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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; THE KING
COUNTY DEPARTMENT OF FINANCE, a subdivision of KING
COUNTY, a municipal corporation; and THE KING COUNTY
DEPARTMENT OF STADIUM ADMINISTRATION, a subdivision of
KING COUNTY, a municipal corporation,

Petitioners.

AMICUS BRIEF OF THE STATE OF WASHINGTON

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae is the state of Washington.

The Public Records Act, RCW 42.56, is Washington's principal statute providing open access to public records. In this respect, the Act provides an essential tool to help ensure that government is open, transparent, and responsive. The people of the state of Washington and the agencies that serve them equally share this vital interest in government accountability under the Act. The Act applies to virtually every state agency.

If the Act is to fulfill its promise of open government, judicial decisions must be consistent with its terms and provide standards that are consistent with its purpose. The state, accordingly, has an important interest in the sound development of case law concerning the Act. The state respectfully submits this amicus brief to assist the court in reaching a decision in this case that is consistent with the terms of the Act, and that provides guidance that will promote government accountability under the Act.

II. ISSUE

In this long-running public records case, only one issue remains: whether the superior court abused its discretion in determining the penalty amount under RCW 42.56.550. The court addressed that issue in a

decision on January 15, 2009, (“the January decision”), reported at *Yousoufian v. Office of Sims*, 165 Wn.2d 439, 200 P.3d 232 (2009) (*Yousoufian IV*).

In an Order dated June 12, 2009, the court recalled the mandate for the January decision, and it now appears the court has granted King County’s motion for reconsideration to determine whether the January decision should be set aside and a new decision issued.

III. ARGUMENT

A. **The Public Records Act Appropriately Leaves The Penalty Amount To The Sound Discretion Of The Superior Court**

The Public Records Act provides for two kinds of actions to enforce the disclosure of public records: (1) a challenge alleging a requester has been “denied an opportunity to inspect or copy a public record by an agency,” RCW 42.56.550(1); and (2) a challenge alleging “an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request,” RCW 42.56.550(2). An action alleging an agency has failed to respond to a public records request falls within the first category because it has “effectively denied access to the records.” *See ACLU v. Blaine Sch. Dist. 503*, 86 Wn. App. 688, 695, 937 P.2d 1176 (1997).

The Act correspondingly authorizes a penalty *only* where a requester “was denied the right to inspect or copy” a requested public record. RCW 42.56.550(4). Accordingly, when Amicus refers to a violation of the Act or noncompliance with the Act, it is a reference to a judicial determination that a requester has been denied access to a requested public record.

The only issue still before the court in this case is the amount of penalty to be awarded. From its inception in 1973, the Public Records Act always has left the penalty amount in individual cases to the discretion of the superior court. Initiative 276 provided that the penalty was “not to exceed twenty-five dollars” for each day the requester was denied access to requested records, but otherwise placed the penalty amount solely within the discretion of the superior court. Laws of 1973, ch. 1, § 34 (Initiative 276). In 1992, the legislature established a penalty range—“not less than five dollars and not to exceed one hundred dollars” per day—but continued to leave the specific penalty amount solely within the discretion of the superior court. Laws of 1992, ch. 139, § 8. In *Yousoufian v. Office of Sims*, 152 Wn.2d 421, 431, 433, 98 P.3d 463 (2004) (*Yousoufian II*), this court interpreted the 1992 amendment to have made a penalty mandatory where a requester is denied a requested record, but once again

reaffirmed that under the terms of the Act the amount of the penalty is within the sound discretion of the superior court.

Until the January decision, this court consistently recognized what the Act makes explicit—the discretion that the people and the legislature vested in the superior courts to determine the appropriate penalty for a violation of the Act. Superior courts' penalty awards have been reviewed under the traditional abuse of discretion standard:

[The Public Records Act's] penalty provision clearly grants the trial court “discretion” to determine the appropriate per day penalty, and this grant of discretion is only meaningful if appellate courts review the trial courts imposition of that penalty under an abuse of discretion standard of review.

Yousoufian II, 152 Wn.2d at 431 (citing former RCW 42.17.340 (recodified as RCW 42.56.550)). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Progressive Animal Welfare Soc’y. v. Univ. of Wash.*, 114 Wn.2d 677, 688-89, 790 P.2d 604 (1990). If a superior court abused its discretion, this court reversed and remanded.

