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STATE OF WASHINGTON

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No. 80081-2

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

ARMEN YOUSOUFIAN,

Respondent,

v.

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

Petitioners.

RESPONDENT'S ANSWER TO STATE'S AMICUS BRIEF

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I. In its Amicus Brief, the State Sides with Government Agencies Rather than the People of the State of Washington.

Unfortunately, in its Amicus Brief the Attorney General stands the purpose of the Public Records Act on its head. Rather than defending the explicit purpose of the Public Records Act and the people's right to know, the Attorney General steps in on the side of government agencies that the Act was intended to constrain. "The stated purpose of the [PRA] is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of the public officials and institutions." Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

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.

RCW 42.56.030.

In arguing for an eviscerated application of deterrence and against a rational framework to assess culpability, the Attorney General would undermine the purpose of the Act. The State makes the Pollyanna claim that "[t]he people of the State of Washington and the agencies that serve

them equally share this vital interest in government accountability under the Act.” Amicus Brief of State, at 1, *emphasis added*. This may be true for many government entities much of the time, but it is certainly not true with regard to all government entities all of the time. Otherwise, the Public Records Act would not be necessary and violations of the Act would be extremely rare. It is certainly not true with regard to King County’s response to Armen Yousoufian’s request for documents under the Public Records Act.

In setting the per day penalty under the statutory penalty scale, trial court discretion should focus on two considerations -- deterrence and culpability. How does a trial court set a penalty under the statutory scheme that punishes past violations of the statute while at the same time deterring future violations?

II. Deterrence is Critical in Setting the Per Day Penalty.

As this court has stated, a central purpose of the penalty provisions of the Public Records Act is “to discourage improper denial of access to public records” Yousoufian v. Office of Sims, 152 Wn.2d 421, 429-30, 98 P.3d 463 (2004), *quoting* Hearst Corp. v. Hoppe, 90 Wn.2d 124, 140, 580 P.2d 246 (1978). King County has agreed that deterrence is a valid consideration in determining the penalty for a violation of the Public Records Act. “Courts are free to consider the amount necessary for

deterrence.” King County’s Reply in Support of Petition for Review at 3. The State likewise acknowledges the importance of deterrence in setting penalties. “The manifest purpose of the penalty is to compel agency compliance, not to award damages.” “It follows that the purpose of a penalty is to compel compliance by forcing changes in agency performance.” Amicus Brief of State, at 11 and 9.

Despite acknowledging the centrality of deterrence to the statutory penalty scheme, the State argues that “[i]t is entirely speculative to conclude that agencies comply with the Act only if they are significantly ‘hurt’ monetarily by their non-compliance.” Amicus Brief of State at 13. While there may be government entities that would comply with a Public Records Act without a penalty provision, the people of the State who supported the initiative and the legislature that enacted the statute thought that a penalty provision was necessary to deter recalcitrant entities. This conviction was reaffirmed when the legislature changed the upper limit on the penalty scale from \$25 to \$100.

The State goes on to argue that “[i]f such a lack of motivation [by an agency] were to prove true in an individual case, that case should be addressed individually.” Amicus Brief of State at 13. This is exactly what the statute provides and what Yousoufian advocates. If an entity follows the law, as most do, there is no fine. On the other hand, if there is a lack

of motivation and the entity violates the Public Records Act, then the trial court addresses the case “individually.” The legislature has seen fit to add a monetary penalty set on a \$5-\$100 a day penalty scale, just in case agency good will is not sufficient to ensure compliance.

The State next argues that there is no support for “the premise that a large penalty is necessary to compel compliance from a large agency.” Amicus Brief of State at 12. The State’s argument defies both common sense and economic theory. Given that deterrence is a primary purpose of the statutory penalty scheme, it must be assumed that effective deterrence is intended. Common sense is a compelling indicator that a poor entity is more punished and deterred by a large fine than a wealthy entity. A \$50,000 fine is easily absorbed by Microsoft, but would be devastating to a mom and pop grocery store. It is hard to imagine that it would not take a larger fine to deter King County from future violations than it would take to deter the Blaine School District.

