

No. 275965
[Consolidated with No. 281124]

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SEP 03 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

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IN AND FOR THE STATE OF WASHINGTON

JEFF and DONNA ZINK,

Appellants/Cross Respondents,

v.

CITY OF MESA, a Washington Municipal Corporation,

Respondent/Cross-Appellant.

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

CORRECTED BRIEF OF RESPONDENT/CROSS APPELLANT

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1. INTRODUCTION

This case shows the Public Records Act at its best and at its worst. The City of Mesa (City or Mesa) has violated the PRA and has a judgment against it for \$245,914.86. The Zinks are seeking a significantly higher judgment and the imposition of daily penalties for more than 22,000 days. The current judgment is equal to approximately 25% of Mesa's annual budget and will cost every man, woman and child in Mesa over \$500 each.

This case shows the PRA at its best. The PRA is meant to be used by requesters to uncover and deter government abuse. The Zinks were able to use the PRA to expose an illegal meeting where the Mesa Board of Appeals terminated the Zinks' building permit. The secretary of the Board of Appeals, a third-party contractor, failed to disclose the tape recording of this illegal meeting for almost nine months, causing the City Clerk to tell the Zinks that there was no tape. But eventually the tape was located and disclosed, forcing the City to concede that the meeting had been illegal.¹

This case also shows the PRA at its worst. The PRA is not meant to be used by requesters as a tool to punish government with burdensome requests at the expense to taxpayers. This case demonstrates how an aggrieved requester can exact a pound of flesh in retaliation for a government error. After the Zinks' permit was terminated and their request for the tape recording of the board of appeals meeting was denied,

¹ This illegal meeting is the subject of the first published case between the parties, *Zink v. City of Mesa*, 137 Wn. App. 271, 152 P.3d 1044 (2007).

the Zinks employed the PRA to make a large number of PRA requests² to Mesa during the next nine months until the tape was finally produced. These requests placed a severe strain on the City's very limited staff resources. This case also shows how the complicated rules of the PRA, coupled with a high volume of requests, can lead to numerous mistakes that hurt transparency and have significant monetary consequences to taxpayers.

This Court must now take both aspects of this PRA dispute into account to give the trial court guidance on how Mesa and its taxpayers should be penalized for this misconduct of failing to disclose a crucial public record and for the mistakes caused in part by an excessive use of the PRA.

Part of the Court's task is easy. The parties agree that the trial court applied the wrong legal protocol for determining the daily penalty amount. Mesa and the Zinks agree that the Supreme Court's holding in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010) (*Yousoufian 2010*) should be used to determine the proper daily penalties. In *Yousoufian 2010*, the Supreme Court rejected the court of appeal's negligence-based standard and instead adopted a list of aggravating and mitigating factors. The trial court in the case at bar determined Mesa's penalties using this rejected, negligence-based standard.

² The number of requests is disputed, but is somewhere between 68 and 172.

The parties also agree that the trial court erred in determining the proper number of days to impose daily penalties by excluding days between the trial court's original ruling in favor of Mesa and this Court's August 2007 decision reversing that ruling.

Much of the Court's task is anything but easy. The parties disagree on how these errors should be corrected. Guided by the Supreme Court's decision in *Yousoufian 2010*, where the Supreme Court stated, "[i]t is generally not the function of an appellate court to set the penalties,"³ Mesa asks this Court to remand the case back to the trial court for a new hearing. In that hearing, Mesa should be allowed to supplement the record with evidence related to any mitigating factors and present new arguments regarding the proper amount of the daily penalties and the proper number of days those penalties should be imposed. The Zinks ask the Court to ignore the Supreme Court's cautions and set the daily penalties itself.

While remand is necessary, Mesa also asks this Court to rule on numerous legal issues that stem from the trial court's first ruling that will arise on remand if they are not addressed in this appeal.

The PRA is an indispensable tool that citizens must have to ensure that governments are using their tax dollars in a lawful manner. But its penalty provisions should not be used to decimate a city based on the actions of a third-party contractor who fails to produce a record that would

³ *Yousoufian 2010*, 168 Wn.2d at 469.

have exposed his error. Thus, Mesa asks the Court to allow the City to present its case to the trial court on remand regarding why a more reasonable amount of penalties is appropriate.

2. ASSIGNMENTS OF ERROR

2.1. Assignments of Error regarding **Complaint Against 109 N. Rowell**

2.1.1. Assignment 1: Finding of Fact 9 (CP 111)

2.1.2. Assignment 2: Conclusions of Law 13, 14 and 15 (CP 143)

2.1.3. Issue 1 pertaining to 2.1 Assignments of Error: Did the trial court err in imposing a daily penalty when Mesa had fully complied with this request prior to the Zinks filing their lawsuit? (Addressed in section 5.4, *infra*.)

2.1.4. Issue 2 pertaining to 2.1 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra*.)

2.1.5. Issue 3 pertaining to 2.1 Assignments of Error: Did the trial court err in imposing an increased daily penalty based on Mesa's reliance on advice from a third party contractor? (Addressed in sections 5.2.4, *infra*.)

2.2. Assignments of Error regarding **Clerk's Memos and Notes**

2.2.1. Assignment 3: Finding of Fact 20 (CP 113)

2.2.2. Assignment 4: Finding of Fact 21 (CP 113)

2.2.3. Assignment 5: Finding of Fact 24 (CP 113)

2.2.4. Assignment 6: Finding of Fact 25 (CP 113)

2.2.5. Assignment 7: Conclusions of Law 18, 20, 21, 23 (CP 144)

2.2.6. Issue 1 pertaining to 2.2 Assignments of Error: Where the City's error in withholding both sets of notes was based on a common legal error, did the trial court err in failing to combine the two requests when imposing daily penalty? (Addressed in section 5.5.4, *infra*.)

2.2.7. Issue 2 pertaining to 2.2 Assignments of Error: Where the second request for notes was made on the same day as other requests, did the trial court err in failing to combine those requests when imposing daily penalty? (Addressed in section 5.5.4, *infra*.)

2.3. Assignments of Error regarding **Board of Appeals November 13, 2002 Meeting Minutes, Tape, and Rules and Regulations**

2.3.1. Assignment 8: Finding of Fact 37 (CP 114)

2.3.2. Assignment 9: Finding of Fact 38 (CP 115)

2.3.3. Assignment 10: Conclusions of Law 30 & 31 (CP 145-46)

2.3.4. Issue 1 pertaining to 2.3 Assignments of Error: Did the trial court err in holding that the conduct of a third-party contractor warranted an increased daily penalty for Mesa? (Addressed in section 5.2.4, *infra*.)

2.3.5. Issue 2 pertaining to 2.3 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra*.)

2.4. Assignments of Error regarding **Twenty-One Code Violation Letters**

2.4.1. Assignment 11: Finding of Fact 45 (CP 115)

2.4.2. Assignment 12: Finding of Fact 50 (CP 116)

2.4.3. Assignment 13: Finding of Fact 51 (CP 116)

2.4.4. Assignment 14: Conclusions of Law 33, 34, 35, 36, 37, 38
(CP 146)

2.4.5. Issue 1 pertaining to 2.4 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra*.)

2.4.6. Issue 2 pertaining to 2.4 Assignments of Error: Did the trial court err in not combining this request with other requests where Mesa's redactions were based on a common legal error? (Addressed in section 5.5.4, *infra*.)

2.5. Assignments of Error regarding **Resignation Letters of Leo Murphy and Linda Erickson**

2.5.1. Assignment 15: Finding of Fact 56 (CP 117)

2.5.2. Assignment 16: Finding of Fact 57 (CP 117)

2.5.3. Assignment 17: Conclusions of Law 40, 41, 42 (CP 147)

2.5.4. Issue 1 pertaining to 2.5 Assignments of Error: Did the trial court err in not combining this request with other requests where Mesa's redactions were based on a common legal error? (Addressed in section 5.5.4, *infra*.)

2.6. Assignments of Error regarding **Correspondence Between City of Mesa, City Attorney and MRSC**

2.6.1. Assignment 18: Finding of Fact 67 (CP 118)

2.6.2. Assignment 19: Finding of Fact 68 (CP 118-19)

2.6.3. Assignment 20: Conclusions of Law 47, 48, 49 (CP 147-48)

2.6.4. Issue 1 pertaining to 2.6 Assignments of Error: To the extent that the court's findings implies that separate daily penalties for the single request for correspondence with MRSC and the City Attorney, did the trial court err in not combining these requests? (Addressed in section 5.5.4, *infra*.)

2.7. Assignments of Error regarding **Board of Appeals Rules and Regulations Adopted December 5, 2002**

2.7.1. Assignment 21: Finding of Fact 79 (CP 120)

2.7.2. Assignment 22: Conclusions of Law 249, 52, 53 (CP 148-49)

2.7.3. Issue 1 pertaining to 2.7 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra*.)

2.7.4. Issue 2 pertaining to 2.7 Assignments of Error: Did the trial court err in imposing a daily penalty when Mesa had fully complied with this request prior to the Zinks filing their lawsuit? (Addressed in section 5.4, *infra*.)

2.7.5. Issue 3 pertaining to 2.7 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.8. Assignments of Error regarding **Time Card of Teresa Standridge**

2.8.1. Assignment 23: Finding of Fact 84 (CP 121)

2.8.2. Assignment 24: Finding of Fact 85 (CP 121)

2.8.3. Assignment 25: Conclusions of Law 55, 56, 57 (CP 149)

2.8.4. Issue 1 pertaining to 2.8 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.9. Assignments of Error regarding **Water Meter Readings**

2.9.1. Assignment 26: Finding of Fact 91 (CP 121)

2.9.2. Assignment 27: Finding of Fact 92 (CP 122)

2.9.3. Assignment 28: Conclusions of Law 59, 60, 61 (CP 149-50)

2.9.4. Issue 1 pertaining to 2.9 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra*.)

2.9.5. Issue 2 pertaining to 2.9 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.10. Assignments of Error regarding **Phone/Fax Log**

2.10.1. Assignment 29: Finding of Fact 97 (CP 122)

2.10.2. Assignment 30: Finding of Fact 98 (CP 122)

2.10.3. Assignment 31: Conclusions of Law 63, 64, 65 (CP 150)

2.10.4. Issue 1 pertaining to 2.10 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.11. Assignments of Error regarding **Eighteen Residential Address Files**

2.11.1. Assignment 32: Finding of Fact 105 (CP 123)

2.11.2. Assignment 33: Finding of Fact 107 (CP 124)

2.11.3. Assignment 34: Finding of Fact 108 (CP 124)

2.11.4. Assignment 35: Conclusions of Law 67, 68, 69 (CP 150-51)

2.11.5. Issue 1 pertaining to 2.11 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra*.)

2.11.6. Issue 2 pertaining to 2.11 Assignments of Error: Did the trial court err in not combining this request with other requests where Mesa's redactions were based on a common legal error? (Addressed in section 5.5.4, *infra*.)

2.11.7. Issue 3 pertaining to 2.11 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.11.8. Issue 4 pertaining to 2.11 Assignments of Error: Where Mesa was acting on the advice of counsel when it imposed restrictions on the Zinks, where the trial court originally ruled that this was permissible under RCW 42.56.100/42.17.290, and where Mesa would have treated anyone else similarly situated to the Zinks who made a high volume of requests the same as it treated the Zinks, did the trial court err in holding this action justified an increased penalty? (Addressed in sections 5.2.3 and 5.2.4, *infra*.)

