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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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NO. 275965-III

COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON

JEFF and DONNA ZINK,

Appellants/Cross Respondents,

v.

CITY OF MESA, a Washington Municipal Corporation,

Respondent/Cross-Appellant.

**ON APPEAL FROM THE SUPERIOR COURT OF
FRANKLIN COUNTY, STATE OF WASHINGTON**

REPLY BRIEF OF CITY OF MESA

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1. INTRODUCTION

Everyone agrees that the City of Mesa (City or Mesa) has violated the Public Records Act (PRA or the Act) and therefore the Zinks are entitled to daily penalties from between \$5 to \$100 for each and every day records were wrongfully withheld.

The ultimate issue on appeal is whether the trial court has the discretion within the PRA's \$5-to-\$100-per-day penalty range to shape those daily penalties to reach an equitable result, or must the court mechanically determine and impose the penalty regardless of any unduly harsh impacts that the penalty may have on taxpayers who must ultimately foot the bill.

The answer to this question is suggested by the question itself. By giving the trial court the discretion to determine the daily penalty within a \$95 range, with the largest daily penalty totaling 20 times the lowest, the intent of the PRA is to provide the trial court broad discretion to take into account any and all equitable considerations. This broad equitable discretion is particularly important given that the trial court had no equitable discretion when determining whether a violation occurred – here the PRA mandates strict compliance.

The Zinks do not want to talk about equity. They want to turn this Court's review into a fact-finding hearing, focusing on whether the City acted with good faith in this and that particular response. The Zinks do

not believe this Court has any discretion to do any equity to avoid harsh, potentially bankrupting penalties.

In their Reply Brief, the Zinks repeatedly claim that courts cannot even consider the “unduly harsh” nature of the penalties they seek against Mesa. *See, e.g.*, Reply Brief of Appellant/Cross Respondents (Zink Reply Br.) at 2-3, 29. This inequitable attitude is well captured in the Zinks’ conclusion where they acknowledge:

Are the penalties high for one of the State’s smallest agencies? Yes.

Is there a real possibility Mesa will consider bankruptcy? Yes.

Zinks’ Reply Br. at 62.

While any resolution in this case will have a harsh result for the taxpayers of Mesa, nothing in the Act suggests the trial court cannot take that result into account as long as its ruling (1) awards daily penalties for every day records were not produced (2) within the \$5-to-\$100 range mandated in RCW 42.56.550(4)/42.17.340. The Supreme Court’s decision in *Yousoufian 2010*¹ merely provides some structure for how trial courts should exercise their discretion – the Supreme Court did not intend to put limits on what equitable considerations could be taken into account by trial courts determining daily penalties.

The \$5-to-\$100 penalty spread provides an incredibly broad range for a court to act. Here, if the proper number of days of penalties is

¹ *Yousoufian v. Officer of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010) (*Yousoufian 2010*).

22,000², then the total penalty can fall somewhere between approximately \$130 thousand (at \$6 per day³) to \$2.2 million (at \$100 per day). The trial court imposed a \$167,905 penalty for a total of 15,060 days. If the proper number of days is 8600⁴ – the approximate number of days of penalties in *Yousoufian* – the penalty could be as low as \$51,600 (at \$6 per day). The PRA, by providing this over \$2 million range, provides the trial court sufficiently broad discretion when setting penalties to consider the impact of the penalty on taxpayers and all other equitable considerations.

Remand and a new hearing are required in this case because equity was not done. Rather than consider the impacts of the penalty on Mesa taxpayers, the trial court imposed an unduly harsh penalty after ruling that it was limited by the Court of Appeal's now-overruled decision in *Yousoufian* 2007⁵ and its own erroneous interpretation of the Court's decision in *Zink v. Mesa*, 140 Wn. App. 328, 166 P.3d 738 (2007) (*Zink II*). Under the four-tiered penalty scheme used by the trial court, Mesa had no reason to offer evidence in support of specific mitigating factors. Moreover, the trial court's daily penalty awards do not fully take into account any mitigating factors

² The trial court imposed penalties for 15,060, but the Zinks claim on appeal that the proper number of days is over 22,000.

³ This presumes the average daily penalty averages \$6 per day. The City agrees that higher than the minimum daily penalty will be warranted in at least some of the cases so \$6 per day is used instead of \$5.

⁴ If the requests are combined as argued in section 5.5.4 (pages 55-58) of the City's opening brief, this would total approximately 8600 days.