Economists have long recognized what is called the marginal utility of wealth. A dollar has less value to Bill Gates than to a homeless person who lives on a dollar a day. The more institutions or individuals

have, the less they care about a small change in their wealth brought about by a fine and the greater fine it takes to induce a change in behavior.¹

III. Culpability is Critical in Setting the Per Day Penalty.

In conjunction with deterrence, culpability is the second consideration in assessing penalties under the Public Records Act. The Attorney General agrees that culpability is a critical issue. “[T]his court long has recognized that agency culpability is the touchstone for determining the amount of penalty to be imposed for a failure to provide requested records in response to a public records request.” Amicus Brief of State at 8. The State acknowledges that “[t]o be effective, a penalty must be calibrated to actions that reflect culpability and that can be changed in response to the penalty.” Amicus Brief of State at 6. Yet, the State is remarkably resistant to this Court providing an analytical framework of culpability factors to calibrate decisions based on culpability.²

¹ “An extra dollar of income to a poor person provides that person with more additional utility than does an extra dollar to a rich person. In other words, as a person’s income rises, the extra well-being derived from an additional dollar of income falls.” Principles of Micro Economics, N. Gregory Mankiw, Dryden Press (1998), p. 431. *See also*, Becker, G.S., Crime and Punishment: An Economic Approach, Journal of Political Economy, 1968, vol. 76, 169-217.

² The State claims that “[n]either party appears to have advocated the multifactor [test] set out in the January decision.” This is correct only in so far as the State labels the factors a test, which they are not. In his Supplemental Brief to this Court, page 6-8, Yousoufian proposed guidelines for trial courts similar to those enunciated by the Court in Yousoufian IV.

Culpable means “meriting condemnation or blame especially as wrongful or harmful.” Merriam-Webster’s Collegiate Dictionary, 11th Edition, p. 304. Culpability simply characterizes action as blameworthy but gives no indication of what makes the action blameworthy. To achieve the consistency and predictability required by the legal system, it is important for this Court to provide a framework of factors that distinguish degrees of blameworthiness in the context of the purpose of the Public Records Act. These factors do not supplant a trial court’s discretion in a particular case, but rather ensure that trial courts throughout the state are approaching the problem of setting a per day penalty in a similarly calibrated fashion. A trial court remains free, indeed obliged, to use its discretion to identify and weigh factors relevant to the case before the court.

King County has agreed that it is appropriate for this court to enumerate factors for consideration, so long as those factors do not displace the discretion of the trial court. “While the appellate courts may from time to time choose to enumerate factors that the trial courts may consider, it should remain the responsibility of the trial court to determine which factors are relevant, and what relative weight to assign to each factor under the facts in a given case.” Supplemental Brief of Petitioner King County at 10. “Should this Court decide to provide additional

guidance to trial courts to determine PDA penalties, it can do so by enumerating additional factors for consideration, not by accepting the categorical ‘guideline’ approach of Yousoufian II. Almost invariably, when the Legislature or appellate courts provide guidance for trial courts to exercise discretion, they do so by enumerating factors for the trial court to consider.” Supplemental Brief of Petitioner King County at 12. *See Id.*, fn 6, and Reply Brief of Appellant Yousoufian, pp. 6-7, for examples of appellate courts providing factors for trial court consideration.

As Justice Chambers wrote in Yousoufian IV:

Setting the appropriate penalty for a Public Records Act, chapter 42.56 RCW violation requires judgments on both fact and law. It is wholly appropriate for this court to interpret the statute and establish the factors to be considered in assessing such penalties. It is also appropriate for this court to give guidance, as the majority has, where along a scale of penalties a particular set of facts should fall to promote consistency and predictability.

Trial court discretion does not mean that each judge is entitled to impose his or her subjective view of what an appropriate penalty should be. Guidance from this court is important.

Yousoufian v. Office of Sims, 165 Wn.2d 439, 463-64, 200 P.3d 232, 243 (2009) (Chambers, J., concurring).

The State objects to factors listed in the Sanders opinion that are not based on agency culpability and are beyond agency control. “It follows that the purpose of a penalty is to compel compliance by forcing

changes in agency performance. Change is not compelled by basing penalties on factors that are unrelated to agency culpability and beyond agency control. . . . Because culpability is the touchstone for determining the appropriate level of penalty, only actions that are relevant to culpability should be assessed in determining the penalty amount for a violation of the Act.” Amicus Brief of State at 9.

Yousoufian agrees that factors provided by this Court to guide discretion of trial courts should be closely tied to culpability and to matters within an agency’s control. After all, a fine cannot induce a change of conduct that is beyond an agency’s control. Thus, Yousoufian has redrawn and proposed below a list of factors for a trial court to consider that includes only factors that relate directly to culpability and are under the control of the government entity that has been found to have violated the Act. Because an agency has control over each of these factors, it can reduce penalties to the very bottom of the scale even if an inadvertent violation should occur.