2.12. Assignments of Error regarding **Eleven Residential Files**

2.12.1. Assignment 36: Finding of Fact 115 (CP 125)

2.12.2. Assignment 37: Finding of Fact 117 (CP 125)

2.12.3. Assignment 38: Finding of Fact 118 (CP 125)

2.12.4. Assignment 39: Conclusions of Law 71, 72, 73 (CP 151)

2.12.5. Issue 1 pertaining to 2.12 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra*.)

2.12.6. Issue 2 pertaining to 2.12 Assignments of Error: Did the trial court err in not combining this request with other requests where Mesa's redactions were based on a common legal error? (Addressed in section 5.5.4, *infra*.)

2.12.7. Issue 3 pertaining to 2.12 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.12.8. Issue 4 pertaining to 2.12 Assignments of Error: Where Mesa was acting on the advice of counsel when it imposed restrictions on the Zinks, where the trial court originally ruled that this was permissible under RCW 42.56.100/42.17.290, and where Mesa would have treated anyone else similarly situated to the Zinks who made a high volume of requests the same as it treated the Zinks, did the trial court err in holding this action justified an increased penalty? (Addressed in sections 5.2.3 and 5.2.4, *infra*.)

2.13. Assignments of Error regarding **Complaint from Steve Sharp**

2.13.1. Assignment 40: Finding of Fact 122 (CP 126)

2.13.2. Assignment 41: Finding of Fact 123 (CP 126)

2.13.3. Assignment 42: Conclusions of Law 75, 76, 77 (CP 152)

2.13.4. Issue 1 pertaining to 2.13 Assignments of Error: Did the trial court err in not combining this request with other requests where Mesa's redactions were based on a common legal error? (Addressed in section 5.5.4, *infra*.)

2.14. Assignments of Error regarding **Cade Scott Reply to Complaint**

2.14.1. Assignment 43: Finding of Fact 127 (CP 126)

2.14.2. Assignment 44: Finding of Fact 128 (CP 127)

2.14.3. Assignment 45: Finding of Fact 132 (CP 127)

2.14.4. Assignment 46: Finding of Fact 133 (CP 127)

2.14.5. Assignment 47: Conclusions of Law 79, 80, 81 (CP 152)

2.14.6. Issue 1 pertaining to 2.14 Assignments of Error: Where Mesa was acting on the advice of counsel when it imposed restrictions on

the Zinks, where the trial court originally ruled that this was permissible under RCW 42.56.100/42.17.290, and where Mesa would have treated anyone else similarly situated to the Zinks who made a high volume of requests the same as it treated the Zinks, did the trial court err in holding this action justified an increased penalty? (Addressed in sections 5.2.3 and 5.2.4, *infra*.)

2.14.7. Issue 2 pertaining to 2.14 Assignments of Error: Did the trial court err in not combining this request with other requests where Mesa's redactions were based on a common legal error? (Addressed in section 5.5.4, *infra*.)

2.15. Assignments of Error regarding **April 10, 2003 Council Packet**

2.15.1. Assignment 48: Finding of Fact 139 (CP 128)

2.15.2. Assignment 49: Conclusions of Law 83, 84, 85 (CP 153)

2.15.3. Issue 1 pertaining to 2.15 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra*.)

2.15.4. Issue 2 pertaining to 2.15 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.16. Assignments of Error regarding **April 10, 2003 Vouchers and Bills**

2.16.1. Assignment 50: Finding of Fact 145 (CP 129)

2.16.2. Assignment 51: Conclusions of Law 87, 88, 89 (CP 153-54)

2.16.3. Issue 1 pertaining to 2.16 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra*.)

2.16.4. Issue 2 pertaining to 2.16 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.17. Assignments of Error regarding **City of Mesa Council Minute Book**

2.17.1. Assignment 52: Finding of Fact 149 (CP 129)

2.17.2. Assignment 53: Finding of Fact 150 (CP 230)

2.17.3. Assignment 54: Conclusions of Law 90, 91, 92, 93 (CP 154)

2.17.4. Issue 1 pertaining to 2.17 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra*.)

2.17.5. Issue 2 pertaining to 2.17 Assignments of Error: Where Mesa was acting on the advice of counsel when it imposed restrictions on the Zinks, where the trial court originally ruled that this was permissible under RCW 42.56.100/42.17.290, and where Mesa would have treated anyone else similarly situated to the Zinks who made a high volume of

requests the same as it treated the Zinks, did the trial court err in holding this action justified an increased penalty? (Addressed in sections 5.2.3 and 5.2.4, *infra*.)

2.18. Assignments of Error regarding **Minutes of the March 13, 2003, and March 17, 2003 Council Meetings**

2.18.1. Assignment 55: Finding of Fact 156 (CP 130)

2.18.2. Assignment 56: Conclusions of Law 95, 96, 97 (CP 154-55)

2.18.3. Issue 1 pertaining to 2.18 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.19. Assignments of Error regarding **Complaint Against Cade Scott**

2.19.1. Assignment 57: Finding of Fact 161 (CP 131)

2.19.2. Assignment 58: Conclusions of Law 99, 100, 101 (CP 155)

2.19.3. Issue 1 pertaining to 2.19 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.20. Assignments of Error regarding **Ordinance 01-05**

2.20.1. Assignment 59: Finding of Fact 183 (CP 133-34)

2.20.2. Assignment 60: Conclusions of Law 106, 107, 108 (CP 156)

2.20.3. Issue 1 pertaining to 2.20 Assignments of Error: Did the trial court err in imposing a daily penalty when Mesa had fully complied

with this request prior to the Zinks filing their lawsuit? (Addressed in section 5.4, *infra*.)

2.20.4. Issue 2 pertaining to 2.20 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.21. **Assignments of Error regarding Files of Requests Delays Denials and Replies**

2.21.1. Assignment 61: Finding of Fact 189 (CP 134)

2.21.2. Assignment 62: Finding of Fact 191 (CP 134)

2.21.3. Assignment 63: Finding of Fact 192 (CP 135)

2.21.4. Assignment 64: Conclusions of Law 116, 117, 118, 119, 120 (CP 157-58)

2.21.5. Issue 1 pertaining to 2.21 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra*.)

2.21.6. Issue 2 pertaining to 2.21 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.21.7. Issue 3 pertaining to 2.21 Assignments of Error: Where the requested records were records the Zinks either sent to Mesa or received from Mesa, and therefore would already have been in the Zinks' possession, did the trial court err in finding that the Zinks could maintain an action under the PRA? (Addressed in section 5.4, *infra*.)

2.21.8. Issue 4 pertaining to 2.21 Assignments of Error: Where Mesa was acting on the advice of counsel when it imposed restrictions on the Zinks, where the trial court originally ruled that this was permissible under RCW 42.56.100/42.17.290, and where Mesa would have treated anyone else similarly situated to the Zinks who made a high volume of requests the same as it treated the Zinks, did the trial court err in holding this action justified an increased penalty? (Addressed in sections 5.2.3 and 5.2.4, *infra*.)

2.22. Assignments of Error regarding **BOA Signed Minutes of the October 2002, December 2002, and January 2003 Meeting**

2.22.1. Assignment 65: Finding of Fact 201 (CP 136)

2.22.2. Assignment 66: Conclusions of Law 122, 123, 124
(CP 158)

2.22.3. Issue 1 pertaining to 2.22 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra*.)

2.22.4. Issue 2 pertaining to 2.22 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.22.5. Issue 3 pertaining to 2.22 Assignments of Error: Did the trial court err in imposing a daily penalty when Mesa had fully complied with this request prior to the Zinks filing their lawsuit? (Addressed in section 5.4, *infra*.)

2.23. Assignments of Error regarding **Minutes of the March 5, 2003 BOA Meeting**

2.23.1. Assignment 67: Finding of Fact 207 (CP 136)

2.23.2. Assignment 68: Order 5 (CP 164)

2.23.3. Assignment 69: Conclusions of Law 9, 127 (CP 143, 159)

2.23.4. Issue 1 pertaining to 2.23 Assignments of Error: Did the trial court erred in finding that Mesa had any duty to produce a record that did not exist when the request was made? (Addressed in section 5.8, *infra.*)

2.23.5. Issue 2 pertaining to 2.23 Assignments of Error: Did the trial court erred in finding that the PRA authorized the court to order Mesa to comply with some other law and ordering Mesa to prepare minutes pursuant to that law when no mandamus action had been filed? (Addressed in section 5.8, *infra.*)

2.24. Assignments of Error regarding **Minutes of the February 13, 2003 and March 4, 2003 Council Meetings**

2.24.1. Assignment 70: Finding of Fact 215 (CP 138)

2.24.2. Assignment 71: Conclusions of Law 130, 131, 132 (CP 159)

2.24.3. Issue 1 pertaining to 2.24 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra.*)

2.24.4. Issue 2 pertaining to 2.24 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.24.5. Issue 3 pertaining to 2.24 Assignments of Error: Did the trial court err in imposing a daily penalty when Mesa had fully complied with this request prior to the Zinks filing their lawsuit? (Addressed in section 5.4, *infra*.)

2.25. Assignments of Error regarding **Resignation Letters of Rick Hopkins and Devi Tate**

2.25.1. Assignment 72: Finding of Fact 223 (CP 139)

2.25.2. Assignment 73: Conclusions of Law 134, 135, 136
(CP 160)

2.25.3. Issue 1 pertaining to 2.25 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra*.)

2.25.4. Issue 2 pertaining to 2.25 Assignments of Error: Did the trial court err in imposing an increased daily penalty based on Mesa's reliance on advice from a third party contractor? (Addressed in sections 5.2.4, *infra*.)

2.25.5. Issue 3 pertaining to 2.25 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.25.6. Issue 4 pertaining to 2.25 Assignments of Error: Did the trial court err in imposing a daily penalty when Mesa had fully complied with this request prior to the Zinks filing their lawsuit? (Addressed in section 5.4, *infra*.)

2.26. Assignments of Error regarding **Resolution 2003-03**

2.26.1. Assignment 74: Finding of Fact 229 (CP 139)

2.26.2. Assignment 75: Conclusions of Law 138, 139, 140
(CP 160)

2.26.3. Issue 1 pertaining to 2.26 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.27. Assignments of Error regarding **Maintenance Logs**

2.27.1. Assignment 76: Finding of Fact 233 (CP 140)

2.27.2. Assignment 77: Finding of Fact 234 (CP 140)

2.27.3. Assignment 78: Conclusions of Law 142, 143, 144
(CP 161)

2.27.4. Issue 1 pertaining to 2.27 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra*.)

2.27.5. Issue 2 pertaining to 2.27 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.28. Assignments of Error regarding **June 14, 2001 Council Meeting Tape**

2.28.1. Assignment 79: Finding of Fact 239 (CP 141)

2.28.2. Assignment 80: Conclusions of Law 146, 147, 148

(CP 161)

2.28.3. Issue 1 pertaining to 2.28 Assignments of Error: Did the trial court err in imposing a daily penalty that exceeds the minimum amount without considering mitigating factors? (Addressed in sections 5.1 and 5.2, *infra*.)

2.28.4. Issue 2 pertaining to 2.28 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.29. Assignments of Error regarding **Draft Dog Ordinance**

2.29.1. Assignment 81: Finding of Fact 244 (CP 141)

2.29.2. Assignment 82: Conclusions of Law 150, 151, 152

(CP 162)

2.29.3. Issue 1 pertaining to 2.29 Assignments of Error: Did the trial court err in not combining this request with other requests that were made on the same day as this request? (Addressed in section 5.5.4, *infra*.)