⁵ *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 151 P.3d 243 (2007) (*Yousoufian* 2007), overruled by *Yousoufian* 2010.

2. REMEDY REQUESTED

The parties agree that (1) prior to the *Yousoufian 2010* decision, there was a “paucity of published cases”⁶ governing the imposition of penalties and (2) the trial court did not “weigh the mitigating and aggravating factors associated with the culpability of the City in violating the PRA.”⁷

To remedy these agreed shortcomings, the Court should remand this case to allow for a new hearing where Mesa can provide additional evidence in support of mitigating factors and make new arguments in support of penalty awards that take into account all relevant equitable considerations. The Court should also provide guidance on (1) whether the trial court should consider mitigating factors such as City resources, the volume of requests, and the conduct of the requester; and (2) how the trial court should calculate the number of days, including consideration of additional grouping of requests.⁸

3. ARGUMENT

3.1. Mesa Has Not Had a Meaningful Opportunity to Offer Evidence in Support of the *Yousoufian* Factors

Before the Court imposes any “unduly harsh” penalties on Mesa, it should allow the City to properly and fully defend itself by presenting

⁶ Zinks’ Reply Br. at 3.

⁷ Zinks’ Reply Br. at 27-28.

⁸ The Zinks claim ethical violations regarding a mistake made about the record below related to the documents withheld as attorney client communications. Contrary to the Zinks’ claim, the primary author of this brief – Ramsey Ramerman – was not involved in the case at the trial court level, nor has there been any intentional misstatement regarding the record. This issue is more fully addressed in section 3.7, *supra*.

evidence and making arguments regarding the aggravating and mitigating factors identified in *Yousoufian 2010*.

3.1.1. When the trial court determined penalties in this case, it applied an inadequate standard based on a paucity of case law.

As the Zinks concede, when the trial court imposed its penalties, there was a “paucity of published cases” and trial courts “needed . . . a framework to guide [them] in calculating PRA penalty amounts[.]” Zinks’ Reply Br. at 3. Only three published cases had addressed the adequacy of penalties when the trial court imposed penalties in this case. *Yousoufian 2010*, 168 Wn.2d at 464.

When setting penalties in this case, the trial court primarily relied on *Yousoufian 2007*, with its four-tiered, negligence-based culpability scale. As the Supreme Court recognized, however, the approach adopted in *Yousoufian 2007* “is inadequate because culpability definitions do not lend themselves to the complexity of the PRA penalty analysis.” *Yousoufian 2010*, 168 Wn.2d at 463.

The multifactor approach in *Yousoufian 2010* is fundamentally different from the culpability approach in *Yousoufian 2007* because it allows for considerations of equitable mitigating factors beyond simply the agency’s culpability. Therefore, the *Yousoufian 2010* decision is essential for providing guidance to trial courts imposing penalties and should be used by the trial court in this case.

Because of the factually complex nature of this case, the trial court must make this determination on remand.

3.1.2. The Court of Appeal's decision in *Yousoufian 2007* did not provide Mesa with a clear target for the City's defense.

On remand, the parties should be allowed to supplement the record with evidence relevant to those factors and any additional relevant factors prior to that determination. While the record in this case does provide significantly more evidence than exists in many PRA cases, this record is still incomplete and inadequate because the parties did not know the proper legal standard when presenting evidence and arguments regarding penalties. Instead, the parties were offering evidence and argument regarding the rejected, inadequate four-tiered standard from *Yousoufian 2007*. See, e.g., RP (7/16/08) at 4:22-23 (counsel for City noting limited issues City was seeking to address at hearing); 11:19-20 (court listing issues it will address); 18:6-7 (court noting that it could not consider Zinks' conduct); 62:2-3 (court noting it could not consider financial affect on City). And while Mesa has offered some evidence that has ended up being relevant to the *Yousoufian 2010* factors, this does not mean that the City provided all of its evidence relevant to those factors.

The trial court's offer to allow the parties to submit additional evidence after remand in *Zink II* did not allow the City an adequate opportunity to present evidence relating to the *Yousoufian 2010* factors because those factors had not been adopted. Under the state of existing case law at the time of the 2008 hearing – namely *Yousoufian 2007* – the City had no motivation to provide extensive evidence on equitable mitigating factors such as the City's financial resources. This factor did

not relate to culpability and therefore was not relevant under *Yousoufian 2007*. Had the *Yousoufian 2010* factors been in place, the City would have had the incentive to offer additional evidence on each factor.

