

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

CITY OF LAKEWOOD, *Respondent,*

v.

DAVID KOENIG
Appellant,

BRIEF OF APPELLANT

WILLIAM JOHN CRITTENDEN
Attorney for Appellant

William John Crittenden
Attorney at Law
927 N. Northlake Way, Ste 301
Seattle, Washington 98103
(206) 361-5972
wjcrittenden@comcast.net

CO MAY -6 11 09 AM
STATE OF WASHINGTON
BY 
COURT OF APPEALS
DIVISION II

PM5-4-07

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR.....	2
III.	STATEMENT OF THE CASE.....	2
	A. Facts and Procedural History	2
	B. Trial Court Ruling.....	9
	C. Discretionary Review and Stay Granted.....	10
IV.	STANDARD OF REVIEW	11
V.	ARGUMENT	11
	A. The PRA does not authorize an agency to submit discovery requests to a records requester.	11
	1. Agencies may not consider the identity of a requester or the purpose of a request..	12
	2. A requester’s economic loss, or lack thereof, is not a proper factor for penalties under RCW 42.56.550(4).....	14
	B. In the alternative, the City’s discovery requests are not reasonably calculated to lead to the discovery of admissible evidence.	18
	C. In the alternative, discovery relating to penalties should not be permitted until after an agency has been found liable for penalties under RCW 42.56.550(4).....	24
	D. Koenig is entitled to attorney’s fees for this appeal.	26
VI.	CONCLUSION	27

TABLE OF AUTHORITIES

CASES

<i>ACLU v. Blaine</i> , 86 Wn. App. 688, 937 P.2d 1176 (1997).....	15
<i>Amren v. City of Kalama</i> , 131 Wn.2d 25, 929 P.2d 389 (1997).....	14-15
<i>City of Everett v. Van Dyke</i> , 18 Wn. App. 704, 571 P.2d 952 (1977).....	5
<i>ETCO Inc. v. Dept. Labor & Industries</i> , 66 Wn. App. 302, 831 P.2d 1133 (1992).....	17-18
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978)	11
<i>Kaech v. Lewis County PUD No. 1</i> , 106 Wn. App. 260, 23 P.3d 529 (2001).....	17
<i>King County v. Sheehan</i> , 114 Wn. App. 325, 57 P.3d 307 (2002).	13, 15
<i>Lindblad v. Boeing Co.</i> , 108 Wn. App. 198, 31 P.3d 1 (2001).....	11, 23
<i>Livingston v. Cedeno</i> , 164 Wn.2d 46, 186 P.3d 1055 (2008).....	7, 13, 16, 24
<i>Progressive Animal Welfare Soc’y v. UW (PAWS I)</i> , 114 Wn.2d 677, 790 P.2d 604 (1990).....	27
<i>Progressive Animal Welfare Society v. UW (PAWS II)</i> , 125 Wn.2d 243, 884 P.2d 592 (1995).....	11
<i>Rhinehart v. The Seattle Times</i> , 98 Wn.2d 226, 654 P.2d 673, 676 (1982), <i>aff’d</i> 467 U.S. 20 (1984).	19
<i>Soter v. Cowles Pub’g Co.</i> , 162 Wn.2d 716, 174 P.3d 60 (2007).....	4, 5, 11, 12, 27
<i>Spokane Research v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005).....	27
<i>State ex rel. Bronson v. Superior Court</i> , 194 Wash. 339, 77 P.2d 997 (1938).....	18
<i>Yacobellis v. Bellingham</i> , 64 Wn. App. 295, 825 P.2d 324 (1992).....	14

<i>Yousoufian v. Sims (Yousoufian II)</i> , 152 Wn.2d 421, 98 P.3d 463 (2004).....	15, 22
<i>Yousoufian v. Sims (Yousoufian III)</i> , 137 Wn. App. 69, 151 P.3d 243 (2007).....	15
<i>Yousoufian v. Sims (Yousoufian IV)</i> , 165 Wn.2d 439, 200 P.3d 232 (2009).....	15-16, 17-18, 22

STATUTES

RCW 42.56.080	13, 14, 16
RCW 42.56.540	4, 12
RCW 42.56.550(1).....	3
RCW 42.56.550(3).....	11
RCW 42.56.550(4).....	2, 4, 6, 12, 14, 18, 20, 24, 25, 26-27

COURT RULES

CR 26	2, 5, 6, 8, 9, 18, 19
RAP 2.3.....	10
RAP 18.1.....	26

I. INTRODUCTION

This case arises out of appellant David Koenig's requests for public records from the respondent City of Lakewood ("City") pursuant to the Public Records Act, Chapter 42.56 RCW ("PRA"). The City claims to have brought this action for declaratory relief to obtain a "prompt" determination of whether the City has complied with the PRA. CP 7. The only substantive issue in this case is the legal question of whether the City properly redacted driver's license numbers under the PRA. But the City has waited more than an entire year without asking the trial court to rule on the merits of its case.

