

No. 68016-1-I

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Turner Helton,

*Respondent,*

vs.

Seattle Police Department,

*Petitioner,*

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**APPELLANT'S OPENING BRIEF**

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PETER S. HOLMES  
Seattle City Attorney

Gary T. Smith, WSBA #29718  
Assistant City Attorney  
Attorneys for Petitioner

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STATE OF WASHINGTON  
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Seattle City Attorney's Office  
600 - 4<sup>th</sup> Avenue, 4<sup>th</sup> Floor  
P.O. Box 94769  
Seattle, Washington 98124-4769  
(206) 684-8200

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## I. INTRODUCTION

This is a case under the Public Records Act (“PRA”). But this is not a case about records withheld from disclosure. In fact, the disputed records were disclosed to the requester long ago, immediately after the Washington Supreme Court set forth an opinion that clarified and changed the legal landscape with respect to the category of records at issue.

The majority of litigation in this matter involved the level of per day penalties, and the level of reasonable attorney’s fees, when an agency acts in good faith to comply with the PRA. Even though the Seattle Police Department (“SPD”) acted in reasonable reliance on then existing case law interpreting the PRA, the trial court imposed a level of per day penalties that the Supreme Court itself assessed only after finding that the agency at issue had acted grossly negligent, with wanton disregard for the requirements of the PRA. Moreover, the trial court granted nearly 100% of the requested fees, despite the fact that the (1) the City voluntarily turned over the records after the law was clarified by the Supreme Court and (2) the requester incurred approximately \$44,000 in attorney’s fees after the disputed records were disclosed in their entirety.

## **II. ASSIGNMENTS OF ERROR**

- A. The trial court erred in its November 18, 2011 order assessing per day penalties under the PRA based on unreasonable and untenable grounds, as compared to the facts and guidance provided by other Public Records Act cases.
  
- B. The trial court erred in finding that Helton submitted a records request for specific and individual documents related to a November 3, 2009 incident. Helton submitted a records request for the content of a disciplinary investigative file involving unsubstantiated allegations of misconduct.
  
- C. The trial court erred in finding that SPD did not evaluate the requested records to determine if a PRA exemption applied.
  
- D. The trial court erred in making its conclusion of law that “unreasonableness of explanation for nondisclosure that relied upon a narrow reading of PRA exemptions by agency in its own interests” was an aggravating factor in its determination of per day penalties. SPD appropriately relied on the law as it existed at the time it asserted applicable PRA exemptions, and the trial court found that SPD did not act in bad faith.

- E. The trial court erred in making its conclusion of law that “the public importance of imposing a PRA penalty to encourage law enforcement agencies to comply in good faith with the PRA’s broad mandate of disclosure of records to foster public trust and allow public access to public records” was an aggravating factor. PRA penalties apply to a specific agency, in this case SPD, and not agencies in general.
- F. The trial court erred in assessing a \$45.00 per day penalty because mitigating factors outweighed the aggravating factors, and SPD acted in reasonable reliance on existing case law interpreting the PRA. At the time of Helton’s request, three separate trial courts had enjoined the disclosure of the same category of records in response to records requests under the PRA.
- G. The trial court erred in its December 30, 2011 order concluding that Helton’s requested attorney’s fees were reasonable, and awarding \$132,586 dollars in fees under the PRA based on a fee petition that included excessive and duplicative attorney work.
- H. The trial court erred in its April 2, 2012 order concluding that Helton’s requested additional attorney’s fees were reasonable, and awarding \$12,706 dollars in additional fees under the PRA based

on a fee petition that included excessive and duplicative attorney work.

- I. The trial court erred in applying a flawed methodology to critically analyze an attorney fee petition under the PRA.
- J. The trial court erred in concluding that the plaintiff failed to meet his burden of justifying his request for attorney fees because of extensive “block billing,” and then approving the same fee petition based on plaintiff’s affidavits.
- K. The trial court erred in its February 9, 2012 order on reconsideration deciding not to consider the Seattle Police Department’s affidavit opposing plaintiff’s fee petition after relying on plaintiff’s affidavits supporting the fee petition.
- L. The trial court erred when it relied upon an incorrect legal standard in its award of attorney’s fees under the PRA.
- M. The trial court erred when it concluded that the scope of attorney work necessary in this case “may have exceeded the amount of work necessary to present a typical PRA case.” Multiple other PRA cases involving more extensive litigation resulted in much lower attorney fee awards.

- N. The trial court erred when it incorrectly applied the *Mahler v. Szucs* factors in its award of attorney's fees under the PRA.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- A. Where other Public Records Act cases have affirmed per day penalties in a significantly lower amount based on facts similar to this case, did the trial court's assessment of per day penalties constitute an abuse of discretion?
- B. Where SPD applied PRA exemptions based on a reasonable interpretation of the law as it existed at the time of the request to support non-disclosure and subsequently disclosed the documents after a Supreme Court decision on those exemptions, did SPD interpret the PRA exemptions "too narrowly?"
- C. Where per day penalties pursuant to the PRA are intended as a punitive measure for a specific agency, should the trial court assess a per day penalty against SPD to encourage law enforcement agencies in general or agencies other than Seattle Police Department to comply with the PRA?
- D. Where the trial court finds mitigating factors in favor of SPD, and incorrectly applies aggravating factors against SPD, should the per day penalty be the same as the penalty generally recognized by the

Washington State Supreme Court as appropriate for cases where the agency was grossly negligent in not disclosing records under the PRA?

- E. Where the trial court identified significant deficiencies in an attorney fee petition, should it have approved the fee petition after reviewing later submitted affidavits supporting the fee petition, and declining to review affidavits opposing the fee petition?
- F. Where the trial court relied upon argument and evidence that cited an incorrect legal standard for the award of attorney's fees, should this court reverse an award of attorney's fees?
- G. Where the trial court incorrectly applied the *Mahler v. Szucs* factors in support of an award of attorney's fees, should this court reverse award of attorney's fees?

#### IV. STATEMENT OF THE CASE

**A. Mr. Turner Helton submits a request for records and the Seattle Police Department responds**

On November 23, 2009, Respondent Turner Helton filed a complaint with the Seattle Police Department Office of Professional Accountability Investigation Section ("OPA-IS") alleging that SPD officers used unnecessary force while taking Mr. Helton into protective

custody. Clerk's Papers ("CP") 117. In response to the complaint, OPA-IS Sergeants initiated an investigation, designated as OPA-IS Case No. 09-0451. *Id.* OPA ultimately concluded that the allegations of unnecessary force were "unfounded." *Id.* An "unfounded" conclusion means that "a preponderance of the evidence indicates that the alleged act did not occur as reported or is false." CP 137.