The Zinks' claim that this argument has been waived by the City's decision to not offer additional evidence is therefore misplaced – the City cannot be faulted for not offering additional evidence related to a non-existent test.⁹

Given what is at stake – penalties that currently total over \$500 per resident in Mesa that could potentially grow much higher – it would be manifestly unjust to impose any penalty on the taxpayers of Mesa without first allowing Mesa an opportunity to present a full defense made pursuant to the proper legal standards.

3.1.3. This case fundamentally differs from *Yousoufian* and *Sanders v. State*.

The Supreme Court made it clear in *Yousoufian 2010* that trial courts, not appellate courts, should be setting daily penalties. *Yousoufian 2010*, 168 Wn.2d at 469. Nevertheless, in *Yousoufian 2010* and the recent case *Sanders v. State*,¹⁰ the Supreme Court imposed penalties rather than remand. The case at bar, however, fundamentally differs from those two cases because of the complexity of the facts and potential consequences.

In *Yousoufian 2010*, there was no dispute that penalties were being imposed under a single standard based on the uncontested fact that King

⁹ Moreover, while the City originally chose not to offer additional evidence, after the trial court excluded exhibit 216, the City sought in the alternative to present additional evidence. CP 174.

¹⁰ *Sanders v. State*, -- Wn.2d --, 2010 WL 3584463 (2010).

County had acted grossly negligent. *Yousoufian 2010*, 168 Wn.2d at 457. In *Sanders*, the court was likewise imposing penalties under a single standard based on a single factor – the failure to provide an adequate exemption log. *Sanders*, at *18.

In contrast, here the penalties are sought for 34 violations based on each violation’s own set of factors.

In *Yousoufian* and *Sanders*, the penalties imposed did not amount to significant portions of the budgets for King County or the State. In contrast, even a penalty at the lowest end of the range – \$51,600 – will equal a significant portion of Mesa’s annual budget of approximately \$1 million.

Given the intensely factual nature of the necessary analyses and potential impacts of the final award, the Court should follow the Supreme Court’s admonition in *Yousoufian* that “[i]t is generally not the function of an appellate court to set penalties” and should instead remand for that determination. *Yousoufian 2010*, 168 Wn.2d at 469.

If the Court is inclined to set the penalties on appeal, however, the Court should exercise its broad discretion and make a total award at the low end of the range (i.e. near \$51,600), particularly in light of the mitigating factors noted below.¹¹

¹¹ The Zinks try to claim that remand would be an injustice to the Mesa taxpayers. Zinks’ Reply Br. at 11. While any further litigation will cost Mesa attorney fees and expose the City to more fees from the Zinks, remand would only be an injustice if the City could obtain a more equitable result on appeal, e.g., if the Court were to impose a low end penalty on appeal.

3.2. The Trial Court Must Be Allowed to Consider All Mitigating Factors

When the Supreme Court adopted the 16 factors in *Yousoufian 2010*, it emphasized four limitations:

1. “the factors may overlap”;
2. “the factors . . . are offered only as guidance”;
3. “the factors . . . may apply not equally or at all in every case”; and
4. “the factors . . . are not an exclusive list of appropriate considerations.”

Yousoufian 2010, 168 Wn.2d at 468.

Despite these unambiguous limits, the Zinks argue that the City’s proposed factors are somehow barred by *Yousoufian 2010*. If anything, the proposed factors are implicit in the *Yousoufian* factors, but they are certainly not excluded by the decision in that case.

3.2.1. A trial court should take equitable considerations into account and should consider the full picture of how the violations occurred and of the impact of the final award.

As noted in the Court’s decision in *Zink II*, which was subsequently adopted by the Supreme Court in *Rental Housing Authority v. City of Des Moines*, the PRA mandates “strict compliance.” *Rental Housing Authority v. City of Des Moines*, 165 Wn.2d 525, 535, 199 P.3d 393 (2009) (citing *Zink II*). As a result, a court must find a violation any time a record is wrongfully withheld, even when an agency acts in complete good faith or other equitable considerations explain the agency’s noncompliance. *Zink II*, 140 Wn. App. at 339-40; *Yousoufian 2010*, 168 Wn.2d at 460.