1. Did the agency demonstrate good faith, lack of good faith or intentional misconduct?

2. Did the agency take prompt corrective action or was litigation necessary to compel production of the requested documents?

3. Did the agency have a program for training and supervision of personnel dealing with Public Records Act requests?

4. Did the agency know or should the agency have known that time was of the essence in the production of requested documents?

5. Did the agency respond in an efficient and professional manner in dealing with the requestor?

6. In addition to the primary harm of loss of government accountability, did the agency know or should the agency have known that the requested documents pertained to a matter of significant public interest or of economic consequences to the requestor?

7. Did the agency have a sound system for tracking and retrieving documents?

8. Did the agency have a reasonable claim that a statutory exemption applied, a legitimate third party interest prevented production, or the request was confusing or unusually complex?

9. Did the agency engage in deceit, misrepresentation or dishonesty?

10. Was the violation the work of an errant individual or a pervasive pattern indicative of an organizational culture?

In applying these factors to each case that involves a violation of the Public Records Act, the trial court should be admonished to keep in

mind two important considerations. First, this is not a test as the Amicus State and Yousoufian IV dissenters repeatedly insist. No matter how many times they say it, the culpability factors are not a test to determine the outcome. They are not a checklist or a matrix that will produce an answer. These are factors that are likely relevant to a wide range of Public Records Act violation cases. The trial court will have to use its discretion to determine which of these factors is relevant to the case before it. The trial court must also use its discretion to determine what weight, if any, is to be given to each of the factors it considers to be relevant. Second, this delineation of factors is not exclusive. Based on the record before it, the trial court may, in its discretion, consider other factors relevant to culpability in a particular case. In the judgment of the trial court, additional factors may indicate a higher or lower penalty on the penalty scale.

IV. The Bricker Case Cited by the State in fn.1, p.6, Demonstrates that the Analytic Framework from Yousoufian IV is Working Just as Intended.³

³Yousoufian moves to strike from the State's Amicus Brief footnote 1 on page 6 that discusses Bricker v. Department of Labor and Industries, a case still pending in Thurston County Superior Court. As best Yousoufian has been able to determine, in Bricker there have been no written Findings of Fact or Conclusion of Law, and no judgment or written order entered, only an oral ruling by the court after a two day trial regarding penalties for a Public Records Act violation. The footnote violates the spirit and intent of General Rule 14.1 that prohibits the citation of unpublished opinions of the court of appeals. The unpublished ruling of a trial court does not even approach the relevance of an unpublished court of appeals opinion. State's footnote 1 also violates RAP 9.11 that restricts appellate consideration of additional evidence on review. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005). The State

Because Yousoufian does not know whether the court will grant his motion to strike the State's discussion of Bricker and because it is difficult to unring the bell, we will respond here to the claims regarding *Bricker* made by the State. The case is an instructive example of how trial courts will be helped by the factors set out in Yousoufian IV without surrendering their discretion.

The State's undocumented version of Bricker is radically at odds with the transcript of the court's oral ruling. The State's summary of facts make it difficult to imagine a responsible trial court assessing a fine high on the penalty scale with or without culpability factors as a guide. The transcript shows that the trial court used its discretion and the factors responsibly and made a reasonable ruling.

Yousoufian has obtained a copy of the verbatim report of Judge Hirsch's oral ruling of June 12, 2009, in Bricker. That transcript is attached as Appendix A, with underlines added.⁴ In addition to presenting

essentially testifies as to its view of the facts in the Bricker, a view shared by neither the trial court nor plaintiff.

⁴Yousoufian requests this Court take judicial notice of the attached Bricker transcript of oral ruling (Thurston County Superior Court, No. 08-2-01711-4) under ER 201(b)(2), (d) and (f), where such facts are "not subject to reasonable dispute" and are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" when "requested by a party and supplied with the necessary information." State v. Royal, 122 Wn.2d 413, 417-18, 858 P.2d 259, 262 (1993).

its version of the facts in Bricker, the State distorts what Judge Hirsch said in her oral ruling.

A review of the transcript demonstrates that Judge Hirsch did exactly as she should have done in examining the evidence and setting a penalty under the Public Records Act. She listened to testimony, reviewed the evidence and used her discretion to select and weigh appropriate considerations for setting the penalty. The culpability factors from Yousoufian IV provided guidance but not a bridle for her discretion.

