

57112-5

57112-5

80081-2

No. 571125-I

---

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON, DIVISION I**

---

ARMEN YOUSOUFIAN,

Appellant

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,

Respondents.

---

**BRIEF OF APPELLANT**

---

BRETT & DAUGERT, PLLC  
By: Rand Jack, WSBA #1437  
P. O. Box 5008  
Bellingham, WA 98227-5008  
360/733-0212

LAW OFFICES OF  
MICHAEL G. BRANNAN  
By: Michael G. Brannan  
2033 Sixth Avenue, Suite 800  
Seattle, WA 98121  
206/448-2065

ATTORNEYS FOR PETITIONER

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIV. #1  
2005 DEC 28 PM 4:55

**ORIGINAL**

## TABLE OF CONTENTS

	Page
I. Assignment of Error . . . . .	1
II. Statement of the Case . . . . .	2
A. Procedural Background . . . . .	2
B. Facts . . . . .	4
III. Argument . . . . .	9
A. The Trial Court on Remand Abused Its Discretion by Ignoring Appropriate Criteria for Awarding a Per-Day Penalty . . . . .	9
1. The Full \$5-To-\$100-A-Day Scale Must Be Utilized In Assessing The Per-Day Penalty. . . . .	10
2. Culpability Is the Critical Determinant Of The Per-Day Penalty. . . . .	13
3. Deterrence Must Be Considered in Setting the Per-Day Penalty. . . . .	15
B. The Trial Court's Reliance on <u>ACLU v. Blaine         School District</u> Was Inappropriate . . . . .	17
C. The Trial Court's Award of a \$15-Per-Day Penalty Undermines the Statutory Enforcement Mechanism of the Public Disclosure Act . . . . .	18
D. The Trial Court on Remand Abused Its Discretion by Ignoring the Statutory Mandate for Liberal Construction of the Public Disclosure Act, Including the Penalty Provisions. . . . .	20
IV. Request for Attorneys Fees. . . . .	23
V. Conclusion . . . . .	23

VI. Appendix

24

Attachment 1 – Findings of Fact and Conclusions of Law

Attachment 2 – King County Brief on Remand

Attachment 3 – Order on Remand

## TABLE OF AUTHORITIES

	Page
<u>Washington Cases</u>	
<u>American Civil Liberties Union v. Blaine School District</u> , 95 Wn. App. 106, 975 P.2d 536 (1999) . . . . .	1, 16, 17 18, 23, 24
<u>Amren v. City of Kalama</u> , 131 Wn.2d 25, 929 P.3d 389 (1997) . . . . .	22
<u>Progressive Animal Welfare Society v. University of Washington</u> , 125 Wn.2d 243, 884 P.2d 592 (1994) . . .	21, 22
<u>Yousoufian v. Office of Ron Sims</u> , 114 Wn. App. 836, 60 P.3d 667 (2003). . . . .	10, 11, 20
<u>Yousoufian v. Office of Ron Sims</u> , 152 Wn.2d 421, 98 P.3d 463 (2005). . . . .	1, 2, 3, 8, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21
<u>Statutes</u>	
RCW 42.17.010(11) . . . . .	21, 22
RCW 42.17.251 . . . . .	20, 21, 22
RCW 42.17.340 . . . . .	23
RCW 42.17.340(4). . . . .	2, 22
RCW 42.17.920 . . . . .	22

**I. ASSIGNMENT OF ERROR.**

The trial court on remand erred by awarding \$15 per day on the \$5-to-\$100-a-day statutory penalty scale in this factually egregious Public Disclosure Act case of repeated misconduct, lack of good faith and gross negligence.

The following Issues pertain to the Assignment of Error:

1. Did the trial court on remand err by not utilizing the full \$5 - \$100 range of the statutory per-day penalty scale in assessing a \$15-per-day penalty for an egregious Public Disclosure Act violation?
2. Did the trial court on remand err by not relying on the relative degree of King County's culpability in assessing the per-day penalty as required by the Supreme Court's decision in Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 98 P.3d 463 (2005)?
3. Did the trial court on remand err by not giving due weight to the size of penalty required to deter King County from violations of the Public Disclosure Act?
4. Did the trial court on remand err by relying on ACLU v. Blaine School District, 95 Wn. App. 106, 975 P.2d 536 (1999) as guiding precedent?
5. Did the trial court on remand err by assessing a per-day penalty so low as to undermine the enforcement mechanisms of the Act?

6. Did the trial court on remand err by ignoring the statutory mandate to liberally construe the Act to accomplish the statutory purpose?

The Assignment of Error and underlying Issues are all reviewed under an abuse of discretion standard. RCW 42.17.340(4); Yousoufian v. Sims, 152 Wn.2d 421, 430-31, 98 P.3d 463 (2005).

## II. STATEMENT OF THE CASE

### A. Procedural Background

The procedural history of this case developed within the structure of the mandatory penalty provisions of the PDA. The Public Disclosure Act requires that any person who prevails against an agency for violation of the Act shall be awarded a penalty of “not less than five dollars and not to exceed one hundred dollars for each day that he was denied the right to inspect or copy said public record.” RCW 42.17.340(4). The penalty is calculated by multiplying the number of documents or groups of documents times the number of days each document was withheld to determine the number of penalty days. The number of penalty days is then multiplied by the per-day penalty from the \$5-to-\$100 a day penalty scale.

After trial in King County Superior Court, the trial judge made extensive Findings of Fact and Conclusions of Law that are central to this case. (Attachment 1, Findings; CP 28-58) She found egregious violations of the PDA, ruled that King County had not acted in good faith, and awarded

penalties and attorneys' fees. In calculating the penalty, the trial court subtracted 527 days from the total days each of six groups of documents (E-J) that were late, for a total reduction of 3,162 penalty days. (Findings at 30-31; CP 57-58). Though the trial judge made damning Findings of Fact, she awarded a minimum \$5-a-day penalty on the per-day penalty scale.

The Court of Appeals, Division I, ruled that because of King County's gross negligence, Yousoufian was entitled to more than the statutory \$5 a day minimum penalty awarded by the trial court. The appellate court upheld the trial court's categorization of the documents withheld into ten groups, constituting ten violations, and upheld the trial court's computation of penalty days that included the subtraction of some days from the penalty calculation. The Court of Appeals also ruled that the size of an attorney fee award could not be used to justify a smaller penalty award, as the trial court had done.

The Supreme Court affirmed the Court of Appeals ruling "that assessing the minimum penalty of \$5 a day was unreasonable considering that the County acted with gross negligence." Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 438, 98 P.3d 463 (2005). The Court reversed the Court of Appeals' decision reducing the number of penalty days and ruled that "the PDA does not allow a reduction of the penalty period."

Yousoufian, 152 Wn.2d at 438. The Court also affirmed the Court of Appeals' decision that the documents produced by King County were properly placed in ten groups for purposes of the penalty calculation and ruled that on remand Yousoufian was entitled to reasonable attorneys' fees for his appeal.

In summary, the appellate courts have now determined two of the three factors in the penalty calculation – the number of days documents were not produced and the number of documents or groups of documents, for a total of 8,252 penalty days.

On remand, the trial court awarded a penalty of \$15 per day on the \$5-\$100 penalty scale, for a total penalty of \$123,780. Total attorney fees awarded for the trial, appeal and remand of this case are \$299,246.26.

#### B. Facts

Armed with the Public Disclosure Act, Armen Yousoufian requested documents from the King County Executive regarding the \$300,000,000 public financing of a new football stadium for the Seattle Seahawks. He made his request on May 30, 1997, 18 days before a referendum vote on the public financing proposal. Not until June 8, 2001, over four years after Yousoufian's initial request and after he had commenced this litigation, did Yousoufian receive the final documents that the trial court deemed responsive to his request. (Findings at 13; CP

40). Once Yousoufian filed a lawsuit, the County located and produced most of the requested documents within a few days. (Findings at 17; CP 44).

In the intervening period, Yousoufian was met with obfuscation, misrepresentations, deception, incompetence and gross negligence. The trial court characterized the conduct of King County as demonstrating a lack of good faith. (Findings at 17; CP 44).

The court does not find that there was "bad faith" in the sense of intentional non-disclosure. However, the court finds that there was not a good faith effort by the involved County staff to read, understand and respond to Mr. Yousoufian's letter in a timely, accurate manner. There was a lack of coordination among the departments and staff assigned to the task, and absolutely no effective oversight of the PDA request. Certainly, King County did not render full assistance to Mr. Yousoufian as required under the statute. Nor was there any effective system for tracking PDA requests to ensure compliance with the law.

The County's lack of good faith was also apparent in misrepresentations made in correspondence to Mr. Yousoufian. Many of the letters contained incorrect statements, both factual and legal. No effort was made to verify the accuracy of those statements.

In summary, the County was negligent in the way it responded to Mr. Yousoufian's PDA request at every step of the way, and this negligence amount to a lack of good faith. There was a lack of coordination among the departments, and there was a lack of oversight by the Executive's office. The people given the responsibility for this PDA request had only a rudimentary understanding of the County's responsibilities under the PDA and apparently were not trained in how to locate and retrieve

documentation, or didn't take the trouble to do so. No one ever took the time to carefully read Mr. Yousoufian's letter.

(Findings at 17-18; CP 44-45).

The Findings and Conclusions of the trial court demonstrate the unusually high degree of culpability in this case. King County made statements to Mr. Yousoufian that were deceptive and misleading. (Findings at 5, 11 and 18; CP 32, 38 and 45). Several times it told him that all documents had been produced when they had not. (Findings at 5 and 11; CP 32 and 38). It told him that the archives were being searched when they were not. (Findings at 2 and 8; CP 29 and 35). It told him that documents were being compiled when they were not. (Findings at 4; CP 31). It told him that hundreds of hours had been spend trying to retrieve requested documents when they had not. (Findings at 11; CP 38). It told him that the Executive is only responsible for retrieving documents in its office, which is not the case. (Findings at 11; CP 38).

The same prosecuting attorney told Mr. Yousoufian to contact the Finance Office for the documents he sought and shortly thereafter wrote to him on behalf of the Finance Office that it did not have the documents. In fact, it did. (Findings at 11-12; CP 38-39).

On October 9th, an employee wrote to Mr. Yousoufian that an archival search was underway and that documents would be produced in

two weeks. That same day a different staff person wrote informing Mr. Yousoufian "that there were no more responsive documents." (Findings at 8; CP 35).

The Findings and Conclusions are riddled with phrases like "untimely and unreasonable" (Findings at 3; CP 30), "no evidence that Mr. Woo had the appropriate training or experience" (Findings at 5; CP 32), "negligently overlooked" (Findings at 5; CP 32), "negligence of county staff" (Findings at 6; CP 33), "no action to investigate the problem" (Findings at 6; CP 33), "not adequately trained or knowledgeable" (Findings at 7; CP 34), "did not carefully read nor reasonably understand" (Findings at 7; CP 34), "made no attempt to find ... continued to disregard" (Findings at 7; CP 34), "this explanation was not reasonable" (Findings at 7; CP 34), "not reasonable to ask Mr. Yousoufian where to search" (Findings at 8; CP 35), "lack of coordination" (Findings at 8; CP 35), "response was inadequate" (Findings at 11; CP 38), "factually and legally incorrect" (Findings at 11; CP 38), "statements were unsubstantiated... Did have the documents" (Findings at 11-12; CP 38-39), "lack of communication and coordinated effort" (Findings at 12; CP 39), "lack of good faith" (Findings at 17; CP 44), "complete lack of coordination ... no effective oversight" (Findings at 18; CP 45), "misrepresentations made in correspondence" (Findings at 18; CP

45), “letters contained incorrect statements both factual and legal” (Findings at 18; CP 45), “negligent ... at every step of the way and this negligence amounted to a lack of good faith” (Findings at 18; CP 45), “only a rudimentary understanding of the County's responsibilities ... were not trained in how to locate and retrieve documentation, or didn't take the trouble to do so” (Findings at 18; CP 45).

The County failed to maintain an indexing and retrieval system and failed to conduct a thorough and careful search. (CP 10; Findings at 13, 15; CP 40-42). It turned compliance with the request over to the most untrained, inexperienced personnel. (Findings at 5, 7, 18; CP 32, 34, 45). It never claimed an exemption and never gave notice that additional time was needed. (Findings at 16). No third party enjoined access to the documents. The violation involved a matter of significant public concern affecting substantial public resources. Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 447, 98 P.3d 463 (2005), Sanders, Dissenting in part.

In arguing this case before the State Supreme Court, Senior Deputy Prosecuting Attorney Mark Stockdale could find little or nothing to say in King County’s defense.

Stockdale: I am saying that all documents were produced;  
most in an untimely manner. I’m not challenging  
that Finding at all.

.....

Judge Madsen: The County could have, you know, the County at any time could have come forward with the records is what I'm trying to say. It didn't need to be three or two years.

Stockdale: I agree, Your Honor. I don't dispute that at all.

Stockdale: There's nothing to fall back on, Your Honor. You know, I, I would love to come up here and say "Yeah, we had exemptions" or "We had some really great reasons why we didn't –" the trial judge nailed it. Lack of training, miscommunication, misunderstanding, lack of diligence – no, for the trial court, it amounted to a finding of gross negligence.

Judge Madsen: . . . . I'm not sure that having you confess the guilt of your client is very helpful in helping us to decide whether or not –

Stockdale: No, I understand.

(Sub #128).

### III. ARGUMENT

#### A. The Trial Court on Remand Abused Its Discretion by Ignoring Appropriate Criteria for Awarding a Per-Day Penalty.

The trial court on remand abused its discretion by ignoring three critical criteria for determining the per-day penalty – use of the full range of the penalty scale, reliance on relative culpability to set the per-day penalty between \$5 and \$100, and consideration of deterrence in determining the per-day penalty.