On June 9, 2010, the SPD Public Records Unit ("PRU") received a records request from Mr. Helton for the contents of the OPA investigative file for Case No. 09-0451. CP 52-53. On July 15, 2010, SPD PRU completed its response to Mr. Helton's records request for the contents of "IIS 09-0451." CP 145. Because of the unfounded outcome, and pursuant to SPD policy at the time, SPD PRU explained that the response was limited to a redacted summary of the investigation and a redaction log of all items withheld. CP 60-64. SPD's redaction log cited the RCW 42.56.240(1) exemption for records "the non-disclosure of which is essential to effective law enforcement" and the RCW 42.56.230 exemption for records related to a public employee where disclosure would violate the employee's right to privacy. *Id.*

On May 11, 2011, Mr. Helton filed an additional records request asking for "a copy of my 2010 Public Disclosure Request for items from IIS Case file # IIS 09-0451." CP 148. On May 17, 2011, SPD PRU

provided the requested copy of Mr. Helton's 2010 records request. CP 150.

**B. Mr. Helton files a Public Records Act lawsuit**

On June 29, 2011, approximately one year after Mr. Helton's first request, Mr. Helton filed the lawsuit that is the subject of this appeal alleging a violation of the Public Records Act.

SPD's response to Mr. Helton's lawsuit argued that both the RCW 42.56.230(1) "right to privacy" exemption, and the RCW 42.56.240(1) "essential to effective law enforcement" exemption justified non-disclosure. CP 101-112. The trial court conducted a partial hearing on August 5, 2011 which concluded with the incomplete testimony of SPD's first witness. August 5, 2011, Report of Proceedings ("August RP") at 81-82.

**C. The Washington Supreme Court decides the *Bainbridge Island Police Guild v. City of Puyallup* case**

At the time of Mr. Helton's original request, the two leading cases addressing requests for records of law enforcement disciplinary investigative records related to unsubstantiated allegations of misconduct were *Bellevue John Does v. Bellevue School District* and *Cowles Pub. Co.*

*v. State Patrol*.<sup>1</sup> In *Bellevue John Does*, the Supreme Court held that an employee has a right to privacy in their identity associated with records of unsubstantiated allegations of misconduct. In *Cowles*, the Supreme Court provided additional confidentiality protections when a law enforcement agency is investigating allegations of misconduct against a law enforcement officer. The *Cowles* court held that the “essential to effective law enforcement” exemption applied to specific content of law enforcement disciplinary investigative records, even when the allegations were sustained. *Cowles*, 109 Wn.2d at 728-733. Moreover, the *Cowles* court recognized that disclosure of disciplinary investigative files dealing with “complaints which were later dismissed would constitute a more intrusive invasion of privacy than would the release of files relating only to completed investigations which resulted in some sanction against the officers.” *Id.* at 725. SPD withheld the records requested by Helton pursuant to this existing case law.

When Helton’s lawsuit was filed, however, the Washington Supreme Court was actively considering a similar case involving a PRA request for internal law enforcement investigative files where there was no finding of misconduct. *Bainbridge Island Police Guild v. City of*

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<sup>1</sup> *Bellevue John Does 1-11 v. Bellevue School District #405*, 164 Wn.2d 199, 189 P.3d 139 (2008); *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988).

*Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011). That case involved direct review of three separate trial court orders enjoining the disclosure of the identical type of internal law enforcement investigative records which are at issue in this case. *Id.* at 405-406. In that case, the Supreme Court analyzed whether the PRA's "right to privacy" exemption applied to prevent disclosure of internal law enforcement investigative records where there was no finding of misconduct.

On August 18, 2011, prior to the next scheduled hearing before the trial court in the present case, the Washington Supreme Court issued an opinion in the *Bainbridge* case, holding that the privacy exemption did not justify withholding the records. The opinion stated that it did not address the separate PRA "essential to effective law enforcement" exemption, but it included strong language regarding the public's interest in reviewing the contents of law enforcement internal investigations of alleged misconduct. *Id.* at 419. The Supreme Court held that the public's legitimate interest in the details of internal law enforcement disciplinary investigations, regardless of the outcome of the investigation, required disclosure of the records, and thus the "right to privacy" exemption did not apply. *Id.* at 416.

**D. *Bainbridge Island Police Guild v. City of Puyallup* and its effect on this case, and the Seattle Police Department's policy regarding disclosure of the records at issue**

In light of the *Bainbridge* decision, and after careful consideration within the department, SPD made a decision to change its policy with regard to disclosure of OPA-IS investigative files, and to generally disclose the contents of the files, even where there was no finding of misconduct. CP 664-665. SPD now applies a heightened level of scrutiny with respect to the withholding of any portion of OPA-IS investigative files, regardless of the findings. CP 664. On August 30, 2011, less than two weeks after the *Bainbridge* decision, and consistent with the new SPD policy, SPD voluntarily chose to proactively disclose the contents of the OPA-IS file at issue in this matter to Mr. Helton. CP 665. At that point, the only remaining issues in the present case were the trial court's assessment of per day penalties, if any, and an award of attorney's fees.

**E. **The trial court's consideration of per day penalties and attorney's fees in this case****

On September 23, 2011, the trial court heard Helton's motion for an award of attorney fees and per day penalties under the PRA. Helton's motion sought the maximum \$100 per day penalty award under the PRA. The motion also included a fee petition with block billing entries, in many instances with more than ten different types of work grouped under the

same entry. CP 398-420. In that fee petition, Mr. Helton requested a total of approximately \$93,300 in attorney's fees. CP 420. Notably, almost \$14,000 of the requested fees had been incurred after SPD had disclosed the disputed documents in their entirety. CP 417-420.

SPD's response to Helton's motion pointed out that the department acted in reasonable reliance on existing case law, and thus in good faith compliance with the PRA. SPD also noted that the requested records were produced immediately after the *Bainbridge Island* case changed the legal landscape with respect to law enforcement internal investigative files. CP 647-659. SPD argued that, consistent with the guidance provided in case law, any per day penalty award should be low.

Further, SPD challenged the attorney fee petition on the basis that the overreliance on block billing made it impossible to independently justify the fee award, and that the billing statements included duplicative, and overall excessive hours of attorney and paralegal work. *Id.*

**F. The trial court assesses a \$45 Per Day Penalty award**

The trial court concluded that any of SPD's non-compliance with the PRA was not in bad faith, but instead a result of reading the PRA's exemptions "too narrowly." CP 1123-1126. The court then applied the Supreme Court's *Yousoufian* factors and found the following mitigating factors: (a) prompt procedural response to the records request; (b) strict

PRA procedural compliance; and (c) no evidence of improper training or supervision of agency personnel. CP 1125. The court found only two aggravating factors: (a) unreasonableness of explanation for non-disclosure that relied upon a narrow reading of PRA exemptions by agency in its own interests; and (b) the public importance of imposing a PRA penalty to encourage law enforcement agencies in general to comply in good faith with the PRA's broad mandate of disclosure of records to foster public trust and allow public access to public records." *Id.* Based solely on the application of those factors, the trial court awarded \$45 per day in penalties under the PRA. *Id.*

**G. The trial court initially rejects Helton's attorney fee petition as unsubstantiated because of the excessive use of block billing, among other deficiencies.**

The trial court declined to award attorney's fees at the time it heard Helton's motion for fees and penalties. Instead, the court identified numerous deficiencies with Helton's fee petition and directed Helton's counsel to resubmit the petition to address those deficiencies. September 28, 2011, Report of Proceedings ("September RP") 72.

