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DIVISION III  
STATE OF WASHINGTON  
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No. 29918-0-III  
COURT OF APPEALS,  
DIVISION III  
OF THE STATE OF WASHINGTON

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DOUBLE H, L.P.,

Appellant,

v.

WASHINGTON DEPARTMENT OF ECOLOGY,

Respondent.

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REPLY BRIEF OF APPELLANTS

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## A. INTRODUCTION

In this Public Records Act case, the Department of Ecology (Ecology) admitted to the trial court that it had wrongfully withheld a number of records that had been requested by Double H, L.P. (Double H). RP, p. 4, lines 14-15 (Jan. 14, 2011). Ecology admitted that these actions constituted violations of the statute. RP, p. 5, lines 13-14 (Jan. 14, 2011). And Ecology admitted that it was subject to a per diem penalty. RP, p. 8, lines 4-5 (Jan. 14, 2011). These issues, as well as the amount of the per diem penalty (which was the principal focus of the hearing before the trial court), have been resolved and are not before this Court on appeal.

What is before this Court is an issue on which both parties were in agreement before the trial court. In determining the number of penalty days, should the court place the records in groups according to the date that various groups of records were produced to Double H? The answer given to this question by both parties before the trial court was yes. RP, p. 8, lines 5-7 and p. 13, lines 4-10 (Jan. 14, 2011).<sup>1</sup> Nevertheless, on February 9, 2011, when the trial court filed its memorandum decision, the parties learned for the first time that the court intended to create a group of

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<sup>1</sup> In addition, Double H proposed further grouping of the records according to the type of violation, whether improper assertion of exemptions or failure to disclose (i.e., silent withholding). Double H has not raised this issue on appeal.

one because, in the court's view, grouping records according to response dates "is artificial, and would actually encourage a governmental agency to *withhold* records for days, weeks, or months, until the agency is positive that all documents have been gathered." CP 1284 (emphasis by court).

In its opening brief, Double H argued that the trial court's decision was based on a misinterpretation of the statute, a matter subject to *de novo* review. Ecology responded that the proper standard of review is abuse of discretion, that the trial court did not misinterpret the statute, and that the trial court did not abuse its discretion. Double H's reply to Ecology's arguments follows.

## **B. ARGUMENT IN REPLY**

The following Argument in Reply is divided into three parts. The first part replies to Ecology's position that appellate review in this case should be under the abuse of discretion standard. The second part replies to Ecology's arguments concerning the trial court's interpretation of the Public Records Act. And the third part replies to Ecology's argument that the trial court did not abuse its discretion.

### **1. THE STANDARD FOR REVIEW IS DE NOVO**

Ecology argues that "[t]he question of whether or not to place records in categories (or groups), and how many such groups to create, is ... a matter committed to the trial court's discretion, and is thus ...

reviewed under the abuse of discretion standard. Resp. Brief, p. 8. The trial court's decision to count the penalty days based on groups of records is not challenged here; in fact, both parties supported grouping the records. The issues before this Court all involve the number of groups (one) created by the trial court. As discussed below, this Court should review these issues de novo.

**a. This Court Is in the Same Position as the Trial Court**

There was no testimonial evidence presented to the trial court. There is no issue as to the credibility or competency of witnesses. The facts of the case are largely agreed upon, particularly as they relate to the issues on appeal. At the hearing, the trial court stated:

I do believe that for summary judgment purposes, I need to weigh the record and draw some inferences based upon even the agreed facts. Most of the facts seem to be agreed but the inferences from these agreed facts seem to be quite desperate, desperate [sic]<sup>2</sup> between the two sides, so I am going to have to review that again and make certain findings based upon that and my understanding based upon the comments of both sides is that I am entitled to do that. They are submitting this matter to me on the record for that purpose and if there is an appeal, I am not sure if this creates a de novo type of review. I am not sure about that. I am not going to worry about that for now, but that is what I intend to do. I intend to weigh the record.

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<sup>2</sup> The transcription appears to be in error with respect to the word "desperate" in this sentence. Read in context, it appears the trial judge actually used the word "disparate."

