

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2009 AUG 21 P 4: 20

BY RONALD R. CARPENTER

No. 80081-2

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

ARMEN YOUSOUFIAN,

Respondent,

v.

THE OFFICE OF RON SIMS, KING COUNTY EXECUTIVE, a  
subdivision of KING COUNTY, a municipal corporation, et. al,

Petitioners.

**BRIEF OF AMICUS CURIAE ALLIED DAILY NEWSPAPERS OF  
WASHINGTON, WASHINGTON NEWSPAPER PUBLISHERS  
ASSOCIATION, WASHINGTON ASSOCIATION OF  
BROADCASTERS, ASSOCIATED PRESS NW BUREAU,  
ABERDEEN DAILY WORLD, EVERETT HERALD, PENINSULA  
DAILY NEWS, SKAGIT VALLEY HERALD, SOUND  
PUBLISHING, TRI-CITY HERALD, WALLA WALLA UNION-  
BULLETIN, WENATCHEE WORLD, KING 5, CENTER FOR  
JUSTICE, AND WASHINGTON COALITION FOR OPEN  
GOVERNMENT**

Michele Earl-Hubbard  
Chris Roslaniec  
Allied Law Group  
2200 Sixth Avenue, Suite 770  
Seattle, WA 98121  
Attorneys for *Amici Curiae*

BY RONALD R. CARPENTER

2009 AUG 31 P 3:00

FILED  
SUPREME COURT  
STATE OF WASHINGTON

ORIGINAL

FILED AS  
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

I. Identity of Amici..... 1

II. Interest of amici ..... 1

III. Statement of the case ..... 2

IV. Argument and Authority ..... 2

    A. Penalties Under the PRA Must Deter Future Violations and Promote the Purpose and Goals of the Act ..... 2

    B. Denial of a Requestors’ Rights Under the PRA Causes a Considerable Harm to the Public, to all Requestors and to Our Democratic Form of Government..... 5

    C. Agencies Should be Barred from Asserting Lack of Economic Loss as a Factor to Mitigate Penalty Awards..... 6

        1. The Purpose of the PRA is to Facilitate The Public’s Access to Government..... 6

        2. In No Published Case has a Court Considered Economic Loss in Determining Penalty Awards..... 7

        3. The PRA Prohibits Disparate Treatment of Requestors ..... 9

        4. Economic Loss Should Only be Considered as a Factor in Assessing Penalties if Raised by a Prevailing Requestor ..... 10

        5. Economic Loss is Not an Accurate Proxy for the Importance of Public Records ..... 11

        6. Allowing Agencies to Unilaterally Raise Economic Loss as a Factor Invites the Use of Discovery to Undermine the Purposes of the PRA..... 12

    D. Agencies are in Need of Deterrence ..... 13

        1. The Court Should Weigh Trial Court Decisions Reflecting Current Penalties Awarded Under the PRA..... 14

2.	Trial Court Opinions are Historical Facts of Which This Court May Take Judicial Notice .....	15
E.	The Penalty Range Established in the PRA Suggests that Courts Begin at the Median Penalty .....	16
F.	A Multi-Factor Approach Will Guide Courts While Allowing Lower Courts to Continue to Exercise Their Discretion When Assessing Penalties .....	19
V.	Conclusion .....	20

**TABLE OF AUTHORITIES**

**Cases**

<u>American Civil Liberties Union of Washington v. Blaine School Dist.</u> , 86 Wn. App. 688, 937 P.2d 1176 (1997) .....	8
<u>American Civil Liberties Union of Washington v. Blaine School Dist.</u> , 95 Wn. App. 106, 975 P.2d 536 (1999) .....	4
<u>Amren v. City of Kalama</u> , 131 Wn.2d 25, 929 P.2d 389 (1997) .....	3, 4, 8
<u>ETCO v. Dept. of Labor</u> , & Indust., 66 Wn. App. 302, 831 P.2d 1133 (1992) .....	9
<u>Grosjean v. American Press Co.</u> , 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936) .....	11
<u>Herman v. State of Washington Shorelines Hearings Bd.</u> , 149 Wn. App. 444, 204 P.3d 928 (2009) .....	2
<u>Hudson v. U.S.</u> , 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) .....	2
<u>King County v. Sheehan</u> , 114 Wn. App. 325, 57 P.3d 307 (2002) .....	8

