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SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR WEST,

Appellant,

v.

CHRISTINE GREGOIRE, GOVERNOR OF THE STATE OF
WASHINGTON, STATE OF WASHINGTON,

Respondents/Cross Appellants.

BRIEF OF RESPONDENTS AND CROSS APPELLANTS,
GOVERNOR GREGOIRE AND THE STATE OF WASHINGTON

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ORIGINAL

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GOVERNOR'S BRIEF OF RESPONDENT

I. INTRODUCTION

This action is before the Court on appeal by Mr. West and cross-appeal by the Governor's Office, challenging the trial court's award of penalties against the Governor's Office under the Public Records Act (PRA).

II. ASSIGNMENT OF ERROR ON CROSS APPEAL

1. The trial court erred in entering Conclusion of Law 5, which provides: "Based on all of the relevant *Yousoufian* factors and the facts of this case, \$25 is the appropriate daily penalty." CP 169.
2. The trial court erred in entering judgment awarding penalties in the amount of \$2,175 based upon its determination that "\$25 is the appropriate daily penalty." CP 170.

III. ISSUE RELATING TO ASSIGNMENT OF ERROR ON CROSS APPEAL

Where the trial court concluded that (1) "[t]he Governor's Office acted in good faith throughout this case in responding to Plaintiffs' public record's request and in asserting executive privilege"; (2) "[a]ll of the [*Yousoufian V*] mitigating factors have application"; and (3) "[n]one of the [*Yousoufian V*] aggravating factors apply to this case," did the trial court abuse its discretion in determining that \$25 – five times the then-statutory

minimum – was the appropriate daily penalty?¹ CP 169 (Conclusions of Law 1, 2, 5).

IV. COUNTERSTATEMENT OF THE CASE

A. Factual Background

On November 16, 2009, Appellant, Mr. West, delivered to the Governor's Office a memorandum addressed to "WASHINGTON STATE GOVERNOR CHRISTINE GREGOIRE AND WSAC DIRECTOR ERIC JOHNSON." CP 21, 45-47, 165 (Finding of Fact 3). The memorandum began with a subject line, bolded and in all capital letters, identifying its subject as "RE: ATTENDANCE AT SECRET SHADOW GOVERNMENT EVENT, AKA (WSAC 2009 ANNUAL CONFERENCE)." CP 45, 165. The memorandum generally addresses the Governor's planned attendance at a meeting of the Washington State Association of Counties (WSAC), asks the Governor to reconsider attending the meeting, and requests the Governor to investigate and review the activities of WSAC and alleged obstruction by WSAC counsel and Judge Thomas McPhee to prevent fair adjudication of WSAC's duty to

¹ At the time the trial court decided this case, RCW 42.56.550(4) authorized the court to award a person who prevailed against an agency under the PRA "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 a public record. In 2011, through enactment of SHB 1899, the legislature amended this statute, deleting its requirement that a daily penalty be "not less than five dollars." Laws of 2011, ch. 273, § 1 (copy attached). Accordingly, the statute now authorizes, rather than mandates, the award of a daily penalty, and authorizes a penalty of less than five dollars per day.

comply with the Open Public Meetings and Public Records Act. CP 22, 45. The memorandum also references and attaches a second memorandum prepared by Mr. West dated November 6, 2009, for recall of Thurston County Commissioners Wolfe, Valenzuela, and Romero, in part on the basis of approving certain county payments to WSAC. CP 22-23, 45-46. In the fifth and final paragraph of the memorandum Mr. West delivered on November 16, 2009, it states: "Please regard this also as a request under RCW 42.56 for disclosure of all records of communications between the Office of the Governor and WSAC from 2007 to the present." CP 23, 45, 165 (Finding of Fact 3). As explained below, the memorandum was not immediately identified as a request for public records, and accordingly, was routed to the Constituent Correspondence Unit of the Governor's Office for response.

Two weeks later, on December 1, 2009, at 12:32 p.m., Mr. West sent an email to Glenn Kuper, Communications Director for the Office of Financial Management (who was then on temporary assignment to the Governor's Office), with a copy to Martin C. Loesch, then Director of External Affairs and Senior Counsel to Governor Gregoire, stating that he had submitted a public records request to the Governor's Office on

On the same afternoon, December 1, 2009, Ms. Campbell notified staff of the Governor's Office of Mr. West's public records request, and directed staff to advise her of documents responsive to Mr. West's request. CP 23, 166 (Finding of Fact 8). Also on that same afternoon, December 1, 2009, at 3:42 p.m., Ms. Campbell sent an email and attached letter to Mr. West. In her email and letter to Mr. West, Ms Campbell explained to Mr. West that his November 14, 2009, memorandum, delivered to the Governor's Office on November 16, 2009, had not initially been identified as a public records request, and accordingly, had been forwarded to CSU for referral and response. CP 23, 166 (Finding of Fact 9). Ms. Campbell also let Mr. West know that she would provide an estimate of the time required to respond to his public records request within two days, and apologized for the delay. *Id.*

Mr. West responded to Ms. Campbell the next day (December 2, 2009) that he had a deadline of December 7th for filing information about WSAC in a case concerning the status of WSAC. CP 23, 166 (Finding of Fact 10). Mr. West stated that he was hoping to receive the proclamation he had requested on December 1, 2009, and whatever other information was readily available by that date. Ms. Campbell immediately sent another email to staff informing them of Mr. West's desire for an expedited response. CP 23-24, 166 (Finding of Fact 10).

The following day, December 3, 2009, Ms. Campbell sent 57 pages of responsive documents to Mr. West by email, including the proclamation by the Governor that Mr. West had asked to receive by December 7th. CP 24, 166 (Finding of Fact 11). Mr. West was not asked to pay for any of these copies. *Id.* Ms. Campbell also advised Mr. West that searches were still ongoing, and that she would let him know if additional documents were located. *Id.*

On December 17, 2009, at 9:46 a.m., Ms. Campbell provided an additional 299 pages of documents responsive to Mr. West's request by email, scanning a response letter and 299 pages of documents into PDF files and transmitting them as attachments. CP 24, 167 (Finding of Fact 12). Mr. West was not asked to pay any charges for the provision of these documents. *Id.* One 3-page document was withheld, and Ms. Campbell's email also transmitted a privilege log to Mr. West identifying the withheld document as a briefing document to Governor Gregoire from Kathleen Drew, one of the Governor's Executive Policy Advisors, and stating that the document was withheld based on executive privilege. CP 24, 167 (Finding of Fact 11, 12). This completed the response of the Governor's Office to Mr. West's public records request. *Id.*

As Legal Counsel to the Governor explained in her declaration, the briefing document at issue, entitled Governor's Meeting Memorandum,

