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OCT 03 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29918-0

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

DOUBLE H, L.P.,

Appellant,

v.

WASHINGTON DEPARTMENT OF ECOLOGY,

Respondent.

RESPONSE BRIEF OF RESPONDENT

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I. INTRODUCTION

In 2009, Appellant, Double H, L.P. (Double H) made a public records request to Respondent Department of Ecology (Ecology) seeking records relating to Ecology's investigation of illegal disposal of hazardous waste on Double H's farm. In 2010, Double H "refreshed" its request to obtain records relating to the same subject, but created subsequent to its initial request. Ecology's public records coordinator followed established agency procedures to provide responsive records to Double H. Ecology provided over 3,000 pages of records to Double H in batches, while withholding and redacting some records under exemptions in the Public Records Act, Chapter 42.56 RCW (PRA).

In 2010, shortly before Ecology provided the first batch of records in response to Double H's refresher request, Double H filed suit claiming Ecology had improperly denied it access to records and had not provided a reasonable estimate of the time required to respond to the refresher request. The parties filed cross-motions for summary judgment. Ecology's motion acknowledged some PRA violations. With these violations acknowledged, Ecology sought the resolution of all claims in the case and the imposition of a reasonable per-day penalty. Double H's motion sought the imposition of the maximum statutory per-day penalty available under the PRA. In addition, Double H argued that the

improperly withheld records should be separated into multiple records groupings based first on the dates on which they were produced, and then on common errors of law. This would have had the effect of creating separate but overlapping penalty calculations for each group created, thus magnifying the total penalty amount.¹

The trial court determined it should only consider one “group” of records to be at issue in the case based on the fact that all the records related to the same subject. It awarded Double H a penalty in excess of \$13,000 on that basis, plus its costs and fees. Double H now appeals the trial court’s determination that there should only be one group of records for calculating a penalty in this case.

II. COUNTER STATEMENT OF ISSUES PRESENTED

1. Whether the trial court correctly established the number of penalty days on which a penalty would be calculated when it established the penalty period by counting the total number of days between the first date upon which records could have been expected to be provided to Double H, and the date when the last responsive records were actually provided to Double H.

¹ Thus, to illustrate through a simplified example, if the court were to determine that the penalty amount should be \$10/day and records had been improperly withheld for 100 days, the total penalty amount would be doubled if the court created two record groups versus one ($[\$10/\text{day} \times 100 \text{ days}] \times 2 = \$2,000$).

2. Whether the trial court abused its discretion when it treated Double H's request as pertaining to a single group of records for the purpose of calculating a penalty, when Double H's request, as "refreshed," related to a single subject and merely continued the original request.

III. STATEMENT OF THE CASE

A. Procedural History

In March 2010, Double H sued Ecology for wrongfully withholding records requested under the PRA. Clerk's Papers (CP) 1–17. The parties brought cross-motions for summary judgment. CP 23–24, 432–33. Ecology acknowledged some violations of the PRA in its motion, sought in-camera review of certain still-withheld records, and requested assessment of a penalty at the low end of the statutory range. CP 72–87, 597–604. Double H proposed that the records at issue be divided into multiple groups corresponding to the dates on which Ecology had provided them, as well as based on the alleged common legal errors that resulted in improper withholding of documents. CP 420–22, 565–66.

At hearing on the cross-motions, the parties acknowledged that both determining the number of groups of records involved and setting the appropriate per diem penalty was a matter within the trial court's discretion that would require the court to weigh inferences. The parties thus agreed that summary judgment was inappropriate. CP 1280, 1310.

The 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). CP 1280.

After reviewing the record, the trial court determined that the number of days for which a per diem penalty was due was 495. This penalty period started on the reasonable estimated response date given by Ecology for the first request (September 10, 2009) and ended on the date the last responsive records were produced to Double H (January 27, 2011).² CP 1312–13, 1315.

