

**FILED**

MAY 21 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

No. 275965

[Consolidated with 281124]

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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JEFF ZINK and DONNA ZINK, husband and wife, *Appellants*

v.

CITY OF MESA, a Washington Municipal Corporation, *Respondents*

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BRIEF OF APPELLANTS JEFF and DONNA ZINK

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RONALD F. ST. HILAIRE  
Attorney for Appellants  
Jeff Zink and Donna Zink  
1141 North Edison, Suite C  
Kennewick, WA 99336  
(509) 735-3581  
WSBA No. 31713

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## I. ASSIGNMENTS OF ERROR

### *A. Issues Pertaining To Appellants' Assignments of Error*

#### **Findings of Fact**

#### **Complaint Against 109 N Rowell**

##### Assignment 1 – Finding of Fact No. 6 (CP 111)

- a. Does the evidence support a finding that the City was reasonable in withholding the complaint against 109 N. Rowell Ave. from the plaintiff's for five days after plaintiff's request of September 30, 2002?

##### Assignment 2 – Finding of Fact No. 8 (CP 111)

- a. Does the evidence support a finding that the complaint was wrongfully withheld for only fifty-one (51) days?

##### Assignment 3 – Finding of Fact No. 9 (CP 111)

- a. Does the evidence support a finding that silently withholding the complaint was gross negligence and a thirty-five dollar (\$35) per day penalty is appropriate under the PRA?

#### **Clerk's Memos and Notes**

##### Assignment 4 – Finding of Fact No. 14 (CP 112)

- a. Does the evidence support a finding that the wrongful assertion of exemption under RCW 42.17.310(1)(i) for the denial of the Clerk's memos and notes was mere negligence?

##### Assignment 5 – Finding of Fact No. 15 (CP112)

- a. Does the evidence support a finding that the City was acting in good faith when it denied the release of the Clerk's memos and notes?

Assignment 6 – Findings of Fact No. 18 (CP 112)

- a. Does the evidence and facts presented to the court support the finding that the City needed five (5) business days to respond to the request for the memos and notes?

Assignment 7 – Finding of Fact No. 20 (CP 113)

- a. Does the evidence support a finding that the Court should exclude forty-seven (47) days from the time of its ruling at trial until the Clerk's memos and notes, requested on October 10, 2002, were produced by the City of Mesa?

Assignment 8 – Finding of Fact No. 21 (CP 113)

- a. Does the evidence support a finding that the City was acting in good faith and it was mere negligence to wrongfully withhold the Clerk's memos and notes requested on October 10, 2002?
- b. Does the evidence support a finding that a penalty of five dollars (\$5) per day is appropriate under the PRA for the October 10, 2002 request for the Clerk's memos and notes?

Assignment 9 – Finding of Fact No. 24 (CP 113)

- a. Does the evidence support a finding that the Court should exclude forty-seven (47) days from the time of its ruling at trial until the Clerk's memos and notes, requested on April 14, 2003, were produced by the City of Mesa?

Assignment 10 – Finding of Fact No. 25 (CP 113)

- a. Does the evidence support a finding that the City was acting in good faith and it was mere negligence to withhold the Clerk's memos and notes requested April 14, 2003?

- b. Does the evidence support a finding that a penalty of five dollars (\$5) per day is appropriate under the PRA for the withholding of the Clerk's memos and notes requested on April 14, 2003?

**BOA November 13, 2002 Special Executive Board Meeting Documents**

Assignment 11 – Finding of Fact No. 30 (CP 114)

- a. Does the evidence support a finding that the request of November 24, 2002 for the BOA tape, BOA minutes, and BOA rules and regulations (adopted at the November 13, 2002 meeting) were one request for the purposes of the PRA?

Assignment 12 – Finding of Fact No. 38 (CP 115)

- a. Does the evidence support a finding that the total penalty for withholding the BOA records should only be \$27,800.00?

**Twenty-one (21) Code Violation Letters**

Assignment 13 – Finding of Fact No. 40 (CP 115)

- a. Does the evidence support a finding that the City was reasonable in its estimate of thirty (30) days to locate and assemble the twenty-on code-violation letters?
- b. If an agency does not attempt to locate public documents during the time given in the estimated delay, was the delay reasonable?
- c. If an agency can fill a request faster by contacting a different department is their time estimate reasonable?

Assignment 14 – Finding of Fact No. 43 (CP 115)

- a. Could the City have produced the twenty-one (21) code violation letter prior to January 3, 2003?

Assignment 15 – Finding of Fact No. 44 (CP 115)

- a. Was the finding that the twenty-one (21) code violation letters were only withheld for forty-two (42) days reasonable?

Assignment 16 – Finding of Fact No. 45 (CP 115)

- a. Does the evidence support a finding that a penalty of ten dollars (\$10) per day for wrongfully withholding the twenty-one (21) code violation letters from January 3, 2003 to February 14, 2003 is appropriate under the PRA?

Assignment 17 – Finding of Fact No. 49 (CP 116)

- a. Does the evidence support a finding that un-redacted copies of the twenty-one (21) code violation letters could not be produced on January 3, 2003?

Assignment 18 – Finding of Fact No. 50 (CP 116)

- a. Does the evidence support a finding that the Court should exclude eight hundred thirty-two (832) days from the time of its ruling at trial until the Court of Appeals, Division III ruling?
- b. Does the evidence support a finding that under the PRA the Court should limit the penalty days to the date the judgment is entered if the records have not yet been produced?

Assignment 19 – Finding of Fact No. 51 (CP 116)

- a. Does the evidence support a finding that the wrongful redaction of the code violation letters was mere negligence and a penalty of five dollars (\$5) per day is appropriate under the PRA?

**Resignation Letter of Leo Murphy and Linda Erickson**

Assignment 20 – Finding of Fact No. 56 (CP 117)

- a. Does the evidence support a finding that the Court should exclude eight hundred thirty-two (832) days from the time of its ruling at trial until the Court of Appeals, Division III ruling?
- b. Does the evidence support a finding that under the PRA the Court should limit the penalty days to the date the judgment is entered if the records have not yet been produced?

Assignment 21 – Finding of Fact No. 57 (CP 117)

- a. Does the evidence support a finding that the wrongful withholding and wrongful redaction of the resignation letters was mere negligence and a penalty of five dollars (\$5) per day is appropriate under the PRA?

**Correspondence Between Attorney and Municipal Research**

Assignment 22 – Finding of Fact No. 59 (CP 117)

- a. Does the evidence support a finding that the Zinks' request of March 19, 2003 was a second request for the same records made on January 28, 2003?

Assignment 23 – Finding of Fact No. 60 (CP 117-118)

- a. Does the evidence support a finding that the request of January 28, 2003 and the request of March 19, 2003 should be considered one request?

Assignment 24 – Finding of Fact No. 61 (CP 118)

- a. Does the evidence support a finding that all correspondence between the City of Mesa and City attorney was clearly communication in anticipation of litigation?
- b. Does the evidence support a finding that all correspondence between the City of Mesa and City attorney may be privileged and exempt from disclosure?

Assignment 25 – Finding of Fact No. 67 (CP 118)

- a. Does the evidence support a finding that the Court should exclude eight hundred thirty-two (832) days from the time of its ruling at trial until the Court of Appeals, Division III ruling?
- b. Does the evidence support a finding that under the PRA the Court should limit the penalty days to the date the judgment is entered if the records have not yet been produced?

Assignment 26 – Finding of Fact No. 68 (CP 118-119)

- a. Does the evidence support the finding that the City was acting in good faith and it was mere negligence to wrongfully withhold the Municipal Research correspondence?
- b. Does the evidence support a finding that a penalty of five dollars (\$5) per day is appropriate under the PRA for wrongfully withhold the Municipal Research correspondence?

**Ordinance 02-01**

Assignment 27 – Finding of Fact No. 71 (CP 119)

- a. Does the evidence support a finding that the City's delay for Ordinance 02-01 for twenty-one (21) days in order to locate and assemble the document was reasonable?

**BOA Rules and Regulation Adopted December 5, 2002**

Assignment 28 – Finding of Fact No. 74 (CP 119)

- a. Does the evidence support a finding that the City's delay of twenty-one (21) days in order to locate and assemble the BOA Rules and Regulations adopted on December 5, 2002 was reasonable?

- b. Does the evidence support a finding that the rules and regulations of the BOA should not be readily available to members of the public?

Assignment 29 – Finding of Fact No. 76 (CP 120)

- a. Does the evidence support a finding that the City’s additional delay for the BOA rules and regulations for seven (7) days in order to locate and assemble the document was reasonable?
- b. Does the evidence support the finding that the City could continue to delay production of the BOA rules and regulations indefinitely as long as they provided an explanation for the continued delay?

Assignment 30 – Finding of Fact No. 77 (CP 120)

- a. Does the evidence support the finding that the BOA rules and regulations could not have been produced to the Zinks prior to March 26, 2003?

Assignment 31 – Finding of Fact No. 79 (CP 120)

- a. Does the evidence support the finding that the delay in releasing the BOA rules and regulations adopted on December 5, 2002 was only negligence and a penalty of ten dollars (\$10) per day is an appropriate under the PRA?

**Time Card of Teresa Standridge**

Assignment 32 – Finding of Fact No. 84 (CP 121)

- a. Does the evidence support a finding that the Court should exclude eight hundred thirty-two (832) days from the time of its ruling at trial until the Court of Appeals, Division III ruling?

- b. Does the evidence support a finding that under the PRA the Court should limit the penalty days to the date the judgment is entered if the records have not yet been produced?

Assignment 33– Finding of Fact No. 85 (CP 121)

- a. Does the evidence support a finding that the City was acting in good faith and it was mere negligence to wrongfully withhold the time card of Teresa Standridge and a penalty of five dollars (\$5) per day is appropriate under the PRA?

**Water Meter Readings**

Assignment 34 – Finding of Fact No. 90 (CP 121)

- a. Does the evidence support the finding that the water meter readings could not have been produced by the City of Mesa prior to March 13, 2003?
- b. Does the evidence support the finding that the City of Mesa had five business days to produce the water meter readings after the Zinks clarified what record was being requested?

Assignment 35 – Finding of Fact No. 91 (CP 121)

- a. Does the evidence support a finding that the Court should exclude one hundred thirty-nine (139) days from the time of its ruling at trial until the water meter documents were produced by the City of Mesa?

Assignment 36 – Finding of Fact No. 92 (CP 122)

- a. Does the evidence support a finding that the wrongful withholding of the water meter reading records was only negligence and a penalty of ten dollars (\$10) per day is appropriate under the PRA?

**Phone/Fax Logs**

Assignment 37 – Finding of Fact No. 96 (CP 122)

- a. Does the evidence support the finding that un-redacted copies of the phone logs could not have been produced prior to March 17, 2003?

Assignment 38 – Finding of Fact No. 97 (CP 122)

- a. Does the evidence support a finding that the Court should exclude eight hundred thirty-two (832) days from the time of its ruling at trial until the Court of Appeals, Division III ruling?
- b. Does the evidence support a finding that under the PRA the Court should limit the penalty days to the date the judgment is entered if the records have not yet been produced?

Assignment 39– Finding of Fact No. 98 (CP 122)

- a. Does the evidence support a finding that the City was acting in good faith and it was mere negligence to wrongfully withhold un-redacted phone logs and a penalty of five dollars (\$5) per day is appropriate under the PRA?

**Eighteen (18) Residential Files**

Assignment 40 – Finding of Fact No. 106 (CP 123)

- a. Does the evidence support the finding that copies of the eighteen (18) residential files, in their un-redacted form, could not be produced prior to March 17, 2003?

Assignment 41 – Finding of Fact No. 107 (CP 124)

- a. Does the evidence support a finding that the Court should exclude eight hundred thirty-two (832) days from the time of its ruling at trial until the Court of Appeals, Division III ruling?

- b. Does the evidence support a finding that under the PRA the Court should limit the penalty days to the date the judgment is entered if the records have not yet been produced?

Assignment 42 – Finding of Fact No. 108 (CP 124)

- a. Does the evidence support a finding that a penalty of twenty-five dollars (\$25) per day is appropriate under the PRA for the City’s limitation of time for review of the residential files?
- b. Does the evidence support a finding that a penalty of twenty-five dollars (\$25) per day is appropriate under the PRA for the City’s refusal to release un-redacted copies of the residential files?

**Eleven (11) Residential Address Files**

Assignment 43 – Finding of Fact No. 116 (CP 125)

- a. Does the evidence support the finding that copies of the eleven (11) residential files, in their un-redacted form, could not be produced prior to March 24, 2003?

Assignment 44 – Finding of Fact No. 117 (CP 125)

- a. Does the evidence support a finding that the Court should exclude eight hundred thirty-two (832) days from the time of its ruling at trial until the Court of Appeals, Division III ruling?
- b. Does the evidence support a finding that under the PRA the Court should limit the penalty days to the date the judgment is entered if the records have not yet been produced?

Assignment 45 – Finding of Fact No. 118 (CP 125)

- a. Does the evidence support a finding that a penalty of twenty-five dollars (\$25) per day is appropriate under the PRA for the City's limitation of time for review of the residential files?
- b. Does the evidence support a finding that a penalty of twenty-five dollars (\$25) per day is appropriate under the PRA for the City's refusal to release un-redacted copies of the residential files?

### **Steve Sharp Complaint**

#### Assignment 46 – Finding of Fact No. 122 (CP 126)

- a. Does the evidence support a finding that the Court should exclude eight hundred thirty-two (832) days from the time of its ruling at trial until the Court of Appeals, Division III ruling?
- b. Does the evidence support a finding that under the PRA the Court should limit the penalty days to the date the judgment is entered if the records have not yet been produced?

#### Assignment 47– Finding of Fact No. 123 (CP 126)

- a. Does the evidence support a finding that the City was acting in good faith, it was mere negligence to wrongfully withhold an unredacted copy of the Sharp complaint and a penalty of five dollars (\$5) per day is appropriate under the PRA?

### **Cade Scott Reply to Complaint**

#### Assignment 48 – Finding of Fact No. 129 (CP 127)

- a. Does the evidence support the finding that the City was reasonable to delay release of the Scott reply for fifty-four (54) days because of the volume of records requested?

- b. Does the evidence support the finding that there was a significant regular sustained volume of requests when the Scott reply was requested?

Assignment 49 – Finding of Fact No. 131 (CP 127)

- a. Does the evidence support the finding that the Scott reply could not have been produced to plaintiffs prior to May 30, 2003?

Assignment 50 – Finding of Fact No. 132 (CP 127)

- a. Does the evidence support a finding that the Court should exclude eight hundred thirty-two (832) days from the time of its ruling at trial until the Court of Appeals, Division III ruling?
- b. Does the evidence support a finding that under the PRA the Court should limit the penalty days to the date the judgment is entered if the records have not yet been produced?

Assignment 51 – Finding of Fact No. 133 (CP 127)

- a. Does the evidence support a finding that the City was acting in good faith, it was mere negligence to wrongfully withhold an un-redacted copy of the Scott reply, and a penalty of five dollars (\$5) per day is appropriate under the PRA?

**April 10, 2003 Council Packet**

Assignment 52 – Finding of Fact No. 135 (CP 128)

- a. Does the evidence support the finding that the City of Mesa was reasonable to delay release of the Council Packet for the April 10, 2003 Council meeting?

Assignment 53 – Finding of Fact No. 137 (CP 128)

- a. Does the evidence support the finding that the City of Mesa could not have produced the Council Packet prior to April 13, 2003?

Assignment 54 – Finding of Fact No. 139 (CP 128)

- a. Does the evidence support the finding that the delay in releasing the City of Mesa Council Packet was only negligence and a penalty of ten dollars (\$10) per day is an appropriate under the PRA?

**April 10, 2003 Vouchers and Bills Presented to City Council**

Assignment 55 – Finding of Fact No. 141 (CP 128)

- a. Does the evidence support the finding that the City of Mesa was reasonable to delay the release of the vouchers and bills for the April 10, 2003 Council meeting?

Assignment 56 – Finding of Fact No. 143 (CP 129)

- a. Does the evidence support the finding that the City of Mesa could not have produced the vouchers and bills prior to April 13, 2003?

Assignment 57 – Finding of Fact No. 145 (CP 129)

- a. Does the evidence support the finding that the delay in releasing the City of Mesa vouchers and bills was only negligence and a penalty of ten dollars (\$10) per day is appropriate under the PRA?

**City of Mesa Council Minute Book**

Assignment 58 – Finding of Fact No. 150 (CP 130)

- a. Does the evidence support the finding that twenty-five (\$25) per day is appropriate under the PRA for the City's denial of the City Council Minute book and the disparate treatment of Ms. Zink by the City of Mesa?

**March 13, 2003 and March 17, 2003 Council Meeting Minutes**

Assignment 59 - Findings of Fact No. 153 (CP 130)

- a. Does the evidence support the finding that it was reasonable for the City to delay the release of the March 13, 2003 and March 27, 2003 meeting minutes?

Assignment 60– Finding of Fact No. 156 (CP 130)

- a. Does the evidence support a finding that the wrongful withholding of the March 13, 2003 and March 27, 2003 meeting minutes was mere negligence and a penalty of five dollars (\$5) per day is appropriate under the PRA?

**Complaint Against Cade Scott**

Assignment 61– Finding of Fact No. 161 (CP 131)

- a. Does the evidence support a finding that the wrongful withholding of the complaint against Cade Scott was mere negligence and a penalty of five dollars (\$5) per day is appropriate under the PRA?

**Ordinance 03-03**

Assignment 62 – Finding of Fact No. 165 (CP 131)

- a. Does the evidence support the finding that the City was reasonable to withhold the release of Ordinance 03-03 for twenty-five (25) days because it was treated as a public records request and not a request to view an ordinance?

**December 11, 2002 Resolutions and Ordinances**

Assignment 63 – Finding of Fact No. 174 (CP 132)

- a. Does the evidence support the finding that the City was reasonable to delay the release of the ordinances and resolutions requested on December 11, 2002 for thirty (30) days in order to locate and assemble the documents?

**Ordinance 01-05**

Assignment 64 – Finding of Fact No. 179 (CP 133)

- a. Does the evidence support the finding that the City was reasonable to withhold the release of Ordinance 01-05 due to a high volume of requests in general?
- b. Does the evidence support a finding that there was a high volume of records requested?

Assignment 65 – Finding of Fact No. 180 (CP 133)

- a. Does the evidence support the finding that the City was reasonable to withhold Ordinance 01-05 for thirty-six (36) days because it was included with a request for other ordinances and resolutions that did not exist and they were trying to provide all the materials at the same time?

Assignment 66– Finding of Fact No. 183 (CP 133-134)

- a. Does the evidence support a finding that wrongfully withholding Ordinance 01-05 was mere negligence because it got lost in the shuffle and a penalty of five dollars (\$5) per day is appropriate under the PRA?

**File of Requests Delays Denials and Replies**

Assignment 67 – Finding of Fact No. 185 (CP 134)

- a. Does the evidence support the finding that the City was reasonable when it failed to respond to Ms. Zink’s request for the files of requests, delays, denials, and replies because the request was confusing?

Assignment 68 – Finding of Fact No. 187 (CP 134)

- a. Does the evidence support the finding that the City was reasonable to delay the release of the files of requests, delays, denials, and replies until April 18, 2003?

Assignment 69 – Finding of Fact No. 191 (CP 134)

- a. Does the evidence support the finding that a twenty-five dollars (\$25) per day penalty is appropriate under the PRA for the disparate treatment of Ms. Zink associated with her request for the files of requests, delays, denials, and replies?

Assignment 70 – Finding of Fact No. 192 (CP 135)

- a. Does the evidence support the finding that the City limited Ms. Zink to one hour per day to review the files of requests, delays, denials, and replies on only one day?

**BOA Signed Meeting Minutes for October 2002, December 2002 and January 2003**

**Meetings**

Assignment 71 – Finding of Fact No. 195 (CP 135)

- a. Does the evidence support the finding that the City was reasonable to delay the release of the BOA meeting minutes, requested on March 7, 2003, until April 11, 2003?

Assignment 72 – Finding of Fact No. 198 (CP 135)

- a. Does the evidence support the finding that the draft minutes of the BOA meetings are the records the BOA passed at their March 5, 2003 meeting?

Assignment 73 – Finding of Fact No. 199 (CP 135)

- a. Does the evidence support the finding that the City could not produce copies of the BOA minutes until April 11, 2003?

Assignment 74 – Finding of Fact No. 201 (CP 136)

- a. Does the evidence support the finding that the delay in releasing the BOA meeting minutes was only negligence and a ten dollar (\$10) per day penalty is appropriate under the PRA?

**Minutes of the March 5, 2003 BOA Meeting**

Assignment 75 – Finding of Fact No. 204 (CP 136)

- a. Does the evidence support the finding that there was a high volume of record requests when Ms. Zink requested the BOA draft minutes for March 5, 2003?

Assignment 76 – Finding of Fact No. 207 (CP 136)

- a. Does the evidence support the finding that the tape of the March 5, 2003 BOA meeting was more than just the requested meeting minutes and under the circumstances actually satisfied the statute?

**February 13, 2002 and March 4, 2003 City Council Meeting Minutes**

Assignment 77 – Finding of Fact No. 210 (CP 137)

- a. Does the evidence support the finding that it was reasonable for the City to delay the release of the February 13, 2003 and March 4, 2003 meeting minutes for seventeen (17) days in order to determine if any of the requested documents were exempt?

Assignment 78 – Finding of Fact No. 212 (CP 137)

- a. Does the evidence support the finding that it was reasonable for the City to further delay the release of the February 13, 2003 and March 4, 2003 meeting minutes for an additional fifteen (15) days due to high volume of requests?
- b. Does the evidence support the finding that there were a large volume of requests when the February 13, 2003 and March 4, 2003 meeting minutes were requested?

Assignment 79 – Finding of Fact No. 213 (CP 137)

- a. Does the evidence support the finding that the February 13, 2003 and March 4, 2003 meeting minutes could not be produced upon request?

Assignment 80– Finding of Fact No. 215 (CP 138)

- a. Does the evidence support the finding that the City's wrongful withholding of the meeting minutes until April 15, 2003 was a little more egregious than the least culpable negligence and a ten dollar (\$10) per day penalty is appropriate under the PRA?

**Resignation Letters from Rick Hopkins and Devi Tate**

Assignment 81 – Finding of Fact No. 218 (CP 138)

- a. Does the evidence support the finding that it was reasonable for the City to delay the release of the BOA resignation letters for seventeen (17) days in order to determine if any of the requested documents were exempt under the law?

Assignment 82 – Finding of Fact No. 220 (CP 138)

- a. Does the evidence support the finding that it was reasonable for the City to further delay the release of the BOA resignation letters an additional fifteen (15) days due to the high volume of records requested?
- b. Does the evidence support the finding that there was a large volume of record requests when the BOA resignation letters were requested?

Assignment 83 – Finding of Fact No. 221 (CP 138)

- a. Does the evidence support the finding that the BOA resignation letters could not be produced prior to April 11, 2003?

Assignment 84 – Findings of Fact No. 223 (CP 139)

- a. Does the evidence support the finding that the City's wrongful withholding of the BOA resignation letters was a little more egregious than the least culpable negligence and a ten dollar (\$10) per day penalty is appropriate under the PRA?

**Resolution 2003-03**

Assignment 85 – Finding of Fact No. 226 (CP 139)

- a. Does the evidence support the finding that Resolution 2003-03 could not be produced by the City of Mesa prior to April 21, 2003?

Assignment 86 – Finding of Fact No. 228 (CP 139)

- a. Does the evidence support the finding that because the request for Resolution 2003-03 was included with nine (9) other bulleted requests it is considered a high volume of requests and is not more egregious than the minimum penalty?

Assignment 87 – Finding of Fact No. 229 (CP 139)

- a. Does the evidence support a finding that the withholding of Resolution 2003-03 constituted negligence not more egregious than the minimum culpable negligence by the City of Mesa and a penalty of five dollars (\$5) per day is appropriate under the PRA?

**Maintenance Logs**

Assignment 88 – Finding of Fact No. 233 (CP 140)

- a. Does the evidence support a finding that the Court should exclude one hundred eighteen (118) days from the time of its ruling at trial until the Maintenance Logs were produced by the City of Mesa?

Assignment 89 – Finding of Fact No. 234 (CP 140)

- a. Does the evidence support a finding that a penalty of fifteen dollars (\$15) per day is appropriate under the PRA for the City's wrongful withholding of the Maintenance Logs because it was more than mere negligence?

**June 14, 2001 Council Meeting Tape**

Assignment 90 – Finding of Fact No. 236 (CP 140)

- a. Does the evidence support the finding that the City failed to respond to plaintiff's request to review the Mesa City Council tape of June 14, 2001?

Assignment 91 – Finding of Fact No. 237 (CP 140)

- a. Does the evidence support the finding that the Zinks could not have been allowed to review the tape of June 14, 2001 prior to May 2, 2003?

Assignment 92 – Finding of Fact No. 239 (CP 141)

- a. Does the evidence support a finding that the withholding of the release of the June 14, 2001 City council tape by City constituted more than mere negligence and a penalty of twenty-five dollars (\$25) per day is appropriate under the PRA?

**Draft Dog Ordinance**

Assignment 93 – Findings of Fact No. 241 (CP 141)

- a. Does the evidence support the finding that the City failed to respond to plaintiff's request to review the Draft Dog Ordinance requested by plaintiff on April 25, 2003?

Assignment 94 – Finding of Fact No. 242 (CP 141)

- a. Does the evidence support the finding that the Zinks could not have been allowed to review the Draft Dog Ordinance prior to May 2, 2003?

Assignment 95 – Finding of Fact No. 244 (CP 141)

- a. Does the evidence support a finding that the withholding of the Draft Dog Ordinance by City of Mesa was less egregious than if it had been an actual ordinance and a penalty of five dollars (\$5) per day is appropriate under the PRA?

**Conclusions of Law**

Assignment 96– Conclusion of Law No. 1 (CP 142)

- a. As a matter of law, can the Court stop the per day penalties for non-exempt documents not produced before the governmental agency provides the document?

Assignment 97 – Conclusion of Law No. 3 (CP 142)

- a. As a matter of law, does strict compliance of the PRA allow governmental agencies to take five business days to provide public documents regardless of whether the record is readily available on demand or not?
- b. As a matter of law, does strict compliance of the PRA allow governmental agencies to take five business days to provide public records if another statute requires the disclosure of the document on demand?

Assignment 98 – Conclusion of Law No. 7 (CP 142)

- a. As a matter of law, should the court use *Yousoufian v. Office of Ron Sims, 165 Wn.2d 439 (2010) (Yousoufian IV)* as a guide in assessing per day penalties?

Assignment 99 – Conclusion of Law No. 10 (CP 143)

- a. As a matter of law, should the City be entitled to rely upon the trial court's ruling that it had not violated the PRA?

Assignment 100 – Conclusion of Law No. 11 (CP 143)

- a. As a matter of law, can the court reduce the number of penalty days from the date of the trial court's verbal ruling, May 13, 2005, until the date the Court of Appeals' Opinion reversing said ruling was filed, August 23, 2007?

**Complaint against 109 N Rowell Avenue**

Assignment 101 – Conclusion of Law No. 13 (CP 143)

- a. Do the findings support the conclusion that the per day penalty for withholding the complaint against 109 N. Rowell Avenue should begin on October 7, 2002?

- b. Was the conclusion that the City wrongfully withheld the complaint against 109 N. Rowell Avenue for fifty-one (51) days an abuse of discretion?

Assignment 102 – Conclusion of Law No. 14 (CP 143)

- a. Was setting the penalty for wrongfully withholding the complaint against 109 N. Rowell Avenue at \$35.00 per day an abuse of discretion?

Assignment 103 – Conclusion of Law No. 15 (CP 143)

- a. Was setting the total penalty for wrongfully withholding the complaint against 109 N. Rowell Avenue at \$1,785.00 an abuse of discretion?

**Clerk's Memos and notes**

Assignment 104 – Conclusion of Law No. 18 (CP 144)

- a. Do the findings support the conclusion that the City of Mesa's violation of the PRA by wrongfully withholding the clerk's memos and notes kept on the Zinks' activities at City Hall reviewed and requested on October 10, 2002, should only be assessed a per day penalty for a total of 946 days?

Assignment 105 – Conclusion of Law No. 19 (CP 144)

- a. Was setting the penalty for wrongfully withholding the clerk's memos and notes kept on the Zinks' activities at City Hall, reviewed and requested on October 10, 2002, at \$5.00 per day an abuse of discretion?

Assignment 106 – Conclusion of Law No. 20 (CP 144)

- a. Was setting the total penalty for wrongfully withholding the clerk's memos and notes kept on the Zinks' activities at City Hall, reviewed and requested on October 10, 2002, at \$4,730.00 an abuse of discretion?

Assignment 107 – Conclusion of Law No. 21 (CP 144)

- a. Do the findings support the conclusion that the City of Mesa further violated the PRA by withholding the clerk's memos and notes kept on the Zinks' activities at City Hall requested on April 14, 2003 should only be assessed a per day penalty for a total of 753 days?

Assignment 108 – Conclusion of Law No. 22 (CP 144)

- a. Was setting the penalty for wrongfully withholding the clerk's memos and notes kept on the Zinks' activities at City Hall, requested on April 14, 2003, at \$5.00 per day an abuse of discretion?

Assignment 109 – Conclusion of Law No. 23 (CP 144)

- a. Was setting the total penalty for wrongfully withholding the clerk's memos and notes kept on the Zinks' activities at City Hall, requested on April 14, 2002, at \$3,765.00 an abuse of discretion?

**BOA November 13, 2002 Special Executive Board Meeting Documents**

Assignment 110 – Conclusion of Law No. 28 (CP 145)

- a. As a matter of law, should meeting minutes, meeting tapes, as well as agency rules and regulations be considered one document?
- b. Do the findings support the conclusion that the November 13, 2002 meeting minutes and rules and regulations should only be assessed a per day penalty for two-hundred fifty (250) days?

Assignment 111 – Conclusion of Law No. 29 (CP 145)

- a. Do the findings support the conclusion that the tape of the November 13, 2002 BOA meeting should only be assessed a per day penalty for a total of twenty-eight (28) days?

Assignment 112 – Conclusion of Law No. 31 (CP 146)

- a. Was setting the total penalty for wrongfully withholding the November 13, 2002 BOA meeting minutes, the November 13, 2002 BOA meeting tape, and the BOA rules and regulations adopted on November 13, 2002, at \$27,800.00 an abuse of discretion?

**Twenty-one (21) Code Violation Letters**

Assignment 113 – Conclusion of Law No. 33 (CP 146)

- a. Do the findings support the conclusion that the wrongful delay in the production of the twenty-one (21) code-violation letters requested on November 27, 2002 should be assessed from January 3, 2003 to February 14, 2003 for a total of forty-two (42) days?

Assignment 114 – Conclusion of Law No. 34 (CP 146)

- a. Was setting the penalty for wrongfully withholding the twenty-one (21) code violation letters, at \$10.00 per day an abuse of discretion?

Assignment 115 – Conclusion of Law No. 35 (CP 146)

- a. Was setting the total penalty for wrongfully withholding the twenty-one (21) code violation letters at \$420.00 an abuse of discretion?

Assignment 116 – Conclusion of Law No. 36 (CP 146)

- a. Do the findings support the conclusion that the City's further violation of the PRA by wrongfully redacting the twenty-one (21) code violation letters requested on November 27, 2002 should be assessed for a total of 1,261 days?

Assignment 117 – Conclusion of Law No. 37 (CP 146)

- a. Was setting the penalty for wrongfully redacting and withholding the twenty-one (21) code violation letters, at \$5.00 per day an abuse of discretion?

Assignment 118 – Conclusion of Law No. 38 (CP 146)

- a. Was setting the total penalty for wrongfully redacting and withholding the twenty-one (21) code violation letters at \$6,305.00 an abuse of discretion?

***Resignation Letter or Leo Murphy and Linda Erickson***

Assignment 119 – Conclusion of Law No. 40 (CP 147)

- a. Do the findings support the conclusion that the City's violation of the PRA by wrongfully redacting the resignation letters of Leo Murphy and Linda Erickson requested on January 9, 2003 should be assessed for a total of 1,297 days?

Assignment 120 – Conclusion of Law No. 41 (CP 147)

- a. Was setting the penalty for wrongfully redacting and withholding the resignation letters of Leo Murphy and Linda Erickson at \$5.00 per day an abuse of discretion?

Assignment 121 – Conclusion of Law No. 42 (CP 147)

- a. Was setting the total penalty for wrongfully redacting and withholding the resignation letters of Leo Murphy and Linda Erickson at \$6,485.00 an abuse of discretion?