“was authored by Kathleen Drew, Executive Policy Advisor” and “was prepared to outline for the Governor the considerations and recommendations by policy staff on the issues anticipated to be raised in a meeting of the Governor and her advisors and the Chair, executive director, and deputy director of the Washington Association of Counties (“WAC”).” CP 68 (Pierce Declaration ¶¶ 3, 4). The memorandum communicates perspectives, considerations, and recommendations with respect to pending legislation and related policy proposals. CP 68-69. The heading of the document states the purpose of the meeting as follows: “Purpose: Discuss legislative bills and budget issues.” CP 68 (Pierce Declaration ¶ 4). “In the document the executive policy advisor discusses her understanding of the positions and concerns of the WAC representatives regarding pending legislation and related policy issues.” CP 68-69 (Pierce Declaration ¶ 4). “The executive policy advisor suggests actions the Governor may take or positions she may wish to adopt with regard to the legislation. The document includes discussions of options, tradeoffs, overall strategy, policy concerns, implications of certain choices, and other factors to be considered in making the decisions.” CP 69 (Pierce Declaration ¶ 4). “Kathleen Drew, the author of the memorandum, includes her own recommendations and also conveys the recommendations of other executive policy advisors regarding which

sections of proposed legislation they recommend the Governor support or oppose.” *Id.*³

B. Procedural Background In The Trial Court

Mr. West brought this action against the Governor’s Office under the Public Records Act on January 11, 2010. CP 3. Mr. West’s Complaint asserted that: “This is an action authorized by RCW 42.56, for violation of the Public Records Act resulting from an improper assertion of an executive privilege by the governor of the State of Washington[.]” CP 3 (Complaint ¶ 1.1). As part of his claim under the Public Records Act, Mr. West asserted that executive privilege is not a valid exemption under the Act, and sought a ruling to that effect, along with costs and daily penalties under the Act. CP 3 (Complaint ¶ 1.2).

On the same day, Mr. West secured an ex parte Order To Show Cause issued by the Thurston County Superior Court, the Honorable Paula Casey. CP 19. The Order To Show Cause directed the Office of the Governor to appear and “show cause why it should not be found in violation of the Public Records Act for unlawfully withholding records,

³ For example, with respect to considering then pending legislative budget proposals, the Governor’s Executive Policy Advisor, Kathleen Drew, advises the Governor: “You can help by supporting flexibility for counties in fund transfers, revenue diversity, flexibility and new revenue sources, such as is found in SB 5433”, and goes on to discuss portions of SB 5433 that the Governor’s Legislative Affairs Director, Julie Murray, (CP 104) recommends the Governor support. CP 449. The memorandum further advises the Governor that if she opposes certain revenue options, she should “[c]onsider greater support of other bills that provide state funding to local governments.” *Id.*

for failing to produce records within a reasonable time, and for failing to produce an exemption log citing an actual exemption to public disclosure contained in the Public Disclosure Act.” *Id.* The Public Records Act, RCW 42.56.550(1), authorizes show cause proceedings for judicial review of agency actions denying an opportunity to inspect or copy a public record.

On March 12, 2010, following continuances of the show cause proceedings at Mr. West’s request, the superior court ruled in Mr. West’s favor. CP 157-58. The superior court also ruled that it need not decide whether Washington’s Governor possesses executive privilege. Rather, the trial court decided that the briefing memo to the Governor would not be subject to executive privilege without regard to whether executive privilege exists. The trial court entered the following finding of fact:

1. The Court concludes that the Document at issue contains a recitation of what positions of different entities are and what proposed legislation is before the Legislature, and does not contain advice to the Governor.

The trial court entered the following conclusions of law:

1. The document identified in the privilege log as PRR 71-73 does not contain advice to the Governor, and as such, would not be subject to a claim of executive privilege, if such a privilege were found to exist.
2. The Court needs not address the issue of whether an executive privilege exists in the State of Washington.

CP 159. The trial court ordered that the document was subject to production under the PRA. *Id.* On the same day, the briefing document was produced to Mr. West. CP 168 (Finding of Fact 18).

The trial court subsequently considered Mr. West's request for costs and daily penalties. *See* RCW 42.56.550(4). The trial court ruled that "the appropriate penalty period is 87 days, representing the period between Plaintiff's November 16, 2009, request, and March 12, 2010, (116 days) when Plaintiff received the single record at issue in this case, exclusive of 7 days during which plaintiff waived penalties to secure a second continuance of the show cause proceeding, and exclusive of 22 days which represents a reasonable period for the Governor's Office to respond to Plaintiff's public records requests in this matter." CP 169 (Conclusion of Law 4).

As to the daily penalty amount, the superior court "considered the entire penalty range of the Public Records Act, and all of the aggravating and mitigating factors identified in *Yousoufian v. Office of Ron Sims*, No. 80081-2, filed March 25, 2010." CP 169 (Conclusion of Law 2). The superior court concluded that "[a]ll of the mitigating factors have application. None of the aggravating factors apply to these facts", and it specifically concluded that "[t]he Governor's Office acted in good faith throughout this case in responding to plaintiff's public records requests

and in asserting executive privilege.” *Id.*; RP, April 2, 2010, p. 33, lines 3-7. The court then imposed a daily penalty on the Governor’s Office of \$25 per day – five times the statutory minimum daily penalty. CP 169 (Conclusion of Law 5).

C. Procedural Background In The Appellate Court

Mr. West timely filed a Notice of Appeal directly to the Washington Supreme Court. CP 195-204. The Governor’s Office timely filed a Notice of Cross-Appeal to the Court of Appeals, Division II. CP 206-214.

In seeking direct review, Mr. West’s Statement of Grounds for Direct Review asserted, at page 2: “The primary issue presented is whether the Superior Court erred in declining to determine whether the Constitution of the State of Washington contains any provision, express or implied, that supersedes the Public Records Act . . . and allows for assertion of an Executive Privilege.” Appellant’s Statement of Grounds for Direct Review at 2. With respect to any other issues on appeal, Mr. West’s Statement of Grounds for Direct Review asserted only that “[a]ccessory penalty related issues are also raised.” *Id.*

The Governor’s Answer to Statement of Grounds for Direct Review opposed direct review. The Governor’s Answer explained that only an aggrieved party may seek review (RAP 3.1), and that a prevailing

party is not aggrieved where a trial court rules in its favor, but on grounds different from those asserted. The Governor's Answer argued that Mr. West is not an aggrieved party with respect to his claim that the briefing document at issue is subject to disclosure under the PRA, because the trial court ruled in his favor on that point, although not on Mr. West's preferred grounds. The Governor's Answer contended that "[t]he issues actually presented by this case concern only whether the trial court erred in its penalty award under the PRA", and those issues do not warrant direct review under RAP 4.2(a). Respondent's Answer to Statement of Grounds for Direct Review at 6.