RP, p. 41, line 16 – p. 42, line 2 (Jan. 14, 2011).<sup>3</sup>

However the proceedings below are characterized, it amounts to the same things in terms of the standard on review: the appropriate standard is de novo. Ecology says that rather than summary judgment, “[t]he parties instead submitted the case to the trial court on the pleadings and affidavits in accordance with *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 793, 791 P.2d 526 (1990).” Resp. Brief, p. 4. The trial court took the same view in its memorandum decision. CP 1280. But recharacterizing the proceedings in this manner does not change the standard of review. In *Brouillet*, the Supreme Court held: “Because the trial court decided this case on the basis of affidavits, we review its decision de novo.” *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d at 793. The distinction drawn in *Brouillet* between the nature of its review and review on summary judgment was that the Court did not construe the facts in the light most favorable to the non-moving party. *Id.* at 794 (“This case will be reviewed de novo, but the facts will not be construed in the light most favorable to the school system inasmuch as no party moved for

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<sup>3</sup> Ecology claims that at the hearing on the cross motions for summary judgment, “[t]he parties ... agreed that summary judgment was inappropriate.” Resp. Brief, p. 3. This tracks statements by the trial court in its memorandum decision, as well as the preamble to the findings of fact and conclusions of law, both of which are cited by Ecology. CP 1280 and 1310. As the remarks of the trial court cited above show, at the hearing it was understood that cross motions for summary judgment were before the court, and the judge expressly stated his intention to decide the issues on summary judgment.

summary judgment below.”). Unlike *Brouillet*, the trial court did have before it cross motions for summary judgment and the motions were submitted to the trial court for decision. Counsel for Double H specifically argued to the trial court that in weighing the inferences to be drawn from the record, “the burden on the proof is on the Department of Ecology. And any inferences to be drawn should be drawn in favor to the extent that the record supports it, in favor of, of Double H.” RP, p. 26, lines 11-13 (Jan. 14, 2011).

It was not until the trial court issued its memorandum decision that the proceedings were characterized as anything but summary judgment. This Court should look to the true nature of the proceedings below, which is that they were cross motions on summary judgment. Therefore, the standard of review before this Court is de novo, and the Court should engage in the same inquiry as the trial court. *Neighborhood Alliance of Spokane County v. County of Spokane*, \_\_\_ Wn.2d \_\_\_, 261 P.3d 119, 125 (2011). But even if the Court accepts the proposition that the proceedings below were converted into a *Brouillet*-type of submission on the pleadings and affidavits, the standard on review remains de novo, albeit without construing the facts in the light most favorable to the non-moving party.

**b. A Matter of Statutory Construction Is Given De Novo Review**

In addition, de novo review is the proper standard because Double H challenges the trial court's interpretation of the Public Records Act. App. Brief, pp. 9-19. Ecology responded to Double H's arguments regarding the interpretation of the Public Records Act, but appears to treat the question of statutory interpretation as subject to the abuse of discretion standard. Resp. Brief, pp. 15-18. A matter of statutory interpretation is a question of law subject to de novo review. *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn.App. 185, 191, 181 P.3d 881 (2008). Even with respect to a question that is within the trial court's discretion, the trial court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *In re Rhome*, \_\_\_ Wn.2d \_\_\_, 260 P.3d 874, 883 (2011) (citations and internal quotation marks omitted). Therefore, whether the trial court misinterpreted the statutorily-mandated requirement that a penalty be awarded for each day a record is wrongfully withheld is a matter for this Court to decide de novo. If the trial court's decision to put all of the records in one group fails to give force to the statute, then the trial court's decision is based on an erroneous view of the law, and is an abuse of such discretion as it may have had on the matter.

## 2. THE TRIAL COURT MISINTERPRETED THE PUBLIC RECORDS ACT

### a. The Public Records Act Requires Separate Groups for Double H's Initial Request and the Refresher Request

The Public Records Act provides that with respect to –

– [a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record ... it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

RCW 42.56.550(4) (2005), *amended by* Laws of 2011, ch. 273, § 1 (eliminating the minimum penalty level). Ecology argues that this provision does not require that separate groups be created for two separate requests, where the second request is a refresher request. Resp. Brief, pp. 16-17. According to Ecology: “The refresher in this case was for records concerning the same subject as the initial request. CP 10-12. Double H can point to no authority requiring the trial court to create multiple penalty groups in this circumstance.” Resp. Brief, p. 17. The statute provides such authority. In considering whether this language required a separate penalty to be assessed for every record that was wrongfully withheld, the Washington Supreme Court said:

RCW 42.17.340(4)<sup>4</sup> is, in our view, ambiguous. We say

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<sup>4</sup> Now codified at RCW 42.56.550(4).

that because we are instructed by the PDAs<sup>5</sup> definitions section to interpret terms as either singular or plural “as the context requires.” If the term “record” is interpreted as “record,” then the plain meaning would suggest that courts should assess penalties for every “record” that is requested. However, if the term is interpreted as “records,” then the plain meaning would suggest that courts should assess penalties only for each request regardless of the number of records sought.

*Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 434, 98 P.3d 463 (2005) (*Yousoufian II*). While there may be ambiguity in the statute as to whether a penalty must be issued for each record, there is no similar ambiguity about the number of days. The statute explicitly says that the penalty shall apply “for each day” the record was wrongfully withheld. RCW 42.56.550(4). If the requester was wrongfully denied access for one day, he or she is to be awarded a one-day penalty. If denial were for 100 days, the penalty is to be applied 100 times. Applied literally, this requires that the penalty be applied to the actual number of days that a record is wrongfully withheld. This literal reading of the statute is not inconsistent with the Supreme Court’s holding in *Yousoufian II* that per-record penalties are not required. As long as all of the records in each group were wrongfully withheld for the same number of days then the penalty period accurately corresponds to the number of days the requester was denied

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<sup>5</sup> In 2005, the legislature renamed the Public Disclosure Act (PDA) as the Public Records Act (PRA). Laws of 2005, ch. 274, § 102.

access to the records.

As quoted above, the Court said “the plain meaning would suggest that courts should assess penalties only for *each request* regardless of the number of records sought.” *Yousoufian II*, 152 Wn.2d at 434 (emphasis added).<sup>6</sup> The present case involves two requests made by Double H. The first was made on August 7, 2009. CP 139. The second was made on January 14, 2010. CP 348. The second request was a “refresher” request. The Public Records Act “does not require that agencies provide updates to previous responses, or monitor whether documents properly withheld as exempt may later become subject to disclosure.” *Sargent v. Seattle Police Dep’t*, \_\_\_ Wn.App. \_\_\_, 260 P.3d 1006, 1011 (2011). A refresher request, then, asks the agency to produce such updates. Failure to make such a request would leave the agency under no obligation to produce the new records because, as Ecology correctly notes, “[a]n agency is not obligated ... to provide records that did not exist at the time a request was made.” Resp. Brief, p. 17.

In *Yousoufian II*, the Court, in dicta, discussed a circumstance where it might be permissible to aggregate the records from multiple requests into one group. An amicus brief postulated that without per-

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<sup>6</sup> In the next portion of this Argument in Reply, Double H will discuss why the Supreme Court’s language should not be read as requiring that groups be limited to one group per request.

record penalties records requesters might be inspired to file individual requests for each record. The Court responded that its “holding does not suggest that the trial court lacks the ability to determine that multiple requests are actually one single request based on the subject matter and timing of the requests.” *Yousoufian II*, 152 Wn.2d at 436, n. 10. If a case does arise in which a wily plaintiff attempts to game the system in order to maximize penalties, this dicta suggests that it might be permissible to aggregate all of the records into a single group. But the trial court in this case was not presented with that situation. Here, there was no gaming of the system by Double H. On August 7, 2009, Double H made a request for records. CP 139. On January 14, 2010, it made a second request for a new, non-overlapping universe of records – that is, records created after August 7, 2009. CP 348. Under the Public Records Act, Ecology had no obligation to produce a single record in that second universe unless Double H filed a refresher request. The fact that the two requests asked for records relating to the same subject matter does not alter the fact that they asked for entirely different sets of records.

**b. The Public Records Act Requires Separate Groups for Each Date of Production**

Ecology argues that the Public Records Act does not require the trial court to have created multiple record groups based on the multiple

dates records were produced to Double H. Resp. Brief, p. 15. According to Ecology: “Nothing in the PRA or any Washington precedent establishes that when records are produced on separate days, each production must constitute a separate record group or require the separate calculation of an additional penalty period.” Resp. Brief, p. 16.