The City's real goal in this litigation is to establish its right to bludgeon records requesters with useless, burdensome discovery requests that have nothing to do with PRA compliance. The first action taken by the City in this case was to submit useless, burdensome discovery requests to Koenig. CP 102-111. It is *undisputed* that these discovery requests are not relevant to the question whether the City has violated the PRA. *Ruling Granting Review* at 3.

The City's discovery requests are incompatible with the PRA, and are not reasonably calculated to lead to the discovery of admissible evidence. The trial court's decision to allow such discovery was clearly an abuse of discretion. This Court must not allow discovery to become a

pretext or weapon by which agencies might seek to deter requests for public records under the PRA. The Court should reverse the trial court's discovery order, and stop the City's misuse of discovery in PRA cases.

II. ASSIGNMENTS OF ERROR

Assignment of Error. The trial court erred in issuing the *Order Compelling Discovery* dated December 5, 2008. CP 176-177.

Issues Pertaining to Assignment of Error:

A. Whether an agency is barred from submitting discovery requests to a requester under the Public Records Act, Chapter 42.56 RCW.

B. In the alternative, whether the City's discovery requests fail to meet even the minimal requirement in CR 26(b)(1) that discovery must be "reasonably calculated to lead to the discovery of admissible evidence."

C. In the alternative, whether discovery relating to penalties should be prohibited until after an agency has been found liable for penalties under RCW 42.56.550(4).

III. STATEMENT OF THE CASE

A. Facts and Procedural History

In October 2007, Koenig requested various investigative records from the City. CP 10-14. When the City produced the records on

November 30, 2007, it redacted various information including, but not limited to, driver's license numbers. CP 99-100.

The City immediately threatened to take legal action against Koenig unless he notified the City in writing that the City's responses were satisfactory. CP 101. Given the City's history of making erroneous exemption claims, CP 60-74, there was no reason for Koenig to "acknowledge" that the City's numerous exemption claims were correct. The City's demand flew in the face of the PRA, which expressly places "the burden of proof ... **on the agency** to establish that refusal to permit public inspection and copying is in accordance" with relevant statutory exemptions. RCW 42.56.550(1) (emphasis added); RCW 42.56.210(3).

The City filed this action against Koenig in March of 2008, and filed an amended complaint on April 22, 2008. CP 4-8. The City asserts that this case was brought because Koenig failed to acknowledge that the City had complied with his October 2007 requests. CP 19-20. But nothing in the PRA allows an agency to demand that a requester acknowledge that the agency's response to a request complies with the PRA. On the contrary, the PRA clearly requires an agency to determine which exemptions are applicable and to explain why such exemptions are applicable. RCW 42.56.210(3).

Furthermore, it was not clear until December 27, 2007, that an agency even had the right to seek declaratory relief under the PRA. On that date, the Supreme Court held that an agency may bring an action under RCW 42.56.540 to “seek a determination from the superior court as to whether an exemption applies.” *Soter v. Cowles Pub ’g Co.*, 162 Wn.2d 716, 752, 174 P.3d 60 (2007).

On May 13, 2008, the City served Koenig with interrogatories and requests for production. These discovery requests related to Koenig’s residential address for the past ten years, date and place of birth, marital status, education, employment history, criminal history, and litigation history. CP 102-111.

The City argues that Koenig’s other PRA litigation is somehow relevant to the question of penalties under RCW 42.56.550(4). CP 23. But the City’s discovery was *not* limited to PRA cases. The City’s intrusive interrogatory specifically included any bankruptcy or divorce proceedings even though such information could not possibly be germane in a case under the PRA:

INTERROGATORY NO. 6:

Have you been a party to any lawsuits, including bankruptcy and/or divorce proceedings, in the past ten years? If so, provide:

- a. a description of the nature of lawsuit;
- b. the names of parties (or case name);
- c. the court and cause number;
- d. the name of the attorney representing you;
- e. the name of any insurance company involved; and
- f. the outcome of lawsuit.

ANSWER:

CP 105. None of the City's discovery requests related in any way to the question of whether the City had actually violated the PRA.