For nearly four decades, this traditional abuse of discretion review has well served the Public Records Act. Superior courts have shown themselves fully equipped to make this necessarily individualized calibration. On the rare occasion when an appellate court has concluded that the court below abused its discretion, the standard still has allowed

appropriate appellate oversight. In the January decision, however, this court abandoned its long-standing recognition of the broad discretion statutorily lodged in the superior courts under RCW 42.56.550. Instead, the majority devised a complex, multifactor balancing test. *Yousoufian IV*, 165 Wn.2d at 457-59, ¶¶ 39-43.

It is not clear how the court intended the superior courts to employ this multifactor test. The court referred to the factors as “guidance” for the superior courts’ exercise of discretion. *Id.* at 456, ¶ 35. Not surprisingly, however, superior courts are viewing the factors as mandatory, and this only makes sense—if the court did not intend to require the superior courts to consider each factor, then the factors serve little purpose. The multifactor test thus discards the review of penalty awards for abuse of discretion, displaces the discretion of the superior courts under the terms of the Act, and establishes a heightened standard of appellate review. The test should be set aside and the discretion that the Act lodges in superior courts to appropriately determine penalties under the circumstances of each individual case should be returned to them. *Cf.* 165 Wn.2d at 471, (¶ 77) (Owens, J., dissenting) (majority’s multifactor test “endangers trial

courts' discretion and will also prove unhelpful for litigants and courts alike.”).¹

B. The Amount Of Penalty Assessed For Violating The Public Records Act Should Relate Solely To Agency Culpability

Moreover, the multifactor test created in the January decision does not serve the Act's primary purpose: to promote access to public records. To be effective, a penalty must be calibrated to actions that reflect culpability and that can be changed in response to the penalty. The test includes several factors that are unrelated to agency culpability, cumulative, and unworkable.

¹ The dissent warned that the new test “requires trial courts to march through a list of considerations” but “leaves courts with little idea of what to do with the results.” *Yousoufian IV*, 165 Wn.2d at 472, ¶ 79. In the short time since the test was announced, the state has seen the accuracy of that warning.

In one recent example, in which a final order is still pending, the superior court issued an oral ruling that will likely result in a judgment for \$500,000 in penalties and costs, even though the agency accepted liability and immediately corrected its inadvertent error. *Bricker v. Dept. of Labor and Indus.*, Thurston County Superior Court, No. 08-2-01711-4. Line staff in a regional office did not recognize and act on a records request included in a letter challenging a citation. The requester did not follow up on the request, but instead filed an action for judicial review shortly before the one-year statute of limitations. Upon receiving the summons and complaint, headquarters staff discovered the mistake and promptly produced the approximately two dozen responsive documents.

Citing the January decision, the trial court went down the checklist of factors, found the aggravating factors outweighed the mitigating factors, and assessed a \$90 penalty for each day for each record. The court acknowledged that it was “unfortunate” the penalty was so high but stated the “Supreme Court has been very clear to trial courts in what they are supposed to do in determining penalties.”

As the dissent in *Yousoufian IV* predicted, an unreasonable and disproportionate award such as this one is the unfortunate result of having stripped superior courts of their discretion to assess the totality of the circumstances, including the ultimate penalty award.

In concept, the Public Records Act is simple and straightforward. Public records are to be made available, within a reasonable time, upon request, to any person who asks for them, unless the records are exempt, in all or in part, under a specific statutory exemption. RCW 42.56.070(1). Agencies that do not comply with this mandate are penalized. RCW 42.56.550(4).

In practice, the Act is complicated. It contains scores of exemptions. Hundreds more exemptions are scattered throughout the Revised Code of Washington. Most exemptions are permissive, but some are mandatory, imposing criminal penalties or authorizing civil actions for unauthorized disclosure.² Disclosure of some records, or information, may be prohibited by federal law.³ Public records requests may be difficult to interpret; the requested records may be dispersed among many files or programs, or otherwise difficult to identify and locate, and the number of records responsive to a request may be immense.