Rather than dividing the records into groups based on production date, the trial court found there was a single group of records for the purpose of calculating the penalty. In reaching this determination, the court focused on the fact that both of Double H's requests related to the same subject matter. CP 1313, 1284. The court rejected the idea that multiple production installments required creation of multiple groups because such a division would be "artificial" and would encourage agencies to withhold records, rather than release installments, in order to

² In July 2011 Ecology staff discovered a compact disc and a digital camera memory chip containing, respectively, 287 and 53 additional photographs of the Double H site investigation that were responsive to Double H's records requests. The photos were provided to Double H on July 22, 2011. Ecology with has agreed with Double H that the number of days in the penalty period should be accordingly increased to 683 days, and the total penalty should thus be increased to \$18,441. This brief will continue to refer to a penalty period of 495 days as found by the trial court on April 18, 2011, with the understanding that the parties intend to stipulate that the penalty period is now 683 days.

avoid creating groups. CP 1284. The court found Ecology should not be punished for the continuous review and release of records. CP 1284–85. The court then employed the mitigating and aggravating factors set out by the Washington Supreme Court in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467–68, 229 P.3d 735 (2010) (*Yousoufian V*) (*Yousoufian* factors) to arrive at a daily penalty of \$27. CP 1313–15. The total penalty awarded was thus \$13,365.00 (\$27/day x 495 days x 1 records group). CP 1319–21. The trial court also awarded Double H costs and attorney fees totaling \$88,659.82. CP 1319.

B. Relevant Facts

Double H requested records from Ecology under the PRA in August 2009. CP 8. Ecology communicated to Double H its reasonable estimate that Double H would receive responsive records the week of September 10, 2009. CP 141. Ecology provided the first set of records to Double H on or about September 24, 2009, and produced additional installments of records on September 30, 2009, and January 27, 2010. CP 153, 157, 26.

In January 2010, Double H took the position that its August request was continuing and that Ecology should provide further documents in supplementation. CP 14–15. In response, Ecology’s attorney explained that a public records request did not create an open-

ended obligation to produce records, and that Ecology was not required to continue providing records created after the date of Double H's records request. CP 14–15. Later the same month, Double H then made a “refresher” request for records responsive to its August request, but created after that request was made.³ CP 10–12. Records responsive to the refresher request were initially provided on March 19, 2011, and March 22, 2011. CP 366, 368. Double H filed the instant lawsuit on March 17, 2010. CP 1–17.

In total, Ecology produced over 3,000 pages of records responsive to both the original request and the refresher. CP 1311. The majority of these records were produced either before Double H filed its lawsuit, or shortly afterwards. CP 1311. Throughout the production period, Ecology continued to review its claims of exemption for some records and continued to find additional responsive records. Ecology provided newly discovered and non-exempt records to Double H on eight different occasions in 2010 and 2011.⁴ In the process of responding to Double H's request, Ecology committed some admitted violations of the PRA,

³ In its brief, Double H states that “Ecology’s action to not supplement its response to the first request made the refresher request necessary.” Appellant’s Brief at 15. As discussed on page 17 *infra*, it was not Ecology’s action, but the law governing public records requests that made the refresher necessary.

⁴ In addition to the records provided on July 22, 2011, records were provided to Double H on June 10, 2010, June 24, 2010, July 1, 2010, September 2, 2010, November 29, 2010, December 2, 2010, December 17, 2010, and January 14, 2011. CP 664–67.

including failing to provide records within a reasonable time and wrongfully withholding some records. CP 1311.

IV. SUMMARY OF ARGUMENT

The PRA requires a penalty for each day a person is denied the right to inspect or copy a “public record.” This requirement is satisfied by awarding a penalty for each day records are improperly withheld, beginning on the first day records should have been provided until the last day records were provided. Under Washington Supreme Court precedent, a trial court has the discretion to group multiple documents for purposes of assessing a penalty under the PRA. This precedent, however, does not require a court to create such groups, nor is it necessary for a court to create multiple groups in order to arrive at the per day penalty mandated by the PRA. The trial court in this case did not abuse its discretion when it found that the records at issue constituted a single group based on the reasonable criterion of common subject matter. The fact that Ecology produced records to Double H in multiple batches, and that Double H made a refresher request to obtain records that had been created after the date of its original request, does not mandate the creation of multiple record groups.

V. ARGUMENT

A. The Proper Standard Of Review Is Abuse Of Discretion

Determining the proper amount of a per diem penalty under the PRA is within the sound discretion of the trial court. RCW 42.56.550(4); *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 430–31, 98 P.3d 463 (2004) (*Yousoufian II*) (the PRA specifically provides that setting the penalty amount is within the court’s discretion). Accordingly, appellate courts review a trial court’s imposition of a penalty under the PRA under the abuse of discretion standard. *Yousoufian II*, 152 Wn.2d at 431. The question of whether or not to place records in categories (or groups), and how many such groups to create, is also a matter committed to the trial court’s discretion, and is thus also reviewed under the abuse of discretion standard. *Sanders v. State*, 169 Wn.2d 827, 864, 240 P.3d 120 (2010); *Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 849, 60 P.3d 667 (2003) (*Yousoufian I*). A trial court abuses its discretion when it makes a decision that is manifestly unreasonable or based on untenable reasons. *Yousoufian V*, 168 Wn.2d at 458–59 (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)).⁵

⁵ Double H argues for de novo review, which is not the correct standard of review for the reasons explained *infra* page 14.