In doing so, the court stated "[b]ut certainly block billing, [Helton's counsel] should look at those" entries. *Id.* at 74: 4. In fact, the court stated that it had not even begun to analyze the block billing issue, because the court "recognized some issues with it at the very beginning

and knew there would be something more.” *Id.*: 5-7. Further, the court expressed concern with duplicative work and conferencing among the firm attorneys reflected in the billing statements. *Id.* at 75. The court directed Helton’s counsel to “go back through your records and identify” instances of duplicative work so that the court could analyze “how often that occurs, [and] how many total hours are involved in that.” *Id.*: 14-19.

**H. Without notice, the trial court reverses its earlier ruling related to block billing and other deficiencies, thus denying the Seattle Police Department the opportunity to fully respond to Helton’s “supplemental” attorney fee petition.**

Helton’s counsel essentially ignored the court’s direction, and resubmitted the same fee petition, but now included additional entries that brought the total requested fees to approximately \$125,000. CP 1016. At this point, Helton’s fee request now included \$36,000 in attorney fees incurred after the disputed records were disclosed in their entirety.

This “supplemental” fee petition included a declaration from Shelly Hall, an attorney with another law firm, making a statement that in her opinion the amount of attorney work was reasonable and not duplicative. Ms. Hall did not provide any citations or references to actual PRA cases involving a similar amount of work, or level of awarded fees. CP 1021-1025. Instead, Ms. Hall’s declaration asserted that, without a

“complete” award of fees, “agencies would have little incentive to comply with the PRA.” CP 1025.

SPD continued to argue that the court should only award fees for a reasonable amount of attorney work, and reiterated the court’s direction, which Helton’s counsel had ignored when resubmitting the identical fee petition. At a November 18, 2011 hearing on the “supplemental” fee petition, the trial court repeatedly requested that SPD provide a line by line criticism of Helton’s fee petition. SPD argued that Helton still had not met his burden of proof, but requested leave of court to provide the requested line by line analysis. November 18, 2011, Report of Proceedings (“November RP”) at 54: 7-8. The trial court did not provide SPD with that opportunity.

Ultimately, the trial court cited Shelly Hall’s declaration and awarded the requested amount of fees, with only a minimal \$700 reduction. *Id.* at 75-81. In its written order, the trial court concluded that Helton met his burden of proof on the reasonableness of requested fees, and SPD “failed to rebut Helton’s evidence.” CP 1149-1152. The awarded fees and costs totaled approximately \$138,000. *Id.*

**I. The trial court compounds its error by refusing to consider an affidavit from the Seattle Police Department's own expert.**

SPD timely filed a motion for reconsideration of the trial court's decision, and included a declaration from its PRA expert, Ramsey Ramerman, an attorney with extensive experience and knowledge of PRA cases that involved trials and appellate litigation. CP 1320-1323. Mr. Ramerman explained the overall excessiveness of Helton's requested fees, in light of the well-defined issues, limited records at issue, and limited number of relevant cases. CP 1326. Mr. Ramerman also cited to multiple recent PRA cases involving more complicated issues, multi-day trials, and litigation through the appellate courts, and all the way to the Supreme Court, all of which involved drastically lower total attorney fee awards. CP 1327. In addition, SPD provided a line by line critique of Helton's fee petition, based upon Mr. Ramerman's criticisms, and proposed a total reduction of approximately \$52,000. CP 1183-1230. Mr. Ramerman noted that, although this would still result in a substantial attorney fee award, it was "significantly more reasonable for a PRA case." CP 1329. Because they were presented as part of a motion for reconsideration, the trial court declined to consider any of the arguments in SPD's motion, or

Mr. Ramerman's declaration, and upheld its initial attorney fee award. CP 1441-1443.

## V. SUMMARY OF ARGUMENT

The trial court abused its discretion in awarding a \$45 per day penalty – the same per day penalty amount that the Washington Supreme Court held was proper when an agency was “grossly negligent” in responding, or completely failing to respond, to public disclosure requests. Moreover, the trial court based the heightened penalty on only two aggravating factors weighing against SPD, each of which applied an incorrect legal standard. The per day penalty award, based upon these incorrect legal conclusions, was therefore manifestly unreasonable or based upon untenable grounds. Based upon these errors, the trial court abused its discretion and the per day penalty award should be reversed.

In addition, the trial court abused its discretion in awarding attorney fees based on a fee petition that included inherent deficiencies, as identified by the trial court itself. Moreover, trial court awarded unreasonable and excessive fees in light of the limited issues involved in this case, and particularly when viewed in contrast to other PRA cases involving more complicated issues and more extensive litigation history. Further, the trial court substantially relied upon a declaration from Helton's expert that cited an incorrect legal standard as the basis for an

attorney fee award. Finally, the trial court improperly shifted the burden of proving the reasonableness of requested attorney fees to the public agency, and then declined to allow the public agency an opportunity to rebut plaintiff's evidence. Based upon these errors, the attorney fee award should be reversed.

## VI. ARGUMENT

### A. The trial court's award of per day penalties was arbitrary and manifestly unreasonable.

The PRA authorizes the trial court to award any person who prevails against a public agency "an amount not to exceed one hundred dollars for each day" that the person is denied the opportunity to inspect public records. RCW 42.56.550(4).

#### 1. Standard of review

A trial court's award of per day penalties is reviewed for abuse of discretion. *Yousofian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 725 (2010). A trial court abuses its discretion when a decision is arbitrary, manifestly unreasonable, or based upon untenable grounds. *City of Bellingham v. Chin*, 98 Wn. App. 60, 66, 988 P.2d 479 (1999) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law. *Id.* (citing *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054

(1993)). A trial court's decision is an abuse of discretion if it is the result of the application of an incorrect standard or based upon facts that do not meet the correct standard. *Yousoufian*, 168 at 471.

This Court reviews issues of PRA statutory interpretation *de novo*. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 344, 217 P.3d 1172 (2009) (citing *State v. Schultz*, 146 Wn.2d 540, 544, 48 P.3d 301 (2002)).