**Correspondence Between Attorney and Municipal Research**

Assignment 122 – Conclusion of Law No. 45 (CP 147)

- a. As a matter of law, are all communications between the City Attorney and the City of Mesa are privileged?

Assignment 123 – Conclusion of Law No. 47 (CP 147-148)

- a. Do the findings support the conclusion that a violation of the PRA by the City of Mesa in wrongfully denying access to the communication between the City of Mesa and Municipal Research requested on January 28, 2003 and communication between

the City of Mesa and Municipal Research requested on March 19, 2003, should be assessed one per day penalty for a total of 1,271 days?

Assignment 124 – Conclusion of Law No. 48 (CP 148)

- a. Was setting the penalty for wrongfully withholding the communication from Municipal Research requested on January 28, 2003 and communication between the City of Mesa and Municipal Research requested on March 19, 2003 at \$5.00 per day an abuse of discretion?

Assignment 125 – Conclusion of Law No. 49 (CP 148)

- a. Was setting the total penalty for wrongfully withholding the communication from Municipal Research requested on January 28, 2003 and communication between the City of Mesa and Municipal Research requested on March 19, 2003 at \$6,355.00 an abuse of discretion?

**Ordinance 02-01**

Assignment 126 – Conclusion of Law No. 51 (CP 148)

- a. As a matter of law, under the PRA can a municipality delay the release of an ordinance for twenty-one (21) days in order to locate and assemble the document?
- b. Do the findings support the conclusion that the City of Mesa did not violate the PRA when it delayed the release of Ordinance 02-01 for twenty-one (21) days in order to locate and assemble the document?

**BOA Rules and Regulation Adopted December 5, 2002**

Assignment 127 – Conclusion of Law No. 249 (CP 148)

- a. As a matter of law, under the PRA can a public agency delay the release of agency rules and regulations indefinitely as long as they continue to provide a delay letter?

- b. Do the findings support the conclusion that for the City of Mesa's withholding the Zinks' request of February 24, 2003 for the BOA rules and regulations, the City should only be assessed a per day penalty for the time periods from March 17, 2003 to March 19, 2003 and March 26, 2003 to April 4, 2003 for a total of eleven (11) days?

Assignment 128 – Conclusion of Law No. 52 (CP 149)

- a. Was setting the penalty for wrongfully withholding the BOA rules and regulations requested on February 24, 2003 at \$10.00 per day an abuse of discretion?

Assignment 129 – Conclusion of Law No. 53 (CP 149)

- a. Was setting the total penalty for wrongfully withholding the BOA rules and regulations requested on February 24, 2003 at \$110.00 an abuse of discretion?

**Time Card of Teresa Standridge**

Assignment 130 – Conclusion of Law No. 55 (CP 149)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa in wrongfully denying access to the time card for Teresa Standridge requested by the Zinks on February 24, 2003 should be assessed for a total of 1,243 days?

Assignment 131 – Conclusion of Law No. 56 (CP 149)

- a. Was setting the penalty for wrongfully withholding the the time card for Teresa Standridge at \$5.00 per day an abuse of discretion?

Assignment 132 – Conclusion of Law No. 57 (CP 149)

- a. Was setting the total penalty for wrongfully withholding the time card for Teresa Standridge at \$6,215.00 an abuse of discretion?

## **Water Meter Readings**

### Assignment 133– Conclusion of Law No. 59 (CP 149)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa in wrongfully denying access to the water meter readings requested by the Zinks on February 24, 2003 should be assessed for a total of 792 days?

### Assignment 134 – Conclusion of Law No. 60 (CP 150)

- a. Was setting the penalty for wrongfully withholding the water meter readings at \$10.00 per day an abuse of discretion?

### Assignment 135 – Conclusion of Law No. 61 (CP 150)

- a. Was setting the total penalty for wrongfully withholding the water meter readings at \$7,920.00 an abuse of discretion?

## **Phone/Fax Logs**

### Assignment 136– Conclusion of Law No. 63 (CP 150)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa in wrongfully denying access to the phone/fax logs requested by the Zinks on February 24, 2003 should be assessed for a total of 1,230 days?

### Assignment 137 – Conclusion of Law No. 64 (CP 150)

- a. Was setting the penalty for wrongfully redacting and withholding the phone/fax logs at \$5.00 per day an abuse of discretion?

### Assignment 138 – Conclusion of Law No. 65 (CP 150)

- a. Was setting the total penalty for wrongfully redacting and withholding the phone/fax logs at \$6,150.00 an abuse of discretion?

**Eighteen (18) Residential Files**

Assignment 139– Conclusion of Law No. 67 (CP 150)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA for wrongfully denying access to documents from the City files of eighteen (18) different residential files within the City of Mesa maintained at City Hall, requested by the Zinks on February 24, 2003, should be assessed for a total of 1,230 days?

Assignment 140 – Conclusion of Law No. 68 (CP 151)

- a. Was setting the penalty for wrongfully redacting and withholding the City files of eighteen (18) different residential addresses within the City of Mesa maintained at City Hall requested February 24, 2003 at \$25.00 per day an abuse of discretion?

Assignment 141 – Conclusion of Law No. 69 (CP 151)

- a. Was setting the total penalty for wrongfully redacting and withholding the City files of eighteen (18) different residential addresses within the City of Mesa maintained at City Hall requested February 24, 2003 at \$30,750.00 an abuse of discretion?

**Eleven (11) Residential Address Files**

Assignment 142– Conclusion of Law No. 71 (CP 151)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA for wrongfully denying access to documents from the City files of eleven (11) different residential files within the City of Mesa maintained at City Hall requested by the Zinks on March 3, 2003 should be assessed for a total of 1,223 days?

Assignment 143– Conclusion of Law No. 72 (CP 151)

- a. Was setting the penalty for wrongfully redacting and withholding the City files of eleven (11) different residential addresses within the City of Mesa maintained at City

Hall requested by the Zinks on March 3, 2003 at \$25.00 per day an abuse of discretion?

Assignment 144 – Conclusion of Law No. 73 (CP 151)

- a. Was setting the total penalty for wrongfully redacting and withholding the City files of eleven (11) different residential addresses within the City of Mesa maintained at City Hall requested by the Zinks on March 3, 2003 at \$30,575.00 an abuse of discretion?

**Steve Sharp Complaint**

Assignment 145 – Conclusion of Law No. 75 (CP 152)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa in wrongfully denying access to the complaint from Steve Sharp should be assessed for a total of 1,227 days?

Assignment 146 – Conclusion of Law No. 76 (CP 152)

- a. Was setting the penalty for wrongfully redacting and withholding the complaint from Steve Sharp at \$5.00 per day an abuse of discretion?

Assignment 147 – Conclusion of Law No. 77 (CP 152)

- a. Was setting the total penalty for wrongfully redacting and withholding the complaint from Steve Sharp at \$6,135.00 an abuse of discretion?

**Cade Scott Reply to Complaint**

Assignment 148 – Conclusion of Law No. 79 (CP 152)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa in wrongfully denying access to the Cade Scott reply to complaint should be assessed for a total of 1,156 days?

Assignment 149 – Conclusion of Law No. 80 (CP 152)

- a. Was setting the penalty for wrongfully redacting and withholding the Cade Scott reply to the complaint at \$5.00 per day an abuse of discretion?

Assignment 150 – Conclusion of Law No. 81 (CP 152)

- a. Was setting the total penalty for wrongfully redacting and withholding the Cade Scott reply to the complaint at \$5,780.00 an abuse of discretion?

**April 10, 2003 Council Packet**

Assignment 151 – Conclusion of Law No. 83 (CP 153)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa in wrongfully delaying production of the City Council Packet for the upcoming City council meeting to be held on April 10, 2003 requested by plaintiffs on April 6, 2003, should be assessed from April 13, 2003 to June 3, 2003; for a total of fifty (50) days?

Assignment 152 – Conclusion of Law No. 84 (CP 153)

- a. Was setting the penalty for wrongfully withholding the City Council Packet for the upcoming City council meeting at \$10.00 per day an abuse of discretion?

Assignment 153 – Conclusion of Law No. 85 (CP 153)

- a. Was setting the total penalty for wrongfully withholding the City Council Packet for the upcoming City council meeting at \$500.00 an abuse of discretion?

**April 10, 2003 Vouchers and Bills Presented to City Council**

Assignment 154 – Conclusion of Law No. 87 (CP 153)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa in wrongfully delaying production of the vouchers and bills to be

presented to the Mesa City Council on April 10, 2003 requested by plaintiffs on April 6, 2003, should be assessed from April 13, 2003 to June 3, 2003; for a total of fifty (50) days?

Assignment 155 – Conclusion of Law No. 88 (CP 153)

- a. Was setting the penalty for wrongfully withholding the production of the vouchers and bills to be presented to the Mesa City Council on April 10, 2003 at \$10.00 per day an abuse of discretion?

Assignment 156 – Conclusion of Law No. 89 (CP 154)

- a. Was setting the total penalty for wrongfully withholding the vouchers and bills to be presented to the Mesa City Council on April 10, 2003 at \$500.00 an abuse of discretion?

**City of Mesa Council Minute Book**

Assignment 157 – Conclusion of Law No. 92 (CP 154)

- a. Was setting the penalty for wrongfully withholding the production of the City Council minute book at \$25.00 per day an abuse of discretion?

Assignment 158– Conclusion of Law No. 93 (CP 154)

- a. Was setting the total penalty for wrongfully withholding the production of the City Council minutes book at \$1,225.00 an abuse of discretion?

**March 13, 2003 and March 17, 2003 Council Meeting Minutes**

Assignment 159 – Conclusion of Law No. 95 (CP 154)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa wrongfully delaying production of copies of the meeting minutes for March 13, 2003 and March 27, 2003 requested by plaintiffs on April 14, 2003

should be assessed a per day penalty from April 21, 2003 to June 3, 2003: for a total of forty-three (43) days?

Assignment 160 – Conclusion of Law No. 96 (CP 154)

- a. Was setting the penalty for wrongfully withholding copies of the meeting minutes for March 13, 2003 and March 27, 2003, requested by plaintiffs on April 14, 2003, at \$5.00 per day an abuse of discretion?

Assignment 161 – Conclusion of Law No. 97 (CP 155)

- a. Was setting the total penalty for wrongfully withholding copies of the meeting minutes for March 13, 2003 and March 27, 2003 at \$215.00 an abuse of discretion?

**Complaint against Cade Scott**

Assignment 162– Conclusion of Law No. 100 (CP 155)

- a. Was setting the penalty for wrongfully withholding a copy of the complaint against Cade Scott at \$5.00 per day an abuse of discretion?

Assignment 163 – Conclusion of Law No. 101 (CP 155)

- a. Was setting the total penalty for wrongfully withholding a copy of the complaint against Cade Scott at \$235.00 an abuse of discretion?

**Ordinance 03-03**

Assignment 164 – Conclusion of Law No. 103 (CP 155)

- a. Do the findings support the conclusion that the City of Mesa was reasonable in delayed the release of Ordinance 03-03 for twenty-five (25) days due to the high volume of requests because it was included with other requests for public records?

Assignment 165 – Conclusion of Law No. 104 (CP 155)

- a. Do the findings support the conclusion that the City of Mesa did not violate the PRA when it delayed the release of Ordinance 03-03 for twenty-five (25) days?

**Ordinance 01-05**

Assignment 166 – Conclusion of Law No. 106 (CP 156)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa wrongfully withholding Ordinance 01-05 Public Hearing notice requested on December 11, 2002 should be assessed a per day penalty from January 16, 2003 to March 3, 2003 for a total of forty-six (46) days?

Assignment 167 – Conclusion of Law No. 107 (CP 156)

- a. Was setting the penalty for wrongfully withholding Ordinance 01-05, requested on December 11, 2002, at \$5.00 per day an abuse of discretion?

Assignment 168 – Conclusion of Law No. 108 (CP 156)

- a. Was setting the total penalty for wrongfully withholding Ordinance 01-05, requested on December 11, 2002, at \$230.00 an abuse of discretion?

**Ordinance 03-02**

Assignment 169– Conclusion of Law No. 110 (CP 156)

- a. As a matter of law, under the PRA can a Municipality delay the release of an ordinance for thirty (30) days in order to locate and assemble the document when they knew the document did not exist?

**Resolution 2003-01**

Assignment 170– Conclusion of Law No. 112 (CP 157)

- a. As a matter of law, under the PRA can a Municipality delay the release of an resolution for thirty (30) days in order to locate and assemble the document when they knew the document did not exist?

**Resolution 2003-02**

Assignment 171 – Conclusion of Law No. 114 (CP 157)

- a. As a matter of law, under the PRA can a Municipality delay the release of an ordinance for thirty (30) days in order to locate and assemble the document when they knew the document did not exist?

**File of Requests Delays Denials and Replies**

Assignment 172 – Conclusion of Law No. 118 (CP 157-158)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa wrongfully delaying review and/or copying of the files of complaints, replies, requests, and denials maintained by the City of Mesa should be assessed a per day penalty from April 18, 2003 to May 30, 2003: for a total of forty-two (42) days?

Assignment 173 – Conclusion of Law No. 119 (CP 158)

- a. Was setting the penalty for wrongfully delaying the review and/or copying of the files of complaints, replies, requests, and denials maintained by the City of Mesa at \$25.00 per day an abuse of discretion?

Assignment 174 – Conclusion of Law No. 120 (CP 158)

- a. Was setting the total penalty for wrongfully delaying review and/or copying of the files of complaints, replies, requests, and denials maintained by the City of Mesa at \$1,150.00 an abuse of discretion?

## **BOA Signed Meeting Minutes for October 2002, December 2002 and January 2003**

### **Meetings**

#### Assignment 175 – Conclusion of Law No. 122 (CP 158)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa for wrongfully withholding the minutes of the BOA meetings for October 2002, December 2002, and January 2003 meetings requested by plaintiffs on March 7, 2003 should be assessed from April 11, 2003 to April 15, 2003; for a total of four (4) days?

#### Assignment 176 – Conclusion of Law No. 123 (CP 158)

- a. Was setting the penalty for wrongfully withholding of copies of the approved meeting minutes of the BOA meetings for October 2002, December 2002, and January 2003 meetings at \$10.00 per day an abuse of discretion?

#### Assignment 177 – Conclusion of Law No. 124 (CP 158)

- a. Was setting the total penalty for wrongfully withholding copies of the approved meeting minutes of the BOA meetings for October 2002, December 2002, and January 2003 meetings at \$40.00 an abuse of discretion?

### **Minutes of the March 5, 2003 BOA Meeting**

#### Assignment 178 – Conclusion of Law No. 127 (CP 159)

- a. As a matter of law, is the order directing the City of Mesa to prepare the minutes of the March 5, 2003 BOA meeting and deliver them to plaintiff within seven days, in lieu of any penalty for failing to produce the March 5, 2003 BOA meeting minutes to the Zinks an appropriate remedy under the PRA?

#### Assignment 179 – Conclusion of Law No. 128 (CP 159)

- a. As a matter of law, does the production of an audio tape of a city meeting in response to a request for meeting minutes satisfy the PRA?

**February 13, 2002 and March 4, 2003 City Council Meeting Minutes**

Assignment 180 – Conclusion of Law No. 130 (CP 159)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa wrongfully withholding the Mesa Council meeting minutes for February 13, 2003 and March 4, 2003 requested by plaintiffs on March 10, 2003 should be assessed a per day penalty from April 11, 2003 to April 15, 2003; for a total of four (4) days?

Assignment 181 – Conclusion of Law No. 131 (CP 159)

- a. Was setting the penalty for wrongfully withholding copies of the meeting minutes for February 13, 2003 and March 4, 2003 at \$10.00 per day an abuse of discretion?

Assignment 182– Conclusion of Law No. 132 (CP 159)

- a. Was setting the total penalty for wrongfully withholding copies of the meeting minutes for February 13, 2003 and March 4, 2003 at \$40.00 an abuse of discretion?

**Resignation Letters from Rick Hopkins and Devi Tate**

Assignment 183 – Conclusion of Law No. 134 (CP 160)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa wrongfully withholding the BOA resignation letters of Rick Hopkins and Devi Tate requested by plaintiffs on March 10, 2003 should be assessed a per day penalty from April 11, 2003 to April 15, 2003; for a total of four (4) days?

Assignment 184 – Conclusion of Law No. 135 (CP 160)

- a. Was setting the penalty for wrongfully withholding copies of the BOA resignation letters of Rick Hopkins and Devi Tate at \$10.00 per day an abuse of discretion?

Assignment 185 – Conclusion of Law No. 136 (CP 160)

- a. Was setting the total penalty for wrongfully withholding copies of the BOA resignation letters of Rick Hopkins and Devi Tate at \$40.00 an abuse of discretion?

**Resolution 2003-03**

Assignment 186 – Conclusion of Law No. 138 (CP 160)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa wrongfully delaying production of a copy of Resolution 2003-03 requested by plaintiffs on April 14, 2003 should be assessed a per day penalty from April 21, 2003 to May 30, 2003; for a total of thirty-nine (39) days?

Assignment 187 – Conclusion of Law No. 139 (CP 160)

- a. Was setting the penalty for wrongfully delaying production of a copy of Resolution 2003-03, requested by plaintiffs on April 14, 2003, at \$5.00 per day an abuse of discretion?

Assignment 188 – Conclusion of Law No. 140 (CP 160)

- a. Was setting the total penalty for wrongfully delaying production of a copy of Resolution 2003-03, requested by plaintiffs on April 14, 2003, at \$195.00 an abuse of discretion?

**Maintenance Logs**

Assignment 189 – Conclusion of Law No. 142 (CP 161)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa wrongfully delaying production of copies of the maintenance

logs requested by plaintiffs on April 14, 2003 should be assessed for a total of 753 days?

Assignment 190 – Conclusion of Law No. 143 (CP 161)

- a. Was setting the penalty for wrongfully withholding copies of the maintenance logs, requested by plaintiffs on April 14, 2003, at \$15.00 per day an abuse of discretion?

Assignment 191 – Conclusion of Law No. 144 (CP 161)

- a. Was setting the total penalty for wrongfully withholding copies of the maintenance logs, requested by plaintiffs on April 14, 2003, at \$11,295.00 an abuse of discretion?

**June 14, 2001 Council Meeting Tape**

Assignment 192 – Conclusion of Law No. 146 (CP 161)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa wrongfully delaying review of the Mesa City Council tape of June 14, 2001 requested by plaintiff on April 25, 2003 should be assessed from May 2, 2003 to June 3, 2003: for a total of thirty-two (32) days?

Assignment 193 – Conclusion of Law No. 147 (CP 161)

- a. Was setting the penalty for wrongfully delaying review of the Mesa City Council tape of June 14, 2001, requested by plaintiff on April 25, 2003, at \$25.00 per day an abuse of discretion?

Assignment 194 – Conclusion of Law No. 148 (CP 161)

- a. Was setting the total penalty for wrongfully delaying review of the Mesa City Council tape of June 14, 2001, requested by plaintiff on April 25, 2003, at \$800.00 an abuse of discretion?

**Draft Dog Ordinance**

Assignment 195 – Conclusion of Law No. 150 (CP 162)

- a. Do the findings support the conclusion that the per day penalty for violation the PRA by the City of Mesa wrongfully delaying review of the draft dog ordinance presented to City council requested by plaintiff on April 25, 2003 should be assessed from May 2, 2003 to June 3, 2003: for a total of thirty-two (32) days?

Assignment 196 – Conclusion of Law No. 151 (CP 162)

- a. Was setting the penalty for wrongfully delaying review of the draft dog ordinance presented to City council, requested by plaintiff on April 25, 2003, at \$5.00 per day an abuse of discretion?

Assignment 197 – Conclusion of Law No. 152 (CP 162)

- a. Was setting the total penalty for wrongfully delaying review of the draft dog ordinance presented to City council, requested by plaintiff on April 25, 2003, at \$160.00 an abuse of discretion?

## II. STATEMENT OF THE CASE

### ***B. Statement of Facts***

The Zinks have been active in the City of Mesa government for many years (RP (February 8, 2005) 34:8-35:4; RP (May 11, 2005) 447:21-448:7). The Zinks have maintained a watch-dog role by writing letters to the local newspaper, filing complaints, and filing objections to rate increases (Ex 135; 140; RP (February 8, 2005) 35:5-36:10; 37:17-38:9; RP (May 11, 2005) 279:5-12; 449:12-450:13). In July of 2002, Ms. Zink began to investigate the activities of the City of Mesa Mayor, Council members, and Building Inspector<sup>1</sup> in relation to complaints she had received from neighbors (Ex: 70; 78; 135; 109; 110; 140; 89; 91; 29; 11;

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<sup>1</sup> The Building Department (TBD) is a contracted agency that acts as the Building Official for the City of Mesa.

132: RP (February 8, 2005) 36:10-37:7; 40:20-44:1). Ms. Zink's activities annoyed and irritated the City Officials and employees (Ex 3; 8; 19; 84; 106; 108: RP (February 8, 2005) 64:10-65:3: RP (May 11, 2005) 377:15-382:13: RP (May 12, 2005) 16:24-18:18; 65:18-69:21; 79:3-80:17: RP (May 13, 2005) 489:23. Councilmember Murphy<sup>2</sup> warned Ms. Zink that the city had passed a new Ordinance (Ex 194) and was out to get her (Ex 70; 74: RP (February 8, 2005) 36:20-37:3). A table of requests is found at Appendix C.

**August 29, 2002 Public Records Request - Complaint against 109 N Rowell Ave**

On August 7, 2002, The Building Department (TBD), the contract building official for the City of Mesa, expired the Zinks' building permit asserting complaints against the home as the reason for the expiration of the permit (Ex 70; para 4: Ex 73; para 3: RP (February 8, 2005) 37:8-16; 45:2-25: RP (May 12, 2005) 80:18-81:2). Ms. Standridge<sup>3</sup>, at the request of Mayor Ross, wrote out a complaint against the Zinks' home on August 8, 2002 and back dated it to August 2, 2002; prior to the date the Zinks' permit was expired (Ex 79: RP (May 12, 2005) 97:11-98:7). The complaint was submitted to the Mesa City Council for action on August 22, 2002 (Ex 78: RP (May 12, 2005) 73:1-74:20; 98:8-21). Ms. Standridge testified that, after review by the City Council, she filed the written complaint under the address file for 109 North Rowell Avenue. (RP (May 12, 2005) 73:19-25).

Ms. Zink verbally requested to review the address files for 109 North Rowell Avenue on August 29, 2002, on September 13, 2002, and September 30, 2002 (RP (May 12, 2005) 77:5-78:18; 82:10-83:9), looking for any complaints against her home. Ms. Zink submitted a written request to the City of Mesa for copies of all documents related to her property at 109

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<sup>2</sup> Leo Murphy resigned his position as a Mesa Councilmember on January 6, 2003 (Ex 178).

<sup>3</sup> Ms. Standridge had been the City of Mesa Clerk/Treasurer for 15 years at the time of her testimony (RP (May 11, 2005) 370:24-371:5).

North Rowell Avenue on September 30, 2002, (Ex 72: RP (February 8, 2005) 47:12-48:11), a verbal request on October 8, 2002 and another written request on October 9, 2002 (Ex 76: RP (February 8, 2005) 46:1-25). The City responded that Ms. Zink had been allowed to review all documents (RP (February 8, 2005) 50:20-56:25: RP (May 12, 2005) 90:20-91:10). On October 10, 2002, Ms. Zink attended the Mesa City Council meeting to discuss the missing complaint (Ex 21: RP (February 8, 2005) 55:3-57:13: RP (May 12, 2005) 91:11-92:18). She again reviewed all files for 109 North Rowell Avenue during the meeting (RP (February 8, 2005) 56:1-56:25). The complaint was not in any of the files.

On October 11, 2002 and October 24, 2002, Ms. Zink again submitted written requests to review all documents pertaining to 109 North Rowell Avenue, but found no complaint (Ex 60; 77: RP (February 8, 2005) 58:10-59:22; 60:2-61:5). On October 24, 2002, Ms. Zink again attended the City Council meeting to discuss the missing complaint and was told by Mayor Ross that there was no written complaint (Ex 66; 67 pg 1:18-29: RP (February 8, 2005) 61:6-18: RP (May 11, 2005) 365:23-366:1: RP (May 12, 2005) 96:16-97:10). Finally, on November 21, 2002, Ms. Zink found an entry in the Mesa City Council minutes showing that a written complaint against her home at 109 North Rowell Avenue had been submitted to the City Council for review on August 22, 2002 (Ex 79: RP (February 8, 2005) 61:19-64:2). Ms. Zink requested a copy of this complaint from Ms. Stephenson<sup>4</sup> and finally received a copy of the missing complaint on November 27, 2002 (*Id*), ninety (90) days after she was first allowed to review all the files held on her property at 109 North Rowell Avenue.

At the initial trial, the court determined that there was no evidence of a written complaint that was subject to the Public Records Act (PRA). The court of appeals Division III reversed

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<sup>4</sup> Ms. Stephenson was employed by the City of Mesa as the assistant clerk from May 2002 to August 2004 (RP (May 12, 2005) 4:3-14)

the trial court's decision finding that "Ms. Zink's initial request was sufficient to notify the city..." and remanded the issue back to the trial court "to determine an appropriate remedy for the City's improper denial or delay in responding to the Zinks' request." *Zink v. City of Mesa*, 140 Wn. App 328, 166 P.3d 738 (Div. III, 2007).

#### **October 10, 2002 Public Records Request - Clerk's Memos and Notes**

In August 2002, Mayor Ross requested that the City clerks keep notes on Ms. Zink's activities at City Hall and make copies of all documents Ms. Zink copied or reviewed (Ex 61; 65: RP (February 8, 2005) 64:13-22: RP (May 12, 2005) 16:24-18:18; 79:3-81:3; 82:6-9). On October 10, 2002, Ms. Zink attended the Mesa City Council meeting and was allowed to review four folders containing documents related to her home and family (RP (February 8, 2005) 56:5-23: RP (May 11, 2005) 365:10-366:24: RP (May 12, 2005) 98:22-99:13). During the review of the documents, Ms. Zink found the notes and memos kept on her activities at City Hall. After reviewing these documents in their entirety, Ms. Zink told Ms. Stephenson that she wanted copies of the documents; she was told to put the request in writing (Ex 61: RP (February 8, 2005) 57:8-22).

On October 11, 2002, Ms. Zink submitted a written request to review the memos and notes (Ex 60: RP (February 8, 2005) 57:22-58:9; 64:23-65:19). On October 15, Ms. Zink went up to review the file folders and make copies of the memos and notes but they were no longer in the files (Ex 61). On October 17, 2002, Ms. Zink submitted another request for the memos and notes (Ex 61: RP (February 8, 2005) 65:20-66:9). On October 24, 2002, the City denied the request (Ex 62: RP (February 8, 2005) 66:10-68:5). Ms. Zink requested the City to reconsider the denial of these documents; the request to reconsider was verbally denied (Ex 65: RP (February 8, 2005) 68:6-69:21).

On February 4, 2003, Ms. Zink submitted a request to the City of Mesa not to destroy the previously requested memos and notes (Ex 68: RP (February 8, 2005) 69:22-70:18). The City responded that the records were exempt under RCW 42.17.310(1)(i) and they were not presented to the City Council (Ex 69: RP (February 8, 2005) 70:16-71:7). Ms. Zink requested to see the report generated by the clerk's memos and notes but the request was denied (RP (February 8, 2005) 71:8-25).

**November 24, 2002 Public Records Request - BOA November 13, 2002 Special Executive Board Meeting Documents**

On September 3, 2002, the Zinks appealed the expiration of their building permit to the City of Mesa (RP (February 8, 2005) 72:7-16). On September 12, 2002, the City of Mesa created a Board of Appeals (BOA) to hear appeals concerning decisions made by the Building Official (Ex 109: RP (May 13, 2005) 482:9-16). The BOA held their first meeting on October 7, 2002 (Ex 195: RP (February 8, 2005) 72:19-73:15). On October 8, 2002, Ms. Zink wrote a letter to the BOA informing them that they were required to follow the Open Public Meetings Act; requesting notification of their next meeting (Ex 44: RP (February 8, 2005) 73:16-74:6).

On November 13, 2002, the BOA held an executive meeting of the board in Richland, Washington (Ex 42; 161). No notice was provided for the meeting and the public was not allowed to attend. At the executive meeting, the BOA appointed their officers, established the date and time for meetings, and adopted their rules and regulations (Ex 163). Mr. Mumma<sup>5</sup> presented the Zinks' request for appeal and, based on his recommendation, the BOA decided not to hear the appeal (Ex 222).

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<sup>5</sup> Mr. Mumma is the owner of TBD and was the City of Mesa's Building Official and the Board of Appeals secretary from the time the BOA was created on September 12, 2002 (Ex 109) through the date the board was dissolved on March 5, 2005 (RP (May 11, 2005) 400:23-25).

On November 14, 2002, Mr. Mumma faxed a draft copy of the BOA meeting minutes to the City of Mesa (Ex 222: RP (May 13, 2005) 464:12-18). After receiving the BOA minutes from Mr. Mumma, Ms. Standridge contacted Municipal Research<sup>6</sup> (Ex 46: RP (May 12, 2005) 115:18-116:24). Municipal Research informed the City the BOA had violated the Open Public Meeting Act when they held the executive session. The Zinks attended the City council meeting on November 14, 2002 to ask about the BOA and their appeal (Ex 112: RP (February 8, 2005) 74:7-20). Mayor Ross stated the BOA was not quite ready and Mr. Mumma would be contacting them (RP (February 8, 2005) 74:20-75:7). The BOA executive meeting was not mentioned (Ex 113).

On approximately November 21, 2002, the City notified the Zinks that their appeal would be heard on December 5, 2002 (RP (February 8, 2005) 75:8-23). On November 24, 2002, Ms. Zink requested copies of the BOA rules and regulations, as well as the minutes and tape of the BOA meeting at which their appeal was presented to the board (Ex 44: RP (February 8, 2005) 75:24-76:19). On November 25, 2002, the City of Mesa faxed the request to Mr. Mumma (Ex 107). On November 27, 2002, Mr. Mumma replied to the request denying the existence of the requested documents (Ex 45). Mr. Mumma did not inform Ms. Zink about the November 13, 2002 BOA meeting nor did he offer any documents related to that meeting (Ex 45: RP (February 8, 2005) 76:20-79:14). At trial, Ms. Standridge testified that the November 13, 2002 BOA meeting minutes faxed to the City on November 14, 2002 (Ex 222) would have been responsive to Ms. Zink's request of November 24, 2002 (RP (May 12, 2005) 116:25-118:2; RP (May 13, 2005) 477:8-11).

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<sup>6</sup> Ms. Standridge testified that Municipal Research is a resource used by the City of Mesa (RP (May 11, 2005) 443:14-18; 445:19-25)

On December 5, 2002, the BOA met again, wherein they once more appointed their officers, established the date and time for meetings, adopted their rules and regulations and Mr. Mumma yet again presented the Zinks' request for appeal (RP (February 8, 2005) 79:15-80:1). This time the BOA heard the Zinks' appeal and upheld Mr. Mumma's decision to expire the permit. No one ever mentioned the meeting held on November 13, 2002 to any of the parties involved in the appeals before the BOA (Ex 180).

On April 3, 2003, the Zinks appealed the BOA decision to the Franklin County Superior Court (RP (February 8, 2005) 80:2-7).<sup>7</sup> On August 7, 2003, the City of Mesa submitted the record to the court. On August 8, 2003, the Zinks received copies of the record submitted to the court (RP (February 8, 2005) 80:7-13). Contained in the record submitted to the court were copies of the November 13, 2002 BOA executive meeting minutes, the meeting agenda, and the rules and regulations adopted at that meeting; the very documents Ms. Zink had requested on November 24, 2002 (Ex 42; 44; 161; 163: RP (February 8, 2005) 80:9-86:7).

On August 20, 2003, Ms. Zink again requested the tape of the November 13, 2002 BOA meeting (Ex 50: RP (February 8, 2005) 86:8-87:5). The City of Mesa did not respond within five (5) business days (RP (February 8, 2005) 87:16-19). On August 28, 2003, Ms. Zink contacted Ms. Standridge concerning the release of the tape. She was told that Ms. Stephenson was out for the day (RP (February 8, 2005) 87:9-13: RP (May 11, 2005) 375:2-17). On August 29, 2003, the City responded to the request stating that they need an additional ten (10) days to locate and assemble the information (Ex 51: RP (February 8, 2005) 87:13-15; 87:20-88:10). Ms. Zink asked the City to reconsider the delay in releasing

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<sup>7</sup> The trial court reversed the BOA decision, reinstated the Zink's permit, and awarded the Zinks attorney fees and costs for frivolous lawsuit under RCW 4.84.185 On appeal. Division III affirmed the trial court's decision. *Zink v. City of Mesa*, 137 Wn. App. 271, 152 P.3d 1044 (Div. III, 2007).

the tape but they refused to release the tape (RP (February 8, 2005) 88:13-89:20). On September 3, 2003, Ms. Zink wrote to Mr. Tanner, the City Attorney, requesting release of the tape (Ex 52: RP (February 8, 2005) 89:21-90:21). The City of Mesa refused to forward the letter to the City Attorney (Ex 54). On September 4, 2003, Ms. Zink e-mailed a copy of the letter requesting reconsideration to Mr. Tanner (Ex 54: RP (February 8, 2005) 90:22-92:6) and she was provided a copy of the tape later that day (RP (February 8, 2005) 92:7-13).

