No. 42647-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

AMBER WRIGHT,

Respondent.

RESPONDENT'S ANSWERING BRIEF

HAGENS BERMAN SOBOL SHAPIRO, LLP

David P. Moody, WSBA #22853
Marty D. McLean, WSBA #33269
1918 Eight Avenue, Suite 3300
Seattle, Washington 98101
(206) 623-7292

CONNOLLY TACON & MESERVE, PC

Carter W. Hick, WSBA #36721
201 5th Ave. SW, Suite 301
Olympia, Washington 98501
(360) 943-6747

Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INDEX OF APPENDICES

I. INTRODUCTION

According to the Supreme Court of the State of Washington, the stated purpose of the Public Records Act:

> [I]s nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions . . . Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests.

Progressive Animal Welfare Society v. The University of Washington, 125 Wn.2d 243, 251 (1994).

The Public Records Act "is a strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The act must be liberally interpreted and exemptions narrowly construed in favor of disclosure. *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 730-731 (2007).

Amber Wright ("Amber") sought information by using the Public Records Act. The information related to the decision by the Department of Social and Health Services ("DSHS") to return Amber (a child) to the home of a man accused of molesting numerous children.

In March 2007, Amber made her first Public Records Act request. It was directed to DSHS. Amber submitted a second, more extensive request, in May 2008. The second request was also directed to DSHS.

The purpose of each request was to determine why DSHS failed to act to protect Amber. Put simply, Amber wanted answers.

Amber's requests were met with what the trial court determined was "an unbelievable obstruction of justice" lasting more than three years. This obstruction and distortion continues in DSHS' Opening Brief.

DSHS claims that the statute of limitations bars Amber's claims. However, DSHS continued to provide records called for by Amber's requests up to six months before the date when Amber's Complaint was filed – well within the one-year statute of limitations.

Further, despite withholding and redacting information responsive to both requests, DSHS refused to provide a privilege log. Washington law is clear that the statute of limitations does not commence until a privilege log is provided. *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 541 (2009).

Understanding the weakness of its statute of limitations arguments, DSHS lobs a Hail Mary, arguing that all Children's Administration records are exempt from public disclosure. DSHS says that, because it is defined as a "juvenile justice or care agency" under RCW 13.50.010, it is entitled to withhold all of Amber's records from the Public Records Act.

DSHS is the largest agency in the State of Washington. Multiple government entities are defined as "juvenile justice or care agencies"

under RCW 13.50 including: (1) all police departments; (2) the Washington State Attorney General's Office; (3) all schools; (4) all courts; (5) all prisons; and (6) several legislative bodies.

Adopting DSHS' argument would gut the Public Records Act by exempting the records of all "juvenile justice and care agencies" – a finding contrary to the legislature's directive that the act's exemptions must be "construed narrowly." *See* RCW 42.56.030. RCW 13.50 was meant to apply to a limited and circumscribed category of dependency records -- not to insulate entire agencies from the right of open government provided to all Washington citizens.

DSHS' remaining arguments are equally meritless. Trial courts are vested with broad discretion when considering the penalties and attorneys' fees to award for violations of the Public Records Act. As discussed below, the principal factor to consider when determining an appropriate penalty is the existence of bad faith on the part of the responding agency. Here, the trial court's findings demonstrate bad faith in the extreme:

> I'm finding, as I've indicated I think throughout this, that there was an unbelievable obstruction of justice by the executive branch of our government contrary to what this country is all about, again, which is open government, justice, and that's been violated, violated maliciously almost. The obstruction is clear and it insults the citizens of this country for a government entity to proceed as DSHS proceeded in this matter. RP 57 (9/1/2011).

II. COUNTER-STATEMENT OF ISSUES

1. DSHS admits that it withheld records and redacted information from Amber's March 2007 and May 2008 Public Record Act requests. Washington law requires a privilege log whenever information is withheld or redacted and the statute of limitations does not commence until a privilege log is provided. Was the trial court correct in finding that the statute of limitations had not expired considering that DSHS never provided Amber with a privilege log?

2. DSHS admits that records responsive to Amber's requests were withheld until December 2009. The Public Records Act provides a one year statute of limitation following the last production of records responsive to a request. Did the trial court correctly reject DSHS' claim that the statute of limitations had elapsed considering that Amber filed her lawsuit within one year following the last production of responsive records?

3. RCW 13.50.010 defines a circumscribed class of records that are exempt from public disclosure, including the official juvenile court file, the records and reports of probation counselors, and dependency-related documents. At trial, DSHS offered no evidence that an audio recording, withheld until December 2009, qualified as a "record" as defined by RCW 13.50.010. Given this lack of evidence, did the trial court correctly reject DSHS' claim that the audio recording was exempt pursuant to RCW 13.50.010?

4. Amber's May 2008 request sought all records used by DSHS to investigate complaints that she had been abused or neglected. The "Child Physical and Sexual Abuse Investigation Protocols for Pierce County, Washington" and the "PRIDE Manual" were both used by DSHS to investigate reports that Amber was sexually victimized. Was the trial court correct in finding that these two records were improperly withheld from Amber's May 2008 records request?

5. The Public Records Act vests the trial court with broad discretion to award statutory penalties. The trial court concluded that DSHS' behavior constituted an "unbelievable obstruction of justice." Did the trial court exercise its discretion in awarding $100 per day for DSHS' violations of the Public Records Act considering that bad faith is the principal factor determining penalties?

6. The Public Records Act entitled Amber, the prevailing party, to an award of costs and attorneys' fees. Washington law directs courts to use the lodestar method for determining attorneys' fees awarded under the Public Records Act. Did the trial court correctly exercise its discretion by applying the lodestar method?

7. Washington courts may apply a lodestar multiplier to attorneys' fees when success is contingent in nature and the quality of the work performed is high. The trial court found that Amber's attorneys took this case on a contingency fee basis and obtained an exceptional result for Amber. Did the trial court act within its discretion when it awarded a lodestar multiplier?

III. STATEMENT OF THE CASE

A. Amber's History of Abuse

In August 2004, DSHS received the first of several warnings that Amber's father was physically and sexually abusing her, her brother, and several underage children. CP 2. Despite the constellation of reports received from multiple sources, including local law enforcement, DSHS failed to perform a meaningful investigation. *Id.*

Instead, DSHS closed its investigation and returned Amber and her younger brother to their abusive father. The same day DSHS closed its investigation, Amber's father moved the children to a remote area of Pacific County, Washington. There, Amber endured an additional eight months of abuse and torture before escaping, on foot, with nothing more than the clothes on her back. *Id.*

After Amber again reported her abuse, Amber's father was arrested and charged with multiple crimes. He pled guilty to three counts of child molestation in the first degree and was sentenced to prison. *Id.*

B. Amber's Public Records Requests

1. March 2007 Request

After Amber escaped from her abuser's home in Pacific County, Washington, she wanted to know why DSHS failed to take steps to protect her and her brother. CP 2. On March 26, 2007, Amber made her first public records request to DSHS. Amber's March 2007 request reflects that she sought "her entire DSHS file."[1] Ex. 1.

On May 4, 2007, Amber submitted a signed "Consent to Exchange Confidential Information" which was requested by DSHS. Ex. 203. In short, DSHS wanted a signed release. In the letter enclosing the release, Amber again indicated that she was seeking "her entire DSHS file." CP 151. The release also indicates that Amber wanted "all DSHS records." Ex. 203, CP 152.

On June 1, 2007, DSHS disclosed portions of Amber's Children's Administration record. Ex. 205; CP 156-157. DSHS' letter transmitting Amber's records demonstrates that it withheld and/or redacted numerous records from its production. *Id.* However, DSHS did not provide the legal authority on which it relied when withholding or redacting this information. *Id.*

[1] By March 2007, Amber retained attorney Carter Hick to investigate possible civil claims on her behalf. Mr. Hick submitted the March 2007 request on Amber's behalf.