Responding to public records requests is a human endeavor, subject to human frailties. It is not mechanized. Accurately responding to a public records request requires professional judgment, clerical and

² See, e.g., RCW 10.97.120 (nonconviction data in criminal history record information); RCW 71.05.440 (mental health information).

³ See, e.g., Health Information Portability and Accountability Act, 42 U.S.C. 1320d to 1329d-8 (1996); 45 C.F.R. Part 160; Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (1974); 34 C.F.R. Part 99.

record-keeping precision, and substantial coordination and cooperation among agency employees. No matter the care and diligence exercised, mistakes will happen, and, in some instances, courts will conclude that records reasonably thought to be exempt under the Act in fact are not.

1. The Existence Or Absence Of Agency Culpability Is The Touchstone For A Penalty Calculation

Perhaps because a penalty is *mandatory* for denying access to a requested record, this court long has recognized that agency culpability is the touchstone for determining the amount of penalty to be imposed for a failure to provide requested records in response to a public records request. *See Yousoufian II*, 152 Wn.2d at 435 (“[w]hen determining the amount of the penalty to be imposed the existence or absence of [an] agency’s bad faith is the principle factor which the trial court must consider.”) (quoting *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997); *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 303, 825 P.2d 324 (1992)). *Accord ACLU of Wash. v. Blaine Sch. Dist.* 503, 95 Wn. App. 106, 111, 975 P.2d 536 (1999). An inquiry into an agency’s bad faith is, in essence, an inquiry into the agency’s culpability in violating the Act.

The purpose of the Public Records Act is to “promote access to public records” and “this purpose is better served by increasing the penalty

based on an agency's culpability," than by basing the penalty on factors unrelated to culpability. *Yousoufian II*, 152 Wn.2d at 435. It follows that the purpose of a penalty is to compel compliance by forcing changes in agency performance. Change is not compelled by basing penalties on factors that are unrelated to agency culpability and beyond agency control.

What actions can be assessed to determine agency culpability? The end points are not difficult to discern.⁴ On one end is the agency that exercises diligence in responding to a request for public records and attempts to apply exemptions consistent with their language and with case law—and that nevertheless fails to comply with the Act through error or inadvertence. On the other end is an agency whose noncompliance is intentional: it refuses to accept a public records request, accepts a request, but purposefully makes no attempt to respond to it, or obstinately refuses to timely disclose a requested record in the absence of any statutory exemption.

Because culpability is the touchstone for determining the appropriate level of penalty, only actions that are relevant to culpability should be assessed in determining the penalty amount for a violation of the Act. There is no reason why this penalty analysis should be "packaged"

⁴ Compliance with the Public Records Act is not an end point for purposes of calculating a penalty, since no penalty is assessed against an agency that has complied with the Act. Noncompliance is a necessary condition for any penalty.

into a multifactor test.⁵ Because a penalty calculation is based on the specific circumstances of the agency response at issue, it is well-suited to the exercise of sound discretion by superior courts, considering the totality of relevant circumstances.

Moreover, the inevitable consequence of establishing a multifactor test is to marginalize the show cause hearing set out in RCW 42.56.550 to provide timely and efficient judicial review of public records responses, replacing it with discovery and a full evidentiary hearing solely as to the amount of penalty.⁶ The test changes the Act's focus from access to public records to contests as to the penalty amount.

2. Many Factors Listed In the January Decision Do Not Address Culpability

The January decision listed sixteen factors courts “should bear in mind” when assessing penalties. Many of these factors do not address culpability and are unrelated to how an agency acted in responding to a particular request.

⁵ Neither party appears to have advocated the multifactor text set out in the January decision.

⁶ The state already has observed an increase in discovery requests and trial settings as to the penalty in public records cases with the attendant increase in mandatory costs and attorney fees.

“Personal economic loss,”⁷ for example, is completely unrelated to an agency’s culpability. The Act does not authorize an award of damages to a requester, even though the legislature plainly knows how to create damages remedies when it intends them.⁸ Use of this factor converts the penalty provision of RCW 42.56.550 into a damages provision. That was not the legislature’s choice here. The manifest purpose of the penalty is to compel agency compliance, not to award damages. *Yousoufian IV*, 165 Wn.2d at 454-55, ¶ 29 (citing *Yousoufian II*, 152 Wn.2d at 429, 435; *Yacobellis*, 64 Wn. App. at 301). As this court consistently recognized prior to the January decision, the amount of penalty assessed should be based on an agency’s culpability.

