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CLERK OF SUPREME COURT
STATE OF WASHINGTON

NO. _____

COURT OF APPEALS NO. 57112-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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,

Petitioner

v.

ARMEN YOUSOUFIAN,

Respondent.

PETITION FOR REVIEW

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COURT OF APPEALS DIVISION
STATE OF WASHINGTON
2007 APR 18 PM 4:03

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ORIGINAL

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A. IDENTITY OF PETITIONER

King County asks the Court to accept review of the Court of Appeals' decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

King County seeks review of *Yousoufian v. Office of Ron Sims, et al.*, ____ Wn. App. ____, 151 P.3d 243 (2007). It is a published decision filed by Division One of the Court of Appeals on February 5, 2007. See Appendix A. The court denied King County's timely-filed motion for reconsideration on March 19, 2007. See Appendix B.

This is the second published Court of Appeals decision in this case, and will therefore be referred to as *Yousoufian II*. In this petition, King County will cite former RCW 42.17.340(4) when referring to the Public Disclosure Act penalty provision. In June 2006, the PDA was recodified under RCW 42.56, and the penalty provision appears at RCW 42.56.550(4). This provision is identical to former RCW 42.17.340(4).

C. ISSUES PRESENTED FOR REVIEW

1. This Court and the Court of Appeals have long held that the presence or absence of an agency's bad faith is the principal factor in determining the per day penalty for an agency's failure to disclose public records under RCW 42.17.340(4). In *Yousoufian II*, the Court of Appeals

abandoned this approach for a new, four-category culpability scale. Does the analysis of *Yousoufian II* conflict with prior decisions of this Court and the Court of Appeals?

2. Under the law of the case doctrine, courts do not re-decide questions of law determined in a prior appeal in the same case unless the prior decision is clearly erroneous, and application of the erroneous decision would work a manifest injustice. In the prior appeal, this Court and the Court of Appeals applied the longstanding rule that the presence or absence of an agency's bad faith is the principal factor in determining a penalty under RCW 42.17.340(4). Was this rule the law of the case in *Yousoufian II*?

3. The doctrine of *stare decisis* means "to stand by things decided," and before a court overrules established precedent, there must be a showing that the established rule is incorrect and harmful. In this case, Armen Yousoufian has received the largest public disclosure act penalty in state history, even though he suffered no economic loss and King County did not act in bad faith. Has he demonstrated that the established rule governing penalty determination is incorrect and harmful?

4. Under the Public Disclosure Act, trial court penalty determinations are reviewed for abuse of discretion. The court in

Yousoufian II created a new rule for penalty determination, found the trial court decision inconsistent with this new rule, and reversed on that basis. Did the Court of Appeals properly evaluate the trial court decision under an abuse of discretion standard?

5. Did the trial court abuse its discretion in setting the penalty in this case?

6. Did the Court of Appeals err in finding that “gross negligence” was the law of the case, where the trial court found King County’s conduct to be negligent only, and the gross negligence label is the result of a mischaracterization by the Court of Appeals in the first *Yousoufian* appeal?

7. Did the Court of Appeals err in denying King County’s motion to strike Amicus briefing that failed to comply with the Evidence Rules and Rules of Appellate Procedure?

D. STATEMENT OF THE CASE

The facts are set forth in the decision of the trial court (CP 29-59), as well as the subsequent published decisions of the Court of Appeals¹ and

¹*Yousoufian v. Office of Ron Sims*, ___ Wn. App. ___, 151 P.3d 243 (2007); *Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 60 P.3d 667 (2003), *rev’d in part*, 152 Wn.2d 421 (2004).

the state Supreme Court². What follows is in large part a summary of those facts.

1. King County delays responding to Yousoufian's public records request.

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

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

The parties corresponded over the next 6 months. Then, on June 22, 1998, King County informed Yousoufian that the King County Finance

²*Yousoufian v. Office of Rons Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004).

Department had no documents related to the financing of stadium studies.

As it was later discovered, this representation was not correct. CP 40.

2. Yousoufian files suit under PDA.

Yousoufian filed this lawsuit on March 30, 2000. *See Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 845. As the case progressed, King County produced more documents, some of which related to the stadium studies. The case went to trial in the Summer of 2001.

3. Trial court rules that King County's negligent delay in producing records violated the Act

Following a bench trial, the court entered findings and conclusions. CP 29-59. The court found that Yousoufian had made two public records requests – one on May 30, 1997 and one on December 8, 1997. CP 68-69. While the county eventually produced all records sought, its delay in doing so violated the Public Disclosure Act. King County acted negligently, and this negligence evidenced a lack of good faith:

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 amounted to a lack of good faith. [CP 46].

But the court could not find “bad faith” in the sense of intentional nondisclosure. CP 45-46.

4. The trial court groups documents, deducts penalty days, and imposes a \$5 daily penalty for a total penalty of \$25,450.

The trial court then determined the amount of the penalty under RCW 42.17.340(4). Yousoufian claimed his 2 requests covered approximately 189,000 pages of material, and that the statutory penalty amount (anywhere between \$5 and \$100 per day) should be applied to each page.³ CP 53.

Instead, the court found that Yousoufian's request covered 18 responsive documents. It divided these documents into 10 groups, based on the date of production and the subject matter involved. CP 58-59. For each group, the court determined the "days late" as the difference between the date the records were due and the date King County produced the records.

King County produced 6 of these record groups after Yousoufian's March 30, 2000 lawsuit. For these groups, the court deducted 527 days from the penalty period, reasoning that Yousoufian waited an unreasonable period of time to file suit following King County's final correspondence of June 22, 1998.⁴

³In the prior appeal, Yousoufian claimed the minimum penalty was \$948,465. *Yousoufian*, 114 Wn. App. at 848. Dividing this figure by the \$5 per day minimum statutory amount under RCW 42.17.340(4) results in approximately 189,000 pages.

⁴CP 57-59. 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.

From these calculations, the trial court determined that there were 5090 penalty days. The court assessed a \$5 per day penalty (*see* RCW 42.17.340(4)), resulting in a penalty of \$25,450.00. CP 59. The court also awarded Yousoufian attorney's fees in the amount of \$82,196.16. CP 54. The total penalty, fees and costs equaled \$114,416.26. CP 67.

The trial court explained that the minimum daily penalty -- when combined with the total attorney fees awarded -- was sufficient to deter future inappropriate conduct. CP 55. The court declined to impose the minimal fine suggested by King County, finding that "the government incompetence displayed in this case is not justifiable . . .". CP 55. The court agreed, however, that there was no evidence an earlier disclosure of documents in this case "would have had any material impact on issues of public concern." CP 55.