2.30. Assignments of Error regarding **PRA policies**

2.30.1. Assignment 83: Finding of Fact 247 (CP 142)

2.30.2. Assignment 84: Conclusions of Law 5, 8, 9 (CP 142-43)

2.30.3. Issue 1 pertaining to 2.30 Assignments of Error: Did the trial court err when it held that Mesa could not take reasonable actions to

prevent the excessive interference with its other essential functions without having previously adopted rules to address an unforeseen situation? (Addressed in section 5.2.3, *infra*.)

2.30.4. Issue 2 pertaining to 2.30 Assignments of Error: Where Mesa was acting on the advice of counsel when it imposed restrictions on the Zinks, where the trial court originally ruled that this was permissible under RCW 42.56.100/42.17.290, and where Mesa would have treated anyone else similarly situated to the Zinks who made a high volume of requests the same as it treated the Zinks, did the trial court err in holding this action justified an increased penalty? (Addressed in sections 5.2.3 and 5.2.4, *infra*.)

2.31. Assignments of Error regarding **application of 2007 *Yousoufian* opinion**

2.31.1. Assignment 85: Conclusion of Law 7 (CP 142)

2.31.2. Issue 1 pertaining to 2.31 Assignment of Error: Should penalties be determined based on the Supreme Court's 2010 opinion in *Yousoufian v. Office of Ron Sims*? (Addressed in section 5.1, *infra*.)

2.32. Assignments of Error regarding Penalty Amounts

2.32.1. Assignment 86: Orders 9, 10, 11(CP 165)

2.32.2. Issue 1 pertaining to 2.32 Assignments of Error: Should penalties and costs be based on the Supreme Court's 2010 opinion in *Yousoufian v. Office of Ron Sims*? (Addressed in section 5.1, *infra*.)

3. STATEMENT OF THE CASE

3.1. A Note on the Scope of the Issues Covered on this Appeal

While a full review of the extensive factual record will be essential for the proper determination of the daily penalties in this case, the parties agree that the trial court's current penalty awards must be thrown out because the trial court applied the wrong legal standard. See *infra*, section 5.1; Zinks' Br. at 71.

This requires the Court to remand this case to the trial court for a new hearing, with the entry of new findings of fact and conclusions of law after Mesa is allowed to supplement the record with additional evidence relevant to these new standards and make new arguments regarding those standards. Accordingly, this brief will not address whether the trial court's now irrelevant findings of fact are supported by substantial evidence in this case or whether any particular daily penalty amount is warranted. Instead, this brief will focus on legal issues that will arise on remand and thus should be addressed in this appeal. As a result of this limitation, the following statement of the case will be limited to facts relevant to those legal issues.

3.2. *Zink v. City of Mesa*, 140 Wn. App. 328, 166 P.3d 738 (2007).

This Court has previously issued two published opinions related to the controversy between the Zinks and Mesa. The Court first issued its opinion in *Zink v. City of Mesa*, 137 Wn. App. 271, 152 P.3d 1044 (2007) (*Zink I*), which dealt with Land Use Petition Act and Open Public Meetings Act claims related to November 13, 2002 Board of Appeals

meeting. The Court then issued its earlier opinion in this case, *Zink v. City of Mesa*, 140 Wn. App. 328, 166 P.3d 738 (2007) (*Zink II*), relating to the Zinks' PRA claims. In *Zink II*, the Court summarized the facts and procedures in this case, which are re-printed below. After that summary, this brief will provide an overview of the procedures in this case since this Court issued its opinion in *Zink II*.

3.2.1. Factual Summary in *Zink II*.

This action had its beginnings in August 2002 when the City decided to "expire" a building permit it had issued to the Zinks to repair and remodel their fire damaged home. In support of its decision, the City cited neighbors' complaints about the home's exterior. The Zinks appealed to the City of Mesa Board of Appeals. They also began filing disclosure requests for public documents held by the City. The requests, by the City's count, totaled 172 over the period beginning July 30, 2002 and ending January 31, 2005.

Many of the Zinks' requests were linked to the decision on their building permit. In addition, some requests related to their self-described "watchdog type" role in the City. Clerk's Paper (CP) at 343. Ms. Zink is both a former councilwoman and a former mayor of the City. She stated in a declaration that "[m]y husband and I have been asking for records to investigate several complaints we have received from other Mesa residents.... Many of the residents are non-English speaking and many do not know their rights." CP at 343. Ms. Zink later testified it was her impression that these watch-dog activities generated the City's alleged resistance to filling her public record requests.

Zink II, 140 Wn. App. at 333-34.

3.2.2. Procedural Summary in *Zink II*.

On April 30, 2003, the Zinks filed this action against the City. They alleged the City wrongfully denied or delayed many of their requests for access to and copies

of public records maintained by the City. They further alleged the City wrongfully limited the time in which they could view public records and charged them excessive amounts for copies. They sought a court order compelling the City to allow them to view the public records it had wrongfully withheld from them and to provide the Zinks copies of the documents at no more than the statutory maximum charge. They also asked for penalties of \$100 for each day they were denied their rights under the PDA, as well as costs and reasonable attorney fees.

On February 27, 2004, the Zinks filed a motion under former RCW 42.17.340 [42.56.550] for an order to show cause why the court should not enter findings granting them the relief requested in their complaint. Ms. Zink specifically argued in the show cause motion that the City had violated RCW 42.17.250 through .320 [title 42.56 RCW] by failing to respond to the Zinks' requests within five days; failing to provide the records within the time the City in its responses stated that it would; causing unreasonable delays in record requests; wrongfully denying record requests; wrongfully redacting portions of records produced; failing to specifically state the bases for the City's denials of certain requests; charging excessive amounts for copying; and limiting the time in which the Zinks could view the public records to only one hour per work day.

At the hearing on the show cause motion, the trial court heard testimony from Jeff and Donna Zink, Anita Zink, City Clerk Teresa Standridge and Assistant City Clerk Carolyn Stephenson. On June 22, 2005, the court entered findings, conclusions, and an order denying the motion. Except in three instances, the court did not make specific findings on the numerous violations of the PDA alleged by the Zinks. Instead, it entered a general finding that the City had "more than substantially complied" with all the requests. CP at 31. It concluded that there was a limit to the number of requests an individual can make to an agency, and it was a "practical impossibility" for the City to strictly comply with the Zinks' requests because of the sheer number of those requests and the City's limited manpower. CP at 32. The court further concluded that the Zinks' public record requests "amounted to unlawful harassment," and that the City did not engage in disparate treatment of the Zinks. CP at 30.

Zink II, 140 Wn. App. at 334-35 (footnote omitted, alterations added).

On the issue of substantial compliance, the trial court ruled:

While the court concluded that the City acted reasonably in responding to the Zinks, and that it was a “practical impossibility for the City of Mesa to strictly comply with Plaintiff’s public disclosure requests due to the number of requests and limited manpower,” it entered no findings as to the City’s procedures, or lack thereof, to assure compliance. CP at 32. Nor did it determine whether the City had met its burden of showing that any of the documents sought by the Zinks were exempt from disclosure.

Indeed, the trial court in its oral opinion agreed that the City’s compliance may have been “short of total ... hundred percent strict compliance with the act.” Report of Proceedings (RP) at 543. But it concluded that, “given the uniqueness of this situation, the very, very limited number of personnel hours available in [the] city clerk’s office, that ... some allowance has to be made from absolute hundred percent strict compliance.” RP at 544. The court also stated, “you [Zinks] were thoroughly one hundred percent provoked. I am not faulting you for any of your actions because most of all of your requests, the vast majority of your requests, had to do with your home or people involved in the decision as pertains to your home.... [But][i]n the process you really interfered with the operation of the clerk’s office.” RP at 544. The court concluded: “There is a limit to the number of public requests an individual can make to a public agency.” CP at 32 (Conclusion of Law 2).

Zink II, 140 Wn. App. at 339 (citations and footnote omitted).

While this Court ultimately rejected the trial court’s conclusion that substantial compliance was sufficient, it also ruled, “We do not doubt that the impact of the Zinks’ requests on the clerk’s office was significant. There is substantial evidence in the record to support the trial court’s findings to this effect.” *Zink II*, 140 Wn. App. at 339.

On the issue of disparate treatment, the trial court ruled:

The trial court's finding that the City did not treat Ms. Zink differently from other persons making public record requests is based on Clerk Standridge's testimony that she placed restrictions on Ms. Zink's access because she was falling behind in her other official duties, and that anyone who made the number of requests that Ms. Zink made would have been treated the same. She estimated that between August 2002 and April 2003, all of her assistant clerk's time and 50 percent of her own time was spent filling Ms. Zink's public record requests.

Zink II, 140 Wn. App. at 342.

This Court ruled that Mesa needed to adopt rules to address any excessive interference, but still recognized that "the record contains substantial evidence to support the trial court's finding that the City would have treated other persons making a large number of public record requests the same as it treated Ms. Zink[.]" *Zink II*, 140 Wn. App. at 342.

3.2.3. Holding in *Zink II*.

In *Zink II*, this Court held that the PRA requires strict compliance and neither a requester's conduct nor the volume of requests justify anything less than strict compliance. *Zink II*, 140 Wn. App. at 340. Instead, it ruled these facts were only relevant on the issue of assessing the amount of penalties. *Zink II*, 140 Wn. App. at 340.

The Court did, however, make rulings on several legal issues, finding that (1) the City could not limit the Zinks to one hour per day to review records, (2) the City must adopt rules to prevent a requester from interference with the City's essential functions, (3) the Zinks' conduct was not "unlawful harassment," (4) the complaint against the Zink's home was not exempt, (5) the City could only charge the actual cost of copies, (6) the

trial court properly exercised its discretion in determining that Exhibit 216 was a business record, but on remand the trial court should determine whether it was admissible under ER 1006, and (7) any penalties and attorney fees must be determined on remand.

The Court also rejected the Zinks' request for a de novo review and for this court to determine the penalty amounts, holding that "the determination of penalties is best left to the trial court[.]" *Zink II*, 140 Wn. App. at 347. Thus, this Court remanded for the entry of new findings of fact and conclusions of law on whether Mesa complied with the Zinks' requests and what costs and penalties should be awarded. *Zink II*, 140 Wn. App. at 340-41, 349.

3.3. **Procedural Facts after *Zink II***

Although this Court's opinion in *Zink II* was issued August 27, 2007, the trial court did not hold a new hearing until nearly 11 months later on July 17, 2008. There was then an additional almost five months delay until the Court issued an order on November 7, 2008.

At the July hearing, which lasted for two days, the trial court reviewed each of the requests the Zinks claimed the City had failed to comply with, which the trial court ultimately treated as 33 separate requests. See Findings of Fact, Conclusions of Law and Order (November 8, 2008), CP 110-166 (hereafter FF #__, CL #__ or Order #__).

At the hearing, the trial court applied the negligence-based penalty standards adopted by the Court of Appeals in *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 151 P.3d 243 (2007) (*Yousoufian 2007*). See RP

(7/17/08) at 11:18-21; CL #7 (CP 142). It also interpreted this Court's *Zink II* opinion as prohibiting it from considering how many requests had been made or the financial impact of the penalties when setting the penalty amounts. RP (7/17/08) at 18:4-8; 61:25-62:3.

In addition, the trial court made numerous rulings not contained in its final order. It ruled that Exhibit 216 was not admissible even though the City had supplied the factual evidence to support the exhibit. RP (7/17/08) at 18:18. The trial court did not determine the total number of requests the Zinks had made to Mesa and instead found that there was between 68-172 requests. RP (7/17/08) at 83:1-3.

The trial court ruled that it was "not certain [it had] the authority" to combine requests and therefore refused to combine requests made on a single day, even though the trial court had combined other request. RP (7/17/08) at 104:18.

