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COURT OF APPEALS

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STATE OF WASHINGTON

BY \_\_\_\_\_

**Court of Appeals No. 40064-2-II**

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO**

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**KEN BRICKER,**  
Appellant,

v.

**STATE OF WASHINGTON,**  
Respondent.

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On Appeal from Thurston County Superior Court,  
The Honorable Anne Hirsch

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**BRIEF OF APPELLANT**

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RCW 42.56.550

RCW 42.56.010

RCW 42.17.020

RCW 42.17.340

## **I. ASSIGNMENTS OF ERROR**

1. ERROR IS ASSIGNED TO THE TRIAL COURT'S PENALTY COMPUTATIONS FOR NON-COMPLIANCE WITH WASHINGTON'S PUBLIC RECORDS ACT
2. ERROR IS ASSIGNED TO THE TRIAL COURT'S FINDING OF FACT #1.2, ("Mr. Ulmer did not intentionally, or in bad faith, not comply with the Public Records Act because he did not know about it. The Department personnel at the top of the chain did try to comply with all the procedural requirements of the act once they were aware of Bricker's request.")
3. ERROR IS ASSIGNED TO THE TRIAL COURT'S CONCLUSION OF LAW #2.3, ("The Department did not intentionally or maliciously withhold records from Mr. Bricker. The Department acted in good faith in responding to Mr. Bricker's public records request albeit in a belated manner on 8/8/07.")
4. ERROR IS ASSIGNED TO THE TRIAL COURT'S CONCLUSION OF LAW #2.4, ("The Department promptly responded to the request (on August 8, 2008) after discovering the October 1, 2007 letter in July 2008.
5. ERROR IS ASSIGNED TO THE TRIAL COURT'S CONCLUSION OF LAW #2.5, Factor 12, "Mr. Ulmer did not intentionally fail to comply with the Public Records Act ; he did not know about it. I am not finding that he exercised any bad faith."
6. ERROR IS ASSIGNED TO THE TRIAL COURT'S CONCLUSION OF LAW #2.5, Factor 13. "There is no finding of dishonesty in the communications to Mr. Bricker."
7. ERROR IS ASSIGNED TO THE TRIAL COURT'S CONCLUSION OF LAW #2.5, "Nothing in the Public Records Act as interpreted by case law requires that the daily penalty be applied against each individual record withheld."

8. ERROR IS ASSIGNED TO THE TRIAL COURT'S CONCLUSION OF LAW #2.8, setting "The Penalty for noncompliance amounts to \$29,445.00. The penalty is calculated as 312 days ... x \$90/day = \$28,080.00 [and] 91 days ... x \$15/day = \$1365.00

9. ERROR IS ASSIGNED TO THE TRIAL COURT'S MEMORANDUM, DATED November 9, 2009, summarizing its decision not to impose any "per record" penalty. It is unclear how to assign error to the memorandum, which contains no findings, but does references the fact that the court had made an "incorrect assumption of the Yousufian factors" and instead "redetermined the penalty" based on the "purpose of the Public Records Act" which is to "promote public access to public records. to encourage, and demand governmental transparency... not... compensation for damages." The court erred in concluding "The purpose (of RCW 42.56) is best served by imposing a penalty at the high end of the possible range, as the court did in this case in part. Under the facts presented here, there is no appropriate purpose that would be served in imposing a per day and per document penalty. " The Court then used the \$90 per day figure, and \$15 per day figure, but dropped any consideration of the "per document" penalty. To avoid a claim that ERROR was not properly assigned, error is assigned to the whole memorandum, which is attached to the appendix.

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

1. Whether the trial court erred in calculating the damages for violation of the Public Records Act.
2. Whether the Appellant is entitled to attorney fees on appeal.

### **III. STATEMENT OF THE CASE**

The Department of Labor and Industries admitted liability for violating the Public Records Act, and so on June 10-11, 2009, the court held a hearing, with live witnesses, in order to determine the appropriate penalty. June 10-11, 6/10/2008 RP. 7.

Electrical inspector Don Ulmer inspected Ken Bricker's residence Mr. Koons explained that in July 2007, two Department citations issued to Trinity Construction were voided when Trinity's electrician and homeowner Ken Bricker wrote letters to the Department, explaining that Ken Bricker, not Trinity Construction, did some repairs in his bathroom. 6/10/2008 RP. 129. Don Uhlmer, electrical inspector, re-issued three citations to Ken Bricker in August 2007. 6/10/2008 RP. The three citations to Ken Bricker just generally alleged that he had violations, such as failing to obtain an electrical permit prior to beginning installations or alterations. 6/10/2008 RP. 43.