Judge Hirsch's oral ruling makes clear that her discretion was alive and well. She used the analytic framework provided in Yousoufian IV but was not enslaved by it. For instance, Judge Hirsch heard nearly two days of testimony and valued her unique "opportunity to observe the demeanor of witnesses when they are testifying." (Bricker transcript page 3, lines 17-20 and pages 11-12, lines 24-25, 1-3). She weighed factors relevant to this particular case but not suggested by the court in Yousoufian IV. "Even during trial there were witnesses for the Department that came unprepared. They had not reviewed their records. They said, I don't remember, I don't remember, I don't remember...Frankly, at bottom it just makes the State look like they are not public servants and they are public servants." (Bricker transcript, page 14, lines 5-8 and 11-13). When not relevant to the case before her, Judge Hirsch disregarded culpability factors listed by

the court in Yousoufian IV such as “existence of systems to track and retrieve public records.” (Bricker transcript, page 10, lines 16-20).

Though relying on factors from Yousoufian IV, Judge Hirsch was clear that setting the penalty on the statutory scale was up to her as the trial court judge acting within the context of the broad public purpose of the Public Records Act. “I think Yousoufian referred to either end of the penalty between five and a hundred dollars as bookends that the Court needs to use in figuring out where inside the bookends the penalties should be. As both of you know, the Public Records Act is a mandate. It is to be liberally construed for the purpose of full disclosure. Records are public records. They belong to the public, not the agencies, and Courts are directed to broadly construe the act to accomplish its purpose and narrowly construe any exceptions.” (Bricker transcript, page 4, lines 7-16).

Excerpts from the transcript reveal how the State’s misconduct pushed Judge Hirsch to the upper end of the penalty scale. After the initial document request, the State was totally unresponsive to Mr. Bricker. “In this case there was no response and no follow up, and even when Mr. Bricker was attempting for some clarification or maybe even just attempting contact, there was no response by the State agency.” (Bricker transcript, pages 8-9, lines 22-25 and 1). The office to which Mr. Bricker

submitted his request seemed clueless regarding what to do with it. “[E]ven outlying offices in Kennewick have to know what the rules are, and they have to comply with them.” (Bricker transcript, pages 9-10, lines 25 and 1). There was no reasonable “explanation for noncompliance. Mr. Ulmar just said well, the envelope was already open and I stuck it in my file. Frankly, even if Mr. Ulmar did not know what to do with a public records request, he put the letter in a file and did not respond to a request for a phone call. He made no attempt that I could see to contact Mr. Bricker, and at the bottom that is what the problem was in this case.” (Bricker transcript, page 10, lines 2-9).

“The evidence is undisputed that Mr. Ulmer received no training....” (Bricker transcript, page 9, lines 14-15). With regard to “helpfulness of the agency to the requester,” the trial court commented: “In this case there was not any helpfulness, not until the case went to litigation, and even then there was confusion.” (Bricker transcript, page 10, lines 10-13). The agency knew that time was of the essence because it was about to conduct an administrative hearing on the matter about which Mr. Bricker requested documents. And, he was the subject of the administrative hearing. (Bricker transcript, pages 10-11, lines 21-25 and 1-5).

The trial court identified “[t]he key factor here [as] loss of government accountability.” (Bricker transcript, page 10, lines 4-5). The court also recognized the importance of deterrence and the penalty amounts necessary to deter a large state agency. “The issue here now becomes a penalty amount necessary to deter future misconduct considering the size of the agency and the facts of the case.... I think that to deter future noncompliance it is appropriate to set the [amount] higher rather than lower.” (Bricker transcript, page 14, lines 14-16 and 21-23). Finally, judge Hirsch concluded, “I, frankly, cannot see any mitigating factors that occurred between October 1st and August 8th when I go through these, and I am going to set the penalty at the high end here.” (Bricker transcript, page 14, lines 18-21). The court ruled that sixteen documents were withheld for over 300 days and set the penalty at \$90 a day. (Bricker transcript, page 6, lines 7-14, and pages 14-15, lines 25 and 1).

The State claims that Judge Hirsch “acknowledged that it was unfortunate the penalty was so high....” Amicus Brief of State at 6, fn 1. That is not what Judge Hirsch said. What she said was that, “as a taxpayer,” it was unfortunate that cases like this of such extreme government misconduct necessitating large fines come before the court. “As a taxpayer it really is unfortunate that this case, for me, that I see

these kind of cases. We are in very difficult financial times in this state, and this is a huge hit for the State, I think.” (Bricker transcript, page 16, lines 15-18).