B. While The PRA Requires The Trial Court To Levy A Per Diem Penalty Within A Statutory Range For Each Day A Record Is Improperly Denied, It Is Within The Court's Discretion To Determine The Specific Penalty Amount And Whether To Create Multiple Groups Of Records For Penalty Purposes

Determining a penalty under the PRA is a two-step process. *Yousoufian II*, 152 Wn.2d at 438. The first step is to determine the penalty period, which is the number of days a party was denied access to records. The second step is to determine the appropriate penalty amount to be levied per day, which is to be between five and one hundred dollars. RCW 42.56.550(4)⁶; *Yousoufian II*, 152 Wn.2d at 438.

With respect to determining the penalty period, a person is entitled to a penalty under the PRA “for each day that he or she was denied the right to inspect or copy” a “public record.” RCW 42.56.550(4). The penalty period is thus strictly defined by the number of days a person has been denied a record after it should have been produced. RCW 42.56.550(4) (a penalty is prescribed “for each day” a person is denied records); *see also Yousoufian II*, 152 Wn.2d at 437.

With respect to determining a penalty amount, there are two mandates within the PRA. One is that there must be a penalty when a requesting party is improperly denied access to a public record under the

⁶ The Legislature amended the statute in 2011 to provide that the daily penalty amount may be between zero and one hundred dollars. Laws of 2011, ch. 273, § 1.

PRA. RCW 42.56.550(4); *Yousoufian* II, 152 Wn.2d at 431–33. The other is that a penalty shall be awarded for each day records are wrongfully withheld. RCW 42.56.550(4); *Yousoufian* II, 152 Wn.2d at 437 (PRA unambiguously requires a penalty for each day).

Beyond these mandates, establishing the penalty amount is within the sound discretion of the trial court. The Supreme Court has provided a set of aggravating and mitigating factors for courts to use in arriving at penalty amounts. *Yousoufian* V, 168 Wn.2d at 467–68. The Court has also stated that the purpose of promoting access to public records is better served by increasing a penalty based on an agency’s culpability than by basing it on the size of a plaintiff’s request. *Yousoufian* II, 152 Wn.2d at 435. In other words, courts should focus on the per diem amount between five dollars and one hundred dollars in arriving at the proper penalty, not the number of records involved.

This principle applies equally well when the question is whether to base a penalty on “groups” of records. A disproportionate penalty can result from arbitrarily created multiple record groups just as easily as it can result from basing a penalty on a large number of individual records.

Whether a trial court creates record groups depends on the facts of each case. Multiple record groups are in no way required by the PRA. Neither are they mandatory under either *Yousoufian* or *Sanders*.

Yousoufian I, 114 Wn. App. at 849; *Sanders*, 169 Wn.2d at 864. When it divided records into groups, the trial court in *Yousoufian* was confronting the question of whether the penalty mandated by the PRA must be applied to each and every document at issue. *Yousoufian I*, 114 Wn. App. at 847–49. The court refused to award penalties on a per document basis because it would result “in a penalty ‘totally out of proportion to the County’s negligence, the harm done thereby, and any amount needed for deterrence.’” *Id.* at 848. Upholding this approach, the Court of Appeals said “the literal meaning of RCW 42.17.340(4)^[7] contemplates a penalty for each day a *record request* is unlawfully denied; the statute does not require the penalty to be multiplied by the number of records responsive to a single request.” *Id.* (emphasis added). Applying the penalty to record “groups” thus provided a middle ground between the extreme penalty sought by the requestor and the minimal penalty sought by King County. *Id.* at 849.⁸

This does not mean, however, that establishing multiple record groups is necessary in all cases. In fact, the Washington Supreme Court has made it clear that it “does not suggest that the trial court lacks the ability to determine that multiple requests are actually one single request

⁷ Predecessor to RCW 42.56.550(4).