**2. Washington appellate cases provide guidance on the determination of an appropriate per day penalty amount**

Multiple Washington courts have set forth general principles regarding an appropriate assessment of per day penalties. In determining the proper amount of per day penalties, the existence or absence of an agency's bad faith is the principal factor that the trial court must consider. *Yousoufian*, 168 Wn.2d at 460; citing *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997).

Appellate court guidance on the assessment of per day penalties culminated in the *Yousoufian* case, which established seven mitigating factors and nine aggravating factors intended to provide guidance to trial courts, more predictability to parties, and a framework for meaningful appellate review. *Yousoufian*, 168 Wn.2d at 467-468.

The seven mitigating factors are as follows: (1) a lack of clarity in the PRA request; (2) the agency's prompt response or legitimate follow-up

inquiry for clarification; (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions; (4) proper training and supervision of the agency's personnel; (5) the reasonableness of any explanation for noncompliance by the agency; (6) the helpfulness of the agency to the requestor; and (7) the existence of agency systems to track and retrieve public records. *Id.* at 467.

The nine aggravating factors are as follows: (1) a delayed response by the agency, especially in circumstances making time of the essence; (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions; (3) lack of proper training and supervision of the agency's personnel; (4) unreasonableness of any explanation for noncompliance by the agency; (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency; (6) agency dishonesty; (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency; (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency; and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case. *Id.* at 467-468.

Failure to properly consider the *Yousoufian* factors may result in a finding that the trial court abused its discretion. *Sargent v. Seattle Police Department*, 260 P.3d 1006, 1017-1018 (2011); *See also Zink v. City of Mesa*, 162 Wn.App. 688, 256 P.3d 384 (2011)(vacating penalty award where penalties were issued prior to the *Yousoufian* decision, and therefore decided under the wrong legal standard). Moreover, the underlying facts involved in *Yousoufian*, and later appellate cases applying the *Yousoufian* factors, are instructive in determining whether the trial court's assessment of per day penalties in this case was an abuse of discretion.

In *Yousoufian*, the Supreme Court held that the trial court's assessment of a \$15 per day penalty was manifestly unreasonable in light of the county's "gross negligence" in responding to a PRA request. *Yousoufian*, 168 Wn.2d at 463. In that case, the requested records dealt with a \$300 million publicly financed project that was subject to an upcoming referendum. *Id.* at 462. The facts demonstrated that over a period of four years the county repeatedly failed to meet its responsibilities under the PRA. *Id.* at 455-456. Specifically, the agency falsely asserted that it was conducting searches for records; falsely asserted that it had produced all responsive records; and falsely asserted that records were located in other places. *Id.* at 456. After "years of delay

and misrepresentation,” the requester filed suit, yet it would still take another year, and long after the public vote at issue, for the county to completely and accurately respond to the request. *Id.* In that case, the Supreme court itself set the per day penalty amount at \$45 per day.

In one later case applying the *Yousoufian* factors, the court upheld a \$90 per day penalty. *Bricker v. State, Dept. of Labor and Industries*, 164 Wn.App. 16, 262 P.3d 121 (2011). In that case, the requester, Bricker, was cited by the public agency for a failure to obtain work permits. *Id.* at 18. Subsequently, Bricker requested copies of other similar citations in preparation for his hearing to contest his own citation. *Id.* The agency employee who received the letter had never received training on the requirements of the PRA, and filed the letter without ever responding. *Id.* at 18-19. Bricker then made several phone calls to multiple individuals in the public agency in an attempt to receive the requested documents, to no avail. *Id.* at 19.

In its consideration of the *Yousoufian* factors, the trial court found none of the mitigating factors. Moreover, the trial court found almost all of the *Yousoufian* aggravating factors to be present, including the following: factor (8) a delayed response that prejudiced the requester; factor (9) no compliance with the PRA’s requirements when an employee filed away a letter and never responded; factor (10) lack of supervision

and training with respect to the employee who received the request; factor (11) made no sense to file away a letter and never respond; factor (12) no intentional non-compliance, but lack of any knowledge of the PRA or its requirements; and factor (14) no governmental accountability, and witnesses who were unprepared and had not reviewed their records. *Id.* at 28.

In its opinion, Division II focused on the trial court's application of the *Yousoufian* factors, and particularly the trial court's conclusion that almost all of the aggravating factors were established in the case. *Id.* at 28. In light of the existence of almost all of the aggravating factors, and the "agency misconduct" that "shows an absence of accountability that is fundamental to the PRA," the appellate court found no abuse of discretion in the award of per day penalty. *Id.*

A federal district court's application of the *Yousoufian* factors to a range of agency culpability is also instructive. In *Lindell v. City of Mercer Island*, the agency relied upon an incorrect privilege determination to withhold a specific investigative report in response to a records request, and subsequently produced the report after a two and a half year delay. *Lindell v. City of Mercer Island*, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 2535147, \*9-10 (W.D. Wash. 2011). The court concluded that the agency's action

was not egregious, and therefore assessed only the minimum \$5 per day penalty award for wrongful withholding of the report. *Id.* at 10.

In response to a separate request for email contacts and calendar entries, the agency again failed to produce the records until after a two and half year delay. *Id.* For those records, the agency provided no explanation for non-disclosure, and the court could not discern any exemption that was applicable. *Id.* Thus, the court assessed a \$25 per day penalty. *Id.* at 11.

Finally, the court considered the agency's improper withholding of another investigative report as attorney-client privileged. The public agency continued to withhold that record from the requester after a clear waiver of any claim of privilege, and the agency only produced the record after a court order requiring it to do so. *Id.* at 4-5. The requester set forth details as to how the agency's wrongful withholding caused her significant economic loss, including the inability to explain to prospective employers why she left work with the agency, the inability to respond to charges of dishonesty, and the inability to defend her reputation and good character. *Id.* at 11. The court held that the agency's wrongful withholding caused the requester personal economic loss that was foreseeable to the agency. *Id.* Further, the agency's decision to withhold the record under those circumstances, and in light of the clear waiver of any privilege, constituted the level of agency culpability that warranted a higher per day penalty. *Id.*

Based on its weighing of the *Yousoufian* factors, the court assessed a \$75 per day penalty for withholding those records. *Id.*

**3. The trial court abused its discretion by applying the wrong legal standards when it incorrectly applied two *Yousoufian* aggravating factors in its calculation of an award of a per day penalty.**

A trial court's decision is an abuse of discretions if it results from the application of an incorrect standard or facts that do not meet the correct standard. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 471, 229 P.3d 735, 749 (2010) citing *In re Marriage of Littlefield*, 133 Wash.2d 39, 47, 940 P.2d 1362 (1997). See also *Yacobellis v. City of Bellingham*, 64 Wn.App. 295, 303, 825 P.2d 324 (1992) (remanding for a proper determination of a per day penalty amount where the trial court applied an incorrect standard in its initial determination). See also *Zink v. City of Mesa*, 162 Wn.App. 688, 256 P.3d 384 (2011) (vacating penalty award where penalties were issued prior to the *Yousoufian* decision, and therefore decided under the wrong legal standard).