1. The Full \$5-To-\$100-A-Day Scale Must Be Utilized In Assessing The Per-Day Penalty.

When established by initiative in 1972, the Public Disclosure Act included a per-day penalty of up to \$25. Because this penalty provision was too constricted to promote the purposes of the Act, the legislature in 1992 discarded the \$25 per-day limit and adopted a per-day penalty ranging from a minimum of \$5 to a maximum of \$100 a day. Yousoufian, 152 Wn.2d at 433. When the Legislature established this \$5-to-\$100 penalty scale, it must have intended that the whole scale be used and that penalties would be assessed along the full spectrum of the scale according to the circumstances of the case. Why else would the legislature set the daily penalty according to a range from \$5 to \$100? No other interpretation of the statute is reasonable. Even though King County “agrees with Yousoufian that the legislature intended for courts to use the entire penalty range (\$5 to \$100),” the trial court on remand did not make use of the full scale. (Attachment 2, King County’s Brief on Remand at 7; CP 103).

As described by the Court of Appeals, the original trial court made “unchallenged findings of egregious mishandling of Yousoufian’s record request and lack of good faith by the County.” Yousoufian v. Office of Ron Sims, 114 Wn. App. 836, 840, 60 P.3d 667 (2003). Without a

dissenting voice, the Supreme Court and the Court of Appeals characterized the County's repeated misconduct as gross negligence. Yousoufian v. Office of Ron Sims, 114 Wn. App. at 847, 853 and 854; 152 Wn.2d 421, 429, 439; 98 P.3d 463 (2005). Both courts concurred in the trial court's finding that King County demonstrated a lack of good faith. Justice Sanders characterized King County's conduct as "egregious misconduct" and "devious misconduct." Yousoufian, 152 Wn.2d at 447 and 448, Sanders, Dissenting in part.

Both the Court of Appeals and the State Supreme Court agree that the trial judge in this case did not properly use the penalty scale as established by the legislature. "[W]e agree with the Court of Appeals that assessing the minimum penalty of \$5 a day was unreasonable considering that the County acted with gross negligence." Yousoufian, 152 Wn.2d at 439. This same judgment of unreasonableness applies to the \$15-per-day assessment by the trial judge on remand.

Typical, garden-variety violations should fall somewhere toward the middle of the scale. Less serious violations should be penalized less severely, and more culpable and egregious violations like Yousoufian should rise to the top of the scale. Considering the degree of culpability, including mitigating and aggravating factors, a reasonable distribution across the statutory penalty scale would look something like this:

1. \$5-\$20 - no culpability, innocent mistakes, good faith, violation minimal in scope and time, prompt corrective action, significant mitigating factors

2. \$20-\$40 - low culpability, mild negligence, good faith, limited mitigating factors, reasonable corrective action, violation moderate in scope and time

3. \$40-\$60 - moderate culpability, negligence, good faith more tenuous, modest aggravating factors, slight mitigating factors, violation substantial in scope and time

4. \$60-\$80 - significant culpability, blatant repeated negligence, no finding of good faith, no serious corrective action, some public interest in request, violation more substantial in scope and time, aggravating factors far outweigh any mitigating factors

5. \$80-\$95 - high culpability, gross negligence, finding of lack of good faith, violation expansive in scope and time, request time sensitive, corrective action negligible, documents produced in response to litigation, deception, no mitigating factors, substantial aggravating factors, high public interest in request, deterrence only by large penalty

6. \$95-\$100 - maximum culpability, intentional, bad faith, deceptive withholding

Given the facts of this case, the trial court could not possibly have utilized the full scale in setting a per-day penalty in the bottom, rather than the top, quartile. To ignore the statutory structure for awarding the per-day penalty is an abuse of discretion.

2. Culpability Is the Critical Determinant Of The Per-Day Penalty.

While some earlier cases have suggested that the per-day penalty be assessed on the basis of a good faith/bad faith, either/or dichotomy, the Supreme Court ruled in Yousoufian that the purpose of the PDA “is better served by increasing the penalty based on an agency’s culpability. . . .” Yousoufian v. Office of Ron Sims, 152 Wn.2d at 436. “After determining the number of days that the agency has denied a request, the trial court should determine the proper amount of the penalty based on the agency’s culpability.” Yousoufian v. Office of Ron Sims, 152 Wn.2d at 440, Fairhurst concurring.

The Supreme Court’s use of the term culpability in Yousoufian shifted the focus from the good faith/bad faith dichotomy to a term that invites consideration of matters of degree. Unlike bad faith or no bad faith, culpability comes in increments and is a practical, effective way of measuring where a case falls across the full spectrum of the penalty scale.

An either/or approach steered trial courts to ignore the full range of the statutory penalty scale established by the legislature.

The original trial court's determination in this case of a lack of good faith but an absence of bad faith demonstrates the need for more subtle distinctions of degree in order to place violations along the full spectrum of the penalty scale. The Chief Justice focused on this quandary at oral argument when he suggested that the difference between lack of good faith and presence of bad faith is difficult to discern. In its brief on remand, King County admits that a case of "egregious misconduct. . . may well justify a per-day penalty at the high end of the range." (King County's Brief on Remand at 8; CP 108). Yet despite the egregious nature of this case, the court on remand set the per-day penalty not at the high end, but at the low end of the range.

Justice Sanders, the only justice to address the question of what the per-day penalty assessed against King County should have been, pegs the number at or near the top of the scale. King County's "failure to comply with Mr. Yousoufian's PDA request affected the 'public concern' far more than any other failure resulting in a mere inconsequential inconvenience to the litigant *alone*. Accordingly, a penalty at or near \$100 per day is not only necessary but also required to punish King County's misconduct." Yousoufian, 152 Wn.2d at 448, Sanders, Dissenting in part. "I agree a

minimum penalty is plainly insufficient. Rather, the plain language of the PDA as well as its purposes demand a penalty closer to \$100.” Yousoufian, 152 Wn.2d at 445, Sanders, Dissenting in part.

If a trial court were to use culpability as a guide, what would a case look like that fell at the top end of the penalty scale? It would be a case that looked like Yousoufian, a case of repeated and prolonged gross negligence, an unchallenged Finding of a lack of good faith, an extensive pattern of misrepresentation and deception, no claim of exceptions or the need to protect third party interests, documents withheld until compelled by litigation, a demonstration that with a little effort, compliance could have been timely, no mitigating factors, a matter of high public interest, a time urgency and an offender that can only be deterred by a very substantial fine.

Yousoufian is arguably the most egregious reported case in the 30 year history of the Public Disclosure Act. With culpability as the measure, the trial court on remand did not have discretion to set the per-day penalty at \$15 per-day.

3. Deterrence Must Be Considered in Setting the Per-Day Penalty.

“The PDA 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 Ron Sims, 152 Wn.2d at 430. This deterrent effect is an essential function of the penalty provisions of the Act. Given the size of the King County budget, the trial court on remand could not have seriously considered deterrence when setting the \$15-per-day penalty. In its written opinion, the trial court did not mention deterrence or the difference in what it takes to deter King County, the wealthiest local jurisdiction in the State, and what was required to deter a small town school district in ACLU v. Blaine School District, 95 Wn. App. 106, 975 P.2d 536 (1999), the precedent upon which the court relied in setting the low per day penalty. With King County’s 2005 and projected 2006 budgets at \$3.4 billion and the \$300 million at stake in the referendum, only a significant penalty will serve as a deterrent. Setting a penalty that does not function as a deterrent is an abuse of discretion.

The trial court on remand cannot have utilized the full penalty scale, culpability and deterrence in setting the per-day penalty. In a case of gross negligence, lack of good faith, and multiple acts of egregious misconduct by the wealthiest of local governments, these criteria cannot lead to a per-day penalty near the bottom 10% of the scale.

B. The Trial Court's Reliance on ACLU v. Blaine School District Was Inappropriate.

With “little to guide this court as to how high the penalty should go,” the trial court on remand looked to ACLU v. Blaine School District, 95 Wn. App. 106, 975 P.2d 536 (1999), and found that “its analysis is instructive.” (Attachment 3, Order on Remand at 3 and 4; CP 125 and 126). This reliance on a six-year-old discretionary Court of Appeals ruling involving school discipline and a single act of misconduct by a small-town school district is inappropriate. Because of the huge discrepancy between the culpability in the two cases, the \$10-a-day ruling in the Blaine School District case cannot persuasively justify a \$15-a-day penalty in Yousoufian.

In Blaine School District, the requested documents were made available in a timely manner; the School District simply refused to mail them to the ACLU. Based on a single letter to a parent stating improper reasons for refusing to mail the documents, the Court of Appeals found the District had not acted in good faith. Yousoufian, on the other hand, was repeatedly denied access to the requested documents and was told by King County that the documents he sought concerning a \$300,000,000 public expenditure did not exist. Yousoufian was met by a steady stream of misrepresentations, false denials, gross negligence, and obstruction, until

litigation elicited quick compliance with Act. King County's culpability was many times more serious and multi-faceted than a single letter to a parent from the Blaine School District.

Despite the moderate degree of culpability in Blaine School District, the Court of Appeals found a lack of good faith and awarded \$10 a day on the penalty scale. Such a low award in a lack of good faith case indicates that the Court of Appeals there did not use the full penalty scale and that the case is not an appropriate guide for setting a per-day penalty based on degree of culpability as required by Yousoufian, 152 Wn.2d at 436. Finally, reliance on Blaine School District is inappropriate because the penalty it takes to deter misconduct by King County is a far cry from what it takes to deter a small-town school district.

C. The Trial Court's Award of a \$15-Per-Day Penalty Undermines the Statutory Enforcement Mechanism of the Public Disclosure Act.

Lawsuits by aggrieved citizens are the only mechanism provided for enforcement of the Public Disclosure Act. If citizens improperly denied access do not force the issue, compliance with the Act becomes discretionary with public agencies, and the purposes of the Act are thwarted. By ignoring appropriate criteria and setting an unreasonably low per-day penalty, the trial court on remand abused its discretion and perpetuated the uncertainty of those denied access to documents when

deciding whether to file a lawsuit to enforce compliance with the statute. Such uncertainty cripples the sole enforcement mechanism established by the legislature. Without a reasonable expectation of appropriate penalties, an aggrieved citizen often will not be willing to invest the time, energy and emotion necessary to serve as a private attorney general enforcing the Act.

Without substantial penalties for egregious cases, aggrieved parties have no incentive to serve as private attorneys general, and the Act is left without an effective enforcement mechanism. Inappropriately small penalties deter not the governmental agency but the taxpayer. If Yousoufian warrants a per-day penalty in the bottom quartile of the scale, what kind of penalty can the citizen enforcer expect for more typical and modest violations? A private attorney general simply will not represent the public interest, as anticipated by the PDA, without a penalty incentive that is reasonable and reasonably predictable. Such an incentive for private enforcement was intended by the Legislature in establishing the \$5-to-\$100 penalty scale with cases distributed according to the seriousness of the misbehavior.

To give attorneys incentive to represent aggrieved parties, the Act provides for reasonable attorneys' fees; to give incentive to parties wrongfully denied access to documents, the Act provides for penalties,

including a per-day penalty on a scale ranging from \$5-to-\$100 a day. The trial court must set the per-day penalty amount independent of any consideration of the award of reasonable attorneys' fees. Yousoufian v. Office of Ron Sims, 114 Wn. App. at 854. High attorney fees cannot justify a low penalty award, or vice versa. The imposition of penalties and the award of attorneys' fees serve distinct functions under the statutory scheme. "[T]he compensatory purpose of attorney fee awards is separate and distinct from the punitive purpose of statutory penalties. Accordingly, in order to effectuate the strong public policy in favor of public disclosure, courts should not justify a low penalty award on the basis of a high attorney fee award. RCW 42.17.251." Yousoufian v. Office of Ron Sims, 114 Wn. App. at 854.

The court on remand did not have discretion to set a penalty that undermined the only enforcement mechanism of the Public Disclosure Act.

D. The Trial Court on Remand Abused Its Discretion by Ignoring the Statutory Mandate for Liberal Construction of the Public Disclosure Act, Including the Penalty Provisions.

The Legislature and this Court have emphasized the close relationship between the Public Disclosure Act and maintenance of a free democratic society. This relationship indicates that a judicial decision

threatening the efficient functioning of the Act is not within a trial court's discretion.

The Public Disclosure Act was passed by popular initiative and stands for the proposition that, "full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society. RCW 42.17.010(11)." The stated purpose of the Public Records Act 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 public officials and institutions. RCW 42.17.251.

Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d 243, 250-51, 884 P.2d 592 (1994).

"The PDA enables citizens to retain their sovereignty over their government and to demand full access to information relating to their government's action. RCW 42.17.010, .251." Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 429-30, 98 P.3d 463 (2005). As this Court has noted, "the Legislature leaves no doubt about its intent" in passing the Public Disclosure Act:

"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. The public records subdivision of this chapter shall be liberally construed and its exceptions narrowly construed to promote this public policy. RCW 41.17.251."

Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d at 260.

Three times the Act mandates liberal construction to assure “full access to public records.” RCW 42.17.010(11); RCW 42.17.251; RCW 42.17.920. This liberal construction requirement includes RCW 42.17.340(4), the penalty provision of the statute. The penalty provision is an integral, critical support for the Act’s important goals and the sole tool to deter misconduct and encourage citizen enforcement of the PDA. “The PDA 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, 152 Wn.2d at 430. “This provision has been treated by this court as a penalty to enforce the strong public policies underlying the public disclosure act.... This court has emphasized that ‘strict enforcement’ of this provision ‘will discourage improper denial of access to public records.’” Amren v. City of Kalama, 131 Wn.2d 25, 35-6, 929 P.2d 389 (1997).

Because the penalty provision of the Act is essential to its effectiveness, a judicial ruling that undermines the penalty provision endangers the high public purpose of the Act. Awarding a \$15-per-day penalty under the facts of this case, the trial court on remand abused its

discretion by acting inconsistently with the statute's purpose and liberal construction mandate.

#### **IV. REQUEST FOR COSTS AND ATTORNEYS FEES.**

RCW 42.17.340 of the Public Disclosure Act requires that "any person who prevails" in a PDA case "shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action." This is a mandatory provision of the Act designed to assure that litigants enforcing the Public Disclosure Act will be able to obtain competent legal representation. A.C.L.U. v. Blaine School Dist. No. 503, 95 Wn. App. 106, 115, 975 P.2d 536 (1999). Should plaintiff prevail in this appeal, he respectfully requests costs and reasonable attorney fees as provided in RCW 42.17.340.