To balance what the Zinks concede can be unduly harsh consequences, courts imposing penalties must be allowed to take any and all equitable considerations into account when setting the penalty amount as long as the penalty awarded is somewhere between \$5 to \$100 per day for each grouped violation. Taxpayers are the group most often harmed by noncompliance and taxpayers also foot the bill for any penalties, so it would make no sense to interpret the PRA to prohibit trial courts from considering the affects of the penalty on the taxpayers. The factors below should be considered because they will assist the trial court in making an equitable determination.

3.2.2. The Supreme Court's decision in *Yousoufian 2010* recognizes that size and resources are valid considerations when a court is determining penalties.

Any time a smaller agency such as Mesa is at issue, the trial court must be able to consider the agency's size and resources as a mitigating factor when setting the penalties. While size and deterrence are only listed in the aggravating factor column in *Yousoufian 2010*, that opinion must be read to allow size and deterrence to qualify as mitigating factors as well. This is because size and deterrence are based on a single scale – once the Supreme Court recognized King County deserved a higher penalty based on its size, it was also recognizing that a small jurisdiction like the Blaine School District or Mesa deserve a reduced penalty based on their size.

This is made clear by the reasoning the Supreme Court used to determine that King County deserved a higher penalty. The trial court in *Yousoufian* had set the penalties at \$15 per day based on a prior decision

in *ACLU v. Blaine School District*, 95 Wn. App. 106, 975 P.2d 536 (1999), which held that \$15 per day was appropriate for bad faith conduct. *Yousoufian 2010*, 168 Wn.2d at 460. The Supreme Court rejected that comparison and tripled the penalty to \$45 per day, based in part on the fact that King County is much larger than the Blaine School District. *Yousoufian 2010*, 168 Wn.2d at 463. By making this ruling, the Supreme Court was also holding that something less than \$45 per day would have been appropriate for Blaine School District if it had made a similar violation. In other words, if Blaine School District had acted grossly negligent, it would have received a smaller penalty than King County for the same conduct.

This factor is especially appropriate when the Court considers the full range of municipal entities in Washington State. While Mesa is a very small city, its budget and staff are much larger than many special purpose districts with budgets in the 10s of thousands of dollars and no full time staff. To say a lake protection district with a \$15,000 annual budget should be punished to the same extent as King County defies reason.

In attempting to refute the idea that courts should consider an agency's resources, the Zinks try to create a slippery slope argument by asserting that such considerations will make it so only large agencies face PRA penalties or that it will allow courts to award penalties that are lower than \$5 per day. Zinks' Reply Br. at 13, 29. These claims ignore the

City's concession that no matter what, the City must be penalized at least \$5 per day for each day a penalty is warranted.

Finally, the fact that the Supreme Court did not put size and resources in the mitigating column of factors, despite arguments made by King County at oral argument, does not demonstrate any intent by the Court to reject that factor. First, the Supreme Court made it clear it was not providing an exclusive list of factors. *Yousoufian 2010*, 168 Wn.2d at 468. Second, all appellate courts loath to comment on issues that are not before it. *See Wash. State Farm Bureau v. Gregoire*, 162 Wn.2d 284, 307, 174 P.3d 1142 (2007) (holding that judicial restraint dictates that courts should avoid resolving issues that do not need to be resolved to decide the case); *Ward v. Board of County Comm'rs*, 86 Wn. App. 266, 275, 936 P.2d 42 (1997) ("We decline to reach hypothetical issues not raised by the facts presented.") King County is not a small agency, which made the issue it raised in oral argument a hypothetical issue that the Supreme Court properly avoided.

3.2.3. The volume of requests is relevant when agencies have extreme limitations on personnel.

When the Court rejected the trial court's conclusion that the impact of the high volume of the Zinks' requests justified noncompliance, the Court noted that this could be relevant in determining the amount of penalties. *Zink II*, 140 Wn. App. at 339-40 (the court does "not doubt that the impact of the Zinks' requests on the clerk's office was significant").

This is the law of the case,¹² and therefore the trial court erred when failed to use this as a mitigating factor for penalties.

The Zinks first claim that the volume of their requests was not significant or disruptive because it only averaged six requests a month, Mesa has plenty of staff to manage the requests and many of their requests were easy to fulfill.¹³ Not only do these claims conflict with the Court's ruling in *Zink II*, they are also misleading.