Here, the trial court based its decision on the level of per day penalties by its application of just two *Yousoufian* aggravating factors. Specifically the court held that \$45 per day was appropriate because of the following: (a) unreasonableness of explanation for non-disclosure that relied upon a narrow reading of PRA exemptions by agency in its own

interests; and (b) the public importance of imposing a PRA penalty to encourage law enforcement agencies to comply in good faith with the PRA's broad mandate of disclosure of records to foster public trust and allow public access to public records. CP 1125. Moreover, rather than giving the *Yousoufian* factors due consideration, and recognizing the importance of a careful and consistent application of those factors, the trial court characterized the \$45 figure as "in some sense of the word, an arbitrary figure."<sup>2</sup> November RP 42: 14-16. Failure to properly consider or apply the *Yousoufian* factors, or an arbitrary assessment of a per day penalty is an abuse of discretion.

- a. **Instead of a "narrow reading" of PRA exemptions, SPD's original decision to withhold the records at issue was based on a good faith interpretation of then existing law, and three separate trial courts had agreed with that interpretation.**

SPD's explanation for non-disclosure in this case was not unreasonable, nor did it rely on a narrow reading of PRA exemptions. SPD initially withheld the requested records based upon two separate exemptions – the public employee "right to privacy" exemption, and the "essential to effective law enforcement" exemption. The PRA exempts "personal information in files maintained for employees, appointees, or

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<sup>2</sup> In an earlier hearing, the trial court also stated "[s]o I have thought about it, and any amount [of per day penalty] is somewhat arbitrary." September RP: 23-24.

elected officials of any public agency to the extent that disclosure would violate their right to privacy.” RCW 42.56.230(3). A person’s privacy is invaded if release of information about a person (1) would be highly offensive to a reasonable person; and (2) is not of legitimate concern to the public. RCW 42.56.050; *Hearst Corp. v. Hoppe*, 90 Wn.2d 123,136, 580 P.2d 246 (1978). The PRA also exempts records “the nondisclosure of which is essential to effective law enforcement.” RCW 42.56.240(1).

**i. The controlling case law at the time of Helton’s records request justified non-disclosure.**

In 2008, the Washington Supreme Court held that identities of public employees (school teachers) who are the subject of unsubstantiated allegations of sexual misconduct are exempt from disclosure under the PRA, because publication would be both highly offensive, and not of legitimate public interest. *Bellevue John Does 1-11 v. Bellevue School District #405*, 164 Wn.2d 199, 189 P.3d 139 (2007). That case also supports withholding the entire contents of an unsubstantiated internal investigative file if disclosing it in conjunction with a specific officer’s name would inevitably reveal the officer’s identity in connection with matters that serve no legitimate public interest. *See also Tacoma v. Tacoma News Inc.*, 65 Wn. App. 140, 827 P.2d 1094 (1992) (records of a

criminal investigation of unsubstantiated child sexual abuse by a public official were exempt in their entirety).

In *Cowles Pub. Co. v. State Patrol*, the Supreme Court provided additional confidentiality protections when a law enforcement agency is investigating allegations of misconduct against a law enforcement officer. *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988). In that case, based on the State Patrol's showing that confidentiality was necessary to induce officers to cooperate with an investigation of a fellow officer, the Supreme Court held that the "essential to effective law enforcement" exemption applied to the content of law enforcement disciplinary investigative records, even when the allegations were sustained. *Id.* at 728-733. Moreover, the *Cowles* court recognized that disclosure of disciplinary investigative files dealing with "complaints which were later dismissed would constitute a more intrusive invasion of privacy than would the release of files relating only to completed investigations which resulted in some sanction against the officers." *Id.* at 725.

At the time of Mr. Helton's request, SPD was relying upon the essential to effective law enforcement exemption, the public employee privacy exemption, and the well established precedent set by *Cowles Publishing v. State Patrol* and *Bellevue John Does*. In fact, at the time of

Helton's request, three separate trial courts had concluded that disclosure of any contents of unsubstantiated disciplinary investigative files in conjunction with the name of a specific employee would violate that employee's right to privacy.

**ii. Three separate trial courts had agreed with SPD's interpretation of the employee privacy exemption and controlling case law at the time of Helton's request.**

In *Bainbridge Island Police Guild v. City of Puyallup*, the Kitsap County Superior Court determined that production of any part of the disciplinary investigation records at issue would violate the officer's right to privacy. *Bainbridge Island*, 172 Wn.2d at 405. That court reviewed the disputed records *in camera* and ruled that the disciplinary investigative report, in addition to a related police incident report, were both properly withheld in order to protect the employee's right to privacy. *Bainbridge Island*, 127 Wn.2d at 405.

Two months later, the Pierce County Superior Court ruled that the entire contents of the same disciplinary investigative report were exempt from production under the privacy exemption "because the request was specific to information regarding the investigation of Koenig's allegation against Officer Cain, and thus any production would reveal his identity in connection with the incident." *Id.* at 406.

Confronted with the same issue, the King County Superior Court granted an identical injunction exempting the internal investigation records in their entirety. *Id.*<sup>3</sup>

From the arguments of the parties in the *Bainbridge Island* case, it is clear that the disciplinary investigative file at issue in that case contained records as attachments or exhibits, in addition to the written report. *Bainbridge Island*, 172 Wn.2d at 421 (discussing the application of the Criminal Records Privacy Act to the contents of the disciplinary investigative file “to the extent it contains” a separate criminal investigative report).

In this case, Mr. Helton also requested the contents of an unsubstantiated disciplinary investigative file. CP 52-53. In later communication, Mr. Helton reiterated this request for the contents of SPD “IIS 09-0451.” CP 148. Mr. Helton’s request included the names of the officers who were the subject of unsubstantiated allegations of misconduct. CP 53.

In response, SPD applied the same right to privacy exemption to the same category of records that were enjoined from disclosure by three separate trial courts. In fact, SPD did so with the actual knowledge that

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<sup>3</sup> These three separate trial court orders were consolidated on appeal in *Bainbridge Island Police Guild v. City of Puyallup*.

Superior Court judges had upheld the same application of the exemption, in response to the same type of request for information contained within a disciplinary investigative file involving unsubstantiated allegations of misconduct. These facts do not support a conclusion that SPD read the requirements of the PRA “too narrowly.” Thus it was an abuse of discretion for the trial court to make such a conclusion.