<u>Progressive Animal Welfare Soc’y v. Univ. of Wash.,</u> 125 Wn.2d 243, 884 P.2d 592 (1994).....	3, 4
<u>Sinatra, Inc. v. City of Seattle.</u> 131 Wn.2d 640, 935 P.2d 555 (1997).....	2
<u>State v. Calkins.</u> 50 Wn.2d 716, 314 P.2d 449 (1957).....	9
<u>State v. Quantex Microsystems, Inc.,</u> 809 So.2d 246, (La. Ct. App. 2001).....	15
<u>Village of North Atlanta v. Cook.</u> 219 Ga. 316, 133 S.E.2d 585 (1963).....	15
<u>Yacobellis v. City of Bellingham.</u> 64 Wn. App. 295, 825 P.2d 324 (1994).....	6, 7, 8
<u>Yousoufian v. Office of King County Executive.</u> 152 Wn.2d 421, 98 P.3d 463 (2005).....	2, 3
<b><u>Statutes</u></b>	
RCW 42.56.030 .....	3, 6, 11
RCW 42.56.070 .....	12, 13
RCW 42.56.080 .....	9, 10, 12, 13
RCW 42.56.100 .....	5
RCW 42.56.520 .....	5, 12, 13
RCW 42.56.550(1).....	13
RCW 42.56.550(3).....	14

## I. IDENTITY OF AMICI

The *Amici Curiae* are Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, Washington Association of Broadcasters, Associated Press NW Bureau, Aberdeen Daily World, Everett Herald, Peninsula Daily News, Skagit Valley Herald, Sound Publishing, Tri-City Herald, Walla Walla Union-Bulletin, Wenatchee World, King 5, Center for Justice, and Washington Coalition for Open Government: news media and public-interest watchdog organizations with a strong interest in access to public records in order to keep the public informed. *See also* Motion for Leave to File Amicus Curiae Brief.

## II. INTEREST OF AMICI

*Amici's* interest in this case stems from their interest in timely access to accurate, complete information concerning the conduct of government and its agents in order to inform the public about governmental actions and issues. *Amici* are unable to inform the public if agencies do not adequately respond to public records requests. *Amici* rely on the tools in the Public Records Act (“PRA”)—the award of attorney’s fees and costs incurred in litigation, and the award of statutory penalties of \$5 to \$100 per day for each day a record is wrongfully denied—to encourage compliance and deter violations. This Court’s decision interpreting penalty calculations will greatly impact the strength of the

deterrent effect of the penalty provision and ability and willingness of requestors to enforce their rights under the PRA—and, in turn, the government’s motivation to comply with the law. The *Amici* have a legitimate interest in assuring the Court is adequately informed about the impact its decision will have on all record requestors, not only the individual whose record requests are currently at issue before the Court.

### III. STATEMENT OF THE CASE

*Amici* adopt Yousoufian’s Statement of the Case. App. Br. at 2-9.

### IV. ARGUMENT AND AUTHORITY

#### A. Penalties Under the PRA Must Deter Future Violations and Promote the Purpose and Goals of the Act

When a statute provides for a civil penalty, its primary purpose is to punish current violations and to deter future violations. *See Sinatra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662, 935 P.2d 555 (1997); *see also Hudson v. U.S.*, 522 U.S. 93, 102, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (“all civil penalties have some deterrent effect”) *see also Herman v. State of Washington Shorelines Hearings Bd.*, 149 Wn. App. 444, 460, 204 P.3d 928 (2009) (noting “[a] civil penalty is primarily intended to coax compliance with the law and deter future violations” in the context civil penalties for violations of the Shoreline Management Act). Similarly, the PRA “includes a penalty provision that is intended to discourage improper denial of access to public records and [encourage] adherence to the goals

and procedures dictated by the statute.” *Yousoufian v. Office of King County Executive*, 152 Wn.2d 421, 429-30, 98 P.3d 463 (2005) (*Yousoufian II*) (alteration in original).

This Court has repeatedly emphasized the importance of the goals of the PRA, and penalties—coupled with attorney fees and costs to a prevailing requestor—are what serve to accomplish these goals. The Supreme Court of Washington interprets the PRA as “a strongly worded mandate for broad disclosure of public records.” *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997) (quoting *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (“PAWS II”). “The stated purpose of the [PRA] is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of the public officials and institutions.” *Id.* The intent of the PRA is clearly delineated in RCW 42.56.030:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to ensure that the public interest will be fully protected [.]

