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NO. 89629-1

SUPREME COURT OF THE STATE OF WASHINGTON

WADE'S EASTSIDE GUN SHOP INC., et al.,  
Plaintiffs,

v.

DEPARTMENT OF LABOR & INDUSTRIES,  
Appellant,

v.

SEATTLE TIMES COMPANY,  
Respondent,

and

CHRISTOPHER SEAVOY and JANE DOE SEAVOY, et al.,  
Defendants.

**AMICUS CURIAE MEMORANDUM OF ALLIED DAILY  
NEWSPAPERS OF WASHINGTON, WASHINGTON  
NEWSPAPER PUBLISHERS ASSOCIATION, THE NEWS  
TRIBUNE, THE OLYMPIAN, TRI-CITY HERALD, THE  
BELLINGHAM HERALD and WASHINGTON COALITION  
FOR OPEN GOVERNMENT**

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## I. INTRODUCTION

When facing penalties under the Public Records Act, Chap. 42.56 RCW, an agency may pay a lot, a little or nothing, at the sound discretion of the trial court. When violations are egregious, as in this case, hand-slapping is insufficient to compel strict compliance in the future. That is why the Legislature vested courts with broad discretion to determine how many records to count for penalty purposes in each case.

RCW 42.56.550 authorizes penalties of up to \$100 for each day that an agency unlawfully withholds a “public record.” There is no limit on how many records may be counted in assessing penalties. Rather, the court considers the volume of concealed records along with the urgency and importance of disclosure, the agency’s culpability, and the need for deterrence, in deciding total penalties.

The Legislature defined “public record” broadly to include any form of government-related writing, regardless of size. Courts must have the flexibility to count each withheld page as a “record” for penalty purposes, or else agencies will lose the incentive to treat every page as a pressing matter. Strict compliance will yield to relaxed practices. In order to safeguard the public’s right to complete disclosure, courts must retain the full range of discretion in counting records for penalty purposes.

## II. INTEREST OF AMICI

Allied Daily Newspapers of Washington (Allied) is a non-profit trade association representing 25 daily newspapers throughout the state, including the respondent Seattle Times. Washington Newspaper Publishers Association (WNPA) is a non-profit trade association representing 140 weekly community newspapers in this state. The Washington Coalition for Open Government (WCOG) is a non-profit statewide organization dedicated to promoting and defending the public's right to know about the conduct of public business. These nonpartisan organizations regularly advocate for public access to government records as part of government accountability, including lobbying the Legislature and participating as amicus parties in open government appeals.

The News Tribune in Tacoma, The Olympian in Olympia, Tri-City Herald in Kennewick and The Bellingham Herald are daily newspapers owned by The McClatchy Company, the nation's third largest publisher of newspapers.

Amici have a strong interest in upholding the trial court's exercise of discretion in this case. Amici's members often use the Public Records Act to gather information of importance to the general public. Newspapers must be able to quickly ferret out newsworthy information in

order to promote meaningful public oversight of state and local governments. The ability to fully and timely inform Washington residents about government operations would be impaired if the threat of penalties under the Public Records Act is weakened.

### III. DISCUSSION

#### A. The Act Authorizes Daily Penalties Per Page.

##### 1. **The Operative Term Is “Said Public Record.”**

This case concerns interpretation of RCW 42.56.550, which says in relevant part:

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court...may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records....

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

(Emphasis added). Thus, when a requester wins a suit seeking access to “any public record,” the court may award that requester up to \$100 “for each day that he or she was denied...said public record.” RCW 42.56.550(4). The dispute here concerns whether “said public record” can

be one page of a document, as opposed to a whole document or group of documents. Based on the Act's broad definition of "public record," the answer is yes.

**2. A "Public Record" Includes Any Combination of Letters, Words, Pictures or Symbols Related to Government.**

When interpreting the Public Records Act, courts "look at the Act in its entirety in order to enforce the law's overall purpose." *Rental Housing Assoc. of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2008). Courts give effect to all language in the statute and harmonize all of its provisions. *Ockerman v. King County Department of Development & Environmental Services*, 102 Wn. App. 212, 216, 6 P.3d 1214 (2000). Thus, the term "said public record" in the penalty provision, RCW 42.56.550(4), must be harmonized with the definition of "public record" in RCW 42.56.010(3).

