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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

NO. 44480-1-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

JOHN ANDREWS
Appellant

v.

WASHINGTON STATE PATROL
Appellee

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities.....2

Assignment of Error.....3

Statement of the Case.....3

Argument.....4

 Prompt Response.....5

 Denial of Public Records Request.....6

 Penalty.....6

Conclusion.....9

TABLE OF AUTHORITIES

Caselaw

Am. Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503.....6
Double H, L.P. v. Washington Dept. of Ecology.....7
Progressive Animal Welfare Soc. v. University of Wash. (PAWS II).....4
Soter v. Cowles Publ'g Co......4
Violante v. King County Fire Dist. No. 20.....5
Yousoufian v. Office of Ron Sims.....7

Statutes

RCW 42.17.010.....4
RCW 42.56.070.....4
RCW 42.56.100.....5
RCW 42.56.520.....5
RCW 42.56.550.....7

I. ASSIGNMENTS OF ERROR

Washington State Patrol violated the Public Records Act when it failed to produce documents by two continued deadlines, and failed to respond to John Andrews' inquiries upon the missed deadlines.

II. STATEMENT OF THE CASE

On March 8, 2012, John Andrews submitted a written Public Records Act (PRA) request to Washington State Patrol (WSP). RP 3. On March 15, 2012, Mr. Andrews received a letter via e-mail from Gretchen Dolan with the Risk Management Division of the WSP. *Id.* Ms. Dolan estimated 20 days to produce the requested documents. *Id.* The documents would have been due on April 4, 2012. *Id.* WSP did not produce the documents by April 4, 2012. *Id.*

Mr. Andrews did not hear from WSP until April 11, 2012. RP 3. Ms. Dolan estimated that an additional 20 days was required to respond. *Id.* The records would have been due on May 1, 2012. *Id.* WSP did not provide the records by May 1, 2012 either. *Id.* There was no further communication from Ms. Dolan or anyone at WSP. *Id.*

Mr. Andrews made several attempts to contact Ms. Dolan to inquire about the delay. RP 3. Ms. Dolan did not return any of Mr. Andrew's messages. *Id.* Mr. Andrews thus filed suit for WSP's violation of the PRA. *Id.*

Even after filing suit, WSP did not promptly produce the records. RP 4. Instead, it requested another 20-day extension. *Id.* WSP finally mailed responsive documents to Mr. Andrews on May 25, 2012, only after suit was filed. *Id.*

On February 8, 2013, the court granted WSP's motion for summary judgment, and dismissed Mr. Andrews' PRA action with prejudice. RP 6. The court held that WSP's time extensions were reasonable, as well as the total amount of time in which WSP produced the records. RP 5. Mr. Andrews' appeal timely followed.

III. ARGUMENT

In the interest of transparency in the administration of government, the PRA "is a strongly worded mandate for broad disclosure of public records." *Progressive Animal Welfare Soc. v. University of Wash. (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (internal quotation makes omitted); RCW 42.17.010. To this end, the disclosure requirements of the PRA are broadly construed, and the exemption requirements are narrowly construed. *Id.* at 251; RCW 42.17.010(11). Unless the record falls within a certain exemption of the PRA, or other statute that prohibits disclosure of particular records, the record must be produced. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 730, 174 P.3d 60 (2007); RCW 42.56.070(1). "Courts are to take into account the [PRA]'s policy that free and open examination of public records is

in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” *PAWS II*, 125 Wn.2d at 251 (internal quotation marks omitted).

a) Prompt Response

Agencies must provide “the fullest assistance to inquirers and the most timely possible action on requests for information.” RCW 42.56.100. Under RCW 42.56.520, within five business days of receiving a public record request, the agency must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested; (3) acknowledging that the agency has received the request and providing a reasonable estimate of the time the agency will require to respond to the request; or (4) denying the public record request. *Id.*

If the agency responds by providing an estimate of time, the estimate must be reasonable and the agency should consider itself bound by its estimate. RCW 42.56.520; *Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 570–71, 59 P.3d 109 (2002).

It is correct that WSP responded within 5 days of the request. It is also correct that WSP is entitled to make time extensions for production of documents. Whether the time extensions were reasonable is secondary here. The primary issue is much simpler—WSP did not respond by the deadlines

that it established, and ignored Mr. Andrews' phone calls regarding the passing of the second deadline with no response or documents.