The Zinks' requests came in bursts, some took an excessive amount of time to fulfill, and Mesa's office staff of one and a half full time positions had many other tasks to complete. The City's public record officer was also the City Clerk, the City treasurer, the City manager and had to run all other administrative aspects of the City – public records compliance was only suppose to take up a small portion of her time. But when the Zinks requested 21 Code Violations on November 27, 2002, this request required the City to review approximately 150 different files to locate those records. RP (5/11/05) at 428:6-17. Thus, while some other requests were easier to comply with, this Court was right “not [to] doubt that the impact of the Zinks' requests on the clerk's office was significant.” *Zink II*, 140 Wn. App. at 339-40. The trial court should

¹² *Yakima County v. Yakima County Law Enforcement Officers' Guild*, 157 Wn. App. 304, 319-20, 237 P.3d 316 (2010) (issue decided on first appeal is “law of the case” and cannot be challenged on second appeal).

¹³ The Zinks' claim that on a strict population ratio basis, King County would have thousands of public records officers. This argument ignores the economy of scale and ignores all of the other functions Mesa's public records officer had to perform that are performed by thousands of King County employees.

consider the uncontestable impacts of the Zinks' high volume of requests when setting penalties.

The Zinks next try to claim the trial court already took the volume of requests into account when setting penalties by citing to six places in the record where the trial court mentioned the volume of requests. The Zinks, however, conspicuously fail to cite to a seventh place, where the trial court stated, "The Court of Appeals made it exceedingly clear it doesn't matter how many are made, that's not important." RP (7/16/08) at 18:7-8). Moreover, when these six citations are reviewed, it becomes clear that the Court only made limited considerations regarding the volume on a couple of specific requests, while rejecting that volume could be broadly considered for all 30 violations.

The trial court's attitude about the volume of requests is in fact exemplified by the Zinks' first citation,¹⁴ where the trial court highlighted the volume of requests to support entering a finding against the City for not having procedures in place. RP (7/17/08) at 59:10-60:18.

In Zinks' second citation,¹⁵ and sixth citation,¹⁶ the Court is ruling on the reasonableness of a time estimate, not on a penalty amount.

In the Zink's fourth citation,¹⁷ the Court merely notes the high volume and then rules that the City's conduct was beyond mere negligence and warranted a higher, \$15 per day penalty.

¹⁴ Zinks' Reply Br. at 14.

¹⁵ Zinks' Reply Br. at 15 (citing RP (7/17/08) at 13:20-15:25).

¹⁶ Zinks' Reply Br. at 16 (citing RP (7/17/08) at 3:2-4:15).

¹⁷ Zinks' Reply Br. at 16 (citing RP (7/17/08) at 46:8-48:24).

In the Zinks' third citation,¹⁸ the Court does find that penalties for one request should be reduced based on the volume of requests, but this was because the Court found the Clerk could have been trying to produce all records requested in one narrow time period as one installment in good faith. See, e.g., RP (7/17/08) at 15:14-18 ("I don't see anything wrong with the City trying to provide all of the materials at the same time . . .").

Finally, in the Zink's fifth citation,¹⁹ the Court does reduce the penalty amount and the number of days, making this one example out of 30 where the Court was ignoring its own mandate that it was not suppose to consider how many requests were made.

None of these citations demonstrate and undercut of the trial court's clear (and erroneous) statement that, "The Court of Appeals made it exceedingly clear it doesn't matter how many are made, that's not important." See, e.g., RP (7/16/08) at 18:7-8. This error must be corrected.

3.2.4. A requester's conduct is relevant when a court is setting penalties even if it is not relevant when determining whether a violation occurred.

Contrary to the Zinks' argument, this Court ruled that the Zinks' conduct is relevant when setting penalties – the Court merely held the Zinks' conduct was not relevant when determining compliance. The Court did "not doubt that the impact of the Zinks' requests on the clerk's office was significant" and ruled that the trial court's findings that the

¹⁸ Zinks' Reply Br. at 16 (citing RP (7/17/08 at 13:9-16:22).

¹⁹ Zinks' Reply Br. at 16 (citing RP (7/16/08 at 112:1-113:18).

Zinks interfered with the operations of the clerk's office were supported by substantial evidence. *Zink II*, 140 Wn. App. at 339-40. These conclusions are now the law of the case. *Yakima County*, 157 Wn. App. at 319-20.

After ruling that these facts did not warrant non-compliance, the Court went on to hold that the facts were relevant when determining the amount of penalties. *Zink II*, 140 Wn. App. at 339-40. This is also the law of the case.