Koenig filed his *Answer* to the City's complaint on June 12, 2008, stating that he refused to perform the legal research necessary to determine whether the City's exemption claims were correct. Koenig denied that the City had properly redacted driver's license numbers. Koenig further stated that he did not care to litigate the other exemption issues, and that such issues were therefore moot and/or nonjusticiable.¹

CP 17-18. Consequently, **the *only* substantive issue in this case is whether the City has properly redacted driver's license numbers.**

Also on June 12, 2008, Koenig responded to the City's discovery requests. Koenig objected that the City's discovery requests were inappropriate in a PRA case, and were not calculated to lead to the discovery of admissible evidence under CR 26. CP 32-33. Prior to the

¹ See *Soter v. Cowles Pub'g Co.*, 162 Wn.2d 716, 753 n.16, 174 P.3d 60 (2007); *City of Everett v. Van Dyke*, 18 Wn. App. 704, 705, 571 P.2d 952 (1977).

CR 26(i) conference, Koenig further explained his objections to the City's burdensome and irrelevant discovery requests:

This is not a typical civil case. We believe it is wholly inappropriate for an agency to burden a requester with requests for discovery. Although Mr. Koenig has counsel, many requesters do not. The intimidation, delay and burden imposed on the average requester by useless agency discovery requests is unacceptable in light of the purposes of the PRA. Expecting a requester to respond to such requests by filing a motion to compel is equally unacceptable. As a staunch advocate of the PRA, Mr. Koenig is willing to use his resources to fight the City on this point.

CP 112. Finally, to avoid any possible prejudice to the City, Koenig unilaterally waived any PRA penalties from June 12, 2008 until the discovery issues were resolved. *Id.*²

After the discovery conference, the City agreed to withdraw interrogatories 2-4 (marital status, employment history, education). However, the City rejected Koenig's proposal to suspend discovery until after a determination of the legal issue of whether driver's license numbers are exempt. CP 115-116.

On November 12, 2008, the City filed a motion to compel, arguing that Koenig's other PRA litigation was somehow relevant to the question of penalties under RCW 42.56.550(4). CP 23. Koenig filed a cross-

² Koenig will continue to waive the accrual of penalties until the issue of discovery is resolved.

motion for a protective order to quash the City's interrogatories relating to both litigation history and criminal history (interrogatories nos. 5 and 6). CP 141-159.

The City's motion made virtually no effort to explain why an agency should be permitted to make broad discovery requests to a records requester in a PRA case. Instead, the City's motion sought to prejudice the trial court against Koenig with irrelevant allegations that have little or nothing to do with the substantive issue in this case. CP 19-21. In response to the City's factual allegations, Koenig's cross-motion included a lengthy factual response and supporting declaration. CP 56-140, 141-159. Koenig carefully explained how the City's factual allegations were misleading, irrelevant, unsupported, false, and contrary to findings of fact in another case involving the same parties. CP 142-150. The City's reply did not rebut any of the actual facts established by Koenig. CP 160-164.

Koenig's response explained that there is no authority for the assumption that an agency is permitted to make discovery to a requester in a PRA case. CP 151-154. It is well established that agencies may not consider either the identity of the requester or the purpose of a request in responding to a request for records under the PRA. *See Livingston v. Cedeno*, 164 Wn.2d 46, 53, 186 P.3d 1055 (2008). There are no reported

cases in the entire 36-year history of the PRA in which an agency submitted discovery requests to a requester.

Koenig further explained that even if an agency were permitted to submit discovery to a requester under the PRA, the City's discovery requests were clearly inappropriate under CR 26(i) because they are not calculated to lead to the discovery of admissible information, and serve only to burden, intimidate, harass and embarrass the requester. CP 154-157. Finally, Koenig argued, in the alternative, that the City's discovery requests are premature and should be suspended until a court determines that the City is actually liable under the PRA. CP 157-158.

The City's reply completely ignored Koenig's legal arguments that (i) discovery was not permitted under the PRA, and (ii) the City's discovery requests were not calculated to lead to the discovery of admissible evidence. The City's reply did not explain the materiality of its discovery requests. Instead, the City blithely admitted that its discovery requests were taken "near verbatim" from **pattern interrogatories in a personal injury case**. CP 162. Ignoring the obvious intimidation, harassment, and embarrassment that such interrogatories would cause to any normal person who had been sued by a government agency, the City argued that Koenig had not shown any "cognizable harm" to justify quashing the discovery requests. CP 163.

The City's use of discovery to harass and intimidate requesters is not limited to this case or appellant Koenig. In October 2008, the City filed an action for declaratory relief against another requester and propounded discovery requests to the *pro se* defendant in that case. The first six interrogatories in that case are exactly the same as those submitted to Koenig. CP 104-106, 132-134.