**iii. The Supreme Court’s decision in *Bainbridge Island Police Guild v. City of Puyallup* represented a significant shift in court interpretation of the PRA.**

The Supreme Court’s ultimate decision in *Bainbridge Island* significantly changed the legal landscape regarding the “privacy” exemption. The court concluded that disclosure of investigative records related to unsubstantiated allegations, even where the subject officer’s name is known, is a “matter of legitimate public interest.” Therefore, the court held that only the subject officer’s identity is exempt under the PRA, and should be redacted, but the rest of the information regarding the investigation must be produced. *Bainbridge Island*, 172 Wn.2d at 417-418.

The *Bainbridge Island* court did not opine on whether the separate “essential to effective law enforcement” exemption applied in that case because it was not at issue on appeal. *Bainbridge Island*, 172 Wn.2d at

419. This Court recognized in *Sargent v. Seattle Police Department* that the *Bainbridge Island* case did not specifically address the essential to effective law enforcement exemption. *Sargent*, 260 P.3d 1017, fn.53. These two cases indicate that, at least for now, that issue is still unsettled. Even so, in light of the *Bainbridge Island* decision, SPD determined to release the records at issue in this case, and now applies a heightened level of scrutiny with respect to the withholding of any portion of OPA-IS investigative files, including those where there was no finding of misconduct. CP 664.

**iv. Instead of an aggravating factor, SPD’s reliance on a reasonable interpretation of then existing case law is a mitigating factor and the quintessential type of “good faith” compliance with the PRA that warrants minimal penalties.**

The appellate decision on the appropriate assessment of per day penalties that is most instructive on these facts is this Court’s recent decision in *Sargent*, 260 P.3d 1006. In that case, SPD asserted the protection of witnesses and victims of crimes exemption (RCW 42.56.240(2)) as a basis for redacting witness names. *Id.* at 1014. This Court concluded that even though there was no categorical exemption, SPD’s application of the exemption in that case “was hardly an unreasonable reading of the case law.” *Id.* at 1018. This Court remanded the case to give SPD an opportunity to establish such a justification. *Id.* at

1015. In reviewing the per day penalty award, this Court concluded that SPD violated the PRA “only insofar as it failed to provide Sargent’s jail records and failed to justify certain exemptions.” *Id.*, at 1018. Under those facts, this Court determined that a \$100 per day penalty award was “completely disproportionate” to the level of culpability. *Id.*

Similar to the facts regarding the application of the witness safety exemption, here SPD relied upon long standing precedent regarding the essential to effective law enforcement exemption, and the employee privacy exemption, which was further supported by the three trial courts’ rulings in *Bainbridge Island*. Such reliance is hardly unreasonable or a “narrow reading” of the PRA. Moreover, even though SPD articulated the negative effects of disclosure on law enforcement functions, SPD determined to disclose the records at issue, and now applies a heightened level of scrutiny to the withholding of any portion of internal investigative files. CP 664.

As this Court stated in an earlier consideration of the *Yousoufian* case, the minimum statutory penalty should apply in “instances of less egregious agency conduct, such as those instances in which the agency has acted in good faith but, through an understandable misinterpretation of the [PRA] or failure to locate records, has failed to respond adequately. *Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 854, 60 P.3d 667,

(2003), *aff'd in part, rev'd in part*, 152 Wn.2d 421 (2004). Instead of an aggravating factor, SPD's reasonable reliance on existing case law warranted minimal per day penalties.

- b. The trial court's reliance on a second aggravating factor, and decision to impose a higher penalty based on the need to ensure other agency's PRA compliance, was based on a misreading of *Yousoufian*, and if proper, would mean aggravating factors were always present.**

The trial court's second aggravating factor that it relied upon was an incorrect application of the guidance from the *Yousoufian* case. With respect to the second factor, the trial court concluded it was necessary to assess a per day penalty in an amount necessary to "encourage law enforcement agencies to comply in good faith" with the PRA. CP 1125. But the correct restatement of that factor is an assessment of a per day penalty amount "necessary to deter future misconduct by the agency." *Yousoufian*, 168 Wn.2d 468 (emphasis added).

Here, the trial court incorrectly applied this factor to set a penalty amount intended to enforce the provisions of the PRA among all law enforcement agencies. That is not correct, and it raises issues of fundamental fairness. SPD should not be penalized in an amount intended to raise the eyebrows of King County or the State of Washington. Therefore, because the trial court relied upon this aggravating factor to

justify the per day penalty award in this case, it applied an incorrect standard and abused its discretion.

**B. The trial court's award of attorney's fees**

The PRA states that a prevailing party "shall be awarded all costs, including reasonable attorney fees, incurred in connection" with a PRA lawsuit. RCW 42.56.550(4). Helton, as the fee applicant, has the burden of proving the reasonableness of the requested fees. *Fetzer v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993).

**1. Standard of review**

A trial court's award of attorney's fees is reviewed under an abuse of discretion standard. *Progressive Animal Welfare Soc. v. University of Washington*, 114 Wn.2d 677, 688, 790 P.2d 604, 609 (1990). A trial court abuses its discretion if the attorney fee award is manifestly unreasonable or based on untenable grounds or reasons. *Id.* at 689. An appellate court may find that a trial court abused its discretion, and overturn an attorney fee award, if the appellate court disapproves of the method utilized by the trial court in awarding fees. *Id.*

**2. The trial court first ruled that Helton’s fee petition containing excessive block billing was insufficient to meet his burden, then accepted the same fee petition to justify a fee award; thus, the trial court unreasonably shifted the burden of justifying fees to SPD, which had relied upon the trial court’s prior ruling.**

In this case, Helton’s counsel initially submitted a fee petition that the trial court deemed deficient. September RP 72. Because of those deficiencies, the trial court rejected the fee petition, but gave Helton’s counsel an opportunity to resubmit the fee request. In so doing, the trial court gave specific direction regarding the areas where the fee petition needed work. *Id.* at 72-75.

The court stated “[b]ut certainly block billing, [Helton’s counsel] should look at those” entries. *Id.* at 74: 4. In fact, the court stated that it had not even begun to analyze the block billing issue, because the court “recognized some issues with it at the very beginning and knew there would be something more.” *Id.*: 5-7. Further, the court expressed concern with duplicative work and conferencing among the firm attorneys reflected in the billing statements. *Id.* at 75. The court directed Helton’s counsel to “go back through your records and identify” instances of duplicative work so that the court could analyze “how often that occurs, [and] how many total hours are involved in that.” *Id.*: 14-19

In response, Helton's counsel resubmitted the same fee petition with very minor reductions to address unnecessary work on a motion to seal, and adding a request for an additional award of approximately \$32,000 for work undertaken since the first fee petition submittal. CP 1016. In addition, Helton's counsel submitted declarations from the firm attorneys, and a declaration from Shelly Hall, an attorney with another firm, in support of the complete fee award. In the second submittal, Helton's counsel now sought to also recover approximately \$2,000 from SPD for the costs of Ms. Hall's work. CP 867-868.