2. May 2008 Request

After receiving Amber's Children Administration records, Mr. Hick associated with David P. Moody and Marty McLean of Hagens Berman Sobol Shapiro, LLP, to assist in the investigation of possible tort claims on Amber's behalf. On May 20, 2008, Amber submitted a second, more detailed, Public Records Act request. Ex. 2, CP 11-17.

Amber's May 20, 2008 request also encompassed all of her DSHS records. Ex. 2, CP 11. However, Amber sought additional records. For example, Amber sought records used by DSHS to investigate reports that she was the victim of physical and sexual abuse:

> Any and all documents associated with CPS referral ID #1543537, dated 08/18/2004. This includes, but is not limited to any and all intake documents, any and all notes, e-mails, letters, faxes, photographs and/or other documentation generated or received by Department personnel during investigation of this complaint. ***This request also includes, but is not limited to, any documents relating to the resolution of this complaint including reports, compliance agreements, revocation letters, etc.***

CP 13 (emphasis supplied).

On May 28, 2008, DSHS acknowledged receipt of Amber's second public records request. Ex. 207, CP 27-28. DSHS did not ask for clarification. *Id.* Rather, DSHS indicated it would produce Amber's records in 120 business days (approximately 6 months). *Id.*

From July 2008 through November 2008, DSHS occasionally provided records in response to Amber's May 2008 Public Records Act

request. On November 14, 2008, DSHS sent a letter to Amber stating that its response to her May 2008 public records request was complete. Ex. 214.

There is no dispute that DSHS withheld and redacted information responsive to Amber's May 2008 request. *See* Exs. 211, 213 and 214. However, DSHS did not provide a privilege log identifying the records that it was withholding and/or redacting.

C. Negligence Lawsuit

In February 2009, after being assured that DSHS completed its response to her two Public Records requests, Amber filed a negligence lawsuit against DSHS. This lawsuit related to the failed child abuse investigation undertaken by DSHS.

During discovery in Amber's negligence lawsuit, critical evidence was discovered that should have been produced in response to Amber's public records requests.

Specifically, it was discovered that, in its response to Amber's public records requests, DSHS withheld: (1) a recorded statement made by Amber detailing the horrific abuse she endured; (2) the child abuse investigation protocols governing DSHS' child abuse investigation; and (3) a "PRIDE" manual for placement of children with out-of-home relatives. These records were critical pieces of evidence.

In November 2009, Amber's attorneys learned about the existence of an audio recording generated by DSHS. The audio recording memorialized Amber's disclosure of graphic sexual abuse to CPS social workers. This critical piece of evidence had never been provided in response to Amber's long standing public records requests.

In November 2009, Amber's attorneys questioned the attorneys representing DSHS in the negligence lawsuit regarding their failure to provide the audio recording. Ex. 7, p. 3. On December 7, 2009, DSHS' torts attorneys deflected blame for their discovery violations by stating that DSHS would provide this audio recording in response to Amber's long overdue Public Records Act requests:

> I have learned that the audio recording referred to at the bottom of page 7 of your November 9, 2009 letter has been located by DSHS. I understand DSHS will provide you with that recording and a transcript of that recording pursuant to the public records request. Ex. 7, p. 3. (emphasis supplied).

Two days later, on December 9, 2009, DSHS disclosed the audio recording and a written transcript of the recording. Ex. 4.

As discovery continued in the negligence lawsuit, additional evidence was discovered that was responsive to Amber's May 2008 Public Records Act request -- but had not been previously disclosed.

On March 4, 2010, DSHS' torts attorneys disclosed the "DSHS Foster/Adoption PRIDE Manual." Ex. 6, CP 283. The PRIDE manual

was used by DSHS to determine appropriate placement for Amber during its August 2004 child abuse investigation. RP 69 (8/31/2011). This issue was hotly contested in the negligence lawsuit, with DSHS contending it acted reasonably by placing Amber with her abusers' mother during the pendency of its 2004 investigation.

On March 16, 2010, DSHS again supplemented its discovery responses in the tort litigation. Ex. 5, CP 470. DSHS disclosed the "Child Sexual and Physical Abuse Protocols for Pierce County, Washington. (Revised 6/11/04)" CP 472-528; Ex. 5. These policies specifically govern the August 2004 child abuse investigation and DSHS' response to reports that Amber was physically and sexually abused in 2004. RP 66 (8/31/2011).

Katherine Kent is a former DSHS social worker who was retained as Amber's standard-of-care expert in her negligence lawsuit.[2] RP 49-50. (08/31/2011). Ms. Kent testified that the audio recording (wherein Amber disclosed her sexual abuse to DSHS), as well as the placement and investigation protocols, were all critical pieces of evidence in the torts litigation. RP 64-65; 69 (8/31/2011).

However, DSHS did not disclose this evidence until long after Amber's expert witnesses were required to disclose their written opinions.

[2]As discussed *infra*, Ms. Kent also served as Amber's expert witness in the Public Records lawsuit. RP 50.

RP 51 (8/31/2011).[3] In fact, the first time DSHS disclosed the existence of its "Child Sexual and Physical Abuse Protocols for Pierce County, Washington" was during its questioning of Ms. Kent at her deposition in March 2010. RP 67 (8/31/2011). These documents were not disclosed in response to Amber's public records requests, both of which were sent to DSHS long before the negligence lawsuit was ever filed.

D. Public Records Act Lawsuit

Because it was clear that DSHS had failed to disclose documents in response to Amber's public records requests, Amber filed a Public Records Act lawsuit on April 6, 2010 – less than one month after DSHS' long-overdue and tardy disclosure of its investigatory policies and PRIDE placement manuals. CP 1.

In September 2010, DSHS moved for summary judgment. Simultaneously, DSHS resisted Amber's efforts to conduct the written discovery necessary to respond to its motion. CP 129, nt. 4. At Amber's request, the trial court declined to consider DSHS' motion for summary judgment until DSHS answered written discovery. *Id.*

In early 2011, DSHS again moved for summary judgment. In support of its motion, DSHS submitted three declarations from employees

[3] Because Amber's civil claims were originally filed in federal court, all expert witnesses were required to memorialize their opinions in a written report.

involved in responding to Amber's Public Records Act requests. CP 7-37; 140-157; 158-164.

Despite relying upon these declarations in seeking dismissal of Amber's claims, DSHS refused to make these employees available for deposition prior to the summary judgment hearing. Consequently, Amber was required to file a motion seeking to continue the summary judgment hearing and directing DSHS to make its employees available for deposition.

On January 25, 2011, the trial court granted Amber's motion. CP 121-122. DSHS' summary judgment motion was, once again, continued and Amber was allowed to depose the individuals who provided testimony in support of DSHS' summary judgment motion. *Id.*

The deposition testimony from these DSHS' employees was devastating to DSHS. Kristal Wiitala, the highest ranking official at DSHS on Public Records Act matters, disagreed with DSHS' primary argument that all Children's Administration records are exempt from public disclosure:

> **Q:** Okay. So my question to you is: are all Children's Administration records exempt from public disclosure?
>
> **A:** No. CP 328.

Contemporaneously, DSHS filed a second motion for summary judgment seeking dismissal of Amber's claims based on the statute of limitations. CP 56-73. DSHS claimed that its response to Amber's two requests was complete by July 2008. CP 62-63. Therefore, DSHS argued that Amber's Complaint, filed in April 2010, did not comply with the one-year statute of limitations applicable to Public Records Act claims. *Id.*

Amber responded that DSHS continued to provide records in response to Amber's Public Records Requests into late 2009/early 2010. *See* Section III C, *supra*. Consequently, Amber's Complaint, filed in April 2010, was timely under RCW 42.56.550(6). CP 1, 190-192.

Additionally, DSHS both withheld and redacted information responsive to Amber's 2007 and 2008 records requests. CP 190-192. Even though it withheld records, DSHS failed to provide a privilege log explaining the basis for its decision to withhold or redact information -- meaning that the statute of limitations had not yet commenced. *Id.* In support of her arguments, Amber quoted from the testimony of DSHS' own employees:

Kristal Wiitala

Q: And no privilege log was ever provided to my client explaining each record that was not provided in response to 42.56, correct?