#### **V. CONCLUSION**

The undisputed Findings of Fact by the trial court and the characterization of those facts by the reviewing court place the violations in this case at the upper end of the \$80-\$95 tier of this outline. Assuming a reasonable distribution of cases across the scale, a rationale argument that does not place this case near the upper end is hard to imagine. That only a hair's breadth separates this case from an intentional, bad faith, \$100 a day violation is suggested by the Chief Justice's rhetorical question that brought laughter in the courtroom at oral argument before the

Supreme Court: “The [trial] court said there wasn’t bad faith but there wasn’t good faith – where – that one – where are we on that?” (CP 14).

In setting the penalty instead at \$15 per day, the court on remand abused its discretion by ignoring three critical criteria for establishing the per-day penalty – use of the full scale, use of culpability as a yardstick, and appropriate consideration of deterrence. The court also abused its discretion by its reliance on Blaine School District as persuasive precedent, by undermining the sole enforcement mechanism of the Act and by failing to liberally construe the penalty provision in order to safeguard the purpose of the Act.

**VI. APPENDIX**

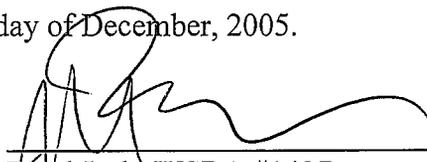
The Appendix consists of the following designated clerk’s papers:

Attachment 1 – Findings of Fact and Conclusions of Law

Attachment 2 – King County Brief on Remand

Attachment 3 – Order on Remand

DATED this 28 day of December, 2005.



---

Rand Jack, WSBA #1437  
Michael Brannan, WSBA #28838  
Attorneys for Appellant

# APPENDIX

# Attachment 1

**COPY RECEIVED**

SEP 24 2001

DAVID J. BALINT, PLLC  
ATTORNEY AT LAW

**SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY**

ARMEN YOUSOUFIAN,

Plaintiff,

vs.

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,

Defendants.

No. 00-2-09581-3 SFA

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW**

This matter having come before the Court by trial by affidavit with oral argument, on August 15<sup>th</sup>, 2001; and the plaintiff being represented by Michael G. Brannan and David J. Balint, and the defendant being represented by Janine Joly; and the Court having considered these arguments and all of the pleadings, declarations, depositions, affidavits, and exhibits submitted by the parties in connection thereto, the Court FINDS the following:

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Judge J. Kathleen Learned  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-296-9205

1 I. FINDINGS OF FACT

2 A. Reasonable Interpretation of Mr. Yousoufian's Public Disclosure Request to  
3 the King County Executive.

4 On May 30<sup>th</sup>, 1997, Mr. Yousoufian faxed a letter to the King County Executive.  
5  
6 The letter was clearly marked as a Public Disclosure Request and contained a very  
7 broad request for documents. PDA requests are to be read broadly to ensure that  
8 sought-after documents are included rather than excluded. The letter plainly requested  
9 the following:  
10

- 11 1. Studies indicating that the "fast food" tax had not been passed on to  
12 consumers (referred to by Ron Sims in an interview on KUOW).
- 13 2. Stadium studies:
  - 14 a. The "Conway Study" and all related file materials. Because there were  
15 two Conway studies, one in 1994 and one in 1996, the letter must be read  
16 as incorporating both Conway studies.
  - 17 b. All records related to the Conway studies; including how, why, and by  
18 whom the studies were ordered and their costs.
  - 19 c. Any other studies, previous or subsequent to the Conway studies,  
20 regarding the economic impacts of sports stadiums.  
21

22 King County claims that Mr. Yousoufian's request was vague. This claim is not  
23 supported. Although Mr. Yousoufian's request was extremely broad, it was not vague  
24 or ambiguous.  
25

26 On December 8<sup>th</sup>, 1997, Mr. Fenton (Mr. Yousoufian's attorney at the time) sent  
27 a letter to the King County Executive to emphasize his client's request. He reiterated  
28

1 the initial request and added an additional request for documents related to "how, why  
2 and by whom" the *various studies* (in addition to Conway) were ordered and the costs  
3 of each study. Although Mr. Yousoufian contends that he requested this documentation  
4 initially, a plain reading of his May 30<sup>th</sup> letter indicates otherwise.  
5

6 **B. King County's Response to Mr. Yousoufian's Public Disclosure Request.**

7 King County was untimely and unreasonable in its interpretation of and response  
8 to Mr. Yousoufian's PDA requests.  
9

10 Mr. Yousoufian's May 30, 1997 letter to the King County Executive was routed to  
11 Pam Cole, Office Manager, for a response. Pam Cole responded by letter, dated June  
12 4<sup>th</sup>, 1997 (signed by Desiree Leigh), and advised Mr. Yousoufian that the Conway study  
13 was available for immediate viewing. In fact, the day before he sent his formal PDA  
14 request, Mr. Yousoufian had received access to the 1994 Conway study (Conway #1),  
15 absent relevant attachments. Ms. Cole advised that the other records would not be  
16 available for three weeks because they had to be retrieved from Archives. It appears,  
17 however, that she did not specifically inquire into the location of other studies before  
18 responding. As discovered later, much of Mr. Yousoufian's PDA request involved  
19 documentation not yet stored in Archives. Pam Cole's reference to other records dating  
20 back to 1994 demonstrates that she knew that he was requesting documentation  
21 related to studies in addition to the Conway study.  
22  
23

24 At the time of Mr. Yousoufian's initial request, Pam Cole was the person  
25 responsible for handling public disclosure requests for the King County Executive's  
26 Office. Sometime in June, this responsibility was transferred to Linda Meachum. Ms.  
27  
28

1 Cole worked with Ms. Meachum for a short amount of time in order to train her in  
2 responding to PDA requests. There is no evidence to support the adequacy of such  
3 training.  
4

5 On June 10<sup>th</sup>, 1997, Mr. Yousoufian was given access to the Conway  
6 attachments and to a study by Peat Marwick.

7 He sent a letter, dated June 18, 1997, objecting to the delayed response to his  
8 PDA request and specifically complained that, due to the recent nature of the fast food  
9 study, it would not be found in Archives. Pam Cole sent an E-mail to Ron Sims on June  
10 20<sup>th</sup> to find out where she could locate the fast food study that he had referred to in his  
11 interview with KUOW. Mr. Sims responded that Mr. Yousoufian should contact the  
12 Restaurant Association for that study. A letter was then sent to Mr. Yousoufian to that  
13 effect on June 20<sup>th</sup>, 1997. There is no evidence as to why this correspondence could  
14 not have occurred within five days of May 30<sup>th</sup>, other than through negligence. The  
15 June 20<sup>th</sup> letter also indicated that materials related to the Conway study were being  
16 compiled and that he would be contacted about that in the following week. There is no  
17 evidence that this contact was ever made.  
18  
19  
20

21 On June 12<sup>th</sup>, Linda Meachum forwarded Mr. Yousoufian's request to Susan  
22 Clawson in Stadium Administration. Ms. Meachum relied on Susan Clawson to handle  
23 the request thereafter, and made no further effort to respond or to verify that Stadium  
24 Administration was properly responding to the request, or to retain overall responsibility  
25 for the response.  
26  
27  
28

1 Susan Clawson then assigned the task to Steve Woo, her administrative  
2 assistant, who had only been in his job a few days. Mr. Woo apparently did nothing  
3 until July 15<sup>th</sup>. There was no evidence that Mr. Woo had the appropriate training or  
4 experience to handle a PDA request, or that there was effective supervision of his work  
5 on this request.  
6

7 Susan Clawson claims that Mr. Yousoufian's PDA request was unclear but that  
8 she thought the Stadium Administration was being responsive. However, she took no  
9 independent action to clarify whatever ambiguities she believed to be in the request, nor  
10 did she explain what in particular she found to be unclear or vague.  
11

12 On July 15<sup>th</sup>, Mr. Woo talked with Mr. Yousoufian by telephone to inform him that  
13 there was another Conway study (Conway #2) related to football, conducted in 1996.  
14 On July 25<sup>th</sup>, Mr. Woo sent a letter to Mr. Yousoufian along with the Conway #2 study.  
15 In response to Mr. Yousoufian's request for cost documentation, Mr. Woo provided cost  
16 "information" for the Conway and the HOK studies, but no documents. He indicated  
17 that the Kingdome had paid \$9,000 for the Conway study and \$150,000 toward the cost  
18 of the HOK study. This latter figure was later determined to be incorrect. At this point,  
19 Mr. Woo believed that he had completely satisfied Mr. Yousoufian's request for  
20 documents. He ended the letter with, "I hope this answers the remaining questions you  
21 had related to the Stadium's involvement with the above studies. If [you] need  
22 additional information, please feel free to call me ..." Mr. Woo negligently overlooked  
23 Mr. Yousoufian's request for cost documentation and for the other studies related to  
24 sports stadiums.  
25  
26  
27  
28

1 On August 21, 1997, Mr. Yousoufian wrote to the Executive to express his  
2 frustration with the lack of an appropriate response to his PDA request. In his letter, he  
3 expressly emphasized that he wanted more than just the Conway studies: "I asked for  
4 any and all reports on economic impacts of sports stadiums." In response to this letter,  
5 on August 21<sup>st</sup>, Mr. Woo allowed Mr. Yousoufian to view four more studies: the LMN  
6 Architects Master Plan, the King County Task Force on Stadium Alternatives study, the  
7 HOK #1 study, and the Seahawks/Kingdome Renovation Task Force study. Again,  
8 there is no evidence as to why these studies were not made available sooner, except  
9 through the negligence of county staff. These additional studies were still only a partial  
10 response to Mr. Yousoufian's request. As discovered later, there were more studies  
11 and "related file materials" responsive to Mr. Yousoufian's request. Additionally, no cost  
12 documentation related to the Conway or other studies was provided.  
13  
14  
15

16 Mr. Woo was keenly aware of Mr. Yousoufian's anger and frustration. In an E-  
17 mail to Linda Meachum, dated August 26th, Mr. Woo acknowledged this and explained  
18 that the Conway studies had been provided to Mr. Yousoufian along with some cost  
19 "information". He referred to the other four studies that Mr. Yousoufian had viewed on  
20 August 21<sup>st</sup> and ended his E-mail, "I honestly don't know how to respond to Mr. Y..." In  
21 response to this E-mail, Linda Meachum took no action to investigate the problem or to  
22 evaluate Mr. Woo's ability to handle the request. Rather, she seems to have adopted  
23 Mr. Woo's belief that Mr. Yousoufian, not the County's lack of responsiveness, was to  
24 blame.  
25  
26  
27  
28

1           Although Mr. Woo tried to be cooperative with Mr. Yousoufian, he was not  
2 adequately trained or knowledgeable to handle this request, and his overall efforts to  
3 fulfill Mr. Yousoufian's request were inadequate. It is apparent from the  
4 correspondence that Mr. Woo did not carefully read nor reasonably understand Mr.  
5 Yousoufian's PDA request. It is clear that Mr. Woo focused solely on the word  
6 "Conway" in Mr. Yousoufian's initial letter, essentially ignoring all other aspects of the  
7 request.  
8

9           Even after Mr. Woo realized that more was wanted, he relinquished the studies  
10 in increments, rather than all at once. He made no attempt to find an appropriate  
11 source of information to help him track down all of the studies that had been completed  
12 to date on the economic impacts of sports stadiums, and continued to disregard the  
13 request for financial documentation. Mr. Woo had no formal training on how to respond  
14 to PDA requests and had never read the statute or county ordinances.  
15

16           On August 27<sup>th</sup>, 1997, a letter was mailed to Mr. Yousoufian. The letter appears  
17 to be an attempt by the County to excuse its actions thus far. The letter stated that the  
18 Executive had interpreted his letter as a request for information related to baseball,  
19 thereby explaining why it had initially only provided Conway #1. This explanation was  
20 not reasonable in light of the plain language of Mr. Yousoufian's May 30<sup>th</sup> request. The  
21 letter stated that Linda Meachum was performing an Archive search for Executive  
22 Office documents and would be in contact with him shortly. It further inquired into  
23 whether Mr. Yousoufian would like an Archive search to be performed by the Stadium  
24  
25  
26  
27  
28

1 Administration. It was not reasonable to ask Mr. Yousoufian where to search for the  
2 documents responsive to his request.

3           On October 2<sup>nd</sup>, 1997, Mr. Yousoufian sent another very detailed letter  
4 complaining that he had still not received what he was requesting. He reiterated his  
5 request for cost documentation. On October 9<sup>th</sup>, Ms. Meachum responded only that her  
6 office had already provided all of the documents in its possession pertaining to the May  
7 30<sup>th</sup> request, demonstrating her overly narrow understanding of the County's  
8 responsibility to locate responsive documents. Ms. Meachum then advised Mr.  
9 Yousoufian to be very specific in future requests to the Executive's Office, a criticism  
10 without a reasonable basis.

11           On October 9<sup>th</sup>, a letter signed by Desiree Leigh was sent to Mr. Yousoufian.  
12 The letter notified him that an Executive Office archival search had been performed and  
13 that documents responsive to his request were being forwarded to their attorneys for  
14 review. The letter estimated that the documents would be available to view within two  
15 weeks. There is no evidence whether such an archival search ever occurred, what was  
16 found if anything, or why it took so long to conduct it. The fact that this letter was sent  
17 on the same day as the one by Linda Meachum, stating that there were no more  
18 responsive documents, clearly indicates a lack of coordination even among staff in the  
19 Executive Office.

20           Mr. Woo then faxed a letter to Mr. Yousoufian on October 9<sup>th</sup>, explaining that two  
21 more studies could be found on the King County's web site. On October 10<sup>th</sup>, Mr. Woo  
22 sent these two items to Mr. Yousoufian (The "Kingdome's Future" report and a portion  
23

1 of the "CSL" study). He also provided information, but no documentation, as to how  
2 much the consultant report cost.