Moreover, it would make no sense to say that a requester's conduct, if it contributed to an agency's noncompliance, cannot be taken into account when setting penalties. When the people enacted the PRA, they directed courts to be "mindful . . . of the desirability of the efficient administration of government." RCW 42.17.010(11). It would directly contradict this mandate if the Court were to encourage requesters to interfere with agency compliance by prohibiting trial courts from taking that interference into account when awarding penalties.²⁰

²⁰ The Zinks try to argue that the trial court did in fact take their conduct into account, but a fair reading of the records shows this was only true in one limited aspect in one incident cited by the Zinks. See Zinks's Reply Br. at 8. In response to the Zinks' argument that the City acted in bad faith because it ignored Ms. Zink's legal advice to release the records, the Court stated that the City clerk was not required to take Ms. Zink's advice over its own attorney, particularly when you consider how Ms. Zink behaved. This shows that in one instance, Ms. Zink's behavior was relevant to the Zink's good faith; it does not show that the trial court fully considered Ms. Zink's behavior when ruling on all 30 alleged violations where penalties were imposed.

3.2.5. When violations are caused by third party contractors, this is relevant to the penalty amount, even if it is not relevant when determining whether a violation occurred.

The Zinks ask the Court to ignore the realities of the situation in favor of a formulaic application of penalties.²¹ By noting that Mr. Tanner and Mr. Mumma were agents of the City, the Zinks argue the Court cannot consider that they were third-party agents when setting penalties. But it is the Court's job to do equity, and taking the actual relationship between the City and these two individuals into account when setting penalties will result in a more equitable resolution, even if such considerations are not appropriate when determining whether a violation occurred.

3.2.6. The Supreme Court's decision in *Yousoufian 2004*²² recognizes that variable-rate penalties are appropriate when an agency is not responsible for delays.

The Zinks concede that the Supreme Court authorized variable rate penalties in *Yousoufian 2004* but ask the Court to narrowly interpret that case to hold that variable rate penalties are only appropriate when a requester delays in filing suit. The Court should reject this narrow reading and find that *Yousoufian 2004* holds that any time an agency is not responsible for the delay, the Court can set variable rate penalties to reach a more equitable result. *Yousoufian 2004*, 152 Wn.2d at 437-38. As the Zinks note, penalties are meant to punish violations, not compensate for harm. Zinks' Reply Br. at 55. Whether the delay is caused by the

²¹ The Zinks note that the Court already found that the City was liable for Tanner's and Mumma's actions. The City agrees that for the purpose of determining a violation, you cannot take the relationships into account. But that does not address penalties, where the Court has more equitable discretion.

²² *Yousoufian v. Officer of Ron Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004) (*Yousoufian 2004*).

requester or the court system, either way the agency is not responsible, so imposing a higher penalty during that delay is not warranted.

3.3. Penalizing Agencies that Voluntarily Produce Records Prior to Litigation Would Reduce the Incentive for Agencies to Produce Records, Is Contrary to the Plain Language of the PRA, and Antithetical to the Legislative Intent of the PRA.

The plain language of the PRA makes it clear that an agency must be *wrongfully withholding records* when a lawsuit is filed before the penalty provisions of the Act apply. In RCW 42.56.550(1)/42.17.340(1), the PRA provides that when requester brings a claim, the court “may require the responsible agency to show cause why it has refused to allow inspection or copying[.]” (emphasis added). It then puts the burden of proof “on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute[.]” RCW 42.56.550(1)/42.17.340(1) (emphasis added). Finally, it allows for costs and penalties for a requester “who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record[.]” RCW 42.56.550(4)/42.17.340(4) (emphasis added).

By the use of the present tense verbs “has refused”, “is” and “seeking”, the plain language of the PRA requires that the records are still being withheld at the time the lawsuit was filed. Otherwise, the drafters would have used the simple past tense in these sections.

This is consistent with the intent of the PRA. The Public Records Act should be interpreted to fulfill the Act’s purpose: to increase transparency. *Sanders*, at *9. The Act should not be interpreted in a

manner that “would reduce the incentive for agencies to produce records.”
Sanders, at *9.

Punishing agencies that voluntarily produce wrongfully withheld records prior to the filing of a lawsuit would harm transparency by discouraging agencies from voluntarily correcting their mistakes. For example, if an agency overlooked a record but later located that record, the PRA should be interpreted to encourage the agency to produce that record. Moreover, allowing litigation solely for penalties would result in a waste of public resources.