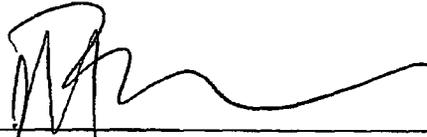
Under any reasonable reading of the transcript, Judge Hirsch was not blaming the factors from Yousoufian IV for the large fine - but rather was placing the blame squarely on the shoulders of the state agency that badly mishandled a public records request of high urgency and importance for the requestor. Nowhere does she even hint that the Supreme Court had tread upon her discretion. The oral ruling shows that the analytical framework of Yousoufian IV was working just as intended – supporting analysis but not quashing discretion. The State’s real complaint is not that Judge Hirsch lacked discretion, but that she exercised it.

V. Conclusion

The Court should clearly identify deterrence and culpability as the two critical considerations in setting a per day penalty and should delineate factors relevant to culpability and within an agency’s control for trial courts to consider in assessing per day penalties for PRA violations. The Court should emphasize that these are factors to guide discretion, not replace it. The trial court is obliged to select and weigh relevant factors, add new factors and eliminate irrelevant ones. The Bricker case is a good example of how the factors from Yousoufian IV are already working to

create a helpful analytical framework for trial courts to achieve consistency and predictability in setting penalties on the statutory scale.

Respectfully submitted this 10th day of September, 2009.

A handwritten signature in black ink, appearing to be a combination of the initials 'RJ' and 'MB' followed by a long, sweeping horizontal line.

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I certify that I served a copy of Respondents Answer to State's Amicus Brief on all parties or their counsel of record on the date below as follows:

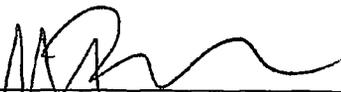
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DATED this 10th day of September, 2009, at Edmonds,
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Michael Brannan

Appendix A

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JUNE 12, 2009

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(After hearing trial testimony and argument, the Court ruled as follows:)

THE COURT: Please be seated.

Do we have Mr. Barnes on the phone?

THE CLERK: Yes, we do.

THE COURT: Are you there, Mr. Barnes?

MR. BARNES: Yes, I am. Can you hear me?

THE COURT: I can. Can you hear me okay?

MR. BARNES: I can. Thank you.

THE COURT: All right. Mr. Bawn, I know if you talk you are going to need to work real hard to speak up because you are quiet when you talk.

I am going to make a few comments, and then I am going to ask a couple of questions, and then I am going to make my ruling. I just want to start by saying I just sat through two days or almost two days of testimony. I had an opportunity to hear the evidence with respect to the issue of penalty. In this case the State has admitted that they violated the Public Records Act, and the only issue is the amount of the penalty. The penalty has a couple of different stages involved in it. One is the Court has to determine the number of days that a party has been denied access, and then the

1 Court needs to determine the appropriate penalty per day
2 using all of the factors the case law has outlined and
3 in particular the *Yousoufian* factors. That sets forth
4 in quite some detail aggravating and mitigating factors
5 the Court needs to assess and consider in determining an
6 appropriate fine.

7 I think *Yousoufian* referred to either end of the
8 penalty between five and a hundred dollars as bookends
9 that the Court needs to use in figuring out where inside
10 the bookends the penalty should be. As both of you
11 know, the Public Records Act is a mandate. It is to be
12 liberally construed for the purpose of full disclosure.
13 Records are public records. They belong to the public,
14 not the agencies, and Courts are directed to broadly
15 construe the act to accomplish its purpose and narrowly
16 construe any exceptions.

17 Now, there are no exceptions really or exemptions
18 at issue in this case. Having said that by way of
19 background, I am going to go through the factors. I
20 reviewed again the exhibits last night, and I reviewed
21 the trial brief, and I also reviewed the *Yousoufian* case
22 again. These are my findings.

23 The mitigating factors -- well, first of all, the
24 factors sort of overlap, the mitigating and aggravating
25 factors. It is not completely clean. The Court is to

1 consider under the *Armen* case the existence or absence
2 of an agency's bad faith, but there is no requirement
3 that bad faith be found in order to penalize an agency,
4 and an agency's good faith reliance on an exemption, for
5 instance, would not necessarily insulate the agency from
6 liability. The Court is to look for the potential for
7 public harm, not necessarily a finding of economic loss.