A: Not by me, no.

Q: And you're not aware of one, right?

A: No.

Q: I'm correct?

A: Yes, correct. Sorry. CP 330.

Barbara McPherson

Q: And you agreed with me earlier that information was redacted in response to my client's public records request, right?

A: Yes.

Q: And you agree that no privilege log was ever provided to my client, correct?

A: That's right. CP 313.

Because the statute of limitations had not commenced -- let alone expired -- and because there remained genuine issues of material fact regarding DSHS' claimed exemptions, the trial court denied DSHS' motions for summary judgment. CP 376-378.

Amber's Public Records Act claims went to trial on August 31, 2011. On September 1, 2011, the trial court entered Findings of Fact and Conclusions of Law reflecting that DSHS violated the Public Records Act. CP 795-797 (Appendix A).

IV. LEGAL ARGUMENT

A. Construing the Public Records Act

The Public Records Act is found at RCW 42.56. RCW 42.56.030 contains the Legislature's mandate regarding how the Act must be construed:

> 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.

The Public Records Act is of great importance. The Supreme Court of the State of Washington states that it:

> [I]s nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions . . . Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests.
>
> * * * * *
>
> A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or, perhaps both.

Progressive Animal Welfare Society v. The University of Washington, 125 Wn.2d 243, 251 (1994) (internal citations omitted).

Because the Public Records Act "is a strongly worded mandate for broad disclosure of public records" it must be construed liberally in favor of disclosure of records and its exemptions narrowly applied. *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 730-731 (2007).

B. Burden of Proof Under the Public Records Act

An agency may be found to have violated the Public Records Act in four distinct ways: (1) by improperly withholding records; (2) by unreasonably delaying the fulfillment of a record request; (3) by failing to provide a privilege log explaining the legal justification for the withholding or redaction of information; or (4) failing to conduct a reasonable search for responsive records. *See* RCW 42.56.550(1) & (2); *see also Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702 (2011); *Sanders v. State of Washington,* 169 Wn.2d 827 (2010); *Yousoufian v. King County*, 152 Wn.2d 421 (2004).

The Act imposes a positive duty upon state agencies to disclose public records unless the records fall within a specific statutory exemption. *See Hearst Corp., v. Hoppe*, 90 Wn.2d 123, 130 (1978). An agency bears the heavy burden of proving that its refusal to disclose public records is in accordance with a statute that exempts or prohibits disclosure. *See* RCW 42.56.550(1) & (2); *see also Dawson v. Daly,* 120 Wn. 2d 782, 789 (1993). *Rental Housing Ass'n of Puget Sound,* 165 Wn.2d 525 (2009).

The Public Records Act is strictly enforced:

> [S]trict enforcement of this provision discourages improper denial of access to public records. A showing of bad faith is not required nor does good faith reliance on an exemption exonerate an agency that mistakenly relies upon that exemption.

Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 101 (2005); *see also Zink v. City of Mesa*, 140 Wn. App. 328, 338 (2007) (Public Records Act requires strict compliance rather than substantial compliance on part of responding agency).

C. Amber's Lawsuit was Timely Filed

1. DSHS Produced Records Responsive to Amber's Requests as Late as December 2009

DSHS' initial assignment of error is that the trial court incorrectly denied summary judgment based upon the statute of limitations. The statute of limitations for Public Records Act lawsuits is governed by RCW 42.56.550(6):

> Actions under this section must be filed within one year of the agency's claim of exemption ***or the last production of a record on a partial or installment basis***. (Emphasis supplied).

As discussed above, DSHS continued to produce records responsive to Amber's March 2007 and May 2008 requests, as late as December 2009. Ex. 4. There is no question that the audio recording wherein Amber disclosed the nature and severity of her sexual victimization was a part of her DSHS file. Amber made her disclosure to

DSHS personnel and the recording was maintained with Amber's DSHS records. Ex. 7; RP 169 (8/31/2011). This record was responsive to each request made by Amber.

The attorneys representing DSHS made clear that the audio recording would be provided pursuant to Amber's public records requests:

> I have learned that the audio recording referred to at the bottom of page 7 of your November 9, 2009 letter has been located by DSHS. I understand DSHS will provide you with that recording and a transcript of that recording pursuant to the public records request. (Emphasis supplied).

Amber's Public Records Act lawsuit was filed less than five months after DSHS produced the audio recording "pursuant to the public records request."[4] Consequently, the trial court denied DSHS' motion for summary judgment because Amber complied with the one-year statute of limitations.

2. DSHS Has Never Provided a Privilege Log

A second basis for denying DSHS' motion for summary judgment regarding the statute of limitations is that no privilege log has ever been provided. Washington law recognizes that an agency's response to a public records request is not complete, and the statute of limitation does not commence, until the agency specifies each exemption claimed. *See*

[4] In fact, DSHS continued to produce records responsive to Amber's May 2008 request as late as March 2010. Exs. 5 and 6.

Rental Housing Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 541 (2009).

In particular, the Supreme Court mandated that a privilege log must be provided whenever records are withheld. The privilege log must:

> (1) adequately describe individually the withheld records by stating the type of record withheld, date, number of pages, and author/recipient or (2) explain which individual exemption applied to which individual record rather than generally asserting....exemptions as to all withheld documents.

See Rental Housing Ass'n, 165 Wn.2d at 539-540.

Supreme Court authority makes clear that this requirement applies when an agency withholds or redacts information from a Public Records Act request. *See Sanders v. State of Washington,* 169 Wn.2d 827, 846 (2010) (agency withholding ***or*** redacting any record must specify the exemption and give a brief explanation of how the exemption applies to the document). Failure to provide a privilege log is, by itself, a violation of the Public Records Act. *Id.* at 842.

Here, there is no dispute that DSHS withheld and redacted information from Amber's March 2007 and May 2008 Public Records Act requests. Diane Fuller was the DSHS employee who responded to Amber's March 2007 request. RP 88-89 (8/31/2011). Ms. Fuller's June 1, 2007 letter to Amber's attorney makes clear that information was

"removed or redacted." CP 156-157. At trial, Ms. Fuller reiterated that DSHS withheld and redacted information from the March 2007 request:

> **Q:** And what was the purpose of sending [Mr. Hick] this letter?
>
> **A:** It was to explain what had been withdrawn from the file, if there had been any redactions, to clarify what it was that was forwarded to him.
>
> **Q:** Were there any pages you did not give to Mr. Hick out of the file?
>
> **A:** Yes. RP 94-95 (8/31/2011).

Despite withholding and redacting information, DSHS did not provide Amber with the legal authority justifying its claimed exemptions:

> **Q:** Now, in your letter where you are describing records withheld from Amber's request, you would agree with me that you don't provide any sort of legal authority as to why you're withholding each individual record?
>
> **A:** That's correct.
>
> **Q:** You didn't provide Amber's attorney or Amber with what's called a privilege log in response to her request, correct?
>
> **A:** Correct. RP 101 (8/31/2011).

Kristal Wiitala and Barbara McPherson were the DSHS' employees responsible for responding to Amber's May 2008 request. RP 105-106; 148-149 (8/31/2011). Ms. Wiitala admitted that information was withheld and/or redacted from Amber's May 2008 request. RP 116 (8/31/2011). But, no privilege log was ever provided.

Ms. McPherson testified that all DSHS records, even those from Children's Administration, are public records. RP 161 (8/31/2011). However, Ms. McPherson claimed that all of the records that Amber requested in her May 2008 request were exempt from the Public Records Act. RP 162 (8/31/2011). Despite claiming an exemption for virtually all of its Children's Administration records responsive to Amber's May 2008 request, DSHS did not provide a privilege log, as required:

> **Q:** And did you provide a privilege log? I mean your exempting an entire portion of the DSHS file from the Public Records Act. Did you provide a privilege log in conjunction with your asserted exemptions?
>
> **A:** No, we did not. RP 167-168 (8/31/2011).