Indeed, this Court in *PAWS II* has echoed the importance of the policy behind the PRA that:

Without tools such as the Public Records Act, government of the people, by the people, for the people, risk becoming government of the people, by the bureaucrats, for the special interests.

125 Wn.2d at 251. One of the strongest tools for enforcing the PRA is its penalty provision.

Due to the unusually strong policy behind the PRA, penalties must be sufficient not only to reflect the amount necessary to deter future violations, but must also punish the current violation. This amount is presently determined by factoring in the agency's culpability and actions in responding to a public records request—including the presence of good or bad faith on the part of the agency. *See American Civil Liberties Union of Washington v. Blaine School Dist.*, 95 Wn. App. 106, 111, 975 P.2d 536 (1999); *Amren*, 131 Wn.2d at 37-38 (“the existence or absence of [an] agency's bad faith is the principal factor which the trial court must consider”) (citation omitted).

Because this inquiry necessarily focuses on the deterrent and punitive effects of the penalty, it should function wholly independent of any facts pertaining to the requester, such as the identity of, or the economic loss suffered by, the requester. The determination of penalties should not, as discussed below, serve as an invitation for agencies to

subject requestors to discovery regarding economic harm and shift the burden to requestors to establish that harm. Assessment of penalties must focus on the actions of the agency and the resultant harm to the public.

**B. Denial of a Requestors' Rights Under the PRA Causes a Considerable Harm to the Public, to all Requestors and to Our Democratic Form of Government**

King County persists in arguing that because Yousoufian has not shown economic harm from the denial of his rights under the PRA, there has been no “tangible harm” to the public or to Yousoufian in this case.<sup>1</sup> The County misapprehends the purpose and importance of the PRA. Here, the voters of King County and Yousoufian were denied records related to a \$300 million stadium project to be funded by taxpayers for more than four years after the election where they were asked to vote on whether to fund the project. They were denied access to non-exempt public records they were unquestionably entitled to in the most timely possible manner and with the agency’s fullest assistance. *See RCW 42.56.100.*<sup>2</sup> While we may never know if access to those records before the vote would alter the outcome, and the stadium has now been built— with funding from tax payers for years to come—the denial of public

---

<sup>1</sup> King County Brief of Resp. at 13; King County Mot. for Reconsid. at 9; Supp. Brief of Petitioner King County at 19.

<sup>2</sup> Agencies shall adopt and enforce reasonable rules and regulations ... consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization.... Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information. RCW 42.56.100.

records to which one is entitled is itself a harm to the public and to the requester. The denial of access is the paramount injury. Access to public records is of vital importance to our democratic form of government. When those rights are denied, that is a considerable harm. Thus, considerable harm exists even absent a showing that money was lost or decisions would have changed had the information been disclosed.

**C. Agencies Should be Barred from Asserting Lack of Economic Loss as a Factor to Mitigate Penalty Awards**

Allowing a lack of economic loss to serve as a mitigating factor in the assessment of penalties under the PRA contravenes the central purposes of the PRA, improperly focuses the penalty inquiry on the requestor rather than the conduct of the agency, improperly differentiates between requestors, invites discovery abuses, and discourages requestors from challenging agencies that wrongfully withhold records.

**1. The Purpose of the PRA is to Facilitate The Public's Access to Government**

The Washington Public Records Act is an unusually strongly-worded mandate for broad disclosure of public records. *See infra* Section IV part A. The purpose of the PRA is to allow the people of the State to remain informed of the actions of the agencies that serve them. RCW 42.56.030. While the PRA contains provisions awarding penalties to prevailing requestors, these penalties are not to be construed as a damages

provision. *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 303-304, 825 P.2d 324 (1994). Hence, the penalty provisions are meant to vindicate the public's right to remain informed through free and open access to public records and do not exist to serve as a damages statute to vindicate an individual's economic loss. Simply put, a PRA enforcement action is not a tort action for the recovery of damages.

King County has repeatedly asserted that the penalty assessed the County is adequate at least in part because the requestor has suffered no economic loss. The asserted lack of economic loss should be irrelevant to the penalty assessed in this case. Yousoufian made requests regarding a very large public expenditure and was denied access to those records for four years after the election on that proposal. This case is not to correct an economic wrong suffered by Yousoufian as an individual; it is to achieve the goals of the PRA—to facilitate the public's ability to remain informed of the workings of the governmental agencies that serve it. Penalties must be assessed based on the agency's wrongful conduct and the resultant harm to the public; not on a requestor's lack of economic loss.

