCW 42.56.550(2) specifically grants the public the right to ask a court to review an agency's inaction if its estimate of the time needed to produce a record is unreasonable.

<sup>8</sup> Good faith, while not a shield against the imposition of a penalty, is a factor to be taken into account in setting the amount. *Amren*, 131 Wn.2d 25, 38.

<sup>9</sup> RCW 42.56.100 states that "rules and regulations shall provide for the *fullest assistance* to inquirers and the most timely possible action on requests for information." (Emphasis added.)

<sup>10</sup> While obvious, it bears repeating that delaying documents long past their ability to influence a public vote defeats the PRA's purpose of keeping people informed "so that they may maintain control over the instruments that they have created." RCW 42.56.030.

intentional noncompliance with the PRA; (6) dishonesty; (7) potential for public harm, including economic loss or loss of governmental accountability<sup>11</sup>; (8) personal economic loss; and (9) a penalty amount necessary to deter future misconduct considering the size of the agency and the facts of the case.<sup>12</sup>

As discussed above this court already recognizes some of these factors: the endpoints of good faith and bad faith, deterrence, the public interest, economic loss, and compliance with the PRA procedures. Providing this analytical framework guides the trial court's discretion "in light of the complex issues and circumstances presented" without substituting the opinion of the appellate judge. *Yousoufian II*, 152 Wn.2d at 450 (Chambers, J., dissenting).

In sum, the legislature established a penalty range between \$5 and \$100 a day to contrast between the least and the most violative conduct, expecting extreme cases to fall at either endpoint with the rest falling in between. Our multifactor analysis is consistent with the PRA and our precedents and provides guidance to the trial court, more predictability to the parties, and a framework for meaningful appellate review.

## B

The Court of Appeals in *Yousoufian III* proposed a tiered approach based on degrees of culpability. 137 Wn. App. at 78. Under this approach the culpability tiers

---

<sup>11</sup> RCW 42.56.550(3) states that records may not be withheld because they cause embarrassment to public officials.

<sup>12</sup> A flea bite does little to deter an elephant.

provide the baseline from which the trial court applies other factors to determine the appropriate penalty. *Id.* at 80.

Both parties point out the shortcomings of this approach: culpability definitions do not lend themselves to the complexity of a PRA penalty analysis. The parties agree a nuanced multifaceted approach is more appropriate to a PRA penalty determination. King County, however, argues trial courts are sufficiently guided by the current good faith/bad faith dichotomy.

King County's argument is unpersuasive for two reasons. First, only three published cases have reviewed a penalty for its sufficiency: *Lindberg v. Kitsap County*, 133 Wn.2d 729, 746-47, 948 P.2d 805 (1997) (upholding a trial court's order awarding a combination of attorney fees and penalties); *ACLU*, 95 Wn. App. 106; *Yousoufian II*, 152 Wn.2d 421. Given the paucity of published cases after 35 years of PRA case law, a piecemeal approach insufficiently addresses the current need for guidance. *See Zink v. City of Mesa*, 140 Wn. App. 328, 348, 166 P.3d 738 (2007) (remanding for penalty determination "in an amount [the trial court] determines to be appropriate in light of the relevant circumstances").

Second, King County ignores the procedural history of this case. This is the second time this court has reviewed the sufficiency of the penalty. This review provides the appropriate opportunity to set forth relevant considerations to guide a trial court's penalty determination. *Cf. Progressive Animal Welfare Soc'y v. Univ. of*

*Wash.*, 125 Wn.2d 243, 272, 884 P.2d 592 (1994) (declining to create a penalty standard because of the procedural posture of the case).

C

Applying our guidance to these facts shows no mitigating factors but many aggravating ones. King County failed to reply to Yousoufian's clear request promptly or accurately. King County failed to train its responding personnel or supervise its response. King County did not comply strictly to the procedures set forth in RCW 42.56.520, failing to seek clarification from Yousoufian when necessary, failing to give any reason for its delay, failing to set forth an exception for its refusal, failing to provide any estimate of its delayed response time, and making Yousoufian contact King County more than 11 times over the course of two years to obtain the requested information when under the statute only one request should suffice. *See* RCW 42.56.520. King County either made no explanation of its noncompliance or misrepresented the truth. As the trial judge found, with proper diligence and attention, King County could have responded accurately to Yousoufian within five days. The potential for public harm was high; the requested records tested the veracity of King County's assertions regarding a pending referendum on a \$300 million public financing scheme. The request was time-sensitive, seeking documents relevant to the upcoming referendum, whereas the disclosure of these documents was delayed years beyond the election day without justification.<sup>13</sup>

Finally, proper deterrence for King County and others clearly requires a penalty at the high end of the penalty range.<sup>14</sup>

#### IV

Yousoufian properly requests an award of attorney fees and costs incurred in connection with this appeal. *See* RAP 18.1(a). RCW 42.56.550(4) authorizes “all costs, including reasonable attorney fees” to be awarded to “[a]ny person who prevails” in a PRA case. Yousoufian is entitled to an award of all reasonable attorney fees and costs incurred in connection with this appeal plus a supplemental award to be calculated by the trial court for additional fees and expenses incurred on remand. RCW 42.56.550(4).

#### V

We affirm, but modify, the Court of Appeals’ decision, and remand this case to the trial court for recalculation of the penalty consistent with this opinion plus all

---

<sup>13</sup> The dissent argues the total penalty of \$123,780 serves the PRA’s deterrence purpose because, “The legislature did not intend to bankrupt government agencies with huge penalties, as evidenced by its imposition of a one-year statute of limitations for PRA claims.” Dissent at 6 n.2. First, the legislature added the one-year limitation in 2005, so it cannot be used as evidence of legislative intent several years earlier, when the violations occurred and Yousoufian filed suit. Second, even if the statute of limitations had been in effect then, Yousoufian would have met it, and the penalty amount would not have been affected. Third, the trial judge found King County could have responded to Yousoufian’s request within five days, whereas the county was found to have violated the PRA over nearly four years. The dissent’s argument seems counterintuitive: that the longer the flagrant violations continued, the smaller the per-day penalty should be.

<sup>14</sup> King County argues the historic significance of the penalty must be considered when determining the penalty. King County’s argument evades the express language of the statute: “inconvenience or embarrassment” are irrelevant considerations under the PRA. RCW 42.56.550(3).

reasonable attorney fees and expenses incurred by Yousoufian on remand.<sup>15</sup>

---

<sup>15</sup> In addition, we reverse the Court of Appeals' failure to strike portions of an amicus brief noncompliant with RAP 9.11 and RAP 10.3. *See Spokane Research & Def. Fund*, 155 Wn.2d at 98; *United States v. Hoffman*, 154 Wn.2d 730, 735 n.3, 116 P.3d 999 (2005).

No. 80081-2

AUTHOR:

Justice Richard B. Sanders

---

WE CONCUR:

---

Justice Charles W. Johnson

Justice Mary E. Fairhurst

---

Justice James M. Johnson

---

---

---