The Supreme Court has emphasized this requirement – that an agency must still be withholding records when the lawsuit is filed – in numerous cases. Most recently, the Supreme Court made this point in *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005) (*SRDF*), where the Court also held that fees could be awarded even if the lawsuit did not force the disclosure of records. In making this second point, the Supreme Court stated that “[s]ubsequent events do not affect the wrongfulness of the agency’s initial action[.]” *SRDF*, 155 Wn.2d at 103-04. But the Court only made that statement in an effort to address the problem of agencies trying to avoid attorney fee and penalty awards by “disclosing the documents after the plaintiff has been forced to file a lawsuit[.]” *SRDF*, 155 Wn.2d at 104 (citation omitted, emphasis added). It therefore noted that “if a requester has to resort to litigation,” then penalties are warranted. *SRDF*, 155 Wn.2d at

104 n.10. Thus, the *SRDF* Court stands for the proposition that when a requester files a lawsuit and then an agency releases the records, the agency cannot avoid liability – because the requester was already forced to resort to litigation.

SRDF follows a long line of cases, starting with *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 129, 580 P.2d 246 (1978), where the Court interpreted the attorney fee and penalty provision to allow for awards “to the successful party in the event legal action need be commenced to acquire records[.]” *Hearst*, 90 Wn.2d at 129 (emphasis added); *see also Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997) (holding fees are warranted if a requester is forced to file suit to obtain records). Thus, when squarely addressing the issue, the Supreme Court has repeatedly interpreted the PRA to allow for fees only when a requester is forced to file suit – no case holds that fees can be awarded when records are released prior to litigation.

Ignoring the plain language of the PRA and the strong policy consideration, the Zinks make several technical arguments that do not hold up on inspection. First, the Zinks note that in *Yousoufian*, the trial court imposed penalties for records that were released prior to the filing of the lawsuit. While that is true, King County never challenged the propriety of those penalties on appeal, just like it failed to challenge the trial court’s findings regarding its decision to group the requests into 10 groups rather than two. *Yousoufian 2004*, 152 Wn.2d at 436 n.9.

When King County tried to raise this second issue on appeal without assigning error to the trial court's findings, the Court refused to address it because it had not been properly raised. *Yousoufian 2004*, 152 Wn.2d at 436 n.9. No one would argue that the Supreme Court was really ruling against the County on the merits of their claim. And this is all the more true for a claim that the County did not even attempt to raise – whether penalties are appropriate when an agency produces records prior to litigation.

Finally, the Zinks once again ask the Court to over-construe its opinion in *Zink II*. In that case, the Court held that the “Complaint Against 109 N. Rockwell” was not exempt under RCW 42.56.280/42.17.310(1)(i). The Zinks try to twist that conclusion into a conclusion that penalties must be awarded for the City's withholding of that record. But the Court did not make that additional holding – it merely held the record was not exempt and remanded for the trial court to determine the appropriate remedy. *Zink II*, 140 Wn. App. at 344.

The PRA places a heavy burden on agencies to produce responsive records. Sometimes mistakes are made. The PRA should be interpreted to encourage agencies to correct their mistakes prior to litigation. It should not be interpreted in a manner where anytime an agency voluntarily corrects a mistake prior to litigation, that correction is treated as a confession that creates liability.

3.4. Allowing Requesters to Challenge Reasonable Time Estimates After the Fact Would Encourage Useless Litigation.

The provision that allows a requester to file suit to challenge a reasonable time estimate is designed to give requesters a tool when an agency is being intransigent – it allows the requester to force an agency to respond. This purpose is fully served by allowing pre-disclosure lawsuits. No benefit arises by allowing a requester to file a lawsuit challenging a reasonable time estimate after that time estimate has expired and the records are produced.

3.5. The Trial Court Erroneously Determined that It Only Had Limited Authority to Group Requests.

Because penalties are meant to deter improper conduct, the trial court must have broad discretion to group requests in a manner that relates to the agency's culpability. It is this reasoning that led the Supreme Court in *Yousoufian 2004* to reject a claim that penalties had to be per document – the “purpose [of the PRA] is better served by increasing penalties based on an agency's culpability than it is by basing penalty on the size of the plaintiffs request.” *Yousoufian 2004*, 152 Wn.2d at 436.

The same is true in this case – where common legal errors led to multiple delayed responses, the City's culpability is making a single legal error. The fact that the Zinks made lots of requests that resulted in the repeated application of that error does not weigh on the City's culpability. Likewise, the sheer volume of the requests should not serve as a basis for increasing the penalties so requests made on the same day should be grouped as well.