8 For the mitigating factors, first of all, the Court
9 needs to look at the lack of clarity of the request. In
10 this case the written request was pretty clear. It
11 asked for all permits, copies of inspections, or
12 corrections requests by all inspectors on the residence.
13 Actually let me back up for a minute. I am referring to
14 the October 1st, 2007, letter.

15 The Court is finding that the initial request for
16 public records was October 1st, 2007, which was the date
17 of the certified letter written by Ken Bricker
18 requesting the three types of records I just referred
19 to. There is specific reference in that letter by Mr.
20 Bricker. The letter reads "Don, I am following up on
21 our September 4, 2007, conversation in which you were to
22 provide me some additional insight into the citations
23 issued." Later at the end of that paragraph -- well,
24 actually he says "I have not heard from you, and I am
25 again requesting that information. I would also like a

1 copy of all permits issued and copies of inspections and
2 corrections by all inspectors on that residence."

3 My reading of this letter leads me to conclude that
4 he may or may not have asked for specific records in his
5 phone conversation of the 4th of September, and I am not
6 able to make that finding, and I am not making that
7 finding. Again the start date for purposes of assessing
8 a penalty is October 1st, 2007, the date of this letter.

9 August 8, 2008, is the date that the State
10 initially responded to the initial records request or
11 the initial, well, to the request as contained in that
12 letter. From my review of the record I find that there
13 are 16 responsive documents disclosed on the 8th of
14 August. On September 5th of 2008 -- and I am kind of
15 going through Mr. Bawn's trial brief because he did in
16 the brief set forth the different items. I am now on
17 the trial brief on page -- actually let me back up. I
18 am going to explain how I got to the number 16, just in
19 case you are confused about that.

20 On page four and continuing on to page five of the
21 trial brief there are 22 items that were noted to be
22 provided in the response by the State, but some of those
23 items that were provided were not requested documents,
24 they were additional documents, so the 16 are the
25 specific items that were requested in that letter.

1 Beginning at paragraph 11 on page six of the trial
2 brief the plaintiff has indicated that there were
3 additional public records that were provided to Mr.
4 Bricker at the administrative hearing or actually prior
5 to the administrative hearing. Some of those were not
6 things that were requested in the public records
7 request. Specifically there are some citations listed
8 here that were not requested. There was a letter from
9 Terry Graff that was not requested. Mr. Bricker's
10 letter was not requested. But there were three
11 additional inspection reports or statements that were
12 provided at that time, so those are three additional
13 documents.

14 On September 5th -- excuse me if I said that date
15 before because what I meant for that one was
16 November 7th for the ones I just went through. On
17 December 5th defendants submitted answers to
18 interrogatories, and Mr. Bricker is alleging that there
19 were seven additional public records that had not been
20 disclosed. Two are envelopes that were not records that
21 were requested. Number five and six are Trinity
22 Construction license detail report infractions. Those
23 were not requested, and I am not finding that they were
24 lawfully not disclosed.

25 The only issue really is the print permit and that

1 is numbers three, four, and seven, and my recollection
2 of the evidence is that it is not any additional
3 information. Those permits were provided earlier and a
4 different print button was hit or a different right
5 click or something was made so that it printed out
6 differently, but the document was the same that had
7 already been disclosed, so none of those are going to be
8 counted. So those are the numbers we are talking about.

9 To the extent that documents were not provided or
10 were later provided with a distinction of once they were
11 signed and once they were not signed, those are
12 different documents. If they have a signature on one
13 and no signature on the other that is different to the
14 Court than something being printed out and hitting a
15 different button.

16 Now I am going to go through the factors. The
17 mitigating factors include the lack of clarity of the
18 request. The written request on its face seems pretty
19 clear. It asks for certain items, and eventually those
20 were provided.

21 Two, the agency's prompt response or legitimate
22 follow-up inquiry for clarification. In this case there
23 was no response and no follow-up, and even when Mr.
24 Bricker was attempting for some clarification or maybe
25 even just attempting contact, there was no response by

1 the State agency.

2 Three, good faith, honest, timely, and strict
3 compliance with all the procedural requirements and
4 exceptions. I think in part there was that up higher in
5 the chain. Frankly, in this case it is pretty clear to
6 me that the issues arose initially in the Kennewick
7 office with Mr. Koons and Mr. Ulmer. I will talk a
8 little bit more about that later, but I think that at
9 the top of the chain people were trying, once they were
10 aware, to provide information, and they were trying to
11 comply strictly with the Public Records Act
12 requirements.