**2. In No Published Case has a Court Considered Economic Loss in Determining Penalty Awards**

While economic loss has been *mentioned* by the appellate courts in PRA cases, it has never actually been applied or considered by a

reviewing court; it is in fact merely dicta. While the Court of Appeals at Division I in *Yacobellis* stated that the requestor had acknowledged that economic loss could be relevant to penalties and stated the trial court may consider this as a factor on remand, economic loss was not considered by the appellate court in determining the validity of a penalty or in rendering its decision. 64 Wn. App. at 301-304. This Court in *Amren* then repeated the above dicta from *Yacobellis* but did not evaluate the issue of as a factor in assessing a penalty under the PRA. 131 Wn.2d at 37-38 (holding that penalties are mandatory whenever an agency violates the PRA). Lower appellate courts then repeated this dicta in cases where economic loss was not raised or evaluated as a potential factor for penalties. See *American Civil Liberties Union of Washington v. Blaine School Dist.*, 86 Wn. App. 688, 699, 937 P.2d 1176 (1997) (“The *Amren* court also stated that courts should consider any showing of bad faith or economic loss when determining the amount of the penalty”); *King County v. Sheehan*, 114 Wn. App. 325, 356, 57 P.3d 307 (2002) (citing *Amren* for the proposition that economic loss can be a factor in determining the penalty amount).<sup>3</sup> Significantly, none of the courts that have mentioned economic loss as a factor in assessing penalties have performed any analysis regarding how this factor would conflict with the PRA’s mandate to treat all requestors

---

<sup>3</sup> This Court also mentioned economic loss as a factor in its recalled mandate in the instant action.

equally nor have they actually evaluated economic loss. It is axiomatic that dicta is not binding precedent and need not be followed. *State v. Calkins*, 50 Wn.2d 716, 726-27, 314 P.2d 449 (1957) (“We are convinced that the language to which we refer is dicta, and not binding upon us in the present instance.”); *see also ETCO v. Dept. of Labor & Indust.*, 66 Wn. App. 302, 307, 831 P.2d 1133 (1992) (holding same). This Court should conclude that the lack of economic loss cited by the County should not factor into the penalty because it is without legal basis. Again, the penalty inquiry must focus on the actions of the agency and need for deterrence and not on an individual requestor’s alleged lack of economic loss.

### **3. The PRA Prohibits Disparate Treatment of Requestors**

Under the PRA, “[a]gencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request.” RCW 42.56.080. Hence, requestors differing economic circumstances may not come into play in an agency’s response to a requestor. Because economic considerations may not be addressed when responding to a request for public records, they should be similarly excluded from consideration in disputes regarding records. It is contrary to logic to forbid an agency from taking economic considerations into account by responding to those who may have a

potential for greater economic harm more quickly than those who do not face similar harm, and then to expose the agency to greater liability based on the same consideration that they were forbidden to address when responding. Allowing agencies to lessen liability based upon a requestor's lack of economic loss creates a framework that encourages prompt compliance with the PRA when there is potentially significant economic loss as a result of the agency's failure to release records. While at the same time encouraging agencies to slight requestors who do not face similar potential economic loss. When an agency can gauge its potential liability based on economic loss, its incentive to uniformly comply with the PRA is inevitably diminished. Creating a scenario where requestors can, and will, be differentiated in such a manner, is directly contrary to the PRA's mandate that requestors be treated equally.

Here, the penalty awarded against the County may not be lessened by any alleged lack of economic loss because Yousoufian must be treated equally with other requesters.

**4. Economic Loss Should Only be Considered as a Factor in Assessing Penalties if Raised by a Prevailing Requestor**

Under the PRA requestors "shall not be required to provide information as to the purpose for the request." RCW 42.56.080. Hence, while an agency may not require a requester to provide information as to

why the records are sought, a requestor is free to inform the agency of the purpose. This is true at the time of the initial request and remains true throughout litigation concerning the records. Should the requestor sue for disclosure of records withheld by an agency and assert that denial of the records led to economic harm, the requestor is free to assert such a claim, and upon such assertion the agency is free to challenge or explore it.