3 On October 14<sup>th</sup>, Mr. Yousoufian again wrote to the Executive to express his  
4 confusion about the apparent conflict between the Meachum and the Leigh letters. In  
5 response, Oma LaMothe, King County Prosecuting Attorney, wrote to Mr. Yousoufian to  
6 give her opinion that his initial PDA request had been fully answered. She also stated  
7 that two boxes of materials, which she claimed were not relevant to his original request,  
8 were nevertheless available for him to view. She identified the documents as relating  
9 generally to the Kingdome. Ms. LaMothe ended the letter by commenting on the  
10 alleged "difficulty" in specifically identifying the documents that Mr. Yousoufian had  
11 requested.  
12  
13

14 On October 21<sup>st</sup> or 22<sup>nd</sup>, Mr. Yousoufian made several attempts to arrange for a  
15 time with Ms. Meachum to view the documents. Mr. Yousoufian viewed the two boxes  
16 on October 28<sup>th</sup> and again on February 6<sup>th</sup> with his attorney. It seems, at least initially,  
17 that Mr. Yousoufian found these documents to be responsive to his request. He made  
18 132 copies of documents on October 28<sup>th</sup>, and another 265 copies on February 6<sup>th</sup>. He  
19 then sent a letter to Ms. Meachum thanking her for allowing him to inspect "at long last,  
20 the documents I had originally requested in my May 30, 1997 Public Disclosure  
21 Request." However, at trial he asserted that the material was "virtually all non-  
22 responsive to my request (citizen letters, etc). No 'how, why, by whom' or cost  
23 documents." The Court finds Mr. Yousoufian's initial reaction to the material to be more  
24 credible than his post litigation statement, and finds that the boxes did contain  
25  
26  
27  
28

1 documents relating to the requested studies, exclusive of cost documentation.

2 However, the County failed to identify what documents were in the boxes and has  
3 therefore not kept an appropriate record of materials produced.  
4

5 After determining that he had still not received all the documents that he was  
6 seeking, Mr. Yousoufian hired attorney Paul Fenton to assist in his efforts. Mr. Fenton  
7 on December 8<sup>th</sup> to reiterate Mr. Yousoufian's request, and to request the cost  
8 documentation associated with the other studies. On December 10<sup>th</sup>, Pam Cole sent  
9 an E-mail to Steve Woo, and others, requesting the documentation. Mr. Woo  
10 responded to Ms. Cole on December 12<sup>th</sup>, reiterating what he had already provided to  
11 Mr. Yousoufian. He concluded that he believed that he had been completely  
12 responsive to Mr. Yousoufian's request. He demonstrated his ignorance of the initial  
13 request by stating that the initial request sought 2 distinct items, the survey and the  
14 Conway study, along with associated material. He failed to make any mention of the  
15 cost documentation that had been specifically requested. He seemed to have realized  
16 at that point that Mr. Yousoufian's request was broader than he had originally thought,  
17 because he stated that Mr. Yousoufian "now" wanted the unlimited universe of all  
18 studies and information on sports stadiums previous and subsequent to his request,  
19 along with all related information, even though the "previous and subsequent" language  
20 came directly from the May 30<sup>th</sup> letter. Mr. Woo then indicated that he would generate  
21 the other information on studies with regards to costs. However, there is no evidence  
22 that Mr. Woo ever followed up on this. Instead, Mr. Wilson, Chief of Staff, wrote to Mr.  
23 Fenton on December 15<sup>th</sup>, 1997, to state that the cost "information" provided by Mr.  
24  
25  
26  
27  
28

1 Woo satisfied Mr. Yousoufian's request and that future inquiries should be directed to  
2 the Public Facility District. This response was inadequate.

3 Mr. Fenton sent another letter on December 31<sup>st</sup> to explain that Mr. Yousoufian's  
4 request had not been adequately answered. Oma LaMothe responded on January  
5 14<sup>th</sup>, 1998, that the Executive was only responsible for providing documents within its  
6 office and that "hundreds of hours" had already been spent trying to retrieve responsive  
7 documents. This statement was factually and legally incorrect. When the county did  
8 make an informed effort to find the documents, they were located and produced within  
9 a couple of days by Pat Steele. Ms. LaMothe either did not read the May 30, 1997  
10 letter or incorrectly interpreted it. She apparently never checked with anyone with  
11 appropriate knowledge to verify whether or not other responsive documents might exist,  
12 and she never attempted to obtain the cost-related documentation responsive to Mr.  
13 Yousoufian's initial request. She took a narrow view both of Mr. Yousoufian's request  
14 and of the County's obligation to respond.

15 Mr. Fenton responded on March 6<sup>th</sup>, 1998 to inquire into any exemptions that the  
16 County might be claiming and to determine whether any other agency might have the  
17 documents that they were seeking. He reiterated the PDA request in substantial detail.  
18 Ms. LaMothe responded on March 24<sup>th</sup> and advised Mr. Fenton to write to the Finance  
19 Department, which he promptly did. The Finance Department claimed never to have  
20 received this letter so Mr. Fenton re-sent the letter in June. Ms. LaMothe then  
21 responded as representative of the Finance Department, on June 22<sup>nd</sup>, 1998, to notify  
22 Mr. Fenton that it did not have the documents he requested. Her statements were  
23  
24  
25  
26  
27  
28

1 unsubstantiated. In fact, the Department of Finance did have the documents, as was  
2 discovered later.

3           The wording of many of Mr. Yousoufian's letters was, in many respects,  
4 accusatory, offensive and abusive. Regardless of the excessiveness of the language,  
5 however, his requests were clear and the County had an obligation to respond to them  
6 in a prompt and accurate manner.  
7

8           The present lawsuit was initiated on March 30<sup>th</sup>, 2000. In February of 2001, Pat  
9 Steele was recruited to assist in efforts to locate documents responsive to Mr.  
10 Yousoufian's request. She immediately began coordinating an effort to locate the  
11 documents responsive to the request. Ms. Steele requested a list of archived records  
12 from King County Archives, highlighted the records that she "believed might have *any*  
13 *relation at all* to the subject of Armen Yousoufian's May 30, 1997, public disclosure  
14 request," and contacted Susan Clawson in the Department of Finance for assistance in  
15 locating the records. At her request, Pam Cole retrieved the appropriate documents  
16 from Archives and sent them to Mr. Yousoufian's attorney. It was Ms. Steele's  
17 understanding that all files appearing to contain any information possibly responsive to  
18 Mr. Yousoufian's request should be provided. Ms. Cole then contacted the Department  
19 of Finance to give it the information that it needed to retrieve the cost information that  
20 Mr. Yousoufian was seeking. This was the appropriate way to handle a PDA request,  
21 and the procedure that could and should have been employed in 1997.  
22  
23  
24  
25

26           It appears that there was a lack of communication and coordinated effort  
27 between the Department of Finance and the Executive's Office in 1998. In February of  
28

1 2001, Pam Cole discovered that the Department of Finance was unable to retrieve  
2 records by subject (such as "sports stadiums"), and was only able to retrieve records by  
3 contractor names and contract numbers. There is no evidence as to why this  
4 "discovery" could not have been made in 1997 or 1998 with appropriate and diligent  
5 inquiry.  
6

7 Mr. Yousoufian received the bulk of the cost documentation on March 7<sup>th</sup>, 2001,  
8 as well as the Mariners Baseball Club Economic Impact Study and the Economic  
9 Impact of the Mariners on King County study. More cost information was provided on  
10 March 19<sup>th</sup>, 2001. On April 20<sup>th</sup>, 2001, Mr. Yousoufian, and his attorney Mr. Brannan,  
11 reviewed more boxes of previously undisclosed materials specifically containing one  
12 additional study, the "CSL" study (dated 6/3/97). On June 8<sup>th</sup>, the HOK2 study (dated  
13 12/96) was provided to Mr. Yousoufian. There is no evidence as to why these could not  
14 have been provided in 1997.  
15

16  
17 The Court finds that as of trial, a reasonable disclosure of documents has now  
18 been made. Any miscellaneous documents not yet produced are non-responsive not  
19 warranting either findings or a fine.  
20

21 In summary, King County failed to correctly interpret and respond to Mr.  
22 Yousoufian's PDA request. With proper diligence, all of the material untimely provided  
23 could and should have been provided in June or December of 1997.  
24  
25  
26  
27  
28

1       **II. CONCLUSIONS OF LAW**

2  
3       **A. King County was the Agency Responsible for Responding to Mr. Yousoufian's**  
4       **PDA request.**

5               RCW 42.17.020 defines agency as all state and local agencies. Local agency  
6 includes every county or department thereof. The Court finds that King County was the  
7 agency responsible for ensuring that Mr. Yousoufian's PDA request was completely,  
8 promptly, and accurately answered, regardless of which department maintained the  
9 records. The request was sent to the King County Executive, directly in response to  
10 comments made by Ron Sims. A PDA request sent to the chief executive officer of the  
11 county must be broadly interpreted to cover all documents that are maintained by the  
12 county executive agencies. The Department of Finance and the Stadium  
13 Administration are both branches of the King County Executive, under its ultimate  
14 direction.  
15

16  
17               The studies requested were also "used" by the County, as defined by the Act.  
18 Documents that are reviewed, evaluated, or referred to, that have an impact on the  
19 agency's decision-making process, fall within the parameters of the Act. Documents  
20 need not be in the actual physical possession of the agency. It is sufficient that the  
21 writing was prepared or used by the agency. Here, the studies were commissioned by  
22 the Executive to answer questions related to the financing of sports teams and  
23 stadiums in Washington. The fact that the documents were maintained by Stadium  
24 Administration, or any other agency, is of no consequence. The Executive's Office had  
25  
26  
27  
28

1 the obligation to coordinate and oversee all PDA requests for documents that it had  
2 used.

3 Although delegation is reasonable, it was not proper for the Executive Office to  
4 relinquish responsibility to another department without following through to ensure that  
5 a complete response was rendered. It was clear from Mr. Yousoufian's October 2<sup>nd</sup>  
6 letter that he had not received all of the documents that he had requested. Someone  
7 should have had the responsibility for coordinating efforts between the Executive, the  
8 Stadium Administration, and the Department of Finance to make sure that Mr.  
9 Yousoufian received a full, complete, and accurate response to his request. No one did  
10 this.  
11  
12

13 **B. The Documents Requested by Mr. Yousoufian were "Public Records" under**  
14 **the PDA.**

15 "Public Record" is defined under the Act as "any writing containing information  
16 relating to the conduct of government or the performance of any governmental or  
17 propriety function prepared, owned, used, or retained by any state or local agency  
18 regardless of physical form or characteristics." Evaluating, reviewing, and referring to a  
19 document constitutes "use" under the Act.  
20

21 The studies and associated file material that Mr. Yousoufian requested are  
22 clearly public records under the statute. The studies were commissioned by the  
23 County, and the studies and associated file materials were referred to and evaluated by  
24 the County when it made decisions regarding the viability of sports teams and stadiums  
25 in Seattle. These documents clearly fall under the PDA as public records.  
26  
27  
28

1 The financial documentation requested by Mr. Yousoufian are also public  
2 records under the Act. The records of contract, invoices, payment warrants, and  
3 bidding documentation, along with other such cost documentation, were prepared,  
4 retained and used by King County. Furthermore, these documents directly relate to the  
5 conduct and performance of King County in securing those contracts.  
6

7 **C. King County's Responses were Untimely under the PDA.**

8 Washington's Public Disclosure Act (PDA) requires a five-day response to all  
9 public disclosure requests. The Act allows additional time, as *necessary*, to clarify the  
10 intent of the request, to locate and assemble the information, or to determine whether  
11 or not any of the information is exempt from disclosure. It is the agency's burden to  
12 prove the necessity of and to set forth the reasons for any delay in responding to a  
13 specific PDA request. The Court finds that King County has not met this burden.  
14  
15

16 The King County Executive received Mr. Yousoufian's initial request on May 30<sup>th</sup>,  
17 1997, and therefore had until June 6<sup>th</sup> to either fulfill the request or to set forth valid  
18 reasons why the request could not be fulfilled by that date. In response to Mr.  
19 Yousoufian's letter, the Executive's Office sent him notification that, because the  
20 documents he requested were in Archives, three weeks were required to respond to his  
21 request. However, the County failed to provide evidence that any of the documents  
22 were in archives at that time. This notification suspiciously resembled a form letter,  
23 prohibited under the Act unless it set forth reasons specific to the request in question.  
24  
25 King County failed to establish at trial that three weeks was necessary to respond to Mr.  
26 Yousoufian's request, either in whole or in part. The specific evidence is to the  
27  
28

1 contrary. When Pat Steele finally reviewed Mr. Yousoufian's May 30<sup>th</sup> request, in  
2 February of 2001, she coordinated an effort and located the documents within a few  
3 days. Because of the large volume of documents requested, perhaps the County could  
4 have provided evidence that a diligent response would have taken more than five days.  
5 However, the County did not sustain this burden. The Court would have to speculate to  
6 come up with a reasonable time due to "necessity", and therefore the Court sets all due  
7 dates at five business days following the initial request.  
8

9  
10 King County also responded in an untimely manner to the December, 1997  
11 request by Mr. Fenton for cost documentation for studies in addition to Conway. It was  
12 not reasonable to require him to re-direct his inquiry to the Department of Finance. It  
13 was the Executive Office's obligation to find where the documents were. There is no  
14 evidence as to why this could not have been done in December, 1997.  
15

16 **D. King County Demonstrated a Lack of Good Faith in its Response to Mr.**  
17 **Yousoufian's PDA request.**

18 Washington's Public Disclosure Act requires agencies to act with due diligence  
19 and speed in responding to requests for public documents. The Act imposes on  
20 agencies an obligation to devote their best efforts to providing the "fullest assistance  
21 possible" to citizens making public disclosure requests. If a request is ambiguous or  
22 broad, the statute mandates that the agency make an effort to clarify and narrow the  
23 request. A failure to fulfill these obligations amounts to a lack of good faith under the  
24 statute.  
25

26 The Court does not find that there was "bad faith" in the sense of intentional  
27 nondisclosure. However, the Court finds that there was not a good faith effort by the  
28