According to Don Ulmer, a person receiving such a citation would then "call in" to find out the reason for the citation, which

would be contained on a inspector's statement that was not provided with the citation. 6/10/2008 RP. 43. Don Ulmer explained that he keeps the original citations he issues and other documents, together with correspondence he receives from people in a file cabinet in his desk. 6/10/2008 RP. 38-39. In this case, Mr. Ulmer remembered Ken Bricker calling, possibly more than once, before Ken Bricker submitted the public records request on October 1, 2007. 6/10/2008 RP. 46, RP. 360. Mr. Bricker sent a certified letter to Dene Koons and Don Ulmer, dated October 1, 2007, requesting all permits, copies of inspections, and correction sheets by all inspectors on his residence. (Finding of Fact. 1.1), 6/10/2008 RP. 362.

Weeks later, Ken Bricker called Don Ulmer and expected that Don Ulmer and Dene Koons were going to work on the request. 6/10/2008 RP. 363-64. Ken Bricker called again 2 or 3 weeks later, and again right before Christmas. 6/10/2008 RP. 364.

In March 2008, Ken Bricker received a notice that he would have to pay for three appeals or pay the fines for the three citations, so he called on the phone and again explained he wanted

the documents. 6/10/2008 RP. 366. Next, Ken Bricker filed three appeal letters, repeating in each one that he was not provided records he had requested. 6/10/2008 RP. 367. On June 24<sup>th</sup>, after not hearing anything since his appeal was accepted, Ken Bricker started trying to reach someone, and eventually got Reuel Paradis, Dene Koons' boss. Ken Bricker told Paradis he wanted the records he had been asking for since October. 6/10/2008 RP. 372. Despite all the extra phone calls and letters, the Department testified (in a response to interrogatories admitted into evidence), that it was unable to identify any efforts undertaken to contact Ken Bricker subsequent to Ken Bricker's October 21, 2007 letter. 6/10/2008 RP. 392.

Don Ulmer confirmed he received a public records request from Ken Bricker on or about October 1, 2007. RP 23. He read the letter, knew that Ken Bricker was requesting documents, but claimed he just put it in the citation file, and assumed that Ken Bricker would get all the documents when he appealed the citations. 6/10/2008 RP. 24. Mr. Ulmer testified that he had heard

of public records before, but received “no specific training.”

6/10/2008 RP. 41.

Dene Koons, a supervisor of electrical inspectors for the Department of Labor and Industries testified that an inspection would be contained in the permit file. 6/10/2008 RP. 124. An inspector’s statement or correction notice, however, would be contained in a “citation file” and “they’re not even the same data base.” 6/10/2008 RP. 125. Similarly, electrical inspector Don Ulmer explained, “[t]he inspector statement has nothing to do with the inspection.” “The inspector statement has to do with the citations. The inspection is the corrections that were issued, just safety violations of ... whatever the code issue is.” 6/10/2008 RP. 160. According to Ulmer, if you look at the permit, you have no clue what’s going on with the citation. 6/10/2008 RP. 160.

When Don Ulmer received Ken Bricker’s certified public records request, he did not ask Ken Bricker for clarification, and Don Ulmer estimated he had a two-inch thick file of the original documents concerning Ken Bricker’s residence in his desk.

6/10/2008 RP. 53.

After this public records lawsuit was initiated, the agency public records people began processing the request on July 22, 2008 (6/10/2008 RP. 210). The first response to Ken Bricker's request from October 1, 2007 occurred on August 8, 2008, but even then the Department failed to provide at least one of the requested permits. 6/10/2008 RP. 74. By the time the agency processed the request, however, Mr. Ulmer's file was only an inch thick. 6/10/2008 RP. 216. The special "point of contact" in the electrical section who collected the records made no determination as to what fit or did not fit within the scope of the request. 6/10/2008 RP. 217. The public records officer testified that she expected her "point of contact" to make sure the right records were obtained for disclosure, because it is that person's "expertise." 6/10/2008 RP. 84- 85.

A technical specialist who approved Ken Bricker's appeal of the citations he was issued testified that she reviewed Ken Bricker's complaint, in April 2008, about not receiving a response to his public records request from October 2007, but she did not do anything about it but approve the appeal. 6/10/2008 RP. 249.