After Mr. West filed his opening brief, the Governor filed a Motion to Strike those portions of Mr. West's brief challenging the trial court's decision not to rule on whether executive privilege exists in Washington. Respondents/Cross Appellants' Motion to Strike and Motion to Stay Briefing Schedule, dated March 4, 2011. On April 1, 2011, the Court Commissioner ruled that Mr. West was not an aggrieved party in that regard, granted the Governor's Motion, and struck the following portions of Mr. West's opening brief:

- Assignments of Error I and II on page 8;
- Issues I and II on page 9;
- Summary of Argument on pages 12 through 14;

- Argument under headings I and II on pages 14 through 16 and 16 through 41;
- Conclusion on pages 51 through 55.

Ruling Granting Motion to Strike and Establishing Briefing Schedule. Mr. West moved to vacate the Commissioner's Ruling. By Order dated July 12, 2011, the Court denied Mr. West's motion to modify.

Accordingly, the issues presented on appeal are confined to those concerning the propriety of the superior court's penalty award. This brief therefore addresses those issues.

V. SUMMARY OF ARGUMENT

A. Summary Of Argument In Response To Appellant, Mr. West

Mr. West's claim that the PRA penalty period includes the reasonable time the law affords an agency to respond to a public records request is unsound. It is contrary to the PRA, which gives agencies a reasonable period to locate, review, and provide requested records or claim an exemption, and which does not include that time in the statutory penalty period. The claim erroneously assumes that a person who requests records under the PRA has a right to receive them instantaneously, rather than once the agency has a reasonable opportunity to complete its response to the request for records. In addition, Mr. West's claim is not

supported by the cases that he cites, defies the purpose of a penalty, and is contrary to common sense.

The superior court concluded that a reasonable period for the Governor's Office to complete its response to Mr. West's public record requests was twenty-two (22) days. Mr. West has not challenged the trial court's conclusion in this respect. Its determination of the number of penalty days should be affirmed.

Mr. West's claim that the trial court was required to determine whether Washington's Governor possess executive privilege before establishing an appropriate daily penalty, is not before the Court for two reasons. First, the Court already has ruled that Mr. West is not aggrieved by the trial court's decision that it was unnecessary to determine whether Washington's Governor possesses executive privilege in order to adjudicate his PRA claim. Second, Mr. West offers no argument to support his claim that whether the privilege exists is relevant to a PRA penalty determination.

Moreover, even if this claim were before the Court, it would fail. The agency's good faith is the touchstone in establishing an appropriate daily penalty under the PRA. The trial court concluded, and its conclusion is overwhelmingly supported in the law and the record, that the

Governor's Office acted in good faith throughout this matter in responding to Mr. West's requests and in claiming executive privilege.

Mr. West makes three additional claims to assert that the trial court abused its discretion in not awarding a daily penalty in excess of \$25. None withstand scrutiny. Mr. West offers no argument to support one of them. There is no basis in the record for the other two, and in fact, the record is contrary to those claims.

B. Summary Of Argument On Governor's Cross Appeal

The court below abused its discretion in awarding a daily penalty of \$25 -- five times the then-minimum daily penalty under the PRA. The trial court concluded that "[t]he Governor's Office acted in good faith throughout this case in responding to Plaintiff's public records request and in asserting executive privilege"; "[a]ll of the [*Yousoufian V*] mitigating factors have application"; and "[n]one of the [*Yousoufian V*] aggravating factors apply to this case." CP 169. The superior court's conclusions in this respect are well-supported by its findings and the record. Nonetheless, it then concluded that "\$25 dollars is the appropriate daily penalty." *Id.*

In light of the facts of this case, the applicable legal framework, and the trial court's findings and conclusions, a daily penalty five times the then-statutory minimum is manifestly unreasonable. The trial court's

decision in this respect is all out of proportion to an appropriate daily penalty when viewed in isolation, and when viewed in light of penalty awards established or affirmed on appellate review.

For reasons of economy, finality, and appellate guidance, the Court should reverse the trial court's daily penalty award, and establish an appropriate daily penalty of \$5.

VI. ARGUMENT IN RESPONSE TO APPELLANT

A. The Superior Court Correctly Calculated Penalty Days, Recognizing That The PRA Penalty Period Does Not Include Time An Agency Reasonably Requires To Locate And Review Requested Records For Potential Exemptions And To Respond To The Request

The superior court ruled that “the appropriate penalty period is 87 days.” This “represent[s] the period between Plaintiff’s November 16, 2009 request, and March 12, 2010, [116 days] when Plaintiff received the single record at issue in this case”, not including “7 days during which plaintiff waived penalties to secure a second continuance of the show cause proceeding”, and “22 days which represents a reasonable period for the Governor’s Office to respond to Plaintiff’s public records requests in this matter.” CP 169.

Mr. West acknowledges that the superior court was correct in concluding that the penalty period in this case does not include 7 days during which Mr. West waived penalties as a condition of receiving a

second continuance of show cause proceedings.⁴ Mr. West apparently asserts, however, that the PRA requires the penalty period to include the time that it reasonably took the Governor's Office to locate and review the records Mr. West requested and to respond to his request. Mr. West's position is contrary to the PRA and common sense. Not surprisingly, the PRA expressly affords agencies a reasonable period to respond to records requests, and does not include that reasonable time in its penalty period.

Under former RCW 42.56.550(4), the court is to award "[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record . . . 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." (Emphasis added.). The PRA thus defines the penalty period as each day the requester was denied "the right" to inspect or copy the record. Only those days are part of the penalty period to begin with. Under the PRA, "the right to inspect or copy" a record is not a right to instantaneous inspection or copying. The *right* under the PRA is to inspect or copy records *after*

⁴ At page 50 of Appellant's Opening Brief, Mr. West states "[i]t is not in dispute that the correct number of penalty days in this case from the date of the original request for records in this case was filed by West until the record was produced is 109." What Mr. West seems to mean is that he does not dispute that the period between his November 16, 2009 request, and March 12, 2010, when he received the single record at issue in this case, totaled 116 days, and that 116 days minus 7 days, during which he waived penalties to secure a second continuance, leaves 109 days. Respondents, of course, very much dispute that 109 days is the correct penalty period in this case.

the agency has been afforded a reasonable period to complete its response to the request. The PRA makes this evident in at least four ways.