1 involved county staff to read, understand, and respond to Mr. Yousoufian's letter in a  
2 timely, accurate manner. There was a complete lack of coordination among the  
3 departments and staff assigned to the task, and absolutely no effective oversight of this  
4 PDA request. Certainly, King County did not render full assistance to Mr. Yousoufian  
5 as required under the statute. Nor was there an effective system for tracking a PDA  
6 request to ensure compliance with the law.  
7

8           The County's lack of good faith was also apparent in misrepresentations made in  
9 correspondence to Mr. Yousoufian. Many of the letters contained incorrect statements,  
10 both factual and legal. No effort was made to verify the accuracy of those statements.  
11

12           In summary, the County was negligent in the way it responded to Mr.  
13 Yousoufian's PDA request at every step of the way, and this negligence amounted to a  
14 lack of good faith. There was a lack of coordination among the departments and there  
15 was a lack of oversight by the Executive's Office. The people given the responsibility  
16 for this PDA request had only a rudimentary understanding of the County's  
17 responsibilities under the PDA and apparently were not trained in how to locate and  
18 retrieve documentation, or didn't take the trouble to do so. No one ever took the time to  
19 carefully read Mr. Yousoufian's letter. If they claimed to be confused about the request,  
20 there was inadequate communication with Mr. Yousoufian to clear up the confusion.  
21 There were broad assumptions that Mr. Yousoufian was being difficult or unreasonable,  
22 assumptions which may have affected how people responded to his requests.  
23

24           According to Pat Steele's declaration, the county is now implementing strategies  
25 to increase communication between the various departments, and is implementing  
26  
27  
28

1 training programs to properly teach people of their obligations under the PDA.  
2 Hopefully these measures will be successful in ensuring that a similar mishandling of a  
3 PDA request does not occur in the future.  
4

5 Although there was an clear mishandling of Mr. Yousoufian's request, the Court  
6 finds no intentional nondisclosure or intent to conceal. Although not effective, it  
7 appears that the county's intent was to be responsive to Mr. Yousoufian's request.  
8

9 **E. Mr. Yousoufian is Entitled to all Reasonable Attorney Fees and Costs.**

10 Costs and attorney fees are mandatory under the Act to compensate any person  
11 who prevails in a court action to recover documents. Because the County offers no  
12 objection to the costs, all costs associated with the present suit are granted. Attorney  
13 fees were assessed as those reasonably necessary to secure the release of the  
14 relevant documents.  
15

16 **1. Mr. Fenton**

17 Mr. Fenton has asked for attorney fees in the amount of \$16,095, for 87 hours of  
18 work, at a rate of \$185.00 per hour. The Court finds portions of this amount to be  
19 unreasonable.  
20

21 **a. Estimated Telephone Calls**

22 There has been no showing that anything productive occurred between July,  
23 1998 and July, 1999. Therefore, these hours will be reduced by one-half, to 13 hours  
24 total, for the 1997-98 hours.  
25  
26  
27  
28

1 **b. Meetings with Citizen Activists**

2 This time will be disallowed because there was no showing that it was  
3 reasonably necessary to the litigation. All ten hours will be stricken.  
4

5 **c. Locating Alternative Counsel**

6 The time spent locating alternative counsel appears excessive and not  
7 reasonably related to the success of the case. This time will be reduced by five hours.  
8

9 **d. Total Award for Mr. Fenton's Fees**

10 The total time allowable for Mr. Fenton is 59 hours, and the total award for Mr.  
11 Fenton's attorney fees is \$10,915.00.  
12

13 **2. Mr. Balint**

14 Mr. Balint worked together with Mr. Brannan to represent Mr. Yousoufian in the  
15 present lawsuit. Mr. Balint bills at a rate of \$250 per hour and his paralegal bills at \$125  
16 per hour. The County has raised several objections with regards to his fees. Listed  
17 below are the objections and the Court's ruling.  
18

19 **a. Response to Defendant's Successful Motion in Limine and Work on**  
20 **Declarations that were Found to be Inadmissible**

21 With regards to the individual motions, attorney fees will only be awarded to the  
22 prevailing party. The County prevailed on its Motion in Limine to exclude evidence of  
23 Mr. Yousoufian's other PDA requests. Therefore, attorney fees associated with  
24 responding to that motion will not be granted. The amount billed on August 5<sup>th</sup>, 2001  
25 will be reduced by one-fourth (\$218.75) as suggested by defendant.  
26  
27  
28

1 The County was also successful in excluding the testimony of Mr. Derdowski.  
2 The attorney fees associated with the preparation of his declaration will not be granted.  
3 Therefore, the amount billed on July 20<sup>th</sup>, 2001 will be reduced by an amount of  
4 \$104.20 (25 minutes, as per Declaration of David J. Balint in Response to Objections to  
5 Attorney's Fees).  
6

7 **b. Duplicative Attorney Fees**

8 The County objects to the double billing associated with Mr. Balint and Mr.  
9 Brannan conversing with one another. There was no showing that these discussions  
10 were other than duplicative, and they would have been unnecessary if only one lawyer  
11 had handled the case. Mr. Balint argues that because Mr. Brannan has a lower hourly  
12 rate, that total fees were less. However, differences in hourly rates are presumed to  
13 reflect skill and efficiency.  
14

15  
16 The values given by Mr. Balint in his July 20<sup>th</sup>, 2001 declaration were used to  
17 determine the total time spent conversing with co-counsel. Because the supplemental  
18 declarations contained no breakdown for these calls, an average of 16 minutes per call  
19 was used. This value was obtained by averaging the times for phone calls listed in the  
20 July 20<sup>th</sup> declaration. The Court finds that \$6,917 was spent talking and corresponding  
21 with co-counsel. This amount shall be deducted from the total request.  
22

23 Double attorney fees were also generated for several of the depositions. Mr.  
24 Brannan conducted the depositions while Mr. Balint observed. Mr. Balint is not entitled  
25 to attorney fees for sitting in on the depositions. Therefore, the attorney fees will be  
26 reduced by \$4,482.  
27

1 **c. Research on Irrelevant Matters**

2 The Court does not agree that the research and briefing on contract law was  
3 wholly irrelevant, but does agree that it was excessive. Therefore, these fees will be  
4 reduced by one-half, or \$3,300.  
5

6 **d. Total Award for Mr. Balint's Attorney Fees and Costs**

7 Mr. Balint is requesting a total of \$48,700 in attorney fees: \$31,937.50 for time  
8 spent between October 6<sup>th</sup>, 2000 through July 19<sup>th</sup>, 2001; \$14,787.50 for time spent  
9 from July 19<sup>th</sup> through August 14<sup>th</sup>; \$1000 for the August 15<sup>th</sup> trial; and \$975 for work he  
10 did on August 23<sup>rd</sup>. This amount will be reduced by \$15,021.95 for the reasons  
11 explained above. The total award for his attorney fees will be \$33,678.05.  
12

13 Mr. Balint requests \$5,581.25 for total costs associated with the case. This  
14 amount will be awarded. The total award for his fees and costs is \$39,259.30.  
15

16 **3. Mr. Brannan**

17 Mr. Brannan participated in the representation of Mr. Yousoufian, and bills at a rate  
18 of \$185 per hour. The County has raised several objections with regards to his fees.  
19 Listed below are the objections and the Court's ruling.  
20

21 **a. Administrative Tasks Billed at Attorney Rates**

22 The Court does not find that Mr. Brannan spent an excessive amount of time  
23 organizing files. Additionally, this organizing was always associated with review of the  
24 file and/or research of legal issues. The conclusion that this was merely an  
25 administrative task that could have been delegated to a non-lawyer is not supported.  
26 There will be no reduction in attorney fees based on this argument.  
27  
28

1 **b. Review of Documents with Client**

2 The Court finds that it was appropriate for Mr. Brannan to review the boxes of  
3 documents with his client, as document disclosure was the very heart of the litigation.  
4 There will therefore be no reduction in attorney's fees based on this argument.  
5

6 **c. Unsuccessful Motions to Reconsider and Compel**

7 With regards to the individual motions, attorney fees will only be awarded to the  
8 prevailing party. Mr. Yousoufian's Motion to Reconsider was denied. Therefore,  
9 attorney fees associated with that motion will not be granted (June 25<sup>th</sup>, 2001). The  
10 attorney fees will be reduced by \$277.50.  
11

12 Plaintiff's Second Motion to Compel was denied because the parties had failed  
13 to meet and confer. There will be no award of fees associated with this motion. In his  
14 attorney fees table, Mr. Brannan fails to segregate how much time was devoted to each  
15 task. It is impossible to determine exactly how much time was devoted to the motion.  
16 However, a reasonable estimate can be made by dividing the total time by the number  
17 of tasks performed, for an estimate of time spent working on the motion. The total fees  
18 will be reduced by \$11,033.  
19  
20

21 **d. Response to Defendant's Motions in Limine and Work on Inadmissible**  
22 **Declarations**

23 Most of the County's Motion in Limine was granted. The County suggests that  
24 Mr. Brannan's fee for responding to this motion be reduced to one-fourth to reflect this.  
25 Mr. Brannan offers no counter-argument for that proposition. Therefore, his fees will be  
26 reduced by \$2,969.25.  
27  
28

1 Two declarations submitted by plaintiff were deemed inadmissible. The County  
2 objects to fees associated with these declarations. It appears that a total of 21.1 hours  
3 were spent preparing these declarations. Because Mr. Brannan does not dispute this  
4 number as incorrect, the Court accepts the County's recommendation to reduce these  
5 fees by one-half. The total fees will be reduced by \$1,951.75.  
6

7 **e. Duplicative Attorney Fees**

8 Mr. Brannan's fees for conversations with co-counsel will be deducted. Where it  
9 was impossible to determine a specific time for these conversations, the 16-minute  
10 average was again used. The total fees for these conversations will be reduced by  
11 \$3,293.00. The fee will also be reduced for duplicative time for trial attendance  
12 (\$1,110.00) for a total reduction of \$4,403.00.  
13  
14

15 **f. Discovery in an Attempt to Prove Bad Faith**

16 The Court finds that this discovery was not frivolous and was helpful to the  
17 Court's lack of good faith determination. Nor has the County specifically shown that the  
18 discovery was excessive, duplicative, or inefficiently conducted. A citizen is not  
19 required to assume government incompetence in response to a PDA request, and is  
20 entitled to search for other explanations. However, it does appear that significant time  
21 and effort was spent searching for the elusive "smoking gun" long after it should have  
22 been apparent that lack of diligence, not evil intent, was the cause of the problems.  
23  
24 There will be a 10% reduction in the final amount authorized.  
25  
26  
27  
28

1 **g. Total Award for Brannan's Attorney Fees and Costs**

2 Mr. Brannan requests total attorney fees of \$85,248.00: \$80,697 for work  
3 performed between October 2<sup>nd</sup>, 2000 through August 14<sup>th</sup>, 2001; and \$4,551.00 for  
4 work performed between August 15<sup>th</sup> and August 27<sup>th</sup>. This amount will be reduced by  
5 \$20,634.50 for the reasons described above, and an additional 10% for the "smoking  
6 gun" inquiry. The total award for Mr. Brannan's attorney fees is \$58,152.15.

7  
8 Mr. Brannan requests reimbursement for costs associated with the suit, totaling  
9 \$1,198.85. This amount will be awarded. The total award of his attorney fees and  
10 costs is \$59,351.00:

11 **4. Other Considerations**

12  
13 The total award of attorney fees, even after specific itemized deductions,  
14 impresses the court as excessive in relation to the complexity of the issues and  
15 presentation. The time sheets submitted by counsel do not allow for a detailed  
16 evaluation of whether all time was reasonably necessary. For example, Brannan's 15.6  
17 hour day on June 7<sup>th</sup>, 2001 (including Internet research) and 12 hours on June 8<sup>th</sup>,  
18 2001, appear excessive. Certain claims were clearly unfounded, such as the ludicrous  
19 request for fines in the range of \$1.5 to \$3.6 million. Further, plaintiff's presentation of  
20 the case could have been clearer for the court. Counsel did not prepare a clear and  
21 detailed itemization of which documents were produced, when, and did not specify  
22 which documents were relevant to the initial request. The Court had to request at trial  
23 supplemental material to get this information. The Court's deliberation on this case was  
24  
25  
26  
27  
28

1 more time consuming and difficult than it would have been had the case been better  
2 organized and more clearly presented.