5. Court of Appeals rules that minimum \$5 per day penalty insufficient.

Yousoufian appealed. The Court of Appeals issued a published decision in January 2003, affirming the trial court on every issue except the daily penalty amount. Although the trial court was entitled to great deference on the penalty question, this court ruled that a minimum daily

penalty could not be sustained given King County's conduct, which the court mistakenly characterized as grossly negligent.⁵

Further, the trial court justified the minimum daily penalty award by reasoning that, given the large amount of attorney fees awarded, the combined amount of fees and penalties (\$114,416.16.00) would have a sufficient deterrent effect. In adopting this approach, the trial court abused its discretion. "[T]he size of an attorney fee award is not a tenable basis to award a minimum penalty where a higher penalty would otherwise be appropriate." *Yousoufian*, 114 Wn. App. at 854.

6. State Supreme Court rules that documents can be grouped and that all penalty days must be counted.

Yousoufian petitioned the state Supreme Court for review. The Court granted his petition, agreeing to decide two primary issues: (1) can records be grouped for penalty purposes (or must the per-day penalty be applied to each separate record that is delayed); and (2) did the trial court err in deducting 527 days from the penalty period for the 6 record groups.

The court ruled that records may be grouped for penalty purposes, but that days could not be deducted from the penalty period for alleged

⁵ The trial court found King County's conduct to be negligent only. *See* CP 29-59. The Court of Appeals in the first Yousoufian appeal mistakenly stated that the trial court had found King County's conduct to be grossly negligent. *Yousoufian*, 114 Wn. App. at 853-54.

delays in bringing suit. *See Yousoufian*, 152 Wn.2d 421, 439-440. The court remanded the case to the trial court to decide the appropriate per day penalty amount and the amount of reasonable attorney's fees.

7. Trial court on remand imposes largest penalty in history of PDA.

On remand, Yousoufian and King County filed briefs with the trial court regarding (1) the proper per-day penalty, and (2) reasonable attorney fees on appeal. CP 1; 97. The court heard oral argument on August 19, 2005, and issued its Order on Remand on August 23, 2005. CP 123.

The court increased the penalty to \$123,780, and awarded Yousoufian's three attorneys \$171,100.35 for their services on appeal. CP 127-128. It arrived at the penalty figure by adding 3,162 days to the original penalty period (5,090) for a total of 8,252 penalty days. CP 125. The court multiplied this amount by a \$15 per day penalty to reach \$123,780.

On September 22, 2005, the court awarded Yousoufian's attorneys \$45,970 in attorney fees on remand. *See* CP 129-130.

The \$123,780 penalty is nearly 5 times larger than the amount imposed by the trial court in 2001. It has been called the largest penalty award in the history of the Public Disclosure Act.⁶ When combined with

⁶*See* The Seattle Times, August 27, 2005, page B-1; Seattle Post Intelligencer, August 27, 2005, page B-2.

nearly \$300,000 in court awarded attorney fees, King County has now paid Mr. Yousoufian about \$423,000 for its delay in producing the requested records.

8. Court of Appeals reverses for the second time.

Yousoufian appealed once again, claiming the penalty amount was too low. The Court of Appeals heard oral argument on September 20, 2006, and issued its published decision on February 5, 2007. *See Yousoufian v. Office of Ron Sims*, ___ Wn. App. ___, 151 P.3d 243 (2007) (*Yousoufian II*). The court again found the penalty insufficient, and remanded to the trial court for a re-determination of the penalty amount.

The court changed the law for penalty determination under RCW 42.17.340(4). It removed the presence or absence of an agency's bad faith as the principal factor to consider. Instead, the court divided the \$5 to \$100 penalty range into four categories, beginning with negligence, then gross negligence, then wanton misconduct, and finally willful or bad faith misconduct. *Yousoufian II*, 151 P.3d at 248. Trial courts first determine which category an agency's conduct falls under. They may then rely on other factors – such as the requestor's economic loss – to adjust the penalty amount within that category.

Under this new standard, the court concluded that the trial court's imposition of a \$15 per-day penalty could not be sustained. Because King County's conduct had been characterized as grossly negligent during the prior appeal, it could not fall at the low end of the newly-adopted penalty scale.

King County petitions for review to this Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Yousoufian II conflicts with decisions of the Supreme Court and Court of Appeals. The decision disregards the law of the case, disturbs years of established precedent without adequate justification, and fails to properly apply the abuse of discretion standard of review. King County asks this Court to grant review under RAP 13.4(b)(1), (2) and (4).

1. *Yousoufian II* conflicts with decisions of this Court and the Court of Appeals.

Penalty determinations under the Public Disclosure Act are reviewed for abuse of discretion, and the principal factor trial courts must consider in setting the penalty is the presence or absence of an agency's bad faith. See RCW 42.17.340(4); *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 430, 435, 98 P.3d 463 (2004); *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997); *Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 847-48, 60 P.3d 667 (2003), *rev'd in part*, 152 Wn.2d

421 (2004); *ACLU of Washington v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 111, 975 P.2d 536 (1999); *Yacobelis v. City of Bellingham*, 64 Wn. App. 295, 303, 825 P.2d 324 (1992). A requester's economic loss may also be relevant. *See Amren*, 131 Wn.2d at 38; *Yacobelis*, 64 Wn. App. 295, 303.

The Court clearly stated this rule in *Yousoufian* and *Amren*, and the Court of Appeals was bound to follow it. *See 1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (Court of Appeals errs in failing to follow directly controlling authority by Supreme Court).

Instead, the Court of Appeals fashioned its own rule, which removes the presence or absence of an agency's bad faith from the analysis. The new rule requires trial courts to categorize an agency's conduct as negligent, grossly negligent, wanton, or intentional.⁷ This rule conflicts with established precedent from this Court and the Court of Appeals. Review by this Court is therefore appropriate. *See* RAP 13.4(b).

⁷While the court did not expressly state the per day penalty range for each category, the range would presumably look something like this:

Negligent	\$5.00	-----	\$28.75
Gross Negligent	\$28.75	-----	\$52.50
Wanton	\$52.50	-----	\$76.25
Intentional	\$76.25	-----	\$100.00

2. The presence or absence of an agency's bad faith is the law of the case.

In the first Yousoufian appeal, both this Court and the Court of Appeals applied the rule stating that the principal factor for courts to consider in setting a penalty under the PDA is the presence or absence of an agency's bad faith. This rule is the law of the case. While there are exceptions to this doctrine, none apply here.

Law of the case is a doctrine that derives from both RAP 2.5(c)(2) and common law. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. *Id.* The doctrine seeks to promote finality and efficiency in the judicial process. *Id.*

The exceptions to the law of the case are outlined in RAP 2.5(c)(2):

(2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review. [RAP 2.5(c)(2)].

This discretionary rule codifies at least two historically recognized exceptions to the law of the case doctrine that operate independently. *Roberson*, 156 Wn.2d at 42. First, the doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party. *Id.* This assures that the trial court is not obliged to perpetuate its own error. *Id.* Because the rule requiring trial courts to consider the presence or absence of an agency's bad faith is not clearly erroneous, this exception to the law of the case doctrine does not apply here.

Second, application of the doctrine may be avoided where there has been an intervening change in controlling precedent between trial and on appeal. *See* RAP 2.5(c)(2); *Roberson*, 156 Wn.2d at 42. There was no change in this case. In its decision, this Court clearly stated that the principal factor in penalty determination is the presence or absence of an agency's bad faith.