Regardless of whether one measures the statute of limitations in terms of the last production of records (December 2009), or by the production of a privilege log (never), Amber's Complaint was filed within the statute of limitations.

DSHS continued to provide records responsive to each of Amber's requests (March 2007 and May 2008) as late as December 9, 2009. Because Amber filed the lawsuit in April 2010, it was timely.

Moreover, DSHS has <u>never</u> provided a privilege log detailing the legal authority, or other required information, supporting its claimed

exemptions. Consequently, as recognized in *Rental Housing*, the statute of limitations has not ***commenced***, let alone expired.

D. DSHS Cannot Satisfy its Burden of Proof that the Audio Recording is Exempt from the Public Records Act

DSHS next claims that RCW 13.50 *et seq.* exempted the audio recording from the Public Records Act. Appellant's Brief, p. 26-32. DSHS argues that because it is a "juvenile justice or care agency" under RCW 13.50.010, ***all*** of the records of its sub-agency, the Children's Administration, are exempt from the Public Records Act. *Id.* at 32.

While DSHS relies upon the definition section of RCW 13.50.010 to establish that it is a "juvenile justice or care agency," it ignores the statute's definition regarding the "records" to which the law was intended to apply. RCW 13.50.010(c) lists the types of records subject to that statute's protections to be a circumscribed class of dependency documents typically maintained by the juvenile court system:

> "Records" means the official juvenile court file, the social file, and records of any other juvenile justice or care agency in the case.

The "official juvenile court" file is:

> [T]he legal file of the juvenile court containing the petition or information, motions, memorandums, briefs, findings of the court, and court orders.

RCW 13.50.010(b). The "social file" is "the juvenile court file containing the records and reports of the probation counselor." *See* RCW 13.50.010(d).

For the audio recording to be exempt from the Public Records Act, DSHS was required to prove that it falls within the class of "records" to which RCW 13.50 applies. At trial, DSHS offered ***no*** evidence that the audio recording was a "record" as defined in RCW 13.50.010. Likewise, DSHS' appellate brief is devoid of any citation to evidence demonstrating that the recording is a "record" as that term is defined in RCW 13.50.010, nor that the recording was used in a dependency case.[5]

The Public Records Act makes clear that an agency claiming that an otherwise "public record" is exempt from the Public Record Act bears the heavy burden of establishing the exemption's application to a particular record. RCW 42.56.550(1); *see also Rental Housing*, 165 Wn. 2d., at 535. DSHS' failure to carry its burden of proof that the audio recording is a "record" as defined in RCW 13.50 *et seq.*, is fatal to its claim of exemption.

[5] At trial, DSHS did not offer any evidence that the audio recording was kept in the "official juvenile court file" or the "social file" or any other evidence that the audio recording was utilized in a dependency proceeding. In fact, DSHS did not offer the audio recording itself. Certainly, DSHS had access to individuals and/or documentation capable of supporting its claimed exemption.

Considering the lack of evidence that the audio recording is a "record" defined in RCW 13.50.010, DSHS argues that ***all*** of its records are exempt pursuant to 13.50 because it is a "juvenile justice or care agency." DSHS seeks an exemption that would swallow the rule.

RCW 13.50.010(1)(a) defines the entities considered to be a "juvenile justice or care agency," as:

> (a) "Juvenile justice or care agency" means any of the following: Police, diversion units, court, prosecuting attorney, defense attorney, detention center, attorney general, the legislative children's oversight committee, the office of [the] family and children's ombudsman, the department of social and health services and its contracting agencies, schools; persons or public or private agencies having children committed to their custody; and any placement oversight committee created under RCW 72.05.415;

If DSHS' interpretation of RCW 13.50 is adopted, many public entities would be exempt from the Public Records Act, including: the courts, police departments, schools, prosecuting attorneys, the Washington State Attorney General's Office, prisons, foster parents and certain legislative committees.

Each of these entities is also defined as a "juvenile justice or care" agency under RCW 13.50.010. DSHS' approach would mean that all "juvenile justice or care agencies" would be exempt from compliance with the requirements of the Public Records Act.

DSHS' interpretation conflicts with RCW 42.56.030 which requires that exemptions must be "narrowly" tailored. Any exemption that would exclude many governmental agencies, including our state's largest (DSHS), from public transparency cannot be considered "narrow."[6]

Moreover, in recent years, the Supreme Court of the State of Washington has determined there is no blanket exemption for other "juvenile justice or care agencies." *See, e.g., Sanders v. State of Washington,* 169 Wn.2d 827 (2010) (Attorney General's office found in violation of the Public Records Act); *Sargent v. Seattle Police Dep't*, 167 Wn. App. 1 (2011) (Police records subject to the Public Records Act); *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196 (2007) (school district found to have violated Public Records Act); *Citizens v. Dep't of Corr.*, 117 Wn. App. 411 (Div. II, 2003) (Prisons subject to the Public Records Act and can be penalized for violations).

On appeal, DSHS' interpretation of RCW 13.50 *et seq.* is at odds with the testimony it presented at trial. Ms. Wiitala, the "highest official" at DSHS concerning public records matters, disagreed that all Children's Administration records are exempt from public disclosure:

[6] To the extent DSHS believes that there is a conflict between the Public Records Act requirement that its exemptions be construed narrowly, and any provision of RCW 13.50 *et seq.*, our legislature makes clear that the former prevails. *See* RCW 42.56.030.

Q: You would agree with me that not all Children's Administration records are exempt from public disclosure, correct?

A: Correct. RP 140 (8/31/2011).[7]

DSHS relies exclusively upon this Court's opinion in *Deer v. DSHS*, 122 Wn. App. 84 (2004), in support of its claim that all Children's Administration Records are exempt. However, the *Deer* decision is narrow -- holding only that RCW 13.50.100 exempts ***dependency*** records -- not every record of the Children's Administration:

> Deer requested the records that DSHS held for purposes of the ***dependency proceedings***. DSHS contends that the PDA does not apply to these records because chapter 13.50 RCW exempts ***juvenile dependency records*** from the PDA. The trial court agreed, as do we.

Deer, 122 Wn. App. at 90 (emphasis supplied).[8]

Deer does not support DSHS' claim that all Children's Administration records are exempt from the Public Records Act. Rather, *Deer's* holding is consistent with the definitional section of RCW 13.50.010(c) which limits its application to a circumscribed class of ***dependency records***. *See also, In Re the Matter of Dependency of T.L.G.*, 139 Wn. App. 1, 28 (Div. I, 2007) ("Chapter 13.50 RCW governs the

[7] And as noted above, DSHS' own attorneys in the negligence action recognized that Amber's audio recording would be provided pursuant to Amber's public records requests. Ex. 7.

[8] This Court used the term "dependency" at least 15 times in the *Deer* decision. Not once did this Court use the term "Children's Administration" or suggest that all of DSHS' records are exempt from the Public Records Act.

maintenance of and release of ***dependency records*** by juvenile justice and care agencies.") (emphasis supplied).

Further undercutting DSHS' argument, the Supreme Court of the State of Washington has already held that child abuse investigative records, like the audio recording withheld by DSHS until December 2009, are not exempt from the Public Records Act. In *Koenig v. City of Des Moines*, 158 Wn.2d 173 (2006), the Supreme Court was asked to decide whether the City of Des Moines Police Department could withhold records regarding the sexual abuse of a minor child. The City had refused to provide the requested records to the minor's father claiming the information was exempt from the Public Records Act and because the minor asked for non-disclosure. *Id.* at 178. Mr. Koenig sued, alleging violations of the Public Records Act. *Id.* at 179.

The trial court ordered that the record should be produced subject to redaction of the victim's name, address and relationship to the victim. *Id.* at 179. The trial court awarded Mr. Koenig his attorneys' fees but refused to award penalties for violations of the Public Records Act. *Id.* at 179. The Court of Appeals affirmed the trial court's decision to order the records released (though it held that the trial court erred in refusing to award statutory penalties allowed by the Public Records Act). *Id.* at 180.