13 The fourth mitigating factor is proper training and
14 supervision of personnel. The evidence is undisputed
15 that Mr. Ulmer received no training, and that is despite
16 the fact of the policy of the Department, and it is a
17 pretty detailed policy. It seems pretty thought out. I
18 don't know where the problem was as far as not getting
19 the training done, but at some point the system that
20 looks to be in place sort of seems that with respect to
21 Mr. Ulmer it fell apart.

22 I think that the Public Records Act is a work in
23 progress in some ways. The Supreme Court is being
24 pretty clear to trial courts as to expectations, and
25 even outlying offices in Kennewick have to know what the

1 rules are, and they have to comply with them.

2 The reasonableness of any explanation for
3 noncompliance. Mr. Ulmer just said well, the envelope
4 was already open and I stuck it in my file. Frankly,
5 even if Mr. Ulmer did not know what to do with a public
6 records request, he put the letter in a file and did not
7 respond to a request for a phone call. He made no
8 attempt that I can see to contact Mr. Bricker, and at
9 bottom that is what the problem was in this case.

10 Another mitigating factor could be the helpfulness
11 of the agency to the requester. In this case there was
12 not any helpfulness, not until the case went to
13 litigation, and even then there was confusion. I don't
14 know if it was a lack of helpfulness, but things were a
15 little difficult.

16 The last mitigating factor is existence of systems
17 to track and retrieve public records. Frankly, I don't
18 know that I saw or heard testimony that really went to
19 that issue one way or the other, so I am not going to
20 make a finding of it.

21 Aggravating factors, first of all, are delayed
22 response, especially in circumstances making time of the
23 essence. In this case Mr. Bricker had citations that he
24 did not think he deserved. He was waiting for a call
25 back from an inspector and then later on some

1 information to see what the office had in his files so
2 he could have a discussion hopefully to get the
3 citations taken care of and if not that then to prepare
4 for an administrative hearing, and he never got his
5 information until just before the hearing.

6 Another aggravating factor the Court has to
7 consider is the lack of strict compliance. Mr. Barnes?
8 Are you in a windy area now? Mr. Barnes?

9 MR. BARNES: Yeah, yeah, I can hear you now.

10 THE COURT: Okay. I am going on to the next
11 factor which is lack of strict compliance.

12 MR. BARNES: I have not heard anything about
13 that yet.

14 THE COURT: Okay. I have not started, so that
15 is good.

16 In this case there was not any compliance at the
17 point of Mr. Ulmer sticking the letter in his file and
18 not doing anything with it.

19 Lack of proper training and supervision of
20 personnel and response. I have already addressed that a
21 bit.

22 What I did not really talk about was it is not
23 clear to -me, and this is one reason I really don't like
24 telephonic hearings. It would have been nice to have
25 the ability to observe Mr. Koons as he was testifying.

1 It certainly is not the be all and end all, but the
2 Court really does appreciate the opportunity to observe
3 the demeanor of witnesses when they are testifying. I
4 did not have that opportunity here.

5 Now, Mr. Koons -- I don't really know what his role
6 in this was, but it seems that he was the person who
7 wanted to make very sure that Trinity was going to be
8 held accountable for what the Department viewed was
9 Trinity's lack of compliance with permitting
10 requirements, which, frankly, you know, if Trinity
11 Construction was not complying with the regulations and
12 construction requirements, then that could be a real
13 danger to the public, but the issue is that Mr. Bricker
14 did not need to be the person in the middle of that.
15 They did not deal with Mr. Bricker because they ignored
16 his request or put it aside, and by doing that I think,
17 frankly, it really made this case a lot more difficult
18 than it needed to be. Now, it could have very well been
19 that the Department would not have settled, and there,
20 frankly, was enough evidence, I think, for them to go
21 and pursue the case, but the way that that happened here
22 I think is really problematic.

23 The next aggravating factor is unreasonableness of
24 any explanation for noncompliance. I think, Mr. Barnes,
25 you referred to the explanation as lame by Mr. Ulmer. I

1 think that is a start. I just don't understand why
2 somebody would put a letter in a file and stick the file
3 away. That just does not make any sense to me.

4 Negligent, reckless, wanton bad faith, or
5 intentional noncompliance. I don't think Mr. Ulmer
6 intentionally did not comply with the Public Records Act
7 because I don't think he knew about it. I am not sure
8 he was the most appropriate public servant when he did
9 that, but I am not finding that he exercised any bad
10 faith. I do think that there were some significant
11 problems in his office though with a combination of
12 folks, and that would include Mr. Koons, Mr. Paradis,
13 and Mr. Ulmer. I am not sure what the combination of
14 all of that was, but I have some concerns about that.