Rather than expend additional taxpayer funds and engage in a "battle of the experts," SPD responded to this second submittal by simply pointing out the same deficiencies that the trial court had identified in the first fee petition that had not been addressed. For example, SPD pointed out that the block billing entries remained in their entirety. SPD also pointed out other areas where Helton's counsel had failed to address the trial court's concerns, such as the court's references to duplicative work and excessive conferencing among firm attorneys. SPD noted that, in response to the court's concerns, Helton's counsel merely included a conclusory statement in a declaration that "it is not practical to precisely quantify the exact amount of time spent in conference meetings." CP 869. SPD questioned how the trial court could conduct a critical review of these

entries, if Helton's counsel lacked the ability to do so because of block billing. SPD did attempt a critical analysis of the time entries to point out instances where fees were unnecessary or excessive, and to point out all entries that appeared to involve duplicative work. CP 1064-1070.

At oral argument, the trial court asked SPD whether it had engaged an expert to review the fee petition. November RP 37: 12-14. The trial court also repeatedly asked SPD for specificity regarding the amount of monetary reductions for billing entries on the fee petition. *Id.* at 41: 3-4; *Id.* at 48: 11-13; *Id.* at 54: 1-3. In response, SPD noted its arguments regarding the overall excessiveness and unreasonableness of the fees, and further requested leave of court to provide the additional entry by entry specificity, as requested by the trial court, to assist its review. *Id.* at 54: 7-8; *Id.* at 68: 4-8. The trial court did not provide SPD with that opportunity.

On December 30, 2011, the trial court entered a written order granting Helton's counsel almost 100% of the requested fees, with only a \$700 deduction by the trial court based on billing for work completely unrelated to *Helton v. SPD*.

**3. The trial court then compounded its initial improper shift of the burden on proving the reasonableness of the requested fees by refusing to consider an SPD affidavit criticizing the fee award.**

On a motion for reconsideration, SPD submitted a declaration from Ramsey Ramerman, an expert in the field of public records law, to explain the overall excessiveness and unreasonableness of the requested fees. CP 1320-1400. Based upon Mr. Ramerman's criticisms, SPD also provided an entry by entry critique of the fee petition. CP 1182-1230. The trial court declined to consider SPD's additional submission, and denied the motion for reconsideration. CP 1441-1443.

Subsequent to that denial, Helton's counsel submitted another motion for additional fees incurred after the trial court's December 30, 2011 order. CP 1444-1449. SPD's response, including Mr. Ramerman's declaration, again challenged the overall excessiveness of the fees, in addition to the continued use of block billing. CP 1486-1490. The trial court's final order on additional fees included a reduction of approximately five percent in the requested fee award. CP 1607-1610. The trial court made this reduction based on Helton's overuse use of block billing, and the "lack of specificity" in those entries which "gives little guidance to the amount of time expended [for each entry]." CP 1597. As

the court stated, whether the requested fees were reasonable “cannot be determined on the basis of the general block billing used for that date.” *Id.*

In sum, the trial court identified numerous deficiencies in Helton’s original submission of a fee petition in this case. Because of those deficiencies, the trial court directed Helton’s counsel to resubmit the petition, along with specific direction regarding the issues to address. Helton’s counsel resubmitted the same fee petition, along with supporting affidavits, including the affidavit from Shelly Hall, an attorney from a separate law firm, who opined regarding the reasonableness of the requested fees.

The trial court substantially relied upon the Shelly Hall affidavit in awarding virtually 100% of the requested fees, even though the supplemental fee petition suffered from the same deficiencies as the initial submission. Further, the trial court declined to consider an additional submission from SPD challenging the overall excessiveness of the requested fees.

Significantly, when presented with a subsequent motion for additional fees, the trial court did, in fact, reduce the award of additional fees based on deficiencies related to block billing and a lack of specificity. As discussed, these were the same deficiencies that were present and never addressed in the original submission.

The trial court gave Helton a second bite at the apple, but declined to extend the same opportunity to SPD, both at oral argument, and in response to a motion for reconsideration. That is a flawed methodology that constitutes an abuse of discretion.

**4. The trial court abused its discretion by relying upon argument and supporting affidavits that set forth an incorrect legal standard for an award of attorney fees.**

The PRA attorney fee provision is intended to provide a mechanism for a requester to enforce his rights in court, rather than serve a punitive purpose, such as the per day penalty provision. *See Yacobellis v. City of Bellingham*, 64 Wn.App. 295, 304, 825 P.2d 324 (1992) (discussing the different purposes of the two separate provisions). The compensatory purpose of attorney fee awards is separate and distinct from the punitive purpose of statutory penalties. *Yousoufian v. Office of Ron Sims*, 114 Wn.App. 836, 854, 60 P.3d 667 (2003), *aff'd in part, rev'd in part*, 152 Wn.2d 421 (2004). Moreover, use of the attorney fee provision in the PRA for profit through inflated costs is “contrary to the PRA's stated purpose to keep the governed informed about their government.” *Mitchell v. Washington State Institute of Public Policy*, 153 Wn.App. 803, 830, 225 P.3d 280 (2009). Attorney fee awards which do not serve that purpose are not reasonable. *Id.*

In this case, Helton argued that a “complete award” of attorney’s fees “provides SPD a proper incentive to comply with the PRA’s broad mandate of disclosure.” CP 854. Moreover, the trial court’s rationale for an award of almost 100% of the requested attorney’s fees was substantially based upon the declaration from Shelly Hall. In that declaration, Ms. Hall stated that it was important from a policy perspective to award “full fees” in PRA cases. According to Ms. Hall, “without a complete award of [attorney’s] fees”...“agencies would have little incentive to comply with the PRA.” CP 1025.

Helton’s argument and Ms. Hall’s statements are incorrect. As discussed, the law is clear that any punitive purpose of the PRA is served by the separate per day penalty provision. The PRA itself allows recovery of “reasonable” attorney fees. RCW 42.56.550(4). What may constitute “reasonable” fees is different from “complete” fees. Ms. Hall’s declaration played a central role in this litigation, and the court substantially relied upon that evidence. By relying on the Hall declaration, the trial court applied upon an incorrect standard of law, and therefore abused its discretion.