First, RCW 42.56.520 gives agencies 5 business days to respond to a records request by providing the record, acknowledging receipt of the request and providing a reasonable estimate of the time required to respond to the request, or denying the request. Second, RCW 42.56.520 provides that “additional time required to respond to a request may be based upon the need . . . to locate and assemble the information requested . . . or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.” Third, RCW 42.56.080 specifically permits an agency to respond to large requests “on a partial or installment basis” over time. Fourth, RCW 42.56.090 allows agencies to adopt rules that accommodate the agencies’ time, resource, and personnel constraints to prevent excessive interference with other essential functions of the agency.

A requester’s “*right* to inspect or copy said public record” then, arises once the agency has had a reasonable period under the PRA to complete its response to the request. For this reason, the PRA penalty period does not include the 5 business days that RCW 42.56.520 gives the agency to make an initial response to a public records request. Similarly, the PRA penalty period does not include a reasonable time that the PRA

authorizes under both RCW 42.56.520 and RCW 42.56.080 for the agency to locate, review, and produce or assert an exemption with respect to the public records request.

Mr. West cites *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006) and *Yousoufian v. Office of King County Executive (Yousoufian II)*, 152 Wn.2d 421, 424, 98 P.3d 463 (2004), to support his argument. But neither case holds that the PRA penalty period includes the reasonable time that the PRA allows an agency to respond to a public records request. Neither case even considers the issue.

In *Koenig*, the trial court declined to impose *any* penalty on the City of Des Moines because the city had secured an injunction prohibiting disclosure of the requested records, the issue of whether the records were exempt from disclosure was very close, and the plaintiff only partially prevailed. *Id.* at 179. The Supreme Court identified the question in *Koenig* as “whether the trial court had the discretion to decline to impose the statutory penalty.” *Id.* at 188. The Court held that the trial court did not have such discretion, and rejected a suggestion by the Court of Appeals that it was within the trial court’s discretion to reduce the number of penalty days “to account for such factors as whether the plaintiff filed suit in a timely manner, and perhaps whether the city did not wrongfully withhold the records during the period that an injunction prohibited the

city from disclosing the records.” *Koenig*, 158 Wn.2d at 188, quoting *Koenig*, 123 Wn. App. at 303-04. *Koenig* thus does not address the issue in this case.

Similarly, in *Yousoufian II*, the only question before the court with respect to the appropriate penalty period was whether the trial court properly excluded days attributed to the plaintiff’s unreasonable delay in bringing suit under the PRA. *Id.* at 427-28. The Court held that the suit was brought within the statute of limitations, the limitations period was the only constraint on the time for bringing suit, and that the penalty period could not be reduced for perceived delay in commencing litigation within the statutory time limit.

Although *Yousoufian II* did not consider the issue in the present case, even the language that Mr. West quotes from it is contrary to his claim. Mr. West points out at page 49 of his opening brief that *Yousoufian II* states “a per day penalty must be assessed for each day the requested records were *wrongfully* withheld.” *Yousoufian II*, 152 Wn.2d at 424. (Emphasis added.)⁵ A record cannot be said to be “*wrongfully* withheld” during the reasonable period that the PRA affords the agency to respond to a public records request under RCW 42.56.520. Put otherwise, a requester is not “denied *the right* to inspect or copy said public record” during that

⁵ Mr. West’s quote and citation should read “a per day penalty for each day a record is wrongfully withheld.” *Yousoufian II*, 152 Wn.2d at 425.

period, and as set forth in RCW 42.56.550(4), that period is not included in the penalty period.

This conclusion is dictated not only by the language of the PRA, but also by common sense. Mr. West's argument depends on the premise that a requester has the right to inspect or copy a record immediately upon request. If that were the case, then a penalty would be awarded in every situation where the requester is denied the opportunity to inspect or copy records, commencing on the same day that the records are sought. Such an approach would be contrary to any common understanding of the nature and function of a penalty – as an exaction to deter inappropriate conduct. *See Yousofian v. Office of Ron Sims (Yousofian V)*, 168 Wn.2d 444, 463-4, 229 P.3d 735, 745 (2010). (“[T]he purpose of the PRA’s penalty provision is to deter improper denials of access to public records.”) Under Mr. West’s argument, a “penalty” would be imposed for each day the agency is doing precisely what the PRA authorizes, and what reality requires, and before any improper denial could have occurred.

In this case, the superior court concluded that a reasonable period for the Governor’s Office to complete its response in this case was 22 days.⁶ CP 169. The trial court’s conclusion is fully supported by the

⁶ As set out above, the Governor’s Office acted very quickly to provide the requested records in response to Mr. West’s December 1, 2009, email. Within one day of being notified that Mr. West desired a particular record for a court case, the Governor’s

record and the trial court's findings, and Mr. West has offered no argument otherwise. In his opening brief, Mr. West "take[s] exemption" (*sic*) to each and every one of the mixed findings of fact and law" of the superior court. Opening Brief of Appellant, p. 44. However, Mr. West's brief includes no argument or authority to support this all-encompassing assignment of error as it relates to the trial court's determination of a reasonable period to respond to his requests. A party who offers no argument in its opening brief on a claimed assignment of error waives the assignment. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Matter of Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1988) (treating findings as verities on appeal where argument and citations to the record were not offered to show why specific findings of the trial court were not supported by evidence.) Mr. West has waived any claimed error in this regard.

In summary, Mr. West's position erroneously assumes that a requester has an instantaneous "*right* to inspect or copy said public record" in response to a request. The Public Records Act is not that rigid, providing reasonable time for an agency to locate, assemble, and process

Office provided that record and dozens of additional responsive pages. Two weeks later, the Governor's Office provided an additional 299 pages of responsive documents, completing the request. CP 21-24, 168. The Governor's Office expeditiously responded to Mr. West's request; the record contains absolutely no indication of any intent or effort to delay the response.

requested records. The trial court was correct in rejecting Mr. West's contention, and did not abuse its discretion in determining that, on the facts of this case, the penalty period was 87 days.

B. The Superior Court Did Not Abuse Its Discretion In Establishing A Per Day Penalty Without Deciding Whether Washington's Governor Possesses Executive Privilege

Mr. West asserts that the superior court abused its discretion in determining a per day penalty in this case "without deciding the underlying issue of whether the claimed exemption existed." Opening Brief of App. at 42. Mr. West's argument fails at the outset for two reasons. First, the Court already has ruled that Mr. West is not aggrieved by the trial court's determination that it was unnecessary to decide whether Washington's Governor possesses a constitutional executive privilege in order to dispose of Mr. West's PRA claim. Ruling Granting Motion to Strike and Establishing Briefing Schedule, entered April 1, 2011; Order dated July 12, 2011, denying Mr. West's motion to modify the Commissioner's Ruling.