Finally, the trial court made numerous rulings captured in its final order, which was entered on November 7, 2008. The trial court found that Mesa had violated the PRA in how it responded to 29 of the 33 requests. See FF #71 (CP 119) (no violation in response to request for Ordinance 02-01); FF #165 (CP 131) (no violation in response to request for Ordinance 03-03); FF #174 (CP 132) (no violation in response to request for Ordinances and Resolutions on December 11, 2002); FF #207 (CP 136) (no violation in response to request for Minutes of the March 5, 2003 BOA Meeting).

Although it awarded \$6,355 in penalties for the City's failure to provide its correspondence with MRSC and the city attorney, it also ordered an *in camera* hearing so it could determine exactly what correspondence with the city attorney had to be disclosed. FF #62, #68 (CP 118).

In setting the penalty amounts, the trial court excluded the days between its original ruling in favor of Mesa and this Court's ruling in *Zink II*. CL #11 (CP 143). Finally, it entered a judgment against Mesa for \$245,914.86, which included \$167,905 in penalties. Order #9, #10, #11 (CP 165).

On April 16, 2009, the trial court entered an order after its *in camera* review of the City's correspondence with its city attorney. CP 1280-87. When the records were provided to the Court for *in camera* review, the Zinks were also inadvertently provided access. See CP 1123-1279 (records inadvertently disclosed). Nevertheless, the trial court still conducted an *in camera* review and ruled that many of the documents were privileged. CP 1280-87.

The Zinks filed Notices of Appeal for the November 8, 2008 order and April 16, 2009 order. CP 16-75, 1092-1101. The City filed a Notice of Appeal for the November 8, 2008 order. CP 1026-86. These three notices are all now combined in one appeal.

4. SUMMARY OF ARGUMENT

In March 2010, the Supreme Court issued the final opinion in *Yousoufian v. Office of Ron Sims*, where the Supreme Court adopted a complex non-exclusive 16-factor protocol for determining the proper amount of daily penalties for PRA violations. *Yousoufian 2010*, 168 Wn.2d at 476-68. The parties agree that this latest *Yousoufian* opinion controls how penalties should be determined in this case.

In the *Yousoufian 2010* opinion, the Supreme Court cautioned that trial courts – not appellate courts – should apply these factors and set daily penalties. Because the penalties against Mesa were set under the *Yousoufian 2007* standard that was rejected by the Supreme Court, this Court must remand this case back to the trial court for a new hearing to set penalties. Moreover, in *Yousoufian 2010*, the Supreme Court recognized for the first time that mitigating factors may warrant a reduced penalty, so Mesa must be allowed to supplement the record with evidence that supports mitigating factors.

While remand is necessary, there are still numerous issues that can be resolved on this appeal to provide guidance to the trial court on remand.

First, the trial court should expressly recognize that Mesa's limited resources, the number of requests the requester made, and requesters' actions can qualify as mitigating factors.

Second, the Court should hold that Mesa acted in good faith when it relied on third-party contractors, including the private attorney who served as its city attorney.

Third, the Court should hold that on remand the trial court should set variable-rate penalties for any penalties that exceed the \$5-per-day minimum when litigation delays resulted in an increased number of days, or the impact of the City's allegedly improper conduct only lasted for a limited period of time.

Fourth, the Court should hold that the Zinks are not entitled to relief under the PRA when the City's improper conduct ceased prior to the Zinks filing their lawsuit.

Fifth, the Court should provide guidance on several issues to assist the trial court in determining the proper number of days of penalties. The current judgment awards penalties for approximately 15,000 days. The Zinks claim on appeal that penalties should be issued for over 22,000 days. The City agrees that the trial court improperly excluded days between its ruling and this Court's holding in *Zink II*, but it also argues that the number of days should be reduced in several ways.

To help guide the trial court in its calculation of the proper number of days, this Court should make it clear that (1) penalties should be awarded for the days between the trial court's original ruling and its ruling on remand; (2) penalties are limited by the then-applicable five-year statute of limitations so no daily total should exceed 1825 days; and

(3) the trial court should consider whether requests should be grouped further based on the timing of the request, the subject matter of the request and common errors by Mesa that resulted in multiple violations.

Sixth, the Court should rule that the issues regarding the attorney client privilege were mooted when all of the City's privileged records were inadvertently disclosed to the Zinks.

Seventh, the Court should find that the trial court properly ruled that the Zinks did not make a PRA request for a copy of the complaint against 109 N. Rowell until September 30, 2002.

Eighth, the Court should find that the trial court erred in ruling that the PRA required Mesa to create a record – minutes for the March 5, 2003 Board of Appeals meeting – that did not exist when the Zinks requested those records.

Ninth, the Court should rule that the Zinks failed to prove Mesa violated the PRA when it could not provide signed copies of the minutes from three Board of Appeals meetings.

Finally, the Court should rule that the Zinks are not entitled to interest on the November 2008 judgment that they agree must be re-determined. Nor are they entitled to any attorney fees for this appeal, as they should not prevail, nor obtain any ruling that any additional records must be released.

5. ARGUMENT

5.1. Remand Is Necessary to Allow Mesa the Opportunity to Present Evidence Regarding Mitigating Factors⁴

5.1.1. The Court must remand this case to allow the trial court to apply the *Yousoufian 2010* decision.

The Supreme Court's 2010 opinion in *Yousoufian v. Office of Ron Sims* dramatically re-shaped the rules for how PRA penalties are determined by adopting a new protocol that requires the consideration of both aggravating and mitigating factors. Prior to that decision, the leading court opinion did not allow for the consideration of mitigating factors and instead applied a strict negligence-based standard. *See Yousoufian 2007*, 137 Wn. App. at 75 (holding that penalties should be based on a negligence standards borrowed from tort law), *reversed by Yousoufian 2010*.

The *Yousoufian 2010* decision applies in this case. PRA penalties are governed by statute – RCW 42.56.550/42.17.340 – and thus the Supreme Court's 2010 decision in *Yousoufian* was by definition interpreting that statute. “It is a fundamental rule of statutory construction that . . . once the court had determined the meaning [of a statute], that is what the statute has meant since its enactment.” *Bowman v. State*, 162 Wn.2d 325, 335, 172 P.3d 681 (2007) (citation omitted). Because this case is not yet final, it must be governed by the Supreme Court's final ruling interpreting the meaning of the penalty statute. *See State v.*

⁴ This section addresses the arguments made by the Zinks in section III.E of their brief.

Hanson, 151 Wn.2d 783, 784, 91 P.3d 888 (2004) (holding that new decision interpreting state statute applied to all cases where appeal was still pending). The Zinks agree and have based their appeal on the *Yousoufian 2010* decision. Thus, RCW 42.56.550/42.17.340 as interpreted by the *Yousoufian 2010* decision applies to this case.

This Court cannot, however, simply apply the *Yousoufian 2010* protocol and determine the appropriate penalty amounts itself. As the Supreme Court emphasized in *Yousoufian 2010*, “the usual procedure is to remand to the trial court[.]” *Yousoufian 2010*, 168 Wn.2d at 468. This Court must therefore remand this case for a new hearing and the entry of new findings of fact and conclusions of law based on *Yousoufian 2010*.

5.1.2. On remand, Mesa must be allowed to supplement the record with evidence related to aggravating and mitigating factors.

It would work an injustice if this Court were to determine the daily penalties without remanding to the trial court to allow Mesa to present evidence on the mitigating factors and argument on what penalties are appropriate. The show cause hearing was held in Spring 2005 and the current trial court judgment was issued in November 2008. In 2005, the only guidance on penalties came from the Supreme Court’s 2004 opinion in *Yousoufian*, where the Court held that a \$5-per-day penalty was only appropriate in cases of good faith, but the Court declined to provide any guidance on how those penalties should be determined. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004) (*Yousoufian 2004*); see also *Yousoufian 2007*, 137 Wn. App. at 75 (noting that the

Supreme Court implicitly reject adopting factors that were proposed in Justice Sanders' opinion concurring in part, dissenting in part).

After this Court's decision in *Zink II*, the case was remanded and hearings were held in July and November 2008. At that time, the leading opinion governing penalties was *Yousoufian 2007*. That opinion adopted a negligence-based standard adopted from tort law. Thus, the trial court limited its consideration to the degree at which Mesa acted in good faith, negligent, grossly negligent, wanton or willful. RP (7/17/2008) at 11:19-20.

In rejecting that negligence-based standard, the Supreme Court emphasized that tort standards "do not lend themselves to the complexity of the PRA penalty analysis." *Yousoufian 2010*, 168 Wn.2d at 463. Instead, the Supreme Court adopted the multifactor protocol for determining penalties.

Because all of the hearings in this case occurred before the Supreme Court adopted that multifactor protocol, Mesa has never had an opportunity to present evidence and make argument regarding those factors.⁵ Most importantly, the *Yousoufian 2010* opinion recognizes that courts should consider mitigating factors, but the trial court's November 2008 ruling is based solely on how negligent Mesa allegedly acted.

⁵ Mesa had also heavily relied on Exhibit 216 to support its defense. See CP 173-74. Although this Court held the exhibit qualified as a business record under ER 803(a)(6), see *Zink II*, 140 Wn. App. at 346, and the City complied with the requirements under ER 1006 on remand, the trial court still excluded the exhibit, depriving the City of evidence of its compliance. RP (7/17/2008) at 18:18-20. The City objected and sought a new trial based on the exclusion of this record. CP 173-74.

Given the magnitude of the monetary judgment at issue in this case – over \$500 per resident of Mesa – Mesa must have the opportunity to fully address the *Yousoufian* factors. This means the City must be allowed to present new arguments about how they should be applied and present new evidence in support of mitigating circumstances that would justify a lower penalty.

Because this case must be remanded, this brief will not address whether any specific penalty amount is appropriate. Instead, it only addresses issues related to what factors should be considered on remand and how the number of days that constitute the daily penalties should be determined.

5.2. On Remand, the Trial Court Should Consider Several Additional Mitigating Factors Beyond Those Recognized in *Yousoufian 2010*⁶

In *Yousoufian 2010*, the Supreme Court emphasized that the factors it had listed were “offered only as guidance” and courts were free to adopt additional factors that were appropriate for a particular case. *Yousoufian 2010*, 168 Wn.2d at 468.

Here, the Court should recognize several additional mitigating factors.

⁶ This section addresses the arguments made by the Zinks in section III.F of their brief. It also is related to the Zinks’ repeated claims that daily penalties were insufficient in sections III.H to III.HH.

5.2.1. Mesa's small size and limited resources justify a reduction of the amount of daily penalties.

The PRA applies to every governmental entity in the state, from the smallest special purpose district with a budget in the 10s of thousands of dollars to King County and the State with billion dollar budgets. It is inconceivable that the legislature intended penalties to be as harshly applied to smaller agencies with limited resources as those penalties are applied to large agencies with extensive resources.

While not expressly identified as a mitigating factor, this mitigating factor is implicitly recognized in *Yousoufian 2010* when the Supreme Court distinguished King County from the Blaine School District. *Yousoufian 2010*, 168 Wn.2d at 460-63. In an earlier decision, the Court of Appeals had issued a \$15-per-day penalty after finding the Blaine School District had acted in bad faith. The trial court in *Yousoufian* had relied on that case to set the \$15-per-day penalty against King County. The Supreme Court rejected the analogy, by noting that Blaine “was a small school district” while King County “is the most populous county in the state.” *Yousoufian 2010*, 168 Wn.2d at 463. While the Supreme Court went on to list size in its aggravating-factor list, the Court’s reasoning works both ways – if \$15-per-day was too little for King County, then \$45-per-day must be too high for a smaller jurisdiction in the same circumstance.