### **November 27, 2002 Public Records Request - Twenty-one (21) Code Violation Letters**

The City of Mesa files documents related to residents according to their residential address at the time the document is created or submitted to the City (Ex 21 page 3: RP (May 11, 2005) 287:5-289:12: RP (May 12, 2005) 75:7- 25; 130:9-19). The city maintains a separate file for each residential address in the city.

On November 27, 2002, Ms. Zink requested to review twenty-one (21) code violation letters sent to residents of Mesa by TBD on five specific dates (Ex 93; 220: RP (February 8, 2005) 94:7-95:14: RP (May 12, 2005) 123:7-24). On December 5, 2002, the City responded stating they needed thirty (30) days to locate and assemble the requested documents (Ex 94: RP (February 8, 2005) 95:15-96:3: RP (May 12, 2005) 123:11-124:2). On approximately January 5, 2003, Ms. Zink went to review the requested code violation letters, but they were not available (RP (February 8, 2005) 96:4-17). During the week of January 13, 2003, Ms. Zink again attempted to review the code violations letters; but only a portion of the letters requested were available (RP (February 8, 2005) 96:18-97:4).

On January 24, 2003, the City delayed the release of the code violation letters stating it was unclear what records were being requested (Ex 95: RP (February 8, 2005) 97:5-23; 98:11-15). On February 3, 2003, Ms. Zink submitted a letter of clarification and a new

request for all code violation letters issued from March 13, 2000 to February 3, 2003 (Ex 96: RP (February 8, 2005) 98:2-23). On February 10, 2003, the City delayed the request claiming the request was unclear (Ex 97). Ms. Zink told the City they should contact TBD since they issued the code violation letters (RP (February 8, 2005) 99:24-100:7). On February 14, 2003, eighty (80) days after the initial request, Ms. Zink was finally allowed to review the code violation letters (RP (February 8, 2005) 101:2-4). After reviewing the letters in their entirety, Ms. Zink requested copies. The City redacted the code violation letters without providing any explanation (RP (February 8, 2005) 100:9-101:15; RP (May 12, 2005) 26:3-12; 135:6-136:19).

#### **December 11, 2002 Public Records Request - Resolutions and Ordinances**

The City of Mesa maintains an index of Ordinances and Resolutions as required per RCW 35A.12.150 (RP (May 11, 2005) 286:18-287:4; RP (May 12, 2005) 31:15-25). On December 5, 2002, the BOA held a public hearing ((CP 133) FOF 178: RP (February 8, 2005) 75:9-19). The Zinks believed procedures for notifying the public of the BOA public hearing had not been followed and Ms. Zink attempted to acquire a copy of the procedures so that she could present this information at the next BOA meeting. (RP (February 8, 2005) 103:18-24). Ms. Zink verbally requested the ordinance for public hearing notice but Ms. Stephenson was unable to locate it; so she asked Ms. Standridge about it (RP (February 8, 2005) 103:25-104:4; RP (May 12, 2005) 27:5-15).

On December 11, 2002, Ms. Zink requested copies of the following documents:

- the tape of the December 5, 2002 BOA meeting;
- the affidavit of publication for the notification of the BOA public hearing;
- procedure for the publication of ordinances, the notification of upcoming hearings and the preliminary agenda (RCW 35A.12.160)

- the resolution designating an official newspaper (RCW 35A.21.230); and
- the ordinance setting out the City's days and hours of operation (RCW 35A.21.070).

(Ex 87: RP (February 8, 2005) 101:16-102:19). On December 12, 2002, **the day after the request was made**, the City clerk noted there were no procedures adopted for the last three requests<sup>8</sup> (Ex 233: (CP 132) FOF 168; 169). The City provided Ms. Zink with the tape of the December 5, 2002 BOA meeting and the affidavit of publication on December 12, 2002 (RP (May 13, 2005) 479:23-480:3). Five days later, December 17, 2002, the City delayed the remainder of the request for the procedures for thirty (30) days in order to locate and assemble the documents (Ex 88: RP (February 8, 2005) 102:20-103:14: RP (May 13, 2005) 480:4-22). Approximately a month after the initial request, Ms. Zink attended the January 9, 2003 City Council meeting where in the clerk reported that none of the requested procedures existed (RP (February 8, 2005) 104:4-11: RP (May 13, 2005) 481:2-8).

#### **December 11, 2002 Public Records Request - Ordinance 01-05**

Ordinance 01-05 was adopted on July 26, 2001; approximately seventeen (17) months prior to Ms. Zink's request of December 11, 2002 (Ex 188). Ordinance 01-05 establishes the City's procedures for notifying the public of upcoming public hearings (Ex 188: RP (May 12, 2005) 146:25-148:25). At the January 9, 2003 City Council meeting, the City informed Ms. Zink that there was no Ordinance for notifying the public of upcoming public hearings (RP (February 8, 2005) 104:4-11: RP (May 13, 2005) 481:2-482:8).

Feeling that there must have been some procedure Mr. Mumma was following concerning the publication of the notice for the Public Hearing held on December 5, 2002 by

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<sup>8</sup> The tape of the December 5, 2002 BOA meeting and the affidavit of publication were provided to Ms. Zink the day after the request was made (Ex 233: RP (February 8, 2005) 103:1-11: RP (May 11, 2005) 406:12-23).

the BOA, Ms. Zink continued to look for an ordinance outlining the procedure for notifying the public of upcoming public hearings (RP (February 8, 2005) 109:3-18; 111:21-112:18). On March 3, 2003, Ms. Zink finally found and requested a copy of Ordinance 01-05 (Ex 30; 188: RP (February 8, 2005) 110:1-111:12). Ms. Standridge testified that she did not offer a copy of, or mention the existence of, Ordinance 01-05 to Ms. Zink in response to her December 11, 2002 request because “that’s actually the building department’s area” (RP (May 12, 2005) 148:10-25).

#### **January 9, 2003 Public Records Request – Resignation Letters**

On January 9, 2003, Ms. Zink requested copies of the resignation letters of Council members Leo Murphy and Linda Erickson (Ex 81: RP (February 8, 2005) 112:19-113:16). That same day the city verbally denied releasing the records because the City council had not yet reviewed them (RP (February 8, 2005) 113:16-114:6: RP (May 12, 2005) 152:11-154:22; 155:18-156:11). Ms. Zink did not receive copies of the resignation letters after they were approved by the City Council (RP (February 8, 2005) 114:4-6). *See also request of March 10, 2003, infra.*

#### **January 28, 2003 Public Records Request - Correspondence from City Attorney, Municipal Research and the City of Mesa**

On January 28, 2003, Ms. Zink submitted a request for all written correspondence the City of Mesa received from Municipal Research, City Attorney, or any other governmental agency concerning public records requests from January 1, 2002 to January 28, 2003 (Ex 55: RP (February 8, 2005) 127:3-13). The City never responded to the request (RP (February 8, 2005) 127:14-18).

**February 24, 2002 Request for Public Records - Phone/Fax Logs; BOA Rules and Regulation Adopted December 5, 2002; Time Card of Teresa Standridge; Ordinance 02-01; Water Meter Readings; and Eighteen (18) Residential Files**

In August 2002, the City of Mesa told Ms. Zink that she had to remove the bushes along her fence line in the alley or they would be sprayed (RP (February 8, 2005) 38:10-21). The Zinks attended the August 22, 2002 Council meeting wherein the City agreed to allow the bushes to remain and not to spray that area (Ex 78; 80 pg 3:19-4:25: RP (February 8, 2005) 38:22-23). After the Council meeting, the Zinks discovered that the bushes had already been sprayed and were dying (Ex 130: RP (February 8, 2005) 38:24-39:5). Ms. Zink attended the September 12, 2002 Council meeting to discuss the bushes (Ex 109). Mayor Ross explained that the City had started to read the water meters monthly and the spiders in the bushes were endangering the maintenance personnel (Ex 109; 228: RP (February 8, 2005) 39:6-22). Ms. Zink requested copies of the water meter readings (Ex 18: RP (February 8, 2005) 137:7-9). On September 13, 2002, Ms. Standridge contacted Municipal Research and was informed the water meter readings were not exempt from disclosure (Ex 116). Ms. Zink was provided a copy of the requested water meter readings for February 2002 (Ex 18: RP (February 8, 2005) 138:22-139:2).

On February 24, 2003, Ms. Zink requested the following documents:

- copies of the phone logs from December 2002 through February 2003;
- copies of the photo Copy/Fax Log from October 2002 through February 2003;
- a copy of the signed BOA rules and regulations adopted on December 5, 2002;
- a copy of the time card of Teresa Standridge for December 19, 2002;
- a copy of Ordinance 02-01 passed by council in January 2003;
- a copy of water meter readings from October 2002 through February 2003;
- to review the TBD insurance policy; and

- to review the files of eighteen (18) residential addresses.

(Ex 14: RP (February 8, 2005) 129:10-132:10). On February 28, 2003, the City delayed the request for seventeen (17) days in order to locate and assemble the documents (Ex 15: RP (February 8, 2005) 132:16-133:5). That same day, the City attorney sent a second response to Ms. Zink's request of February 24, 2003 stating that the City:

- will release redacted copies of the phone logs on March 17, 2003;
- will release a copy of the BOA rules and regulations on March 17, 2003;
- will release a copy of Ordinance 02-01 on March 17, 2003
- will not release the time card of Teresa Standridge claiming it was exempt per RCW 42.17.255 and 42.17.310(1)(b);
- will not release copies of water meter readings because it is unclear what record was being requested and all water meter records are exempt per RCW 42.17.255; and
- will release the files of eighteen (18) residential addresses beginning on March 17, 2003 but only between the hours of 10:00 a.m. and 11:00 a.m.

(Ex 16: RP (February 8, 2005) 133:13-135:12). On March 7, 2003, Ms. Zink sent an e-mail to the City attorney requesting that he reconsider his decision to:

- redact the phone logs due to privacy and attorney client privilege;
- delay the release of the BOA rules and regulations for a total of twenty-one (21) days;
- delay the release of Ordinance 02-01 for a total of twenty-one (21) days;
- deny the release of the time card as it was not exempt;
- deny the release of the water meter readings as they were not exempt; and
- limit Ms. Zink's access to public records as this was in violation of the PRA.

(Ex 17: RP (February 8, 2005) 135:13-138:10). Ms. Zink also attached a copy of the water meter reading record she had received from the City of Mesa in September 2002 to clarify

what records she was requesting (RP (February 8, 2005) 137:7-10; 138:22-139:21). The City attorney responded that the matter was concluded and he would not waste any more time on Ms. Zink's frivolous requests stating she should seek legal remedies if she felt otherwise (Ex 19: RP (February 8, 2005) 138:11-21; 139:22-25).

On March 17, 2002, Ms. Zink went up to City Hall at 10:00 a.m. and she was provided with a copy of Ordinance 02-01 and redacted copies of the phone logs (Ex 131: RP (February 8, 2005) 140:25-141:3; 142:3-143:4; 144:17-145:1). Ms. Zink did not receive a copy of the time card, the water meter readings, or the BOA rules and regulations (RP (February 8, 2005) 146:12-24).

Ms. Zink was allowed to begin reviewing the eighteen (18) residential files (RP (February 8, 2005) 140:1-9; RP (May 11, 2005) 295:12-296:24). After reviewing the documents in their entirety, Ms. Zink requested copies (RP (February 8, 2005) 140:8-10). Ms. Stephenson made the requested copies (RP (February 8, 2005) 140:11-16). At 11:00 a.m. the City stopped the review of the records (RP (February 8, 2005) 140:18-19). Ms. Zink asked for the copies made during the review (RP (February 8, 2005) 140:19-20). The City would not release the copies until the documents had been redacted (Ex 134: RP (February 8, 2005) 140:20-141:20; 145:9-145:20; RP (May 12, 2005) 26:3-12). The City did not provide Ms. Zink with a written explanation for the redactions (RP (May 12, 2005) 136:3-11).

On March 19, 2003, Ms. Zink received another delay letter from the City stating they needed an additional seven (7) days to locate and assemble the BOA rules and regulations (Ex 23: RP (February 8, 2005) 146:25-147:14). On April 3, 2003, the Zinks filed a LUPA action in the Franklin County Superior Court (*Zink v. City of Mesa*, 137 Wn. App. 271

(Div.III, 2007). On April 4, 2003, Ms. Zink finally received the BOA rules and regulations adopted by the board on December 5, 2002 (RP (February 8, 2005) 147:15-25).

At trial, Ms. Standridge testified that she had provided the water meter readings records to Ms. Zink (RP (May 11, 2005) 423:24-424:17; RP (August 30, 2006) 26:21-25). On September 28, 2005, after the initial trial, Ms. Zink again requested copies of the water meter readings from October 2002 to September 2003 (Ex 227: RP (August 30, 2006) 24:13-25:16). The City responded on September 29, 2005 that the request was ready (Ex 227). Ms. Zink received copies of the water meter readings for December 2002 and February 2003 (RP (August 30, 2006) 25:16-25). The City denied the existence of all other water meter readings (Ex 228: RP (August 30, 2006) 26:1-21).

#### **March 3, 2003 Public Records Request - Eleven (11) Residential Address Files**

On March 3, 2003, Ms. Zink submitted a request to review the property files for eleven (11) different residential files (Ex 24: RP (February 8, 2005) 148:1-16). The City responded that Ms. Zink could review the eleven (11) residential files beginning on March 24, 2003 for one hour per day from 10:00 a.m. to 11:00 a.m. (Ex 25: RP (February 8, 2005) 148:17-149:15). On or about March 24, 2003, Ms. Zink was allowed to begin reviewing the files between 10:00 a.m. and 11:00 a.m. (RP (February 8, 2005) 149:16-150:18). Ms. Zink requested copies of the documents after reviewing them in their entirety (RP (February 8, 2005) 150:19-20). The City of Mesa redacted the copies before releasing them to Ms. Zink without providing any written explanation for the redactions (Ex 133: RP (February 8, 2005) 150:21-151:19; RP (May 12, 2005) 26:3-12).

#### **March 3, 2003 Public Records Request - Requests, Delays, Denials, and Replies**

On March 3, 2003, Ms. Zink submitted a written request for copies of Ordinance 01-05, Ordinance 96-06, Resolution 1999-04, numerous meeting notices and agendas and requested

to review the file of requests, replies, delays, and denials that the City maintained pertaining to Ms. Zink (Ex 30: RP (February 8, 2005) 151:20-152:24). All of the documents were provided while Ms. Zink waited except for the request to review the file of requests, delays, denials, and replies, which the City refused to release (RP (February 8, 2005) 152:25-153:18). On March 10, 2003, Ms. Zink submitted another written request for the file of requests, delays, denials, and replies (Ex 31: RP (February 8, 2005) 153:19-154:13). On March 11, 2003, Ms. Zink contacted the City by phone and requested to review the file. Ms. Stephenson stated she could review the file but only after 1:00 p.m. (Ex 32: RP (February 8, 2005) 154:15-155:16). On March 12, 2003, Ms. Zink again called the City about the file and Ms. Standridge told her that the file was not ready and she could not review it on that day (Ex 33: RP (February 8, 2005) 155:17-156:18: RP (February 9, 2005) 179:8-20). On March 13, 2003, the City delayed Ms. Zink's request for the file claiming they needed an additional fourteen (14) days to determine whether the information requested was exempt (Ex 34: RP (February 8, 2005) 156:19-157:8: RP (February 9, 2005) 179:21-23). On March 18, 2003, Ms. Zink received a second delay letter from the City attorney stating that the documents would not be provided until April 18, 2003 due to the high volume of records requested (Ex 35: RP (February 8, 2005) 157:9-158:13: RP (February 9, 2005) 179:24-180:19).

On Friday, April 4, 2003, the City released a copy of Ordinance 03-03 (RP (February 9, 2005) 198:20-199:2: RP (May 11, 2005) 406:1-11) and finally allowed Ms. Zink to review a portion the file of requests, replies, delays, and denials (RP (February 9, 2005) 180:20-181:8). During the review of the files, Ms. Zink found a reply from Cade Scott to a complaint she had filed and requested a copy of the document (RP (February 9, 2005) 216:8-20; 220:1-17). Although Ms. Zink had not completed the review of the file, at 11:00 a.m. Ms.

Standridge stated that the record review was over (Ex 2 pg 2: RP (February 9, 2005) 181:6-23). Ms. Zink requested the copies that had been made during the review. Ms. Standridge refused to release the records until she redacted them (Ex 130: RP (February 9, 2005) 181:24-182:17; 219:10-220:19). Ms. Zink received the copies later that day.

**March 10, 2003 Public Records Request - Ordinance 03-03; BOA Meeting Minutes; March 5, 2003 BOA Meeting Minutes; Resignation Letters of Rick Hopkins and Devi Tate; Resignation Letters of Leo Murphy and Linda Erickson; February 13, 2003 and March 4, 2003 Council Minutes**

On February 13, 2003, the City Council adopted Ordinance 03-03 (Ex 49; 91). As required by RCW 35A.12.160, on February 27, 2003, the City published a summary of Ordinance 03-03 in the Franklin County Graphic that included a statement that the full text of this Ordinance would be available at Mesa City Hall and would be provided to any citizen upon personal request during normal business hours (Ex 41: RP (February 9, 2005) 200:3-17).

On March 5, 2003, the BOA held their final meeting, finalizing their decision to uphold the Building Inspectors decision to expire the Zinks' permit (RP (May 11, 2005) 255:13-19). At this meeting, the BOA members approved and signed their meeting minutes and, at the end of the meeting, they resigned (Ex 39: RP (February 9, 2005) 195:4-197:13). Ms. Standridge testified that after the BOA members resigned, Mr. Mumma sent copies of the resignation letters to the City of Mesa (RP (May 13, 2005) 483:3-18).

Ms. Zink obtained a copy of the March 5, 2003 BOA meeting tape (RP (February 9, 2005) 193:21-194:2) and on March 7, 2003, sent two public records request to Mr. Mumma requesting copies of the approved BOA meeting minutes (Ex 40: RP (February 9, 2005) 188:4-23) and the minutes of the March 5, 2003 BOA meeting (Ex 111). Mr. Mumma did not

respond to either request (RP (February 9, 2005) 188:22-23). On March 10, 2003, Ms Zink made a public records request to the City for the following documents:

- a signed copy of Ordinance 03-03;
- a signed copy of the BOA meeting minutes;
- a copy of the draft BOA meeting minutes for March 5, 2003;
- copies of the BOA resignation letters of Richard Hopkins and Devi Tate;
- copies of the resignation letters of Leo Murphy and Linda Erickson;
- copies of the February 13, 2003 and March 4, 2003 City council meetings; and
- a copy of the letter from Mr. Tanner reducing his fee for review of records request presented and discussed at the February 13, 2003 Council meeting.

(Ex 36: RP (February 8, 2005) 114:7-116:12).

On March 13, 2003, the City delayed the request until March 27, 2003 in order to determine whether the information was exempt (Ex 34: RP (February 8, 2005) 116:13-117:23: RP (May 12, 2005) 44:12-45:14). In a second delay letter dated March 14, 2003, the City delayed the request until April 11, 2003 “due to high volume of records request” (Ex 37: RP (February 8, 2005) 117:22-119:10).

#### **March 18, 2003 Public Records Request - Steve Sharp Complaint**

On March 18, 2008, Ms. Zink requested the complaint from Steve Sharp presented to the City Council on March 17, 2003 (Ex 117: RP (February 9, 2005) 208:4-20). On March 20, 2003, Ms Zink received a redacted copy of the Sharp complaint (Ex 129: RP (February 9, 2005) 208:21-210:8: RP (May 12, 2005) 53:5-54:3). No explanation for the redaction was provided as required (RP (May 12, 2005) 54:6-55:15). To date, the City has not provided the Zinks with an un-redacted copy of the Steve Sharp complaint.

### **March 19, 2003 Public Records Request - Correspondence Between Attorney and Municipal Research**

On March 19, 2003, Ms. Zink submitted a request for copies of all correspondence between the City of Mesa; State Auditor's office; the Attorney General's office; Municipal Research; and the City Attorney, Terry Tanner, from January 1, 2003 to March 17, 2003 (Ex 56: RP (February 9, 2005) 210:9-25). On March 24, 2003 the City delayed the request for twenty-two (22) days in order to locate and assemble the documents (Ex 57: RP (February 9, 2005) 211:1-10). On April 4, 2003, Ms. Zink received a letter of denial from the City of Mesa claiming the correspondence between Municipal Research and the City Attorney was privileged (Ex 58: RP (February 9, 2005) 211:11-212:2). The City did not provide a privilege log explaining the specific document(s) being withheld, the applicable exemption(s) or how the exemptions applied (RP (February 9, 2005) 212:3-10): CP 1016-1020).

On remand the trial court opined that all communication between the City attorney and the City of Mesa is privileged (COL 45 (CP 147)) concluding that all privileged documents were subject to an in-camera review by the court in order to determine if the withheld documents were exempt under the PRA (FOF 62 (CP 118): COL 46 (CP 147)). At the remand hearing On November 7, 2008, the trial court ordered the City of Mesa to provide all privileged documents to the court no later than December 8, 2008 (Order #3 (CP 164)). The City of Mesa did not provide the privileged documents to the trial court for an in-camera review until April 14, 2009; over five months after the City was court ordered to do so (CP 1288). On April 20, 2009, the trial court entered an order on the in-camera review finding the documents at issue in this complaint were exempt in their entirety (CP 1280-1287).

**April 4, 2003, April 6, 2003 and April 10, 2003 Public Records Requests – Reply from Cade Scott; Complaint Against Cade Scott; Council Minute Book; Council Packet; and Vouchers and Bills**

During the review of the files on April 4, 2003, Ms. Zink found a reply from Cade Scott to a complaint she had filed and requested a copy of the document (RP (February 9, 2005) 216:8-20; 220:1-17). After receiving the documents from the City, Ms. Zink discovered the reply from Mr. Scott was missing (RP (February 9, 2005) 182:6-17).

On April 6, 2003, Ms. Zink left a message on the City's answering machine requesting a copy of the missing document, as well as the original complaint; Ms. Zink also requested to review City Council packet and the vouchers/bills to be submitted to the City Council on April 10, 2003 (Ex 223: RP (May 13, 2005) 471:10-472:8; 472:16-473:6). On April 7, 2003, Ms. Zink sent a follow-up e-mail (Ex 13: RP (February 9, 2005) 220:23-222:4). The City did not respond. Ms. Zink had been reviewing the vouchers and bills prior to the Council meeting (Ex 91; 29) and it was noted in the minutes that she had made some comments about the billings at the February 13, 2003 council meeting (Ex 91).

On April 10, 2002, Ms. Zink went to City Hall to continue the review of the files requested on March 3, 2003, to pick-up a copy of the reply from Cade Scott, and to review the council packet and vouchers/bills to be presented at the council meeting that night (Ex 105: RP (February 8, 2005) 120:1-7: RP (February 9, 2005) 182:18-185:20). The City tape recorded the interaction, denied the release of all requested records, and told Ms. Zink that her attorney must contact the City attorney before any public records would be released (Ex 105: RP (February 8, 2005) 119:13-120:12: RP (February 9, 2005) 184:5-185:9). The City refused to release the audio tape of the interaction (RP (February 8, 2005) 120:16-21).

On April 11, 2003, Ms. Zink returned to City Hall with a video recorder. The City audio recorded the interaction (Ex 12; 211: RP (February 8, 2005) 120:13-121:24; 123:18-22: RP

(May 11, 2005) 381:14-382:13). Ms. Zink requested to continue the review of the file of requests, replies, delays, and denials as well as the Minute Book of the Council meetings (Ex 12 pg 2). Ms. Zink also requested the release of all outstanding public record requests including the resignation letters, meeting minutes (per prearrangement with city attorney), vouchers, and the council packet (Ex 12; 37: RP (February 9, 2005) 189:18-190:9: RP (May 12, 2005) 51:21-53:4). The City refused to release any public records stating "Our attorney has advised us that you need to contact your attorney then our attorney will tell us what we need to do" (Ex 12 pg 2:4-5).

On April 14, 2003, Ms Stephenson contacted Ms. Zink and stated they would only release records between 10:00 a.m. and 11:00 a.m. on April 16, 2003. (Ex 2; 3 (pg 1 para 2-3); 212: RP (February 8, 2005) 123:23-124:7: RP (February 9, 2005) 190:6-191:4). On April 15, 2003, Ms. Zink went to City Hall to review the records and received the following documents:

- redacted copies of the resignation letters of Murphy and Erickson without an explanation for the redaction (Ex 2; 178: RP (February 8, 2005) 124:17-20: RP (February 9, 2005) 215:2-16);
- City Council meeting minutes for February 13, 2003 and March 4, 2003;
- the resignation letters of the BOA members Rick Hopkins and Devi Tate;
- draft copies of the BOA meeting minutes (except March 5, 2003);
- a denial letter stating the signed minutes and the March 5, 2003 BOA meeting minutes did not exist (Ex 38: RP (February 9, 2005) 191:5-20; 193:17-195:3)

Ms. Zink did not receive copies of the meeting minutes approved by the BOA on March 5, 2003, or the draft of the minutes of the March 5 2003 BOA meeting (Ex 38: RP (February 9, 2005) 194:6-197:17). The City stated Ms. Zink could only review public records between

10:00 a.m. to 11:00 a.m. (Ex 2; 3; 212). Because it was 1:00 p.m., the City refused to allow Ms. Zink to review the vouchers/bills, the council packet, the files of requests, delays, denials, and replies, the complaint against Cade Scott, Cade Scotts reply, or the Council minutes book (Ex 2; 3; 212; RP (February 8, 2005) 124:11-125:1).

**April 14, 2003 Public Records Request - Maintenance Logs; March 13, 2003 and March 27, 2003 minutes; Resolution 2003-03; Complaint against Cade Scott; Cade Scott's reply; Vouchers/Bills; Council Packet; Minute Book; and Notes and Memos**

During the winter of 1999-2000, Ms. Zink discovered that the City was over-chlorinating the water system when one of her African Grey Parrots became sick (RP (February 8, 2005) 37:22-38:1). Ms. Zink requested and received the maintenance logs kept by the City maintenance personnel (Ex 175: RP (February 8, 2005) 38:1-4; RP (February 9, 2005) 236:8-16). After reviewing the maintenance logs, Ms. Zink reported the incident to the Health Department. The City was required to hire someone certified in water quality to oversee the water system (RP (February 8, 2005) 38:5-9).

On April 14, 2003, Ms. Zink submitted a request for review and/or copy:

- the maintenance logs from September 12, 2002 to September 30, 2002;
- the minutes of the meetings for March 13, 2003 and March 27, 2003;
- Resolution 2003-03 – Copy Fees Schedule;
- the complaint filed against Mr. Scott;
- Mr. Scott's reply to the complaint against him;
- the vouchers/bills presented to council on April 10, 2003
- the council packet presented to council on April 10, 2003;
- the council minute book from January 1, 1996 to April 10, 2003; and
- the clerks notes and memos from August 8, 2002 to March 14, 2003

(Ex 1: RP (February 9, 2005) 216:21-217:5; 223:5-224:3). Ms. Stephenson faxed the request to the City attorney asking if the maintenance logs were exempt since the logs were kept only for the Mayor's review (Ex 234). The City did not respond to the request of within five (5) business days (RP (February 9, 2005) 217:6-14).

On April 23, 2003, Ms. Zink received a delay letter stating that due to the high volume of records requested, the records would not be available until Saturday, May 31, 2003 (Ex 5: RP (February 9, 2005) 186:15-25). On Saturday, April 26, 2003, Ms. Zink received a delay letter from the City clerk stating they needed an additional five (5) days to notify third persons or agencies to allow them to seek injunctive relief (Ex 6: RP (February 9, 2005) 218:4-219:9).

**April 25, 2003 Public Records Request - Draft Dog Ordinance and June 14, 2001 Council Meeting Tape**

In March 2003, the City began drafting a new dog ordinance for review and passage by the City Council (Ex 11; 103). At this same time, the Zinks were having a dispute with the City concerning some dog fines they had received in June of 2001 (Ex 11: RP (February 9, 2005) 236:22-237:23). On April 24, 2003, the City sent Ms. Zink a letter concerning dog fines the Zinks had received in June of 2001 (Ex 102).

On April 25, 2003, Ms. Zink submitted a written request for a copy of the draft of the proposed Dog Ordinance and to review the tape of the June 14, 2001 Council meeting (Ex 82: RP (February 9, 2005) 236:19-237:6). Although the City employees were recording the incident, Ms. Standridge demanded Ms. Zink turn off her recording device or leave the City Hall (Ex 3; 83; 84; 85). When Ms. Zink refused to turn off her recording device unless the City turned off their recording device, Ms. Standridge refused to release any public records and Ms. Zink was told that her attorney had to contact the City attorney. Ms. Zink never received any other response to this request for public documents.

On May 6, 2003, Ms. Stephenson contacted Municipal Research to determine if the vouchers and bills were exempt from disclosure (Ex 118).

On May 30, 2003, the City:

- claimed the maintenance logs were exempt from disclosure under RCW 42.17.310(1)(i) (Ex 7: RP (May 12, 2005) 59:21-61:8; 63:8-64:5);
- released copies of the minutes of the for March 2003 meetings;
- released a copy of Resolution 03-03 – Copy fee schedule;
- released a copy of the complaint against Mr. Scott;
- released a redacted copy Mr. Scott’s reply to the complaint (RP (February 9, 2005) 218:20-219:9); no explanation was provided;
- claimed the notes and memos were exempt from disclosure under RCW 42.17.310(1)(i) (Ex 7); and
- allowed Ms. Zink to review the City Council minute book.

On June 3, 2003, Ms. Zink was allowed to review or provided copies of:

- City Council Packet for April 10, 2003 meeting;
- vouchers and bills presented and paid at the April 10, 2003 meeting;
- Minutes of the March 13, 2003 and March 27, 2003 Council meeting minutes;
- Draft Dog Ordinance;
- June 14, 2001 Council meeting tape.

On May 11, 2005, Ms. Standridge testified at the initial hearing that the maintenance logs did not exist (RP (May 11, 2005) 408:3-7). Ms. Standridge testified that she had searched everywhere and asked Cade Scott<sup>9</sup> about the maintenance logs but he had not been keeping the logs. (RP (May 11, 2005) 408:3-25). On August 31, 2005, after the hearing, Ms. Zink

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<sup>9</sup> Cade Scott is the City of Mesa Maintenance Supervisor.

submitted a request to review the maintenance logs for the years 2001, 2002, and 2003 (Ex 224). The City responded that the request would be ready on September 8, 2005 (Ex 225). During the review of the requested logs, Ms. Zink found the log entries the City claimed did not exist (Ex 226). On August 30, 2006, at the hearing for additional evidence, Ms. Standridge testified that before the trial the logs did not exist, but when Ms. Zink requested the logs after the trial they were there (RP (August 30, 2006) 27:19-30:21).

On June 10, 2005, after the initial trial, Ms. Zink submitted another request to review and/or copy all memos and notes from July 30, 2002 to June 10, 2005 (Ex 231 pg 1). The City denied the request. On June 19, 2005, Ms. Zink e-mailed the City attorney and requested that the City reconsider the claimed exemption (Ex 231 pg 5). On June 24, 2005, the Zinks were allowed to review and copy some of the memos and notes but many of the notes and memos were missing (Ex 231 pg 6). Ms. Zink again requested the city release the missing notes and memos (Ex 231 pg 6). On June 29, 2005, the Zinks were allowed to review the bulk of the clerks memos and notes (RP (July 16, 2008) 45:10-19). The Zinks received more memos and notes on June 3, 2008 (RP (July 16, 2008) 38:18-39:18). It is unknown if all the memos and notes have ever been released.