However, the Court of Appeals ordered that the records be further redacted to remove "sexually explicit descriptive information." *Id.* at 180.

The Supreme Court agreed that identifying information of the child-victim (name, address and possibly relationship to the offender) could be redacted and that statutory penalties were mandated by the Act. *Id.* at 187. However, the Supreme Court reversed the Court of Appeal's determination that "sexually explicit descriptive information" could be redacted. The Supreme Court held that the public's right of access outweighs policy considerations regarding child abuse investigations and privacy concerns:

> The disclosure of public records remains our primary objective even when reconciling competing policy considerations expressed in the act. The fact a requester may potentially connect the details of a crime to a specific victim by referencing sources other than the requested documents does not render the public's interest in information regarding the operation of the criminal justice system illegitimate or unreasonable. To hold otherwise would eviscerate the act's policy of favoring openness and disclosure.
>
> Mr. Koenig's, and the public's, interest in examining the crime and the city's response is not significantly outweighed by the harm, if any, to the efficient administration of government. Therefore the details of the crime, including the sexually explicit information redacted by the Court of Appeals, are of legitimate concern to the public and must be disclosed.

Koenig, 158 Wn. 2d at 187.

The audio recording wherein Amber disclosed her abuse is governed by *Koenig*. The audio recording, produced in December 2009,

reflects that, in addition to DSHS' social workers, the Raymond Police Department was present when Amber disclosed her sexual abuse. Ex. 4, p. 2. Like DSHS, the Raymond Police Department is a "juvenile justice or care agency" under RCW 13.50.010.

As held in *Koenig,* statutory penalties would have been mandatory if the Raymond Police Department failed to provide the audio recording in response to a Public Records Act request. Consequently, the fact that DSHS is a "juvenile justice or care agency" does not mean that all of its records are exempt. The applicability of the Public Records Act does not turn on the identity of the agency possessing information. *Koenig* controls.

E. The PRIDE Manual and Pierce County Investigation Protocols were Responsive to Amber's May 2008 Request

DSHS next argues that it cannot be penalized for withholding the PRIDE Manual, or its 2004 child abuse investigation policies, because it claims that Amber did not request these records in either of her public records requests. Appellant's Brief, pp. 32-38.

DSHS is correct that Amber's March 2007 request did not ask for these two records. That is precisely why the trial court did not impose penalties for these two records relative to Amber's March 2007 request.[9]

[9] The liability portion of this public records trial was conducted on August 31 and September 1, 2011. The trial court conducted a penalty hearing on November 18, 2011.

During the penalty phase of the trial, Amber provided a chart reflecting the documents that were improperly withheld. CP 666 (Appendix B).

Appendix B shows that Amber sought penalties for DSHS' improper withholding of the audio recording from both her March 2007 and May 2008 requests. *Id.* However, for the PRIDE Manual and the investigatory protocols, Amber sought penalties for these two records solely in response to her May 2008 request. *Id.*

The penalties reflected on this chart ($287,800) were incorporated into the Court's Judgment Against DSHS. CP 800 (Appendix C).

In contrast to her March 2007 request, Amber's May 2008 request required DSHS to disclose "any document relating to the resolution of" the various reports that Amber was being physically and sexual abused. Ex. 2, pp. 2-5. There is no dispute that the PRIDE Manual and the "Child Sexual and Physical Abuse Protocols for Pierce County, Washington," (Revised 6/11/04), were both used by DSHS during its investigation into reports that Amber was being sexually and physically abused.

Amber offered expert testimony from Katherine Kent, a social worker formerly employed by DSHS for ten years as a Child Protective Services ("CPS") social worker. RP 43-45 (8/31/2011). Ms. Kent testified that the conduct of the social workers investigating the August

2004 reports of abuse was governed by the "Child Sexual and Physical Abuse Protocols for Pierce County, Washington:"

> This is what the social worker would have relied on in completing the investigation on Amber's claims and on Amber's case for the allegations of physical and sexual abuse. That's what they're required to follow in investigating those sorts of concerns.

RP 65 (8/31/2011).

Ms. Kent also testified that the PRIDE manual was relied upon to determine appropriate out-of-home placement for Amber during DSHS' 2004 CPS investigation. RP 69 (8/31/2011), Ex. 6. The only evidence in the record is that the PRIDE manual, like the Piece County investigation protocols, was utilized by DSHS in the "resolution" of its August 2004 investigation regarding Amber's physical and sexual abuse.

DSHS did not call a witness to counter Ms. Kent's testimony regarding the manner in which these two records were used during its August 2004 investigation.[10]

When a trial court hears live testimony and judges the credibility of witnesses, appellate courts should afford great deference to its determinations of fact. *See Org. to Pres. Agric. Lands v. Adams County*, 128 Wn.2d 869, 882 (1996). In an appeal concerning the Public Records Act, the appellate courts review a trial court's findings of fact based on the

[10] Certainly DSHS could have called its social workers involved in the August 2004 investigation to dispute the importance of these two records in their efforts to resolve the reports that Amber was the victim of physical and sexual abuse.

testimonial record to determine if there is substantial evidence to support them. *Zink v. City of Mesa*, 140 Wn. App. 328, 337 (2007). Under the substantial evidence test, an appellate court should overturn a trial court's factual findings only when it is clearly erroneous, *Schuh v. Department of Ecology*, 100 Wn.2d 180, 183 (1983), and the review court is "definitely and firmly convinced that a mistake has been made." *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202 (1994).

Here, the trial court considered the testimony of multiple witnesses and concluded that the "Child Sexual and Physical Abuse Protocols for Pierce County, Washington," and the PRIDE Manual, were both responsive to Amber's May 2008 request. CP 796.

F. The Trial Court Correctly Applied the Law in Awarding Penalties

DSHS claims that the trial court erred in awarding penalties for violations of the Public Records Act. Appellant's Brief, pp. 40-44. Specifically, DSHS argues that Amber failed to articulate the basis for her request for penalties and the trial court failed to apply the factors described in *Yousoufian v. King County*, 168 Wn.2d 444 (2010). Both claims are false.

Yousoufian announced an illustrative set of aggravating and mitigating guidelines that a trial court may utilize when determining the

amount of penalty to impose for violations of the Public Records Act. *Id.* at 466. Contrary to DSHS' claim that Amber provided "less than one page of argument" explaining the basis for her penalty request, Amber's attorneys analyzed the factors described by *Yousoufian*, as well as their application to this case. CP 575-582; 726-734.

Here, each of the "aggravating" factors described in *Yousoufian* is established:

- Amber's requests were clear and DSHS failed to seek clarification regarding any claimed confusion regarding the scope of the requests (CP 729);
- DSHS did not strictly comply with the law or its procedural requirements (CP 580, 729);
- DSHS unreasonably delayed nearly three years before fully responding to Amber's requests (CP 580, 729);
- Despite a two day trial, DSHS offered no evidence of training it provides its employees regarding the Public Records Act (CP 580, 729);
- DSHS was not helpful to Amber. In fact, DSHS persisted in refusing to provide a privilege log (CP 580, 729-730);
- A per-day penalty of $100 was necessary to deter DSHS from engaging in misconduct of this kind in the future (CP 580, 731-732); and

- DSHS' conduct caused harm to Amber and has the potential to harm the public as a whole. (CP 731).

At trial, Amber established, and the trial court found, that DSHS acted with "bad faith" in responding to her March 2007 and May 2008 requests. Bad faith is the principal factor to consider when awarding penalties. CP 579, 728.

Both parties briefed the *Yousoufian* factors. CP 575-582, 674-683, 726-734. The trial court's Findings of Fact and Conclusions of Law make clear that it "carefully considered" the parties' briefing when determining penalties:

> There was a bench trial on August 31 and September 1, 2011. Accordingly, this Court served as the trier of fact and is familiar with the evidence, the law, the circumstances of this case, and the dedication, skill and reputation of the attorneys. Before signing this order, the Court carefully considered the briefing of the parties, the law, and heard oral argument from counsel. Finally, this Court took an active role in determining the reasonableness of the award for attorneys' fees, costs and penalties imposed. CP 786.