As discussed above, in *Yousoufian II*, the Court said “the plain meaning would suggest that courts should assess penalties only for *each request* regardless of the number of records sought.” *Yousoufian II*, 152 Wn.2d at 434 (emphasis added). This should not be read to mean that records should be grouped solely by each request. After all, in *Yousoufian v Office of Ron Sims*, 114 Wn.App. 836, 849, 60 P.3d 667 (2003) (*Yousoufian I*) the court of appeals affirmed the trial court’s determination to establish groups based on their day of production, and in reviewing that decision, the Supreme Court in *Yousoufian II* expressed no qualms. In fact, it later noted that it “approved of this grouping ....” *Sanders v. State*, 169 Wn.2d 827, 864, 240 P.3d 120 (2010). Instead of a limitation on the number of groups, establishing groups for each request is the appropriate starting point.

If, as argued above, the statutory language requiring that the penalty be applied “for each day” is construed literally, then the only way to count those days accurately is to start with the actual day of the request

and end with the actual day of the production. If multiple records covered the same request are produced on the same day, they may be placed together in a single group of records. If, however, they are produced on multiple occasions, the only way to accurately count the actual days is to group them by date of production.

Ecology protests that “[u]nder the approach urged by Double H, such groups – even if separated by only one day – would have a significant impact on an agency’s penalty.” Resp. Brief, p. 16, n. 10. This need not be so. A rule of reason can be brought to bear so as to avoid such an outcome where it would work an injustice. Just as *Yousoufian II* recognizes that a per-request penalty might result in an inappropriate penalty where a requester makes individual requests for each record (see discussion above), so also it may be appropriate for a trial court to provide some leeway where *a single production* occurs on different days over a short, discrete timeframe. But that circumstance does not remotely resemble the facts of this case. Here, nine wrongfully withheld records were produced by Ecology on June 10, 2010. Two weeks later, on June 24, 2010, six additional records were produced. On July 1, 2010, Ecology produced 13 more records. Two months elapsed, and on September 2, 2010, 14 wrongfully withheld records were produced. On November 29, 2010, another record came forward. This was followed about three weeks

later, on December 17, 2010 with nine records. Then, on January 12, 2011, two days before the hearing on the cross motions for summary judgment, Ecology produced an additional 127 records. Another 25 records were produced later that month, on January 26, 2011. Finally, 340 photographic records were produced on July 25, 2011. *See*, App. Brief, p. 5, Table 1. In all, Ecology in this case produced a total of 544 wrongfully withheld records on nine separate occasions over the course of 13 months. These were not records located in obscure or unlikely locations. For example, in the case of the most recent production, on July 25, 2011, at least some of these records appear to have been in the possession of Ecology's regional public records coordinator. CP 1327. In short, just as the hypothetical wily plaintiff who might make separate requests for individual records did not deter the Court in *Yousoufian II* from holding that per-record penalties are not required, likewise, the hypothetical situation of an agency producing records on two days back-to-back does not justify rejecting the approach of counting the actual number of days a record (or group of records) is wrongfully withheld.

**c. The Trial Court's Approach Relies on a Legal Fiction That is Not Justified**

To group together records that were wrongfully withheld for different periods of time, as the trial court has done in this case, creates a

legal fiction as to the actual number of days the records were withheld. Absent a compelling reason for doing so, such a legal fiction should not be adopted. The trial court identified its reason for adopting this legal fiction:

Dividing the records into groups by response dates is artificial, and would actually discourage governmental agencies from producing records over time as they are discovered and reviewed. Therefore, the records which Ecology improperly withheld or failed to disclose constitute one group for purposes of calculating the penalty period.

CP 1313 (Conclusion of Law ¶ 2.7). As Ecology explains it: “The court reasoned that if an agency knew each production would lead to the creation of a new group and a whole new penalty period, agencies might delay production even when they had responsive records in order to minimize the number of groups.” Resp. Brief, pp. 15-16. In light of the specific provisions for a record requester to enforce agency obligations under the Public Records Act, the trial court’s conclusion is counterintuitive. The most surefire way for an agency to avoid or minimize penalties under the Public Records Act is not to delay compliance with the law, but rather to conduct an appropriate search for records to begin with. An agency that behaves in the manner hypothesized by the trial court would be doing so conscious of the fact that it is incurring liability for additional penalties each day it delays, penalties it could avoid by conducting a reasonable search for responsive

records in those places where such records are reasonably likely to be found. A reasonable search in places where records are reasonably likely to be found is, after all, what the law requires, and is *all* it requires.