RCW 42.56.010(3) says in relevant part:

(3) "Public record" includes *any writing* containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency *regardless of physical form* or characteristics....

(emphasis added). The first element of the "public record" definition – it is a "writing" - is itself defined broadly as follows:

*"Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.*

RCW 42.56.010(4) (Emphasis added). Under these broad definitions, a public record can have *any* physical form. RCW 42.56.010(3). Entire “papers” are just one possible form of a government-related “writing.” RCW 42.56.010(4).

Here, the trial court had authority to treat each page of the withheld documents as a distinct “public record” for penalty purposes. A “writing” can be any “combination” of printed letters, words, pictures and symbols. RCW 42.56.010(4). A page of a document easily fits that definition – it is a combination of words. For example, under the Federal Rules of Appellate Procedure, a page is roughly equivalent to 466 words. FRAP 32(a)(7) (permitting a principal brief to contain up to 30 pages or up to 14,000 words).

The Act does not set a minimum or maximum number of words to be counted as a “public record” for penalty purposes. Illustrating the wide latitude in RCW 42.56.550(4), entire batches of documents may be

grouped into a single “public record” for penalty purposes. *State v. Sanders*, 169 Wn.2d 827, 864, 240 P.3d 120 (2010), citing *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 427, 98 P.3d 463 (2005). RCW 42.56.010 does not expressly state that a “public record” or “writing” may consist of multiple documents grouped together. Yet the term “words...or combination thereof” is broad enough to encompass the batches grouped together in *Sanders*. If a “public record” includes batches of documents, it must also include pages of documents, which are simply a different combination of words.<sup>1</sup>

It is logical to treat each page as a “public record” because each page responsive to a request must be processed individually. *See* RCW 42.56.070(1) and RCW 42.56.210 (agencies must determine if any part of a document is subject to a disclosure prohibition, release all parts that are not exempt from disclosure, and explain why any part was withheld); RCW 42.56.120 (copying fees are assessed by the page). This is not to say that penalties under RCW 42.56.550(4) should always be based on a single

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<sup>1</sup> In theory, a penalty could be based on a single word. RCW 42.56.010(3) (a public record is any “writing” related to and used or retained by government); RCW 42.56.010(4) (a “writing” encompasses any “printing” of “letters, words...or combination thereof”). One word can change the meaning or importance of a government document. For example, if an agency approves a controversial land-use application but improperly redacts the word “expired” stamped on the application, so as to mislead the public about the project’s validity, a court should have discretion to treat the single concealed word as a distinct record for penalty purposes.

page within a larger document. The point is that the Legislature vested courts with broad discretion to assess penalties appropriately in each case.

When the meaning of statutory language is plain on its face, courts must give effect to that plain meaning as an expression of what the Legislature intended. *Zink v. City of Mesa*, 162 Wash.App. 688, 709, 256 P.3d 384 (2011); *Ockerman*, 102 Wn. App. at 216. Courts assume that the Legislature “means exactly what it says.” *West v. Thurston County*, 168 Wn.App. 162, 183, 275 P.3d 1200 (2012), quoting *Morgan v. Johnson*, 137 Wn.2d 887, 892, 976 P.2d 619 (1999). Because the Act says daily penalties may be assessed for each “public record” denied, and defines “public record” as including any combination of letters, words, pictures or symbols relating to (and used or retained by) government, the plain meaning of the Act permits an assessment for each unlawfully denied page. RCW 42.56.550(4); RCW 42.56.010.