The PRA does not allow an agency to string the requester along with repeated time extensions, missed deadlines, and lack of communication. This frustrates the purpose of the PRA—to provide the fullest assistance to requestors for an open and transparent government. WSP did not provide the fullest assistance to Mr. Andrews.

b) Denial of Public Records Request

An agency does not have to explicitly deny production of records. “For practical purposes, the law treats a failure to properly respond as a denial.” *Soter*, 162 Wn.2d at 750. The agency effectively denies access to the records by failing to provide records promptly, providing non-responsive records, or failing to provide the fullest assistance. *See Am. Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503*, 86 Wn. App. 688, 695, 937 P.2d 1176 (1997).

Defendant's effectively denied Plaintiff's request for records when it failed to respond by the deadlines on multiple occasions. An agency's wrongful denial of public records entitles the requester to an award of penalties.

c) Penalty

“Any person who prevails against an agency in any action in

the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.” RCW 42.56.550(4).

The court may also award a penalty for each day that the requestor was denied the right to inspect or copy a public record. *Id.* “The penalty period is thus strictly defined by the number of days a person has been denied a record after it should have been produced.” *Double H, L.P. v. Washington Dept. of Ecology*, 166 Wn.App. 707, 713, 271 P.3d 322 (2012). Determining a PRA penalty involves two steps: “(1) determine the amount of days the party was denied access and (2) determine the appropriate per day penalty between \$5 and \$100 depending on the agency's actions.” *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459, 229 P.3d 735 (2010). The law on the penalty amount was recently changed—the penalty is not to exceed one hundred dollars for each day that the requester was denied the right to inspect or copy the public record. RCW 42.56.550(4).

Aggravating factors that may increase the penalty are

(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 467-68. Mitigating factors that may decrease the penalty are

(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. “[These] factors may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate considerations. Additionally, no one factor should control. These factors should not infringe upon the considerable discretion of trial courts to determine PRA penalties.” *Id.* at 468.


Realistically, this is not a case of high daily penalties. However, this does not mean that the court cannot or should not find that the agency violated the PRA. The statute permits the court to find a violation of the PRA, and award penalties from \$0 to \$100 per day. Because WSP should have responded to Mr. Andrews by its set deadlines (even if the response was to

estimate an extension), its penalties should be assessed at the number of days between the deadline and WSP's next time estimate. This equals 11 days (from April 4th to April 11th, and May 1st to May 5th). The court should find that WSP violated the PRA, and award minimal penalties for 11 days. If the court finds that WSP violated the PRA, it must also order WSP to pay for the reasonable costs Mr. Andrews incurred in association with initiating legal action for WSP's violation of the PRA.

IV. CONCLUSION

Based on WSP's conduct, Mr. Andrews had no reason to believe that WSP would comply with the records request. WSP missed each of the deadlines it established prior to this action. It ignored Mr. Andrew's inquiries regarding the delay. It was only after filing this action were responsive records produced. WSP's actions have been far from providing the fullest assistance.

DATED this 5th day of August, 2013.



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STATE OF WASHINGTON
BY _____
DEPUTY

WASHINGTON STATE COURT OF APPEALS
DIVISION II

In re:

WASHINGTON STATE PATROL,

NO. 44480-1-II

Petitioner/Respondent,

vs.

DECLARATION OF SERVICE

JOHN ANDREWS,

Respondent/Appellant

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

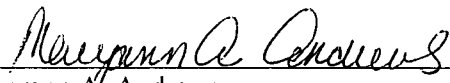
I am Maryann A. Andrews, Legal Assistant to the Plaintiff, in the above-referenced matter declare that on August 5, 2013, I delivered a copy(ies) of the following document:

- Brief of Appellant

To the following parties:

<p>Name: Shelley Anne Williams Assistant Attorney General</p>	<p>VIA: U.S. Mail: 800 Fifth Avenue Suite 2000 Tb-14 Seattle, WA 98104-3188 E-mail: shelleywl@atg.wa.gov</p>
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Signed in Bremerton, Washington this 5th day of August, 2013.



Maryann A. Andrews

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