3  
4 The majority of the attorney's fees were generated after March 2001, the date on  
5 which the County produced most of the documents that it had not produced in 1997.  
6 The County asserted, but could not prove, that it had produced the HOK2 study in  
7 1997. Therefore, the Court deemed it produced in June of 2001. As such, it was the  
8 only document of substance not produced by March/April, 2001. The amount of  
9 attorney time expended is out of proportion to what additional success was achieved on  
10 the merits. By this time, the County had become aware of its error and was doing its  
11 best to produce the requested documents.  
12

13 Overall, the Court will reduce the total amount of attorney fees (\$102,745.20) by  
14 an additional 20%, for a total award for attorney fees of \$82,196.16.  
15

16 **F. King County Shall be Fined at a Rate of \$5 per Day for Each Relevant Study**  
17 **and for Each Set of Financial Documentation Provided.**

18 Washington's Public Disclosure Act mandates a penalty of between \$5 and \$100  
19 per document per day for each day that documents were improperly withheld from  
20 disclosure. The statutory award is a penalty designed to encourage broad disclosure  
21 and to deter improper denial of access to public records.  
22

23 The Court has broad discretion in determining how and at what rate the penalties  
24 will be assessed. A person who prevails at trial is entitled to at least the minimum  
25 penalty award. In determining whether to award a penalty in excess of the minimum,  
26 the court will take into account an amount necessary to effectuate the purpose behind  
27 the statute of encouraging broad disclosure. The court will look to the good faith efforts  
28

29 FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

1 made by the agency in responding to the particular request. If there was little or no  
2 good faith effort to provide the fullest assistance possible, the court will set the penalty  
3 at an amount deemed necessary to deter future inappropriate conduct.  
4

5 In deciding whether to award penalties over the minimum allowable amount, the  
6 Court looked at the reasons for King County's failure to timely respond to Mr.  
7 Yousoufian's request. The Court also considered whether the amount would  
8 encourage King County to respond in a diligent manner to future PDA requests.  
9

10 A rate of \$5 a day is selected because the Court finds that the combined total of  
11 penalty and attorney fees is sufficient to deter future similar inappropriate conduct. The  
12 penalties are not assessed on a per document basis, as requested by plaintiff, as this  
13 results in a penalty totally out of proportion to the County's negligence, the harm done  
14 thereby, and any amount needed for deterrence.  
15

16 The County requests only a minimum fine of a few thousand dollars because it  
17 tried to act in good faith, had good intentions, believed it was responding appropriately,  
18 and because no evidence was shown that early disclosure would have had any material  
19 impact on issues of public concern. The Court concludes these are definitely reasons  
20 for not imposing a higher fine. However, government incompetence displayed in this  
21 case is not justifiable and can be as detrimental to public confidence as actual  
22 malfeasance. An insignificant penalty is simply inappropriate.  
23

24 The plaintiff set forth 15 studies that he believed were responsive to his PDA  
25 request: Conway #1, Pete Marwick Study, Conway #2, LMN Kingdome Master Plan,  
26 King County Executive's Task Force on Stadium Alternatives dealing with Major League  
27  
28

29 FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

1 Baseball, HOK #1, Seahawks/Kingdome Renovation Task Force Study, The  
2 "Kingdome's Future" report, Seattle Mariners Baseball Club Economic Impact,  
3 Economic Impact of Mariners on King County, Work Plan New Baseball Stadium  
4 Proposal, CSL study, Football Stadium and Exhibition Center Neighborhood Impact  
5 Analysis, New Football/Soccer Stadium and Exhibition Center Scoping Summary  
6 report, HOK #2. Four of these studies were found by the Court to be non-responsive  
7 and are therefore not included: LMN Architects Kingdome Master Plan (from the  
8 evidence provided, it is impossible to determine the scope of this report or to determine  
9 whether it has anything to do with the economic impacts of sports stadiums), Work Plan  
10 New Baseball Stadium Proposal (this appears to be a funding proposal for the new  
11 stadium and for maintenance of the Kingdome. There is no indication that it is a study  
12 related to the economic impacts of sports stadiums), Football Stadium and Exhibition  
13 Center Neighborhood Impact Analysis (this study was concluded on 7/23/97,  
14 significantly past Mr. Yousoufian's PDA request for studies. Although Mr. Yousoufian  
15 does request all subsequent studies in his initial letter, that means subsequent to the  
16 Conway study, not "future" studies), New Football/Soccer Stadium and Exhibition  
17 Center Scoping Summary report (this study was concluded on 11/12/97 and will not be  
18 included for the same reasons as for the Neighborhood Impact Analysis).

19  
20  
21  
22  
23 Mr. Yousoufian also requested all cost documentation related to the above  
24 studies. He claims that this documentation was requested in the initial May 30<sup>th</sup>, 1997  
25 letter. However, as discussed above, the Court finds that only those cost documents  
26 related to the Conway studies were requested at that time. All other cost  
27

1 documentation was requested in Mr. Fenton's December 8<sup>th</sup>, 1997 letter. See Table,  
2 page 32. The cost documentation for the following four studies were not included in the  
3 determination of penalties because they were never received by Mr. Yousoufian and  
4 were not included in the list of "Documents Not Yet Received" provided by plaintiff on  
5 July 20<sup>th</sup>, 2001: King County Executive's Task Force on Stadium Alternatives, The  
6 "Kingdome's Future" report, Seattle Mariners Baseball Club Economic Impact report,  
7 and the Economic Impact of the Mariners on King County report. The Court finds that  
8 Mr. Yousoufian has waived any request for that documentation. Below is a table listing  
9 the documentation that the Court considered to be responsive to Mr. Yousoufian's  
10 request, when received and the days late in production. All requests were due five  
11 business days after the County received the request. There were 647 days between  
12 the last letter to Mr. Yousoufian and the filing of suit. Because inclusion of this time  
13 would encourage future plaintiffs to delay in filing suit in order to incur additional  
14 penalties, this time was not included in the calculation of days late. However, 120 days  
15 were subtracted from the 647 days as a reasonable amount of time for Mr. Yousoufian  
16 to find an attorney to represent him in the above suit. The total days subtracted from  
17 the total days late is 527 days.  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

29 FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

TABLE OF DOCUMENTS RECEIVED

Name	Exhibit #	Requested	Due*	Received	Days Late**
1. Conway #1 Study (8/94)	N/A	5/30/97	6/6/97	6/10/97	4
2. Peat Marwick Study (5/94)	N/A	5/30/97	6/6/97	6/10/97	4
3. Conway #2 Study (3/96)	1	5/30/97	6/6/97	7/25/97	49
4. HOK1 Study (3/96)	4	5/30/97	6/6/97	8/21/97	76
5. King County Task Force on Stadium Alternatives Study (1/95)	3	5/30/97	6/6/97	8/21/97	76
6. Seahawks/Kingdome Renovation Task Force Study (1/97)	5	5/30/97	6/6/97	8/21/97	76
7. The "Kingdome's Future" Report (5/97)	7	5/30/97	6/6/97	10/10/97	126
8. Conway #2 Cost Documentation	N/A	5/30/97	6/6/97	3/7/01	843
9. HOK1 Cost Documentation	N/A	12/8/97	12/15/97	3/7/01	661
10. CSL Cost Documentation	N/A	12/8/97	12/15/97	3/7/01	651
11. Peat Marwick Cost Documentation	N/A	12/8/97	12/15/97	3/7/01	651
12. Mariners Baseball Club Economic Impact Study (10/19/91)	5	5/30/97	6/6/97	3/7/01	843
13. Economic Impact of Mariners on King County (10/28/91)	163	5/30/97	6/6/97	3/7/01	843
14. Conway #1 Cost Documentation	N/A	5/30/97	6/6/97	3/19/01	855
15. HOK2 Cost Documentation	N/A	12/8/97	12/15/97	3/19/01	663
16. Seahawks/Kingdome Renovation Task Force Cost Documentation	N/A	12/8/97	12/15/97	3/19/01	663
17. CSL Study (6/3/97)	165	5/30/97	6/6/97	4/20/01	887
18. HOK2 Study (12/96)	169	5/30/97	6/6/97	6/8/01	936
				<b>TOTAL:</b>	<b>8897</b>

\*5 day deadline is five business days.

\*\*527 days were subtracted from total days late (647 days delay in filing suit minus 120 days as a reasonable amount of time for Mr. Yousoufian to find an attorney).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Judge J. Kathleen Learned  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-296-9205

1 Penalties will be based on the dates that production was made and the days late  
2 of each such production as follows:  
3

	Documents	Produced On	Days Late	\$5.00 a day	
4					
5	A	All Documents	6/10/97	4	\$ 20.00
6	B	All Documents	7/25/97	49	\$ 245.00
7	C	All Documents	8/21/97	76	\$ 380.00
8	D	All Documents	10/10/97	126	\$ 630.00
9	E	Some Documents	3/7/01	843	\$ 4,215.00
10	F	Some Documents	3/7/01	651	\$ 3,255.00
11	G	Some Documents	3/19/01	855	\$ 4,275.00
12	H	Some Documents	3/18/01	663	\$ 3,315.00
13	I	All Documents	4/20/01	887	\$ 4,435.00
14	J	All Documents	6/8/01	936	\$ 4,680.00
15		<b>TOTAL</b>			<b>\$25,440.00</b>

16  
17 DATED this 21<sup>st</sup> day of September, 2001.  
18

19  
20 *J. Kathleen Learned*  
21 J. Kathleen Learned, Judge  
22

23  
24  
25  
26  
27  
28  
29 FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

# Attachment 2

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15

The Honorable Michael C. Hayden

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ARMEN YOUSOUFIAN,	)	
	)	
	)	Plaintiff,
	)	No. 00-2-09581-3 SEA
	)	
vs.	)	
	)	KING COUNTY'S BRIEF ON
	)	REMAND
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	)	
	)	
	)	Defendants.
	)	

I. INTRODUCTION

Armen Yousoufian sued King County under the Public Disclosure Act (PDA), RCW 42.17 *et seq.*, due to King County's delay in producing public records related to the funding of County sports stadiums. In September 2001, the trial court found that King County violated the PDA and imposed a statutory penalty of \$25,450. Seeking a penalty at least 40 times this amount<sup>1</sup>, Yousoufian

<sup>1</sup>At the trial court, Yousoufian argued that the appropriate penalty range was \$1,500,000 to \$3,600,000. *See* Yousoufian's Trial Brief on Remand, Attachment 2, p. 25 (Trial Court's Findings of Fact and Conclusions of Law). He reduced this claim somewhat at the Court of Appeals, arguing that the minimum penalty was \$948,465. *See Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 848 note 2, 60 P.3d 667 (2003).

**Norm Maleng**, Prosecuting Attorney  
CIVIL DIVISION  
E550 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9015/SCAN 667-9015

1 retained 3 attorneys and appealed through the Court of Appeals and state Supreme Court. These  
2 courts resolved several legal issues and remanded the case to this court to determine the appropriate  
3 per-day penalty and the amount of reasonable attorney's fees under RCW 42.17.340(4).

4 This case involved lengthy delays by government agencies in responding to a large, complex  
5 public record request. County staff attempting to respond to the request were not properly trained or  
6 supervised, and this resulted in a negligent mishandling of the project over an extended period of  
7 time. It ultimately took King County nearly four years to completely produce the 228 documents  
8 Mr. Yousoufian sought.

9 Due to King County's negligence in handling Mr. Yousoufian's request, he is entitled to a  
10 penalty and attorney's fees under RCW 42.17.340(4). King County asks that this court more than  
11 triple the original penalty imposed by the trial court, resulting in a penalty figure of \$82,252.00.

12 This will be one of the largest penalties ever awarded under the Public Disclosure Act.

13 King County will address attorney's fees in a separate brief.

## 14 II. FACTS

15 The facts of this case are set forth in the decisions of the trial court, Court of Appeals, and state  
16 Supreme Court, all of which are attached. What follows is in large part a summary of those facts.

17 On May 30, 1997, Armen Yousoufian sent a records disclosure request to King County  
18 Executive Ron Sims. He sought records (1) describing how a fast food tax to finance stadium  
19 construction would benefit consumers, and (2) related to the "Conway Study", which dealt with the  
20 economic impacts of sports stadiums. King County responded by letter dated June 4, 1997, informing  
21 Yousoufian that the Conway Study was available for review, but that it would take several weeks to  
22 discover if there were other items within his request.

1 Over the next several months, King County produced a number of documents to Yousoufian.  
2 He did not feel the information was complete, however, and he retained an attorney in December 1997.  
3 On December 8, 1997, the attorney wrote King County a letter restating Yousoufian's records request  
4 of May 30, 1997, and requesting additional information about certain studies and the cost of the  
5 studies.

6 The parties corresponded over the next 6 months. Then, on June 22, 1998, King County wrote  
7 Yousoufian that the King County Finance Department had no documents related to the financing of  
8 stadium studies.

9 Yousoufian filed suit on March 30, 2000. As this suit progressed, King County produced  
10 more documents, some of which related to the stadium studies. Following a bench trial, the court  
11 entered findings and conclusions. *See* Yousoufian's Trial Brief on Remand, Attachment 2.

12 The court found that Yousoufian had made two public records requests – one on May 30, 1997  
13 and one on December 8, 1997. While the county eventually produced all records sought, its delay in  
14 doing so violated the Public Disclosure Act. King County acted negligently, and this negligence  
15 evidenced a lack of good faith. But the court could not find “bad faith” in the sense of intentional  
16 nondisclosure.

17 The court then determined the amount of the penalty under RCW 42.17.340(4). Yousoufian  
18 claimed his 2 requests covered 228 documents, and that the statutory penalty amount (anywhere  
19 between \$5 and \$100 per day) should be applied to each. He requested fines in the range of \$1.5  
20  
21  
22

1 million to \$3.6 million.<sup>2</sup> The court rejected this approach, believing it would produce a penalty figure  
2 totally out of proportion to the County's negligence, the harm done, and the need for deterrence.<sup>3</sup>

3           Instead, the court found that Yousoufian's request covered 18 responsive documents. It  
4 divided these documents into 10 groups, based on the date of production and the subject matter  
5 involved. For each group, the court determined the "days late" as the difference between the date the  
6 records were due and the date King County produced the records. King County produced 6 of these  
7 record groups after Yousoufian's March 30, 2000 lawsuit. For these groups, the court deducted 527  
8 days from the penalty period, reasoning that Yousoufian waited an unreasonable period of time to file  
9 suit following King County's final correspondence of June 22, 1998.<sup>4</sup>

10           The Penalty Calculation Table, shown below, is a combination of the two tables from the trial  
11 court's findings. Each of the 10 rows in the Penalty Calculation Table represents a document group.  
12 The trial court numbered the documents from 1 to 18. *See* Yousoufian's Trial Brief on Remand,  
13 Attachment 2, pp. 30-31. The numbers in the first column of the Penalty Calculation Table are the  
14 numbers of the documents included in each group.

15  
16  
17  
18  
19

---

20           <sup>2</sup>*See* Yousoufian's Trial Brief on Remand, Attachment 2, p. 25 (Trial Court's Findings of Fact and Conclusions  
of Law). The page number refers to the pagination used by the trial court, not the CP number used at the Court of  
Appeals.

21           <sup>3</sup>*See id.*, at pp. 25, 27.

22           <sup>4</sup>*See id.* at 29-31. A total of 647 days transpired between King County's June 22, 1998 letter and the date  
Yousoufian filed suit. The trial court reasoned that 120 days was a reasonable amount of time following King County's  
letter for Yousoufian to act. It arrived at the 527 day total by deducting the 120 days from the 647 day amount.