B. Trial Court Ruling

After a hearing on December 5, 2008, the trial court ordered Koenig to provide responses to Interrogatory No. 6 and Request for Production No. 1:

6	Based on the above findings, It Is Ordered:
7	3.1 Plaintiff's Motion is GRANTED. Defendant is ordered to provide full and
8	complete answers and responses to Interrogatories Nos. 6 and Request for Production No. 1 o
9	Plaintiff's First Set of Interrogatories and Requests for Production on or before
0	January 5, 2009. Jan 5 2009
1	SO ORDERED this 5 day of December, 2008.

CP 177. The trial court did not explain how the City's discovery requests met the requirements of CR 26(b)(1). Nor did the trial court explain why the City's discovery could not wait until after a determination of whether City had actually violated the PRA. VRP 1-16.

Koenig asked the City to agree to stay the *Order Compelling Discovery* pending review by this Court. The City refused.

C. Discretionary Review and Stay Granted

Koenig filed a *Notice for Discretionary Review* on December 12, 2008. At the same time, Koenig filed a *Motion for Stay of Trial Court Discovery Order Pending Review*. A Commissioner of this Court granted Koenig's motion for stay on December 23, 2008. The Commissioner noted that the City's discovery requests were unrelated to the question of whether driver's license numbers are exempt, and that a stay would not harm the City because either party could raise that issue in the trial court at any time. *Ruling Granting Stay* (12/23/08) at 2-3.

The Commissioner granted review pursuant to RAP 2.3(b)(2) on February 24, 2009. The Commission's ruling correctly observed that there is no issue of delay on the part of Koenig, and that the relevance of prior litigation history is "questionable." The Commissioner also observed that:

In any case, even assuming that the discovery request might be relevant in a penalty phase of this lawsuit, it should not become a barrier to the determination regarding the scope of disclosure. Such a result contravenes the intent of the legislature and the rule reiterated in *Livingston v. Cedeno, supra*. Answers to the interrogatories should not be required until the court has ruled on the claimed exemptions.

Ruling Granting Review (2/24/09) at 3.

IV. STANDARD OF REVIEW

Judicial review under the PRA is *de novo*. *Soter v. Cowles Pub'g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007); RCW 42.56.550(3). The trial court's decision to allow discovery is reviewed for abuse of discretion. *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001).

V. ARGUMENT

The Public Records Act (PRA) “is a strongly worded mandate for broad disclosure of public records.” *Progressive Animal Welfare Soc'y v. UW (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). The PRA's disclosure provisions must be liberally construed, and its exemptions narrowly construed. *PAWS II*, 125 Wn.2d at 251; RCW 42.56.030. Courts are to take into account the policy of the PRA “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.” RCW 42.56.550(3).

A. The PRA does not authorize an agency to submit discovery requests to a records requester.

The City has no authority for its assumption that an agency is permitted to conduct discovery in a PRA case. There are no reported

cases in the entire 36-year history of the PRA in which an agency submitted discovery requests to a requester. The Supreme Court only recently clarified that an agency may use RCW 42.56.540 to seek a judicial determination of whether a particular exemption applies to a particular record. *Soter*, 162 Wn.2d at 755. But nothing in either the statute or *Soter* suggests that an agency may go further than merely seeking judicial review by burdening the requester with discovery that has nothing to do with the question on which review is sought.

Agencies do not need to conduct discovery in order to determine whether an exemption applies to requested records. This case proves the point. **None** of the City's discovery requests relate in any way to the question of whether the City's redaction of driver's license numbers is permitted by a statutory exemption. Instead the City seeks to make Koenig disclose any criminal history, divorce, or bankruptcy he may have had.

1. Agencies may not consider the identity of a requester or the purpose of a request.

The City argues that Koenig's other PRA cases are somehow relevant to penalties under RCW 42.56.550(4) and therefore discoverable. *Respondent's Opposition to Motion for Discretionary Review* (1/22/09) (hereafter "*City's Opposition*") at 12. But it is well established — in both

the statute and case law — that agencies may not consider either the identity of the requester or the purpose of a request in responding to a request for records under the PRA. RCW 42.56.080; *King County v. Sheehan*, 114 Wn. App. 325, 341, 57 P.3d 307 (2002). Most recently in *Livingston, supra*, the Supreme Court made this point clearly and emphatically:

In its capacity as an agency subject to the public records act, the Department must respond to all public disclosure requests without regard to the status or motivation of the requester. The statutory directive to screen incoming and outgoing mail does not relieve the Department of its obligation to disclose public records requested by an inmate.