**5. Economic Loss is Not an Accurate Proxy for the Importance of Public Records**

The PRA is to allow the public to remain informed so they may maintain control over the governmental agencies they have created. RCW 42.56.030. *Amici* are tasked with informing the public of governmental decision-making and events. The critical role played by the press in particular has been repeatedly recognized by our courts.

The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.

*Grosjean v. American Press Co.*, 297 U.S. 233, 250, 56 S.Ct. 444, 80 L.Ed. 660 (1936).

*Amici* rely on public records to report on governmental affairs yet, if they are denied records, they may not suffer any quantifiable economic

loss. The harm to the public, however, is immense due to the resultant inability to scrutinize government activity. Conversely, a record could be withheld that causes substantial economic harm to a private citizen, but has little direct impact on the public at large. If lack of economic loss is a factor, the penalty assessed against an agency for denial of the latter category of record will be higher than the former based upon this loss—despite the fact that the denial of the record to a news or advocacy organization arguably has a much greater detrimental effect on the public as a whole. Allowing lack of economic loss to function as a mitigating factor would also create a disincentive for agencies to respond properly to media and advocacy groups, arguably the groups for whom prompt disclosure is most important in maintaining an informed citizenry.

**6. Allowing Agencies to Unilaterally Raise Economic Loss as a Factor Invites the Use of Discovery to Undermine the Purposes of the PRA**

There is no government agency to enforce the PRA. Requesters who challenge violations of the PRA are acting as private attorneys general protecting the rights of all citizens to access to information and ensuring government accountability. Requesters act as the sole check on agencies to ensure that they comply with the obligation imposed by the PRA to

make public records "promptly available to any person" unless the record falls within a specific statutory exemption. RCW 42.56.070, .080, .520.

Agencies are beginning to utilize discovery in a manner that discourages requesters from challenging the withholding of records under the PRA by submitting discovery related to a requestor's purpose of his or her request and proof of economic loss—putting the requestor on trial instead of the agency in direct contravention to the PRA.<sup>4</sup> If this Court rules economic loss is a mandatory component of penalty calculation, it approve of this type of abuse. As with all civil penalties, this Court should hold that penalty calculation is based on an amount necessary to punish current violations and deter future violations.

**D. Agencies are in Need of Deterrence**

The goal of deterring future violations of the PRA is accomplished through awards of penalties, attorney fees, and costs to prevailing requestors. These provide the sole incentives for compliance with the Act. The incentives to ignore the mandate of the act, however, are many. Responding to public records requests takes time and may cause

---

<sup>4</sup> RCW 42.56.550(1) provides: "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." Additionally, this type of discovery will discourage individuals from bringing suit to enforce the terms of the PRA, leaving no one to enforce the Act.

embarrassment to government officials.<sup>5</sup> The likelihood that a requester will challenge a response is low, and the likelihood that they will take the issue to court is even lower. Then, even if a requestor prevails, currently the amounts awarded are generally so miniscule in consideration of the agency's budget that any potential legal effect is nullified.

**1. The Court Should Weigh Trial Court Decisions Reflecting Current Penalties Awarded Under the PRA**

King County has argued against consideration of published studies and trial court judgments related to the reality of how the PRA is enforced and interpreted today, but nonetheless makes the claim that this case involves the highest-ever penalty in our state's history and cites newspaper articles for this proposition. The County persists in asking the Court to strike portions of previous *amici*'s brief which referenced trial court judgments illustrating that trial courts are not utilizing the full penalty scale of the PRA and typically award the lowest range of penalties even in cases where the Agency has demonstrated a high level of culpability. Division I correctly denied that Motion to Strike, and this Court should do the same.

---

<sup>5</sup> See RCW 42.56.550(3): 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.

The function of amicus curiae is to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration. *Village of North Atlanta v. Cook*, 219 Ga. 316, 133 S.E.2d 585 (1963). *Amici* here urge the Court not to limit itself to the facts cited in the materials the County seeks to strike and reject the County's effort to offer its own version of the scope of PRA penalty awards without any legal authority. Further, the portions of the previously filed Amicus Brief that the County seeks to strike are not offered to prove facts related to this case or to prove Yousoufian's evidentiary claims, but are offered to support *amici's* arguments regarding the issue of penalties.<sup>6</sup> Here, the historically low penalty awards in PRA cases demonstrates the need for guidance in assessing penalties, and are not submitted to prove the claims of a party.