### ***C. Procedural History***

The Zinks filed an action on April 30, 2003, in the Franklin County Superior Court, requesting review of the City of Mesa's responses to requests for public records and for review of the City's charges for copies of records and the City's disparate treatment of Ms. Zink. (CP at 1016-1020) On February 8, 2005, the matter finally went to a hearing before visiting Judge Acey. The hearing was interrupted on February 9, 2005 due to a medical necessity and resumed on May 11, 2005. At the end of the hearing, the trial court ruled in

favor of the Defendant, the City of Mesa (RP (May 13, 2005) 546:11-12). The Zinks appealed this decision to the Court of Appeals, Division III (CP 308-312).

On August 23, 2007, Division III held that ‘substantial compliance’ was “an incorrect standard by which to judge an agency’s compliance with its statutory duties” under the PDA (CP 271). Division III held that the record did not “support the trial courts determination that the Zinks unlawfully harassed City Officials or that the City met its obligations under the PDA” reversing the trial court’s decision and remanding the matter to the trial court for determinations consistent with its opinion (CP 270-271). The trial court was directed “to enter findings on whether the City strictly complied with the PDA in every instance identified by the Zinks” and if a violation had occurred “award penalties, costs, and attorney fees to the Zinks, including costs and fees incurred” on appeal (CP 293-294). *Zink v. City of Mesa*, 140 Wn. App. 328, 166 P.3d 738 (2007).

On July 16<sup>th</sup> and 17<sup>th</sup> 2008, the trial court, after hearing arguments on remand, concluded that all communication between the City attorney and the City of Mesa is privileged (COL 45 (CP 147)), ordered all privileged documents to be produced to the court for to an in-camera review not later than December 8, 2008 (FOF 62 (CP 118): COL 46 (CP 147)) and ordered that all remaining public documents at issue in this complaint be released not later than November 14, 2008 (CP 163-164). Extensive Findings of Fact and Conclusions of Law and Judgment for plaintiffs were entered in the Court on November 7, 2008 (CP 110-166) (CP 107-109). On November 17, 2008, the Zinks filed a motion for reconsideration (CP 79-106). The trial court denied the request for reconsideration November 21, 2008 (CP 76). The Zinks timely filed notice of their appeal of the findings and conclusions, order and judgment on November 25, 2008 from which they now seek relief (CP 16-75).

On April 14, 2009 the City of Mesa provided the privileged documents to the trial court for an in-camera review (CP 1288). On April 20, 2009 the trial court entered an order on the in-camera review exempting the documents at issue in this appeal (CP 1280-1287). On April 30, 2009, the Zinks filed a motion of reconsideration (CP 1104-1122). The trial court did not respond. On May 18, 2009, the Zinks timely filed notice of appeal of the order on in-camera review from which they now seek relief (CP 1092-1101). At the request of both parties, the two appeals were consolidated on June 16, 2009.

### **III. ARGUMENT**

#### ***D. The Zinks Are Entitled to a Penalty for Each Day They Are Denied the Right to Inspect or Copy Public Records***

The trial court erred both in excluding days from the penalty period and in cutting off per day penalties before records are actually produced.

##### ***1. The Trial Court Improperly Excluded Days From the Penalty Period***

The trial court erred in decreasing the number of penalty days imposed against the City of Mesa for violations of the Washington Public Records Act (PRA) from the time of the trial court's decision, until said decision was overturned on appeal, ((CP 113) FOF 20, 24; (CP 116) FOF 50; (CP 117) FOF 56; (CP 118) FOF 67; (CP 121) FOF 84, 91; (CP 122) FOF 97; (CP 124) FOF 107; (CP 125) FOF 117; (CP 126) FOF 122; (CP 127) FOF 132; (CP 140) FOF 233; (CP 143) COL 10, 11; (CP 146) COL 36; (CP 147) COL 40; (CP 147-148) COL 47; (CP 149) COL 55; (CP 150) COL 63, 67; (CP 151) COL 71; (CP 152) COL 75; (CP 161) COL 147).

The PRA requires that penalties be awarded “for each day that [a requestor] was denied the right to inspect or copy said public record” RCW 42.17.340(4). In *Yousoufian v Office of*

*King County Executive*, 152 Wn. 2d 421 (2004) (*Yousoufian II*), our Supreme Court found that the issue of whether RCW 42.17.340(4) authorizes a trial court to decrease the number of penalty days is a question of law. The Court determined that the PRA does not contain a provision granting the trial court discretion to reduce the penalty period, rather the statute unambiguously requires a penalty “for each day” a public record is wrongfully withheld. *Id.* at 437-438.

In *Koenig v City of Des Moines*, 158 Wn.2d 173, (2006), the Supreme Court of Washington considered this exact issue. Mr. Koenig sued the City of Des Moines to compel production of public records. The City obtained an injunction from the Superior Court protecting the city’s records from production. After an in camera review, the Superior court ordered redacted records be released and awarded attorney fees and costs to Mr. Koenig. Comparable to the finding in this case, the trial court in *Koenig* refused to impose any statutory penalties on the basis that the City of Des Moines was protected from disclosing the records by the injunction, which prohibited disclosure. *Id.* at 178-179.

Our Supreme Court overturned the Superior Court’s decision finding “that the trial court lacks discretion under former RCW 42.17.340(4) to reduce the number of days for which to award the daily penalty.” *Id.* at 189.

...we decided *Yousoufian v. Office of King County Executive*, 152 Wn.2d 421, 98 P.3d 463 (2004), where we held **the public disclosure act requires a penalty be imposed for each day a record is withheld, ... Once the trial court determined Mr. Koenig was entitled to inspect the records, it was required to assess a penalty within the statutory range for each day the records were withheld.**

*Koenig v. City of Des Moines*, 158 Wn.2d 173, 188 (2006) (emphasis added). Even though the city in *Koenig* was directed not to disclose the records, the Supreme Court still found that

penalties were mandatory for each day that *Koenig* was denied the right to review or inspect the requested record.

As in *Koenig*, the trial court in this matter excluded from the penalty period the time between the trial court's order, and the reversal of that order. For comparison with *Koenig*, in this matter, on May 13, 2005, the trial court found that the City had substantially complied with the PRA. However, in doing so the trial court did not address whether the withheld documents were exempt as claimed by the City nor did the court order the City **not** to release the documents. Further, in its oral ruling, the trial court acknowledged that this decision may be overturned on Appeal stating:

Now, there may be a higher authority like Division III or the Washington State Supreme Court that may disagree with me, and they may reverse me on that decision ...

(RP (May 13, 2005) 543:23-544:1).

After the trial court's decision, the City agreed to release some of the withheld records to the Zinks (Ex 231, 224, 225, 227, 228). On July 12, 2005, the Zinks filed an appeal with the Court of Appeals. At that time, the City was aware that the trial court's decision could be overturned and they could be assessed penalties for continuing to withhold the public records at issue in this complaint. In *Koenig*, the Supreme Court held that per day penalties were required even when the trial court specifically directed the city not to release the records. In this case, there was no order directing the City not to release records. The ruling must be the same here. The per day penalties apply to each day a record is withheld, and must include all days, even those between the trial court's oral ruling and the Division III opinion reversing.

## ***2. Per Day Penalties Should Continue Until the Records are Actually Produced***

The trial court erred in its decision that the per day penalties for the records not yet produced at the time of the proceedings will stop on the day Judgment is entered ((CP 142) COL 1; (CP 150) COL 63, 67; (CP 151) COL 71; (CP 152) COL 75, 79) opining that the Zinks will have to sue the City all over again (RP (November 7, 2008) 17:24-18:6).

On July 16, 2008, the trial court informed the City of Mesa that the code violation letters; resignation letters; correspondence with Municipal Research; time card; phone logs; residential files; Steve Sharp complaint; and Cade Scott reply to complaint were not exempt and had to be released per the PRA. In the trial court's written order entered November 7, 2008, the City was given seven (7) days to produce certain records (CP 163-165). One record was produced on or by November 14, 2008. Additional records were produced on November 17, 2008, and during March and April of 2009. But many continue to be in a redacted form and others are still not produced<sup>10</sup>. The purpose of the "per day" penalty is to ensure agencies will comply with the PRA. By ending the per day penalties prior to the release of the documents, the City has no incentive to release the documents as evidenced by the fact that despite the Court's order, the City continues to refuse to release documents. Just as the *Yousoufian II* and *Koenig* cases support the Zinks' request for a penalty for "each day," they also support the Zinks' request for continuing penalties until the date the records are *actually* produced.

The trial court has already determined that the documents are not exempt and the Zinks should not have to incur further court costs in order to get the records released. The City's failure to provide the records after the trial court's verbal order that they were subject to

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<sup>10</sup> The City of Mesa now claims that many of the outstanding documents can't be found or have been destroyed.

disclosure is indicative that the City is acting in bad faith and is intending to cause economic loss to the Zinks by refusing to release these documents. Clearly the per day penalty set by the trial court is not enough to deter the City from further violations of the PRA. The Zinks ask that the penalties imposed on the City of Mesa for these documents be set at one-hundred dollars (\$100) per day per record from July 16, 2008 until the records are actually released to the Zinks by the City of Mesa as required by the PRA or are proven to be destroyed.

***E. Yousoufian IV Should Guide the Court in Assessing Penalties***

At trial, the court determined that *Yousoufian v Office of Ron Sims*, 137 Wn. App. 69 (Div. I, 2007) (*Yousoufian III*) should be used as a guide in assessing per day penalties ((CP 142) COL 7). Since the trial court's ruling, our Supreme Court has addressed the findings in *Yousoufian III*, modifying the decision to incorporate mitigating and aggravating factors for trial courts to consider in their penalty determination.

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.

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.

Our multifactor analysis is consistent with the PRA and our precedents and provides guidance to trial courts, more predictability to parties, and a framework for meaningful appellate review.

(footnotes omitted). *Yousoufian v. Office of Ron Sims*, 165 Wn.2d 439 (2010) (*Yousoufian IV*). *Yousoufian IV* should be used as a guide to assess any per day penalties in the Zinks' case ((CP 142) COL 7).

#### ***F. The Trial Court Failed to Consider the Entire Penalty Range***

The vast majority of the per day penalties imposed by the trial court were at the low end of the penalty range. This indicates that the trial court failed to consider the entire penalty range.

At the outset of any penalty determination, a trial court must consider the entire penalty range established by the legislature. See Laws of 1992, ch. 139, § 8 (amending the penalty from a \$25 per day limit to the current \$5-\$100 per day range).

This eliminates the perception of bias associated with presuming any "starting point" *Yousoufian v. Office of Ron Sims*, 165 Wn.2d 439 (2010) (*Yousoufian IV*). In this case, the trial court's imposition of a penalty at the low end of the range demonstrates a presumption of a starting point at the lowest penalty. There is a perception of bias, and the penalties should be adjusted such that there is no presumption of the minimum penalty.

***G. Strict Compliance does not give agencies a mandatory five (5) business day delay in responding to all requests for public records***

The trial court erred in determining that strict compliance under the PRA allows agencies to take five (5) business days to provide public records to a requesting individual whether the record is readily available on demand or not ((CP 130) FOF 153; (CP 140) FOF 237: (CP 142) COL 3; (CP 161) COL 146; (CP 162) COL 150). In making this decision the trial court concluded that:

the statute allows them five business days to produce anything that's requested. **That it may be handy to them to produce it quicker doesn't mean they have to produce it quicker.** They can take the full five business days...

(RP (July 16, 2008) 36:1-9)(emphasis added). The trial court relied on RCW 42.17.320 to make this determination.

**Responses to requests for public records shall be made promptly by agencies**

...Within five business days of receiving a public record request, an agency, ... must respond by either (1) providing the record; (2) acknowledging that the agency, ... has received the request and providing a reasonable estimate of the time the agency, ... will require to respond to the request; or (3) denying the public record request. ...

RCW 42.17.320 (emphasis added). Although this statute does allow agencies up to five (5) business days to respond to a public records request, if needed, RCW 42.17.270 requires that upon the request for identifiable records a public agency must make them promptly available.

Public records shall be available for inspection and copying, and agencies **shall**, upon request for identifiable public records, **make them promptly available** to any person.

RCW 42.17.270 (emphasis added). Narrowly interpreting RCW 42.17.320 to mean that all public records can be withheld for five (5) business days from the date of the request, regardless of what record is requested, is contrary to the well recognized intent of the Public Records Act and is further contrary to RCW 42.17.270 which requires records to be promptly available. Under the trial court's ruling, an agency could withhold a document that is sitting on a clerk's desk, in plain view, for up to five (5) business days even though they know the location of the document and it may only take a few seconds to provide the document or couple minutes to make a copy. This is error. Under RCW 42.17.270, if a public agency can produce a public record on demand, they are required to do so. "[G]overnment agencies have a duty to respond promptly to disclosure requests." *Limstrom v Ladenburg*, 98 Wn. App. 612, 616 (Div. II, 1999). Furthermore, other state statutes required public documents to be available upon demand:

- RCW 35A.12.150 requires municipalities to keep all Resolutions and Ordinances in books that must be available for inspection by the public;
- RCW 35A.12.160 requires that summaries of Ordinances published in the official paper must include a statement that the ordinance will be mailed upon request;
- RCW 35A.12.140 requires that a copy of statutes referenced in any draft Ordinance shall be available for inspection by the public;
- RCW 35A.33.052 requires municipalities to make copies of preliminary budgets and make them available for distribution;
- RCW 42.32.030 requires that agency minutes of meetings shall be promptly recorded and open to public inspection; and
- RCW 42.56.070 (7) requires that public agencies must maintain and make available for public inspection and copying a statement of the actual per page costs or other

costs, if any and statement of factors and manner used to determine the actual per page cost or other costs, if any.

The effect of the trial court's ruling was to take the number of days between the date the record was requested and the date produced and subtract seven (7) days in each instance when calculating the total number of penalty days regardless of what record was being requested. Allowing agencies to withhold all public records for five (5) business days, regardless of what record is requested, or whether an agency could have responded without any delay, would allow agencies to withhold preliminary budgets, meeting minutes, rules and regulations, fee schedules, council meeting packets, resolutions, or ordinances for up to five (5) business days<sup>11</sup> after the document was requested.

The Zinks assert that the intent and spirit of the PRA requires that public records which are either readily able to be produced upon demand; are otherwise required to be produced on demand, or both, ought not be subject to a five (5) business day grace period. While an agency must respond within five (5) business days, it is an outside limit, and the requirement that prompt responses be made and only reasonable time taken to respond outweigh the trial court's interpretation of a five (5) business day grace period in **all** instances.

#### ***H. Complaint Against 109 N. Rowell Ave.***

##### ***1. The Evidence Does Not Support the Trial Court's Number of Penalty Days***

The trial court erred in its determination that City did not need to respond to Ms. Zink's request for the complaint against her home at 109 N. Rowell Ave. until five (5) business days after September 30, 2002; only assessing per day penalties for fifty-one (51) days ((CP 111) FOF 6, 8; (CP 143) COL 13). Our Supreme Court has found, as a matter of law, that the PRA

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<sup>11</sup> The trial court established that in its decision concerning the Zink's requests five (5) business days meant seven (7) days including weekends (July 16, 2008) 35:1-36:9)

requires a penalty be awarded for each day a person is denied the right to inspect or copy a public record, *Yousoufian v Office of King County Executive*, 152 Wn. 2d 421, 437-438 (2004) (*Yousoufian II*). However, the number of days that a plaintiff is denied access to requested records is a question of fact (*Id.* at 440).

The testimony presented to the court was on August 8, 2002, at the Mayor's request, Ms. Standridge wrote out a complaint against the Zinks' home at 109 N. Rowell Ave. and back dated it to August 2, 2008 (Ex 79: RP (May 12, 2005) 97:11-98:7). On August 29, 2002, Ms. Zink requested to review the file for 109 N. Rowell Ave and the complaint was not in the file (Ex 76: RP (May 12, 2005) 77:5-78:13). Ms. Standridge testified that Ms. Zink repeatedly requested to see the files associated with her home throughout September and October 2002 (RP (May 12, 2005) 82:10-84:2; 90:10-96:7). On October 24, 2002, Ms Zink attended the Mesa City Council meeting to discuss the missing complaint and was told that there were no written complaints against her property (Ex 67: RP (May 12, 2005) 96:16-97:10). Ms. Zink testified that she finally received a copy of the complaint against her home on November 27, 2002 after she found an entry in the minute book. (Ex 79: RP (February 8, 2005) 61:8-62:20: RP (May 12, 2005) 21:12-22:2). The testimony and evidence presented to the trial court clearly showed that a written complaint existed as of August 8, 2002 and that Ms. Zink's first request was on August 29, 2002. The City responded to the request by allowing Ms. Zink to review the file. The complaint should have been in the 109 North Rowell Avenue file when Ms. Zink reviewed the file on August 29, 2002. From August 29, 2002 to November 27, 2009, the date Ms. Zink finally obtained a copy of the complaint was ninety (90) days. The trial court did not have the authority to decrease the number of penalty days and abused its discretion by doing so.

## ***2. Silently Withholding Documents is a Willful Act, Not Gross Negligence***

The court's determination that the silent withholding of the complaint was gross negligence and awarding only thirty-five dollars (\$35) per day was error and abuse of discretion ((CP 111) FOF 9: (CP 143) COL 14, 15). The evidence presented at trial clearly indicates 1) the Building Inspector claimed there were complaints against the Zink home which prompted his expiration of their permit (Ex 70; 73); 2) the Mayor and clerk falsified records so there would be complaints against the Zink home (Ex 79: RP (May 12, 2005) 97:11-98:7); and 3) after the complaint was presented to the City Council (Ex 78) it disappeared (Ex 67). These are intentional, willful, and wanton acts of the City of Mesa officials. The only reason that Ms. Zink ever found a copy of the complaint was because she continued to look for it over and over until finally she found an entry in the minute book stating a complaint against her home was reviewed by the City Council and the City was forced to provide the document.

...an applicant need not exhaust his or her own ingenuity to "ferret out" records through some combination of "intuition and diligent research." *Ackerly v. Ley*, 420 F.2d 1336, 1342 (D.C. Cir. 1969).

*Daines v. Spokane County*, 111 Wn. App. 342, 349 (Div III, 2002). In applying the factors as determined by *Yousoufian IV*, the evidence showed no mitigating factors surrounding this public record request. Conversely, the evidence clearly proves the presence of multiple aggravating factors. The City officials were dishonest and intentionally denied the existence of the complaint so the Zinks could not locate it. Silently withholding documents is in violation of the PRA and an ethical violation. The public was harmed in the loss of governmental accountability and the City was acting in the worst bad faith and duplicity by intentionally hiding a public document.

An agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain. If any agency employee along the line fails to comply, the agency's response will be incomplete, if not illegal. FN 15

FN15. The Legislature recently enacted a comprehensive act relating to ethics in public service which implicitly recognizes this very fact by making silent withholding an ethical violation.

(4) No state officer or state employee may intentionally conceal a record if the officer or employee knew the record was required to be released under chapter 42.17 RCW, was under a personal obligation to release the record, and failed to do so. This subsection does not apply where the decision to withhold the record was made in good faith.

Laws of 1994, ch. 154, § 105, p. 742. The provision takes effect January 1, 1995. Laws of 1994, ch. 154, § 319, p. 769.

*PAWS v. UW*, 125 Wn.2d 243, 269 (1994). The trial court abused its discretion in finding that silently withholding the complaint was only gross negligence and assessing a penalty of only thirty-five (\$35) dollars per day. The courts have recognized that silently withholding public documents is an ethical violation. *Id.* The Zinks request the court to increase the penalty to one-hundred dollars (\$100) per day from August 29, 2002 to November 27, 2002.

***I. Memos and Notes requested October 10, 2002 and April 14, 2003***

***1. The Evidence Does Not Support the Trial Court's Number of Penalty Days***

The court erred in its decision that the memos and notes requested on October 10, 2002, did not need to be released prior to October 17, 2002 ((CP 112) FOF 18: (CP 144) COL 18). The facts and evidence presented to the court were that on October 10, 2002, Ms. Zink reviewed a file at the City Council meeting that contained all of the notes and memos kept on

her activities at city hall and requested that she be allowed to make copies of some of the documents (RP (February 8, 2005) 56:5-57:22; RP (May 11, 2005) 365:10-366:24; RP (May 12, 2005) 98:22-99:13). The next day, Ms. Zink went up to City Hall to review this same file and to get copies. The request was denied (RP (February 8, 2005) 57:22-24; 64:23-65:19). Ms. Zink submitted a written request and the City of Mesa did not respond (Ex 60). On October 17, 2002, Ms. Zink submitted another request (Ex 61). On October 24, 2002, the City responded that the memos and notes were exempt under RCW 42.17.310(1)(i)(Ex 62). Ms. Zink asked the City to reconsider since she had been allowed to review the documents in their entirety at a City council meeting the documents lost their exemption (Ex 65). The request was denied.

The evidence clearly showed that on October 11, 2002, the City of Mesa knew what file Ms. Zink wanted to review, knew where the file was located (RP (May 12, 2005) 79:3-20), and, as they had at the council meeting the previous night, (RP (May 12, 2005) 98:22-99:13) could easily have handed the file to Ms. Zink so that she could identify which documents she wanted copied. The evidence showed that the City denied Ms. Zink's request for the memos and notes on October 11, 2003. In taking final action on Ms. Zink's request, the City waived any five (5) business day grace period they might be entitled to under RCW 42.17.270. (RP (February 8, 2005) 57:22-24; 64:23-65:19). Furthermore, the City did not respond to Ms. Zink written request of October 11, 2002, violating RCW 42.17.320 and 42.17.310(4). See *Ockerman v. King County*, 102 Wn. App. 212, 217, (Div I, 2000).

## ***2. The Trial Court Abused Its Discretion in Establishing the Per Day Penalty***

The trial court erred in its decision that the City was acting in good faith and that it was mere negligence when the City denied the release of the memos and notes kept on Ms. Zink's

activities at City Hall; assessing only a five dollar (\$5) per day penalty ((CP 112) FOF 14, 15; (CP 113) FOF 21, 25; (CP 144) COL 19, 20, 22, 23). The Court found that the City was acting in good faith and that it was mere negligence because: 1) Ms. Zink clearly got under their skin, “like bamboo under the fingernails so to speak,” 2) the City thought they had an exemption to hang their hat on shows good faith, and 3) they should not have to rely on a lay persons legal opinion in denying a reconsideration. (RP (July 16, 2008) 43:15-24; 47:8-19; 50:14-53:6). The trial court’s decision is manifestly unreasonable and based on untenable grounds. See *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). The PRA does not allow agencies to distinguish among persons requesting records (RCW 42.17.270). The fact that the City’s responses to Ms. Zink’s requests were based on annoyance and irritation would indicate bad faith in responding to a particular person’s requests for public records. “To conclude otherwise would be to allow agencies to deny access to public records to its most vocal critics, while supplying the same information to its friends.” *King County v. Sheehan*, 114 Wn. App. 325, 341 (Div. I, 2002). Finally, the City employs an attorney who reviews requests for public records (RP (May 13, 2005) 484:6-13) and therefore the City clearly had a resource to determine if the notes and memos were exempt and did not need to rely only on Ms. Zink’s “lay person” opinion in her request for reconsideration. Even if the City had an exemption under RCW 42.17.310(1)(i), once Ms. Zink was allowed to review the file of memos and notes in their entirety, the documents lost their exemption.

If an agency discloses documents it believes to be exempt, that agency runs the risk of violating a governmental duty or an individual's right of privacy. RCW 42.17.310.

Thus, when the Department disclosed the records in 1980 without having sought any declaratory relief, the Department waived its right to claim they were exempt.

*Coalition on Gov't Spying v. King County Dep't of Pub Safety*, 59 Wn. App. 856, 864, 801 P.2d 1009 (Div. I, 1990)).

In applying the factors as determined by *Yousoufian IV* the City 1) did not follow PRA procedural requirements, 2) lacked proper training (RP (May 11, 2005) 375:2-11; 376:2-377:5), 3) was unreasonable in its explanation, 4) showed bias toward Ms. Zink, 5) provided false testimony to the court (RP (May 11, 2005) 421:16-422:20: RP (May 12, 2005) 98:22-99:13), 6) was negligent in not following up on Ms. Zink's requests, and 7) intentionally withheld the requested documents because of their content (RP (February 8, 2005) 64:10-22: RP (May 12, 2005) 16:24-18:18; 79:21-82:9).

Furthermore, the City did not provide Ms. Zink with a privilege log or any way to identify the individual documents being withheld in their entirety as required (See *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 270-271, 884 P.2d 592 (1994) (*PAWS II*). The City did not meet its burden of proof that there are any mitigating factors associated with their responses to this request. Rather the City demonstrated that they were acting in bad faith. In light of the lack of any mitigating factors and numerous aggravating factors, assessing a per-day penalty at the lowest point on the scale is error and an abuse of discretion by the trial court.

***J. November 13, 2002 meeting tape, minutes, and rules and regulations***

The trial court erred in combining the November 13, 2002 BOA meeting minutes, tape of the meeting, and the BOA rules and regulations; assessing only one penalty for all three records ((CP 114) FOF 30; (CP 115) FOF 38: (CP 145) COL 28, 29; (CP 146) COL 31). Each of these documents is a stand-alone request. Had Ms. Zink only requested the tape of the November 13, 2002 BOA meeting she would not have been entitled to the minutes of the

November 13, 2002 meeting or the rules and regulations adopted by the BOA that night. The only factors these three records have in common were that they are all associated with the City of Mesa BOA and the City concealed all three records in order to cover up an improper, secretly held meeting. Furthermore, the tape of the BOA November 13, 2002 meeting was not released to the Zinks until September 4, 2003, while the other two records (the minutes and the rules and regulations) were inadvertently released on August 7, 2003 when the record was submitted to the court in the Zinks' Land Use Petition. The trial court abused its discretion in combining the BOA rules and regulations, the November 13, 2002 meeting minutes, and the November 13, 2003 meeting tape. The Zinks are entitled to a per day penalty of \$100 for all three of these individual records:

- 1) the meeting minutes, from November 25, 2002 to August 7, 2003;
- 2) the Rules and Regulations, from November 25, 2002 to August 7, 2003; and
- 3) the audio tape, from November 25, 2002 to September 4, 2003.

***K. Twenty-one (21) code violation letters***

***1. The Trial Court Erred in Determining the Number of Days of Penalty***

The trial court erred in finding that the City was reasonable in delaying the release of the twenty-one (21) code violation letters for thirty (30) days ((CP 115) FOF 40, 43, 44: (CP 146) COL 33). The evidence presented at trial showed that on November 27, 2002, Ms Zink submitted a request for twenty-one (21) code violation letters. The request clearly stated that the building department had billed the City on the date they had issued the violation letters to the residents (Ex 93; 220). The building department attached copies to their invoices (Ex 220 pg 2). The City delayed the request for thirty (30) days in order to locate and assemble the

documents (Ex 94). Ms. Zink returned to City Hall to obtain the code-violation letters around January 5, 2003 but none of the records were available (RP (February 8, 2005) 96:4-17).

The City did not meet its burden of proof under RCW 42.17.340(2) that it provided the Zinks with a reasonable time estimate when it delayed the release of the code violation letter for thirty (30) days. This is evident in the fact that they did not attempt to look for the documents during the thirty (30) day time period they stated they needed to locate and assemble the documents. Approximately one week after Ms. Zink reminded them of the record request, the City was able to provide Ms. Zink with a portion of the requested letters (RP (February 8, 2005) 96:18-97:4). After providing a portion of the records, the City denied the request stating it was unclear what records were being requested (Ex 95) or they needed addresses (Ex 97). On February 10, 2003, after receiving another denial letter, Ms. Zink suggested that the City contact the building department. The documents were produced four (4) days later (RP (February 8, 2005) 99:24-100:10). Clearly, the City did not need thirty (30) days to locate and assemble the documents.

***2. The Trial Court Abused Its Discretion in Assessing the Per Day Penalty for the Second Delay***

The trial court abused its discretion in finding that a ten dollar (\$10) per day penalty for withholding the code violation letters between January 3, 2003 and February 14, 2003 is appropriate under the PRA ((CP 115) FOF 45: (CP 146) COL 34; 35). Applying the factors as determined in *Yousoufian IV*, the city did not prove there were any mitigating factors. The initial request to the City was clear and even explained where the information or dates had been obtained: the building inspector's monthly billings to the City. The City did not attempt to find the letters during the thirty (30) day period of time it stated it would need. Although

the city did request clarification, they did not request clarification until two months after the request was submitted. The city was not helpful and demanded that Ms. Zink provide the addresses when they were the agency issuing the code-violation letters. Furthermore, the City knew what records Ms. Zink was requesting since they had obtained approximately half of the requested documents on January 13, 2003. The City did not contact the building inspector to obtain the records until after February 10, 2003, and had no system to track or retrieve the public records. The city was reckless, grossly negligent, and unreasonable in their explanations for noncompliance (RP (May 12, 2005) 126:4-132:19).<sup>12</sup> The per day penalty assessed by the trial court is not enough based on the factors set by the court in *Yousoufian IV*.

### ***3. Redacted Copies Could Have Been Produced by January 3, 2003***

The trial court erred in finding that un-redacted code violation letters could not be produced prior to February 14, 2003 ((CP 116) FOF 49: (CP 146) COL 36). The trial court found that the code violation letters could have been produced by the City of Mesa on January 3, 2003 ((CP 115) FOF 43). However, the court found that the City did not need to produce un-redacted copies of the code violation letters until February 14, 2003 ((CP 116) FOF 49). If the code violation letters could have been produced on January 3, 2003, they should have been produced in an un-redacted form.

### ***4. The Penalty for Wrongful Redaction Was Error***

The trial court erred in finding that the redaction of the code-violation letters was mere negligence and abused its discretion in finding that a five dollar (\$5) per day penalty was appropriate under the PRA ((CP 116) FOF 51: (CP 146) COL 37; 38). The City violated the

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<sup>12</sup> The remaining outstanding records pertaining to this request were finally produced on April 7, 2009.

PRA by not providing the Zinks with a written reason for the redactions as required by RCW 42.17.310(4) (RP (May 12, 2005) 26:7-12; 135:6-136:11). See *Citizens for Fair Share v. Dep't. of Corr.*, 117 Wn. App. 411, 431, (Div. II, 2003). Evidence at trial showed that the City began redacting all documents, starting with the code-violation letters, in response to a complaint filed by Ms. Zink concerning the fines issued to the residents of Mesa by the Building Department (Ex 89; 135; 139; 140: RP (May 11, 2005) 300:13-301:12: (May 12, 2005) 135:6-141:8).

The city lacks proper training and supervision (RP (May 12, 2005) 136:1-19). The City clerk of fifteen (15) years stated that the assistant clerk, who was new to municipal law and did not know what to give out and what not to give out, was assigned to respond to records requests (RP (May 11, 2005) 375:2-11). The city was negligent and reckless in redacting the documents, waiting until after Ms. Zink had reviewed the record in its entirety and requested a copy before making the redaction (RP (February 8, 2005) 100:8-101:8: RP (May 12, 2005) 25:19-26:12) See *Coalition on Gov't Spying v. King County Dep't of Pub Safety*, 59 Wn. App. 856, 864, 801 P.2d 1009 (Div. I, 1990). The City knew the code violation letters were of public importance. The City did not produced un-redacted copies of the code-violation letters to the Zinks until April 7, 2009; one hundred forty-three (143) days after court ordered to do so (CP 163-164). Clearly a five dollar per day penalty was not a deterrent.

***L. Resignation Letter of Leo Murphy and Linda Erickson***

The trial court erred in finding that the wrongful withholding and wrongful redaction of the resignation letters was mere negligence and assessing only five dollars (\$5) per day penalty ((CP 117) FOF 57: (CP 147) COL 41, 42). The evidence presented at trial showed that on January 9, 2003, Ms. Zink was denied copies of the resignation letters because they

had not been accepted by the City Council. There is no state statute stating that resignation letters are exempt from disclosure until approved by the City Council. At trial, Ms. Standridge initially testified that she gave Ms. Zink copies of the resignation letters on January 9, 2003 (RP (May 11, 2005) 419:13-20) but then recanted her testimony when provided with facts showing that Ms. Zink did not receive the resignation letters on January 9, 2003 (RP (May 12, 2005) 152:11-154:22; 155:18-156:11).

When Ms. Zink made a second request for the resignation letters on March 10, 2003 the City initially delayed the request to determine if the information was exempt (Ex 34). After it was determined that the information was not exempt, the City attorney delayed the request until April 11, 2003 due to the high volume of records requested (Ex 37). The request was again delayed on April 11, 2003 because the City refused to release any public documents until the Zinks' attorney contacted the City attorney (Ex 12; 211). When the City finally produced the resignation letters on April 15, 2003, they had been redacted (Ex 178). The City did not provide Ms. Zink with a written reason for the redactions as required by RCW 42.17.310(4). *See Citizens for Fair Share v. Dep't. of Corr.*, 117 Wn. App. 411, 431, (Div. II, 2003).