Second, Mr. West's opening brief offers nothing, except bare assertion, that deciding whether Washington's Governor possesses executive privilege was necessary to determine an appropriate daily penalty under the PRA. He offers no explanation and no authority to support his assertion. "Without adequate, cogent argument and briefing,

this court should not consider an issue on appeal.” *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 808, 225 P.3d 213 (2009) quoting *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990). A claimed error not supported by argument and authority is waived. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d at 809.

Accordingly, the Court should not consider Mr. West’s argument on this point. If the Court does, however, the argument also fails on its merits. The touchstone for determining an appropriate daily penalty under the PRA is the good faith of the agency in responding to a request for public records. *Yousoufian V*, 168 Wn.2d at 460. Mr. West labels executive privilege the “use of a phantom exception”, dubs its assertion “unreasonable”, and contends that an “actual deterrent” to the use of this “untested exemption” was required. Opening Brief at 45-46. Mr. West’s labels notwithstanding, it cannot be seriously argued that a claim of executive privilege by the Governor constitutes a lack of good faith. The privilege is firmly grounded in the law and recognized by courts throughout the country.

The United States Supreme Court has recognized an executive privilege for the President of the United States that is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683,

708, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). Recognizing that the office of governor bears the same relation to the state as does the office of President to the United States, courts throughout the nation have held that state governors are entitled to the same privilege in the discharge of the duties of that office. *Hamilton v. Verdow*, 287 Md. 544, 561, 414 A.2d 914 (1980) (“In light of these considerations, cases throughout the country, both federal and state, have recognized the doctrine of executive privilege which . . . gives a measure of protection to the deliberative and mental processes of decision-makers.”). To similar effect are *Doe v. Alaska Superior Ct.*, 721 P.2d 617, 623 (Alaska 1986); *Killington, Ltd. v. Lash*, 153 Vt. 628, 636, 572 A.2d 1368 (1990); *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777, 783 (Del. Super. Ct. 1995); and *State ex rel. Dann v. Taft (Dann I)*, 109 Ohio St. 3d 364, 848 N.E.2d 472 (2006). Executive privilege also has been applied in the superior court in Washington. See *Wash State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 298, 174 P.3d 1142 (2007) (“During discovery, WSFB sought disclosure of many internal government documents that the State claimed were protected by legislative or executive privilege. The trial court ruled that such privileges exist, subject to a list of qualifications. Because we resolve this case in favor of the State, it is unnecessary for us to address

this privileges issue, and we decline to do so.”) It simply has not been addressed by an appellate court in this state.⁷

Nor, despite Mr. West’s labels, can it seriously be contended that an assertion of executive privilege as an exemption from the PRA is inconsistent with good faith. The PRA does not expressly include a constitutionally-based executive privilege for the Governor among its statutory exemptions. However, the Act itself explicitly exempts from public inspection and copying public records falling within an “other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). The Court has interpreted this provision to incorporate not just state statutes, but also court rules, *O’Connor v. Dep’t of Social & Health Services*, 143 Wn.2d 895, 912, 25 P.3d 426 (2001), and federal statutes and federal regulations, *Ameriquest Mortgage Co. v. Office of the Attorney General*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010). As the Delaware court recognized in *Guy*, 659 A.2d at 782-83, “it would be incongruous to hold that the [legislature] intended a statutory exemption but not an exemption based upon the constitution to be sufficient to preclude disclosure.” *Id.*

⁷ Subsequent to the superior court’s ruling in the case at bar, two judges in Thurston County Superior Court have ruled that the Governor may claim executive privilege as an exemption under RCW 42.56.070(1). Mr. West is the plaintiff in one of those cases. Plaintiffs in both cases have appealed.

Accordingly, even if the trial court somehow had concluded that Washington's Governor lacks executive privilege, there would be no support for finding anything other than good faith in claiming the privilege under the PRA. Moreover the question of the Governor's good faith in asserting the privilege is not a matter of conjecture. The trial court specifically concluded that "[t]he Governor's Office acted in good faith throughout this case in responding to Plaintiff's public records requests and in asserting executive privilege." CP 169.

In summary, the Court already has rejected Mr. West's claim that the trial court was required to determine whether Washington's Governor possesses a constitutionally based executive privilege in order to adjudicate his PRA claim, and that question no longer is before the Court. Even if that were not the case, however, it was unnecessary for the superior court to determine whether Washington's Governor possesses executive privilege for that court to have found, as it did, that the privilege was asserted in good faith, and to establish a daily penalty.

C. Mr. West Fails To Demonstrate That The Trial Court Abused Its Discretion In Not Setting A Higher Daily Penalty

Mr. West has advised the Court that "[u]nless the issue of whether Executive Privilege exists is decided against the State, there can be no persuasive argument made for the penalty to be raised." Appellant's

Motion to Modify and Vacate Commissioner's Order Redacting Brief at 7. Mr. West has not, however, dismissed his appeal from the daily penalty amount awarded by the trial court. Mr. West's brief makes three claims challenging the daily penalty established by the trial court that do not appear to depend upon his unsound contention, addressed in Part VI B, *supra*, that the trial court was required to decide his executive privilege claim.

First, Mr. West asserts that the trial court committed an abuse of discretion "in finding all of the mitigating factors to be present when such a finding was not supported by the record." Opening Br. at 43. Mr. West does not further discuss this claim. Like Mr. West's shotgun assignment of error "tak[ing] exemption (*sic*) to each and every one of the mixed findings of fact and law" of the superior court (Brief of Appellant, p. 44), this claim is waived. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d at 809. *Matter of Estate of Lint*, 135 Wn.2d at 532.

Second, Mr. West asserts that the superior court "erred and acted at variance with the facts in this case when it failed to consider . . . lack of strict compliance with the 5 day response period requirement." Opening Br. of App. at 45. "[H]onest, timely, and strict compliance with all PRA procedural requirements" is one of sixteen nonexclusive factors to guide a trial court's discretion under the PRA to determine appropriate daily

penalty when RCW 42.56.550(4) authorizes a penalty. *Yousoufian V*, 168 Wn.2d at 467.

Contrary to Mr. West's assertion, the trial court fully considered this *Yousoufian V* factor. Finding of Fact 3 describes the memorandum that Mr. West delivered to the Governor's Office on November 16th including its subject line in all capital letters: "RE: ATTENDANCE AT SECRET SHADOW GOVERNMENT EVENT, AKA (WSAC 2009 ANNUAL CONFERENCE)." CP 165. The trial court found that "[t]he governor's office did not respond to Plaintiff's November 16, 2010, public records request within the initial 5 day period set forth in RCW 42.56.520." Finding of Fact 19; CP 168. The trial court also found that "[w]hile not excusable, the form of Mr. West's request was unclear and foreseeably would contribute to this error." *Id.* The superior court's oral ruling further demonstrates its full consideration of this factor. The trial court observed that the topic of the memorandum delivered to the Governor's Office on November 16th was "attendance at secret shadow government event in big bold type", and that the memo made no mention of a public records request until its last paragraph. RP, April 2, 2010, p. 25, lines 3-14. The court observed that "[c]ertainly, it was not clear at an initial glance or initial reviewing of this incoming correspondence that this was a record request" and that "more careful and perhaps slower

review might have identified this document from the outset as a record request, but I certainly think it was excusable that the governor's office did not immediately determine that this was a records request." RP, April 2, 2010, p. 25, line 17-25.