### **3. Liberal Construction Supports a Per-Page Penalty In This Case.**

The Public Records Act says:

The 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. *This chapter shall be*

*liberally construed* and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

RCW 42.56.030 (*italics added*). As this Court said in *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 100, 117 P.3d 1117 (2005), “We interpret the [Act] 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.” Liberal construction applies to RCW 42.56.550(4), the fee-shifting and penalty section,<sup>2</sup> as well as to RCW 42.56.010, the definition section. *Nissen v. Pierce County*, 333 P.3d 577 (2014) (liberally construing “public record” to include text messages on a prosecutor’s personal cell phone); *O’Neill v. City of Shoreline*, 170 Wn.2d. 138, 147, 240 P.3d 1149 (2010).

In *O’Neill*, this Court liberally construed the definition of “public record” in holding that metadata associated with government emails must be disclosed upon request. 170 Wn.2d at 147. The Court stated that “public record” is defined “very broadly” to include virtually anything related to government, and noted that metadata fits the definition although it is “part of the underlying document and does not stand on its own.” *Id.*,

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<sup>2</sup> See *Progressive Animal Welfare Society v. University of Washington*, 114 Wn.2d 677, 683, 790 P.2d 604 (1990).

quoting *Lake v. City of Phoenix*, 222 Ariz. 547, 550, 218 P.3d 1004 (2009). Just as *O' Neill* recognized that the definition of a public record is expansive enough to include mere parts of documents relating to government, here the trial court properly viewed individual pages of documents as public records subject to RCW 42.56.550(4).

B. Per-Page Penalties Serve the Act's Accountability Purpose.

Penalties under the Act serve two purposes: 1) to discourage improper denial of access to public records; and 2) to encourage adherence to the goals and procedures dictated by the statute. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459, 229 P.3d 735 (2010), quoting *Yousoufian*, 152 Wn.2d at 429-30. "The penalty must be an adequate incentive to induce future compliance." *Yousoufian*, 168 Wn.2d at 463. The focus is on the future conduct of *agencies*, not of record requesters. *Id.*

Here, the Department of Labor and Industries wants to prohibit any award of daily penalties per page, arguing that it "encourages requesters to submit very broad requests in the hope of obtaining a very large penalty." Reply, p. 1. This argument mistakenly assumes that the size of the penalty here is due to the records request, not the agency misconduct. In fact, the size of the penalty reflects the agency's *choice* to withhold records without justification. The Department illegally withheld non-exempt records of

urgent interest to the public in order to help safety violators fight disclosure concerning a public health threat. CP 857-864. Even now, the Department continues to act as if records requesters are a menace to be guarded against, rather than an essential cog in the wheel of government accountability. The trial court properly rejected this backwards mindset.

The purpose of penalties is to promote compliance by agencies for the benefit of the general public. *Yousoufian*, 168 Wn.2d at 459. The enforcement scheme depends on records requesters risking the costs and inconvenience of litigation in order to vindicate the public's right to strict compliance. RCW 42.56.550(4). The individual requester's motives are immaterial because it is the general public's right to open government that is served by RCW 42.56.550(4). Thus, cynicism aimed at requesters (such as The Seattle Times, the state's largest daily newspaper, which was serving the public's interest in this case) is not a valid reason to limit the courts' discretion in enforcing the Public Records Act.

It is important to remember that penalties are not awarded unless the agency actually violates the Act, and even then, a court has discretion to award nothing. RCW 42.56.550(4). Just because a per-page penalty is legally permissible does not mean it will happen in every case. In fact, the mere threat of such a penalty is likely to deter agencies from committing

similarly egregious violations, leading to smaller (or ideally, zero) awards. In sum, courts must be able to penalize the unlawful withholding of each page of requested records in order to promote prompt disclosure of *all* pages, as the Act requires. RCW 42.56.550(4); RCW 42.56.070(1).

C. The Penalty Period Was Correct.

1. **This Was Not an Unsolved Crime Warranting Categorical Exemption of Investigative Records.**

In addition to challenging per-page penalties, the Department of Labor and Industries argues that the penalty period was too long because the records requested by The Seattle Times were temporarily exempt for four months under RCW 42.56.240(1). Reply, p. 10. That statute says:

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

(1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, *the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.*

(Italics added). The Department argues that the mere existence of a pending investigation justified its withholding of all investigation records, without any evidence that “effective law enforcement” actually required nondisclosure. Brief of App., pp. 16-23. This Court should clarify that

RCW 42.56.240(1) applies categorically to records of a pending investigation only when it involves an unsolved crime, as in *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997), and not when an administrative agency investigates possible regulatory violations by people who are aware of the investigation.