Yousoufian II suggests, however, that this Court gave the green light to change the standard by using the term "culpability" in its decision. The Court used this term in rejecting Yousoufian's claim that the per day penalty must be applied on a per-record basis:

We have stated that RCW 42.17.340(4) is a “penalty to enforce the strong public policies underlying the public disclosure act.” And “[w]hen determining the amount of the penalty to be imposed the existence or absence of an agency’s bad faith is the principal factor which the trial court must consider.”

Although the PDAs purpose is to promote access to public records, this purpose is better served by increasing the penalty based on an agency’s culpability than it is by basing the penalty on the size of the plaintiff’s request. Indeed, it seems unlikely that the legislature intended to authorize a penalty that Yousoufian once estimated at between \$1,534,855 and \$30,697,100, considering the agency did not act in bad faith. Therefore, based on the ambiguity of the statute and the purpose for enacting the PDA, we conclude that RCW 42.17.340(4) does not require the assessment of per day penalties for each requested record. [(underline added; citations and footnotes omitted) *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 435-36].

The Court of Appeals used the underlined language above as the foundation for its new category system:

If, as the Supreme Court has held, culpability is to be the principal factor upon which PDA penalties are awarded, then it only makes sense that degrees of culpability such as those defined in the WPI be used as a guide with which to locate violations of the PDA within the penalty range.... [(underline added) *Yousoufian II*, 151 P.3d at 248].

The analysis of *Yousoufian II* takes this Court’s holding out of context. The Court never said that *culpability* was the principal factor for penalty determination. It said that the principal factor for penalty determination is the presence or absence of an agency’s bad faith. The

Court's decision therefore did not change this fundamental rule of penalty determination.

Neither recognized exception to the law of the case doctrine applies in this case. The principal factor courts must consider in determining the penalty under the PDA is the existence or absence of an agency's bad faith. This is the law of the case, and the Court of Appeals was not justified in abandoning it in *Yousoufian II*.

3. The Court of Appeals lacked a sound reason to abandon the presence or absence of an agency's bad faith as the primary factor in penalty determination.

The doctrine of *stare decisis* means, literally, to stand by things decided. *Davis v. Baugh Indust. Contractors, Inc.*, 159 Wn.2d 413, 422, 150 P.3d 545 (2007 (J.M. Johnson, J., dissenting)). It requires a clear showing that an established rule is incorrect and harmful before it is abandoned. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004). *Stare decisis* assures that the same rules will apply to each citizen's case and that these rules may be known and relied upon. *Davis*, 159 Wn.2d at 423 (J.M. Johnson, J., dissenting).

Exercising its discretion, the trial court in this case imposed the largest PDA penalty in state history. It imposed this penalty on an agency that did not act in bad faith. CP 45-47. The penalty is nearly five times

larger than the penalty originally awarded by the trial court in 2001. The \$123,780 award was made to a requester who has shown no economic loss, and in the absence of any tangible evidence of harm to the public. CP 55. Given this result, it is difficult to see how the established rule for penalty determination was incorrect or harmful.

The court in *Yousoufian II* found that "gross negligence" was the law of the case. King County respectfully disagrees. This was clearly a mistaken characterization by a different panel in the first *Yousoufian* appeal, and the mistake has worked a manifest injustice to King County. See discussion, *supra*, Section E(2). It was the court's inability to reconcile a \$15 per day penalty with the characterization of gross negligence that convinced the court to change the law.⁸ When this mistake is corrected, the rationale of *Yousoufian II* crumbles. This Court should rule that gross negligence is not the law of the case.

Aside from the mistaken characterization, the analysis of *Yousoufian II* raises other concerns. The court did not review the trial

⁸ Various amici submitted additional information on the penalty question. This material contained studies, audits, websites, unpublished trial court decisions, and other material. Amici failed to comply with RAP 9.11, RAP 10.3 or the evidence rules in submitting this information. None of it had been introduced at the trial court, and none of it was properly contained in the record. King County therefore objected and moved to strike portions of the amicus briefing prior to oral argument. The court denied this motion. *Yousoufian II*, 151 P.3d at 249, note 19. To the extent necessary to preserve this issue, King County renews its motion now.

court's decision for an abuse of discretion, as is required by RCW 42.17.340(4) and case law. Therefore, its belief that \$15 per day was insufficient in this case is just that - a belief. The court substituted its own judgment for that of the trial court. This was error. The court's role is to review claims of abuse of trial court discretion, not to exercise its own discretion. *See Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421,430-31.

Second, the court failed to recognize that the per day penalty is only one piece of the overall penalty puzzle. Under RCW 42.17.340(4), the process for determining the appropriate PDA award involves two steps: (1) determine the amount of the days the party was denied access, and (2) determine the appropriate per day penalty. *Yousoufian*, 152 Wn.2d 421, 438.⁹

Yousoufian II governs only the second step, not the first. This is a troublesome limitation. For example, the original trial court could have determined the number of penalty days based on Yousoufian's two

⁹ This Court has characterized the first determination as a factual question, *see id.*, although the Court of Appeals has suggested it is discretionary. *Yousoufian*, 114 Wn. App. 836, 849 (decision to group documents discretionary). In any event, while a trial court may not reduce the number of penalty days because a requestor delayed bringing suit, it does have the discretion to reduce the per day penalty over that period. *Yousoufian*, 152 Wn.2d 421, 437. Therefore, the number of penalty days is a factor the trial court may consider in its discretionary determination of the per day penalty.

requests.¹⁰ Had it done so, there would be 2,737¹¹ penalty days. Selecting a \$45 per day penalty, the trial court would arrive at a total penalty of about \$123,000. Under the analysis of *Yousoufian II*, this would be sufficient.

But if, as in this case, the trial court arrives at the exact same penalty by grouping documents and multiplying 8,252 penalty days times a \$15 per day penalty, it has run afoul of the rule of *Yousoufian II*.

In evaluating PDA penalties for abuse of discretion, the better test looks to whether the *total* penalty is sufficient under the circumstances of each case. This requires a consideration of all relevant factors, including the per day penalty and the number of penalty days. The current standard for penalty determination provides courts with this flexibility in determining penalties, and is consistent with the plain language of RCW 42.17.340(4). The test announced in *Yousoufian II* effectively adds language to an unambiguous statute, unnecessarily restricting trial court

¹⁰ See *Yousoufian*, 152 Wn.2d 421, 440 (Fairhurst, J. concurring); *Yousoufian*, 114 Wn. App. 836, 849 (trial court would have been within its discretion to award amount within the statutory range for each day that each of Yousoufian's requests went unanswered).

¹¹ This figure is determined as follows: Yousoufian made his first request on May 30, 1997. The number of days between May 30, 1997 and June 8, 2001 (the date of the last disclosure prior to trial) is approximately four years. Four years times 365 days = 1,460. He made his second request on December 8, 1997. The number of days between that date and June 8, 2001 is 1,277 (approximately 3.5 years x 365 days is 1,277). The total is 2,737.

discretion. *See Yousoufian*, 152 Wn.2d 421, 437 (court's role is not to add language or conditions to unambiguous statutes).