In addition, during the penalty hearing, the trial court took an active role in questioning DSHS' attorneys about the *Yousoufian* factors. For example, during argument, DSHS attempted to persuade the trial court that DSHS has "a very strong public records training program." RP 17 (11/18/2011). The trial court disagreed:

> One witness that testified hardly had any training and had a very important responsibility in the records . . . And she

> said that what her training was it was minimal, that's what the testimony was, she didn't use the words minimal, I did. *Id.* at 17.

The trial court's finding mirrors the testimony of DSHS' witnesses. Diane Fuller, the DSHS employee responsible for Amber's March 2007 request, testified that she received scant training on the Public Records Act:

> **Q:** By the point in time that this [2007] records request came in you had less than half a day of training on the records request, right?
>
> **A:** [Less] than half a day.
>
> **Q:** You agree you have no expertise in the Public Records Act, right?
>
> **A:** I would agree with you. RP 100-101 (8/31/2011).

In addition, the trial court considered, but ultimately disagreed with, DSHS' argument that there was no evidence that Amber suffered the potential for economic harm as a result of its Public Records Act violations. RP 19 (11/18/2011). The trial court acknowledged that DSHS' conduct could have impacted Amber's torts lawsuit by causing her federal claims to be dismissed. *Id.*

The trial court's ruling at the conclusion of the penalty hearing makes clear that it both understood and correctly applied the law when assessing penalties:

> Regarding violations of the Public Records Act,[11] under the law, the authority that I have been provided, states that it is a two-step process and that the Court imposes a per day penalty for each day.
>
> *****
>
> I tried this case, what, two days? In that two days, it is this Court's decision and judgment that DSHS was egregious in its conduct and that requires $100 per day. Also, the law indicates that bad faith is a principal factor in this type of a case. In this Court's judgment this was an unbelievable obstruction of justice, subtle, but obstruction by DSHS which is contrary to what this Court believes that this country is all about. The obstruction is clear and insults the citizens of this country [for] a government entity to proceed as DSHS did in this matter. Open government and justice have been violated by the executive branch of our government. And a high penalty is necessary in the hopes of deterring future similar misconduct. RP 44-45 (11/18/2011).

The trial court's determination regarding the proper penalty to assess is reviewed under the abuse of discretion standard and will not be disturbed unless it is manifestly unreasonably. *Yousoufian*, 168 Wn 2d. at 458. A trial court's decision is 'manifestly unreasonable' only if 'the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take." *State v. Rohrich*, 149 Wn.2d 647, 654 (2003) (*quoting State v. Lewis*, 115 Wn.2d 294, 298-99 (1990)).

DSHS may disagree with the court's penalty assessment. However, that does not meet the high threshold required for a showing

[11] Throughout its briefing, DSHS attacks the trial judge for utilizing the term "discovery" rather than "disclosure." However, the trial judge applied the correct law and the correct legal standard at every stage of this litigation.

that the trial court abused its discretion. The trial court carefully considered the parties' arguments and correctly applied the law in determining the penalty. CP 798-801. The trial court's decision deserves deference and should not be disturbed.

Last, DSHS' claims that the trial court erred by imposing a "double penalty" for its failure to provide the audio recording in response to Amber's March 2007 and May 2008 requests. Appellant's Brief, p. 41-42. DSHS argues that it should only be penalized once for its failure to disclose the same audio recording in response to two separate Public Records Act requests, made through two different law firms, more than a year apart. DSHS provides no legal authority supporting its interpretation of RCW 42.56.550.

DSHS' argument ignores that the trial court's penalty calculation is mandated by Washington law. Daily penalties are mandatory once the trial court determines that the Public Records Act has been violated. *Neighborhood Alliance of Spokane County v. County of Spokane,* 172 Wn.2d 702 (2011). In addition, the Supreme Court has made it clear that the "right to inspect and copy the documents [is] improperly denied ***from the time of the request to the disclosure***. Penalties must be assessed accordingly." *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 102 (2005) (emphasis supplied).

The trial court concluded that the audio recording was improperly withheld from Amber's March 2007 and May 2008 requests. As recognized by *Spokane Research*, the trial court's finding of a violation of the Public Records Act obligated that it calculate the statutory penalties starting from the date of each request.[12]

DSHS twice had the opportunity to provide Amber with the records she requested. On both occasions, DSHS violated the law. The trial court's penalty decision was not an abuse of discretion.

G. The Trial Court Correctly Analyzed Amber's Attorneys' Fees Utilizing the Lodestar Method

DSHS next claims error by arguing that the trial court did not correctly apply the lodestar method in assessing attorneys' fees. Appellant's Brief pp. 45-49. DSHS also complains that the hours and rates of Amber's attorneys are excessive. *Id.*

The prevailing party in a Public Records Act lawsuit is entitled to attorneys' fees and costs. *See* RCW 42.56.550. Washington Courts have held that the lodestar method is appropriate for calculating attorneys' fees under the Public Records Act. *Sanders v. State*, 169 Wn.2d 827, 869 (2010) (*citing West v. Port of Olympia*, 146 Wn. App. 108, 123 (2008)).

[12] The fact that two separate offices of DSHS (South Bend and Olympia) both failed to identify the existence of the audio recording, let alone produce it, in response to two different requests, further supports the trial court's conclusion that DSHS acted with bad faith.

Under the lodestar method, a court determines whether counsel expended a reasonable number of hours in securing a successful recovery for the client, excludes duplicative or wasteful hours, and determines the reasonableness of counsel's hourly rate. *Mahler v. Szucs*, 135 Wn.2d 398, 433 (1998). A trial court's award of attorneys' fees and costs is reviewed under an abuse of discretion standard. *Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn. App. 110 (Div. II, 2010).

During the penalty hearing, Amber requested attorneys' fees of $173,000. CP 734-744. In support, Amber submitted declarations from counsel demonstrating hourly rates and a breakdown of the hours worked. CP 662 (Appendix D).

Amber submitted evidence showing that, since 2000, Mr. Moody and his colleagues have obtained verdicts and/or settlements in excess of fifty-four (54) million dollars against DSHS. Amber's attorneys also obtained a judgment of $525,001 in a prior Public Records Act case where DSHS improperly withheld Children's Administration records. CP 643, 646-648 (*Tamas v. DSHS*, King County Cause No. 08-2-02570-5, reported as the largest Public Records Act judgment ever awarded against a state agency. CP 643).

Amber's attorneys also showed what DSHS considers to be the fair market value when it hires private counsel in Public Records Act

litigation. In the *Tamas* litigation, referenced above, DSHS retained a private Seattle law firm to defend it. CP 634. DSHS agreed to pay up to $166 per hour for work performed by paralegals and $400 per hour for work performed by a partner – rates generally consistent with Amber's attorneys. CP 634.

In the *Tamas* litigation, DSHS hired private attorneys in late January 2008. CP 638. By early June 2008, DSHS had paid nearly $164,000 in attorneys' fees for little more than five months of work. CP 639. Despite these fees, judgment was entered against DSHS in the *Tamas* Public Records Act lawsuit in the amount of $525,001. CP 646-648.

In short, DSHS is willing to pay a private law firm $164,000 for representation it in a Public Records Act lawsuit -- in a losing cause. Unlike the private Seattle law firm hired by DSHS, Amber's attorney worked on this case for over a year, compared to five months, and obtained a favorable result.

In terms of hours, DSHS intransigence was the primary reason Amber's attorneys were obligated to spend the amount of time reflected. In December 2009, as soon as DSHS' misconduct was discovered, Amber's attorneys reached out in an attempt to resolve this dispute. CP

650-652. DSHS was reminded that if Amber was required to file a lawsuit, it would be obligated to pay Amber's attorneys' fees. *Id.*

DSHS ignored Amber and litigated aggressively. On multiple occasions, DSHS attempted to dismiss Amber's claims. While doing so, DSHS refused to respond to Amber's discovery or allow depositions of its employees, necessitating multiple motions. These time-wasting choices were made by DSHS.