**PENALTY CALCULATION TABLE**

	Document Number	Date requested	Date due	Date received	Penalty period	Days deducted	Adjusted period
1.	1&2	5/30/97	6/6/97	6/10/97	4	N/A	4
2.	3	5/30/97	6/6/97	7/25/97	49	N/A	49
3.	4, 5, 6	5/30/97	6/6/97	8/21/97	76	N/A	76
4.	7	5/30/97	6/6/97	10/10/97	126	N/A	126
5.	8	5/30/97	6/6/97	3/7/01	1370	527	843
6.	9, 10, 11	12/8/97	12/15/97	3/7/01	1178	527	651
7.	12, 13, 14	5/30/97	6/6/97	3/19/01	1382	527	855
8.	15, 16	12/8/97	12/15/97	3/19/01	1190	527	663
9.	17	5/30/97	6/6/97	4/20/01	1414	527	887
10.	18	5/30/97	6/6/97	6/8/01	1463	527	936
	<b>TOTALS</b>				8252	3162	5090

The trial court assessed a \$5 per day penalty (*see* RCW 42.17.340(4)) against King County for the total “adjusted days late” (5090), resulting in a penalty of \$25,450.00. *See id.*, at p. 31. The trial court also awarded Yousoufian attorney’s fees in the amount of \$82,196.16. To date, King County has paid Yousoufian \$114,416.26 in attorney’s fees, costs and penalties. This does not include attorney’s fees and costs Yousoufian incurred at the appellate level. *See Full Satisfaction of Judgment, Yousoufian v. Office of Ron Sims, No. 00-2-09581-3 SEA (Sub 63).*

While the \$5 per day is the minimum daily penalty amount under RCW 42.17.340(4), the penalty imposed by the trial court was not a minimum penalty. The trial court could have determined the total number of penalty days based on Yousoufian’s two public disclosure requests. *See Yousoufian v. Office of Ron Sims, 114 Wn. App. 836, 849, 60 P.3d 667 (2003)*<sup>5</sup>. Instead, the trial court created 10 groups of documents, and determined the number of days each group was late. This

<sup>5</sup>The Court of Appeals' decision is attached as Attachment 3 to Yousoufian's Trial Brief on Remand. Had the trial court calculated the number of penalty days based on Yousoufian's 2 requests of May 30, 1997 and December 8, 1997, the maximum number of penalty days would have been approximately 2,737. This is the sum of the number of days between May 30, 1997 and June 8, 2001 (approximately 4 years times 365 days = 1,460) and the number of days between December 8, 1997 and June 8, 2001 (approximately 3.5 years times 365 days = 1,277).

**Norm Maleng**, Prosecuting Attorney  
 CIVIL DIVISION  
 E550 King County Courthouse  
 516 Third Avenue  
 Seattle, Washington 98104  
 (206) 296-9015/SCAN 667-9015

1 resulted in a substantial increase in the total number of penalty days, and a corresponding increase in  
2 the total penalty amount.

3 By the time this case reached the state Supreme Court, the two main issues were (1) can  
4 records be grouped for penalty purposes (or must the per-day penalty be applied to each separate  
5 record that is delayed); and (2) did the trial court err in deducting 527 days from the penalty period for  
6 the 6 record groups. The court ruled that records may be grouped for penalty purposes, but that days  
7 could not be deducted from the penalty period for alleged delays in bringing suit. The court also held  
8 that, given King County's mishandling of the request, the \$5.00 per day penalty under RCW  
9 42.17.340(4) was unreasonable.

10 When the previously-deducted days are added back in to the total, "penalty period" becomes  
11 8,252 days. For the reasons set forth below, King County asks the court to set the per-day penalty  
12 under RCW 42.17.340(4) at \$10, resulting in a total penalty amount of \$82,520.00 -- \$25,450.00 of  
13 which King County has already paid.

### 14 III. ARGUMENT

15 Under the Public Disclosure Act (PDA), all state and local agencies must disclose any  
16 requested public record, unless the record falls within a specific exemption. *Yousoufian*, 152 Wn.2d  
17 421; *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 250, 884 P.2d 592 (1994).  
18 The PDA includes a penalty provision that is intended to discourage improper denial of access to  
19 public records and encourage adherence to the goals and procedures dictated by the statute. *Hearst*  
20 *Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978).

21 The PDA's penalty provision allows a prevailing party to recover attorneys fees, costs and  
22 penalties where an agency improperly denies access to records:

1 Any person who prevails against an agency in any action in the courts seeking the right  
2 to inspect or copy any public record or the right to receive a response to a public record  
3 request within a reasonable amount of time shall be awarded all costs, including  
4 reasonable attorneys 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 less than  
five dollars and not to exceed one hundred dollars for each day that he was denied the  
right to inspect or copy said public record. [RCW 42.17.340(4)].

5 Where an agency violates the PDA, the trial court must impose a penalty under this provision.  
6 *King County v. Sheehan*, 114 Wn. App. 325, 355, 57 P.3d 307 (2002). But the trial court has the  
7 discretion to set the amount of the penalty anywhere between \$5.00 and \$100.00 per day. *See* RCW  
8 42.17.340(4).

9 When determining the amount of the penalty to be imposed, the existence or absence of an  
10 agency's bad faith is the principal factor which the trial court must consider. *Amren v. City of Kalama*,  
11 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997). A requester's economic loss may also be a factor. *See id.*;  
12 *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 303, 825 P.2d 324 (1992) (economic loss a factor,  
13 but attorney's fees not covered under the Act do not qualify).

14 In this case, King County was negligent, but it did not act in bad faith.<sup>6</sup> While the \$5.00 per-  
15 day penalty may have been inappropriate under these circumstances, King County's proposal to double  
16 the penalty to \$10.00 per day is reasonable. Combined with the fact that 3,162 days will be added  
17 back in to the penalty period, this will lead to a penalty well over three times the \$25,450.00 penalty  
18 originally imposed by the trial court.

19 King County generally agrees with Yousoufian that the legislature intended for courts to use  
20 the entire penalty range (\$5 to \$100) set forth in RCW 42,17.340(4) in appropriate circumstances.

21 \_\_\_\_\_  
22 <sup>6</sup> A careful review of Judge Learned's 31 page decision reveals that she never used the phrase "gross  
negligence" in describing King County's conduct. *See* Yououfian's Trial Brief on Remand, Attachment 2. The Court of  
Appeals mistakenly concluded that the trial court did find gross negligence. *See Yousoufian v. Office of Ron Sims*, 114  
Wn. App. at 853.

1 Egregious misconduct, spoliation of evidence, and intentional non-disclosure of records may well  
2 justify a per day penalty at the high end of the range. But for negligent misconduct, a figure towards  
3 the low end of the range is appropriate, particularly when the court calculates the penalty award using a  
4 large number of penalty days, as the trial court did here.

5 In a somewhat comparable case, *ACLU v. Blaine School District*, 95 Wn.App. 106, 975 P.2d  
6 536 (1999), the court found a \$10.00 per-day penalty appropriate where the district failed to act in  
7 good faith when responding to a public records request. The school district in that case refused to mail  
8 the ACLU a copy of its disciplinary policy, even though the ACLU offered to pay the costs. Instead,  
9 the district offered to make the records – totaling 13 pages – available for inspection at its offices. The  
10 ACLU, however, was unable to send a representative to Blaine for an on-site inspection. *ACLU*, 95  
11 Wn. App. at 109.

12 The case went to the Court of Appeals twice. The first time, the court ruled that the district  
13 was required to mail the policy to the ACLU, and remanded for a determination of the penalty. *ACLU*,  
14 95 Wn. App. at 109-110.

15 After the trial court imposed a \$5 per day penalty, the ACLU appealed again. The Court of  
16 Appeals reversed, finding that the minimum penalty was inappropriate because the district had not  
17 acted in good faith. As evidence of its improper motives, the court relied on letters the district wrote to  
18 parents explaining its conduct, falsely representing that the ACLU's request involved thousands of  
19 pages of documents, and that significant employee time would be needed to locate the documents.  
20 The district had also said that it was reluctant to spend taxpayer money to assist the ACLU in  
21 preparing a case against it. *ACLU*, 95 Wn. App. at 114.

1 The minimum penalty, the court observed, was generally reserved for situations where an  
2 agency's refusal to disclose records was motivated by a desire to protect the rights of a third party.  
3 This concern was not what motivated the school district. Because the district did not act in good faith,  
4 the \$10-per-day-minimum-penalty-was-appropriate. The court noted this amount "was in accord with  
5 prior case law,...". *ACLU*, 95 Wn. App. at 115.

6 There was a lack of good faith in the *ACLU* case due to the district's deliberate misconduct –  
7 or at least intransigence – involving a small record request. This case involved negligent handling by  
8 county employees of a much larger, more complicated request.

9 This case has some similarities to the *ACLU* fact pattern, including misrepresentations by the  
10 government agency.<sup>7</sup> The County's factual and legal misrepresentations were due to negligence,  
11 however, whereas the district's misrepresentations in *ACLU* were intentional. *See Yousoufian v. Office*  
12 *of Ron Sims*, 114 Wn. App. 836, 853. Despite extensive discovery by Yousoufian, the trial court  
13 found "no intentional disclosure or intent to conceal." *See Yousoufian's Trial Brief on Remand*,  
14 Attachment 2, p. 19. King County's negligence is lesser on the scale of culpability than intentional  
15 misconduct, and the penalty amount here should be no more than the \$10.00 figure imposed in *ACLU*.

16 The argument can be made that the penalty amount should reflect the significance of the  
17 project the records request was related to, as well as the imminence of the election concerning these  
18  
19

---

20 <sup>7</sup>On several occasions, King County mistakenly represented to Mr. Yousoufian that it had fully responded to his  
21 requests, when in fact it had not. *See Yousoufian's Trial Brief on Remand*, Attachment 2, pp. 9, 11-12. The trial court  
22 also found that, in early 1998, King County represented to Yousoufian that "hundreds of hours" had been spent trying to  
retrieve responsive documents." The court found this statement to be "factually and legally incorrect." *Id.*, p. 11.  
While there may have been some exaggeration in the time estimate, it is clear that by January 1998, King County had  
devoted a considerable amount of time to Mr. Yousoufian's public record request. The trial court's description of King  
County's activities from June 1997 through January 1998, *see id.* pp. 3-11, is eight pages in length.

1 projects.<sup>8</sup> The courts have not, however, recognized these factors as a basis to increase penalty  
2 amounts in past PDA cases.

3 The records Mr. Yousoufian sought were related to sports stadiums requiring public financing  
4 of about \$300 million. At the time Mr. Yousoufian made his request, a special election regarding the  
5 public financing was less than 3 weeks away. The trial court found King County could have produced  
6 the records by June 6, 1997 – a total of eleven days before the election. *See* Yousoufian's Trial Brief  
7 on Remand, Attachment 2, p. 17.

8 This finding assumes several divisions of county government would produce sufficient  
9 personnel to locate up to 228<sup>9</sup> documents from a number of different locations, have them copied,  
10 have them reviewed by counsel to determine the potential applicability of approximately 40 PDA  
11 exemptions<sup>10</sup>, make any necessary redactions, prepare a complete privilege log, have the entire  
12 production copied again, and then shipped to the requestor, all within one week. This might be  
13 possible under perfect circumstances, but King County's initial estimate of 3 weeks for a job of this  
14 size was not unreasonable. By way of comparison, parties in civil litigation have at least 30 days to  
15 produce documents requested in discovery.

16 Public disclosure can be an immensely challenging process for governmental agencies under  
17 the best of circumstances. It often requires close interaction and communication between agency and  
18

---

19 <sup>8</sup>*See Yousoufian*, 152 Wn.2d 421, 444, 98 P.3d 463 (“the amount at issue in the special election concerning  
20 Seahawks Stadium (now Qwest Field) was \$300 million. A just penalty must reflect these realities.” (Sanders, J.,  
dissenting)).

21 <sup>9</sup>At the trial court, Yousoufian argued that there were 228 separate records responsive to his request. *See*  
22 *Yousoufian v. Office of Ron Sims*, 152 Wn.2d at 427. The trial court ultimately grouped these items into 18 complete  
studies. *See* Yousoufian's Brief, attach. 2, p. 30.

<sup>10</sup>*See* RCW 42.17.310(1)(a) - (rr). These are the specific exemptions under the Public Disclosure Act as of  
1999. The number of exemptions now goes from (a) through (fff).

1 requestor to define and then locate the information sought. Large requests can take considerable time  
2 and resources to compile. The Public Disclosure Act recognizes that it may not always be possible to  
3 produce requested records within 5 days.<sup>11</sup> It requires the government agency to interact with the  
4 requester to determine what he or she is asking for, and to work out reasonable time frames for  
5 producing this information.

6 King County reasonably interacted with Mr. Yousoufian at the outset of this case. Its initial  
7 efforts and communications with Mr. Yousoufian in June 1997 were appropriate. King County sent  
8 Mr. Yousoufian a response to his request within 5 business days as required by RCW 42.17.320. *See*  
9 Yousoufian's Trial Brief on Remand, Attachment 2, p. 3. The County representative, Pam Cole,  
10 informed Mr. Yousoufian that one study was available for immediate review, and in fact, Mr.  
11 Yousoufian had already examined one of the documents he requested. Ms. Cole estimated three  
12 weeks would be needed to retrieve the other materials. *Id.* The County gave Yousoufian additional  
13 attachments and another study on June 10, 1997. *Id.*, p. 4.

14 In the period prior to the special election (June 17, 1997),<sup>12</sup> Mr. Yousoufian voiced no concern  
15 over King County's 3-week estimate for producing the records. He wrote a letter complaining of the  
16 delay one day after the election, but did not mention the election specifically. *See* Yousoufian's Trial  
17 Brief on Remand, Attachment 2, p. 4. There is nothing to suggest that the timing of the production in  
18 relation to the upcoming election was an issue for Mr. Yousoufian at the time. There is no basis for the  
19 charge that King County attempted to delay its production of records until after the election. Given the  
20

---

21 <sup>11</sup>*See* RCW 42.17.320. The statute requires the agency to respond to a request within 5 business days. This  
22 does not mean a complete production of documents must occur within 5 days. It is permissible for agencies to respond  
to the requestor by providing a reasonable estimate of the time needed by the agency to respond.