That economic damage to the requester is not an appropriate factor in determining the penalty level under RCW 42.56.550 is demonstrated further by the fact that the legislature prohibits agencies both from inquiring as to the need or reason for a records request and from favoring one requester over another, depending on the agency’s view of the economic importance of the request. RCW 42.56.080 (agencies may not

⁷ Aggravating factor 8. *Yousoufian IV*, 165 Wn.2d at 459, ¶ 41.

⁸ See, e.g., RCW 4.24.700 (authorizing action for damages for posting personal information of certain law enforcement and court employees on the Internet); RCW 9.26A.140 (damages for procuring telephone records without authorization); RCW 9.73.060 (damages for intercepting, recording, or divulging a private electronic communication); RCW 43.43.815 (damages for unauthorized disclosure of a conviction record).

distinguish among requesters and generally may not require them to provide information as to the purpose of their request).

The state acknowledges the statement in *Yacobellis*, 64 Wn. App. at 303, that economic loss is relevant to a penalty calculation, but that declaration is unsupported by any legal analysis or citation to authority. This court simply repeated that declaration in *Amren*, 131 Wn.2d at 38, citing only *Yacobellis* and offering no further analysis or explanation. Economic loss is not a measure of culpability and these unsupported statements to the contrary should not be followed.

Similarly, the “potential for public harm, including economic loss or loss of governmental accountability”⁹ is an unworkable aggravating factor, because it is present in every public records violation. A loss of governmental accountability exists whenever records that should be disclosed are not disclosed, and it exists whether or not the nondisclosure was made in bad faith or with some lesser level of culpability.

Neither is size of the agency related to culpability.¹⁰ While there may be a populist appeal to the premise that a large penalty is necessary to compel compliance from a large agency, there is no legal or factual support for that premise in this context. Indeed, because large agencies

⁹ Aggravating factor 7. *Yousoufian IV*, 165 Wn.2d at 458-59, ¶ 41.

¹⁰ Aggravating factor 9. *Yousoufian IV*, at 459, ¶ 41.

are comprised of more programs and affect more citizens than small agencies, they typically receive much larger numbers of public records requests than small agencies. Large agencies can expect more challenges and more penalties simply because they process more records requests. In addition, large agencies generally maintain more public records than small agencies and are more likely to receive requests requiring the production of larger numbers of records. Large complex requests are more difficult to process than small requests, increasing the probability of error and thus further increasing large agencies' exposure to penalties. For large agencies in Washington, the Public Records Act is no flea on an elephant¹¹—it is an important, difficult, challenging law with which they must comply.

It is entirely speculative to conclude that agencies comply with the Act only if they are significantly “hurt” monetarily by their noncompliance. This court no more should assume that executive branch government officials are unmotivated to follow the law, than it should be assumed that the judiciary is similarly unmotivated. Indeed, the opposite presumption applies, and rightly so. If such a lack of motivation were to prove true in an individual instance, that case should be addressed individually. Moreover, such a rule could prompt unscrupulous requesters

¹¹ See *Yousoufian IV*, 165 Wn.2d at 458 n.12.

to target large agencies with requests intended to result in a violation of the Act so they can obtain large penalties.

This factor also assumes larger agencies with relatively larger budgets are better able to pay larger penalties than are smaller agencies. The assumption is unsound. Agency budgets are comprised of public funds, derived largely from taxes on ordinary people. Those funds are appropriated to agencies to provide programs and services to the people of Washington. Every dollar paid in a penalty under the Act, whether paid by a large agency or a small one, is a dollar that is not available for those programs and services.