This factor is also implicit in the PRA itself, which expressly provides that that agencies can adopt rules “to prevent excessive

interference with other essential functions of the agency[.]” RCW 42.56.100/42.17.290. The same public records request is much more likely to interfere with the core functions of a small agency with limited staff like Mesa than it is a large agency with thousands of employees like King County.

While this Court ruled in *Zink II* that RCW 42.56.100/42.17.290 applies to rules adopted by an agency and the factors listed in that statute cannot excuse non-compliance if the agency has not adopted rules (*Zink II*, 140 Wn. App. at 342-43), the Supreme Court subsequently ruled in *Yousoufian 2010* that the factors in that statute should be considered when determining penalties even if not encompassed in a policy. *Yousoufian 2010*, 168 Wn.2d at 467 & n.12 (citing RCW 42.56.100/42.17.290 to justify one of the mitigating factors). Even this Court implicitly recognized this fact when it stated, “[w]e do not doubt that the impact of the Zink’s requests on the clerk’s office was significant” but that was only relevant when assessing the amount of the daily penalty. *Zink II*, 140 Wn. App. at 339-40.

The trial court in effect ruled that he could not consider Mesa’s size and resources as part of the determination of penalties when he ruled he could not consider whether his ruling would drive Mesa into bankruptcy. (PR 7/16/08 at 61-62). This was a misinterpretation of the Court’s ruling in *Zink II*. Moreover, in light of the Supreme Court’s ruling in *Yousoufian 2010*, the trial court’s ruling is legally incorrect.

The Zinks' requests were significantly more disruptive to Mesa – which only had four employees and only one full time and one part-time employee working in the clerk's office at City Hall – than it would have been to a larger city. RP (5/11/05) at 371:18-72:8. On remand, the trial court must be allowed to reduce any daily penalties based on Mesa's limited resources.

5.2.2. The high volume of requests justifies a reduction of the amount of daily penalties.

The Zinks made numerous requests – somewhere between 68 and 172 – that form the bases of this lawsuit, most of which occurred between September 2002 and April 2003. Mesa properly responded to most of those requests, but did make numerous errors.⁷ The PRA does not place any limits on how many requests a person may make, but obviously, it would be impossible for any government to function if everyone exercised this limitless right to the fullest extent possible. If just 10% of the residents of Mesa⁸ had employed the PRA to the full extent that the Zinks did during this period to time, Mesa would have faced between 2900 and 7500 requests.⁹ Thus, when one person chooses to make a high volume of requests and an agency makes a mistake on one or more of those requests that leads to the imposition of penalties, the court imposing those penalties should consider whether the volume of requests contributed to the

⁷ The Zinks have identified 33 claims errors, and the trial court found 29. Even if the Zinks' lower number of 68 requests is used, the City properly handled over half of those requests.

⁸ Of course you do not have to be a resident of Mesa to make PRA requests to Mesa.

⁹ Mesa's population is approximately 440. $44 \times 68 = 2992$. $44 \times 172 = 7568$.

mistakes when setting the amount of the daily penalty – even though the number of requests is not a proper factor when determining whether an agency has actually complied with the PRA. *See Zink II*, 140 Wn. App. at 339-40.

5.2.3. The conduct of the Zinks may justify a reduction of the amount of daily penalties.

It is a fundamental precept of the PRA that an agency cannot consider the identity of the requester when responding to a PRA request. RCW 42.56.080/42.17.270 (“Agencies shall not distinguish among persons requesting records[.]”). But this does not mean that a court cannot consider the conduct of a requester when setting daily penalties. If, for example, a person were to delay filing a lawsuit to maximize the number of daily penalties, a court should consider reducing the amount of the penalties to dissuade that intentional effort to game the system at the expense of the taxpayers. *Cf., Koenig v. Pierce County*, 151 Wn. App. 221, 226-27, 211 P.3d 423 (2009) (showing requester waited 364 days to file suit). Or, for example, if a requester had made up fliers falsely claiming public employees were sexual predators and had threatened to distribute the fliers in neighborhoods where the employee’s lived using the requested personnel records to supplement those fliers, courts should consider that intent when ruling on whether to enjoin production of those files. *See DeLong v. Parmelee*, -- Wn. App. -- (Div. II, July 29, 2010). Likewise, if a requester took other steps to make compliance more

difficult, that should also be considered by the court when setting penalties.

Here, the trial court originally found that the Zinks' conduct amounted to legal harassment. *Zink II*, 140 Wn. App. at 335. He described the Zinks' conduct as "bamboo under the fingernails" of the Mesa Clerk. RP (7/17/08) at 50:15-18. While this Court rejected the finding of legal harassment, the trial court should be allowed to consider whether the Zinks' conduct contributed to the errors made by Mesa, and accordingly reduce the penalty if that was the case.

5.2.4. Mesa's good faith reliance on outside third-party contractors justifies a reduction in the daily penalty amounts.

The Zinks allege that the trial court erred in finding the City acted in "good faith" – justifying a \$5-per-day penalty – when it relied on advice from a private attorney Mesa had contracted with to serve as its general counsel. Non-attorney city employees cannot be expected to know all of the intricacies of the PRA. Thus, Mesa acted appropriately when it sought outside legal advice.

When an agency withholds a record based on a reasonable belief that it is exempt from disclosure, the agency acts in good faith and the minimum \$5-per-day penalty is appropriate. *ACLU v. Blaine Sch. Dist.*, 95 Wn. App. 106, 111, 975 P.3d 536 (1999) (citing *Lindberg v. Kitsap County*, 133 Wn.2d 729, 747, 948 P.3d 805 (1997)).

In other areas of the law, courts have recognized that agencies and public employees act in good faith when they follow legal advice, even

from in-house counsel. See, e.g., *State ex rel. Wash. Fed. Of State Employees v. Board of Trustees*, 93 Wn.2d 60, 70-71, 605 P.2d 1252 (1980) (college acted in good faith when it relied on advice from an assistant attorney general, even though that advice led to an unfair labor practice; rejecting claim that college should have obtained a second opinion); *State ex rel. Bain v. Clallam County Board of Commissioners*, 77 Wn.2d 542, 546, 463 P.2d 617 (1970) (“the board was entitled to accept in good faith the advice given in good faith by its lawfully constituted legal advisor”); *Miller v. City of Tacoma*, 138 Wn.2d 318, 321, 331, 979 P.2d 429 (1999) (board members did not knowingly violate the law when they relied on advice from city attorney).

The Zinks appear to argue that because this outside attorney served as general counsel, his actions, including what the Zinks call an unsupportable interpretation of the law, should be attributed to Mesa itself and therefore Mesa’s reliance on that advice cannot qualify as good faith.

Assuming *arguendo* that Mesa’s outside counsel was unreasonable in his interpretation of the law, Mesa was justified in assuming his advice was correct. When an agency expends taxpayer dollars to seek outside advice on a complex issue of law, it would be manifestly unjust to increase the amount of daily penalties simply because that outside expert was wrong. Thus, while getting erroneous legal advice does not justify Mesa’s

failure to comply with the PRA, Mesa's decision to seek expert advice does show it was acting in good faith.¹⁰

For example, Mesa expects to establish on remand that it was advised by counsel that under RCW 42.56.100/42.17.290, it could limit the Zinks' time to review records to one hour per day. The trial court found that this limitation was "more than reasonable." *Zink II*, 140 Wn. App. at 341. But after this Court reversed the trial court on that point, the trial court used this limitation – that it had found reasonable and legally justified – as a basis for increasing the daily penalty. E.g., FF #105-#108 & FF #115-#118 (CP 123-24, 125).

Accordingly, where Mesa can establish on remand that its actions were guided by outside expert advice, the trial court should find that those actions were taken in good faith, justifying only the minimum daily penalty amount.

This should apply to actions taken on advice from the City's outside legal counsel,¹¹ and actions taken in reliance on Richard Mumma, the secretary of the Board of Appeals.¹²

¹⁰ Because the PRA involves complex issues of law, Mesa was not required to accept the opinion of a layperson – Ms. Zink – over the advice of its own attorney.

¹¹ On remand, Mesa expects to establish that its decision to require the Zinks to submit their requests to the City Attorney and its decision to limit the Zinks to one hour per day to review records were made at the advice of counsel. See RP (5/11/05) at 376:5-8.

¹² On remand, Mesa expects to establish that the City Clerk was repeatedly told by Mr. Mumma that he could not locate the tape recording of the November 13, 2002 BOA meeting. Mesa had no way to verify or disprove this claim by its third-party contractor. See RP (5/11/05) at 409:17-10:11, 416:16-17:25.

5.2.5. The trial court properly considered the full range of penalties.

The Zinks assert that the trial court must not have considered the full range of penalties because most of the penalties issued were on the low end of the spectrum. But the trial court issued penalties ranging from \$5-per-day to \$100-per-day, so there can be no doubt that the trial court considered the full range. Moreover, the trial court had “considerable discretion under the PRA’s penalty provisions in deciding where to begin a penalty determination.” *Yousoufian 2010*, 168 Wn.2d at 466-67 (rejecting an argument that courts should start their analysis at \$52.50, half way between \$5 and \$100). Therefore, on remand the trial court should be free to start its penalty determination at \$5-per-day. Moreover, because the trial court should consider Mesa’s limited resources when determining penalties, it is likely that the penalties on remand will be even more concentrated on the low end, as is appropriate under *Yousoufian 2010*.¹³

5.2.6. Mesa’s assertion of an exemption after it had allowed the Zinks to review the records does not show bad faith.

The Zinks argue that for several requests, because Mesa asserted exemptions after the City had allowed the Zinks to review the responsive records, this shows bad faith as any exemption was waived once the records were disclosed. While under some circumstances, disclosing a record may waive a PRA exemption, that is not always the case. *Compare Coalition on Gov’t Spying v. King County*, 59 Wn. App. 856, 864, 801

¹³ Thus, a \$6-per-day penalty, rather than a \$10-per-day penalty, may be appropriate in a case were Mesa’s conduct was mere negligent.

P.2d 1009 (1990) (exemption waived when record was previously disclosed) *with Linstom v. Ladenburg*, 110 Wn. App. 133, 146-47, 39 P.3d 351 (2002) (prior disclosure of records did not waive PRA exemption). Thus, the law on this issue is hardly clear cut and the fact that Mesa first allowed the Zinks to review a record and then asserted an exemption does not show bad faith.

5.2.7. The total amount of the penalty award should be considered.

Finally, the trial court should take into account the total size of the penalty award. The PRA is not meant to bankrupt agencies or serve as a lottery for requesters.

5.3. The Trial Erred in Not Setting Variable-Rate Penalties in Some Cases

The Public Records Act mandates daily penalties for every day a request is not fulfilled, with the statute of limitations serving as the only limitation. *Yousoufian 2004*, 152 Wn.2d at 437. (As noted below in section 5.5.1, the trial court erred in excluding daily penalties for the period between when it ruled in Mesa's favor and when it held the July 2008 hearing on remand.) Moreover, the minimum \$5-per-day penalty is only appropriate when an agency is acting in good faith. *Yousoufian 2004*, 152 Wn.2d at 439.

Under some circumstances, however, when the agency may have originally withheld a record because of negligence or some improper reason, it does not follow that the agency's decision to withhold that records for the entire period is in bad faith. In *Yousoufian 2004*, the

Supreme recognized this principle when it held that “the trial court could utilize its discretion by decreasing the per-day penalty amount during this period” if “a plaintiff could have achieved disclosure of the records in a more timely fashion.” *Yousoufian 2004*, 152 Wn.2d at 437-438.