The court failed to demonstrate that the existing standard for penalty determination was incorrect or harmful in this case. It made no analysis of how the largest PDA penalty in state history was the product of a flawed rule in need of change.

4. The trial court's penalty decision was based on a sound exercise of judicial discretion.

In the final analysis, the question in this case is whether the trial court abused its discretion in determining the penalty. Regardless of the particular test for penalty determination employed by this Court or the Court of Appeals, this basic standard of review remains the same.

King County previously summarized why the trial court properly exercised its discretion in this case. But two factors bear particular emphasis. The first concerns King County's culpability. Technical arguments aside, the original determination that King County acted with "gross negligence" was a mistake, and a mistake should never serve as the basis for a fundamental change in the law.

Second, under any view of the facts, the 22 year penalty period governing this case is excessive in light of the time it actually took King County to produce all documents the requester asked for. This alone

serves as a basis to reduce the per day penalty. *See Yousoufian*, 152 Wn.2d 421, 437,

This Court should retain the existing standard for penalty determination under the PDA. Under that test, the trial court did not abuse its discretion in setting the penalty in this case. But even under the standard of *Yousoufian II*, the trial court's penalty decision was reasonable and should be upheld.

F. CONCLUSION

Based on the foregoing, King County asks this Court to grant review of *Yousoufian II*, reverse the Court of Appeals, and reinstate the penalty imposed by the trial court in its August 23, 2005 order.

DATED this 18th day of April, 2007.

Respectfully submitted,



John R. Zeldenrust, WSBA No. 19797
Senior Deputy Prosecuting Attorneys
King County Prosecuting Attorney's Office
300 Fourth Avenue, Suite 900
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APPENDIX A

FILED
COURT OF APPEALS DIV. #3
STATE OF WASHINGTON
2007 APR 18 PM 4:03

ORIGINAL

151 P.3d 243, 35 Media L. Rep. 1326

Court of Appeals of Washington,
Division 1.
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 Stadium Administration, a subdivision of King County, a municipal corporation, Respondents.

No. 57112-5-I.

Feb. 5, 2007.

Background: Petitioner filed action against county for violation of the Public Disclosure Act (PDA) in connection with his request for records. The trial court found county in violation and awarded petitioner penalties less than requested. Petitioner appealed. The Court of Appeals, 114 Wash.App. 836, 60 P.3d 667, reversed \$5 per day penalty imposed. Review was granted. The Supreme Court, 152 Wash.2d 421, 98 P.3d 463, affirmed in part, reversed in part, and remanded. On remand, the Superior Court, King County, Michael C. Hayden, J., imposed \$15 per day penalty. Petitioner appealed.

Holdings: The Court of Appeals, Grosse, J., held that:

- (1) penalty should be based on degree of culpability, and
- (2) penalty at low end for county's gross negligence was not sustainable.

Reversed and remanded.

West Headnotes

[1] KeyCite Notes

326 Records

326II Public Access

326II(B) General Statutory Disclosure Requirements

326k61 Proceedings for Disclosure

326k63 k. Judicial Enforcement in General. Most Cited Cases

The Court of Appeals reviews the trial court's determination of the daily penalties under the Public Disclosure Act (PDA) for an abuse of discretion. West's RCWA 42.17.010 et seq.

[2] KeyCite Notes

326 Records

326II Public Access

326II(B) General Statutory Disclosure Requirements

326k61 Proceedings for Disclosure

326k68 k. Costs and Fees. Most Cited Cases

Penalties for violation of the Public Disclosure Act (PDA) should be based principally on the degree of culpability of the agency such that they should increase upon the statutory scale of \$5 to \$100 depending on whether the agency's conduct constitutes "negligence," "gross negligence," "wanton misconduct," or "willful misconduct," as those terms are defined in the Washington Pattern Jury Instructions (WPI). West's RCWA 42.17.010 et seq.; WPI 10.01, 10.07, 14.01.

[3] [KeyCite Notes](#)



- ↳ [326 Records](#)
- ↳ [326II Public Access](#)
- ↳ [326II\(B\) General Statutory Disclosure Requirements](#)
- ↳ [326k61 Proceedings for Disclosure](#)
- ↳ [326k68 k. Costs and Fees. Most Cited Cases](#)

A showing of bad faith or economic loss are factors for the trial court to consider in determining the amount to be awarded for a violation of the Public Disclosure Act (PDA). West's RCWA 42.17.010 et seq.

[4] [KeyCite Notes](#)



- ↳ [326 Records](#)
- ↳ [326II Public Access](#)
- ↳ [326II\(B\) General Statutory Disclosure Requirements](#)
- ↳ [326k61 Proceedings for Disclosure](#)
- ↳ [326k68 k. Costs and Fees. Most Cited Cases](#)

When determining the amount of the penalty to be imposed for a violation of the Public Disclosure Act (PDA), the existence or absence of an agency's bad faith is the principal factor which the trial court must consider. West's RCWA 42.17.010 et seq.

[5] [KeyCite Notes](#)



- ↳ [326 Records](#)
- ↳ [326II Public Access](#)
- ↳ [326II\(B\) General Statutory Disclosure Requirements](#)
- ↳ [326k61 Proceedings for Disclosure](#)
- ↳ [326k68 k. Costs and Fees. Most Cited Cases](#)

Penalties of \$15 per day for county's gross negligence in violating the Public Disclosure Act (PDA), at low end of PDA penalty scale of \$5 to \$100, was not sustainable. West's RCWA 42.17.010 et seq.

***244** Michael G. Brannan, Law Office of Michael G. Brannan, Seattle, WA, Rand F. Jack, Brett & Coats, Bellingham, WA, for Appellant.
John Robert Zeldenrust, Office of the Prosecuting Attorney, Seattle, WA, for Respondents.
Michele Lynn Earl-Hubbard, Davis Wright Tremaine LLP, Seattle, WA, Amicus Curiae on behalf of Allied Daily Newspapers of Washington, The Evergreen Freedom Foundation, The Washington Newspapers Publishers Association, The Washington Coalition for Open Government, The Seattle Community Council Federation, Reporters Committee for Freedom of the Press.

GROSSE, J.

¶ 1 The purpose of Washington's Public Disclosure Act is best served by basing penalties principally on the degree of the offending agency's culpability. Because King County's conduct in this case was grossly negligent, a penalty at the low end of the statutory range is unsustainable. We thus reverse and remand to the trial court for a determination of an appropriate penalty that is consistent with this opinion.

FACTS

¶ 2 Once again, this court is called upon to evaluate whether the trial court abused its discretion in determining the amount of the per day penalty imposed upon King County for its failure to reasonably comply with Armen **Yousoufian's** request for information under Washington's Public Disclosure Act (PDA).