The fact that the trial court weighed this single *Yousoufian V* factor differently from how Mr. West apparently would have weighed it, hardly demonstrates that the trial court abused its discretion in that respect, let alone that the trial court was "manifestly unreasonable" or based its decision on "untenable grounds or reasons" when it did not impose a daily penalty in excess of \$25 per day. Abuse of discretion is more than disagreement with the trial court's opinion. *Rogstad v. Rogstad*, 74 Wn.2d 736, 446 P.2d 340 (1968).

Second, Mr. West asserts that the superior court committed an abuse of discretion "in failing to find that any of the aggravating factors were present when the information withheld concerning the operations of the governor's office, as well as those of OFM and the WSAC were of foreseeable public importance, when the agency misrepresented the content of the record to evade in camera review." Opening Br. at 43-44. What the above-quoted statement is intended to mean, and whether it makes a single or multiple claims, is not clear.

Mr. West may intend the first part of the statement to refer to aggravating factor 7 of *Yousoufian V*, which allows the court to consider “the public importance of the issue to which the request is related, where the importance was foreseeable to the agency.” *Yousoufian V*, 168 Wn.2d at 468. If that is Mr. West’s intention, however, it fails. Mr. West merely asserts that the information in the single document at issue was important because it related to the operation of the Governor’s Office, OFM, and WSAC. By definition, every public record relates to the operation of government. “Public Record” “includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function.” RCW 42.56.010(2). Asserting, as Mr. West does, that a document was important because its contents relate to the conduct of government does not implicate aggravating factor 7. Aggravating factor 7 requires a showing that the records request was related to an issue of public importance and that the issue was foreseeable to the agency. Mr. West has not made the first part of the required showing. *A fortiori*, Mr. West has not demonstrated that the briefing document related to an issue of public importance foreseeable to the Governor’s Office, which aggravating factor 7 also requires. Nor has he independently addressed the foreseeability requirement of aggravating factor 7. As with Mr. West’s other unsupported assertions,

this assertion is not properly before the Court. *Matter of Estate of Lint*, 135 Wn.2d 532; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d at 809.

Mr. West also asserts that the trial court abused its discretion in determining that none of the *Yousoufian V* aggravating factors applied “when the agency misrepresented the content of the record to evade in camera review.” Opening Br. at 43-44. This assertion is groundless. Mr. West offers no support in the record for his charge of misrepresentation, and there is none. The trial court specifically found that the Governor’s Office acted in good faith throughout this case in asserting executive privilege. CP 169. The strong legal basis for executive privilege and its application to advice provided to the state’s chief executive by the executive’s advisers are discussed in Part VI. B, *supra*. The nature and substance of the briefing document at issue is accurately described in the Declaration of Narda Pierce the Governor’s Legal Counsel. CP 67-70. The briefing document itself confirms the description of the Governor’s Office. CP 448-50. There is no agency misrepresentation concerning the content of the document. This is nothing

more than another unsupported claim by Mr. West, and is not properly before this Court.⁸

VII. ARGUMENT ON GOVERNOR'S CROSS APPEAL

A. The Trial Court Abused Its Discretion In Awarding A Daily Penalty Five Times The Then-Statutory Minimum

In *Yousoufian V*, this Court established a multifactor framework to provide guidance to trial courts in exercising their discretion, and to render those decisions “consistent and susceptible to meaningful appellate review.” *Yousoufian V*, 168 Wn.2d at 465. Noting the absence of any “specific indication [in the PRA] of how a penalty is to be calculated”, the Court “[i]dentified factors that trial courts may appropriately consider in determining PRA penalties.” *Id.* at 465-66. In this respect, *Yousoufian V* reaffirmed that “[t]he existence or absence of [an] agency’s bad faith is the principal factor which the court must consider”, *Id.* at 460 (internal quotations omitted), and explained that the additional factors “relat[e] to the basis for PRA penalties: agency culpability.” *Id.* *Yousoufian V* then

⁸ As explained in the Counterstatement of the Case at p. 9, *supra*, the trial court concluded that the briefing document does not contain advice to the Governor. The Governor has not assigned error to this finding because it is not relevant to any issue on appeal. With respect to Mr. West’s misrepresentation allegation, it is readily apparent that the trial court did not conclude, and could not have concluded, that the briefing document was misrepresented to the court. To the contrary, the trial court found that the Governor’s Office acted in good faith throughout in asserting the privilege. CP 169. Examination of the briefing document, CP 448-50, and the Declaration of Narda Pierce, CP 68-69, makes it apparent that the briefing document advises the Governor as represented to the trial court. See note 3, *supra* at p. 8.

set forth sixteen factors that a trial court should consider, noting that they may overlap and may not apply or apply equally in every case. *Id.*

In our view, mitigating factors that may serve to 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. (Footnotes omitted)

Conversely, aggravating factors that may support increasing 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. (Footnotes omitted)

Id. at 467-68.

A trial court's penalty determination under the PRA is reviewed for abuse of discretion. *Yousoufian V*, 168 Wn.2d at 458. "[W]hen the

trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons", the decision is an abuse of discretion. *State v. Blackwell*, 120 Wash.2d 822, 830, 845 P.2d 1017 (1993). "A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wn .App. 786, 793, 905 P.2d 922 (1995)). "A decision is 'manifestly unreasonable' if the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" *Rohrich*, 149 Wn.2d. at 654 (quoting *State v. Lewis*, 115 Wn.2d 294, 298–99, 797 P.2d 1141 (1990). Put otherwise, a trial court's decision "is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard." *State v. Turner*, 156 Wn. App. 707, 713, 235 P.3d 808 (2010).