⁸ Contrary to Double H’s apparent contention, *see* Appellants Brief at 10–12, 17–18, the Court was not addressing the concept of penalty days with this approach (which is based in the statute), but rather the number of records at issue.

based on the subject matter and timing of the requests.” *Yousoufian II*, 152 Wn.2d at 436 n.10. The Court has only said grouping records is within the trial court’s discretion. *Sanders*, 169 Wn.2d at 864. As argued below, in this case the trial court did not abuse its discretion when it declined to create multiple records groups.

C. The Trial Court Did Not Abuse Its Discretion In Establishing The Penalty Period And In Declining To Create Multiple Records Groups

1. The Trial Court Properly Determined The Penalty Period

Applying the above principles, the trial court first found that responsive records should have been produced to Double H on September 10, 2009, and that records were actually produced as late as January 27, 2011. CP 1312–13. The trial court thus found that the number of days between those two dates—495—was the penalty period for this case. Applying the *Yousoufian* factors, the trial court then assessed a penalty of \$27 for each day between the first day records should have been provided and the last day records were provided, fulfilling both mandates of the PRA. CP 1312–15.

Double H assigns error to the trial court’s conclusion that “this court has discretion to determine the number of days documents were improperly withheld . . . ,” and states that it “challenges the trial court’s

interpretation of the PRA concerning determination of the penalty period.” Appellant’s Brief at 1, 8. In fact, despite the language used in its conclusion, the trial court did not exercise discretion with regard to defining the penalty period. It conformed to the PRA and assessed a penalty for each day between the first day records were due and the last day records were provided. RCW 42.56.550(4); CP 1312–13.

Double H thus never actually addresses the penalty period as specified in the PRA, but instead faults the trial court’s decision to view the records at issue as one group rather than multiple groups. *See* Appellant’s Brief at 1–20. In so arguing, Double H conflates the straightforward factual matter of counting days with the discretionary matter of determining whether multiple groups of records should have been created. When a trial court creates groups of records, this gives rise to separate penalty days for each group, which multiplies the number of penalty days for a given records request where records have been wrongfully withheld. *Yousoufian I*, 114 Wn. App. at 849. However, these additional penalty days are separate from (even though nested within) the penalty period required by the PRA. The creation of record groups is wholly a matter of the trial court’s discretion. *Sanders*, 169 Wn.2d at 864 (grouping records is within trial court’s discretion). Accordingly, determining a number of records groups is not the same thing as

determining the number of days in the penalty period, which again is defined simply by the number of days between the first day records should have been provided in response to a request and the last day records were so provided, as mandated by statute. RCW 42.56.550(4).

In the same vein, Double H appears to allege that the trial court reduced the penalty period in this case, and the standard of review should thus be de novo. Appellant's Brief at 8 (citing *Yousoufian II*, 152 Wn.2d at 436). That is not the case. There was no reduction of the number of penalty days here, in contrast to *Yousoufian II*. The Court in *Yousoufian II* was resolving the trial court's subtraction of 527 days from the total number of days that records were improperly withheld from Mr. Yousoufian, based on Mr. Yousoufian's delay in obtaining counsel. *Yousoufian II*, 152 Wn.2d at 436–38.

In this case, the trial court made no such subtraction. The penalty period remains the period between the reasonable estimated response date given by Ecology for the initial request and the date the last records responsive to either request were produced. What the trial court did here was decline to create record groups, which would have had the effect of multiplying the number of penalty days. This is not the same thing as reducing the penalty days involved. The trial court did not err in determining a penalty period of 495 days.

2. The Trial Court Did Not Abuse Its Discretion In Establishing A Single Records Group For Assessing The Penalty

Double H argues that in order to arrive at the proper per diem penalty under the PRA, the PRA requires a court to create multiple record groups based on the multiple dates records were produced to Double H. Appellant’s Brief at 16–19. However, the law imposes no such requirement, and the trial court did not abuse its discretion in declining to adopt Double H’s position.

The trial court determined that all records in this case relate to one common subject—the investigation at Double H Farms—and therefore all relate to a single request for records.⁹ CP 1313; *see Yousoufian I*, 114 Wn. App. at 848 (“the literal meaning of RCW 42.17.340(4) contemplates a penalty for each day a *record request* is unlawfully denied”) (emphasis added). In so determining, the trial court concluded that dividing records into multiple groups corresponding to Ecology’s production dates would be “artificial,” and would actually discourage agencies from producing records over time. CP 1313. The court reasoned that if an agency knew each production would lead to the creation of a new group and a whole

⁹ Based on the *Yousoufian* cases and *Sanders*, Ecology acknowledged that the trial court could have exercised its discretion to create groups of records in this case. However, the trial court did not find criteria on which to base such groups. This Court is not bound by what either party argued to the trial court, but by the law and the applicable standard of review.