¶ 3 In 1997, **Yousoufian** requested King County to provide him with documents related to the public financing of a new football stadium for the Seattle Seahawks. After meeting numerous roadblocks in his efforts *245 to obtain the documents, **Yousoufian** sued King County under the PDA. In September 2001, after a trial before the King County Superior Court, the trial court found King County had violated the PDA and imposed a \$5 per day penalty on King County for its failure to reasonably comply with **Yousoufian's** request.

¶ 4 Specifically, the trial court found King County's responses to **Yousoufian's** requests were untimely and demonstrated a lack of good faith. The court stated in its finding of fact and conclusions of law:

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

The Court does not find that there was "bad faith" in the sense of intentional nondisclosure. 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 complete lack of coordination among the departments and staff assigned to the task, and absolutely no effective oversight of this PDA request. Certainly, King County did not render full assistance to Mr. **Yousoufian** as required under the statute. Nor was there an effective system for tracking a PDA request 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 amounted 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. If they claimed to be confused about the request, there was inadequate communication with Mr. **Yousoufian** to clear up the confusion. There were broad assumptions that Mr. **Yousoufian** was being difficult or unreasonable, assumptions which may have affected how people responded to his requests.

....

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

¶ 5 On appeal, we reversed the per day court imposed penalty, stating that "the trial court's findings of gross negligence and a lack of good faith by the county do not support the court's imposition of a minimum penalty of \$5 per day." ^{FN1} We explained:

FN1. *Yousoufian v. King County Executive*, 114 Wash.App. 836, 847, 60 P.3d 667 (2003).

In the final analysis, it seems clear 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. We therefore agree with the trial court's characterization of the county's conduct as grossly negligent, but not intentional, withholding of public records. ^{FN2}

FN2. *Yousoufian*, 114 Wash.App. at 853, 60 P.3d 667.

Furthermore, we concluded:

Although we afford great deference to the trial court in this matter, we are convinced***246** that the trial court's award of the minimum statutory penalty must be reversed. While the trial court stopped short of finding bad faith in the sense of intentional nondisclosure, the court's findings reflected strong disapproval with what the court saw as gross negligence by the county in responding to **Yousoufian's** public records request. Those findings do not support the court's imposition of a minimum penalty of \$5 per day. The minimum statutory penalty should be reserved for instances of less egregious agency conduct, such as those instances in which the agency has acted in good faith but, through an understandable misinterpretation of the PDA or failure to locate records, has failed to respond adequately. ^{FN3}

FN3. *Yousoufian*, 114 Wash.App. at 853-54, 60 P.3d 667.

In so stating, we also held the trial court erred by relying on the attorney fee award as a basis on which to award a minimum penalty where a higher penalty would otherwise be appropriate. We thus remanded to the trial court for a determination of the appropriate penalty above the statutory minimum.

¶ 6 The case was then appealed to the Washington Supreme Court. There, King County conceded that a penalty greater than the minimum was justified in this case; however, it claimed the Court of Appeals erred in characterizing the \$5 daily penalty as the minimum penalty. According to King County, "the trial court actually increased the total penalty by assessing the per day penalty against the number of days each of the 10 groups of records were withheld rather than basing the penalty on two requests, as the county proposed." ^{FN4} The Supreme Court rejected this argument, as had the Court of Appeals, because King County had failed to challenge on appeal the manner in which the records were grouped. The Supreme Court explained:

FN4. *Yousoufian v. King County Executive*, 152 Wash.2d 421, 438, 98 P.3d 463 (2004).

The process for determining the appropriate PDA award is best described as requiring two steps: (1) determine the amount of days the party was denied access and (2) determine the appropriate per day penalty between \$5 and \$100 depending on the agency's actions. The determination of the number of days is a question of fact. However, as discussed above, the determination of the appropriate per day penalty is within the discretion of the trial court.

The Court of Appeals correctly ignored the manner in which the records were grouped because the county failed to assign error to the trial court's method of calculation. Therefore, we 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. ^{FN5}

FN5. *Yousoufian*, 152 Wash.2d at 438-39, 98 P.3d 463 (citations omitted).

The Supreme Court thus remanded the case to the trial court for an imposition of the appropriate penalty.

¶ 7 While the majority remained silent on what that penalty should be, other members of the court offered their opinions. In his concurrence/dissent, Justice Chambers disagreed with the majority's conclusion that the trial court abused its discretion in assessing the minimum daily penalty of \$5. Justice Tom Chambers argued that issues involved in public disclosure requests may become complex and raise many issues that should be left to the sound discretion of the trial court. On the other hand, Justice Richard Sanders argued in his concurrence/dissent that a penalty at the upper range of the \$5 to \$100 scale be applied in this case.

¶ 8 On remand, the trial court imposed a penalty of \$15 per day, using as guidance a prior decision from this court, *A.C.L.U. of Washington v. Blaine School District No. 503*.^{FN6} **Yousoufian** appeals, claiming the facts of this case warrant a higher penalty.^{FN7}

FN6. *ACLU v. Blaine Sch. Dist. No. 503*, 95 Wash.App. 106, 975 P.2d 536 (1999).

FN7. King County also argues that **Yousoufian's** appeal should be dismissed as untimely. However, we previously rejected this argument in our order denying the county's motion to modify the Commissioner's January 20, 2006 ruling denying the county's motion to dismiss the appeal.

*247 ANALYSIS

[1]  [2]  ¶ 9 We review the trial court's determination of the daily penalties under the PDA for an abuse of discretion.^{FN8} Here, the only remaining issue is the amount of the daily penalty imposed on King County. The grouping of the documents and the number of penalty days has been resolved.

FN8. *Yousoufian*, 152 Wash.2d at 438-39, 98 P.3d 463.

[3]  [4]  ¶ 10 The case law states that a showing of bad faith or economic loss "are factors for the trial court to consider in determining the amount to be awarded" for a violation of the PDA.^{FN9} Furthermore, "[w]hen determining the amount of the penalty to be imposed the 'existence or absence of [an] agency's bad faith is the principal factor which the trial court must consider.'" ^{FN10}

FN9. *Amren v. City of Kalama*, 131 Wash.2d 25, 37, 929 P.2d 389 (1997).

FN10. *Amren*, 131 Wash.2d at 37-38, 929 P.2d 389 (quoting *Yacobellis v. City of Bellingham*, 64 Wash.App. 295, 825 P.2d 324 (1992)); See also *Yousoufian*, 152 Wash.2d at 435, 98 P.3d 463.

¶ 11 When the Supreme Court agreed with us that the trial court abused its discretion in awarding the minimum penalty it did so simply with instructions to award a penalty above the statutory minimum. The majority did not provide any additional insight into how the trial court should exercise its discretion other than that the existence or absence of the agency's bad faith is the principal factor the trial court must consider. Furthermore, in the context of explaining its decision why the PDA does not require the assessment of per day penalties for each requested record the Court stated:

Although the PDA's purpose is to promote access to public records, this purpose is better served by increasing the penalty based on an agency's culpability than it is by basing the penalty on the size of the plaintiff's request.^{FN11}

FN11. *Yousoufian*, 152 Wash.2d at 435, 98 P.3d 463.