The City has not shown that they were acting in good faith or that any exemptions applied to the resignation letters. The City has not shown that any mitigating factors apply to this public records request. Furthermore, the City attempted to cause the Zinks economic loss by requiring them to have an attorney contact their attorney before they would release the records. The City intentionally put up barriers to Ms. Zink's access to public documents; using any means to prevent her from acquiring any public records.

## ***M. City Attorney and Municipal Research Correspondence***

### ***1. The Court Improperly Combined These Requests***

The trial court erred in combining the request of January 28, 2003 ((CP 147-148) COL 47) with the request of March 19, 2003 ((CP 117-118) FOF 59, 60). Although the request on March 19, 2003 incorporated some of the documents requested on January 28, 2003, these are two separate requests with different documents responsive to each request (Ex 55; 56). For instance, documents requested on March 19, 2003 did not exist on January 28, 2003. Furthermore, the trial court determined the Municipal Research documents were not exempt and ordered their release. Conversely, the trial court ordered an in-camera review of the City attorney documents in order to determine if the City's claimed exemption applied. Clearly the trial court treated these documents differently; as two dissimilar types of records. The trial court's order combining the two requests and the two different types of documents should be reversed and a per day penalty assessed for each PRA violation.

### ***2. A Privilege or Exemption Log is Required***

At trial, the court found that the City Attorney records may be privileged ((CP 118) FOF 61) and required an in-camera review to determine whether any or all of the records are exempt in their entirety or can be redacted ((CP 118) FOF 62). However, the court did not address the City's failure to provide the Zinks with an exemption log or some specific means of identifying the individual records withheld in their entirety as required by the PRA.<sup>13</sup> The PRA does not allow blanket denials by governmental agencies.

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<sup>13</sup> In a recent decision (January 22, 2009) our Supreme Court found that the statute of limitations on PRA suits does not begin until a requestor is provided with a privilege log identifying individual records it was withholding under a claim of exemption. *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 541 (2009).

Failure to identify records withheld in their entirety constitutes silently withholding records and is a violation of the PRA. ... Moreover, without a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorily required de novo review is vitiated.

*PAWS v. UW*, 125 Wn.2d 243, 270-271, 884 P.2d 592 (1994).

Without the information a privilege log provides, a public citizen and a reviewing court cannot know (1) what individual records are being withheld, (2) which exemptions are being claimed for individual records, and (3) whether there is a valid basis for a claimed exemption for an individual record. Failure to provide the sort of identifying information a detailed privilege log contains defeats the very purpose of the PRA to achieve broad public access to agency records. See RCW 42.56.030.<sup>14</sup>

In this regard, requiring a privilege log does not add to the statutory requirements, but rather effectuates them. See RCW 42.56.210(3)<sup>15</sup>, .550(6).

*Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 540 (2009)

(footnotes added). In this same opinion, the Supreme Court determined that an agency must explain “which individual exemption applied to which individual record rather than generally asserting the controversy and deliberative process exemptions as to all withheld documents.”

*Id* at 540 (emphasis added). Whether the documents are exempt, the City of Mesa violated RCW 42.17.310(4) and 42.17.320 when they failed to provide a privilege log.

Although disclosure of the requested material was not required, the County nonetheless violated RCW 42.17 by not complying with RCW 42.17.320. Failure to respond constitutes a violation of the Act, entitling Mr. Smith to a statutory penalty. *Blaine Sch. Dist. No. 503*, 86 Wn. App. at 698-99.

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<sup>14</sup> Formerly RCW 42.17.251.

<sup>15</sup> Formerly RCW 42.17.310(4)

*Smith v. Okanogan County*, 100 Wn. App. 7, 20, (Div. III, 2000). See also *Citizens For Fair Share v. Dep't of Corr.*, 117 Wn. App. 411, 426-437 (Div. II, 2003).

### **3. A Privilege Log Must Contain Specific Information**

The City of Mesa must provide an adequate privilege log to the Zinks. The privilege log must effectuate the purpose of (1) indentifying which individual documents are being withheld, (2) the exemption claimed for each record, and (3) a brief explanation of how the exemption applies to each record. RCW 42.17.320 (see *PAWS v UW*, 125 Wn.2d 243, 270-271 (1994)(emphasis added). In this case, although the city has to a certain extent identified the individual records being withheld in their entirety (CP 1281-1287), the privilege log provided to the court fails to provide any reference to a claimed exemption or a brief explanation of how the claimed exemption applies to each record withheld.

**Agency responses refusing, in whole or in part, inspection of any public record shall include** a statement of the specific exemption authorizing the withholding of the record (or part) and **a brief explanation of how the exemption applies to the record withheld.**

RCW 42.17.310(4)(emphasis added). Our Supreme Court recently noted that the model rules drafted by the Attorney General in the Washington Administrative Code (WAC) 44-14-04004(4)(b)(ii) provides an illustration of compliance with RCW 42.56.210(3) using a detailed privilege log. *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525 (2009).

The privilege log provided by the City of Mesa to the court in April 2009 (CP 1281-1287; 1288-1291) does not contain the required information and is clearly not adequate as determined by our Supreme Court. The City should be directed to produce a privilege log

consistent with the requirements of the PRA and the decision handed down by our Supreme Court in *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525 (2009).

**4. *Not all Correspondence with the City Attorney is Privileged***

The trial court erred in its decision that all communication between the City Attorney, Terry Tanner, and the City of Mesa is privileged ((CP 147) COL 45). The trial court reasoned that “all communication was in anticipation of litigation if litigation had not already been filed and clearly constituted opinions and instructions from the attorney to the client” ((CP 118) FOF 61). Not all communication between an attorney and a government agency is privileged *Limstrom v. Ladenburg*, 136 Wn.2d 595, 610, 963 P.2d 869, (1998). Not all of the documents submitted to the court for in-camera review concerned litigation (see CP 1267, 1271, 1273, 1274-76, 1277, 1278 ...). The trial court did not justify its decision to uphold the exemptions claimed by the City. However, in reviewing the court order (CP 1280-1287) the documents submitted to the court (CP 1123-1279), it is clear that the court based its decision of exemption on who the correspondence was sent to or received from regardless of the content or context of the documents.

**5. *The Records should be reviewed in Light of the Applicable Four Part Test***

An attorney retained by a governmental agency is in a unique position. As a legal expert the attorney’s opinions and theories on various issues are of substantial interest to the citizens of the agency as they are utilized in the decision making process of that government agency. Just as the opinions of the Washington State Attorney General’s office are of interest to the citizens of Washington, the opinions of legal experts retained by municipalities and paid for with public monies, is of interest to its citizens; the tax payers.

Our courts have found that attorney-client privilege "... is not an absolute privilege... and it must be strictly limited to its purpose. *Pappas v. Holloway*, 114 Wn.2d 198, 204, 787 P.2d 30 (1990)" *Overlake Fund v. Bellevue*, 60 Wn. App. 787, 796, 810 P.2d 507 ( Div. I, 1991). In *Port of Seattle v Rio*, 16 Wn. App. 718, 559 P.2d 18 (Div. I, 1977)(*Rio*), Division I determined that the open meeting law and the attorney-client privilege may coexist. *Id* at 725. Relying upon *State v. Smythe*, 25 Wn.2d 161 (1946), Division I found that the attorney client privilege as applied to public agencies must meet a four part test.

A communication between the attorney and his public agency client must pass a four-step test to qualify as an exception to the right-to-know statutes: (1) The communication must originate in a confidence that it will not be disclosed; (2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained.

*Rio* at 725. This same principal can be applied to the PDA.

In applying the four part test to documents found to be exempt by the trial court few if any of the documents meet these requirements. For example, on January 11, 2002, a letter was sent to the City attorney requesting that he review, sign, and send back the enclosed copy of a City Ordinance (CP 1278). Mr. Tanner responded on January 30, 2002 (CP 1277). Certainly the activity referenced and communicated in these letters would have happened on the record at an open public meeting, had the City Attorney attended the meeting. The fact that the ordinance was passed, that the Clerk needed the City Attorney's signature on the ordinance, and that the Mayor broke a tie vote were all, at the time of the letter, public

knowledge. Furthermore, the opinion of the legal expert concerning the tie-breaking ability of the Mayor does not affect one individual(s). The opinion, like that of the State Attorney General's, affected the entire citizenry of the City of Mesa. These two documents were erroneously found to be exempt by the trial court (CP 1283).

The communication in these two letters 1) did not originate in a confidence that they would not be disclosed; 2) the element of confidentiality was not essential to the full and satisfactory maintenance of the relation between the parties; 3) the attorney's opinion on whether the Mayor could break a tie-vote should not be sedulously withheld from the citizens of Mesa; and 4) the benefit of disclosure is greater than the injury of disclosure. These documents fail to meet the requirements of the four part test and are not exempt from disclosure under the PRA. The trial court's decision that these two documents are exempt should be reversed. The four part test provided by Division I in *Rio*, should be applied to each document found exempt from disclosure by the trial court (CP 1280-1287).

#### ***6. The Court Did not Consider Redaction of Documents***

Even if the court found exempt material in the documents, some of the documents found to be exempt could have been redacted and did not need to be withheld in their entirety. For instance, the letter dated December 17, 2002 (CP 1271), using the four part test established in *Rio*, does not appear to contain any privileged communications. The activity referenced and communicated in this letter happened on the record at an open public meeting. Even if the Clerk's "inquiry" on the legality of Ordinance 02-01 is found to be exempt, it could have been redacted by blacking out that sentence, rather than finding the entire document exempt. The remainder of the correspondence could have then been released.

### ***7. Previously Released Documents Lose Any Claim of Exemptions***

Many of the documents provided to the court for in-camera review by the City of Mesa were previously released to the public. (Ex 106: CP 1273). Some were used in this litigation as exhibits (Ex 106: CP 1273; Ex 28: CP 1260). Release of a document constitutes a waiver of an exemption under the PRA.

[W]hen the Department disclosed the records in 1980 without having sought any declaratory relief, the Department waived its right to claim they were exempt.

*Coalition on Gov't Spying v. King County Dep't of Pub Safety*, 59 Wn. App. 856, 864, 801 P.2d 1009 (Div. I, 1990) (emphasis added). Once the documents were released for inspection, they entered the public domain. Any confidentiality was breached destroying any basis for continued existence of a privilege if one ever existed. (see *Sitterson v. Evergreen Sch. Dist. No. 114*, 147 Wn. App. 576 (Div. II., 2008)). This is consistent with the PRA's requirement that a public agency cannot release public records to one individual while denying them to another.

[t]he act expressly states that "[a]gencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request." RCW 42.17.270... To conclude otherwise would be to allow agencies to deny access to public records to its most vocal critics, while supplying the same information to its friends.

*King County v. Sheehan*, 114 Wn. App. 325, 341, (Div I., 2002) (footnote omitted). The City cannot claim these documents are exempt from disclosure.

### ***8. Documents were Submitted that are Not at Issue in These Proceedings***

Ms. Zink's request of January 28, 2003 was for all correspondence from January 1, 2002 to January 28, 2003. Ms. Zink's request of March 19, 2003 requested records from January 1,

2003 until March 17, 2003 (Ex 55; 56); approximately a one (1) year period of time. The City of Mesa submitted documents to the court for the in-camera review for approximately a seven (7) year period of time. Of the one hundred thirty (130) documents claimed by the City of Mesa to be exempt (CP 1281-1287) only thirty (30) of the documents are responsive to the Zinks requests at issue in these proceedings. The remaining one-hundred (100) documents are not responsive to Ms. Zinks requests and are not properly before the court. This is a waste of the courts time and resources. Trial courts should not be expected to review documents for exemptions at the whim of an agency. As these documents are not at issue in this controversy the trial court lacks jurisdiction to rule on any records not relevant to these proceedings. Any actions taken by the trial court exempting documents that are not relevant to these proceedings must be dismissed.

Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

CR 12(h)(3).

***9. The City Submitted Records They Knew or Should have Known are Not Exempt***

The City submitted fifty-six (56) letters and fax cover sheets to the court claiming they were exempt (CP 1281-1283). Approximately half of these documents were: 1) documents filed in the Superior Court (CP 1213; 1215-1224; 1238-1240); 2) documents filed in the Court of Appeals (CP 1200; 1203-1207; 1209-1210; 1212; 1214); 3) correspondence with the Zinks attorney (CP 1199; 1211; 1228; 1232-1235); or 4) deposition notices (CP 1229-1230; 1236). These documents were not prepared for the purpose of communicating with an attorney. The City attorney ought to know that attorney client privilege under RCW 5.60.060 only protects communication between the attorney and the client.

The attorney-client privilege is a narrow privilege and protects only "communications and advice between attorney and client;" it does not protect documents that are prepared for some other purpose than communicating with an attorney. *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 421, 635 P.2d 708 (1981). Thus, should an agency prepare a document for a purpose other than communicating with its attorney, and then claim that the document is protected by the attorney-client privilege, the requesting party might well claim that the agency has acted in bad faith...

*Hangartner v. City of Seattle*, 151 Wn.2d 439, 452 (2004). The City is not only wasting the court's time but is acting in bad faith. Furthermore, the City attorney should know that RPC 1.6 allows information to be revealed if it is impliedly authorized in order to carry out the representation.

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

RPC 1.6(a) (emphasis added). Finally, the City attorney should know that correspondence between the City attorney and someone other than the City or correspondence between the City and someone other than their attorney (CP 1135; 1137; 1284) cannot be claimed as, or found to be, communication between the attorney and their client and therefore cannot be exempt under RCW 5.60.060 or RPC 1.6.

#### ***10. The City Did Not Provide all of the Requested Documents to the Court***

While the City did provide numerous records not at issue in this complaint, the omission of records in the date range produced by the City makes it clear that the City is still withholding documents responsive to the Zinks' requests made on January 28, 2003 and March 19, 2003. By way of example, in reviewing the document dated February 26, 2003

(CP 1261), in response to Ms. Zink's request of March 17, 2003 (CP 1251), Mr. Tanner instructs Ms. Standridge not to release the e-mail from February 10, 2003 or the response dated February 28, 2003 due to attorney client privilege. Both of these records were also responsive to Ms. Zink's request of March 19, 2003 (Ex 56) at issue in this appeal. Although the document dated February 28, 2003 was provided to the court for the in-camera review (CP 1283) the e-mail dated February 10, 2003 was not released to the court (CP 1287). By not including this e-mail with the documents submitted to the court for the in-camera review, or on the exemption log, the City is silently withholding this document. Without the reference made to this e-mail in the February 26, 2003 correspondence (CP 1261), the public would never know this document existed.

Failure to identify records withheld in their entirety constitutes silently withholding records and is a violation of the PRA...

*PAWS v. UW*, 125 Wn.2d 243, 270-271, 884 P.2d 592 (1994).

Thus, it is clear that the City produced documents covering a seven (7) year date range. It is further clear that the City did not produce all responsive documents in that same date range. It is clear that the City produced documents which are patently and obviously not privileged. It is clear that very few documents were produced from the date range at issue. The only possible interpretation is that the City provided the Court with many unresponsive, patently disclosable documents to conceal how few documents responsive to the Zinks' requests were produced and to conceal the City's withholding of responsive documents.

The Court should direct the City to produce all responsive records, including the February 10, 2003 e-mail, and in doing so, to carefully review its files to ensure that no records are overlooked.

### ***11. The City Did Not Provide Attachments***

The City did not include all of the attachments or enclosures to documents requested on January 28, 2003 and March 19, 2003. For instance in the letter dated January 11, 2002, Ms. Standridge writes requesting Mr. Tanner to review, sign and return the enclosed Mesa City Ordinance 02-01 (CP 1278-1279). However, the enclosure (unsigned copy of Ordinance 02-01) was not provided to the court. The fax sent on September 4, 2002, Mr. Tanner faxed four (4) pages (including the cover sheet) to the City of Mesa (CP 1274; 1283). The City only provided the court with three (3) pages for the in-camera review (CP 1274-1276). On September 24, 2002, Ms. Standridge faxed eight pages to Mr. Tanner (CP 1273; 1283). Only the cover sheet was provided to the court for an in-camera review (CP 1273; 1267). Throughout the documents submitted to the court for review are references to attachments or enclosures. Most of those attachments or enclosures were not included in the documents submitted for review by the trial court. (CP 1253; 1254; 1257; 1260; 1271; 1278).

### ***12. The Amount of Per Day Penalty Was Insufficient***

The trial court erred in finding that the City acted in good faith and that the withholding of the Municipal Research correspondence was mere negligence assessing only a five dollar (\$5) per day penalty ((CP 118-119) FOF 68: (CP 148) COL 48, 49). The trial court erred in not assessing a separate per day penalty for the City's withholding of the city attorney correspondence ((CP 117-118) FOF 60). The evidence presented shows that the City failed to comply with PRA procedural requirements. The city did not respond to the January 28, 2003 requests. The City did not provide a privilege log for either the January 28, 2003 or March 19, 2003 requests. The City was unreasonable in their explanation for noncompliance, and they were negligent and reckless in their responses to the Zinks and the court. Furthermore,

the Zinks did not receive any of the documents related to the requests for the Municipal Research records until April 7, 2009. The City did not provide the documents for the court ordered in-camera review until April 14, 2009 (CP 1288). The City has not produced all of the documents requested. The City has not produced an adequate privilege log for all documents withheld in their entirety. **Clearly, the penalty amount was not enough to deter the City's misconduct concerning these records requests.**

*N. BOA Rules and Regulations - release delayed thirty-nine (39) days*

*1. Indefinite Delay Was Unreasonable*

The trial court erred in finding that the City of Mesa was justified in delaying the release of the BOA rules and regulations for twenty-one (21) days ((CP 119) FOF 74). The trial court erred in finding that the City was reasonable to delay release of the BOA rules and regulations for an additional seven (7) days ((CP 120) FOF 76). The trial court found that the City was justified in withholding the BOA rules and regulations as long as they provided a delay letter but did not provide any reasoning for this determination. (CP 120) 76, 77: (CP 149) COL 52). The trial court held the City unreasonably withheld the BOA rules and regulations for eleven (11) days because they did not provide a delay letter ((CP 119) FOF 75; (CP 120) FOF 76, 79: (CP 149) COL 53). The trial court abused its discretion as these findings and conclusions are inconsistent with the PRA's strongly worded mandate that governmental agencies timely provide records.

The Public Records Act "is a strongly worded mandate for broad disclosure of public records". *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)...Courts are to take into account the Act's policy "that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others". RCW 42.17.340(3). ...

Agencies have a duty to provide "the fullest assistance to inquirers and the most timely possible action on requests for information" RCW 42.17.290.

*ACLU v. Blaine Sch. Dist. No 503*, 95 Wn. App. 106, 110 (Div. I, 1999).

Furthermore, the rules and regulations of the BOA are the laws that must be followed during an appeal of decisions of the City of Mesa (Ex 181). These laws must be freely available to the public for inspection and copying in order for the public to know what procedures are to be followed. To find otherwise is to encourage public agencies to enact secret laws which is not acceptable.

[T]o prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it.

*Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir., 1971).

The BOA rules and regulations were adopted by the BOA on December 5, 2002 (Ex 181). When Ms. Zink requested a copy on February 24, 2003, the document should have been provided to her while she waited the "minute" it would have taken to make a copy (RP (May 12, 2005) 46:3-13; 49:2-16). Instead, four days later the City delayed the request for seventeen (17) days in order to locate and assemble the document (Ex 15). On March 4, 2003, the City attorney delayed the request until March 17, 2003; no reason for the delay was provided (Ex 16). On March 7, 2003, Ms. Zink requested that the City reconsider the delay (Ex 17). The request was denied (Ex 19). The City did not provide the BOA rules and regulations on March 17, 2003. Instead, Ms. Zink received another delay letter on March 19, 2003, delaying the release of the BOA rules and regulations for an additional seven (7) days in order to locate and assemble the document (Ex 23). Ms. Zink still did not receive the BOA rules and regulations on March 26, 2003. On approximately April 3, 2003, the Zinks filed a

petition under LUPA in Franklin County Superior Court appealing the BOA land use decision (RP (May 11, 2008) 255:16-256:16) (see *Zink v City of Mesa*, 137 Wn. App. 271, 273-274, (Div. III, 2007)). Ms. Zink finally received a copy of the BOA rules and regulations on April 4, 2003. The City did not meet its burden of proof that it required thirty-nine (39) days to locate and assemble a document that must be available upon request. Failure to promptly disclose the rules and regulations of the BOA, especially to a then present appellant, creates secret laws.

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

RCW 42.30.010. The City acted in bad faith by delaying the release of BOA rules and regulation until the Zinks filed a petition under LUPA in Superior Court. The trial court abused its discretion in finding that the City only violated the PRA by not providing enough delay letters (Ex 74:76:77: (CP 119) FOF 74, 75; (CP 120) FOF 76).

## ***2. The Penalty Assessed Was Insufficient***

The trial court abused its discretion in assessing a ten dollar (\$10) per day penalty for only eleven (11) of the thirty-nine (39) days the BOA rules and regulations were denied to the Zinks ((CP 120) FOF 79: (CP 148) COL 249). The City repeatedly delayed the release of

the BOA rules and regulations until after the Zinks filed an action in Superior court appealing the BOA decision. The City's explanation for non-compliance was not reasonable. Moreover, not only did they cause the Zinks personal economic loss, but the City caused a loss of governmental accountability by not providing the rules and regulations of a governmental board on demand. The City of Mesa has not met its burden of proof that there were any mitigating factors, that they were acting in good faith, and/or that their actions were mere negligence. A ten dollar (\$10) per day penalty is not an appropriate penalty for this PRA violation.

***O. Time Card of Teresa Standridge***

The trial court erred in determining that the denial of the release of the time card for Teresa Standridge was done in good faith and constituted mere negligence and that a penalty of five dollars (\$5) per day was appropriate under the PRA ((CP 121) FOF 85: (CP 149) COL 56; 57). On February 24, 2003, Ms Zink requested the time card of City Clerk/Treasurer Teresa Standridge for December 19, 2002 (Ex 14). Ms. Zink had previously requested and received time cards for Teresa Standridge (Ex 22). The City initially delayed the request for seventeen (17) days (Ex 15) in order to locate and assemble the document. On March 4, 2003, the City Attorney denied the release of the time card for Teresa Standridge (Ex 16). Ms. Zink requested reconsideration on March 7, 2003 (Ex 17) and was denied (Ex 19).

Five years prior to Ms. Zink's request for the time card, Division II addressed the issue of whether or not payroll information pertaining to a government employee was disclosable and determined that such records are not exempt from disclosure. See *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 951 P.2d 357, (Div. II, 1998). The City attorney should have

known that the time cards were not exempt from disclosure. The trial court abused its discretion when it determined that five dollars (\$5) per day penalty was appropriate for withholding the time card because that case did not exist at the time (RP (July 16, 2008) 90:11-17).

In applying the factors as determined by the *Yousoufian IV* court there are no mitigating factors but several aggravating factors which, besides those previously discussed, include the failure of the City attorney to review case law associated with the exemption of time cards. To date the time card for Teresa Standridge has not been released.<sup>16</sup>

***P. Water Meter Readings***

***1. The Evidence Does Not Support the Trial Court's Number of Penalty Days***

The trial court erred in finding that the City had an additional five (5) business days after Ms. Zink clarified what water meter records were being requested to produce the records ((CP 121) FOF 90, 91). The evidence showed that: 1) the requested water meter records were computer printouts (Ex 18) and the City did not need seventeen (17) days to locate and assemble the documents (Ex 15); and 2) Ms. Zink had previously requested the water meter readings (RP (February 8, 2005) 137:7-9; Ex 116) and the City knew precisely what record Ms. Zink was requesting at the time of the request. Nonetheless, the City attorney claimed that the City did not know what records were being requested. (Ex 16). On March 7, 2003, Ms. Zink asked the City attorney to reconsider and clarified her request by providing him with a copy of a previously received water meter record (Ex 17). That same day, the City denied the request to reconsider (Ex 19).

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<sup>16</sup> Subsequent to the drafting of this portion of the Brief of Appellant, the City produced a document destruction log, purporting to indicate that the time card was “inadvertently” destroyed by Ms. Standridge, the City Clerk/Treasurer, on March 22, 2007.

The City of Mesa knew what records Ms. Zink was requesting and they knew that the requested records were not exempt prior to denying their release. The request for the water meter records was denied on February 28, 2003 and the court erred in decreasing the penalty days by excluding penalties between February 28, 2003 and March 13, 2003. Even if it could be argued that the City did not know what records Ms. Zink was requesting, after Ms. Zink clarified her request, per state statute, the matter was finalized two (2) business days after the City denied the request to reconsider.

Agencies, ...shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action ... for the purposes of judicial review.

RCW 42.17.320.<sup>17</sup>(emphasis added). In this instance, the City denied the request to reconsider release of the water meter records on March 7, 2003. As this was the final action by the City of Mesa the trial court erred in allowing the City five (5) additional business days to respond to Ms. Zinks clarification and request for reconsideration. (Ex 19)

## ***2. The Trial Court Abused Its Discretion in Establishing the Per Day Penalty***

The trial court erred in finding that the wrongful withholding of the water meter readings was only negligence and assessing a per day penalty of ten dollars (\$10). ((CP 122) FOF 92: (CP 150) COL 60; 61). The evidence showed that on September 12, 2002, the City claimed that the destruction of Ms. Zinks bushes in the alley was necessary because the City was reading the water meters (Ex 109; 228: RP (February 8, 2005) 39:6-22). When Ms. Zink requested copies of the water meter records in order to determine whether the water meters

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<sup>17</sup> Recodified at 42.56.520

were being read as claimed, the City denied the release of the records. When the matter went before the trial court, knowing that the City's claimed exemption did not apply, Ms. Standridge falsely testified to the court that she had provided the water meter records to Ms. Zink (RP (May 11, 2005) 423:24-424:17; RP (August 30, 2006) 26:21-25). On September 28, 2005, **after the initial trial**, Ms. Zink again requested copies of the water meter readings from October 2002 to September 2003 (Ex 227; RP (August 30, 2006) 24:13-25:16). The City could only provide the water meter records for December 2002 and February 2003 because the City had not been reading the water meters as claimed and therefore the records did not exist. (Ex 227; 228; RP (August 30, 2006) 25:16-26:21).

The City's actions associated with the withholding of the December 2002 and February 2003 water meter records were not negligence: it was a willful act. The City claimed the water meter records were exempt because they did not want Ms. Zink to discover that the City was not reading the meters as claimed in September of 2002 at a City Council meeting. Once the matter went to court, the City gave false testimony claiming that they had provided the records at the time of the request. The City did not provide any evidence, such as a denial letter stating that the water meter records did not exist for October 2002, November 2002, or January 2003. The only evidence presented was the determination by the City attorney that the records were exempt from disclosure and therefore would not be released (Ex 16).

In applying the *Yousoufian IV* factors, the only mitigating factor the City could claim is that the request was unclear. However, since the City had obtained an opinion from Municipal Research as to whether these particular records were exempt (Ex 116) and had previously provided the same type of document to Ms. Zink (Ex 18), the request for clarification was disingenuous. The City knew what records Ms. Zink wanted and the City

did not want to provide the requested documents. The City intentionally withheld the water meter records and then attempted to cover it up at trial. These are not negligent acts. These are intentional actions. The City acted in the worse bad faith, was dishonest, and a penalty in the lowest range is not appropriate under these circumstances.

***Q. Phone/Fax Logs***

***1. The Evidence Does Not Support the Trial Court's Total Penalty Days***

The trial court erred in finding that un-redacted copies of the phone logs could not have been produced prior to March 17, 2003 ((CP 122) FOF 96: (CP 150) COL 63).

Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

RCW 42.17.340(2)(emphasis added). The City did not meet its burden. Ms. Standridge testified that the phone/fax log is kept in a file cabinet next to the photo copier until it is filled (RP (May 13, 2005) 465:23-466:8). The City did not provide any evidence as to why it would take twenty-one (21) days to provide copies of City documents that are used daily. The trial court is in error and its decision must be reversed.

***2. The Trial Court Abused Its Discretion in Establishing the Per Day Penalty***

The trial court erred in finding that the redaction of the phone/fax logs requested on February 24, 2003 constituted mere negligence by the City of Mesa and the subsequent assessment of a penalty of only five dollars (\$5) per day ((CP 122) FOF 98: (CP 150) COL 64; 65).

The attorney-client privilege is a narrow privilege and protects only "communications and advice between attorney and client;" it does not protect documents that are prepared for some other purpose than communicating with an attorney. *Kammerer v. W. Gear Corp .*, 96 Wn.2d 416 , 421, 635 P.2d 708 (1981). Thus, **should an agency prepare a document for a purpose other than communicating with its attorney, and then claim that the document is protected by the attorney-client privilege, the requesting party might well claim that the agency has acted in bad faith.**

*Hangartner v. City of Seattle*, 151 Wn.2d 439, 452 (2004) (emphasis added). The City was acting in bad faith when it claimed an attorney client privilege exemption to justify their redaction of the phone/fax log. The City knew at the time of the claimed exemption that the phone/fax logs are kept to track long distance phone calls and not for the purpose of communicating with an attorney (Ex 131). A greater penalty is warranted.

## ***R. Eighteen (18) Residential Address Files***

### ***1. The Evidence Does Not Support the Trial Court's Number of Penalty Days***

The trial court erred in finding that the eighteen (18) residential files could not have been produced prior to March 17, 2003 ((CP 123) FOF 106; (CP 124) FOF 107: (CP 150) COL 67). The City did not meet its burden of proof that it required twenty-one (21) days to provide the records to Ms. Zink for review. At trial, Ms. Standridge testified that asking for files by address takes less time (RP (May 12, 2005) 130:9-19). In discussing this particular request, Ms. Standridge testified that to locate nineteen (19) residential<sup>18</sup> files would have taken her twenty-to-thirty minutes because Ms. Zink requested the files by address (RP (May 11, 2005) 432:14-433:6). The evidence provided to the court showed that rather than taking twenty-to-thirty minutes to obtain these files and provide them to Ms. Zink for review, the

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<sup>18</sup> Ms. Zink initially requested 20 residential files. Two of the requested addresses were duplicates (Ex 14)

City spent the time delaying the request two different times (Ex 15; 16). Given the fact that the clerk could retrieve the files in half-an-hour at most, the courts finding that the City needed twenty-one (21) days to locate and assemble these files is manifestly unreasonable and is unsupported by the record.

**2. *The Time Limitation on Access to Public Records Requires a Higher Penalty***

The trial court erred in finding that limiting Ms. Zink’s access to City Hall and wrongfully redacting these records constitutes more than mere negligence; assessing a penalty of twenty-five (25) dollars per day ((CP 124) FOF 108: (CP 151) COL 68, 69).

On March 4, 2003, the City attorney told Ms. Zink that the records would be available on March 17, 2003, but only for one hour per day (Ex 16). RCW 42.17.280<sup>19</sup> requires that agencies allow review of public documents during customary office hours. The only deviation from this statutory mandate is if the agency does not have customary hours of at least thirty hours per week. The City of Mesa has customary office hours (RP (May 12, 2005) 144:25-145:4).

RCW 42.17.280 is clear and unambiguous: public agencies do not have the right to limit an individual’s time to inspect public documents during customary office hours. The evidence showed that in asking for reconsideration of the City’s decision to limit Ms. Zink’s access to one hour per day, Ms. Zink specifically pointed out to the City attorney that by state statute the City was “prohibited” from limiting time to review public records (Ex 17 page 2 para 7). The City disregarded the statutory mandate.

After allowing Ms. Zink to review the files in their entirety (See *Coalition on Gov’t Spying v. King County Dep’t of Pub Safety*, 59 Wn. App. 856, 864, 801 P.2d 1009 (Div. I,

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<sup>19</sup> Recodified at RCW 42.56.090.

1990) (quoted, *supra*), the City refused to release the requested copies until they were redacted. If the redactions were not finished before 11:00 a.m., Ms. Zink had to return to pick-up the documents the next day. This prolonged the review of these records as Ms. Zink would allow a part of her assigned hour for the wrongful redaction of the copies so she could take them with her (RP (February 8, 2005) 140:1-142:2). Furthermore, the City never provided any written reason for redacting the documents. On remand, the trial court acknowledged the erroneous limitation placed on Ms. Zink's review of these documents finding that the City's actions were more than mere negligence but only assigned a penalty of twenty-five (25) dollars per day. This was error.

In applying the *Yousoufian IV* factors, the City did not demonstrate any evidence of mitigating factors. Conversely the City 1) delayed a request that could have been filled in half an hour, for twenty-one (21) days; 2) limited Ms. Zink's review of the records to one hour per day; 3) refused to acknowledge PRA requirements; 4) did not provide any reasonable explanation for noncompliance; 5) intentionally disregarded state statutes; and 6) lost governmental accountability by allowing Ms. Zink to review records in their entirety they later claimed were exempt. To date, some of the records associated with this request have not been released in their un-redacted form, even though the City is subject to a court order directing it to do so. Clearly, deterrence requires a penalty at the high end of the penalty range.