**5. The trial court abused its discretion in its application of the *Mahler v. Szucs* lodestar approach**

Multiple courts cite the *Mahler v. Szucs* case and the “lodestar” approach to determine the reasonableness of attorney fees in PRA cases. *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998). Under that approach, the first inquiry is whether counsel expended a reasonable number of hours in securing a successful recovery for their client. *Id.* at 434. The court must exclude any wasteful or duplicative hours. *Id.*

Ms. Hall asserted that Helton’s counsel fee petition reflected a reasonable amount of work because SPD conducted a “mini-trial” that required the attorneys to expend more time than usual. The court’s final order on attorney’s fees stated “[t]he scope and extent of courtroom hearings and underlying briefing may have exceeded the amount of work necessary to present a typical PRA case.” CP 1151. Ms. Hall’s assertion is misleading. SPD did intend to present live testimony in this case, but the extent of a “mini-trial” was one morning of argument and the partial testimony of one witness. August RP 81-82. After that hearing, the *Bainbridge Island* case intervened, and SPD disclosed the disputed records.

More importantly, that rationale in support of a complete fee award

in this case is not supported by recent PRA cases that consisted of full trials with multiple witnesses, or appellate litigation all the way through the Washington State Supreme Court. As set forth in the *Mahler v Szucs* case, the fees customarily charged in similar cases are an important factor for the trial court to consider. *Mahler*, 135 Wn.2d at 434. The trial court should have considered a number of recent cases that involved much more extensive litigation, or more complicated legal issues, but did not result in a fee award anywhere close to the \$125,000 awarded by the trial court in this case.

*Zink v. City of Mesa* involved a 4-day trial, an appeal, and three days of hearings on remand. That case involved dozens of allegations of PRA violations that totaled thousands of pages of trial record and litigation over a five year period. The fee award in that case totaled \$72,309.50. CP 1327; CP 1499.

*Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn. App. 110, 231 P.3d 219 (2010) involved a hearing and an appeal. That case had an added complication of a third-party trying to block disclosure. Plaintiffs were awarded \$66,736.50 in fees – the trial court awarded \$20,620 and the appellate court awarded an additional \$46,116.50. *Id.*

*Yakima County v. Yakima Herald Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011) was litigated through the trial court and Washington State Supreme Court. That case involved the novel issue of the effects of an order

sealing court records outside of the Court. Plaintiffs claimed \$103,320.18 in attorney's fees -- \$22,595.03 at the trial court level and \$80,725.15 on appeal. The Supreme Court only awarded \$21,081.49 on appeal. *Id.*

As Mr. Ramerman pointed out, all three of these cases happened within the last four years, and were longer and far more complicated than this present case. Regardless, the trial court awarded fees in this case that doubled, or more than quadrupled, the total fee award in the more typical PRA case. The trial court's conclusion regarding the reasonableness of the requested is not supported by substantial evidence, and is therefore an abuse of discretion.

**6. The trial court awarded an excessive amount of fees in light of the limited legal issues and case law involved in this matter.**

*Mahler* also instructs the trial court to consider the novel and difficulty of the legal issues involved in setting an appropriate amount of fees. *Mahler*, 135 Wn.2d at 434. This litigation turned on the applicability of *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988) and *Bellevue John does v. Bellevue School District*, 164 Wn.2d 199, 189 P.3d 139 (2008). As Mr. Ramerman explained, only a limited number of cases have addressed the same issues since the *Cowles* and *Bellevue John Does* cases, putting a low ceiling on the amount of legal research that was required. CP 1326; CP 1498. Moreover, SPD relied on

the same exemptions to withhold documents in this case as it did in the *Sargent v. SPD*, \_\_\_ Wn. App. \_\_\_, 260 P.3d 1006 (2011) case, which recently was litigated by Helton's counsel. Thus, minimal research should have been necessary.

The high number of hours billed after the records were released raises the concern that plaintiff's counsel is "running up the score" once victory was assured. Helton's billing after submitting briefing on the first petition for attorney fees heightens this concern. After the September 28, 2011, hearing there was no doubt that fees would be awarded. But after their first fee submittal, Helton's counsel incurred an additional \$23,626 in additional fees. As noted by Mr. Ramerman, this is particularly excessive given that McKay Chadwell only needed to supplement their first inadequate petition. CP 1325; CP 1497.

**7. The trial court's award of fees in this case risks undercutting the very purpose of the PRA**

The purpose of the attorney fee provision in the PRA is to avoid punishing private citizens who front their own time to further government transparency. But if unreasonable fee requests are granted, the fee award itself turns into a waste a of tax dollars, undercutting the very purpose of the PRA.

Here, Helton's counsel expended enormous amounts of work after the disputed records had been fully disclosed and victory was assured. Helton's counsel apparently spent approximately 75 hours preparing the fee and penalty petitions alone – more than the approximately 70 hours Helton's counsel spent preparing the show cause briefing (note that block billing makes it impossible to determine these numbers with complete accuracy). CP 398-420; CP 974-1016.

As Mr. Ramerman opines, the trial court's fee award in this case "risks sending a message to attorneys representing requesters that once it is clear there will be an attorney fee award, counsel can run up the bill by putting an excessive amount of work into the case." CP 1325; CP 1497. As an expenditure of tax dollars, "by encouraging this wasteful conduct," the award in this case works "against the purpose of the PRA – to prevent the waste of tax dollars." *Id.*

## V. CONCLUSION

In response to Helton's records request, SPD acted pursuant to a reasonable interpretation of then existing case law in an effort to comply with the PRA in good faith. Moreover, the trial court relied upon an incorrect legal standard to justify its imposition of heightened per day penalties.

After initially identifying numerous deficiencies with Helton's attorney fee request, the trial court then reversed course and approved almost 100% of the requested attorney fees. In doing so, the trial court relied upon evidence that set forth an incorrect legal standard, and compounded that error by subsequently refusing to consider SPD's evidence.

This Court should reverse the trial court's imposition of per day penalties, and reverse the trial court's award of attorney fees.

DATED this 11<sup>th</sup> day of May, 2012

PETER S. HOLMES  
Seattle City Attorney

By: 

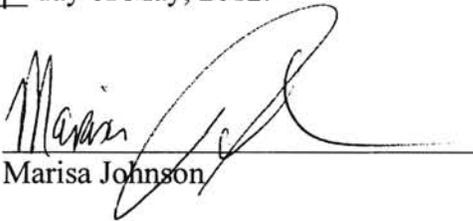
Gary Smith, WSBA # 29718  
Sumeer Singla, WSBA # 32852  
Attorneys for Appellant  
City of Seattle Police Department

**CERTIFICATE OF SERVICE**

I, certify that on this date I caused a copy of Appellant's Opening Brief to be filed with the court and served by legal messenger on:

Patrick Preston  
Thomas Brennan  
McKAY CHADWELL, PLLC  
600 University Street, Suite 1601  
Seattle, WA 98101

Signed at Seattle, Washington, this 11 day of May, 2012.

  
\_\_\_\_\_  
Marisa Johnson

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