Under this approach, the focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate. The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. What will be considered reasonable will depend on the facts of each case. When examining the circumstances of a case, then, the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found.

Additionally, agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. The search should not be limited to one or more places if there are additional sources for the information requested. Indeed, the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested. This is not to say, of course, that an agency must search *every* possible place a record may conceivably be stored, but only those places where it is *reasonably likely* to be found.

*Neighborhood Alliance of Spokane County v. County of Spokane*, 261 P.3d at 128 (citations and internal quotation marks omitted) (emphasis by the court).

If the Public Records Act required an agency to disclose and produce every responsive record, rather than every responsive record that turns up in a reasonable search, then there might be some agencies that would be tempted to delay producing records until the agency is

absolutely certain that it had found all responsive records – even those squirreled away in some obscure filing cabinet or email folder. But if indulging that temptation resulted in records being withheld beyond the date of the agency’s reasonable estimate of time under RCW 42.56.520(3), the requesting party could bring a lawsuit in which the agency is promptly required to show cause why it has withheld the record. RCW 42.56.550(1). To fend off that outcome, perhaps an agency would consider setting unreasonably long estimates of time under RCW 42.56.520(3). If that happened, the requesting party could bring a lawsuit in which the agency is required to show cause why its estimate of time is reasonable. RCW 42.56.550(2). A person who prevails against an agency is entitled to an award of all costs, including reasonable attorney fees, incurred in the lawsuit, as well as a daily penalty. RCW 42.56.550(4). Thus, the legislature has provided the vigilant requester the means by which to prevent the perverse outcome that so concerned the trial court – i.e., an agency delaying compliance with the law until it is absolutely certain it has found every responsive record.

An agency that conducts a reasonable search for responsive records in places those records are reasonably likely to be found, and does so within a reasonable amount of time, has no reason to fear liability under the Public Records Act. It will not be held liable merely because its

reasonable search did not find every record. Here, however, Ecology conducted one inadequate search after another. Even where its search picked up responsive records, Ecology sometimes delayed production, as with the photographic records produced on July 25, 2011 that had been in the custody of the regional records coordinator. To lump all of the records into one group, regardless of the date of production, rewards Ecology for repeatedly failing to comply with the law.

### **3. THE TRIAL COURT ABUSED SUCH DISCRETION AS IT MAY HAVE HAD**

Ecology argues that “the question of whether or not to place records in categories (or groups), and how many such groups to create, is ... a matter committed to the trial court’s discretion, and is thus ... reviewed under the abuse of discretion standard.” Resp. Brief, p. 8. Because Double H disagrees with Ecology’s argument that the appropriate standard of review is abuse of discretion, it did not previously address whether the trial court’s decision would meet that standard. In this part of Double H’s reply, Double H will show that even if abuse of discretion were the appropriate standard of review, the trial court should be reversed because it did abuse its discretion.

“A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons.” *Yousoufian v.*

*Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010) (*Yousoufian V*). “A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Moreover, a court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.”<sup>7</sup> *In re Rhome*, 260 P.3d at 882-83 (citations and internal quotation marks omitted).

As noted earlier, the trial court’s decision to treat the wrongfully withheld records as a single group rests on the factual assumption that “[d]ividing the records into groups by response dates is artificial, and would actually discourage governmental agencies from producing records over time as they are discovered and reviewed.” CP 1313 (Conclusion of Law ¶ 2.7).

It is not clear what the trial court meant by “artificial.” As discussed above, grouping by response dates leads to accurately attributing to the wrongfully withheld records the actual number of days those records were withheld, whereas the use of one group in a case such as the present one, where the records were released on nine response dates over 13 months, employs a legal fiction to establish an *artificial* number of

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<sup>7</sup> That the trial court’s adoption of a single group of records is the result of an erroneous view of the Public Records Act is discussed above, in the second part of this Argument in Reply.

penalty days.