The trial court received and reviewed Amber's attorneys' detailed billing showing the nature of the work performed.[13] CP 755-765. As the trial court's written findings reflect: (1) there were no duplicated efforts by Amber's attorneys; (2) there was a significant amount of time and labor required due to the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly; (3) Amber's attorneys' fees are customary and reasonable in the locality for similar legal services; (4) the results obtained were exceptional; (5) the nature and length of the professional relationship between Amber and her attorneys was significant and long-standing; (6) Amber's attorneys are experienced, have a particularly strong reputation for successfully prosecuting claims against DSHS, including the largest public records judgment against

[13] Despite DSHS' protestations to the contrary, it is up to the trial court, not DSHS, to review a claimant's request for attorneys' fees. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581 (1983).

DSHS in state history; and (7) the fee was contingent in nature, making this an all-or-nothing proposition for Amber's attorneys. CP 786-787.

DSHS disagrees with the trial court's award of attorneys' fees. However, it cannot establish that the trial court abused its discretion. The trial court correctly and thoroughly reviewed Amber's attorneys' fees utilizing the lodestar analysis. CP 787.

H. The Trial Court Followed the Law When It Awarded A Lodestar Multiplier

DSHS argues that the trial court abused its discretion when it awarded a lodestar multiplier of 2x. Appellant's Brief, pp. 49. The only legal authority cited by DSHS, *Sanders v. State of Washington*, held that a trial court is not required to award a multiplier in a Public Records case. Appellant's Brief, p. 49.

DSHS twists the *Sanders* opinion to mean the trial court was prohibited from awarding a multiplier. In fact, *Sanders* recognizes that a trial court has discretion to award a multiplier, particularly in cases that are taken on a contingency basis. *Sanders*,169 Wn. 2d at 869.

Here, Amber's attorneys litigated on a contingency. CP 787. The trial court found that a multiplier was warranted considering the reputation and skill of Amber's attorneys, the exceptional result achieved and the obstacles overcome during the litigation. CP 787.

In *Bowers v. Transamerica Title Ins. Co.*, the Supreme Court of the State of Washington held that a lodestar multiplier may be warranted considering the contingent nature of success and the quality of the work performed. *Id.* at 598.

DSHS cannot show that the trial court abused its discretion. The trial court determined that a lodestar multiplier was warranted. The results were contingent in nature and the trial court recognized the high quality of legal work performed on Amber's behalf.

In a footnote, DSHS argues that Amber's costs were also impermissible. Appellant's Brief, p. 47, nt. 40. The sole basis for DSHS' claimed error is that it does not believe Katherine Kent qualifies as an expert witness.

DSHS filed motions *in limine*, including one seeking to exclude Ms. Kent from testifying at trial. CP 427-428. The trial court denied DSHS' motion. RP 5-6 (8/31/2011). Thereafter, Ms. Kent was allowed to provide expert testimony regarding the Public Records Act. Consequently, the trial court did not err in awarding litigation costs.

V. REQUEST FOR ATTORNEYS' FEES ON APPEAL

Pursuant to RAP 18.1, Amber requests an award of attorneys' fees on appeal. The party prevailing on a Public Records Act claim is entitled to an award of attorneys' fees. *See* RCW 42.56.550(4). Likewise, the

Public Records Act allows a party prevailing on appeal to receive fees incurred during the appeal. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251 (1994).

VI. CONCLUSION

DSHS flagrantly violated the Public Records Act. In the words of the trial court, "there was an ***unbelievable obstruction of justice***" by DSHS which is "contrary to what this country is all about . . . ***[t]he obstruction is clear*** and it insults the citizens of this country for a governmental entity to proceed as DSHS proceeded in this matter." RP 57 (9/1/2011).

In a Public Records case, the trial court is afforded broad discretion to weigh the evidence, the credibility of the witnesses and the reasonableness of attorneys' fees and costs. Here, the record is robust and supports the findings of fact, conclusions of law and the judgment.

DSHS cannot meet the heavy burden of establishing that the trial court abused its discretion. Compounding the difficulties for DSHS is the fact that, in a Public Records lawsuit, the burden is on DSHS (not the plaintiff) to demonstrate strict compliance with the law.

At trial, DSHS failed to offer ***any*** evidence that the records withheld are, in fact, exempt from disclosure. Simply stating that records

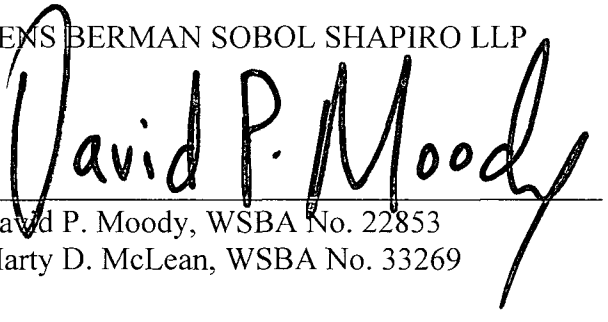
are exempt does not make them so. And, fatally, DSHS never provided a privilege log as required by law.

For more than 3 years, DSHS played a game of blind man's bluff – withholding responsive records, but not disclosing why the records (or how many) were being withheld.

The judgment should be affirmed.

RESPECTFULLY SUBMITTED this 25th day of June, 2012.

HAGENS BERMAN SOBOL SHAPIRO LLP

By 
David P. Moody, WSBA No. 22853
Marty D. McLean, WSBA No. 33269

CERTIFICATE OF SERVICE

I, Nicolle Grueneich, declare under penalty of perjury of the state of Washington that the following is true and correct:

I am a citizen of the United States, over the age of 18 years, and otherwise competent to testify. I am an employee of Hagens Berman Sobol Shapiro LLP and my business address is 1918 8th Ave., Suite 3300, Seattle, Washington 98101.

On June 26, 2012, I caused RESPONDENT'S ANSWERING BRIEF to be filed with the Clerk of the Court, Washington State Court of Appeals, Division II.

On June 26, 2012, I caused a true and correct copy of RESPONDENT'S ANSERING BRIEF to be served on the following parties in the manner indicated:

VIA HAND DELIVERY

John D. Clark
Assistant Attorney General
7141 Cleanwater Drive SW
PO Box 40124
Olympia, WA 98504-0124

Dated this 26th day of June 2012 at Seattle, Washington.

Nicolle Grueneich

Nicolle Grueneich

APPENDIX A

Honorable Frederick Fleming

SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

AMBER WRIGHT,

Plaintiff,

v.

STATE OF WASHINGTON, DSHS,

Defendant.

No. 10-2-08114-9

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court on Plaintiff's Complaint for Violations of the Public Records Act. The Court having considered the evidence presented by the parties hereby enters the following:

FINDINGS OF FACT

1. Plaintiff made her first Public Records Act request on March 26, 2007;

2. Plaintiff made her second Public Records Act request on May 20, 2008;

3. On November 14, 2008, Defendant DSHS informed plaintiff that its response to her Public Records Act request(s) was complete;

4. On December 11, 2009, Defendant DSHS produced an audio recording and a transcription of an interview wherein plaintiff disclosed that she was physically and sexually abused. These materials were response to plaintiff's Public Records Act requests;

5. On March 4, 2010, Defendant DSHS produced a DSHS foster care/adoption manual. These records were responsive to plaintiff's Public Records Act requests;

6. On March 16, 2010, Defendant DSHS produced the Child Physical and Sexual Abuse Investigation Protocols for Pierce County, Washington. These records were responsive to plaintiff's Public Records Act requests; and

7. Despite withholding records from plaintiff's Public Records Act requests, Defendant DSHS failed to provide a privilege log.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties;

2. Venue is proper with this Court;

3. Defendant DSHS violated the Public Records Act by withholding the audio recording and a transcription of an interview wherein plaintiff disclosed that she was physically and sexually abused until December 11, 2009;

4. Defendant DSHS violated the Public Records Act by withholding the DSHS foster care/adoption manual until March 4, 2010;

5. Defendant DSHS violated the Public Records Act by withholding Child Physical and Sexual Abuse Investigation Protocols for Pierce County, Washington, until March 16, 2010;

6. Defendant DSHS violated the Public Records Act by failing to provide a privilege log identifying each record withheld from plaintiff's Public Records Act requests;

7. Pursuant to RCW 42.56.550(4), ~~plaintiff is entitled to a statutory penalty for each day each of the above-described records was withheld from her Public Records Act requests; and~~ the penalties will be determined at a subsequent hearing; and

8. Pursuant to RCW 42.56.550(4), plaintiff is entitled to cost and attorneys' fees necessary for bringing this action.

ORDER

1. No later than September 30, 2011, the parties are ordered to meet and confer to attempt to negotiate the amount of penalties to be assessed and the amount of attorneys' fees and costs to which plaintiff is entitled to receive.