During the review, the specialist wrote “do not settle” on the file, after speaking with Dene Koons, who convinced the specialist (erroneously) that Mr. Bricker was just covering up a screw-up of Trinity Electric. 6/10/2008 RP. 251-253. The specialist explained that this was a mistake, and forced Mr. Bricker to bear a greater burden than was necessary to appeal the citations. 6/10/2008 RP. 260. The public records officer for the Department testified that a signed document and an unsigned document would be two different records. 6/10/2008 RP. 307, 327. If one record says something different, according to the Department’s public records officer, it is a different record. 6/10/2008 RP. 308. The Department’s public records officer testified that the Department considered “document” a record. 6/10/2008 RP. 335.

In its oral ruling on June 12, 2009, the trial court went through every document that was disclosed on or after August 8, 2010, including envelopes, and concluded that there were 16 records that were not disclosed until August 8, 2010. 6/12/2008 RP. 6. Some of the additional items that were provided were not requested, “so the 16 are the specific items that were requested in that letter.” RP. 6.

The court also explained that, to the extent that three additional documents that bore signatures were not provided until November 8<sup>th</sup>, ones that were signed and ones they were not signed were “different documents.” 6/12/2010 RP. 8. Thus, the total undisclosed documents involved 16 that were not disclosed until August 8<sup>th</sup>, and 3 that were not disclosed until November 8, 2008.

After her ruling, the attorney for the Department of Labor and Industries asked for a clarification:

“MR. BARNES: You found that there were 16 records?

THE COURT: Yes.”

RP. 17.

The court went through the mitigating and aggravating factors outlined in Yousoufian, and ruled, “I, frankly, cannot see any mitigating factors that occurred between October 1st and August 8th when I go through these, and I am going to set the penalty at the high end here.” RP. 14. The court cited aggravating factors that supported a high end penalty, including the substantial delay in the response, “especially in circumstances making time of the

essence.” RP. 10. Instead of a lack of strict compliance, the court found no compliance until August 2008. RP. 11. The court noted again the lack of training. RP. 11. With regard to lack of honesty by the agency, the court noted that Mr. Koons appeared to use Ken Bricker to go after Trinity Electric for the citations. “They did not deal with Mr. Bricker because they ignored his request or put it aside, and by doing that I think, frankly, it really made this case a lot more difficult than it needed to be.” RP. 12. The court also found an aggravating factor in the unreasonableness of the excuse offered by the agency in not disclosing the records. The court referred to the State’s own characterization of the excuse as “lame.” RP. 12. With regard to an aggravating factor for “negligent, reckless, wanton bad faith, or intentional noncompliance” the court expressed that one of the characters working for the agency could not intentionally not comply with the act because he did not know about it, but the combination of the three people in the office (Koons, Paradis and Ulmer) was created “significant problems.” RP. 13.

Although the court did not find “dishonesty,” the court did find that the evidence supported a “loss of government

accountability” for the Department’s disclosure of public records, which the court found continued right up to the trial, creating the impression to the judge that the Department made the State “look like they are not public servants.” RP. 14.

The court discussed the fact that it would award reasonable attorney fees to Ken Bricker’s attorney in a subsequent proceeding, and asked counsel to present the court with proposed findings.

In the draft findings that were presented to the court consistent with the court’s ruling, the attorneys calculated the damages for the non-disclosure of the 16-documents at (16 documents x \$90/day x 312 days) and the three additional documents (the signed ones) at (3 x \$90 x 312 days) and (3 x \$15 x 91 days), for a total penalty of \$537,615.00.

After the court entered its ruling, the court issued a letter opinion, along with “interlineated” findings, indicating it had made an “incorrect assumption of the Yousoufian factors” and “redetermined the penalty,” based on the “purpose of the Public Records Act,” which the court felt was to “promote public access to

public records, to encourage, and demand governmental transparency... not... compensation for damages.” The trial court felt the purpose of RCW 42.56 would be better served “by imposing a penalty at the high end of the possible range,” but “under the facts presented here, there was no appropriate purpose that would be served in imposing a per day and per document penalty, so the court simply calculated the damages on the basis of the daily penalty.

## ARGUMENT

1. Whether the trial court erred in calculating the statutory penalty for violation of the Public Records Act in this case.

Once a violation of the PDA has been established, courts are required to award reasonable attorney fees and statutory penalties. King County v. Sheehan, 114 Wn. App. 325, 355, 57 P.3d 307 (2002). But the appropriate amount of penalties and attorney fees to award are matters within the trial court's discretion and subject to review only for an abuse of that discretion. Id. (noting that PDA “grants discretion to the trial court, not to this appellate court, to set the amount of the penalty within the minimum and maximum ranges.”).

Under RCW 42.56.550, “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. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.”

The statute defines a "Public record" as “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” RCW 42.56.010.