Contrary to the Zinks' claim, the City did not waive this issue. After the Court rejected the City's claim that requests made on the same day should be grouped and ruled that it should not have combined any of the requests, the City was not required to make useless arguments in favor of further grouping. See RP (7/16/08) at 104:14-22.²³ Moreover, in light of the size of the penalty, equitable considerations warrant the Court resolving this issue on the merits.

3.6. The Statute of Limitations Serves as a Limit on the Plaintiffs' Ability to Collect Penalties.

The Supreme Court has repeatedly stated that the statute of limitations is the "only limit" on the accrual of daily penalties. *Sanders*, at *17; *Yousoufian 2004*, 152 Wn.2d at 437-38. Presumably the Court meant what it said. Moreover, in light of the uncertainty about the speed of litigation, if the statute does not provide for a hard limitation, it really is not any limitation at all, as this case demonstrates.

The Zinks argue that this interpretation is absurd because now that the statute of limitations is one year, this would mean that the maximum number of daily penalties would be 365. But that result is consistent with the intent of the Legislature when it amended the law, which was in response to the 8252 days of penalties in *Yousoufian 2004*. Moreover, in light of recent cases holding that the statute does not begin to run when documents are overlooked,²⁴ then unless a 365-day limit is imposed, agencies could be facing ten years or more of penalties, contrary to the

²³ In its opening brief, the City erroneously cited to "RP(7/17/08)" instead of "7/16".

²⁴ *Tobin v. Worden*, 156 Wn. App. 507, 512-13, 233 P.3d 906 (2010).

legislature's intent to limit agency liability. Accordingly, the Court should rule that no penalty period can exceed 1827 days.²⁵

3.7. In Light of *Sanders v. State*, Mesa Agrees Its Failure to Provide an Exemption Log with "Brief Descriptions" Serves as an Aggravating Factor.

In *Sanders v. State*, the Supreme Court held that the failure to provide a complete exemption log qualifies as an aggravating factor. *Sanders*, at *15-16. The City did not provide the Zinks with a complete exemption log and therefore it concedes that a \$5-per-day penalty is not appropriate.²⁶ But beyond the issue of penalties, the Zinks' remaining arguments were mooted when the City disclosed all of its privileged communications.

In the opening brief, the City erred in reciting the timing of the disclosure. This error arose because the record is silent on this issue and primary author of the brief, Ramsey Ramerman, was not involved at the trial level. Thus, his recitation was based on a misunderstanding about what happened. The City has been very candid on appeal about its mistakes and would not make any intentional effort to deceive the Court. The City accordingly amends its opening brief to reflect that the communications were disclosed after the trial court ruled on the exemptions. Under *Sanders*, this makes an increased daily penalty appropriate.

²⁵ Originally, the City listed 1825, but because 2004 and 2008 were leap years, the City has added two days.

²⁶ Although in *Sanders*, the Supreme Court held that a \$3 per day increase was appropriate, this does not mean such an increase is proper in this case – other mitigating factors such as the difference in size and resources between the State and Mesa make a much smaller increase appropriate.

3.8. Is Light of *Sanders v. State*, the Trial Court's Award of Attorney Fees Must Be Recalculated

While the Zinks prevailed in the trial court with regards to the determination of violations, the Zinks did not prevail with regards to the penalty amounts, as evidenced by their appeal in this case. Accordingly, any ultimate award of attorney fees must be apportioned under *Sanders v. State* to reflect the degree of the Zink's success. See *Sanders*, at *18-*20. While this should include all fees incurred on the first appeal, it should only cover at most half of the fees generated in the trial court proceedings unless the Zinks ultimately receive a higher penalty award than that first imposed by the trial court.

4. CONCLUSION

As the Zinks' note, an unduly harsh penalty could force Mesa into bankruptcy. Whatever the result of this appeal, each of Mesa's 440 citizens will pay a high price for the City's mistakes. But this Court must remand the case for a proper hearing under the correct legal standard before that price is set.

DATED this 9th day of November, 2010.

Respectfully Submitted,

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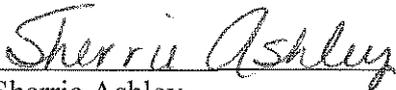
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of November 2010, I caused to be served a true and correct copy of the foregoing REPLY BRIEF OF CITY OF MESA to the following:

<u>XXXX</u> INTER-CITY	Ronald St. Hilaire
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Sherrie Ashley