The Department of Labor and Industries cites *Newman* as supporting a categorical exemption here. But *Newman* was an unsolved criminal case, not an administrative investigation targeting known subjects. 133 Wn.2d at 568. In *Newman*, this Court held that RCW 42.56.240(1) categorically exempts all records “contained in an open and active police investigation file” because requiring police to “segregate documents before a case is solved” could result in disclosing sensitive information undermining the investigation. *Id.*, 133 Wn.2d at 574-75. Such risks are *not* inherent in a civil investigation when the suspected violators are aware of the investigation, as in this case.

In fact, the Supreme Court has never held that nondisclosure is *always* presumed to be essential in *any* investigation, even when there is no mystery about who faces charges. On the contrary, in *Cowles Publishing Co. v. Spokane Police Department*, 139 Wn.2d 472, 477–78, 987 P.2d 620 (1999), the Court said that once an arrestee is referred to the

prosecutor for a charging decision, “the risk of inadvertently disclosing sensitive information that might impede apprehension of the perpetrator no longer exists.” In *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 593-94, 243 P.3d 919 (2010), this Court reiterated that when “the suspect has been arrested and the matter referred to the prosecutor,” the exemption “requires a record-by-record analysis.” Similarly in *Sargent v. Seattle Police Dept.*, 179 Wn.2d 376, 389, 314 P.3d 1093 (2013), in which prosecutors declined to bring charges after an investigation, this Court said:

...the categorical application created in *Newman* applies only to a small class of information, the nondisclosure of which we are confident is always essential to effective law enforcement: situations where *police have not yet referred the matter to a prosecutor for a charging decision and revelation to the defendant.*

Here, the SPD had concluded its investigation and referred Sargent's case to the prosecutor for a charging decision. At that point, the prosecutor could have pressed charges *and disclosed the information to Sargent.* The fact that the prosecutor declined to file charges and requested the SPD to conduct further investigation is of no import.

(Emphasis added).<sup>3</sup> Thus, when there has been a “revelation” informing a person that he or she is suspected of law-breaking, the categorical

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<sup>3</sup> See also *Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn.2d 30, 33, 769 P.2d 283 (1989) (citing “the public need for preserving the confidentiality of **criminal** investigatory matters”).

approach in *Newman* is inapplicable - regardless of whether charges have been filed. *Id.*

It doesn't matter if an agency is both the investigator and the prosecutor, contrary to the Department's arguments here. The point is that once an investigation overtly points to a specific perpetrator, records may be disclosed without risking that the specific person will never be caught.

Here, the agency asserts that RCW 42.56.240(1) temporarily exempted the records withheld from The Seattle Times, but does not explain how enforcement efforts would have been harmed by disclosing the records during the investigation. Brief of App., p. 18. There is only a bare assertion that enforcement of Chap. 49.17 RCW generally depends on "adequate investigation," without explaining how disclosure would render an investigation inadequate. *Id.* Similar arguments were rejected in *Ameriquist Mortg. Co. v. Office of Attorney General*, 177 Wn.2d 467, 490-493, 300 P.3d 799 (2013). In that case, a regulated business argued that disclosure of requested records might "dissuade future targets from cooperating with" state investigators. *Id.* at 492. But the state investigators disputed such a risk, and this Court found that a threat to effective law enforcement was not proven. *Id.* Here, as in *Ameriquist*, speculative assertions of harm do not justify blanket secrecy.

In sum, RCW 42.56.240(1) should not be construed so broadly as to encompass all records of pending civil investigations regardless of whether disclosure would be harmful. RCW 42.56.030 (exemptions are construed narrowly to promote the policy of full disclosure). To so hold would profoundly restrict public oversight of government because virtually any state and local agency could withhold entire files whenever that agency looks into a matter within its jurisdiction, even when disclosure would not impair the agency's enforcement abilities. This Court should hold that open civil investigations are not categorically exempt under RCW 42.56.240(1), and that agencies may withhold records during a civil investigation only when there is specific evidence that secrecy is essential to effective law enforcement.