As for the trial court's assumption that that grouping records by response date "would actually discourage governmental agencies from producing records over time as they are discovered and reviewed", there is not a scintilla of evidence in the record to support that determination. Neither party expressed the view that grouping records according to response date might perversely motivate an agency to delay production of responsive records as they are found, much less place any factual or expert evidence into the record that would support such a concern. Quite to the contrary, in this case Ecology produced records over time as they were discovered and reviewed, obviously not being discouraged from doing so by the fact that grouping records by response date is a method that has received appellate approval since 2003. *Yousoufian I*, 114 Wn.App. at 849, affirmed on this point, *Yousoufian II*, 152 Wn.2d at 436. In fact, Ecology argued for grouping the records according to response dates, just as Double H did. RP 13, lines 1-13 (Jan. 14, 2011) (arguing for 13 groups).

The record indicates that at the hearing the trial court "was going to ask a lot of questions about, the number with groups." RP, p. 29, line 25 – p. 30, line 1 (Jan. 14, 2011). The court did not, however, ask many questions about the number of groups, persuaded for the moment perhaps

by the near agreement of the parties on the number of groups:

Okay, well, the difficult thing I have got here too is that you both are telling me I have broad discretion with a number of groups, but when two attorneys who have lived this case for so long come into court and tell me that it is between 13 and 14 [groups], it is a difficult thing for me to want to use that discretion when I haven't lived this case for a year.

RP, p. 31, lines 19-24 (Jan. 14, 2011). The court did not ask the parties to address, whether by presenting evidence or argument, the concern it later identified about the effect of grouping by response date on timely agency production of wrongfully withheld records as they are found. Therefore, the only thing in the record that sheds light on the trial court's concern is the fact, as discussed above, that in this case the fact that appellate courts had previously approved grouping by response dates had not deterred Ecology from producing records as they were found. In other words, the record, such as it is, indicates that the trial court's concern was misplaced.

To the extent the trial court had discretion to determine the number of groups in which to place the records, it cannot exercise that discretion based on untenable grounds or for untenable reasons. Whether a group of one might be within a trial court's decision in another case, where, as here, the trial court's decision rests on facts unsupported in the record, it has abused its discretion.

### C. CONCLUSION

It is ironic that so many issues in this Public Records Act litigation have been resolved, and yet the issue of grouping the records by response dates – a matter on which the parties were in agreement before the trial court – is now in dispute.

As discussed above, the trial court's decision fails to give literal meaning to the statutory requirement that a penalty issue "for each day" that a record is wrongfully withheld. Grouping records according to response dates results in a penalty being issued for the actual number of days the records in the group were wrongfully withheld. The trial court's group of one creates a legal fiction about the number of days the records in the group were withheld.

Even if the trial court's decision is subject to review under the abuse of discretion standard, the court's decision should be reversed because there is no support in the record – none – for the court's belief that grouping by response dates will cause agencies to delay responding to public records requests until the agency is positive that all documents have been gathered. Indeed, the very facts of this case – where Ecology produced wrongfully withheld records nine times over 13 months despite the existence of caselaw approving grouping by response dates – refute the trial court's reason for rejecting such grouping.

With all due respect, Ecology (and Double H) had it right the first time. Under the facts of this case, the number of penalty days should be determined by grouping the records from each of the two requests according to the date on which they were produced to Double H.

DATED this 28<sup>th</sup> day of October, 2011.

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## APPENDIX A

### CITED PROVISIONS OF REVISED CODE OF WASHINGTON

#### RCW 42.56.520

Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives. Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer; (3) acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request; or (4) denying the public record request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. In acknowledging receipt of a public record request that is unclear, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives need not respond to it. Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

**RCW 42.56.550 (2005)**

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

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

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

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

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

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

[Note: In 2011, the Legislature amended RCW 42.56.550(4) to eliminate the minimum \$5 penalty amount. Laws of 2011, ch. 273.]

Declaration of Service

I, MICHAEL B. GILLETT, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: I am the attorney-of-record for Appellant Double H, L.P. in the above-entitled matter. I am over 18 years of age, knowledgeable of the matters stated herein, and competent to testify as to the same. On this day, I caused to be served on the persons indicated below the Brief of Appellants, via the U.S. Postal Service, first-class postage prepaid:

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SIGNED this this 28<sup>th</sup> day of August, 2011, at Seattle, Washington.



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