### ***S. Eleven (11) Residential Address Files***

#### ***1. The Evidence Does Not Support the Trial Court's Number of Penalty Days***

The trial court erred in finding that the eleven (11) residential files could not have been produced prior to March 24, 2003 ((CP 125) FOF 116; 117: (CP 151) COL 71). At trial, Ms.

Standridge testified that it would only take her twenty-to-thirty minutes to locate nineteen address files. Using that estimate, it would only take the City clerk ten to fifteen minutes to locate the eleven (11) address files requested on March 3, 2003 (Ex 24). Instead of locating the files and allowing review, the City delayed the request for twenty-one (21) days for no apparent reason. The City did not meet its burden of proof that it required twenty-one (21) days to provide the records to Ms. Zink for review. The courts finding that the City needed twenty-one (21) days to provide these files to Ms. Zink for review is manifestly unreasonable and is unsupported by the record.

***2. The Time Limitation on Access to Public Records Requires a Higher Penalty***

The trial court erred in finding that limiting Ms. Zink's access to City Hall and wrongfully redacting the records constitutes more than mere negligence and assessing only a penalty of twenty-five (25) dollars per day ((CP 125) FOF 118; (CP 151) COL 72, 73). The City limited access to these files to only one hour per day starting on March 24, 2003 (Ex 25). The review of these records took several days due to the fact that any requested copies were redacted after Ms. Zink reviewed the document (RP (February 8, 2005) 150:14-151:19). The City never provided any written reason for the redaction of these documents. The City did not meet its burden of proof that they acted reasonably or in good faith. The evidence and testimony indicate that the City was acting in bad faith, disregarded state law in responding to this PRA request, and the trial court erred in finding the City's actions were only more than mere negligence and in assigning only a twenty-five dollar (\$25) per day fine.

***T. Steve Sharp Complaint***

The trial court erred in finding that the City of Mesa was acting in good faith and it was mere negligence to withhold an un-redacted copy of the complaint from Steve Sharp against

the City of Mesa; assessing a penalty of five dollars (\$5) per day ((CP 126) FOF 123: (CP 152) COL 76, 77). Although the record was timely produced, the City of Mesa redacted the document without providing any written reasons for the redactions. The evidence presented at trial did not indicate that the City met its burden of proof that it was acting in good faith in the redaction of this document. The trial court did not provide any specific reason for finding that the City acted in good faith or was reasonable in its explanation for the redactions. To date the City has not provided the Zinks with an un-redacted copy of the Steve Sharp complaint.

***U. Cade Scott Reply to Complaint***

***1. The Evidence Does Not Support the Trial Court's Number of Penalty Days***

The trial court erred in finding that the City was reasonable in delaying the release of the Cade Scott reply to complaint from April 4, 2003 until May 30, 2003 and that the un-redacted copy could not have been produced prior to May 30, 2003 ((CP 127) FOF 129, 131, 132: (CP 152) COL 79). The evidence at trial showed that on April 4, 2003, while reviewing the file of requests, replies, denials, and delays, Ms. Zink found a reply from Cade Scott to her complaint against his spraying their bushes and requested a copy (RP (February 9, 2005) 182:6-17; 216:8-20; 220:1-17). Ms. Zink was not aware that her time in reviewing this file had been limited to one hour. When Ms. Zink was told her review of the file was over at 11:00 a.m. she requested the copies that had been made. The city refused to release the copies until they were redacted.

When Ms. Zink finally acquired the copies made during her review on April 4, 2003, the reply from Cade Scott was missing. Ms. Zink contacted City Hall to request that the document be provided (Ex 223: RP (May 13, 2005) 471:10-472:8; 472:16-473:6). The City

did not respond. Ms. Zink went up to City Hall on April 10, 2003 and April 11, 2003 to get the copy of the missing document, at which time the City refused to release records until her attorney contacted their attorney (Ex 12; 211). When Ms. Zink went to get a copy of the document on April 15, 2003, the City refused to release the document because it was after 11:00 a.m. (Ex 2; 3; 212). On April 15, 2003, Ms. Zink submitted a written request for the reply from Cade Scott (Ex 1) The City did not respond within five (5) business days. When the City finally responded, the City attorney delayed the request until May 31, 2003, due to high volume of records requested (Ex 5). The City sent a second delay to allow third persons to seek injunctive relief (Ex 6). When Ms. Zink finally received the document almost two months later, the City had redacted the document without providing any written reason for the redaction. The City did not meet its burden of proof that it could not have provided an unredacted copy of the Cade Scott Complaint on April 4, 2003.

The trial court based its decision to exclude fifty-six (56) days from penalties based on the fact that although these things constituted disparate treatment, the City needed a little extra time to try to put these things together (RP (July 16, 2008) 113:4-15). The City made a copy of the reply from Cade Scott on April 4, 2003 per Ms. Zink's initial request during review of the file. All other copies of the documents requested during the review of the file were provided on April 4, 2003. The failure to hand the un-redacted copy of the reply from Cade Scott to Ms. Zink on April 4, 2003 was not reasonable and is a violation of the PRA. Had this just been a simple error on the City's part, the City could have provided a copy of the document as soon as Ms. Zink reported the error. Instead, the City continued to delay production of the document for weeks. The trial court's decision is manifestly unreasonable and in error of the PRA.

***2. The Trial Court Abused Its Discretion in Establishing the Per Day Penalty***

The trial court erred in finding that the City's wrongful withholding of the un-redacted copy of the Cade Scott reply was done in good faith, constituted mere negligence by the City, and in establishing a penalty of only five dollars (\$5) per day. ((CP 127) FOF 133: (CP 152) COL 80, 81). The facts presented to the trial court show that the City did not act in good faith or with mere negligence. The evidence presented clearly shows that the City attempted to prevent Ms. Zink from accessing this record for weeks. Furthermore, the City provided a redacted copy of the reply from Cade Scott to Ms. Zink without providing an explanation as required per state statute. The trial court stated that it found this to be a technical violation and did not find it egregious at all (RP (July 16, 2008) 110:7-15). The facts as presented at trial and stated above do not support the trial court's findings. The trial courts decision is manifestly unreasonable and an abuse of discretion.

***V. April 10, 2003 Council Packet and Vouchers/Bills***

***1. The Evidence Does Not Support the Trial Court's Number of Penalty Days***

The trial court erred in finding that the City was reasonable to delay release of the City Council packet and the vouchers and bills to be presented to the City Council for review on April 10, 2003 until April 13, 2003 ((CP 128) FOF 135, 137, 141; (CP 129) FOF 143: (CP 153) COL 83, 87). On remand, the trial court found that strict compliance with the PRA allows the City to take a full five (5) business days to respond to any request for public documents even if the requested documents are time sensitive such as the Council packet or the vouchers and bills (RP (July 16, 2008) 115:7-14; 117:10-11; 118:2-25; 120:21-25).<sup>20</sup> The trial court reasoned that if Ms. Zink wanted to view the council packet and vouchers prior to

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<sup>20</sup> Although these two requests are being combined in this argument the trial court determined that these were two separate document requests and assessed penalties for each one separately.

the meeting she should have asked to review them on April 3, 2003 (RP (July 16, 2008) 117:21-23). Ms. Standridge testified that on April 7, 2003, the council packet and vouchers were not available because they were not prepared yet (RP (May 11, 2005) 413:15-415:15: RP (May 13, 2005) 474:9-23). Had Ms. Zink requested to review the council packet and vouchers on April 3, 2003, the City would have denied the request because the records did not exist. Using the court's reasoning, governmental agencies could prevent citizens from reviewing any information to be presented to the governing board. This is not in keeping with the PRA strongly worded mandate that governments be open to the public (RCW 42.17.251)

Furthermore, the City did not delay the request because they needed five (5) full business days to locate and assemble the documents. Ms. Standridge testified at trial that she did not provide Ms. Zink with the Council packet and the vouchers prior to the meeting because something might be added at the last minute and she did not want Ms. Zink saying she did not get a document that was presented to the council (RP (May 13, 2005) 486:17-487:16). Holding that strict compliance with the PRA means that public agencies can withhold council packets and vouchers from citizens wanting to know what is going to be discussed and acted upon at their local government meetings until after decisions are made flies in the face of the intended purpose of the PRA: open government and government accountability.<sup>21</sup>

## ***2. The Trial Court Abused Its Discretion in Establishing the Per Day Penalty***

The trial court erred in finding that withholding the Council packet and vouchers requested on April 6, 2003 until June 3, 2003 was negligence by the City and finding a

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<sup>21</sup> RCW 42.17.251 The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy. Recodified at RCW 42.56.030.

penalty of ten dollars (\$10) per day was appropriate under the PRA ((CP 128) FOF 139; (CP 129) FOF 145; (CP 153) COL 84, 85, 88; (CP 154) COL 89). The City did not respond to Ms. Zink's initial request on April 6, 2003 to review the council packet and vouchers for the April 10, 2003 council meeting (RP (May 13, 2005) 467:18-468:4; 471:23-472:8). The City did not respond to Ms. Zink's request on April 7, 2003 to view the council packet and vouchers for the April 10, 2003 council meeting (Ex 13). On April 10, 2003, Ms. Zink went to City Hall to review the council packet and vouchers prior to the council meeting. The City refused to allow Ms. Zink access to any public records until her attorney contacted the City's attorney (Ex 105: RP (February 8, 2005) 119:13-120:12; 120:5-7: RP (February 9, 2005) 184:5-185:9). On April 11, 2003, the City again refused to allow any public documents to be reviewed until Ms. Zink's attorney contacted the City attorney (Ex 12; 211: RP (February 8, 2005) 120:13-121:24; 123:18-22; RP (May 11, 2005) 381:14-382:13). The City did not respond to Ms. Zink's third request on April 14, 2003 to review the council packet and vouchers for the April 10, 2003 council meeting (Ex 1). On April 15, 2003, the City refused to allow Ms. Zink to review any public documents except between the hours of 10:00 a.m. and 11:00 a.m. (Ex 2; 3; 212; RP (February 8, 2005) 124:11-125:1). On April 23, 2003, the City delayed the request to review the City council packet and vouchers until May 31, 2003 due to the high volume of records requested (Ex 5). On April 25, 2003 the City refused to allow Ms. Zink to review public documents and called the Sheriff's department to have her removed from City Hall (Ex 3; 83; 84; 85). On April 26, 2003, the City delayed the request to review the council packet and vouchers for an additional five (5) days in order to allow third parties to seek injunctive relief (Ex 6). Ms. Zink was finally provided access to the

council packet and vouchers for the April 10, 2003 council meeting on June 3, 2003; almost two months after the council had acted on the material.

In applying the *Yousoufian IV* factors to these two document requests, the evidence shows several aggravating factors. The City 1) failed to respond to a request for time sensitive material; 2) did not strictly comply with PRA procedural requirements; 3) was unreasonable in its explanation for non-compliance; and 4) the actions of the City in responding to Ms. Zink's records requests were based on agitation and annoyance rather than any lawful motive. (RP (May 11, 2005) 379:10-382:13; (May 13, 2005) 486:21- 487:15)). A penalty of only ten dollars (\$10) per day is not appropriate under the PRA

***W. City Council Minutes Book***

The trial court erred in finding that a twenty-five (\$25) per day penalty was appropriate under the PRA for the City's disparate treatment of Ms. Zink associated with the wrongful withholding of the Council minutes book ((CP 130) FOF 150: (CP 154) COL 92, 93). In applying the decision in *Yousoufian IV* to this case, the City has not presented any mitigating factors. However, the aggravating factors include:

- lack of strict compliance with all PRA procedural requirements (minutes are to be available on demand RCW 42.32.030);
- violation of the PRA by refusing to allow review of the minute book except between 10:00 a.m. and 11:00 a.m. (Ex 2; 3; 212)(RCW 42.17.280);
- attempting to cause the Zinks economic loss by requiring them to pay an attorney in order to view the city minute book (Ex 12; 211);
- failure to respond to Ms. Zinks written request for the minute book on April 14, 2003 (Ex 1);

- denying the release of the minute book on April 25, 2003 contacting the sheriff's department to have Ms. Zink removed from City Hall (Ex 3; 83; 84; 85); and
- loss of governmental accountability in withholding the City Council minute book.

Furthermore the City provided no reasonable explanation for their noncompliance. The City's actions were egregious, reckless, and orchestrated by the City to prevent Ms. Zink's access to any City held record. A twenty-five (\$25) penalty is not appropriate for this violation under the PRA.

***X. Minutes of March 13, 2003 and March 17, 2003 Council meetings***

***1. Council Meeting Minutes Should Have Been Produced On Demand***

The trial court erred in finding that the minutes of the March 13, 2003 and March 17, 2003 meetings could not have been released prior to April 21, 2003 ((CP 130) FOF 153: (CP 154) COL 95). The court found that under the PRA strict compliance provides public agencies with a mandatory five (5) business days before they are required to respond to requests for public records (RP (July 16, 2008) 116:21-118:8). This is error. Meeting minutes are required to be available upon request. RCW 42.32.030. Ms. Stephenson testified that it would only take ten (10) minutes to provide the meeting minutes of two meetings (RP (May 12, 2005) 50:6-16). A five (5) business day deduction in penalty days is not appropriate. Furthermore, the City did not respond to the request (RP (February 9, 2005) 217:6-14). See *Smith v. Okanogan County*, 100 Wn. App. 7, 13, (Div. III, 2000).

***2. The Per Day Penalty Is Insufficient***

The trial court erred in finding that the withholding of the minutes of the March 13, 2003 and March 17, 2003 meetings was done in good faith and constituted mere negligence, assessing a penalty of five dollars (\$5) per day ((CP 130) FOF 156: (CP 154) COL 96; (CP 155) COL 97). In applying the *Yousoufian IV* factors it is clear that the City has not shown

that any mitigating factors apply to this request. On the other hand, the Zinks provided evidence that show the City: 1) could have provided the documents within ten (10) minutes (RP (May 12, 2005) 50:6-16); 2) did not respond to the request within five (5) days (RP (February 9, 2005) 217:6-14); 3) refused to release records unless Ms. Zink's attorney contacted the City attorney (Ex 12); 4) delayed the request twice (Ex 1; 5; 6); 5) would only release records between 10:00 a.m. and 11:00 a.m. (Ex 2; 3; 212); and 7) called the Sheriff's department to have Ms. Zink removed from City Hall (Ex 3; 83; 84; 85). The evidence does not indicate that the City was acting in good faith nor that it was mere negligence on the City's part. The trial court abused its discretion in assessing the smallest penalty in the statutory range.

***Y. Complaint Against Cade Scott***

***1. The Per Day Penalty Is Insufficient***

The trial court erred in finding that the withholding of the complaint against Cade Scott was done in good faith and constituted mere negligence by the City (CP 131) FOF 161). At trial, Ms. Standridge stated that Ms. Zink did leave a message requesting a copy of the complaint on April 6, 2003 (RP (May 13, 2005) 472:23-473:6). The City did not respond to the request. Ms. Zink went up to City Hall on April 10, 2003 and April 11, 2003 to get the copy of the complaint. The City refused to release any records until the Zinks attorney contacted their attorney (Ex 12; 211). When Ms. Zink went to get a copy of the document on April 15, 2003, the City refused to release the document because it was after 11:00 a.m. (Ex 2; 3; 212). Ms. Zink had submitted a written request for a copy of the complaint on April 14, 2003 (Ex 1). The City did not respond within five (5) business days. When the City finally responded, the City attorney delayed the request until May 31, 2003 due to high volume of

records requested (Ex 5). The City sent a second delay to allow third persons to seek injunctive relief (Ex 6). Ms. Zink finally obtained a copy of the complaint on May 30, 2003; fifty-three (53) days after it was initially requested. The evidence has once again demonstrated the City's bad faith in responding to Ms. Zink's public records requests and assessing a penalty at the lowest point in the penalty range of five dollars (\$5) per day is not appropriate ((CP 155) COL 100, 101).

***Z. File of Requests, Replies, Delays, and Denials***

***1. The City Knew Which Records Were Being Requested***

The trial court erred in finding that the request of March 3, 2003 for the file of complaints, replies, requests, and denials regarding Donna Zink, maintained by the City of Mesa, was confusing and further erred in finding that the City was reasonable when they did not respond to the request ((CP 134) FOF 185: (CP 157-158) COL 118). This finding and conclusion are not supported by fact or law.

There is no evidence presented at trial indicating the City was confused by Ms. Zink's request. To the contrary, Ms. Zink testified that when she made the request, she asked Ms. Stephenson if she understood what was being requested and Ms. Stephenson stated that she did (Ex 30; RP (February 8, 2005) 151:20-153:18). Ms. Standridge testified that she would have asked if a request was unclear (RP (May 13, 2005) 476:3-8). This evidence does not support the trial court's determination that the City was confused by this request.

As a matter of law, failure to respond to a public records request within five days is a violation of the PRA triggering statutory sanctions. (RCW 42.17.340) (see *Smith v. Okanogan County*, 100 Wn. App. 7, 20, 994 P.2d 857 (2000)). If the request was unclear the City had the responsibility to request clarification.

Within five business days of receiving a public record request, an agency, ...must respond ... In acknowledging receipt of a public record request that is unclear, an agency, ...may ask the requestor to clarify what information the requestor is seeking.

RCW 42.17.320.<sup>22</sup> The trial court abused its discretion in excusing the City's failure to respond and must be reversed.

## ***2. The Files Should Have Been Produced Earlier***

The trial court erred in finding that the delay for the file of complaints, replies, requests, and denials regarding Donna Zink until April 18, 2003 was reasonable ((CP 134) FOF 187: (CP 157-158) COL 118). When the City did not respond to the initial request, Ms. Zink sent a second request to review the file on March 10, 2003 (Ex 31). The next day Ms. Stephenson told Ms. Zink the file would be ready after 1:00 p.m. (Ex 32: RP (February 8, 2005) 154:15-155:16). Ms. Zink was unable to review the file after 1:00 p.m. so she contacted Ms. Standridge the following day and was told the file was not ready to be reviewed (Ex 33: RP (February 8, 2005) 155:17-156:18: RP (February 9, 2005) 179:8-20). On March 13, 2003, the City delayed the request to determine if the records were exempt (Ex 34: RP (February 8, 2005) 156:19-157:8: RP (February 9, 2005) 179:21-23). On March 18, 2003, the City delayed the request due to high volume of records requested (Ex 35: RP (February 8, 2005) 157:9-158:13: RP (February 9, 2005) 179:24-180:19).

The file requested by Ms. Zink was a file of her complaints, requests, delays, and denials. These are all documents that Ms. Zink had either submitted to the City or received from the City. They are all in one file (Ex 32). The City's delay, claiming to need fourteen (14) days

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<sup>22</sup> Recodified at RCW 42.56.520

to determine if the records were exempt, is disingenuous. The second response claiming they needed to delay the request until April 18, 2003 due to high volume of records requested is in violation of the PRA. There is no provision in the PRA that allows public agencies to delay the release of public records based on a “high volume of records requested.” As all other items requested at the time of the initial request for this file were provided while Ms. Zink waited, the City did not meet its burden of proof that there were so many records requested that they could not hand this file to Ms. Zink for review (Ex 30: RP (February 8, 2005) 151:20-153:18).

Furthermore, Ms. Zink was allowed to review part of the file on April 4, 2003 but was not allowed to finish because of the time limits set by the City of Mesa (Ex 2 pg 2: RP (February 9, 2005) 181:6-23). The City did not meet its burden of proof that it required forty-six (46) days to hand Ms. Zink this file. The trial court’s decision was error and must be reversed.

### ***3. The Per Day Penalty Is Insufficient***

The trial court erred in finding that a penalty of twenty-five dollars (\$25) per day was appropriate under the PRA for the City’s disparate treatment in withholding of the file of complaints, replies, requests, and denials from April 18, 2003 to May 30, 2003 ((CP 134) FOF 191: (CP 158) COL 119, 120). The trial court erred in finding that the City limited the review of the file of complaints, replies, requests, and denials to between 10:00 a.m. to 11:00 a.m. for only one day; April 4, 2003 ((CP 135) FOF 192).

The facts provided to the courts were that on April 4, 2003, one month after the request was made, the City allowed Ms. Zink to begin the review of the requested file. At exactly 11:00 a.m. Ms. Standridge told Ms. Zink her review was over (Ex 2 pg 2: RP (February 9,

2005) 181:6-23). Ms. Zink requested the copies that had been made during the review. Ms. Standridge refused to release the documents until they had been redacted (Ex 130: RP (February 9, 2005) 181:24-182:17; 219:10-220:19). The City was acting in bad faith. The City had already claimed that they needed fourteen (14) days to determine if any of the documents were exempt from disclosure. Any documents requiring redaction should have already been redacted. This file contained correspondence between the Zinks and the City of Mesa. Furthermore, when Ms. Zink finally received the requested copies one of the documents was missing.<sup>23</sup>

When Ms. Zink returned to City hall to continue the review of the file on April 10, 2003, the City refused to release any public documents, including this file. (Ex 105). On April 11, 2003 the City again refused to release all documents (Ex 12; 211). On April 15, 2003, the City refused to allow Ms. Zink to review the file except between 10:00 a.m. and 11:00 a.m. (Ex 2; 3; 212). On April 25, 2003, the City refused to allow Ms. Zink to review public documents (Ex 3; 83; 84; 85) calling the sheriff's department to have Ms. Zink removed from City Hall.

The evidence presented shows that the City intentionally put up barriers to prevent access to this file, including time limitations, throughout May of 2003 and not just on April 4, 2003. These are serious violations of the PRA. The court's decision to limit disparate treatment by the City to one day is not appropriate. A twenty-five (\$25) per day penalty is not appropriate. The penalties for the City's actions should be at the high end of the scale.

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<sup>23</sup> See Reply from Cade Scott to Complaint, *supra*.

***AA. BOA meeting minutes***

**Minutes of the March 5, 2003 BOA meeting**

The trial court erred in finding that there was a high volume of requests when Ms. Zink requested the BOA draft minutes for March 5, 2003 ((CP 136) FOF 204). The evidence presented at trial does not support this finding. The trial court further erred in finding that “production of the audio tape of a city meeting in lieu of meeting minutes satisfies the PRA” ((CP 136) FOF 207; (CP 159 ) COL 128) because the tape “included everything at the meeting and not just the minutes” ((CP 136) FOF 207). There is no basis in fact or law that a tape of a meeting satisfies a request for the meeting minutes under the PRA. State statutes require:

...A journal of all proceedings shall be kept, which shall be a public record.

RCW 35A.12.110.

Every code city shall keep a journal of minutes of its legislative meetings with orders, resolutions and ordinances passed, and records of the proceedings of any city department, division or commission performing quasi judicial functions as required by ordinances of the city and general laws of the state and shall keep such records open to the public as required by RCW 42.32.030...

RCW 35A.39.010.

The minutes of all regular and special meetings except executive sessions of such boards, commissions, agencies or authorities shall be promptly recorded and such records shall be open to public inspection.

RCW 42.32.030.

The Zinks requested the draft of the March 5, 2003 BOA meeting minutes on March 7, 2003 (Ex 111) and on March 10, 2003 (Ex 36). The City responded that they would have the

draft minutes available on April 11, 2003 (Ex 37), approximately five weeks after the meeting took place. However, the City did not provide the draft minutes on April 11, 2003. Instead, on April 15, 2003, the City denied the request stating the draft minutes do not exist (Ex 38). The City of Mesa continued to refuse to draft the meeting minutes of the March 5, 2003 BOA meeting until ordered to do so by the trial court ((CP 164) Order #5) .

At trial, the City claimed that the minutes of the March 5, 2003 BOA meeting did not exist and therefore the City was not in violation of the PRA. The Court determined that “[f]ailure to prepare the minutes of the March 5, 2003 BOA meeting was a violation of state law” ((CP 159) COL 126) and that “[t]he abrogation of a statutory obligation to keep minutes is no justification or defense for a violation of the PRA” ((CP 143) COL 9). However, the court refused to award penalties against the City of Mesa for violation of the PRA ((CP 159) COL 127). This was error. Once the Court determined there was a violation of the PRA, it is mandatory for the court to award per day penalties *Yousoufian II*, 152 Wn. 2d 421, 437-438 (2004).

In *Smith v. Okanogan County*, Division III of the Court of Appeals discussed the issue of non-existent documents stating:

The County argues that several of Mr. Smith's requests were for records that did not exist. No Washington case has decided whether a duty to create an otherwise non-existent document exists under RCW 42.17. But there is federal law on the issue. The Washington public disclosure act closely parallels the federal Freedom of Information Act, 5 U.S.C. § 552 (1970 and Supp. V 1975), and judicial interpretations of that Act are therefore particularly helpful in

construing our own. *Hearst Corp.*, 90 Wn.2d at 128; see also *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993).

*Smith v. Okanogan County*, 100 Wn. App. 7, 13-14 (Div III, 2000). The Federal Freedom of Information Act (FOIA), “requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975). The rationale behind this decision was to prevent public agencies from promulgating and enforcing secret laws. The distinction is between documents which do not exist, and there is no requirement that they do exist, and those which the City is required by law to create. Our legislature enacted three statutes requiring governmental agencies to record the minutes of meetings and make them available to the public for inspection and copying (RCW 42.32.030, 35A.12.110 and 35A.39.010). Certainly, meeting minutes fall under the meaning of documents public agencies are required by statute to maintain and make available to the public.

Finding that the tape of the meeting more than fulfilled the City’s requirement to produce the minutes of the BOA upon request is unsupported in law. The public should not be required to sit and review a tape of a meeting in order to find out what decisions governing bodies are making when the agency has an affirmative statutory duty to draft minutes. While it may be interesting from an anecdotal view, the audio tape recording of the meeting is not the official record of the BOA actions taken at that meeting. By statute, only the minutes can serve that purpose.

The City was required by state statute to draft minutes of the March 5, 2003 BOA meeting. The City clerk had a legal obligation to draft the minutes of the March 5, 2003 BOA meeting (Ex 53). The City had ample time between the dates of Ms. Zink initial request on

March 7, 2003 to the date the City stated the document would be available on April 11, 2003 to draft the minutes of the March 5, 2003 meeting. The Zinks were not asking the City to create a document since by legislative mandate the minutes of the meeting were required to exist. The City's refusal to draft the minutes of the March 5, 2003 meeting in order to claim that the document did not exist was acting in bad faith (RP (May 13, 2005) 466:9-467:14). Once the court determined the City violated the PRA it was mandatory that per day penalties be assessed. Even the most casual observer can see the City's petulant refusal to draft the minutes surpasses gross negligence and begins to tread the realm of wanton disregard.

### **BOA Signed Meeting Minutes**

#### ***1. Draft Minutes are not the Same as the Official Signed Minutes***

The trial court erred in finding that “[a]lthough without the original signed minutes of the BOA for October 2002, December 2002, and January 2003 meetings it is unknown if they are the same, the draft copies of these minutes are the closest thing to what the Zinks asked for. Therefore these are the records that the BOA passed.” ((CP 135) FOF 198).

The trial court found that the BOA is an extension of the City of Mesa ((CP 113) FOF 26) and that possession of documents by the City Building Inspector and/or BOA is possession by the City ((CP 113) FOF 27). The evidence provided to the court was that on March 5, 2003, the BOA held a meeting finalizing their decision to uphold the Building Inspectors decision to expire the Zinks' permit (RP (May 11, 2005) 255:13-19). At the meeting the BOA members signed and approved their minutes from previous meetings (Ex 39). The trial court found that the approved and signed minutes of the BOA did exist on March 5, 2003 ((CP 135) FOF 196) and that the “record is silent as to why these original signed minutes of

the BOA for the October 2002, December 2002, and January 2003 meetings cannot be located” ((CP 135) FOF 197).

The city of Mesa did not meet their burden of proof that the documents sought by Ms. Zink are exempt from disclosure or that they do not exist. The only testimony provided by the City was from Ms. Standridge. Ms. Standridge stated that she had contacted Mr. Mumma and he did not have signed minutes.<sup>24</sup> Mr. Mumma was the BOA secretary. Mr. Mumma was present at the BOA meeting held on March 5, 2003 when the minutes of the BOA meetings were approved and signed by the BOA members (Ex 39). The trial court determined that as of March 5, 2003 the City had possession of the documents when they were signed by the BOA. Mr. Mumma as the secretary of the board, had a legal obligation to provide the official minutes of the BOA meetings to the City of Mesa per state statute.

The minutes of all regular and special meetings except executive sessions of such boards, commissions, agencies or authorities shall be promptly recorded and such records shall be open to public inspection.

RCW 42.32.030. As the City clerk, Ms. Standridge was responsible for maintaining the city files, and had a legal obligation to make sure the City received a copy of the official signed minutes, to promptly record them in the minutes book, and to make sure the public had access to them (Ex 53 K, L). The trial court’s decision is in error.

## ***2. Delay in Release of the BOA Signed Minutes was Unreasonable***

The trial court erred in finding that the City was reasonable to delay the release of the draft BOA minutes<sup>25</sup> until April 11, 2003 ((CP 135) FOF 195, 199; (CP 158) COL 122). On March 7, 2003, two days after the BOA approved their meeting minutes, Ms. Zink requested

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<sup>24</sup> RP (May 11, 2005) 400:13-401:20.

<sup>25</sup> The trial court substituted the draft minutes for the official signed minutes of the BOA ((CP 135) FOF 198).

the signed copies of the BOA meeting minutes from the BOA secretary, Richard Mumma (Ex 40; 111). Mr. Mumma did not respond. Ms. Zink sent a second request for signed minutes of the BOA to the City of Mesa on March 10, 2003 (Ex 36). Meeting minutes are to be open to public inspection per RCW 42.32.030 and cannot be exempt. None-the-less the City responded on March 13, 2003 that the request was delayed for fourteen (14) days in order to determine whether the information was exempt (Ex 34). After the request was reviewed by the City Attorney for exemptions, Ms. Zink received a second delay letter from the city attorney delaying release of the BOA meeting minutes until April 11, 2003 due to a high volume of records requested (Ex 37). On April 11, 2003 the City refused to release records until Ms. Zink's attorney contacted their attorney (Ex 12; 211).

The City has not met its burden of proof that they required thirty-five (35) days to release records that are required to be available to the public (RCW 42.32.030). The trial court's decision that a thirty-five (35) day delay in releasing these documents was reasonable is error and must be reversed.

### ***3. Destruction of the BOA Meeting Minutes is a PRA Violation***

The City of Mesa provided no evidence or testimony concerning the disappearance of the minutes of the BOA; an official record of the City of Mesa. In a recent case, Division I of the Court of Appeals found that under RCW 42.56.100<sup>26</sup>,

The PRA requires agency rules to "provide for the fullest assistance to inquirers." Agencies shall refrain from destroying public records that are subject to a pending public record request.

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<sup>26</sup> Former RCW 42.17.290 was in effect at the time of the Zink's request and was recodified at RCW 42.56.100.

*O'Neill, v. City of Shoreline*, 145 Wn. App. 913, 926, (Div I, 2008). Although this is a civil case, it should be noted that destruction of public records is a class C felony under RCW Chapter 40.16. As in *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 298, 299 n.3, 825 P.2d 324 (Div. I, 1992), wherein the court imposed a monetary penalty for the City's failure to disclose a destroyed document for each day the record was withheld until review by the supreme court was denied, if the records have been destroyed the court must find that the destruction of the minutes is a violation of the PRA and penalize the City of Mesa accordingly.

#### ***4. The Per Day Penalty Is Insufficient***

The trial court erred in finding that the withholding of the draft minutes of the BOA from April 11, 2003 to April 15, 2003 was only negligence and a penalty of \$10 per day is appropriate under the PRA ((CP 136) FOF 201: (CP 158) COL 123, 124).

The City of Mesa has shown a consistent pattern of denial of BOA materials to the Zinks. The official minutes of the BOA were created and therefore existed on the night of March 5, 2003 when the BOA members approved and signed them. (Ex 39). The City had possession of the minutes on March 5, 2003. The City had a statutory obligation to maintain the minutes and provide them promptly to the public for review. Ms. Zink requested the signed and approved meeting minutes two (2) days later. The documents inexplicably disappeared. The City has made other claims that documents do not exist (i.e. maintenance logs, complaint against 109 N. Rowell Avenue) only to have the documents appear later.<sup>27</sup> The city has not met its burden of proof that these documents do not exist, why they were not maintained as

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<sup>27</sup> Ms. Standridge testified that she spoke to the maintenance personnel and the requested logs did not exist. She discover after trial that they did exist; the maintenance personnel had them (RP (February 9, 2005) 208:3-25: August 30, 2006 27:19-30:21).

required by state law, or why they were destroyed (RCW 42.17.340). The trial court's finding that the draft minutes of these meetings is an appropriate substitute for the official minutes of the BOA meetings is error.