new penalty period, agencies might delay production even when they had responsive records in order to minimize the number of groups.¹⁰

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. Different dates of production have been used to create groups, in *Yousoufian*, for example. *Yousoufian* I, 114 Wn. App. at 849. However, nothing in *Yousoufian* I implies it is necessary for trial courts to create groups based on production dates, or that penalties will be insufficient if not based on groups of records. *See generally* *Yousoufian* II, 152 Wn.2d at 435–46. Indeed, the Court in *Sanders*, which was decided after the five *Yousoufian* cases, approved of the trial court’s creation of two groups based on subject, not on production date, despite the fact that records were produced in that case on five different dates.¹¹ *Sanders*, 169 Wn.2d at 864.

Similarly, the fact that Double H made a “refresher” request for

¹⁰ This supposition does not require a presumption of agency cynicism or lack-luster searches, as posited by Double H. Appellant’s Brief at 17. An agency certainly might decide, even in the course of a diligent search, to delay production to avoid multiple groups or to provide a more coordinated and coherent response. Under 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.

¹¹ Before and during the *Sanders* litigation, records were produced in four batches. *Sanders*, 169 Wn.2d at 864. Records deemed non-exempt on appeal required a fifth production. They were considered a single record because they related to the same topic, but the release date itself was not the basis for a record group. *Id.* at 864–65.

records does not mandate creating a separate group and multiplying the penalty amount. Under the PRA, an agency must provide all responsive, non-exempt records in response to a records request. RCW 42.56.070(1). An agency is not obligated, however, to provide records that did not exist at the time a request was made. RCW 42.56.080 (agencies must make “identifiable public records” available for inspection). The PRA “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*, No. 65896-4-I, slip op. at 6 (Wash. Ct. App. Sept. 19, 2011). The *Sargent* Court found no provision in the PRA for a standing records request, which it deemed to be a “sensible, bright-line rule.” *Sargent*, slip op. at 7. When a requesting party wishes to obtain records on a given subject created or acquired subsequent to its request, it must refresh its request.

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. Whether and how to group records is left to the trial court’s sound discretion.

Finally, contrary to Double H’s argument, there is no evidence that the trial court adopted a single record group “so as to reduce the penalty.”

Appellant’s Brief at 9. Double H’s view actually turns the process on its head. It erroneously presumes that multiple production dates will lead to multiple groups, and that a trial court finding only one group is taking an extreme position. This is not the case. In fact, multiple records groups are created only by the court affirmatively exercising its discretion. Similarly, Double H has no basis for the assertion that the seriousness of the violations was minimized in this case. Appellant’s Brief at 7. The seriousness was fully taken into account by the trial court in arriving at a per diem penalty significantly above the \$5 minimum—\$27—through applying the *Yousoufian* factors. CP 1313–15.

Nothing about the trial court’s determination to treat all the records in this case as a single group is “manifestly unreasonable.” See *Yousoufian V*, 168 Wn.2d at 458–59. As a result, the trial court did not abuse its discretion. The trial court should thus be affirmed.¹²

VI. CONCLUSION

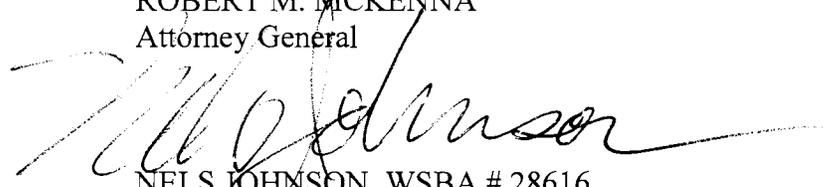
Creating record groups for penalty purposes under the PRA is a matter committed to the trial court’s discretion. Creating such groups is not required by the PRA or case law, nor is creating such groups necessary in order to assess the per day penalty mandated by the PRA. The trial

¹² As a result, Double H should not be awarded its costs and attorney fees incurred in the course of this appeal. The PRA provides costs and attorney fees only to parties who prevail in an action against an agency. RCW 42.56.550(4).

court did not abuse its discretion in viewing all the records in this case as a single group. Accordingly, the decision of the trial court should be affirmed and Double H's appeal should be denied.

RESPECTFULLY SUBMITTED this 29th day of September 2011.

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A handwritten signature in black ink, appearing to read "Nels Johnson", written over the typed name below.

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