Livingston, 164 Wn.2d at 53. If an agency does not need discovery to determine whether a record is exempt, and is barred from considering either the identity of the requester or the purpose of a request, then an agency should not be allowed to submit discovery to a requester. As the Commissioner observed, discovery should not become a barrier to a determination of whether records must be disclosed. *Ruling Granting Review* at 3. To allow such intrusive and burdensome discovery violates the spirit and the letter of the PRA. The intimidation, delay, and burden imposed on the average requester by useless discovery is unacceptable in light of the purpose of the PRA, and violates a requester's right to request

public records without an agency inquiring into the requester's identity or the purpose of a request. RCW 42.56.080.

2. A requester's economic loss, or lack thereof, is *not* a proper factor for penalties under RCW 42.56.550(4).

In support of its discovery requests, the City asserts, *inter alia*, that a requester's economic loss is relevant to penalties. *City's Opposition* at 10. That theory, based on dicta in a handful of cases, is incompatible with the PRA. This case presents an opportunity for this Court to hold that a requester's economic loss, or lack thereof, is **not** a proper factor for penalties under RCW 42.56.550(4).

The idea that economic loss might be a relevant penalty factor arose in dicta in *Yacobellis v. Bellingham*, 64 Wn. App. 295, 825 P.2d 324 (1992). *Yacobellis* concluded that penalties under the PRA are intended to deter wrongful agency conduct and should not be construed as an award of damages. *Yacobellis*, 64 Wn. App. at 301. The court then stated, somewhat inconsistently, that the requester had acknowledged that economic loss was also relevant to penalties, and invited the trial court to address that factor on remand. *Yacobellis*, 64 Wn. App. at 303-04.

The *Yacobellis* dictum was carelessly repeated in *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997), which held that an award of penalties is required whenever an agency violates the PRA. The

Amren dictum was then repeated in *ACLU v. Blaine*, 86 Wn. App. 688, 699, 937 P.2d 1176 (1997), and *Sheehan*, 114 Wn. App. at 356.

The question of appropriate penalties was addressed in *Yousoufian v. Sims* (“*Yousoufian II*”),³ 152 Wn.2d 421, 439, 98 P.3d 463 (2005), which upheld the Court of Appeals’ ruling that a penalty of only \$5 per day was unreasonable where the County acted with gross negligence. Only a lone dissenter gave any credence to the suggestion that economic loss should be a factor in awarding penalties. *Yousoufian II*, 152 Wn.2d at 446 (Sanders, J., dissenting). On appeal following remand, the Court of Appeals held that penalties should be based on the culpability of the agency, using the degrees of culpability found in pattern jury instructions. But the court suggested that economic loss was also a penalty factor (based on the dictum in *Amren*). *Yousoufian v. Sims* (“*Yousoufian III*”), 137 Wn. App. 69, 76, 80, 151 P.3d 243 (2007).

The Supreme Court granted review again, rejecting the Court of Appeals’ culpability framework in favor of a multi-factor analysis. *Yousoufian v. Sims* (“*Yousoufian IV*”), 165 Wn.2d 439, 200 P.3d 232 (2009).⁴ The majority held that courts should consider sixteen different

³ *Yousoufian v. Sims (Yousoufian IV)*, 165 Wn.2d 439, 200 P.3d 232 (2009), establishes a convention for citation to the various published *Yousoufian* opinions.

⁴ On March 31, 2009, King County filed a motion to recall the mandate in *Yousoufian IV*. As of the date of this brief that motion remains pending.

penalty factors, possibly including economic loss. 165 Wn.2d at 458-59.

But the court was clearly struggling with the fact that the PRA was never intended to provide a remedy for economic loss:

This Court has stated economic loss is a relevant factor. As Yousoufian points out, however, the harm suffered by PRA noncompliance is the same regardless of economic loss: the denial of access to public records and the lack of governmental transparency. The penalty's purpose is to promote access to public records and governmental transparency; it is not meant as compensation for damages. **At most, actual economic loss calls for a higher penalty, but the absence of economic damages does not call for a lower one.**

Id. at 455 (citations omitted; emphasis added). Because the majority did not actually address economic loss in its application of penalty factors, the statement that economic loss is a proper factor remains *dicta*. *Id.* at 460-61.