In applying the *Yousoufian IV* factors to these records it is clear that there are no mitigating factors involved. Some of the aggravating factors include: 1) delayed response; 2) lack of compliance with PRA requirements; 3) lack of supervision of agency personnel; 4) unreasonable explanation for noncompliance; 5) negligent, reckless and wanton behavior, bad faith and intentional noncompliance; 6) loss of public accountability; and 7) dishonesty. This is a serious violation of the PRA and the court abused its discretion in assessing a penalty of ten dollars (\$10) per day for four (4) days for this grievous violation ((CP 135) FOF 198). A penalty of at the lower end of the scale is not appropriate.

***BB. Minutes of February 13, 2003 and March 4, 2003 Council Meetings***

***1. Delay in Release of Council Meetings Minutes was Unreasonable***

The trial court erred in finding that the City was reasonable in delaying the release of the February 13, 2003 and March 4, 2003 meeting minutes for seventeen (17) days in order to determine whether any of the requested documents were exempt under the law ((CP 137) FOF 210; (CP 159) COL 130). The trial court erred in finding that the City of Mesa was reasonable in further delay in the release of the minutes due to high volume of records requested and that the City could not have reasonably produced the minutes prior to April 11, 2003 ((CP 137) FOF 212, 213; (CP 159) COL 130).

As previously discussed, meeting minutes are to be promptly recorded and available to the public RCW 42.32.030. The City of Mesa knew or should have known that the minutes

of meetings cannot be exempt.<sup>28</sup> Regardless, on March 13, 2003, the City delayed the request for the City Council minutes to determine whether the information was exempt. (Ex 34). The following day, Mr. Tanner reviewed the request for exemptions (Ex 37). Ms. Stephenson testified that it would take the City clerk approximately 10 minutes to copy these two sets of minutes from the minute book. (RP (May 12, 2005) 50:6-16). However, rather than provide the copies after the review, the City attorney delayed the request for a month due to the high volume of records requests (Ex 37: RP (February 8, 2005) 117:22-119:10). The City did not provide any reasonable explanation for their actions. To the contrary, the evidence shows that it took more time and money for the City to delay the request than to provide the documents.

## ***2. The Per Day Penalty Is Insufficient***

The trial court erred in finding that the City's erroneous withholding of the minutes of the February 13, 2003 and March 4, 2003 council meetings from April 11, 2003 to April 15, 2003 was a little more culpable than negligence and further erred in assessing a penalty of only ten dollars (\$10) per day ((CP 138) FOF 215: (CP 159) COL 131, 132). Minutes of meetings should be available upon demand RCW 42.32.030. However, after delaying release of the meeting minutes for weeks, rather than provide the documents to Ms. Zink, the City refused to release the minutes until the Zinks attorney contact the City's attorney.

Applying the standards set out in *Yousoufian IV* to the facts in this case, a finding that this was a little more than negligence and that a penalty of ten dollars (\$10) is appropriate for this PRA violation is error. The evidence overwhelmingly shows the City intentionally withheld the minutes of these two meetings from Ms. Zink utilizing unwarranted and lengthy delays. Even allowing the City the benefit of the doubt that they did not know minutes of meetings

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<sup>28</sup> Ms. Standridge testified that she has been the clerk/treasurer for the City of Mesa for 15 years at the time of the initial trial (RP (May 11, 2005) 370:24-371:5).

are not exempt, after the City attorney determined the documents could be released copies could have been provided within ten minutes.<sup>29</sup> The City has no reasonable explanation for delaying the release of these documents for over a month other than to prevent Ms. Zink's access to the meeting minutes. A greater per day penalty is warranted.

***CC. Resignation Letters of BOA Members Rick Hopkins and Devi Tate***

***1. Delay in Release of BOA Resignation Letters was Unreasonable***

The trial court erred in finding that the City was reasonable in delaying the release of the BOA resignation letters for seventeen (17) days in order to determine whether any of the requested documents were exempt under the law ((CP 138) FOF 218: (CP 160) COL 134). The City of Mesa knew or should have known that the resignation letters cannot be exempt.<sup>30</sup> However, even if the City believed that these documents might be exempt, on March 14, 2003, the City determined that the resignation letters were not exempt (Ex 37). The City has not shown any reasonable reason as to why the documents were not released on March 14, 2003.

The trial court erred in finding that the City of Mesa was reasonable in further delay in the release of the BOA resignation letters due to high volume of records requested and that the City could not have reasonably produced the BOA resignation letters prior to April 11, 2003 ((CP 138) FOF 220, 221: (CP 160) COL 134).

At trial, Ms. Standridge testified that Mr. Mumma had faxed or e-mailed the resignation letters to the City after the BOA met for the last time on March 5, 2003 (RP (May 13, 2005) 483:3-10). Ms Stephenson testified that the resignation letters should have been in the filing

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<sup>29</sup> The City assistant clerk testified that it would take 10 minutes to provide copies of the minutes of two council meetings (RP (May 12, 2005) 50:6-16)).

<sup>30</sup> Ms. Standridge testified that she has been the clerk/treasurer for the City of Mesa for 15 years at the time of the initial trial (RP (May 11, 2005) 370:24-371:5).

cabinet and would have taken “just a minute” to provide copies (RP (May 12, 2005) 49:2-16). Instead of providing copies of the resignation letters after it was determined they were not exempt, the City again delayed the request until April 11, 2003 (Ex 37). The further delay by the City for an additional month when it would only have taken “just a minute” to provide copies was not reasonable and the trial court erred in finding that it was.

## ***2. The Per Day Penalty Is Insufficient***

The trial court erred in finding that the City’s withholding of the BOA resignation letters from April 11, 2003 to April 15, 2003 was a little more culpable than negligence and in assessing a penalty of ten dollars (\$10) per day ((CP 139) FOF 223: (CP 160) COL 135, 136). Although not required by state law, the BOA resignation letters should have been available upon request as they were easy to locate and it would only have taken a minute to provide copies. At most, the City should have taken no more than five (5) business days to provide these documents. Instead they delayed the release of these documents for thirty-two (32) days. The City stated these documents would be available on April 11, 2003, even so, on the day the records were to be available, the City again refused to release the documents until Ms. Zink had her attorney contact the City’s attorney. Applying the *Yousoufian IV* factors to the facts of this request, the City has established no mitigating factors involved in their refusal to release the BOA resignation letters. Conversely, the record shows numerous aggravating factors. A finding that this was a little more than negligence and assessing a penalty of only ten dollars (\$10) per day is sufficient is error. A greater per day penalty is warranted for the unreasonable delays in release of these public records.

**DD. Resolution 2003-03**

**1. Delaying Release of Copying Costs for Forty-Six Days is Unreasonable**

The court erred in finding that Resolution 2003-03, was properly withheld from the Zinks for seven (7) days after the request was made ((CP 139) FOF 226: (CP 160) COL 138). The PRA requires that public agencies “establish, maintain, and make available for public inspection and copying a statement of the actual per page costs or other costs, if any, that it charges for providing photocopies of public records...”(RCW 42.17.260(7))<sup>31</sup> (emphasis added). On March 27, 2003, the City of Mesa adopted Resolution 2003-03 establishing the copy costs the City charges for photocopies of public records (Ex 11; 124). On April 14, 2003, Ms. Zink requested a copy of this resolution (Ex 1). Ms. Stephenson faxed the request to the City attorney on the day it was received (Ex 234). Nine (9) days later the City attorney responded to the request stating that the document would not be available until May 31, 2003 due to the high volume of records requested (Ex 5). Ms. Zink received another delay letter from the City on April 26, 2003 stating that the City needed to notify third persons to allow them to seek injunctive relief (Ex 6). Ms. Zink finally received a copy of the City’s statement of the actual cost for photocopies of public records (Resolution 2003-03 (Ex 124)) on May 30, 2003, forty-six (46) days after the document was required by law to be available under RCW 42.17.260(7).

**2. The Per Day Penalty Is Insufficient**

The trial court erred in its decision that this request was considered a high volume of requests and not more egregious than the minimum culpable negligence; assessing a penalty of five dollars (\$5) per day ((CP 139) FOF 228, 229: (CP 160) COL 139, 140). The court

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<sup>31</sup> Recodified at RCW 42.56.070(7).

based this decision on the fact that Ms. Zink did not have to contact her attorney for this records request ((CP 139) FOF 228). There is no basis in law that the City was merely negligent in not following the PRA because Ms. Zink was not required to go through her attorney. There is no basis in law, or the facts as presented, that public record requests can be delayed due to high volume of requests. The evidence showed that of the nine bulleted items on this request, the maintenance logs (denied (Ex 7)), the minutes of two meetings (ten (10) minutes to provide (RP (May 12, 2005) 50:6-16)) and the notes and memos kept on Ms. Zinks activities at City Hall (denied (Ex 7; 68)) were the only documents not the subject of a previous, pending request. (Ex 1; 12; 105; 211; 223: RP (May 13, 2005) 471:10-473:6). Furthermore, at trial, Ms. Standridge testified that active resolutions are put into a binder so they can be easily accessed (RP (May 12, 2005) 143:3-7). The City did not meet its burden of proof that the request of April 14, 2003 required a delay of forty-six (46) days. The City did not meet its burden that it was reasonable in not releasing resolution 2003-03 on demand.

Applying the standards set out in *Yousoufian IV* to this case, there are no mitigating factors. Conversely, the aggravating factors include: 1) the document was required by the PRA to be available on demand; 2) the City failed to respond to the request as required by the PRA; 3) the PRA does not allow agencies to delay records requests due to high volume of requests; 4) the City delayed the release of an easily copied document for forty-six (46) days; and 5) did not provide a legitimate reason for this delay. The trial court did not consider the entire penalty range established by the legislature and assessing the minimum penalty for withholding this record was manifestly unreasonable and an abuse of discretion.

***EE. Maintenance Logs***

***1. The Per Day Penalty Is Insufficient***

The trial court erred in its decision that a penalty of fifteen dollars (\$15) per day was appropriate for the City's withholding of the maintenance logs. ((CP 140) FOF 234; (CP 161) COL 143, 144). The evidence and testimony provided to the trial court proves that on the day Ms. Zink submitted the request for the maintenance logs the City knew that the maintenance logs existed and what records were being requested (Ex 1; 234). On the day the request was received the City faxed the request to Mr. Tanner to review for exemptions (Ex 234). The City specifically asked Mr. Tanner if the maintenance logs could be disclosed to Ms. Zink. The City did not respond to Ms. Zink's request within five (5) business days of the request. Nine (9) days after the request was submitted to the City, Ms Zink received a delay letter from the City attorney. After reviewing the request for exemptions, Mr. Tanner delayed release of the maintenance logs for thirty-eight (38) days due to a high volume of records requests (Ex 5). Three (3) days later, Ms. Zink received a second delay from the City stating they needed an additional five (5) days to notify third persons or agencies to allow them to seek injunctive relief (Ex 6). On May 30, 2003, Ms. Zink received a denial letter from the City claiming the maintenance logs were exempt under RCW 42.17.310(1)(i) (Ex 7). When this matter came before the court, Ms. Standridge, knowing the claimed exemption was not valid, gave false testimony as to the existence of the maintenance logs. Ms. Standridge testified that she had searched everywhere and discussed the documents with Cade Scott, the maintenance personnel, and the logs did not exist (RP (May 11, 2005) 408:3-25; 421:9-15).

On May 13, 2005, Ms. Zink requested the maintenance log books for several years and she was able to locate the logs initially requested on April 14, 2003 (Ex 224; 225: RP

(August 30, 2006) 20:18-21:4; 21:17-22:20). Once Ms. Zink discovered the maintenance logs did exist, Ms. Standridge again changed her testimony and on August 30, 2006, Ms Standridge testified that the maintenance logs did not exist in her office at the time of Ms. Zink's request in 2003 but after the hearing they were there. (RP (August 30, 2006) 28:7-30:21).

The actions of the City of Mesa in refusing to release the maintenance logs were intentional. The City was acting in the worst bad faith. The facts and evidence provided at trial show that the City did not want to release the maintenance logs to Ms. Zink. So, after delaying the request for six weeks, the City claimed an exemption they knew was not valid (Ex 5; 234). When the matter came before the court, the City clerk gave false testimony in order to cover up her actions (RP (May 12, 2005) 59:21-61:8: Ex 7). Although this is a civil case, it should be noted that under state statutes that "[e]very public officer who shall knowingly make any false or misleading statement in any official report or statement, under circumstances not otherwise prohibited by law, shall be guilty of a gross misdemeanor." RCW 42.20.040.

At the remand hearing the Zinks brought the evidence of the City clerk's false testimony to the attention of the court (RP (July 17, 2008) 47:4-48:12). The City did not provide the court with any reasonable explanation stating "... I don't know why [the maintenance logs] weren't provided." (RP (July 17, 2008) 48:12-17). The City acted with flagrant disregard for state statutes and our courts. The trial court does not have the right to ignore the evidence presented at trial The trial court abused its discretion when it found that the City's actions were a little more than mere negligence, assessing a penalty of only fifteen dollars (\$15) per day for such egregious behavior. The trial court's decision should be reversed and the

*Yousoufian IV* factors should be applied in assessing the per day penalty for this violation of the PRA.

***FF. Ordinances 02-01, 03-02, 03-03, 01-05 and Resolutions 2003-01, 2003-02, 2003-03***

RCW 35A.12.150 requires ordinances and resolutions to be indexed and available for inspection by the public:

The city clerk shall authenticate by his signature and record in full in a properly indexed book kept for the purpose all ordinances and resolutions adopted by the council. Such book, or copies of ordinances and resolutions, shall be available for inspection by the public at reasonable times and under reasonable conditions.

RCW 35A.12.150 (emphasis added). In December 2002, the City of Mesa maintained an index of ordinances (RP (May 11, 2005) 286:18-287:4; RP (May 12, 2005) 26:20-27:15; 31:18-22). Per statute, cities are required to publish all ordinances or a summary of the ordinance at least once in the city's official newspaper.

Promptly after adoption, the text of each ordinance or a summary of the content of each ordinance shall be published at least once in the city's official newspaper.

RCW 35A.12.160 (emphasis added). When a city publishes a summary of an ordinance, the publication must include a statement that the full text of the ordinance will be available upon request.

When the city publishes a summary, the publication shall include a statement that the full text of the ordinance will be mailed upon request.

RCW 35A.12.160. The City of Mesa publishes Ordinances by summary rather than by full text (Ex 41: RP (May 12, 2005) 143:14-144:22). In the publication, the City includes the required statement that the “full text of this ordinance is available at Mesa City Hall and will

be provided to any citizen upon personal request during normal business hours.” (emphasis added) (Ex 41). The City’s policy in publishing a summary of an Ordinance is that the Ordinance “will be provided” upon personal request to any citizen. By publishing their Ordinances in summary form, the City of Mesa waives any delay that may have existed under RCW 42.17.320<sup>32</sup> in responding to requests for a City Ordinance by any citizen.

RCW 35A.12.150 and 35A.12.160 do not conflict with the PRA. RCW 42.17.270 requires that:

Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person.

RCW 42.17.270.<sup>33</sup> Although RCW 42.17.320 allows up to five business days to respond to a public records request, the five business day response time does not give public agencies the right to withhold all records for five business days simply because they can. Furthermore, providing a public document on demand is within the five day period. The PRA requires that “[a]gencies have a duty to provide the fullest assistance to inquirers and the most timely possible action on requests for information.” RCW 42.17.290. If the public agency does not need five days to respond to a public records request, the intent and purpose of the PRA does not support an automatic five business day grace period to provide the record, especially if other statutes have other requirements. The statutory requirements of RCW 35A.12.150 and 35A.12.160 do not conflict with the PRA (RCW 42.17.320). Laws that govern citizens should be freely accessible to all who are required to follow them.

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<sup>32</sup> Recodified at RCW 42.56.520.

<sup>33</sup> Now codified at RCW 42.56.080.

**Ordinance 03-02, Resolution 2003-01, and Resolution 2003-02**

The trial court erred in finding that the City was reasonable to delay the release of the ordinances and resolutions requested on December 11, 2002 for thirty (30) days in order to locate and assemble the documents ((CP 132) FOF 174: (CP 156) COL 110; (CP 157) COL 112; 114)

On December 11, 2002, Ms. Zink requested copies of the Ordinances and Resolutions concerning public notice requirements, publication of agendas, up-coming public hearings, up-coming council meetings, business hours, and designation of the official newspaper. All of these Ordinances and Resolutions were required to be in effect (RCW 35A.12.160), 35A.21.230, 35A.21.070 and RCW chapter 65.16 (Ex 233). As indicated on the note attached to the request, the City clerk noted that on December 12, 2002, Ms. Zink picked up one of the requested resolutions. The City clerk also noted that none of the other requested procedures existed.<sup>34</sup>

At trial, Ms. Standridge testified that she was the one who writes and processes the ordinances and resolutions (RP (May 11, 2005) 371:12-13: RP (May 12, 2005) 141:19-142:19). Ms. Standridge testified that she had researched all the City ordinances and resolutions and the procedures did not exist (RP (May 13, 2005) 479:17-482:8). Five days later, rather than tell Ms. Zink that the procedures did not exist, the City sent a delay letter stating that it would take thirty (30) days to locate and assemble the documents ((CP 132) FOF 168, 169). In receiving the City's delay letter, a reasonable person would believe that the City actually did have these ordinances and resolutions in effect. The City's response was dishonest and designed to deceive.

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<sup>34</sup> Ordinance 01-05 was responsive to this request but is discussed separately.

RCW 42.17.340(2) allows the court to review a motion of any person who believes a public agency has not provided a reasonable estimate of the time required to respond to a request for a public record. RCW 42.17.340(3) states that courts are to take into account that “free and open examination of public records is in the public interest” even if they cause embarrassment. RCW 42.17.320 requires that agencies respond to public records by either delaying the request or denying the request. Moreover, RCW 42.17.320 only allows agencies to delay release of a public record to locate and assemble the document, determine if it is exempt, or to clarify what record is being requested. RCW 42.17.320 does not allow agencies to delay public records that do not exist because the agency does not want an individual to know the documents do not exist and would be inconvenienced and embarrassed. RCW 42.17.290 requires that public agencies adopt rules and regulations stating that:

Such rules and regulations **shall** provide for the **fullest assistance to inquirers and the most timely possible action on requests for information**.

RCW 42.17.290 (emphasis added). The trial court erred when it determined that the City of Mesa did not violate the PRA by delaying these ordinances and resolutions because they did not exist at the time the documents were delayed ((CP 132) FOF 174: (CP 156) COL 110; (CP 157) 112, 114). Under the PRA, Ms. Zink was entitled to a reasonable response with a reasonable estimate of the time required to provide the document. These documents did not exist at the time of the request, and the City knew the documents did not exist when it provided the delay letter stating it would take thirty (30) days to locate and assemble the documents. The City did not provide Ms. Zink with a reasonable estimate of the time it would take to locate and assemble these records. Furthermore, the City did not provide any of the requested ordinances or resolutions within the thirty (30) day delay period. The City was acting in bad faith and was being deceitful in order to prevent Ms. Zink from finding out

the ordinances and resolutions did not exist because the Zinks needed those documents for their appeal to the BOA (RP (February 8, 2005) 75:9-19; 101:16-112:18).

### **Ordinance 03-03**

The trial court erred in finding that the City was justified in delaying the release of Ordinance 03-03, published by summary (Ex 41), to Ms. Zink for twenty-five (25) days due to a high volume of requests because the request came in with several other requests and it was treated as a public records request and not a request to view the ordinance ((CP 131) FOF 165: ((CP 155) COL 103). The trial court erred in finding that the City did not violate the PRA in delaying the release of Ordinance 03-03 ((CP 155) COL 104) By state statutes (RCW 35A.12.150 and 35A.12.160), this ordinance was **required** to be available on demand by any citizen.

The court found that the extension of twenty-five (25) days in delaying the release of Ordinance 03-03 was justified because it came in on a request for several other public documents and was treated as a public records request, not a request to view an ordinance (RP (July 17, 2008) 4:6-8). There were no facts presented to the Court indicating that Ms. Zink was not requesting a copy of a newly passed ordinance (RP (February 8, 2005) 114:25-115:12). The facts presented at trial showed that Ms. Zink was required to put all requests for public records, including ordinances, in writing (RP (May 11, 2005) 435:6-22: RP (July 16, 2008) 84:10-20), and that the City provided the documents on this request, as well as other requests, at different times (RP (February 8, 2005) 113:12-16: RP (May 12, 2005) 155:24-156:11: RP (July 16, 2008) 85:13-21). The initial delay of fourteen (14) days in releasing the documents requested on March 10, 2003 (which included an ordinance, resignation letters, meeting minutes, and one letter from the city attorney presented at the council meeting) was

to determine whether the documents were exempt (Ex 34: RP (February 8, 2005) 116:8-117:9). Although the City knew the ordinance was not exempt at the time of the request, by March 14, 2003, the City had determined that none of the documents requested were exempt (Ex 37). Rather than release Ordinance 03-03 as required, a second delay was sent by the City attorney, delaying the release of Ordinance 03-03 for an additional twenty-eight (28) days due to the high volume of records requests (Ex 37: RP (February 8, 2005) 117:22-118:16). The PRA is specific as to the reasons a public agency can delay release of public records.

Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, 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.

RCW 42.17.320. The statute simply does not allow public agencies to justify delaying release of public documents due to high volume of requests. Furthermore, Ms. Stephenson testified that Ordinance 03-03 was filed under “ordinance” and it would have taken her “a couple of minutes” to make a copy (RP (May 12, 2005) 45:15-46:2). The City spent more time and money delaying the release of Ordinance 03-03 than if they had just provided the copy when it was requested.

Allowing the City to delay release of Ordinance 03-03 for any reason is contrary to RCW 35A.12.150, RCW 35A.12.160, and the City’s published declaration that the ordinance would be available upon demand to any person. Ordinance 03-03 should have been provided to Ms. Zink the day she submitted the request to the City Hall on March 10, 2003 (RP (February 9, 2005) 200:21-201:1). Failure to provide Ordinance 03-03 to Ms. Zink while providing a copy to others is disparate treatment by the City of Mesa and the trial Court.

### **Ordinance 02-01**

The trial court erred in finding that the City's delay of Ordinance 02-01 for twenty-one (21) days in order to locate and assemble the document was reasonable and did not violate the PRA ((CP 119) FOF 71: ((CP 148) COL 51). On February 24, 2003, Ms. Zink requested Ordinance 02-01 (Ex 14). The trial court found that the City was reasonable in delaying production of Ordinance 02-01 for a total of twenty-one (21) days in order to locate and assemble the document ((CP 119) FOF 71). The court determined that, even though Ms Zink was required to put all requests in writing, the request for Ordinance 02-01 came in with additional requests for BOA rules and regulations, time card, meter readings, phone logs, and 18 residential files ((CP 119) FOF 70).

Pursuant RCW 35A.12.150, RCW 35A.12.160, and the City's published declaration, ordinances should be available upon demand to any person. Ms Stephenson testified that Ordinances are in a file marked "ordinance" and would only have taken a couple minutes to provide a copy (RP (May 12, 2005) 45:19-46:2). Anita Zink testified that even though she had a conflict with the City of Mesa, when she requested a copy of this same ordinance, Ms. Standridge made a copy while she waited (Ex 98: RP (February 9, 2005) 171:6-174:6).

The court's decision to allow the City to delay release of Ordinance 02-01 to Ms. Zink for twenty-one (21) days while the City produces this same Ordinance to others on demand is not only contrary to RCW 35A.12.150 and 35A.12.160 but it is disparate treatment by the City and the trial Court. The evidence provided at trial shows that the City was acting in bad faith by not producing a city ordinance on demand to Ms. Zink, as required by state law, while producing this same document to another citizen.

### **Ordinance 01-05**

The trial court erred in finding that “[t]he City was justified in withholding Ordinance 01-05 from December 11, 2002 until January 16, 2003 because the request was included with the December 11, 2002 request for other Ordinances and Resolution that did not exist at the time and the City was trying to provide all the materials at the same time” ((CP 133) FOF 180). There was no evidence presented at trial to support this finding. The evidence and facts presented at trial showed that the documents requested on December 11, 2002 were provided over a three month period of time, not all at once.

The evidence showed that on December 11, 2002 Ms. Zink submitted a request for the tape of a BOA meeting, an affidavit of publication, and several ordinances and resolutions associated with publications of notice to the public (Ex 87: ((CP 133) FOF 178). On December 12, 2002, the City provided Ms. Zink with the tape of the meeting and the affidavit of publication (RP (February 8, 2005) 103:1-11: RP (May 11, 2005) 406:12-23). That same day the City clerk left a sticky note claiming the other requested ordinances and resolutions did not exist. (Ex 233). Rather than deny the request for the Ordinance because the records did not exist, five (5) days later, the City delayed the request for thirty (30) days (Ex 88). A month later the City of Mesa informed Ms. Zink the documents did not exist. A copy of Ordinance 03-02 and Resolution 2003-01 were provided to Ms. Zink on January 24, 2003 (RP (February 8, 2005) 103:17-109:6: Ex 90; 91). A copy of Resolution 2003-02 was provided to Ms. Zink on February 14, 2003 (RP (February 8, 2005) 109:12-22). Clearly the City did not provide these documents at the same time.

Finally, after an extensive search (RP (February 8, 2005) 109:4-112:18), Ms. Zink found Ordinance 01-05; the Ordinance establishing the procedure for notifying the public of

upcoming hearings (Ex 188; Ex 87). Ms. Zink submitted a request and obtained a copy, while she waited, on March 3, 2003 (Ex 30), well after the BOA had made their final decision and two days before they disbanded their board on March 5, 2003 (Ex 36: RP (May 13, 2005) 483:6-16). Again, the evidence is clear, the City did not delay the request for Ordinance 01-05 in order to provide the documents all at once. The City denied the existence of Ordinance 01-05 in order to prevent the Zinks from acquiring a copy of this Ordinance so they could not use it against the City in their appeal (RP (February 8, 2005) 111:18-112:1; RP (May 11, 2005) 310:15-19; RP (May 12, 2005) 66:13-67:14).

***1. A Thirty Day Delay to Release a City Ordinance is Not Reasonable***

The trial court erred in finding that the thirty (30) day delay to locate and assemble Ordinance 01-05 was reasonable and justified due to a high volume of requests in general ((CP 133) FOF 179; ((CP 156) COL 106). The court's finding is not consistent with the facts presented at trial and is contrary to state statutes (RCW 35A.12.150, 35A.12.160, and 42.17.320). The PRA does not allow an agency to delay the release of public records due to a high volume of requests (RCW 42.17.320). The testimony presented at trial was that the yearly preliminary budget<sup>35</sup> was the only other request for public documents at that time of Ms. Zinks request for Ordinance 01-05. (RP (May 11, 2005) 309:21-310:24). The PRA does not allow agencies to delay the release of public documents based on the possibility of future

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<sup>35</sup> ... The clerk shall provide a sufficient number of copies of such preliminary budget and budget message to meet the reasonable demands of taxpayers therefore and have them available for distribution not later than six weeks before the beginning of the city's next fiscal year. RCW 35A.33.052

Immediately following the filing of the preliminary budget with the clerk, the clerk shall publish a notice once each week for two consecutive weeks stating that the preliminary budget for the ensuing fiscal year has been filed with the clerk, that a copy thereof will be furnished to any taxpayer who will call at the clerk's office therefore ... The publication of the notice shall be made in the official newspaper of the city. RCW 35A.33.060.

requests. The PRA requires that public records are promptly available for inspection and copying to any person RCW 42.17.270. The trial courts finding has no basis in law or fact.

## ***2. The Per Day Penalty Is Insufficient***

The trial court erred in finding that it was mere negligence for the City to withhold Ordinance 01-05 because “under the circumstances it kind of got lost in the shuffle” ((CP 133-134) FOF 183) assessing a penalty at the lowest point on the scale of five dollars (\$5) per day ((CP 156) COL 107, 108). Ms. Zink testified that she had to search out Ordinance 01-05 because she knew there was a procedure for notifying the public of upcoming public hearings (RP (February 8, 2005) 111:7-112:18; RP (May 12, 2005) 27:5-15). Ms. Zink initially requested a copy of this Ordinance on December 11, 2002. Ms. Zink finally received a copy of this ordinance eighty-three (83) days later. (Ex 30; (RP (February 8, 2005) 109:3-18; 110:1-112:18). The only explanation provided by the City was that although Ms. Standridge wrote the ordinance (Ex 188; RP (May 11, 2005) 371:12-13; RP (May 12, 2005) 142:4-19) she did not offer a copy of, or mention the existence of, Ordinance 01-05 to Ms. Zink **because it was not her job** (RP (May 12, 2005) 148:10-25).

...an applicant need not exhaust his or her own ingenuity to "ferret out" records through some combination of "intuition and diligent research." *Ackerly v. Ley*, 420 F.2d 1336, 1342 (D.C. Cir. 1969).

*Daines v. Spokane County*, 111 Wn. App. 342, 349 (Div III, 2002).

Ordinance 01-05 was required to be released upon request by any citizen. The Court is in error in not assessing penalties against the City of Mesa for intentionally and silently withholding Ordinance 01-05 from the date of the initial request on December 11, 2002 to the day the record was finally released to Ms. Zink on March 3, 2003. Furthermore, the court’s decision that the City acted with mere negligence in not releasing Ordinance 01-05,

assessing only a five dollar (\$5) per day penalty, because “it kind of got lost in the shuffle” is contrary to the evidence of bad faith presented at trial ((CP 133-134) FOF 183). The City knew of the existence of Ordinance 01-05 at the time of the request on December 11, 2002. The City intentionally withheld this document so that the Zinks could not use it against the City. Had the Zinks acquired Ordinance 01-05 at the time the request was made they would have presented it to the BOA (RP (February 8, 2005) 103:17-24), not only making the City “look bad” but it would have made the public hearing held on December 5, 2002 null and void due to improper notice. (RP (May 11, 2005) 377:15-381:13: RP (May 12, 2005) 65:18-69:16). The evidence presented to the court showed that Ordinance 01-05 was a smoking gun that the City willfully withheld from the Zinks in the utmost bad faith.

***GG. Draft Dog Ordinance***

***1. Draft Ordinance Should Have Been Produced On April 25, 2003***

The trial court erred in finding that the City properly withheld the release of the draft dog ordinance presented to the City council for review for seven (7) days ((CP 141) FOF 241, 242). The evidence presented at trial showed that on April 25, 2003, Ms. Zink went up to City Hall and requested to review a copy of the draft dog ordinance (Ex 82; 83). Ms. Standridge verbally denied the request (Ex 83). At that time, both parties were recording the interaction (RP (May 11, 2005) 381:14-382:7). Although refusing to turn off the City’s recording device, Ms. Standridge denied access to all public records unless Ms. Zink turned off her recording device (Ex 3). When Ms. Zink refused to turn off her recording device while the City was still recording, Ms. Standridge called the Sheriff’s department (Ex 83; 84; 85; 213). Ms. Stephenson told Ms. Zink to have her attorney contact the City attorney. The evidence clearly showed that the request to review the draft dog ordinance was denied on the

day the request was made. Moreover, the City did not provide any other response to Ms. Zink's request for the draft dog ordinance indicating that the verbal response was the City's final action. The City should not be allowed to claim an automatic five (5) business day grace period for a document they denied at the time of the request.

## ***2. The Per Day Penalty Is Insufficient***

The trial court erred in finding that withholding the draft dog ordinance for thirty-two (32) days was less egregious than if it had been an actual ordinance, assessing only a five dollar (\$5) per day penalty ((CP 141) FOF 244: (CP 162) COL 151, 152). Allowing the public to review draft ordinances is at least as important, possibly even more important, as allowing the public to review adopted ordinances.

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

RCW 42.17.251. The evidence showed that the City Officials were revising the Animal control codes at the time of Ms. Zink's request (Ex 103). Ms. Zink requested a copy of the draft dog ordinance and the City refused to release the document. The City refused to hold a public hearing on the issue (Ex 100). Ms. Zink filed a complaint and the City Council decided to hold a public hearing (Ex 9; 86; 99; 101).

Furthermore, the evidence presented at court showed that at the time Ms. Zink requested to review the draft dog ordinance the City: 1) refused to allow her to review any public

documents; 2) limited her time at city hall to review public records; 3) recorded all interactions; and 4) contacted the sheriff's department to have her removed. All of these acts were found by the Court of Appeals to be disparate treatment,<sup>36</sup> and a greater penalty is warranted. The factors as outlined in *Yousoufian IV* should be utilized in assessing the per day penalties for this request.