¶ 12 **Yousoufian** argues that trial courts need more guidance in setting PDA award amounts and proposes that awards under the PDA be made according to a scale that utilizes the entire extent of the \$5 to \$100 range, with typical violations falling at the middle of the range and violations involving lesser and greater degrees of agency culpability spread out evenly along the scale. He argues that the application of such a scale would place this case closer to \$100 than \$5, considering King County's actions constituted gross negligence. At oral argument, **Yousoufian** also proposed several factors that the court could consider in exercising its discretion. This approach is similar to the one proposed by Justice Sanders in his concurrence/dissent. As Justice Sanders wrote:

As such, the default penalty from which the trial court *should* use its discretion is the half-way point of the legislatively established range: \$52.50 per day, per document. The trial court could then apply various criteria to shift the per diem penalty up or down.

Mr. **Yousoufian** suggests the court consider (1) the extent of any intent to withhold documents the agency knows are subject to disclosure, (2) the agency's failure to adopt and maintain a reasonable indexing system to ensure prompt compliance with the PDA's requirements, (3) the degree of public concern affected by the disclosure of the documents, (4) the need to deter future violations, (5) whether the agency acted in good faith relying on an exemption to the PDA's requirements or the extent of the agency's diligence to comply with the PDA request, and (6) any economic loss suffered by the litigant.

Applying the aforementioned criteria, I find a penalty in the upper range to be necessary here.^{FN12}

FN12. *Yousoufian*, 152 Wash.2d at 446-47, 98 P.3d 463 (J. Sanders dissenting in part) (emphasis in original).

¶ 13 Because it appears the Supreme Court majority implicitly declined to adopt the factors enumerated by Justice Sanders in his dissent and offered to this court at oral argument, we will not adopt those factors here. However, we agree with **Yousoufian** *248 that the purposes of the PDA would be better served by providing the trial courts with some guidance as to how to apply the Supreme Court's emphasis on agency culpability to the PDA penalty range.

¶ 14 In this case, both the Court of Appeals and the Supreme Court characterized King County's conduct as gross negligence. This is the law of the case. On remand, the trial court correctly pointed out that missing from the opinions of the appellate courts was a definition of what gross negligence was and suggested that such a definition would be a logical place to start in determining King County's degree of culpability. The trial court stated:

I think before you start telling us that the Court of Appeals was wrong in recharacterization, we ought to look at the definitions of what gross negligence is.

If we're going to say the finder of fact misapplied the evidence to the law, then what was the law they were dealing with in terms of the definition of gross negligence?

Court of Appeals didn't address it, Supreme Court didn't address it. Certainly, if this had been a jury trial, and I was asking a jury to apply the law to the facts, I would tell them what the law is, including the definition of gross negligence.

The trial court then suggested that the Washington Pattern Jury Instructions (WPI) might be a good place to find a definition of gross negligence.

¶ 15 If, as the Supreme Court has held, culpability is to be the principal factor upon which PDA penalties are awarded, then it only makes sense that degrees of culpability such as those defined in the WPI be used as a guide with which to locate violations of the PDA within the penalty range. As the law stands now, a simple emphasis on the presence or absence of the agency's bad faith does little

more than to suggest what the two poles are on the penalty range and is inadequate to guide the trial court's discretion in locating violations that call for a penalty somewhere in the middle of the expansive range the legislature has provided.

¶ 16 The WPI defines several degrees of culpability in the civil context. These include, in increasing degrees of culpability, negligence, gross negligence, wanton misconduct and willful misconduct. "Negligence" is defined in the WPI as:

the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.^{FN13}

FN13. WPI 10.01.

"Gross negligence" is:

the failure to exercise slight care. It is negligence that is substantially greater than ordinary negligence. Failure to exercise slight care does not mean the total absence of care but care substantially less than ordinary care.^{FN14}

FN14. WPI 10.07.

"Wanton misconduct" is:

the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has a duty to do, in reckless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know, or should know, that such conduct would, in a high degree of probability, result in substantial harm to another.^{FN15}

FN15. WPI 14.01.

"Willful misconduct" is:

the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has the duty to do when he or she has actual knowledge of the peril that will be created and intentionally fails to avert injury.^{FN16}

FN16. WPI 14.01.

These definitions would provide trial courts with the guidance they need to locate an agency's conduct within the PDA penalty range. Then using other factors the Supreme Court has identified, such as the plaintiff's economic loss, the trial court could more easily locate a violation of the PDA within the penalty range.

¶ 17 Therefore, using the WPI as a guide, the minimum statutory penalty should be ***249** reserved for such "instances in which the agency has acted in good faith but, through an understandable misinterpretation of the PDA or failure to locate records, has failed to respond adequately."^{FN17} Then, working up from the minimum amount on the penalty scale, instances where the agency acted with ordinary negligence would occupy the lower part of the penalty range. Instances where the agency's actions or inactions constituted gross negligence would call for a higher penalty than ordinary negligence, and instances where the agency acted wantonly would call for an even higher penalty. Finally, instances where the agency acted willfully and in bad faith would occupy the top end of the scale. Examples of bad faith would include instances where the agency refused to disclose information it knew it had a duty to disclose in an intentional effort to conceal government wrongdoing and/or to harm members of public. Such examples fly in the face of the PDA and thus deserve the harshest

penalties. We decline to attach firm dollar amounts to these degrees of culpability, but offer them instead a guide for the trial court's exercise of discretion.

FN17. *Yousoufian*, 114 Wash.App. at 854, 60 P.3d 667.

[5]  ¶ 18 In this case, the trial court on remand imposed a penalty of \$15 per day. In reaching its decision, the trial court relied heavily on a prior decision from this court, *ACLU v. Blaine School District No. 503*. FN18 However, *Blaine* did not apply the approach we set forth here. Here, the Court of Appeals and the Supreme Court characterized King County's conduct as grossly negligent. In light of this finding, a penalty at the low end of the statutory range is unsustainable. We thus reverse and remand to the trial court for a determination of an appropriate penalty that is consistent with this opinion. FN19

FN18. *Blaine*, 95 Wash.App. 106, 975 P.2d 536 (1999).

FN19. King County submitted a motion to strike portions of the amicus brief filed in this case. The motion to strike is denied.

WE CONCUR: ELLINGTON and BAKER, JJ.

Wash.App. Div. 1, 2007.
Yousoufian v. Office of Ron Sims
151 P.3d 243, 35 Media L. Rep. 1326

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APPENDIX B

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 APR 18 PM 4:03

ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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 STADIUM)
ADMINISTRATION, a subdivision of)
KING COUNTY, a municipal)
corporation,)

Respondents.)

No. 57112-5-1

ORDER DENYING MOTION
FOR RECONSIDERATION

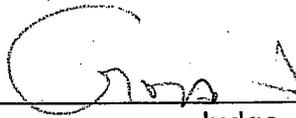
The respondents have filed a motion for reconsideration herein. The court has taken the matter under consideration and has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 19th day of March, 2007.