The leading case involving the determination of the penalty in a public records act case is Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 229 P.3d 735 (2010)(*Yousoufian III*), on appeal after remand from Yousoufian v. Office of King County Executive, 114 Wn. App. 836, 854, 60 P.3d 667 (2003) (*Yousoufian I*), aff'd in part, rev'd in part, 152 Wn.2d 421, 98 P.3d 463 (2004) (*Yousoufian II*).

The trial court in this case appears to have relied upon Yousoufian II, in part because the Yousoufian III decision had been withdrawn and not re-issued until 2010. In Yousoufian II, the Washington Supreme Court was confronted with a trial court that assessed the penalty on the basis of 10 discrete groups of records that were disclosed (making the multiplier of the daily penalty

a multiplier of ten, when Mr. Yousoufian wanted it to be a multiplier by each record that was not disclosed.)

The Court conceded that the case law and language of the penalty section of RCW 42.17 appeared to support Yousoufian's argument, since both referenced the singular "record" in assessment of the penalty. Under the former public records statute, however, the court found that: "Although RCW 42.17.340 (4) states that penalties are assessed "for each day that [the plaintiff] was denied the right to inspect or copy said public *record*," the definitions section of the PDA provides that "[a]s used in this chapter, the singular shall take the plural and any gender, the other, as the context requires." RCW 42.17.020.

The Supreme Court concluded that RCW 42.17, therefore, did not “require” that the penalty be assessed per record. The court explained that its ruling was based upon the ambiguity in the statute created by the definition, together with the legislative intent of the statute of assessing the penalty based on culpability and not necessarily upon the size of the request.

Appellate courts review questions of statutory construction de novo. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). In that review, however, when the statute is not ambiguous, the legislative intent is drawn from the plain language alone. Jacobs, at 600.

The Yousoufian case predated the present public records law, which was enacted in 2006, and recodified in 2007 and amended in 2010. In each instance, RCW 42.56.010 has not included the language, permitting the

singular to take the plural, or vice versa, when the court looks to the definition of a public record under RCW 42.56. Instead, RCW 42.56 contains its own section, defining a public record without the plural taking the singular, or vice versa.

Thus, for purposes of the case before the present trial court, the Yousoufian II interpretation of the public records law is not controlling. In fact, by dropping the language that created an ambiguity in RCW 42.17, the Legislature has made the statute plain on its face, and its plain meaning should now apply, resulting in trial courts returning to the method of calculating non-disclosure on the basis of the number of records that were not disclosed.

Moreover, this case is particularly problematic for two factual reasons: First, the trial court specifically ruled and entered findings concerning the existence of sixteen

different records, and 3 additional records that were different because they were signed. The court also excluded numerous records. The court was prepared to enter penalties on the basis of the 16 records and the 3 subsequent records that were not disclosed. The court took special note of the fact that the signed documents were different records from unsigned documents. This makes clear sense, in terms of public accountability for producing the signed and not just the unsigned documents in response to a request.

Finally, the even if this court considers the Yousoufian II interpretation, it makes no sense for this trial court to apply the standard as “requiring” the court to completely drop a per record count. In Yousoufian II, the court upheld “grouping” the records into 10 groups, rather than allowing hundreds of individual records to be disclosed. Here, it is clear that the records were not all

one record, as the court specifically found otherwise.

Notably, the records were not even disclosed at the same time. In context, it is hardly possible to conclude that the records were all the same, and thus no “per record” consideration would apply.

In any event, it was an abuse of discretion for the trial court to conclude that the “per record” should be completely removed from the formula simply because of the damages that would result. The trial court found ZERO mitigating factors in support of the agency, and also found multiple aggravating factors under the Yousoufian III analysis. The court appears to have used the mere fact that the penalty was assessed at the \$90 level in the range as a basis for reducing the award for 19 different records by a factor of nineteen, by eliminating the multiplier by the number of records withheld.

This makes no sense. The penalty should not be

so easily subject to manipulation by the trial court. If the court had found the “midpoint” of the range, and stuck with the findings that there were 19 records that were untimely, and properly imposed the “per record” computation, it would have only reduced the award by half. It is unreasonable to allow the trial judge to exercise a “loophole” that may remain from Yousoufian I, II, and III, which enables a trial court to find an extraordinarily egregious violation of the public record act, but to then to completely drop the “per record” consideration in order to reduce the damages.