**2. Penalties Also Were Warranted for Withholding Records after the Investigations Ended.**

Even if RCW 42.56.240(1) did apply during the investigations at issue, it would not excuse the additional delays that occurred after the investigations ended. The trial court correctly found that the agency violated the Act by waiting months to notify affected third parties about the Times' records request, and then delaying disclosure for months longer while waiting for the parties to seek an injunction blocking access by the Times. This Court should affirm the rule in *Kitsap County Prosecuting*

*Attorney's Guild v. Kitsap County*, 156 Wn. App. 110, 119, 231 P.3d 219 (Div. 2, 2010), that an agency “may not refuse to honor a public records request pending a court decision without violating the PRA.”

An agency has no duty to notify third parties about a records request. RCW 42.56.540. If it chooses to do so, the agency still must comply with the Act’s disclosure requirements, and cannot delay disclosure indefinitely on the chance that a third party may eventually obtain an injunction. *Kitsap County*, 156 Wn. App. at 119.

Moreover, RCW 42.56.540 requires parties objecting to release to get an injunction, not simply to file a motion, in order to block disclosure. Here, the agency provided 15 days of “notice” to the impacted businesses that it would release the records “unless it received a copy of a motion for court protection to prevent the release of the records” by August 9, 2013. CP 154-58, 801-02. This is contrary to the Attorney General’s Model Rules prescribing ten days’ notice to an affected third party that release will occur on the stated date unless “he or she obtains an order from a court enjoining a release.” WAC 44-14-04003(11). A tight timeline is necessary, as the rule states, because “every additional day of notice is another day the potentially disclosable record is being withheld.”

The delay in this case was especially egregious because the agency no longer believed the requested records were exempt, and withheld them strictly as a courtesy to the workplace safety violators so they could pursue an injunction when it was convenient for them. In defense of its behavior, the agency argues that it needs “cooperation from employers when investigating workplace violations.” Brief of App., p. 29. But the agency is supposed to be regulating safety, not cultivating friendly relationships with violators. That is why it has strong investigatory powers under RCW 49.17.070 and .075.

More importantly, regulatory agencies must remember that they are accountable to the public as a whole, not just regulated communities. The public has a strong interest in ensuring that workers are safe and that safety regulations are effectively implemented. By failing to fully inform the public about an ongoing and serious safety threat, and by going to extraordinary lengths to honor the secrecy wishes of safety violators, the Department of Labor and Industries undermined public confidence in this state’s workplace safety system. In so doing, the agency defeated the purpose of the Public Records Act to fully inform the people about government activities so they may maintain control over them.

The Act requires providing the “fullest assistance” to requesters and “most timely possible action on requests for information.” RCW 42.56.100. Here, the agency stalled disclosure as long as possible, including for months after it stopped claiming a temporary investigative exemption. This is precisely the kind of case where trial courts need the option to impose harsh penalties.

#### IV. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court decision as a proper exercise of discretion.

Dated this 23rd day of March 2015.

HARRISON-BENIS LLP

By: s/Katherine A. George  
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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on March 23, 2015, I served the foregoing Amicus Curiae Memorandum and related motion by email, per agreement, to:

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**Subject:** filing in Case No. 89629-1, Wade's Gun Shop v. WA Labor & Industries v. Seattle Times

Good afternoon. Please find attached for filing and service a Motion for Leave to File Amicus Brief by Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, The News Tribune, The Olympian, Tri-City Herald, The Bellingham Herald and Washington Coalition for Open Government, along with the proposed amicus brief and certificate of service, in Case No. 89629-1, *Wade's Gun Shop v. Labor & Industries v. Seattle Times*.

This filing is by Katherine George, WSBA 36288, phone 425 802-1052, email [kgeorge@hbslegal.com](mailto:kgeorge@hbslegal.com).

Thank you,

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