In this case, after considering all of the *Yousoufian V* factors, the trial court concluded that (1) "[t]he Governor's Office acted in good faith throughout this case in responding to Plaintiff's public records request and in asserting executive privilege"; (2) "[a]ll of the mitigating factors have application"; and (3) "[n]one of the aggravating factors apply to this

case.”⁹ CP 169. The trial court nonetheless concluded that “\$25 dollars is the appropriate daily penalty.” *Id.*

The Governor’s Office respectfully submits that given the facts of this case, the applicable legal framework, and the trial court’s findings and conclusions, a daily penalty five times the then-statutory minimum was “manifestly unreasonable.”¹⁰ The trial court offered no rationale for imposing a penalty five times the then-existing statutory minimum in a case where it determined that all of the *Yousoufian V* factors favored the Governor’s Office. How or why the trial court arrived at such a penalty is unexplained, and in light of its findings, the record, and the applicable legal standard, is inexplicable.¹¹ In its oral ruling, the trial court simply stated, “I don’t have strict standards to follow in determining what the penalty should be, but I am going to assess the penalty at \$25 a day.” RP, April 2, 2010, p. 30, lines 20-22. “Given the facts and the applicable legal standard” this decision by the trial court is “outside the range of acceptable choices.” *State v. Turner*, 156 Wn. App. 707, 713, 235 P.3d 808 (2010). Indeed, the trial court appears to have misapprehended the fundamental

⁹ The trial court itself interlineated items (2) and (3) above in its Findings of Facts, Conclusions of Law, Order Regarding Costs and Penalties and Final Judgment entered April 2, 2010. See RP, April 2, 2010, p. 33, lines 3-7.

¹⁰ The unreasonableness is even more marked if compared to the current statute, under which no penalty is mandated. See Laws of 2011, ch. 273, § 1.

¹¹ It is true that the *Yousoufian V* factors are “nonexclusive”, and accordingly, a trial court may consider additional factors. But the trial court did not do that.

fact that *Yousoufian V* provides standards that are to guide the trial court's discretion, and that one of the purposes of the *Yousoufian V* factors is to provide "more predictability to the parties", *Id.* at 468, and to "render [penalty] decisions consistent."

The trial court's penalty award not only lacks reason in its own context, but also is manifestly unreasonable in light of penalty awards affirmed on review. For example, in *American Civil Liberties Union of Washington v. Blaine School Dist. No. 503*, 95 Wn. App. 106, 975 P.2d 536 (1999), the court of appeals held that a daily penalty of \$10 was appropriate where it determined that the district did not act in good faith in responding to a PRA request in refusing to mail requested records of its disciplinary policy and suspension notices; wrongly stated that the requester had sought thousands of documents; and expressed unwillingness to use employee time to copy the records. "Because it is clear that the District did not act in good faith, a penalty more than the minimum is appropriate." *Id.* at 115. By contrast, in the instant case, the trial court determined that the Governor's Office acted in good faith throughout, and that all of the mitigating and none of the aggravating *Yousoufian V* factors applied, and yet imposed a penalty two and one-half times the penalty in *ACLU*.

In *Sanders v. State*, 169 Wn.2d 827, 240 P.2d 120 (2010), the Supreme Court upheld a per diem penalty of \$8. There, the Court determined that the Attorney General's Office acted in good faith, but had failed to provide a brief explanation of its claimed exemptions, as required by RCW 42.56, and the Court treated that failure as an aggravating factor under *Yousoufian V*. Here, by contrast, the trial court determined that the Governor's Office acted in good faith, and that no aggravating factors applied, and still imposed a daily penalty three times the penalty found reasonable in *Sanders*.

In *Yousoufian V*, among other things, the Court concluded that the county repeatedly failed to meet its responsibilities under the PRA over a period of many years; told the requester that it had produced all the records, when it had not, and that archives were being searched and records compiled, when they were not; engaged in "years of delay and misrepresentation"; "was untimely and unreasonable in its interpretation of and response to [the] requests"; "was negligent in the way it responded to [the] request at every step of the way, and this negligence amounted to a lack of good faith." *Yousoufian V*, 168 Wn.2d at 456. The Court then held that \$45 would be an appropriate daily penalty. In other words, where the agency receiving the request essentially did nothing for years to properly respond to a PRA request and where multiple aggravating factors

applied, an appropriate daily penalty was \$45. The conduct of the Governor's Office in this case is at the opposite end of the spectrum from the conduct in *Yousoufian V*, and yet more than half of the *Yousoufian V* daily penalty has been imposed.

As the above discussion demonstrates, the daily penalty selected by the trial court in this case is all out of proportion to any penalty warranted under the *Yousoufian V* factors in light of the trial court's findings and conclusions and the record in this case, and all out of proportion to penalties awarded in other PRA cases reviewed or awarded on appeal. The daily penalty amount selected by the trial court was manifestly unreasonable.

B. For Reasons Of Finality, Judicial Economy, And Guidance, The Court Should Set An Appropriate Daily Penalty In This Case Not To Exceed \$5

Ordinarily it is not for the appellate court to determine penalties under the PRA. However, for reasons of judicial economy and finality, appellate courts have determined that doing so is the appropriate course in some cases. *See, e.g., Yousoufian V*, 168 Wn.2d at 468-69 (setting the daily penalty to bring long-running litigation to a close); *ACLU*, 95 Wn. App at 114 ("While the usual procedure is to remand to the trial court for a determination of an appropriate penalty, all the relevant information that is necessary to impose an appropriate penalty is in the record on review. In

an attempt to bring this dispute to closure, we will determine the penalty.”)

The Court should take the same course in this case.

The total penalty award in this matter was \$2,175. CP 170. It would be uneconomical and it is unnecessary, to remand this case to the trial court to determine an appropriate penalty, when all of the relevant facts and the trial court’s findings and conclusions with respect to the *Yousoufian V* factors are before the Court.¹² Moreover, a decision by this Court determining an appropriate daily penalty in this case would provide an additional appellate guidepost for trial courts to consider in similar cases, and in that respect would advance the objective of *Yousoufian V* – to promote greater consistency and predictability in PRA penalty decisions. *Yousoufian V*, 168 Wn.2d at 468.