**1. Whether the Appellant is entitled to attorney fees on appeal.**

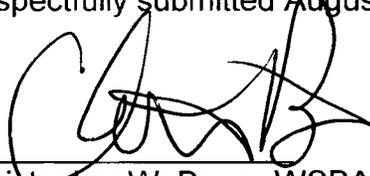
As noted above, once a violation of the PDA has been established, courts are required to award

reasonable attorney fees and statutory penalties. King County v. Sheehan, 114 Wn. App. 325, 355, 57 P.3d 307 (2002). Here, this court should grant review and reverse the decision of the trial court, remanding its determination based on the former language of RCW 42.17, which resulted in a 95% reduction of the damages for an egregious violation of the public records act, and award fees to the Appellant for seeking review.

#### CONCLUSION

In sum, this court should ask the trial court to reconsider its decision in light of RCW 42.56 and Yosoufian III.

Respectfully submitted August 12, 2010.

A handwritten signature in black ink, appearing to read 'C. Bawn', written over a horizontal line.

Christopher W. Bawn, WSBA #13417  
Attorney for Appellant

# Superior Court of the State of Washington

For Thurston County



FILED

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SUPERIOR COURT  
BETTY J. GOULD  
THURSTON COUNTY CLERK

**Paula Casey, Judge**  
*Department No. 1*  
**Thomas McPhee, Judge**  
*Department No. 2*  
**Richard D. Hicks, Judge**  
*Department No. 3*  
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**Chris Wickham, Judge**  
*Department No. 6*  
**Anne Hirsch, Judge**  
*Department No. 7*  
**Carol Murphy, Judge**  
*Department No. 8*

November 9, 2009

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Re: Bricker v. State L&I et al  
Thurston County Cause No. 08-2-01711-4

Dear Mr. Bawn & Mr. Barnes:

Enclosed you will find the Findings of Fact and Conclusions of Law, and Judgment, in the above-noted matter. As the court advised counsel at the hearing on November 6, 2009, the court interlined the proposed order earlier submitted by Mr. Barnes with the additions argued and/or agreed to in court. Further, as the court noted to counsel at the outset of that hearing, it is long past time to enter final orders in this matter, which was tried by the court many months ago. Although had the court been made aware of Mr. Bawn's recent health challenges prior to the hearing, it would, of course, had rescheduled the hearing; Mr. Bawn indicated in court he was able and willing to proceed, so the court did so.

As both counsel are well aware, the court was greatly troubled initially in the amount of penalty it felt compelled to impose, based on its incorrect assumption of the proper application of the "Yousoufian factors" to the number of documents the court found to have been wrongfully withheld in this case. Though invited to comment, the defense did not do so until recently, when it submitted a short memorandum clarifying the relation of the most recent (and now withdrawn)

All Counsel  
November 9, 2009  
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Yousoufian decision to the words of the Public Records Act (RCW 42.56) and earlier cases defining the parameters of factors to consider when imposing penalties for violations of the Act. After further review of the Act and the case law, this court has redetermined the penalty it is imposing in this case, where a violation was found. The specifics of the penalty are included in the enclosed Findings of Fact, Conclusions of Law, and Judgment.

The purpose of imposing a penalty under the Public Records Act is to promote public access to public records; to encourage, and demand, governmental transparency. It is not, in this court's opinion, meant as compensation for damages. Further, that purpose is best served by imposing a penalty at the high end of the possible range, as the court did in this case in part. Under the facts presented here, there is no appropriate purpose that would be served in imposing a per day and per document penalty.

Because the court has not yet been provided information on either attorney fees or costs, both of those issues are reserved for resolution either by agreement or hearing.

The court is enclosing a copy of the Order that was signed and filed for each of you and will be filing the original with the Clerk. If there are to be further hearings in this matter, please clear a date through my judicial assistant Trina Wendel.

Very truly yours,



Anne Hirsch  
Judge

AH/tw

COURT OF APPEALS  
 OF THE STATE OF WASHINGTON  
 DIVISION TWO  
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 [Signature]  
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**Court of Appeals No. 40064-2-II**

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**IN THE COURT OF APPEALS  
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**KEN BRICKER,**  
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On Appeal from Thurston County Superior Court,  
 The Honorable Anne Hirsch

---

**CERTIFICATE OF SERVICE OF BRIEF OF APPELLANT  
AND NOTICE OF CHANGE OF ADDRESS**

---

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This certifies that the Brief of Appellant was served on the John Barnes, Washington Assistant Attorney General on August 13, 2010.

In addition, the Appellant's counsel changed offices, effective August 10, 2010, and all mail should be directed to the Appellant's new address at 1700 Cooper Point Rd. SW, Building A-3, Olympia, WA 98501.



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Christopher W. Bawn, #13417  
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