2. If the parties are not able to reach an agreement regarding the amount of penalties, costs and attorneys' fees, the Court will determine the amount of statutory penalties, attorneys' fees and costs as a part of its ~~regular~~ 2nd day motion calendar.

3. If the motion is filed, the parties shall work together to propose a form of judgment that has been agreed upon in as many areas as possible.

SIGNED IN OPEN COURT this 1st day of ~~August~~ September, 2011.

THE HONORABLE FREDERICK FLEMING

Presented By:

HAGENS BERMAN SOBOL SHAPIRO LLP
Attorneys for Plaintiff

David P. Moody, WSBA #22853
Martin D. McLean, WSBA #33269
Carter W. Hick, WSBA #36721

Approved as to form:

OFFICE OF THE ATTORNEY GENERAL
Attorneys for Defendant DSHS

By _____
John Clark, WSBA #28537
Assistant Attorney General

APPENDIX B

PENALTIES

Document Description	Date Disclosed	Number of Documents Disclosed	Days Withheld from Plaintiff	Penalty	Total
Audio Recording and Transcript	12/11/2009	2	**03/26/2007 request** (x) 990	(x) $100	$ 99,000
Audio Recording and Transcript	12/11/2009	2	**05/20/2008 request** (x) 570	(x) $100	$ 57,000
Pride Manual Foster Care Materials	03/04/2010	1	**05/20/2008 request** (x) 653	(x) $100	$ 65,300
Child Abuse Investigatory Protocols for Pierce County	03/16/ 2010	1	**05/20/2008 request** (x) 665	(x) $100	$ 66,500
					$ 287,800

APPENDIX C

SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

AMBER WRIGHT,

Plaintiff,

v.

STATE OF WASHINGTON, DSHS

Defendant.

No. 10-2-08114-9

~~[PROPOSED]~~
JUDGMENT AGAINST DSHS

With Findings of Fact & Conclusions of Law

****

CLERK'S ACTION REQUIRED

JUDGMENT SUMMARY (RCW 4.64.030)

1.	**Judgment Creditor:**	**Amber Wright**
2.	**Judgment Creditors Attorneys:**	**David P. Moody** **Marty McLean** **Carter W. Hick**
3.	**Judgment Debtor:**	State of Washington, DSHS
4.	**Total Judgment Amount:**	$649,896.87
5.	**Pre-judgment Interest:**	$0
6.	**Post-judgment Interest:**	$0
7.	**Taxable Costs and Attorneys' fees:**	Included in Total Judgment Amount
		Total: $649,896.87

HAGENS BERMAN
1918 Eighth Avenue, Suite 3300 • Seattle, WA 98101
(206) 623-7292 • FAX (206) 623-0594

Active Role Taken By Court

There was a bench trial on August 31 and September 1, 2011. Accordingly, this Court served as the trier of fact and is familiar with the evidence, the law, the circumstances of this case, and the dedication, skill and reputation of the attorneys. Before signing this order, the Court carefully considered the briefing of the parties, the law, and heard oral argument from counsel. Finally, this Court took an active role in determining the reasonableness of the award for attorneys' fees, costs and penalties imposed.

Findings of Fact

The Court finds that there was an obstruction of justice, that the obstruction is clear, and that it insults the citizens for a government entity to proceed as DSHS proceeded in this matter, and therefore the Court finds that **penalties** of $100/day are appropriate.

The penalties equal $287,800.00.

The Court finds that **plaintiff's attorneys' fees** are reasonable and necessary because:

i. There were no duplicated efforts;

ii. There was a significant amount of time and labor required due to the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;

iii. The attorneys' fees charged are customary and reasonable in the locality for similar legal services;

iv. The results obtained are exceptional;

v. The nature and length of the professional relationship between plaintiff and her attorneys was significant and long-standing;

HAGENS BERMAN
1918 EIGHTH AVENUE, SUITE 3300 • SEATTLE, WA 98101
(206) 623-7292 • FAX (206) 623-0594

vi. Plaintiff's attorneys are experienced, have a particularly strong reputation for successfully prosecuting claims against DSHS, including the largest public records settlement against DSHS in state history; and

vii. The fee was contingent in nature, making this an all-or-nothing proposition for plaintiff's attorneys.

The Court further finds that a **loadstar multiplier** of 2x is warranted given the reputation and skill of plaintiff's attorneys, the contingent nature of this litigation, the result obtained for plaintiff, and the obstacles surmounted due to DSHS' obstruction in obtaining these public records.

Attorneys' fees, including a multiplier of 2x, equal $346,000.00.

The Court finds that **plaintiff's litigation costs** are reasonable and necessary.

The costs equal $16,096.87.

Conclusions of Law

1. Judgment shall be taken against Defendant State of Washington, DSHS, in the total amount of $649,896.87, which breaks down as follows;

   a. $287,800.00 for statutory penalties;

   b. $346,000.00 for attorneys' fees;

   c. $16,096.87 for litigation costs.

2. The total judgment of $649,896.87 shall be deposited by Defendant State of Washington, DSHS, into the Registry of the Pierce County Superior Court no later than five business days after the date of entry and filing of this judgment;

3. Upon presentation of identification, the Pierce County Superior Court Clerk is directed to release the funds to plaintiff's counsel, David P. Moody of Hagens Berman Sobol Shapiro, LLP ("David P. Moody, Attorney, in trust for Amber Wright"); and

HAGENS BERMAN
1918 Eighth Avenue, Suite 3300 · Seattle, WA 98101
(206) 623-7292 · FAX (206) 623-0594

4. Upon receipt of $649,896.87, the Court Clerk shall enter satisfaction of the judgment against Defendant State of Washington, DSHS.

Ordered this 18th day of November, 2011.

The Honorable Frederick Fleming

Presented by:

HAGENS BERMAN SOBOL SHAPIRO LLP
Attorneys for Plaintiff

By _____
David P. Moody, WSBA No. 22853
Martin D. McLean, WSBA No. 33269

FILED
DEPT 7
IN OPEN COURT
NOV 18 2011
Pierce County Clerk
By _____ DEPUTY

CONNOLLY TACON & MESERVE
Co-Counsel for Plaintiff

By: _____
Carter W. Hick, WSBA No. 36721

Agreed as to Form

John D. Clark, AAG
WSBA 28537
Office of the Attorney General, Attorneys for DSHS

HAGENS BERMAN
1918 EIGHTH AVENUE, SUITE 3300 • SEATTLE, WA 98101
(206) 623-7292 • FAX (206) 623-0594

APPENDIX D

ATTORNEYS' FEES

Attorney (or Paralegal)	Hourly Rate	# of Hours	Total
Moody	$500	169.6	$84,800.00
Stout	$400	8.5	$3,400.00
McLean	$375	165.5	$62,062.50
Hick[1]	$250	35.0	$8,750.00
Gibson (Paralegal)	$150	48.25	7,237.50
			$166,250

003032-13 473069 V1

[1] Co-counsel, Carter Hick, is not a member of Mr. Moody's law firm (Hagens Berman Sobol Shapiro). Mr. Hick has submitted a declaration which outlines the hours he spent on this lawsuit.