FOR THE PANEL:



Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 MAR 19 PM 1:55

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ARMEN YOUSOUFIAN)	No. 57112-5-1
)	
Appellant,)	DIVISION ONE
)	
v.)	PUBLISHED OPINION
)	
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 STADIUM)	
ADMINISTRATION, a subdivision of)	
KING COUNTY, a municipal)	
corporation,)	
)	FILED: February 5, 2007
Respondents.)	

GROSSE, J. – The purpose of Washington’s Public Disclosure Act is best served by basing penalties principally on the degree of the offending agency’s culpability. Because King County’s conduct in this case was grossly negligent, a penalty at the low end of the statutory range is unsustainable. We thus reverse and remand to the trial court for a determination of an appropriate penalty that is consistent with this opinion.

FACTS

Once again, this court is called upon to evaluate whether the trial court abused its discretion in determining the amount of the per day penalty imposed upon King County for its failure to reasonably comply with Armen Yousoufian’s request for information under Washington’s Public Disclosure Act (PDA).

In 1997, Yousoufian requested King County to provide him with documents related to the public financing of a new football stadium for the Seattle Seahawks. After meeting numerous roadblocks in his efforts to obtain the documents, Yousoufian sued King County under the PDA. In September 2001, after a trial before the King County Superior Court, the trial court found King County had violated the PDA and imposed a \$5 per day penalty on King County for its failure to reasonably comply with Yousoufian's request.

Specifically, the trial court found King County's responses to Yousoufian's requests were untimely and demonstrated a lack of good faith. The court stated in its finding of fact and conclusions of law:

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

The Court does not find that there was "bad faith" in the sense of intentional nondisclosure. 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 complete lack of coordination among the departments and staff assigned to the task, and absolutely no effective oversight of this PDA request. Certainly, King County did not render full assistance to Mr. Yousoufian as required under the statute. Nor was there an effective system for tracking a PDA request 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 amounted 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. If they claimed to be confused about the request, there was inadequate communication with Mr. Yousoufian to clear up the confusion. There were broad assumptions that Mr. Yousoufian was being difficult or unreasonable, assumptions which may have affected how people responded to his requests.

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

On appeal, we reversed the per day court imposed penalty, stating that "the trial court's findings of gross negligence and a lack of good faith by the county do not support the court's imposition of a minimum penalty of \$5 per day."¹ We explained:

In the final analysis, it seems clear 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. We therefore agree with the trial court's characterization of the county's conduct as grossly negligent, but not intentional, withholding of public records.²

Furthermore, we concluded:

Although we afford great deference to the trial court in this matter, we are convinced that the trial court's award of the minimum

¹ Yousoufian v. King County Executive, 114 Wn. App. 836, 847, 60 P.3d 667 (2003).

² Yousoufian, 114 Wn. App. at 853.

statutory penalty must be reversed. While the trial court stopped short of finding bad faith in the sense of intentional nondisclosure, the court's findings reflected strong disapproval with what the court saw as gross negligence by the county in responding to Yousoufian's public records request. Those findings do not support the court's imposition of a minimum penalty of \$5 per day. The minimum statutory penalty should be reserved for instances of less egregious agency conduct, such as those instances in which the agency has acted in good faith but, through an understandable misinterpretation of the PDA or failure to locate records, has failed to respond adequately.³

In so stating, we also held the trial court erred by relying on the attorney fee award as a basis on which to award a minimum penalty where a higher penalty would otherwise be appropriate. We thus remanded to the trial court for a determination of the appropriate penalty above the statutory minimum.

The case was then appealed to the Washington Supreme Court. There, King County conceded that a penalty greater than the minimum was justified in this case; however, it claimed the Court of Appeals erred in characterizing the \$5 daily penalty as the minimum penalty. According to King County, "the trial court actually increased the total penalty by assessing the per day penalty against the number of days each of the 10 groups of records were withheld rather than basing the penalty on two requests, as the county proposed."⁴ The Supreme Court rejected this argument, as had the Court of Appeals, because King County had failed to challenge on appeal the manner in which the records were grouped. The Supreme Court explained:

The process for determining the appropriate PDA award is best described as requiring two steps: (1) determine the amount of

³ Yousoufian, 114 Wn. App. at 853-54.

⁴ Yousoufian v. King County Executive, 152 Wn.2d 421, 438, 98 P.3d 463 (2004).

days the party was denied access and (2) determine the appropriate per day penalty between \$5 and \$100 depending on the agency's actions. The determination of the number of days is a question of fact. However, as discussed above, the determination of the appropriate per day penalty is within the discretion of the trial court.

The Court of Appeals correctly ignored the manner in which the records were grouped because the county failed to assign error to the trial court's method of calculation. Therefore, we 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.⁵

The Supreme Court thus remanded the case to the trial court for an imposition of the appropriate penalty.

While the majority remained silent on what that penalty should be, other members of the court offered their opinions. In his concurrence/dissent, Justice Chambers disagreed with the majority's conclusion that the trial court abused its discretion in assessing the minimum daily penalty of \$5. Justice Tom Chambers argued that issues involved in public disclosure requests may become complex and raise many issues that should be left to the sound discretion of the trial court. On the other hand, Justice Richard Sanders argued in his concurrence/dissent that a penalty at the upper range of the \$5 to \$100 scale be applied in this case.

On remand, the trial court imposed a penalty of \$15 per day, using as guidance a prior decision from this court, A.C.L.U. of Washington v. Blaine

⁵ Yousoufian, 152 Wn.2d at 438-39 (citations omitted).

School District No. 503.⁶ Yousoufian appeals, claiming the facts of this case warrant a higher penalty.⁷

ANALYSIS

We review the trial court's determination of the daily penalties under the PDA for an abuse of discretion.⁸ Here, the only remaining issue is the amount of the daily penalty imposed on King County. The grouping of the documents and the number of penalty days has been resolved.

The case law states that a showing of bad faith or economic loss "are factors for the trial court to consider in determining the amount to be awarded" for a violation of the PDA.⁹ Furthermore, "[w]hen determining the amount of the penalty to be imposed the existence or absence of [an] agency's bad faith is the principal factor which the trial court must consider."¹⁰

When the Supreme Court agreed with us that the trial court abused its discretion in awarding the minimum penalty it did so simply with instructions to award a penalty above the statutory minimum. The majority did not provide any additional insight into how the trial court should exercise its discretion other than that the existence or absence of the agency's bad faith is the principal factor the trial court must consider. Furthermore, in the context of explaining its decision

⁶ ACLU v. Blaine Sch. Dist. No. 503, 95 Wn. App. 106, 975 P.2d 536 (1999).

⁷ King County also argues that Yousoufian's appeal should be dismissed as untimely. However, we previously rejected this argument in our order denying the county's motion to modify the Commissioner's January 20, 2006 ruling denying the county's motion to dismiss the appeal.

⁸ Yousoufian, 152 Wn.2d at 438-39.

⁹ Amren v. City of Kalama, 131 Wn.2d 25, 37, 929 P.2d 389 (1997).