As previously noted, at the time this case was decided below, RCW 42.56.550(4) authorized the court to award a person who prevailed against an agency “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 a public record.” (emphasis added.) In 2011, the

¹² Although not addressing this request and unmindful of the separate issue relating to penalty days requiring appellate review in this case, Mr. West recognized this economic reality in his unsuccessful Motion to Modify and Vacate Commissioner’s Order Redacting Brief: “Even if the State could prevail on its argument that the court abused its discretion and reduce the per diem award to the minimum \$5, the costs of arguing the issue would greatly exceed any saving effected by any reduction in the trial Court’s penalty award.” Appellant’s Motion to Modify at 7.

legislature amended this statute, deleting its requirement that the court impose a daily penalty “not less than five dollars.” Laws of 2011, ch. 273, § 1 (copy attached). Accordingly, RCW 42.56.550(4) no longer mandates a minimum daily penalty. A strong argument can be made that the 2011 amendment is remedial and applies to cases on appeal at its enactment.¹³

In this case, however, the Governor’s Office respectfully submits that based upon the *Yousoufian V* factors, the trial court’s findings and conclusions, and RCW 42.56.550(4) as it existed when this case was decided below, a reasonable daily penalty would be \$5 per day, the then-

¹³ A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right. *Johnston v. Beneficial Management Corp.*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975). “A vested right, entitled to protection from legislation, must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.” *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975). “Statutes which relate to practice, procedure or remedies and which do not affect a contractual or vested right or do not impose a penalty usually apply to pending causes of action.” *Godfrey*, 84 Wn.2d at 961. See also *Ballard Square Condominium Owners Ass’n v. Dynasty Const. Co.*, 158 Wn.2d 603, 617-618, 146 P.3d 914 922 (2006) (dismissing case based upon statutory amendment to statute of limitations enacted while the case was on appeal). The 2011 amendment to RCW 42.56.550(4) relates to remedies, does not affect a vested right, and does not impose a penalty. Rather, the 2011 amendment potentially lessens an existing penalty. “[W]here a controlling law changes between the entering of judgment below and consideration of the matter on appeal, the appellate court should apply the new or altered law.” *Marine Power & Equipment Co. v. Washington State Human Rights Com’n Hearing Tribunal*, 39 Wn. App. 609, 620-621, 694 P.2d 697 (1985).

In amending RCW 42.56.550(4), the Legislature expressed no intent that the amendment apply prospectively only. On its face, the enactment represents the Legislature’s judgment that there should be no mandatory minimum daily penalty under the PRA, and must be understood to recognize that in some instances, a violation of the PRA does not warrant a monetary penalty. No good reason suggests itself why the Legislature would intend its judgment regarding appropriate penalties under the PRA to apply only to cases commenced after its enactment.

minimum statutory daily penalty. Accordingly, whether the 2011 amendment applies retroactively need not be addressed in this case.

VIII. CONCLUSION

For the reasons set forth in this brief, the Governor's Office respectfully requests the Court to affirm the trial court's determination of 87 penalty days, reverse its daily penalty determination of \$25, and set a daily penalty at \$5 per day.

RESPECTFULLY SUBMITTED this 29th day of August, 2011.

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ATTACHMENT

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1899

Chapter 273, Laws of 2011

62nd Legislature
2011 Regular Session

PUBLIC RECORDS VIOLATIONS--PENALTIES

EFFECTIVE DATE: 07/22/11

Passed by the House March 1, 2011
Yeas 96 Nays 2

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 21, 2011
Yeas 47 Nays 0

BRAD OWEN

President of the Senate

Approved May 5, 2011, 10:25 a.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 1899** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

May 6, 2011

Secretary of State
State of Washington

SUBSTITUTE HOUSE BILL 1899

Passed Legislature - 2011 Regular Session

State of Washington

62nd Legislature

2011 Regular Session

By House State Government & Tribal Affairs (originally sponsored by Representatives Miloscia, Overstreet, Hurst, Taylor, Hunt, Armstrong, McCoy, and Condotta)

READ FIRST TIME 02/17/11.

1 AN ACT Relating to penalties for public records violations;
2 reenacting and amending RCW 42.56.550; and prescribing penalties.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 42.56.550 and 2005 c 483 s 5 and 2005 c 274 s 288 are
5 each reenacted and amended to read as follows:

6 (1) Upon the motion of any person having been denied an opportunity
7 to inspect or copy a public record by an agency, the superior court in
8 the county in which a record is maintained may require the responsible
9 agency to show cause why it has refused to allow inspection or copying
10 of a specific public record or class of records. The burden of proof
11 shall be on the agency to establish that refusal to permit public
12 inspection and copying is in accordance with a statute that exempts or
13 prohibits disclosure in whole or in part of specific information or
14 records.

15 (2) Upon the motion of any person who believes that an agency has
16 not made a reasonable estimate of the time that the agency requires to
17 respond to a public record request, the superior court in the county in
18 which a record is maintained may require the responsible agency to show

1 that the estimate it provided is reasonable. The burden of proof shall
2 be on the agency to show that the estimate it provided is reasonable.

3 (3) Judicial review of all agency actions taken or challenged under
4 RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take
5 into account the policy of this chapter that free and open examination
6 of public records is in the public interest, even though such
7 examination may cause inconvenience or embarrassment to public
8 officials or others. Courts may examine any record in camera in any
9 proceeding brought under this section. The court may conduct a hearing
10 based solely on affidavits.

11 (4) Any person who prevails against an agency in any action in the
12 courts seeking the right to inspect or copy any public record or the
13 right to receive a response to a public record request within a
14 reasonable amount of time shall be awarded all costs, including
15 reasonable attorney fees, incurred in connection with such legal
16 action. In addition, it shall be within the discretion of the court to
17 award such person an amount (~~not less than five dollars and~~) not to
18 exceed one hundred dollars for each day that he or she was denied the
19 right to inspect or copy said public record.

20 (5) For actions under this section against counties, the venue
21 provisions of RCW 36.01.050 apply.

22 (6) Actions under this section must be filed within one year of the
23 agency's claim of exemption or the last production of a record on a
24 partial or installment basis.

Passed by the House March 1, 2011.

Passed by the Senate April 21, 2011.

Approved by the Governor May 5, 2011.

Filed in Office of Secretary of State May 6, 2011.

NO. 84629-4

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR WEST,

Appellant,

v.

CHRISTINE GREGOIRE,
GOVERNOR OF THE STATE OF
WASHINGTON, STATE OF
WASHINGTON,

Respondents.

CERTIFICATE OF
SERVICE

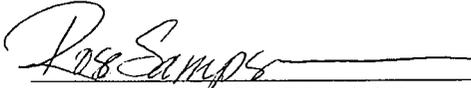
I certify, under penalty of perjury under the laws of the state of Washington, that on this date, I have caused to be served on the parties listed below a copy of the Brief of Respondents and Cross Appellants, Governor Gregorie and the State of Washington and this Certificate of Service.

Parties Served:

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Signed this 29TH day of August, 2011 in Olympia, Washington
by:


Rose Sampson, Confidential Secretary

OFFICE RECEPTIONIST, CLERK

To: Sampson, Rose (ATG)
Cc: Mike Reitz; A West; Copsey, Alan (ATG); Hart, Marnie (ATG)
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Sent on behalf of Maureen Hart, Solicitor General, WSBA #7831

Attached for filing in the above referenced matter, you will find the Brief of Respondents and Cross Appellants, Governor Gregoire and the State of Washington and Certificate of Service.

<<84629-4 Brief of Resp-Cross Appellants.pdf>> <<84629-4 COS 082911.pdf>>

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