Those cases that have mentioned economic loss as a possible penalty factor have failed to consider whether such a factor violates the general rule that agencies may not consider either the identity of the requester or the purpose of a request. *See* RCW 42.56.080; *Livingston*, 164 Wn.2d at 53. It is impossible to adjudicate the question of whether the requester has suffered an economic loss without delving into the identity of a requester and/or the purpose of a request. The prospect of litigating non-monetary issues, such as the importance of an investigation

or public controversy to which a request relates, is even more troubling. Courts should not be charged with adjudicating the relative importance of a particular requester's inquiry into the conduct of government.

Nor has any case considered the serious practical consequences of using economic loss as a penalty factor. Litigation involving questions of economic loss is complex and expensive, and often requires the use of expert witnesses. *See, e.g., Kaech v. Lewis County PUD No. 1*, 106 Wn. App. 260, 23 P.3d 529 (2001). Consideration of a requester's economic loss also invites the agency to submit discovery about the purpose of a request for records, as this case demonstrates. Recognition that (a) economic loss has never been held to be a factor in setting the PRA penalty, and (b) would in fact conflict with the statutory prohibition on identity and purpose inquiries, would make PRA litigation more efficient and less expensive for all parties.

Because *Yousoufian IV* did not consider these issues, this Court is not required to accept economic loss as a penalty factor.

Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined ... without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court. 'An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.'

ETCO v. Dept. Labor & Indus., 66 Wn. App. 302, 307, 831 P.2d 1133 (1992) (quoting *Cont. Mutual v. Elliot*, 166 Wash. 283, 300, 6 P.2d 638 (1932)).

In sum, penalties should be based entirely on the conduct of the agency. Penalty factors that are based on either the identity of the requester or the purpose of a request are not appropriate. This Court should squarely hold that a requester's economic loss, or lack thereof, is *not* a proper factor for penalties under RCW 42.56.550(4). Nothing in *Yousoufian IV* precludes such a holding.

B. In the alternative, the City's discovery requests are not reasonably calculated to lead to the discovery of admissible evidence.

Assuming, *arguendo*, that an agency is permitted to propound discovery to a requester, the City still has the burden to explain the materiality of its discovery requests. *See State ex rel. Bronson v. Superior Court*, 194 Wash. 339, 345, 77 P.2d 997 (1938). Under CR 26(b)(1), discovery requests must be "reasonably calculated to lead to the discovery of admissible evidence." The City has never attempted to explain how its broad, intrusive discovery requests meet the basic test of CR 26(b)(1).

Instead, the City asserts that (i) the City has the same rights as "any other litigant," and (ii) its discovery requests were taken "near verbatim" from **pattern interrogatories in a personal injury case**. CP

162. The City essentially admits that its discovery requests were *not* calculated to lead to the discovery of admissible evidence at all — much less “reasonably calculated.”

Furthermore, CR 26(c) permits the court for good cause shown to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. The City does not deny that its requests for criminal history, divorce history, or prior bankruptcy would intimidate, harass, and embarrass any normal person who received them. Being compelled to provide large amounts of personal information to an adverse party for no reason is exactly the harm that the limits on discovery are intended to prevent. “[G]ood cause’ is established if the moving party shows that any of the harms spoken of in the rule is threatened and can be avoided without impeding the discovery process.” *Rhinehart v. The Seattle Times*, 98 Wn.2d 226, 256, 654 P.2d 673, 676 (1982), *aff’d* 467 U.S. 20 (1984).

The trial court speculated that discovery might reveal that Koenig has lost his right to claim penalties under the PRA due to bankruptcy or divorce. VRP at 10-11. Assuming, *arguendo*, that a PRA claim is an asset for purposes of bankruptcy or divorce, such a claim only came into existence after November 30, 2007. CP 99. Speculation that a requester may have a pending divorce or bankruptcy cannot justify an interrogatory

that seeks information about all litigation history over a period of ten years.

Next the City asserts that criminal convictions may be relevant to the impeachment of a witness. *City's Opposition* at 10. The remote possibility that a requester may be called as a witness on a disputed issue of fact does not justify routinely subjecting requesters to such intrusive and intimidating inquiries. The requester's testimony has no bearing on the question of whether an agency has violated the PRA or whether a particular exemption is applicable to requested records. The Court can only speculate as to how impeachment of a requester might become relevant in a penalty hearing. The Court should rule that the annoyance, embarrassment, and oppression inherent in such discovery requests constitutes good cause to deny such discovery in a PRA case.

The City argues that its discovery requests are relevant to the question of whether Koenig has suffered any economic loss. *City's Opposition* at 10. As explained in section (A)(2) (above), a requester's economic loss, or lack thereof, is not a proper factor for penalties under RCW 42.56.550(4). Assuming, *arguendo*, that courts were permitted to consider economic loss, the City's interrogatories do not ask Koenig whether he suffered any economic loss as a result of the City's redaction of the driver's license numbers. As the Commissioner noted, the City has

not explained how an alleged delay in another case could affect any such loss in this case. *Ruling Granting Review* at 3. Nor has Koenig claimed any such losses.