**2. Trial Court Opinions are Historical Facts of Which This Court May Take Judicial Notice**

This Court should not allow a party, with an interest in barring information contradicting its claims regarding penalty awards, from deterring *amici* from presenting reliable, accurate, and public court documents to prove historical facts. *Amici* aid courts by presenting perspectives and information the other parties have not presented. *See*

---

<sup>6</sup> *See State v. Quantex Microsystems, Inc.*, 809 So.2d 246, 249 (La. Ct. App. 2001) (admitting materials submitted by amicus to support of arguments, rather than to establish evidentiary facts on behalf of a party).

RAP 10.3(e), 10.6(a), (b). *Amici* must present a new perspective and information to be allowed to file a brief. RAP 10.3(e).<sup>7</sup> The Court should deny the County's continued efforts to strike reference to the trial court judgments filed by previous media *amici* before Division I. Whatever ruling this Court makes as to the motion to strike will be applied to future *amici* in future cases. This Court should not allow a party that has opened the door to this area of inquiry with its claims about the appropriateness and size of other penalties to bind the hands of *amici* to rebut these claims in this, or other cases.

**E. The Penalty Range Established in the PRA Suggests that Courts Begin at the Median Penalty**

In 1992, the legislature increased the penalty provisions of the PRA to allow the Court to award penalties ranging from five to one hundred dollars per day, rather than the former penalty range of zero to twenty five dollars per day.<sup>8</sup> Hence, the legislature deliberately took it upon itself to provide for greater penalties under the PRA than the Act formerly allowed, and eliminated the court's discretion to award no

---

<sup>7</sup> *Amici* also are not parties and have no ability to introduce evidence at trial, hence the requirement of RAP 9.11 that a party demonstrate that the evidence presented would alter the outcome of the trial court should not be imputed to *Amici*. Further, RAP 9.11 is of little use in evaluating the judgments at issue here. Citing evidence to a trial court judge that other judges consistently award low penalties would not encourage a judge to award higher penalties. An appellate court is the only place such material will be effective or appropriate.

<sup>8</sup> Formerly, it was within the court's discretion to award no penalty upon the finding of a violation of the PRA. Penalties are now mandatory upon the finding of a violation.

penalty in the event of a violation. Statutory penalties are now mandatory, even in the presence of good faith by the agency.

Further, because the presence of good faith on the part of the agency serves to skew a penalty toward the lower echelon of the penalty range, and bad faith does the opposite, a Court must begin with the median penalty for this balancing to have any real meaning. If a court simply begins with a presumption of the lowest penalty, then a showing of bad faith will be necessary to deviate upward and would nullify the purpose of providing a penalty range. Further, beginning the penalty analysis at the low end of the range shows a bias in favor of the government and against the requestor because it presumes that the government always handled a request properly, and thus merits no punishment or need for deterrence. Courts must assume an average case will fall in the middle of the penalty scale and work its way up or down based on aggravating and mitigating factors, rather than begin at the bottom and require the requestor to convince the court to move upward. Trial courts historically award the lowest end of the penalty scale, even with findings of gross negligence and bad faith, and lower courts need clearer guidance from this Court regarding how they should calculate penalties lest we have more and more cases like the present case—working their back and forth through the appellate court systems for a decade or more.

Here, the trial court never made a finding of bad faith regarding the County; however, it also never made a finding of good faith on the part of the County. (Findings at 17, CP 44) (“the Court finds that there was not a good faith effort by the involved County staff to read, understand and respond to Yousoufian’s letter in a timely and accurate manner”) The findings made by the trial court actually reflect substantial deviation from what would justify a penalty at the very low end of the penalty range. (Findings at 5, 11, 17, 18, CP 32, 38, 44, 45). This lack of finding of good faith, coupled with findings of significant mishandling of Yousoufian’s requests and the lack of finding of bad faith exemplifies the need to take the entire penalty range into account. While the County argues that a \$15 dollar per day penalty is sufficient absent a finding of bad faith, the County fails to acknowledge the myriad of findings reflecting the County’s improper handling of Yousoufian’s requests.

Again, the sole finding in favor of King County in this case is the lack of a finding of bad faith; however, the facts clearly cut against a proper handling of Yousoufian’s public records requests. Hence, it is readily apparent that the trial court did not take the entire penalty range into account in assessing the penalty at the low end of the penalty range and abused its discretion in failing to do so.