Here, however, the trial court did not impose any variable-rate penalties based on the litigation-caused delays.¹⁴ Instead, for several requests where it ultimately imposed penalties over \$5 per day for over 1000 days, it imposed the same elevated daily penalty, even though most of the length of the delay was caused by litigation, not any improper conduct by Mesa.

Mesa is facing potentially over 22,000 days of penalties in part because this case has taken so long to litigate. Unlike in *Yousoufian*, the Zinks were very prompt in filing their lawsuit. But after the lawsuit was filed in April 2003, it took over two years – until June 2005 – for the trial court to complete the show cause hearing and issue its original opinion. *Zink II*, 140 Wn. App. at 334-35. It then took another two years – until August 2007 – for this Court to issue its first opinion reversing the trial court’s judgment. Finally, it took almost another full year – until July 2008 – for the trial court to hold a new hearing, where it ruled Mesa was required to produce numerous documents it had previously withheld. This type of delay, while maybe not the average, is not abnormal in civil

¹⁴ The trial court did impose a variable rate penalty in limited situations such as where redacted records were produced and a penalty was imposed for the original delay in production and then for wrongful redaction. E.g. FF #45, #51 (CP 116, 117).

litigation. But the consequence of this delay is that Mesa is now facing penalties for each day of the delay.

The size of a penalty should reflect an agency's culpability – not the speed of the court system. On remand, this Court should direct the trial court to reduce penalties to \$5-per-day for the period of time that was the result of the court system.

This is particularly true for the penalties imposed on Mesa for redacting identifying information from a total of 29 residential address files requested in two separate PRA requests. The trial court imposed \$25-per-day penalties for each request because Mesa limited the Zinks to one hour per day to review records, but imposed that increased penalty for the entire period the records were withheld, even though the limitation only had a limited harm. The penalty period for the total requests is over 3800 days,¹⁵ which would result in almost \$100,000 in penalties.

While this Court properly ruled that the limitation was improper, see *Zink II*, 140 Wn. App. at 341, and might support an increased penalty for some period of time,¹⁶ this five-fold increase in penalties for the entire time period is arbitrary – any increase should be at most limited to the number of days it took the Zinks to review all of the files. Mesa should not be penalized at a higher rate for litigation delays.

¹⁵ This total is for the reduced number of days that Mesa has conceded below was improper. See *infra* section 5.5.1.

¹⁶ But see *supra* section 5.2.4, explaining how Mesa acted in good faith in imposing this limitation, which the trial court originally found permissible under the PRA.

Any harm from Mesa's improper conduct of limiting the Zinks' time to review records was limited in duration. Therefore, the elevated penalty should only apply to that limited period of time. Once the Zinks had completed their review under the limitation, only a \$5 would be appropriate.

5.4. The Zinks Are Not Entitled to Penalties Where Their Lawsuit Was Not Necessary to Obtain Relief

The purpose of the PRA "is to empower citizens to extract information from reluctant agencies." *Daines v. Spokane County*, 111 Wn. App. 342, 48, 44 P.3d 909 (2002). When a public records requester is forced to resort to litigation to enforce the requester's right to access public records, then the requester is entitled to daily penalties and attorney fees. *See Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103 n.10, 117 P.3d 1117 (2005) ("The requester should recover his costs, and the agency should be penalized, *if the requester has to resort to litigation* (the reason for later disclosure is irrelevant).") (emphasis added); *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.3d 389 (1997) ("[The PRA] provides attorney fees to the successful party *in the event legal action need be commenced* to acquire records desired[.]" (emphasis added) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 129, 580 P.2d 246 (1978); *Daines*, 111 Wn. App. at 347-48 ("To trigger the remedial provisions of the [PRA], the action must be one that could *reasonably be regarded as necessary* to obtain the records.") (internal quotation omitted) (emphasis added). When an agency has already fully complied with the

PRA prior to a requester filing a claim, “that purpose would not be served” and the requester is not entitled to relief. *Daines*, 111 Wn. App. at 348.

Therefore, in *Daines*, where the requester learned the county had improperly claimed it did not have the requested records because the requester had copies of these records himself, the court ruled that the requester was not entitled to penalties or attorney fees. *Daines*, 111 Wn. App. at 347-48.

Here, Mesa had fully complied with many of the Zinks’ requests before they filed their lawsuit on April 30, 2003. Likewise, many of Mesa’s time estimates that the Zinks are challenging had already run before they filed their claims. Under those circumstances, the trial court should not have awarded any relief and the Zinks are not entitled to any further relief on appeal.

5.4.1. The Zinks are not entitled to daily penalties for all requests that were fully complied with prior to April 30, 2003.

Mesa had fully complied with the following requests prior to the date the Zinks filed their lawsuit – April 30, 2003 – so the Zinks are not entitled to daily penalties for these requests:

- Complaint v. Rowell produced November 27, 2002 (FF #1-9, CP 111)
- Ordinance 01-01 produced February 24, 2003 (FF #69-71, CP 119)
- Board of Appeals Rules and Regulations produced April 9, 2003 (FF 72-79, CP 119-20)
- Ordinance 03-03 produced April 4, 2003 (FF #162-65, CP 131)
- Ordinances and Resolutions requested on December 11, 2002 produced January 24, 2003 (FF #166-74, CP 132)
- Ordinance 01-05 produced March 3, 2003 (FF #175-83, CP 132-33)

- Minutes of the February 13, 2003 and March 4, 2003 Council Minutes produced April 15, 2003 (FF #208-215, CP 137-38)
- Resignation Letters of Rick Hopkins and Devi Tate produced April 15, 2003 (FF #216-223, CP 138-39)

5.4.2. The Zinks cannot challenge the “reasonableness” of Mesa’s time estimates after the estimated time had elapsed.

The Zinks claim that Mesa’s “reasonable time estimates” for various requests were unreasonable, and therefore the trial court erred in not awarding daily penalties for the days during those periods:

- 21 Code Violation letters (FF #39-51, CP 115-16)
- Board of Appeals Rules and Regulations (FF #72-79, CP 119-20)
- Water Meter Readings (FF #86-92, CP 121-22)
- Phone/Fax logs (FF #93-98, CP 122)
- 18 Residential Addresses (FF #99-108, CP 122-24)
- 11 Residential Addresses (FF #109-118, CP 124-25)

The PRA provided the Zinks the right to challenge those estimates at the time Mesa provided these estimates. *See* RCW 42.56.550(2)/42.17.340(2). But once those time periods expired, the Zinks could no longer challenge them and cannot – after the fact – obtain penalties.

5.4.3. The trial court erred in awarding penalties based on the Zinks’ request for Mesa’s correspondence with the Zinks.

The trial court awarded the Zinks daily penalties for Mesa’s delay in producing copies of the Zinks’ correspondence with the City. Presumably the Zinks already had copies of these records. Thus, just like the requester in *Daines*, the Zinks are not entitled to any attorney fees or penalties for this request. *Daines*, 111 Wn. App. at 347-48.

While there is a penal aspect to the PRA, the law should not be interpreted to allow a requester a pound of flesh based on an agency error that was corrected before the requester had to resort to the courts. Otherwise, this would crowd the courts with lawsuits solely about fees and discourage agencies from turning over later-discovered records that were overlooked in good faith. This is particularly of concern in light of a recent case out of Division I, where the court of appeals held that when a record is overlooked, the statute of limitations does not begin to run until it is produced. *Tobin v. Worden*, -- Wn. App. --, 233 P.3d 906 (2010) (holding that because an overlooked record was not listed on an exemption log, the statute of limitations was never triggered and the plaintiffs could maintain a cause of action that was filed more than one year after the agency made its production).

When interpreting the law, the Court should be “mindful . . . of the desirability of the efficient administration of government[.]” RCW 42.17.010(11). Allowing requesters to employ the courts to punish agencies who have already fully complied with the PRA simply because that compliance was not timely would hamper the efficient administration of government without any corresponding benefit.

5.5. On Remand, the Trial Must Re-Calculate the Total Number of Days¹⁷

In the November 2008 judgment, the trial court imposed penalties for over 15,000 days. Taking into account Mesa's concession in the following section, Mesa is potentially facing over 22,000 days of daily penalties. On remand, the trial court should recalculate that number of days as described below.

5.5.1. Mesa agrees that the trial court erred in excluding days between its original ruling in favor of Mesa and this Court's Ruling in *Zink II*.

As the Zinks noted, the Supreme Court has repeatedly held that penalties must be imposed "for each day" the records are withheld. *Yousoufian 2004*, 152 Wn.2d at 437. "[T]he only limitation on the number of days comprising the penalty period is the five-year statute of limitations." *Yousoufian 2004*, 152 Wn.2d at 438. Thus, the trial court erred in not awarding penalties for all of the days between its original ruling in favor of Mesa and this Court's ruling in *Zink II*.

5.5.2. On remand, no penalty period should exceed 1825 days.

While the Supreme Court's *Yousoufian 2004* ruling makes it clear that it was improper to exclude all of the days during the delay caused by the trial court's original ruling in favor of Mesa, that decision also makes it clear that the statute of limitations serves as a "limitation on the number of days comprising the penalty period[.]" *Yousoufian 2004*, 152 Wn.2d at

¹⁷ This section addressed the arguments made by the Zinks in sections III.D and III.G of their brief. It is also relevant to the arguments they make regarding the proper count of days in sections III.H to III.HHH.

438. Thus, because the statute of limitations was 5 years at the time this case was filed, on remand the trial court cannot impose more than 1825 days (5 x 365) of penalties for any one violation.¹⁸

5.5.3. In most instances, the trial court properly excluded five days pursuant to RCW 42.56.520/42.17.320 when calculating daily penalties in most cases.

The Zinks assert that the trial court erred in excluding 5 business days (amounting to 7 days of penalties) in several of the penalty awards. But except where noted below, this result is mandated and proper based on the plain language of the PRA.

5.5.3.1. *The PRA allows an agency five business days to respond to a request.*

Penalties are governed by RCW 42.56.550(4)/42.17.340(4), which only allows for (and in fact mandates) penalties after a requester has been “denied the right” to records. But an agency does not even have to respond to a PRA request until five business days after the request is made. RCW 42.56.520/42.17.320 (requiring an agency to respond “within five business days.”). Thus, unless an agency expressly denies the request earlier, the agency has not “denied” access until after that five-day period has expired.

¹⁸ The Zinks claim that the trial court erred in only awarding penalties up until the time it entered its November 7, 2008 order because not all records had been produced. The court, however, cannot enter an open-ended penalty award. Instead, the Zinks’ avenue of relief if the City had not complied with the trial court’s order was to seek relief from the trial court based on Mesa’s failure to comply with the earlier order. The Zinks’ proposal of some form of open-ended judgment would be too indefinite to even qualify as a final order for the purposes of appeal. Nevertheless, this is an issue that can be addressed on remand.

The Zinks are asking this Court to read RCW 42.56.520/42.17.320 out of existence and instead elevate the vague duty in section RCW 42.56.080/42.17.270 to make records “promptly available.” The more specific “five business days” requirement controls over the less specific “promptly available” requirement. Thus, there is no “right to inspect or copy records” that has been “denied” prior to the expiration of the five business days, absent an express denial.