Finally, the City claims to have documented an alleged “pattern of delay” by Koenig in filing suit under the PRA, and suggests that it expects to find other examples that fit this alleged pattern. *City’s Opposition* at 11-12. This argument fails for two reasons. First, the City has never explained how Koenig’s alleged delay in other cases could be relevant to penalties in this case. As the Commissioner noted:

The PRA does not allow for any reduction of the penalty period, even where the requestor could have acted with more diligence, but it does permit the trial court some discretion in the amount of the penalty assessed for each day. *See Yousoufian v. King County Executive*, 152 Wn.2d 421, 437-39, 98 P.3d 463 (2004). ... **However, the City, not Koenig, initiated suit here, and there is no issue of delay on the part of Koenig.** (Emphasis added).

Ruling Granting Review (2/24/09) at 2-3. The Commissioner made the same point in the *Ruling Granting Stay* (12/23/08) at 2. Even after Koenig pointed this out in his *Motion for Discretionary Review* at 18-19, the City again failed to explain the relevance of an alleged delay by Koenig.

Instead, the City blandly asserts that a pattern of delay “fits within the contours of the equitable factors originally espoused in *Yousoufian II*, and the Supreme Court’s multi-factor penalty test announced in

Yousoufian IV ...” *City’s Opposition* at 12. Neither case supports the City’s argument. *Yousoufian II* indicates that the penalty period may be reduced based on laches. *Yousoufian II*, 152 Wn.2d 421, 438 n.11. But the City filed this case, and there is absolutely no issue of intentional delay in this case. Allegations of intentional delay in other cases have no bearing on the calculation of penalties in this case.

Similarly, *Yousoufian IV* provides no support for the City’s argument. That case mentions delay *by the agency* as a proper penalty factor. *Yousoufian IV*, 165 Wn.2d at 458. Nothing in that case suggests that delay by the requester could be relevant to penalties.

Second, there is no factual basis for the City’s claims of intentional delay in other cases. The City has identified two other cases in which Koenig waited until the last day to file and serve the defendant agency. CP 21. So what? The City acknowledges that Koenig has been involved in at least a dozen cases. CP 25. The fact that Koenig waited to the last day to file two of those cases proves nothing.

Furthermore, the City’s argument is based on a false allegation of intentional delay that the City has already litigated and lost. In a case (currently pending appeal)⁵ the City argued that Koenig had delayed filing

⁵ *Koenig v. City of Lakewood*, No. 37761-6-II, heard March 30, 2009.

suit in order to increase penalties, and that penalties for such periods of delay should be barred by laches. CP 78, 90. The trial court (Judge Serko) disagreed, rejecting the City's claim of laches and finding that the delay was caused by Koenig's need to obtain counsel. CP 66. Koenig's *Answer* in this case explained that the City's allegations of intentional delay by Koenig were unsupported by evidence and barred by collateral estoppel. CP 16. Because the City has dismissed its cross-appeal of Judge Serko's findings, the City is clearly barred from arguing that Koenig delayed filing in the earlier case in order to increase penalties. The City cannot justify its discovery requests based on allegations that have already been adjudicated to be false.

Even under the deferential standard of review applied to discovery rulings, the trial court's decision to allow the City's discovery was clearly an abuse of discretion. *Lindblad*, 108 Wn. App. at 207 ("A trial court's ruling on a discovery motion is reviewed for abuse of discretion, which occurs where a decision is manifestly unreasonable or based on untenable grounds.") There were no tenable grounds or reasons for the trial court to allow intrusive, burdensome discovery without requiring the City to show how such discovery would lead to admissible evidence.

C. In the alternative, discovery relating to penalties should not be permitted until after an agency has been found liable for penalties under RCW 42.56.550(4).

It is undisputed that the City's discovery requests are totally unrelated to the substantive issue of whether the City has complied with the PRA. If the Court concludes that the City's discovery requests are somehow related to the question of penalties under RCW 42.56.550(4) and not unduly burdensome, then the Court should hold that such requests are premature and should be suspended until a court determines that the City is actually liable for wrongfully withholding records.