**F. A Multi-Factor Approach Will Guide Courts While Allowing Lower Courts to Continue to Exercise Their Discretion When Assessing Penalties**

As has been recognized by King County,<sup>9</sup> this Court may provide a factor approach in order to provide guidance to Courts below, while recognizing the myriad of facts that may come into play when an agency violates the PRA.<sup>10</sup> As occurred here, factors that may serve to increase a penalty may be present absent a finding of bad faith on the part of the agency. These factors may include: need for increased deterrence, culpability of the agency, lack of training, lack of oversight, lack of follow up on requests, lack of reasonable explanation violations of the PRA, lack of policies or procedures to implement the PRA, lack of strict compliance with the PRA, history of violations, delayed response, disparate treatment of requesters, and dishonesty. Conversely, the absence of these factors would logically serve to drive a penalty toward the lower end of the range. While the factors identified by the Court would not necessarily be an exhaustive list, the factors listed above reflect common facts found in PRA litigation. Further, weighing of the factors would be up to the discretion of the trial judge based on the facts of the individual case. For example,

---

<sup>9</sup> See Supp. Brief of Pet. King County at 12.

<sup>10</sup> King County takes issue with Yousoufian's request to introduce factors that are not in the PRA, while arguing that the presence of good or bad faith on the part of the agency and economic loss should be considered—despite the fact that these are not found in the PRA either.

few aggravating factors may be present, but might justify a penalty at the highest end of the scale based on the severity of factors of that case. Simply, courts must make adequate findings to justify the award of penalties and may not nullify the penalty range established by the legislature through consistently confining penalty awards to the lower end of the spectrum. Courts should in all cases begin at \$52.50 and work their way up or down based on the factors.

#### V. CONCLUSION

Penalties under the PRA must be sufficient to deter future violations by the defendant agency and future agencies, punish the immediate violation, and encourage compliance with the law. Our courts need clearer guidance regarding the assessment of penalties. This Court should hold that courts must begin at the median penalty of \$52.50 and deviate based on the individual factors present in the case at bar. Respectfully submitted this 21st day of August, 2009.

By: \_\_\_\_\_

Michele Earl-Hubbard, WSBA #26454  
Chris Roslaniec, WSBA #40568

**ALLIED**  
LAW GROUP

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2009 AUG 21 P 4: 20

CERTIFICATE OF SERVICE BY RONALD R. CARPENTER

I hereby certify under penalty of perjury under the laws of the State  
of Washington that on the 21st day of August, 2009, I caused a true and  
correct copy of the foregoing document, "Motion for Leave to File  
Amicus Curae Brief of Allied Daily Newspapers of Washington,  
Washington Newspaper Publishers Association, Washington Association  
of Broadcasters, Associated Press NW Bureau, Aberdeen Daily World;  
Everett Herald, Peninsula Daily News, Skagit Valley Herald, Sound  
Publishing, Tri-City Herald, Walla Walla Union-Bulletin, Wenatchee  
World, King 5, Center for Justice and Washington Coalition for Open  
Government" to the following counsel per the methods indicated:

Rand F. Jack  
Brett and Coats  
119 N. Commercial St., Suite 110  
P.O. Box 216  
Bellingham, WA 98227-0216  
Attorney for Respondent  
By email pursuant to agreement

Michael G. Brannan  
Law Offices of Michael G. Brannan  
555 Dayton Street, Suite H  
Edmonds, Washington 98020  
Attorney for Respondent  
By email pursuant to agreement

FILED AS  
ATTACHMENT TO EMAIL

ORIGINAL

John R. Zeldenrust  
Kevin Wright  
Stephen Paul Hobbs  
Office of Norm Maleng, Chief Prosecuting Attorney  
516 Third Avenue, Room W400  
Seattle, WA 98104-2385  
Attorney for Petitioner  
**By Legal Messenger**

David James Eldred  
500 4th Ave Ste 900  
Seattle, WA 98104-2316  
Attorney for Petitioner  
**By Legal Messenger**

William Crittenden  
927 N Northlake Way Ste 301  
Seattle, WA 98103-3406  
Attorney for Amici  
**By email pursuant to agreement**

Patrick Brown  
6112 24th Ave NE  
Seattle, WA 98115-7029  
Attorney for Amici  
**By email pursuant to agreement**



---

Chris Roslaniec, WSBA No. 40568