5.5.3.2. When assessing daily penalties, the PRA controls over other statutes.

The Zinks have also cited to other statutes that create a separate duty to make records available. But the Zinks do not claim that any cause of actions exists to support those statutes, nor have they made any separate claim based on those statutes. Moreover, the Zinks have not cited any authority to support the proposition that the PRA’s penalty provisions can be used as a tool to enforce other statutory requirement. In an analogous situation, Division II of the Court of Appeals recently held that rights created by the PRA can only be enforced in PRA actions and cannot be used to support a tort cause of action. *Corey v. Pierce County*, 154 Wn. App. 752, 767, 225 P.3d 367 (2010) (holding that the PRA’s right to privacy does not create a separate tort claim for violating that right). Likewise, the Zinks cannot use the PRA to enforce other statutory rights and must instead seek to use any enforcement rights embedded in those statutes or file a mandamus action.

Moreover, the statutes the Zink cite conflict with the “five business day” requirement in the PRA and the PRA itself explains how conflicts between the PRA and other statutes are to be resolved: “In the event of conflicts between the provisions of this chapter and any other act, the provisions of this chapter shall govern.” RCW 42.56.030/42.17.251.

5.5.3.3. Mesa agrees the trial court erred in excluding five days from three requests where Mesa expressly denied the request before the 5-day period had expired.

While Mesa has five days pursuant to RCW 42.56.520/42.17.320 to respond to the Zink’s requests, justifying the Court’s decision to exclude those days when calculating the daily penalties, on the three requests listed below, Mesa affirmatively denied these requests prior to the expiration of the five days. Once Mesa expressly informed the Zinks that it would not comply, then the Zinks can demonstrate that a request has been wrongfully denied before the five-day period expired. In the requests listed below, the trial court erred in excluding five days (assuming any penalty is warranted):

- Memos and Notes (FF #10-25, CP 112-13; Zinks’ section III.I)
- Tape recording of June 14 meeting (FF 235-39; Zinks’ section III.HH)
- Draft dog ordinance (FF #240-44, CP141 ; Zinks’ section III.GG)

5.5.4. On remand, the trial court must consider whether requests should be grouped together.

In *Yousoufian 2004*, the Supreme Court ruled that when determining penalties, a trial court has the discretion to group requests and treat those requests as one single request for the purposes of assessing

daily penalties. *Yousoufian 2004*, 152 Wn.2d at 436 & nn. 9 & 10. This is because penalties should be based on an agency's culpability, not the size of a particular request. *Yousoufian 2004*, 152 Wn.2d at 436. When determining how to group requests, the court should consider the subject matter of the requests and the timing of the requests. *Yousoufian 2004*, 152 Wn.2d at 436 n.10.

At the July 17, 2008 hearing, when Mesa requested that the Court group requests for the purpose of determining penalties, the trial court indicated that it "was not certain [it had] the authority to do that," even though it had already grouped some requests together. RP (7/17/08) at 104:18.

On remand, Mesa should be allowed to argue for further grouping. For example, within a one-week period, the Zinks made two requests to review the files for a total of 29 different residential addresses. Based on a common legal error, similar information was redacted from all of these files. Thus, Mesa's legal culpability was that of making a single legal error twice. But rather than group these two requests together, the trial court issued two separate penalties, each totaling over \$30,000. On remand, the court should consider whether these should be grouped together.

Requests that involve a common legal error include:

- Misapplication of RCW 42.56.280/42.17.310(1)(i)
 - Clerk's Memos and Notes Kept on the Zink's Activities at City Hall (two separate requests)

- Improper Redaction of Identifying Information
 - Twenty-One Code Violation Letters
 - Resignation letters of Leo Murphy and Linda Erickson
 - Eighteen Residential Address Files
 - Eleven Residential Address Files
 - Complaint from Steve Sharp Against the City of Mesa
 - Cade Scott Reply to Complaint
 - Complaint Against Scott Cade

Another example where grouping might be appropriate is where the Zinks made a single request for multiple items on a single day. For example, on February 24, 2003, the Zinks made a request for six items, which resulted in five separate penalties (the court found Mesa fully complied with one request in a timely manner), four of which exceed \$5000. The Court should consider whether these should be grouped together.

Requests that were made on the same day include:

- December 11, 2002
 - Request for Ordinances and Resolutions on December 11, 2002
 - Ordinance 01-05
- February 24, 2003
 - Ordinance 02-01
 - Board of Appeals Rules and Regulations adopted December 2002
 - Time Card of Teresa Standridge
 - Water Meter Readings
 - Phone/Fax Logs
 - 18 Residential Addresses
- March 3, 2003
 - 11 Residential Addresses
 - Files of Requests, Delays, Denials and Replies

- March 7, 2003
 - Board of Appeals Signed Minutes of the October 2002, December 2002 and January 2003 Meetings
 - Minutes of the March 5, 2003 BOA Meeting
 - March 10, 2003 Ordinance 03-03
 - Minutes of the February 12, 2003 and March 4, 2003 Council Meetings
 - Resignation Letters of Rick Hopkins and Devi Tate
- April 6, 2003
 - April 10, 2003 Council Packet
 - April 10, 2003 Vouchers and Bills
 - Complaint Against Cade Scott
- April 14, 2003
 - Minutes of the March 13, 2003 and March 17, 2003 Council Meetings
 - Resolution 2003-03
 - Maintenance Logs
- April 25, 2003
 - June 14, 2001 Council Meeting Tape
 - Draft Dog Ordinance

Finally, the trial court's decision to group the three documents the Zinks requested on November 24, 2002 – all were requested the same day and related to the same subject matter – was proper. One \$100-per-day penalty – which totaled \$27,800 – was more than sufficient to penalize the City for its actions. Likewise, its decision to group the requests for attorney-client communications and MRSC communications is appropriate because the City's decision to withhold those records was based on a common legal error.

5.5.5. The trial court properly considered the volume of requests and whether documents were exempt when determining when Mesa could have reasonably responded.

Zinks assert that the trial court erred in considering the high volume of requests when determining whether Mesa's time estimates were reasonable because the City could have responded to each individual request quicker.¹⁹ While that may be true in isolation, the City had to manage all of the Zinks' requests and still run the City. Thus, it was proper to take the volume of requests into account.

The Zinks also object to the City delaying requests to determine if an exemption applies. Under RCW 42.56.520/42.17.320, this is an express justification for an agency to delay a response. The Zinks argue that Mesa should have known the records were not exempt because Mesa had produced the records before without asserting an exemption. But just because Mesa may not have thought to check if an exemption applied when responding to a previous request does not mean that Mesa cannot engage in such a determination in response to future requests.

5.6. The Zinks Claims Regarding the Application of Attorney-Client Communications Are Moot Because the Zinks Have Received Copies of All Privileged Documents²⁰

The issues regarding the trial court's application of the attorney client privilege are moot because the Zinks have all the records and the trial court has imposed its penalty. When the records were filed with the

¹⁹ As noted in section 5.4.2, because most the reasonable-time-estimate periods ran before the Zinks filed suit, they are not entitled to pursue claims based on those allegations.

²⁰ This section addresses the arguments made by the Zinks in section III.M of their brief.

court for *in camera* review, the Zinks were inadvertently given access to these records. See CP 1123-1279. Moreover, the trial court has already imposed a penalty for the City's withholding of these records. FF #58-68 (CP 117-18). Because they have been disclosed, no additional exemption log is needed. Whether this penalty is sufficient will be determined on remand. Thus, this brief will only briefly address the Zinks' claims.

First, the Supreme Court has recognized that public agencies enjoy the same attorney-client privilege that any other private person or entity enjoys. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004) (holding RCW 5.60.060(2), the attorney-client privilege statute in Washington State, is an exemption to the Public Records Act). Under that statute, a document will be privileged if it (1) reflects a communication (2) between the attorney and client (3) for the purpose of seeking or obtaining legal advice (4) made in confidence. See *State v. Perrow*, 156 Wn. App. 322, 328, 231 P.3d 853 (2010) (quoting *Dietz v. Doe*, 131 Wn.2d 835, 849, 935 P.2d 611 (1997)); *State v. Aquino-Cervantes*, 88 Wn. App. 699, 708 n.2, 945 P.2 767 (1997). The privilege belongs to the corporate entity, not the taxpayers at large. RPC 1.13 (noting that a governmental organization is the client of an attorney); see also *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 748, 174 P.3d 60 (2007) (noting role of agency confidentiality serves agency duty to protect taxpayer dollars). Unlike work product, the attorney-client privilege applies even when no litigation is anticipated. *Hangartner*, 151 Wn. 2d at 450-51.

Here, all of the communications that reflect the City seeking advice from its attorney or the attorney providing that advice would be confidential. Thus, for example, Mesa's letter to its attorney on January 11, 2002, was privileged because it reflected the City asking its attorney to provide legal advice by reviewing a proposed ordinance.

The four-part test the Zinks cite from *Rio v. Port of Seattle*, 16 Wn. App. 718, 559 P.2d 18 (1977) cannot be used to narrow the City's privilege as it pre-dates *Hangartner's* holding that public agencies enjoy the exact same privilege as everyone else and it dealt with an Open Public Meeting Act claim. The OPMA provides a different test for when an attorney may provide confidential legal advice in an executive session. See RCW 42.30.110(1)(i).

The Zinks are also incorrect in their critique of the exemption log that was provided. They argue that it is faulty because it does not identify what exemption applies and how it applies.

There is no exemption log requirement in the PRA. Instead it is a judicially created requirement to ensure that records are not "silently withheld." *Rental Housing Authority v. City of Des Moines*, 165 Wn.2d 525, 537, 119 P.3d 393 (2009). It also was adopted to help the requester and court evaluate make a "threshold determination" about whether the record is exempt. *Rental Housing Authority*, 165 Wn.2d at 539 (quoting WAC 44-14-04004(4)(b)(ii)). The items identified in the *Rental Housing Authority* case are not mandatory. For example, the log need not contain

information that would disclose the exempted content of the records. *Koenig v. Pierce County*, 151 Wn. App. 221, 226-27, 211 P.3d 423 (2009) (log listing the total number of pages and applicable exemption sufficient where more detailed log would disclose trial strategy); *Rental Housing Authority*, 165 Wn.2d at 538. Thus, when evaluating a log, the Court should look at whether the requester had sufficient information to make a threshold determination of whether the records are exempt and whether the trial court can identify exempted records for an *in camera* review. If the information is not otherwise available and listing it on the log will not disclose confidential information, then it must be listed on the log.

Here, Mesa's log was sufficient. It identified each communication by author, recipient and date. Moreover, the Zinks already knew what exemption was claimed – the entire purpose of the log was to assist in the *in camera* review of records claimed to be attorney-client privileged. The information on the log allowed the Zinks to determine if the communication was between the City and its attorney. Thus, they could make the threshold determination if the attorney-client privileged applied. It also allowed the Court to perform its *in camera* review. Therefore it was sufficient.

The Zinks assert that not all records were provided. The City has provided all of the records in its possession. While other records may have existed at some point in time, the Zinks have not made any showing that the records existed at the time they made their requests. See *infra*,

section 5.9. Nevertheless, this issue can also be addressed on remand if necessary.²¹

5.7. The Trial Court Properly Determined that the Zinks Did Not Make a Request Pursuant to the PRA for a Copy of the Complaint Against 109 N. Rowell Until September 30, 2002²²

On September 30, 2002, the Zinks submitted a written request for all records related to their home, located at 109 N. Rowell. CP 860. Prior to that date, Ms. Zink had gone to city hall to review the city files associated with her house. CP 869. The Zinks now assert their oral request on August 29, 2002, was a formal PRA request and therefore daily penalties should accrue from that date.