In the trial court, Koenig argued, in the alternative, that any discovery related to penalties should wait until after there has been a determination that the City is actually liable. CP 157-58. The Commissioner of this Court agreed:

In any case, even assuming that the discovery request might be relevant in a penalty phase of this lawsuit, it should not become a barrier to the determination regarding the scope of disclosure. Such a result contravenes the intent of the legislature and the rule reiterated in *Livingston v. Cedeno, supra*. Answers to the interrogatories should not be required until the court has ruled on the claimed exemptions.

Ruling Granting Review (2/24/09) at 3. Even if a requester eventually recovers attorney's fees under RCW 42.56.550(4), *see* section (D) (below), discovery is still a significant barrier to public access to records.

Requesters should not be required to choose between hiring an attorney and answering intrusive interrogatories in order to enforce their rights under the PRA.

Discovery at this early stage is also a significant waste of agency resources. By proceeding with discovery on penalties prior to any determination of liability, the City is making this case take longer and incurring even greater liability for fees if the City is found liable. Judicial economy also dictates that discovery related to penalties should wait until an agency has been found liable.

In support of its premature discovery, the City asserts it wants to avoid the delay created by the bifurcated adjudication of the prior case before Judge Serko. CP 26-27. This assertion is clearly a pretext for forcing Koenig to respond to the City's pointless, invasive, and burdensome discovery. The City is deliberately causing the delay that it claims it seeks to avoid. The City has waited more than an entire year without asking the trial court to rule on the merits of its case.

The City ignores the actual cause of delay in the prior case, and the undisputed fact that the City was not prejudiced by that delay. Judge Serko's findings in that case clearly disclose that the cause of the delay was the City's own chronic violations of the PRA. CP 62-71. No penalties accrued during the period after the City was found to have

complied with the PRA and before the penalty hearing. CP 71-72. These findings clearly establish that bifurcation of the prior case did not prejudice the City in any way. The City's arguments to the contrary are simply false, and barred by collateral estoppel.

The trial court clearly abused its discretion in ordering discovery prior to any determination that the City was actually liable for penalties. The trial court never explained why the City's discovery could not wait until after a determination of liability, and simply ignored Koenig's alternative request. CP 176-77; VRP 1-16.

If this Court concludes that the City's discovery requests are somehow related to the question of penalties and not unduly burdensome, then the Court should order the trial court to suspend such discovery until after there has been a determination that the City is actually liable. To rule otherwise would reward the City's intentional misuse of discovery as a weapon against records requesters.

D. Koenig is entitled to reasonable attorney's fees for this appeal.

Koenig respectfully requests an award of attorney's fees pursuant to RAP 18.1. The PRA provides for an award of reasonable attorney's fees:

(4) 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 (emphases added). This provision includes awards of fees on appeal. See *Progressive Animal Welfare Soc'y v. UW (PAWS I)*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990). This provision also applies where, as here, the lawsuit is initiated by the agency under RCW 42.56.540. *Soter*, 162 Wn.2d at 753 n.16, 174 P.3d 60 (2007).

There is no requirement that Koenig cause the disclosure of records in order to be awarded fees. *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 102-103, 117 P.3d 1117 (2005). The City brought this action under the PRA, and forced Koenig to incur substantial attorney's fees to defend his rights under the PRA. If this Court reverses the trial court's discovery order then Koenig is the prevailing party and he is entitled to attorney's fees for this appeal.

VI. CONCLUSION

For all these reasons the Court should reverse the trial court's *Order Compelling Discovery*. This matter should be remanded to the trial court with instructions to quash the City's discovery requests.

In addition, Koenig should be awarded his attorney's fees for this appeal.

FILED
COURT OF APPEALS
DIVISION II

09 MAY -6 AM 10:18

STATE OF WASHINGTON
BY  DEPUTY

RESPECTFULLY SUBMITTED this 4th day of May, 2009.

By:


William John Crittenden, WSBA No. 22033

WILLIAM JOHN CRITTENDEN
Attorney at Law
927 N. Northlake Way, Suite 301
Seattle, Washington 98103
(206) 361-5972
wjcrittenden@comcast.net

Attorney for Appellant David Koenig

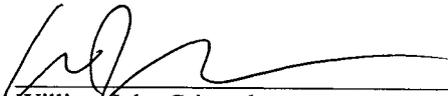
Certificate of Service

I, the undersigned, certify that on the 4th day of May, 2009, I caused a true and correct copy of this *Brief of Appellant* to be served, by the method(s) indicated below, to the following person(s):

By email (PDF) to:
mkaser@cityoflakewood.us

and First Class Mail to:

Matthew S Kaser
City of Lakewood
6000 Main St SW
Lakewood WA 98499-5027


William John Crittenden, WSBA No. 22033