<sup>12</sup>*See Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 447 (2004) (Sanders, J. dissenting) (special election  
was June 17, 1997).

1 size and complexity of his request, a 3 week estimate for production was reasonable, even with the  
2 pending election.

3 Yousoufian suggests that King County's failure to produce the documents he requested prior to  
4 the special election significantly impacted the public at large, not just him individually. Yousoufian's  
5 Trial Brief on Remand, at 8, 11. Even if this impact could be tangibly demonstrated, the issue still  
6 boils down to the County's intent, and whether the County's 3 week initial estimate to produce the  
7 records was unreasonable. Absent intentional misconduct, it makes little sense to enhance a penalty  
8 award simply because the requestor made a large document request shortly before an election.

9 The appellate courts in this case clarified the law regarding document grouping and deduction  
10 of penalty days. But regarding the penalty issue, the decisions go no further than stating that the \$5.00  
11 per day penalty under RCW 42.17.340(4) is unwarranted. This set no new precedent. In fact, it is  
12 exactly what the court did in *ACLU v. Blaine School District*. See *ACLU*, 95 Wn. App. 106, 114  
13 (because district did not act in good faith, minimum \$5 per day penalty awarded by trial court  
14 insufficient).

15 Nor have the courts in this case suggested what the appropriate per-day penalty should be.  
16 This is not generally the role of an appellate court. See *Yousoufian v. Office of Ron Sims*, 114 Wn.  
17 App. 836, 847 (2003) (PDA grants discretion to the trial court, not appellate court, to set the penalty  
18 within the minimum and maximum ranges). Justice Chambers, however, in practical recognition of  
19 the complexities and challenges of public disclosure, believed the trial court was within its discretion  
20 to set the per day penalty at \$5.00:

21 I disagree with the majority's conclusion that the trial court abused its discretion in  
22 assessing the minimum daily penalty of \$5. Issues involved in a public disclosure  
request may become complex. The form and timing of a request or series of requests  
for public records may raise issues with respect to how many requests were made, how

1 many records were requested, whether the right to inspect or copy was denied, and if  
2 so, for how many days. These issues should be left to the sound discretion of the trial  
3 judge.... [*Yousoufian v. Office of Ron Sims*, 152 Wn.2d at 441 (Chambers, J.  
4 concurring)].

5 Justice Chambers' comments implicitly recognize that the trial court considered a number of  
6 factors in arriving at what it considered a just penalty, not just the per day fine. A daily penalty toward  
7 the low end of the range is fair given the court's creation of 10 document groups, which resulted in a  
8 substantial increase in the number of penalty days. The trial court could have simply calculated the  
9 number of days King County delayed responding to Yousoufian's 2 record requests, with the result  
10 being far fewer penalty days overall. See *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 441  
11 (2004) (Fairhurst, J. concurring) ("I would simply hold that the PDA requires penalty assessments to  
12 be based on the number of days a request has been denied by an agency"); *Yousoufian v. Office of Ron  
13 Sims*, 114 Wn. App. 836, 849 (trial court would have been within its discretion to award penalty based  
14 on number of days 2 requests went unanswered).

15 Yousoufian claims his case has changed the landscape of public disclosure, clearing the way  
16 for penalties far in excess of what has been awarded in the past. As evidence of this, he cites *BIAW v.  
17 Department of Labor & Industries*, 123 Wn. App. 656, 98 P.3d 537 (2004). The trial court in *BIAW*  
18 did rely on *Yousoufian*, noting that based on that case, penalties need not be assessed per record.  
19 *BIAW*, 123 Wn. App. at 661. The court made the following comments on the penalty amount:

20 [T]he trial court awarded a penalty of \$10 per day from April 2, 2002, until its October  
21 25, 2002 redaction order and \$75 per day from October 25, 2002, until the November  
22 18 disclosure. This resulted in a penalty award of \$3,925 for BIAW and \$2,305 for the  
Newspapers. [*BIAW*, 123 Wn. App. at 661].

1 The penalty of \$75 per day -- for less than one month -- was triggered by L&I's lack of good faith in  
2 failing to follow the court's oral ruling regarding redaction of information. *See BIAW*, 123 Wn. App. at  
3 661.

4 *BIAW* does not represent a change in penalty jurisprudence under the PDA. A \$75 day penalty  
5 for 24 days due to an agency's failure to abide by a court's ruling breaks no new ground, and is not  
6 comparable to a case involving negligence and 8,252 penalty days.

7 From the standpoint of government culpability, there is nothing to distinguish this case from  
8 prior decisions where courts have approved a \$10 per day. The presence or absence of bad faith is the  
9 principal consideration the trial court considers in setting a penalty under RCW 42.17.340(4), and  
10 King County did not act in bad faith. A penalty of \$10.00 per day for King County's negligence is  
11 consistent with PDA precedent, particularly given a large penalty period of 8,252 days. A penalty of  
12 \$82,252.00, less penalty amounts previously paid, is reasonable, and King County asks that it be  
13 imposed.

14 III. CONCLUSION

15 For the foregoing reasons, King County asks the court to award plaintiff \$82,252.00 in  
16 penalties under RCW 42.17.340(4), which reflects a \$10 per-day penalty for 8,252 days. The penalty  
17 amount King County previously paid, \$25,450, should be deducted from this amount.

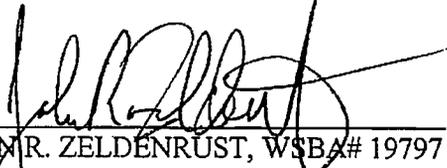
18 RESPECTFULLY SUBMITTED this 22 day of July, 2005.

19 //  
20 //  
21 //

22

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

NORM MALENG  
King County Prosecuting Attorney

By:   
JOHN R. ZELDENRUST, WSBA# 19797  
Senior Deputy Prosecuting Attorneys  
Attorneys for King County

COPY

COPY RECEIVED

AUG 25 2005

DAVID J. BALINT, PLLC  
ATTORNEY AT LAW

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ARMEN YOUSOUFIAN,

Petitioner,

vs.

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,

Respondents.

No.00-2-09581-3 SEA

ORDER ON REMAND

This matter has been remanded from the Supreme Court for the imposition of penalties above the statutory minimum for each day that King County denied the petitioner timely access to public records under the public disclosure act (PDA), RCW 42.17.340 (4).

# Attachment 3

The case was originally decided by the Honorable Kathleen Learned in September 2001. It has been reassigned on remand due to Judge Learned's retirement from the King County Superior Court.

The facts of Mr. Yousoufian's document request to King County and the County's response are set forth in Judge Learned's detailed Findings of Fact and Conclusions of Law and in the opinions of Division One of the Court of Appeals, 114 Wn.App.836 (2003) and the Supreme Court, 152 Wn. 2d 421 (2004).

Although Judge Learned decision has been reversed in part, her factual findings were either unchallenged or affirmed on appeal and therefore form the basis for this court's ruling today. Furthermore, the conclusions of law expressed in her written opinion were affirmed in most regards.

Judge Learned was highly critical of the County's conduct throughout its response to the petitioner's PDA request. She concluded that the County had failed to demonstrate "a good faith effort...to read, understand and respond to Mr. Yousoufian's letter in a timely, accurate manner..." but she declined to find that the County had engaged in "intentional nondisclosure". She also concluded that the County had demonstrated a "complete lack of coordination...and effective oversight of this PDA request" and, finally, that the County was "negligent at every step of the way, and this negligence amounted to a lack of good faith."

The Court of Appeals agreed with Judge Learned that there was no suggestion that the County had intentionally withheld incriminating documents as had occurred in prior PDA cases. The Court concluded "that the County's violation of the PDA was due to poor training, failed communication and bureaucratic ineptitude rather than a desire to hide some dark secret

contained within its files." 114 Wn.App.at 853 Additionally, the Court found that the "factual and legal misrepresentations the County made were grossly negligent" and attributed the finding to Judge Learned's "characterization" of the County's conduct although the term "gross negligence" does not appear in the trial court order. The Supreme Court agreed with the determination that "assessing the minimum penalty of \$5 a day was unreasonable considering that the county acted with gross negligence." 152 Wn 2d 439

With that as background, it is this court's role to assess a penalty above the \$5 per day minimum based on the "gross negligence" of the County. The per day penalty must be multiplied by the amount of days that the party was denied access. That number has already been determined based on Judge Learned's factual findings and the decision of the Supreme Court which reinstated days that Judge Learned had subtracted from the calculation of penalty days. That number is 8,252.

The Supreme Court has directed this court to exercise discretion in determining the daily penalty and rejected the assertion by the petitioner that the appellate courts should subject the decision to *de novo* review.

At oral argument, both the petitioner and the respondents acknowledged that there is no rote formula to determine the per day penalty. The finding of "gross negligence" removes this case from those where the minimum penalty of \$5/day is appropriate but does little to guide this court as to how high the penalty should go. In *ACLU v Blaine Sch. Dist No. 503*, 95 Wn. App.106 (1999), the Court of Appeals, similarly, reversed the trial court for assessing the minimum penalty because of the erroneous finding that the school district had acted in good faith. The Court found that a letter from

the school district Superintendent was "startling evidence of the District's improper motives for refusing to copy and mail the requested documents." Rather than remand the case, however, the Court of Appeals concluded that "all the relevant information that is necessary to impose an appropriate penalty is in the record on review. In an attempt to bring this dispute to closure, we will determine the penalty."

Because the District had failed to act in good faith the Court imposed its own penalty of \$10/day. Following the Supreme Court's decision in the present case it is clear that the Court of Appeals will decline to set its own penalty in the future but its analysis is instructive. Even with startling evidence of improper motive, and having looked at "previous awards for guidance" the Court of Appeals set the per day penalty toward the low end of the statutory scale. Thus it may be concluded that the finding of "gross negligence" does not automatically mandate a per day penalty in the range of \$75-100 per day as requested by the petitioner.

Another factor that has been addressed by the appellate courts is whether the conduct of the non-responsive agency caused economic loss to the party requesting the documents. *Amren v. City of Kalama* 131 Wn 2d 25 (1997); *Yacobellis v. Bellingham* 64 Wn App 295 (1992). In this case there has been no assertion that Mr. Yousoufian suffered any personal economic loss because of the County's intransigence. The petitioner requests this court to focus on the potential public harm because of the stadium issue that was pending at the time of the request. Although that factor is not addressed in any reported cases it is certainly reasonable to conclude that governmental intransigence on an issue of large public import is more culpable than foot

dragging on an issue of less consequence. But it is clear that the County did not have any documents that it was attempting to hide, or that the documents contained anything other than what had already been disclosed publicly.

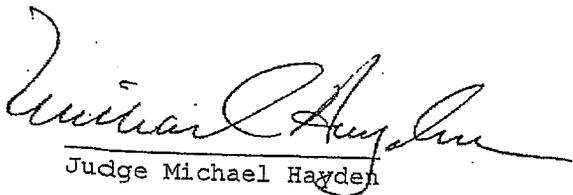
In summary, this court does not regard the County's conduct to be significantly more egregious than that of the school district in *ACLU v Blaine School Dist, supra*. The delay in this case was longer and the records more voluminous. But those factors are already reflected in the multiplier which will be applied to the per day penalty. And the issue in this case was of considerable public interest. But in both cases the responding party misinterpreted the PDA and stalled the document request based on bad information or motive. In neither case was there an effort to hide governmental misconduct or to harm the requestor. In view of all these factors, this Court awards a daily penalty of \$15 for a total penalty of \$123,780.

The Supreme Court also remanded this matter for a determination of the petitioner's reasonable attorney's fees and costs for the appeal to the Court of Appeals and Supreme Court. The petitioner has requested \$181,100.35 based on 923 hours of work. The respondent asserts that the fees should be set at \$64,796.25. The respondent contends that the billing records from petitioner's attorneys reflect duplicative efforts, excessive communication with the client as well as each other, and billing for issues on which petitioner did not prevail. The respondent has provided a detailed analysis of the attorneys' timesheets. The respondent does not challenge the hourly

rate of the petitioner's attorneys, nor does the respondent assert that the attorneys inflated the number of hours actually worked.

The petitioner's attorneys have not requested a multiplier of their fees based on a lodestar formula. Clearly, the result which they achieved on appeal was excellent even though they did not prevail on every issue. The only area in which this Court feels that a reduction in the number of hours is justified is the large amount of time that the attorneys spent communicating with Mr. Yousoufian. Under the rules of professional conduct, attorneys have an absolute obligation to keep their clients informed of the progress of their case. This does not mean, however, that 100 hours of attorney-client communication is justified where the facts of a case have already been established at trial and the primary work on appeal is legal research, analysis, writing and argument. This court is subtracting \$10,000 from the requested attorneys' fees for excessive discussions with Mr. Yousoufian. Therefore, fees are awarded in the amount of \$171,100.35.

Dated this 25<sup>th</sup> day of August, 2005

  
Judge Michael Hayden

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

ARMEN YOUSOUFIAN

Appellant

v.

KING COUNTY, et al.,

Respondents.

No. 57112-5-1

DECLARATION OF SERVICE

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2005 DEC 28 PM 4:54

I, Michael Brannan, declare as follows:

1) I am over 18 years of age and a U.S. citizen.

2) On December 28, 2005, I caused to be delivered true and accurate

copies of the following documents to the following parties as indicated

below:

ORIGINAL

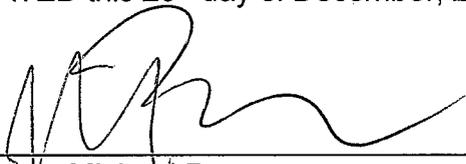
- a. Appellant's Supplemental Designation of Clerk's Papers;
- b. Appellant's Opening Brief, and;
- c. This Declaration of Service

Service List

John R. Zeldenrust Office of the Prosecuting Attorney 516 3rd Ave Ste W554 Seattle, WA 98104-2362	<input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Mailed <input checked="" type="checkbox"/> Faxed ((206) 296-0191) <input type="checkbox"/> Emailed:
---------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28<sup>th</sup> day of December, 2005, at Seattle Washington.

  
\_\_\_\_\_  
Michael Brannan