When requesting a public record, however, a requester has the burden of providing an agency with “fair notice” that the request is being made pursuant to the PRA. *Beal v. City of Seattle*, 150 Wn. App. 865, 872, 209 P.3d 872 (2009) (oral request to see records was insufficient to put the city on notice that it was a request made pursuant to the PRA). Moreover, the request must be made with sufficient clarity to give the agency fair notice about what record is being requested – an agency “is not required to be a mind reader when responding to public records requests.” *O’Neill v. City of Shoreline*, 145 Wn. App. 913, 932, 187 P.3d 822 (2008), *petition for review granted*, 208 P.3d 554 (2009). Finally, while a PRA request can be made orally, oral requests are problematic

²¹ If the case is remanded on this issue, the City expects to show that it retained its emails by printing them without attachments and it did not keep faxed records with fax coversheets.

²² This section addresses the arguments made by the Zinks in section III.H.1 of their brief.

because they can easily lead to mistakes about what is actually being requested. *Beal*, 150 Wn. App. at 876-77.

The Zinks' oral requests to review their files did not provide fair notice to Mesa that they were making PRA requests or that they were seeking a copy of a complaint. Moreover, the PRA does not dictate how an agency must file its records, so there was no requirement that Mesa store the complaint in the Zinks' files. Thus, the trial court properly ruled that the Zinks' September 30, 2002 request was the first PRA request the Zinks made for a copy of the complaint.

5.8. The Trial Court Erred in Holding that the PRA Required Mesa to Prepare Minutes for the March 5, 2003 Meeting²³

The PRA only requires an agency to respond to requests for identifiable public records. RCW 42.56.080/42.17.270. "An agency has no duty to create or produce a record that is non-existent." *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004). Thus, when an agency fails to respond to a request for a non-existent record, there is no PRA violation. *Sperr*, 123 Wn. App. at 137; *cf. City of Federal Way v. Koenig*, 167 Wn.2d 341, 348 n.3, 217 P.3d 1172 (2009) (PRA requirements do not apply when no "public record" exists, thus agency was not required to list non-public records on exemption log).

Here, it is uncontested that on March 7, 2003, when the Zinks requested the minutes to the March 5, 2003 Board of Appeals minutes, no such minutes – draft or otherwise – existed. Thus, there was no such

²³ This section addressed the arguments made by the Zinks in section III.AA of their brief.

identifiable public record responsive to this request and Mesa did not violate the PRA when it failed to produce such minutes.

The fact that some other statute may have mandated Mesa create such minutes does not justify finding a PRA violation. The Zinks could have filed a mandamus action if it believed Mesa had failed to comply with a mandatory statutory duty. But if there is no record, there cannot be a PRA violation.

Thus, the trial court erred in ordering Mesa to produce minutes, but its ruling that no PRA violation occurred is correct.²⁴

5.9. The Zinks Cannot Prove that Mesa's Failure to Produce Signed Board of Appeals Minutes Amounted to a PRA Violation²⁵

It is uncontested that on March 5, 2003, the Board of Appeals signed copies of the minutes for its October 2002, December 2002 and January 2003 meetings. It is also uncontested that on March 7, 2003, when Mesa looked for those records, it could not locate them. RP (5/22/05) at 400:13-401:20. No evidence was offered concerning whether the signed minutes actually existed on March 7, nor when, why or how the records were lost or destroyed.

As plaintiffs, the Zinks had the burden of proving that an identifiable public record that was responsive to their request existed when they made their request. The burden was not on Mesa – the PRA

²⁴ The Court held that Mesa complied with this request when it produced the recording of this meeting. The actual tape record, while not “minutes,” is superior to minutes and should satisfy the request.

²⁵ This section addressed the arguments made by the Zinks in section III.AA of their brief.

expressly provides when the burden is placed on an agency: it is the agency's burden to prove that an exemption allows it to withhold a "public record." RCW 42.56.550(1)/42.17.340(1). The PRA does not address whose burden it is to prove a record is public record in the first instance. When the PRA is silent on an issue, "normal civil procedures are an appropriate method to prosecute a claim[.]" *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 105, 117 P.3d 1117 (2005). If there are no "identifiable public records" responsive to a PRA request, then the requirements of the PRA do not apply. *City of Federal Way v. Koenig*, 167 Wash.2d 341, 348 n.3, 217 P.3d 1172 (2009) (holding that city was not required to produce an exemption log for withheld records that did not qualify as "public records"). In any civil case, the burden of proof is on the plaintiff. *See, e.g., Alprin v. City of Tacoma*, 139 Wn. App. 166, 171, 159 P.3d 448 (2007).

Mesa did not assert that the signed board minutes were exempt – it asserted that there were no signed board minutes. When an agency claims that record does not exist, a requester must do more than assert that it does not believe the agency; the requester cannot show a PRA violation simply by alleging the requester does not believe the agency. *Sperr*, 123 Wn. App. at 136-37; *see also* RCW 42.56.100/42.17.290 (providing that

records must be retained “when such records exist” when the request is made).²⁶

Here, the trial court did not enter any finding that the signed minutes existed when the Zinks made their request, and thus the Zinks did not meet their burden on this issue. Accordingly, Mesa’s failure to produce the signed minutes was not a PRA violation.

Even if the Zinks had proven that the signed minutes were destroyed after they made their requests, they would only be entitled to penalties from the date of the destruction until the date Mesa produced the next best thing to the signed minutes, printed copies of the unsigned electronic copies of those minutes.

While the PRA makes it clear that it is a violation of the PRA to destroy a record after it has been requested, the PRA is silent on what the penalty should be for that destruction. RCW 42.56.100/42.17.290. No appellate court has ruled on how this provision relates to the penal provisions in RCW 42.56.550(4)/42.17.340(4).²⁷ Because it would be

²⁶ If the signed records were destroyed, then this would be a violation of the retention requirements. But the retention statutes already contain an enforcement mechanism – criminal sanctions for the intentional deletion of records. RCW 40.16.010. Moreover, the PRA expressly dictates how it interacts with the retention requirements – if a record exists when a request is made but could otherwise lawfully be destroyed, the agency must retain the record until the request is resolved. If it is deleted, the RCW 42.56.100/42.17.290 provides for a violation. Thus, given the existing statutory scheme, there is no basis for grafting the PRA penalty provisions onto the records retention requirements except as expressly provided by the PRA itself.

²⁷ In *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 825 P.2d 324 (1992), the appellate court noted that the trial court had awarded daily penalties from the date of the request to the date the original appeal was terminated. But the requester did not challenge that aspect of the trial court’s ruling and therefore the appellate court did address whether the trial court had properly determined the number days for the daily penalty. Moreover, the city in *Yacobellis* was not able to provide an electronic version of the destroyed record.

absurd to award penalties in perpetuity, there must be some date where penalties stop accruing. Here, where Mesa was able to produce the next best thing to the signed minutes, printed copies of the electronic versions, the date of that production serves as the most logical cut-off date.²⁸ If it were determined that the records were destroyed intentionally, this should factor into the amount of the daily penalty. *See Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 305, 825 P.2d 324 (1992)

5.10. The Zinks Are Not Entitled to Interest on the November 2008 Judgment Because the Court Applied the Wrong Legal Standard for Determining Penalties²⁹

When a judgment is reversed because the wrong legal standard was used to calculate the judgment, and the case is remanded for the entry of new findings of fact and conclusion of law, the prevailing party is not entitled to interest on the reversed judgment, even if on remand the trial court enters a judgment for the identical amount. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 373-74, 798 P.2 799 (1990).

In *Fisher*, the Supreme Court ruled that the trial court erred by only considering one possible measurement of damages, and thus reversed with directions that the trial court should consider an alternative measure as well as the original measure. *Fisher*, 115 Wn.2d at 373-74. On remand, the trial court entered new findings and conclusions but determined that it would still apply the same measure for damages that it

²⁸ This issue may be resolved by the Supreme Court in *O'Neill v. City of Shoreline*, which was argued March 16, 2010.

²⁹ This section addressed the arguments made by the Zinks in section IV.JJ of their brief.

had originally applied. *Fisher*, 115 Wn.2d at 374. Because the order on remand required the trial court to re-determine the damages and enter new findings and conclusions, the Supreme Court held that first damages award was not liquidated and thus did not accrue interest. *Fisher*, 115 Wn.2d at 374.

Here, the Zinks have admitted that the trial court applied the wrong legal standard and that new findings and conclusions are required for the determination of daily penalties. Under *Fisher*, this concession means they are not entitled to interest from the date of the November 2008 Judgment, even if on remand a judgment for an identical amount is entered.

The Zinks' reliance on *Lindsay v. Pacific Topsoils, Inc.*, 129 Wn. App. 672, 120 P.3d 102 (2005), is misplaced. *Lindsay* addressed the issue of whether a conditional payment into the court registry stopped the accrual of post-judgment interest. It did not address a situation analogous to the case at bar, where both parties agree the trial court applied the wrong standards for determining the judgment amount. And even if it had, the court in *Lindsay* could not "overrule" *Fisher*. *Fisher* controls and mandates that no interest can run on the original judgment.

5.11. The Zinks Are Not Entitled to Attorney Fees on Appeal³⁰

The Zinks will not prevail on this appeal and are therefore not entitled to attorney fees. The entire judgment must be thrown out. On

³⁰ This section addressed the arguments made by the Zinks in section IV.JJ of their brief.

remand, it is likely that any penalty will be reduced when mitigating factors are considered. Thus, while the Zinks may ultimately be entitled to some of their attorney fees, that order should not include fees incurred on this appeal.

6. CONCLUSION

There is no question that the Zinks were wronged by the City of Mesa – the City first held a illegal meeting where the Zinks’ work permit was revoked, and then it failed to disclose the tape recording of that meeting for nine months.

But any penalty in this case should match the crime – the Zinks are not entitled to a lottery award. The citizens of Mesa should not be forced to pay hundreds of dollars each when the truly wrongful conduct was carried out by a third-party contractor. Moreover, the City has the right to have its punishment determined by the proper legal standards after it has had a chance to offer evidence of mitigating factors and make arguments in support of reduced penalties.

Therefore, this Court should remand this case for a hearing where the parties can add new evidence in support of aggravating and mitigating factors and make new arguments regarding those factors before the trial court adopts new findings and conclusions in support of penalties. This Court should also provide guidance on the issues identified in this brief, instructing the trial court that any penalty should be proportionate to any

improper conduct, taking into account the City of Mesa's limited resources.

Ultimately, any penalty should further the ultimate goal of the Public Records Act – promoting transparent government. While the Zinks had a right to be angry at the City, their barrage of requests contributed to the City's mistakes and monopolized the City's resources. The Court should be "mindful ... of the desirability of the efficient administration of government" and interpret the PRA to ensure it is not "misused for arbitrary and capricious purposes[.]" RCW 42.17.010(11). If the Zinks' conduct is rewarded with an oversized penalty award, it will hurt transparency by encouraging requests to inundate agencies with requests that will monopolize resources and detract from agencies' abilities to comply with other requests and carry out their other core functions. Therefore, this Court should reverse the trial court's judgment, remand for a new evidentiary hearing and provide further guidance as requested in this brief.

DATED this 30th day of August, 2010.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of September 2010, I caused to be served a true and correct copy of the foregoing CORRECTED BRIEF OF RESPONDENT/CROSS APPELLANT to the following:

<input checked="" type="checkbox"/>	INTER-CITY	Ronald St. Hilaire
<input type="checkbox"/>	U.S. MAIL	LIEBLER, CONNOR, BERRY &
<input type="checkbox"/>	OVERNIGHT MAIL	ST. HILAIRE, P.S.
<input type="checkbox"/>	FAX TRANSMISSION	1141 North Edison Street, Unit C Kennewick WA 99336-1434

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Clerk's Office
500 North Cedar Street
Spokane WA 99201



Sherrie Ashley