***HH. June 14, 2001 Council Meeting Tape***

***1. Release of The June 14, 2001 Meeting Tape Was Denied on April 25, 2003***

The trial court erred in finding that the City of Mesa properly withheld the release of the June 14, 2001 Council meeting tape presented to the City council for review for five (5) business days ((CP 140) FOF 236, 237; (CP 161) COL 146). As previously discussed, the evidence presented at trial showed that on April 25, 2003, Ms. Zink requested to review documents, including the tape of the June 14, 2001 Council meeting tape. The City denied the release of this public record at the time of the request (Ex 3; 82; 83; 84; 85; 213). The evidence clearly shows that the request to review the June 14, 2001 tape was denied on the day the request was made. Moreover, the City did not provide any other response to Ms. Zink's request for the tape of the June 14, 2001 council meeting indicating that the verbal response was the City's final action. The City should not be allowed to claim an automatic five (5) business day grace period for a document they denied at the time of the request.

***2. The Per Day Penalty Is Insufficient***

The trial court erred in finding that a penalty of twenty-five (\$25) per day was appropriate for the City's refusal to allow Ms. Zink to review the tape because it was more than mere negligence ((CP 141) FOF 239; (CP 161) COL 147, 148). The evidence showed

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<sup>36</sup> *Zink v City of Mesa*, 140 Wn. App. 328 (Div III, 2007)

that the Zinks were having a dispute with the City concerning some dog fines they had received in June of 2001 (Ex 11). Ms. Zink requested the matter be reviewed by the City Council and on April 24, 2003, the City sent Ms. Zink a letter stating that at the June 14, 2001 council meeting, the Zinks had admitted their dogs were at large (Ex 102). When Ms. Zink requested to review the tape of the June 14, 2001 Council meeting, the City refused to allow the review. As previously discussed the City was also refusing to allow her to review any public documents without attorney contact, limiting her time at city hall to review public records, recording all interactions, and contacted the sheriff's department to have her removed. All of which have been determined to be disparate treatment. The evidence does not indicate that the City's actions were only a little more than mere negligence.

#### **IV. DE NOVO REVIEW**

Prolonged litigation is quite costly to both parties and sustained cases with continuous appeals caused by an erroneous trial court decision are an injustice to both parties. The Zinks have previously requested that this court engage in de novo review of the testimonial record, enter findings on the alleged PRA violations, and impose an appropriate remedy, rather than remanding to the trial court. This request was denied in *Zink v. City of Mesa*, 140 Wn. App. 328, 166 P.3d 738 (Div. III, 2007) . However, this is the second appeal to this court, and even though the Zinks filed suit within eight (8) months of the first disputed record request, this litigation has continued for over seven years. Furthermore, on remand, the trial court determined PRA violations, penalties and fees based on the record and did not take additional testimony.

In *Yousoufian IV*, our Supreme Court noted that under certain circumstances it is appropriate for appellate courts to determine the penalties. Therefore, given the unique

circumstances and procedural history of this case, the Zinks again ask the court to consider de novo review and to impose per day penalties as well as attorney fees and costs on appeal as was done in *ACLU v. Blaine Sch.*, Dist. No. 503, 95 Wn. App. 106, 120-121 (Div. I, 1999), as well as in *Yousoufian IV*.

In the alternative, the Zinks request this Court to provide the trial court with explicit instructions concerning the application of the PRA to this case.

## V. COSTS

### *II. Attorney Fees and Costs*

The PRA provides for recovery of attorneys' fees and costs to any person who prevails against an agency in any action in the Courts seeking the right to inspect or copy public records. RCW 42.17.340. The Supreme Court of Washington has clarified the standard for prevailing party for the purposes of RCW 42.17.340(4): "...the "prevailing" relates to the legal question of whether the records should have been disclosed on request." *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103-104 117 P.3d 1117 (2005). It is clear in this case that the records should have been disclosed. The Zinks respectfully request the Court to find them to be the prevailing party. Furthermore, "strict enforcement...discourages improper denial of access to public records." *Id* at 101. As the prevailing party the Zinks request that the court find they are entitled to an award for all attorney fees and costs at the trial court level and for all appellate procedures associated with this case including this appeal, pursuant to RCW 42.17.340(4)<sup>37</sup> as well as attorney fees and costs under RAP 14.1 and RAP 18.1.

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<sup>37</sup> Recodified at RCW 42.56.550(4).

### ***JJ. Post Judgment Interest***

The Zinks request that the court find that they are entitled to receive Post-Judgment Interest, at the rate of 12% per annum, on any portion of the judgment affirmed by this court, from the date of the verdict on July 17, 2008 until the judgment is paid in full by the City of Mesa pursuant to state statute (RCW 4.56.110(4)) and in *Lindsay v. Pac. Topsoils*, 129 Wn. App. 672, 120 P.3d 102 (Div. I, 2005). *review denied*, 157 Wn.2d 1011 (2006).

Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered. ...

RCW 4.56.110(4)(emphasis added)

While judgments generally bear interest from the date of entry, that rule changes to the date of the verdict once a judgment has been affirmed on appeal. Accordingly, the agreed effective date of the judgment does not control the date for interest accrual after the case was affirmed on appeal.

*Lindsay v. Pac. Topsoils*, 129 Wn. App. 672, 683, 120 P.3d 102 (Div. I, 2005); *review denied*, 157 Wn.2d 1011 (2006). The trial court rendered its verdict on July 16 and 17, 2008 when it complied with the direction of this court to enter findings as to whether the City was in violation of the PRA “in every instance identified by the Zinks.” *Zink v City of Mesa*, 140 Wn. App. 328 (Div III, 2007)

## **VI. PUBLICATION**

The Zinks respectfully request the court to publish its decision on this matter as the issues addressed herein are of great public importance.

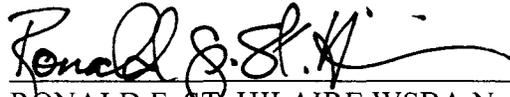
## **VII. CONCLUSION**

In addition to the new authority set out in *Yousoufian IV*, the November 7, 2008 Findings of Fact, Conclusions of Law, and Orders, issued by the trial court, are replete with errors both in determining the appropriate penalty period and the amount of the per day penalty. The penalties set by the trial court are a clear indication that the trial court started at the minimum penalty, rather than consider the entire range. This resulted in only one per day penalty in the top half of the range, despite a record replete with evidence of disparate treatment and the intentional withholding of public records. Finally, the City's continued failure to produce records conclusively establishes that the amount of penalty was insufficient and further demonstrates the City's bad faith. The Zinks respectfully request this Court to modify the penalties awarded by the trial court for wrongful denial of public records and violations of the PRA to reflect the culpability of the City of Mesa as determined by our Supreme Court in *Yousoufian IV*.

Furthermore, the Zinks respectfully request that this Court award all reasonable attorney fees and costs associated with all trial court and appellate court proceedings. The Zinks respectfully request that this court determine that they are entitled to post judgment interest from the date of the verdict until payment in full has been made. In all other issues before this court in this appeal the Zinks respectfully request the Court to modify or reverse the trial court's decisions as discussed.

Respectfully submitted this 20 day of May, 2010.

LIEBLER, CONNOR  
BERRY & ST. HILAIRE

A handwritten signature in black ink, appearing to read "Ronald F. St. Hilaire", written over a horizontal line.

RONALD F. ST. HILAIRE WSBA No. 31713  
Attorneys for Appellants Jeff and Donna Zink  
(509) 735-3581

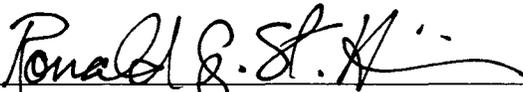
### VIII. CERTIFICATE OF SERVICE

I certify that I mailed a copy of the BRIEF OF APPELLANTS JEFF ZINK AND DONNA ZINK to the following, postage prepaid, on the 20 day of May, 2010:

Ms. Renee Townsley  
Clerk/Administrator  
Division III, Court of Appeals  
500 North Cedar Street  
Spokane, WA 99201-2159

Mr. Lee B. Kerr, Esq.  
Ker Law Group  
7025 West Grandridge Blvd, Suite A  
Kennewick, WA 99336

Mr. Ramsey E. Ramerman  
City of Everett  
2930 Wetmore Avenue  
Everett, WA 98201-4067

  
\_\_\_\_\_  
RONALD F. ST. HILAIRE, WSBA No. 31713  
Attorney for Appellants Jeff Zink and Donna Zink

## APPENDIX A

### **RCW 4.84.185**

#### **Prevailing party to receive expenses for opposing frivolous action or defense.**

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

[1991 c 70 § 1; 1987 c 212 § 201; 1983 c 127 § 1.]

#### **NOTES:**

Administrative law, frivolous petitions for judicial review: RCW 34.05.598.

### **RCW 35A.12.110**

#### **Council meetings.**

The city council and mayor shall meet regularly, at least once a month, at a place and at such times as may be designated by the city council. All final actions on resolutions and ordinances must take place within the corporate limits of the city. Special meetings may be called by the mayor or any three members of the council by written notice delivered to each member of the council at least twenty-four hours before the time specified for the proposed meeting. All actions that have heretofore been taken at special council meetings held pursuant to this section, but for which the number of hours of notice given has been at variance with requirements of RCW 42.30.080, are hereby validated. All council meetings shall be open to the public except as permitted by chapter 42.30 RCW. No ordinance or resolution shall be passed, or contract let or entered into, or bill for the payment of money allowed at any meeting not open to the public, nor at any public meeting the date of which is not fixed by ordinance, resolution, or rule, unless public notice of such meeting has been given by such notice to each local newspaper of general circulation and to each local radio or television station, as provided in RCW 42.30.080 as now or hereafter amended. Meetings of the council shall be presided over by the mayor, if present, or otherwise by the mayor pro tempore, or deputy mayor if one has been appointed, or by a member of the council selected by a majority of the council members at such meeting. Appointment of a council member to preside over the meeting shall not in any way abridge his right to vote on matters coming before the council at such meeting. In the absence of the clerk, a deputy clerk or other qualified person appointed by the clerk, the mayor, or the council, may perform the duties of

clerk at such meeting. A journal of all proceedings shall be kept, which shall be a public record.

[1993 c 199 § 3; 1979 ex.s. c 18 § 23; 1967 ex.s. c 119 § 35A.12.110.]

**NOTES:**

**Severability -- 1979 ex.s. c 18:** See note following RCW 35A.01.070.

**RCW 35A.12.140**

**Adoption of codes by reference.**

Ordinances may by reference adopt Washington state statutes and state, county, or city codes, regulations, or ordinances or any standard code of technical regulations, or portions thereof, including, for illustrative purposes but not limited to, fire codes and codes or ordinances relating to the construction of buildings, the installation of plumbing, the installation of electric wiring, health and sanitation, the slaughtering, processing, and selling of meats and meat products for human consumption, the production, pasteurizing, and sale of milk and milk products, or other subjects, together with amendments thereof or additions thereto, on the subject of the ordinance. Such Washington state statutes or codes or other codes or compilations so adopted need not be published in a newspaper as provided in RCW 35A.12.160, but the adopting ordinance shall be so published and a copy of any such adopted statute, ordinance, or code, or portion thereof, with amendments or additions, if any, in the form in which it was adopted, shall be filed in the office of the city clerk for use and examination by the public. While any such statute, code, or compilation is under consideration by the council prior to adoption, not less than one copy thereof shall be filed in the office of the city clerk for examination by the public.

[1995 c 71 § 1; 1982 c 226 § 2; 1967 ex.s. c 119 § 35A.12.140.]

**NOTES:** **Effective date -- 1982 c 226:** See note following RCW 35.21.180.

**RCW 35A.12.150**

**Ordinances -- Authentication and recording.**

The city clerk shall authenticate by his signature and record in full in a properly indexed book kept for the purpose all ordinances and resolutions adopted by the council. Such book, or copies of ordinances and resolutions, shall be available for inspection by the public at reasonable times and under reasonable conditions.

[1967 ex.s. c 119 § 35A.12.150.]

**RCW 35A.12.160**

**Publication of ordinances or summary -- Public notice of hearings and meeting agendas.**

Promptly after adoption, the text of each ordinance or a summary of the content of each ordinance shall be published at least once in the city's official newspaper.

For purposes of this section, a summary shall mean a brief description which succinctly describes the main points of the ordinance. Publication of the title of an ordinance authorizing the issuance of bonds, notes, or other evidences of indebtedness shall constitute publication of a summary of that ordinance. When the city publishes a summary, the publication shall include a statement that the full text of the ordinance will be mailed upon request.

An inadvertent mistake or omission in publishing the text or a summary of the content of an ordinance shall not render the ordinance invalid.

In addition to the requirement that a city publish the text or a summary of the content of each adopted ordinance, every city shall establish a procedure for notifying the public of upcoming hearings and the preliminary agenda for the forthcoming council meeting. Such procedure may include, but not be limited to, written notification to the city's official newspaper, publication of a notice in the official newspaper, posting of upcoming council meeting agendas, or such other processes as the city determines will satisfy the intent of this requirement.

[1994 c 273 § 15; 1988 c 168 § 7; 1987 c 400 § 3; 1985 c 469 § 42; 1967 ex.s. c 119 § 35A.12.160.]

#### **RCW 35A.21.070**

##### **Office hours prescribed by ordinance.**

All code city offices shall be kept open for the transaction of business during such days and hours as the legislative body of such city shall by ordinance prescribe.

[1967 ex.s. c 119 § 35A.21.070.]

#### **RCW 35A.21.230**

##### **Designation of official newspaper.**

Each code city shall designate an official newspaper by resolution. The newspaper shall be of general circulation in the city and have the qualifications prescribed by chapter 65.16 RCW.

[1985 c 469 § 102.]

#### **RCW 35A.33.052**

##### **Preliminary budget.**

The chief administrative officer shall prepare the preliminary budget in detail, making any revisions or addition to the reports of the department heads deemed advisable by such chief administrative officer and at least sixty days before the beginning of the city's next fiscal year he shall file it with the city clerk as the recommendation of the chief administrative officer

for the final budget. The clerk shall provide a sufficient number of copies of such preliminary budget and budget message to meet the reasonable demands of taxpayers therefor and have them available for distribution not later than six weeks before the beginning of the city's next fiscal year.

[1967 ex.s. c 119 § 35A.33.052.]

### **RCW 35A.33.060**

#### **Budget -- Notice of hearing on final.**

Immediately following the filing of the preliminary budget with the clerk, the clerk shall publish a notice once each week for two consecutive weeks stating that the preliminary budget for the ensuing fiscal year has been filed with the clerk, that a copy thereof will be furnished to any taxpayer who will call at the clerk's office therefor and that the legislative body of the city will meet on or before the first Monday of the month next preceding the beginning of the ensuing fiscal year for the purpose of fixing the final budget, designating the date, time and place of the legislative budget meeting and that any taxpayer may appear thereat and be heard for or against any part of the budget. The publication of the notice shall be made in the official newspaper of the city.

[1985 c 469 § 43; 1973 c 67 § 1; 1967 ex.s. c 119 § 35A.33.060.]

### **RCW 35A.39.010**

#### **Legislative and administrative records.**

Every code city shall keep a journal of minutes of its legislative meetings with orders, resolutions and ordinances passed, and records of the proceedings of any city department, division or commission performing quasi judicial functions as required by ordinances of the city and general laws of the state and shall keep such records open to the public as required by RCW 42.32.030 and shall keep and preserve all public records and publications or reproduce and destroy the same as provided by Title 40 RCW. Each code city may duplicate and sell copies of its ordinances at fees reasonably calculated to defray the cost of such duplication and handling.

[1995 c 21 § 2; 1967 ex.s. c 119 § 35A.39.010.]

### **RCW 42.17.251**

#### **Construction.**

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

[1992 c 139 § 2.]

### **RCW 42.17.255**

#### **Invasion of privacy, when.**

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.

#### **NOTES:**

**Intent -- 1987 c 403:** "The legislature intends to restore the law relating to the release of public records largely to that which existed prior to the Washington Supreme Court decision in *In Re Rosier*," 105 Wn.2d 606 (1986). The intent of this legislation is to make clear that: (1) Absent statutory provisions to the contrary, agencies possessing records should in responding to requests for disclosure not make any distinctions in releasing or not releasing records based upon the identity of the person or agency which requested the records, and (2) agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records. Further, to avoid unnecessary confusion, "privacy" as used in RCW 42.17.255 is intended to have the same meaning as the definition given that word by the Supreme Court in *Hearst v. Hoppe*," 90 Wn.2d 123, 135 (1978)." [1987 c 403 § 1.]

### **RCW 42.17.260**

#### **Documents and indexes to be made public.**

(7) Each agency shall establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of public records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.

### **RCW 42.17.270**

#### **Facilities for copying -- Availability of public records.**

Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person. Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate \*RCW 42.17.260(5) or other statute which exempts or prohibits disclosure of specific information or records to certain persons. Agency facilities shall be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency. Agencies shall honor requests received by mail for identifiable public records unless exempted by provisions of this chapter.

**RCW 42.17.280****Times for inspection and copying.**

Public records shall be available for inspection and copying during the customary office hours of the agency, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives: PROVIDED, That if the entity does not have customary office hours of at least thirty hours per week, the public records shall be available from nine o'clock a.m. to noon and from one o'clock p.m. to four o'clock p.m. Monday through Friday, excluding legal holidays, unless the person making the request and the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives or its representative agree on a different time.

**RCW 42.17.290****Protection of public records -- Public access.**

Agencies shall adopt and enforce reasonable rules and regulations, and the office of the secretary of the senate and the office of the chief clerk of the house of representatives shall adopt reasonable procedures allowing for the time, resource, and personnel constraints associated with legislative sessions, consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information. Nothing in this section shall relieve agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives from honoring requests received by mail for copies of identifiable public records.

If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives shall retain possession of the record, and may not destroy or erase the record until the request is resolved.

[1995 c 397 § 13; 1992 c 139 § 4; 1975 1st ex.s. c 294 § 16; 1973 c 1 § 29 (Initiative Measure No. 276, approved November 7, 1972).]

**RCW 42.17.310****Certain personal and other records exempt. (*Expires June 30, 2005.*)**

(1) The following are exempt from public inspection and copying:

(b) Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy.

(i) Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended except that a specific record shall not be exempt when publicly cited by an agency in connection with any agency action.

(4) Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.

**RCW 42.17.320**

**Prompt responses required.**

Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives. Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond by either (1) providing the record; (2) acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request; or (3) denying the public record request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, 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. In acknowledging receipt of a public record request that is unclear, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives need not respond to it. Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

[1995 c 397 § 15; 1992 c 139 § 6; 1975 1st ex.s. c 294 § 18; 1973 c 1 § 32 (Initiative Measure No. 276, approved November 7, 1972).]

**RCW 42.17.325**

**Review of agency denial.**

Whenever a state agency concludes that a public record is exempt from disclosure and denies a person opportunity to inspect or copy a public record for that reason, the person may request the attorney general to review the matter. The attorney general shall provide the person with his or her written opinion on whether the record is exempt.

Nothing in this section shall be deemed to establish an attorney-client relationship between the attorney general and a person making a request under this section.

## **RCW 42.17.340**

### **Judicial review of agency actions.**

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

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW 42.17.250 through 42.17.320 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

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

[1992 c 139 § 8; 1987 c 403 § 5; 1975 1st ex.s. c 294 § 20; 1973 c 1 § 34 (Initiative Measure No. 276, approved November 7, 1972).]

### **NOTES:**

**Intent -- Severability -- 1987 c 403:** See notes following RCW 42.17.255.

## **RCW 42.32.030**

### **Minutes.**

The minutes of all regular and special meetings except executive sessions of such boards, commissions, agencies or authorities shall be promptly recorded and such records shall be open to public inspection.

[1953 c 216 § 3.]

**NOTES:**

**Reviser's note:** RCW 42.32.010 and 42.32.020 were repealed by 1971 ex.s. c 250 § 15; later enactment, see chapter 42.30 RCW.

**RCW 42.56.030**

**Construction.**

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

[2007 c 197 § 2; 2005 c 274 § 283; 1992 c 139 § 2. Formerly RCW 42.17.251.]

**RCW 42.56.070**

**Documents and indexes to be made public.**

(7) Each agency shall establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of public records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.

**RCW 42.56.080**

**Facilities for copying -- Availability of public records.**

Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure. Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad. Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons. Agency facilities shall be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency. Agencies shall honor requests received by mail for identifiable public records unless exempted by provisions of this chapter.

[2005 c 483 § 1; 2005 c 274 § 285; 1987 c 403 § 4; 1975 1st ex.s. c 294 § 15; 1973 c 1 § 27 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.270.]

## **NOTES:**

**Reviser's note:** This section was amended by 2005 c 274 § 285 and by 2005 c 483 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Intent -- Severability -- 1987 c 403:** See notes following RCW 42.56.050.

### **RCW 42.56.090**

#### **Times for inspection and copying.**

Public records shall be available for inspection and copying during the customary office hours of the agency, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives: PROVIDED, That if the entity does not have customary office hours of at least thirty hours per week, the public records shall be available from nine o'clock a.m. to noon and from one o'clock p.m. to four o'clock p.m. Monday through Friday, excluding legal holidays, unless the person making the request and the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives or its representative agree on a different time.

[1995 c 397 § 12; 1973 c 1 § 28 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.280.]

### **RCW 42.56.100**

#### **Protection of public records -- Public access.**

Agencies shall adopt and enforce reasonable rules and regulations, and the office of the secretary of the senate and the office of the chief clerk of the house of representatives shall adopt reasonable procedures allowing for the time, resource, and personnel constraints associated with legislative sessions, consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information. Nothing in this section shall relieve agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives from honoring requests received by mail for copies of identifiable public records.

If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives shall retain possession of the record, and may not destroy or erase the record until the request is resolved.

[1995 c 397 § 13; 1992 c 139 § 4; 1975 1st ex.s. c 294 § 16; 1973 c 1 § 29 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.290.]

## **RCW 42.56.210**

### **Certain personal and other records exempt.**

- (1) Except for information described in RCW 42.56.230(3)(a) and confidential income data exempted from public inspection pursuant to RCW 84.40.020, the exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought. No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons.
- (2) Inspection or copying of any specific records exempt under the provisions of this chapter may be permitted if the superior court in the county in which the record is maintained finds, after a hearing with notice thereof to every person in interest and the agency, that the exemption of such records is clearly unnecessary to protect any individual's right of privacy or any vital governmental function.
- (3) Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.

[2005 c 274 § 402. Prior: (2006 c 302 § 11 expired July 1, 2006); (2006 c 75 § 2 expired July 1, 2006); (2006 c 8 § 111 expired July 1, 2006); (2003 1st sp.s. c 26 § 926 expired June 30, 2005); 2003 c 277 § 3; 2003 c 124 § 1; prior: 2002 c 335 § 1; 2002 c 224 § 2; 2002 c 205 § 4; 2002 c 172 § 1; prior: 2001 c 278 § 1; 2001 c 98 § 2; 2001 c 70 § 1; prior: 2000 c 134 § 3; 2000 c 56 § 1; 2000 c 6 § 5; prior: 1999 c 326 § 3; 1999 c 290 § 1; 1999 c 215 § 1; 1998 c 69 § 1; prior: 1997 c 310 § 2; 1997 c 274 § 8; 1997 c 250 § 7; 1997 c 239 § 4; 1997 c 220 § 120 (Referendum Bill No. 48, approved June 17, 1997); 1997 c 58 § 900; prior: 1996 c 305 § 2; 1996 c 253 § 302; 1996 c 191 § 88; 1996 c 80 § 1; 1995 c 267 § 6; prior: 1994 c 233 § 2; 1994 c 182 § 1; prior: 1993 c 360 § 2; 1993 c 320 § 9; 1993 c 280 § 35; prior: 1992 c 139 § 5; 1992 c 71 § 12; 1991 c 301 § 13; 1991 c 87 § 13; 1991 c 23 § 10; 1991 c 1 § 1; 1990 2nd ex.s. c 1 § 1103; 1990 c 256 § 1; prior: 1989 1st ex.s. c 9 § 407; 1989 c 352 § 7; 1989 c 279 § 23; 1989 c 238 § 1; 1989 c 205 § 20; 1989 c 189 § 3; 1989 c 11 § 12; prior: 1987 c 411 § 10; 1987 c 404 § 1; 1987 c 370 § 16; 1987 c 337 § 1; 1987 c 107 § 2; prior: 1986 c 299 § 25; 1986 c 276 § 7; 1985 c 414 § 8; 1984 c 143 § 21; 1983 c 133 § 10; 1982 c 64 § 1; 1977 ex.s. c 314 § 13; 1975-'76 2nd ex.s. c 82 § 5; 1975 1st ex.s. c 294 § 17; 1973 c 1 § 31 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.310.]

## **RCW 42.56.520**

### **Prompt responses required.**

Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives. Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond by either (1) providing the record; (2) acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request; or (3) denying the public record request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, 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. In acknowledging receipt of a public record request that is unclear, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives need not respond to it. Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

[1995 c 397 § 15; 1992 c 139 § 6; 1975 1st ex.s. c 294 § 18; 1973 c 1 § 32 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.320.]

#### **RCW 42.56.550**

##### **Judicial review of agency actions.**

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

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

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

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to

exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

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

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

[2005 c 483 § 5; 2005 c 274 § 288; 1992 c 139 § 8; 1987 c 403 § 5; 1975 1st ex.s. c 294 § 20; 1973 c 1 § 34 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.340.]

**NOTES:**

**Reviser's note:** This section was amended by 2005 c 274 § 288 and by 2005 c 483 § 5, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Intent -- Severability -- 1987 c 403:** See notes following RCW 42.56.050.

## **APPENDIX B**

### **RAP RULE 14.1 COSTS GENERALLY**

(a) When Allowed. The appellate court determines costs in all cases after the filing of a decision terminating review, except as provided in rule 18.2 relating to voluntary withdrawal of review.

(b) Which Court Determines and Awards Costs. Costs on review are determined and awarded by the appellate court which accepts review and makes the final determination of the case.

(c) Who Determines and Awards Costs. If the court determines costs in its opinion or order, a commissioner or clerk will award costs in accordance with that determination. In all other circumstances, a commissioner or clerk determines and awards costs by ruling as provided in rule 14.6(a). A party may object to the ruling of a commissioner or clerk as provided in rule 14.6(b).

(d) Who Is Entitled to Costs. Rule 14.2 defines who is entitled to costs.

(e) What Expenses Are Allowed as Costs. Rule 14.3 defines the expenses which may be allowed as costs.

(f) How Costs Are Claimed--Objections. A party claims costs by filing a cost bill in the manner provided in rule 14.4. A party objects to claimed costs in the manner provided in rule 14.5.

#### **References**

Rule 18.1, Attorney Fees and Expenses.

### **RAP RULE 18.1 ATTORNEY FEES AND EXPENSES**

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court. The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

(d) Affidavit of Fees and Expenses. Within 10 days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses, the party must serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.

(e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

(f) Commissioner or Clerk Awards Fees and Expenses. A commissioner or clerk will determine the amount of the award, and will notify the parties. The determination will be made without a hearing, unless one is requested by the commissioner or clerk.

(g) Objection to Award. A party may object to the commissioner's or clerk's award only by motion to the appellate court in the same manner and within the same time as provided in rule 17.7 for objections to any other rulings of a commissioner or clerk.

(h) Transmitting Judgment on Award. The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses may be enforced in the trial court.

(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals,

and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.

[Amended to become effective December 29, 1998; December 5, 2002; September 1, 2003; September 1, 2006.]

## **APPENDIX C**

### **Washington Administrative Code 44-14-04004(4)(b)(ii)**

Brief explanation of withholding. When an agency claims an exemption for an entire record or portion of one, it must inform the requestor of the statutory exemption and provide a brief explanation of how the exemption applies to the record or portion withheld. RCW 42.17.310(4)/42.56.210(3). The brief explanation should cite the statute the agency claims grants an exemption from disclosure. The brief explanation should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper. Nonspecific claims of exemption such as "proprietary" or "privacy" are insufficient.

One way to properly provide a brief explanation of the withheld record or redaction is for the agency to provide a withholding index. It identifies the type of record, its date and number of pages, and the author or recipient of the record (unless their identity is exempt).<sup>7</sup> The withholding index need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly invoked the exemption.

### **Superior Court Civil Rule 12(h)(3)**

Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

### **Rules of Professional Conduct 1.6**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

**APPENDIX D**

<b>Summary of Public Records Requests</b>		
<b>Documents Received</b>		
<b>Request Date</b>	<b>Document Requested</b>	<b>Received</b>
August 29, 2002	Complaint against 109 N. Rowell Avenue	November 27, 2002
October 10, 2002	Clerks memos and notes on Zink activity	June 24, 2002
November 24, 2002	BOA rules and regulations adopted on November 13, 2002	August 8, 2003
November 24, 2002	BOA meeting minutes of November 13, 2002	August 8, 2003
November 24, 2002	BOA tape of the November 13, 2002 meeting	September 4, 2003
November 27, 2002	Un-redacted copies of the twenty-on code violation letters	April 7, 2009
December 11, 2002	Ordinance 01-05 - Public Hearing Notice Requirements	March 3, 2003
December 11, 2002	Ordinance 03-02 - Setting hours for City Hall	January 24, 2003
December 11, 2002	Resolution 2003-01 - Designating the Franklin County Graphic as the City's Official Newspaper for Publication of all required Legal Notices	January 24, 2003
December 11, 2002	Resolution 2003-02 Adopting Procedures for Publication of Ordinances and Posting Notices	February 14, 2003
January 9, 2003	Resignation letters of Leo Murphy and Linda Erickson	November 17, 2008
January 28, 2003	Correspondence from Municipal Research	April 16, 2009
February 24, 2003	Ordinance 01-02	March 17, 2003
February 24, 2003	BOA rules and regulations adopted by the board on December 5, 2002	April 4, 2003
February 24, 2003	Water meter readings for December 2002 and February 2003	August 29, 2005
February 24, 2003	Un-redacted copies of the phone logs	November 17, 2008
February 24, 2003	Un-redacted copies of some of the eighteen (18) residential files	April 7, 2009
March 3, 2003	Un-redacted copies of some of the eleven (11) residential files	April 7, 2009
March 3, 2003	Access to the file of requests, delays, denials, and replies	May 30, 2003

March 10, 2003	Ordinance 03-03	April 4, 2003
March 10, 2003	Draft minutes of the March 5, 2003 BOA meeting	November 14, 2008
March 10, 2003	BOA resignation letters of Rick Hopkins and Devi Tate	April 15, 2003
March 10, 2003	February 13, 2003 and March 4, 2003 City Council meeting minutes	April 15, 2003
March 19, 2003	Correspondence between the City of Mesa and Municipal Research	April 16, 2009
April 4, 2003	Cade Scott's reply to complaint	November 17, 2008
April 7, 2003	Complaint against Cade Scott	May 30, 2003
April 7, 2003	City Council Packet for April 10, 2003	June 3, 2003
April 7, 2003	Vouchers/Bills for the April 10, 2003 City Council meeting	June 3, 2003
April 11, 2003	Access to the City Minute Book	May 30, 2003
April 14, 2003	Maintenance Logs	September 29, 2005
April 14, 2003	Minutes of the March 13, 2003 and March 27, 2003 Council meetings	June 3, 2003
April 14, 2003	Resolution 2003-03 – Copy Fee Schedule	May 30, 2003
April 14, 2003	Notes and memos kept on Ms. Zink from August 8, 2002 to March 14, 2003	June 29, 2005
April 25, 2003	Draft Dog Ordinance	June 3, 2003
April 25, 2003	June 14, 2001 Council meeting tape	June 3, 2003
<b>Documents Still Outstanding</b>		
February 24, 2003	Time card of Teresa Standridge	
January 28, 2003	Correspondence between the City of Mesa and the City Attorney, and/or a privilege log showing which documents were withheld in their entirety, the exemption for each document withheld, and a brief explanation how the exemption applies to the withheld document.	
February 24, 2003	Un-redacted copies of some of the eighteen (18) residential address files	
March 3, 2003	Un-redacted copies of some of the eleven (11) residential address files	
March 10, 2003	BOA meeting minutes approved and signed by the BOA on March 5, 2003	
March 18, 2003	Un-redacted copy of the complaint from Steve Sharp	
March 19, 2003	Correspondence between the City of Mesa and the City Attorney, and/or a privilege log showing which documents were withheld in their entirety, the exemption for each document withheld, and a brief explanation how the exemption applies to the withheld document.	