3. By Listing Selected Factors Related To Culpability, The January Decision Prevents An Adequate Case-Specific Review Of Culpability

While some factors in the January decision's multifactor test potentially relate to culpability,¹² those factors can be reviewed by superior courts exercising the discretion granted in RCW 42.56.550, as they have always done. Listing generic factors does not provide helpful guidance to superior courts' exercise of discretion in this context. Rather, it effectively replaces a case-specific assessment of culpability, in the

¹² See, e.g., mitigating factor 3 ("good faith, honest, timely, and strict compliance with all the PRA procedural requirements and exceptions"), *Yousoufian IV*, 165 Wn.2d at 458, ¶ 40; aggravating factor 1 ("a delayed response, especially in circumstances making time of the essence"), *id.*; aggravating factor 2 ("lack of strict compliance with all the PRA procedural requirements and exceptions"), *id.*

totality of the circumstances, with a checklist of factors that predictably becomes the exclusive list of factors to be considered. Instead of facilitating an effective inquiry into culpability, the multi-factor test chokes it off.

4. There Is No Legal Justification For Presuming The Midpoint Of The Statutory Penalty Range As The Default Penalty

The January decision presumes the penalty assessment should start at the midpoint of the statutory penalty range and then be adjusted upward or downward using a multifactor test. There is no statutory basis for any such assumption.

While an agency has the burden of demonstrating compliance with the Act if challenged under RCW 42.56.550, that burden carries no implication as to the amount of penalty to be imposed. The agency has the burden in the compliance phase because it has the information necessary to determine compliance, since any nondisclosed records remain in the agency's possession. Assigning the burden to the agency to explain its decision, therefore, brings the necessary facts before the court and makes them available for legal argument and review.

The Act places no similar burden on the agency to prove a lack of culpability in the penalty phase. The penalty amount is left to the sound discretion of the superior court, RCW 42.56.550(4), as it reviews the

agency's response to the request guided by the Act's fundamental purpose "to promote access to public records". *Yousoufian II*, 152 Wn.2d at 435.

That purpose is served most fairly and effectively by starting at the low end of the statutory penalty range, then "increasing the penalty based on an agency's culpability", *id.*, not by assuming culpability, through a mid-range starting point and then requiring an agency to disprove the assumption. See *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 101, ¶ 23, 117 P.3d 1117 (2005) (agency culpability not relieved by its good faith action); *ACLU*, 95 Wn. App. at 115 (penalty increased to "more than the minimum" because the agency did not act in good faith). Except in unusual cases, a superior court can determine the existence or absence of bad faith based on a review of the agency's response to the request, the agency's explanation of its reasons for delaying or denying a records request, and the parties' legal arguments.

There is no support in the language of RCW 42.56.550(4), or in the legislative history of that subsection, for any presumption that a "typical violation" of the Public Records Act should result in a penalty somewhere in the middle of the five to 100 dollar range established in RCW 42.56.550(4).

Moreover, there is no evidence before the court as to what constitutes a "typical violation" of the Act or that a "typical violation" is halfway between the least serious and most serious violation that could occur. Is a "typical violation" one in which an agency inadvertently fails to provide one or more pages because of an error in photocopying? Is it a legal dispute as to the application of a particular exemption? Is it a disagreement as to how broadly a request should have been interpreted? Is it a challenge by a requester who is dissatisfied with an agency response because he did not receive the specific record he was looking for? These questions cannot be answered based on the record in this case, even though it may be admitted that the facts of this case do not represent a "typical case." Absent any such evidence, the only justifiable approach to imposing a penalty under RCW 42.56.550(4) is to start at the low end of the range and increase the penalty to reflect the degree of bad faith and culpability exhibited by the agency when it denied access to requested records.

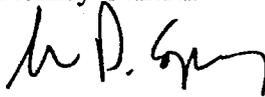
IV. CONCLUSION

For all the above reasons, the state respectfully asks the court to return to its longstanding recognition, consistent with the express language of the Public Records Act, that the appropriate amount of penalty under

the Act is within the sound discretion of the superior courts, reviewed on appeal only for abuse of that discretion.

RESPECTFULLY SUBMITTED this 21st day of August, 2009.

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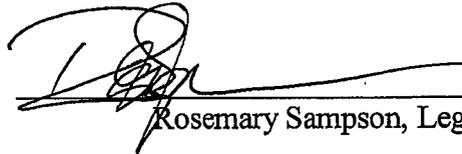
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Importance: High

Attached for filing in .pdf format is the Amicus Brief of the State of Washington, in *Yousoufian v. Sims*, Cause No. 80081-2. The attorney filing this brief is Alan D. Copsey, Deputy Solicitor General (AlanC@atg.wa.gov) WSBA #23305.

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