¹⁰ Amren, 131 Wn.2d at 37-38 (quoting Yacobellis v. City of Bellingham, 64 Wn. App. 295, 825 P.2d 324 (1992)); See also Yousoufian, 152 Wn.2d at 435.

why the PDA does not require the assessment of per day penalties for each requested record the Court stated:

Although the PDA's purpose is to promote access to public records, this purpose is better served by increasing the penalty based on an agency's culpability than it is by basing the penalty on the size of the plaintiff's request.¹¹

Yousoufian argues that trial courts need more guidance in setting PDA award amounts and proposes that awards under the PDA be made according to a scale that utilizes the entire extent of the \$5 to \$100 range, with typical violations falling at the middle of the range and violations involving lesser and greater degrees of agency culpability spread out evenly along the scale. He argues that the application of such a scale would place this case closer to \$100 than \$5, considering King County's actions constituted gross negligence. At oral argument, Yousoufian also proposed several factors that the court could consider in exercising its discretion. This approach is similar to the one proposed by Justice Sanders in his concurrence/dissent. As Justice Sanders wrote:

As such, the default penalty from which the trial court should use its discretion is the half-way point of the legislatively established range: \$52.50 per day, per document. The trial court could then apply various criteria to shift the per diem penalty up or down.

Mr. Yousoufian suggests the court consider (1) the extent of any intent to withhold documents the agency knows are subject to disclosure, (2) the agency's failure to adopt and maintain a reasonable indexing system to ensure prompt compliance with the PDA's requirements, (3) the degree of public concern affected by the disclosure of the documents, (4) the need to deter future violations, (5) whether the agency acted in good faith relying on an exemption to the PDA's requirements or the extent of the agency's diligence to comply with the PDA request, and (6) any economic loss suffered by the litigant.

¹¹ Yousoufian, 152 Wn.2d at 435.

Applying the aforementioned criteria, I find a penalty in the upper range to be necessary here.¹²

Because it appears the Supreme Court majority implicitly declined to adopt the factors enumerated by Justice Sanders in his dissent and offered to this court at oral argument, we will not adopt those factors here. However, we agree with Yousofian that the purposes of the PDA would be better served by providing the trial courts with some guidance as to how to apply the Supreme Court's emphasis on agency culpability to the PDA penalty range.

In this case, both the Court of Appeals and the Supreme Court characterized King County's conduct as gross negligence. This is the law of the case. On remand, the trial court correctly pointed out that missing from the opinions of the appellate courts was a definition of what gross negligence was and suggested that such a definition would be a logical place to start in determining King County's degree of culpability. The trial court stated:

I think before you start telling us that the Court of Appeals was wrong in recharacterization, we ought to look at the definitions of what gross negligence is.

If we're going to say the finder of fact misapplied the evidence to the law, then what was the law they were dealing with in terms of the definition of gross negligence?

Court of Appeals didn't address it; Supreme Court didn't address it. Certainly, if this had been a jury trial, and I was asking a jury to apply the law to the facts, I would tell them what the law is, including the definition of gross negligence.

¹² Yousofian, 152 Wn.2d at 446-47 (J. Sanders dissenting in part) (emphasis in original).

The trial court then suggested that the Washington Pattern Jury Instructions (WPI) might be a good place to find a definition of gross negligence.

If, as the Supreme Court has held, culpability is to be the principal factor upon which PDA penalties are awarded, then it only makes sense that degrees of culpability such as those defined in the WPI be used as a guide with which to locate violations of the PDA within the penalty range. As the law stands now, a simple emphasis on the presence or absence of the agency's bad faith does little more than to suggest what the two poles are on the penalty range and is inadequate to guide the trial court's discretion in locating violations that call for a penalty somewhere in the middle of the expansive range the legislature has provided.

The WPI defines several degrees of culpability in the civil context. These include, in increasing degrees of culpability, negligence, gross negligence, wanton misconduct and willful misconduct. "Negligence" is defined in the WPI as:

the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.¹³

"Gross negligence" is:

the failure to exercise slight care. It is negligence that is substantially greater than ordinary negligence. Failure to exercise slight care does not mean the total absence of care but care substantially less than ordinary care.¹⁴

¹³ WPI 10.01.

¹⁴ WPI 10.07.

"Wanton misconduct" is:

the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has a duty to do, in reckless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know, or should know, that such conduct would, in a high degree of probability, result in substantial harm to another.¹⁵

"Willful misconduct" is:

the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has the duty to do when he or she has actual knowledge of the peril that will be created and intentionally fails to avert injury.¹⁶

These definitions would provide trial courts with the guidance they need to locate an agency's conduct within the PDA penalty range. Then using other factors the Supreme Court has identified, such as the plaintiff's economic loss, the trial court could more easily locate a violation of the PDA within the penalty range.

Therefore, using the WPI as a guide, the minimum statutory penalty should be reserved for such "instances in which the agency has acted in good faith but, through an understandable misinterpretation of the PDA or failure to locate records, has failed to respond adequately."¹⁷ Then, working up from the minimum amount on the penalty scale, instances where the agency acted with ordinary negligence would occupy the lower part of the penalty range. Instances where the agency's actions or inactions constituted gross negligence would call for a higher penalty than ordinary negligence, and instances where the agency acted wantonly would call for an even higher penalty. Finally, instances where

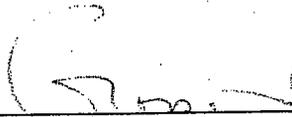
¹⁵ WPI 14.01.

¹⁶ WPI 14.01.

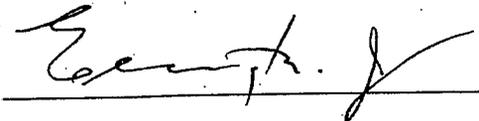
¹⁷ Yousoufian, 114 Wn. App. at 854.

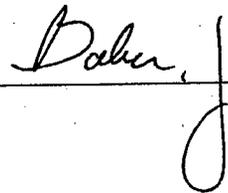
the agency acted willfully and in bad faith would occupy the top end of the scale. Examples of bad faith would include instances where the agency refused to disclose information it knew it had a duty to disclose in an intentional effort to conceal government wrongdoing and/or to harm members of public. Such examples fly in the face of the PDA and thus deserve the harshest penalties. We decline to attach firm dollar amounts to these degrees of culpability, but offer them instead a guide for the trial court's exercise of discretion.

In this case, the trial court on remand imposed a penalty of \$15 per day. In reaching its decision, the trial court relied heavily on a prior decision from this court, ACLU v. Blaine School District No. 503.¹⁸ However, Blaine did not apply the approach we set forth here. Here, the Court of Appeals and the Supreme Court characterized King County's conduct as grossly negligent. In light of this finding, a penalty at the low end of the statutory range is unsustainable. We thus reverse and remand to the trial court for a determination of an appropriate penalty that is consistent with this opinion.¹⁹



WE CONCUR:





¹⁸ Blaine, 95 Wn. App. 106, 975 P.2d 536 (1999).

¹⁹ King County submitted a motion to strike portions of the amicus brief filed in this case. The motion to strike is denied.