15 At the time of trial - and I am getting to the next
16 factor which is dishonesty - I don't think people
17 remembered, some of them, and I don't -- I am not
18 finding dishonesty here. Frankly, I -- I am just going
19 to wait.

20 Mr. Barnes?

21 MR. BARNES: Yes, yes.

22 THE COURT: I took a break because every once
23 in a while it sounds like it is really windy at your
24 end.

25 MR. BARNES: Yeah, I'm outside. I'm taking

1 this outside, and there are planes flying overhead.

2 THE COURT: Okay. The potential for public
3 harm, including economic loss or loss of governmental
4 accountability. The key factor here is loss of
5 governmental accountability. Even during trial there
6 were witnesses for the Department that came unprepared.
7 They had not reviewed their records. They said I don't
8 remember, I don't remember, I don't remember. That
9 could have been true, and they could have taken the step
10 of reviewing their documents or preparing for trial so
11 that they could be able to do that. Frankly, at bottom
12 it just makes the State look like they are not public
13 servants, and they are public servants.

14 The issue here now becomes a penalty amount
15 necessary to deter future misconduct considering the
16 size of the agency and the facts of the case. I think I
17 have covered all of the areas that I need to look at.
18 I, frankly, cannot see any mitigating factors that
19 occurred between October 1st and August 8th when I go
20 through these, and I am going to set the penalty at the
21 high end here. I think that to deter future
22 noncompliance it is appropriate to set the matter higher
23 rather than lower. I don't think midpoint is
24 appropriate.

25 I am going to assess a penalty in the amount of \$90

1 per day per document. A document is a document; it is
2 not a page. That is for the time between October 1st
3 and the 8th of August. There were additional documents
4 provided later on. I am not doing the math, but those
5 documents I think it is not appropriate any longer to
6 assess the penalty at the higher rate, and I am going to
7 set it in the amount of \$15 per non-disclosed document
8 per day.

9 With respect to attorney's fees, I am going to
10 wait, Mr. Bawn, until you submit an affidavit of your
11 fees, and I will determine, if there is not agreement to
12 them, whether they are reasonable, and I will consider
13 that at a later date.

14 MR. BAWN: (Nods affirmatively.)

15 THE COURT: I am not sure, frankly - and I
16 have not seen any case law on this - whether you would
17 be entitled to fees because I think you are asking for
18 them in the administrative proceeding.

19 MR. BAWN: I'll clarify, Your Honor. Aside
20 from that one week where he called me and I immediately
21 filed the public records issue and trying to get his
22 administrative proceeding set aside -- Mr. Bricker had
23 no more money left for the representation of the
24 administrative proceedings which was in the Tri-Cities,
25 so I'm not claiming fees for the appearances or his

1 hearings over there in the Tri-Cities. He was pro se in
2 those proceedings.

3 THE COURT: Okay.

4 MR. BAWN: I'm not asking for a ruling on
5 that. I'm not going to submit that in my affidavit.

6 THE COURT: Did you not hear that, Mr. Barnes?

7 MR. BARNES: No, I cannot hear Mr. Bawn very
8 well.

9 THE COURT: Mr. Bawn said he is not asking for
10 any fees for any of the administrative proceeding parts.

11 MR. BARNES: Okay. I accept that.

12 THE COURT: I guess I just want to say one
13 thing, and maybe I should not, but I have a tendency to
14 say things that I should not say sometimes.

15 As a taxpayer it really is unfortunate that this
16 case, for me, that I see these kind of cases. We are in
17 very difficult financial times in this state, and this
18 is a huge hit for the State, I think. I have not done
19 the math, but I don't think it is going to be very low.
20 But I think that the Supreme Court has been very clear
21 to trial courts in what they are supposed to do in
22 determining penalties. That is what I have done, to the
23 best of my ability.

24 I think I told both attorneys I am not going to be
25 here after Friday. I, frankly, don't really have a lot

1 of time next week to do anything as far as looking at
2 findings, so I would hope that you can prepare an order
3 by agreement. If you cannot you are going to need to
4 check with my judicial assistant and get a date sometime
5 in late July.

6 MR. BARNES: Your Honor?

7 THE COURT: Mr. Barnes.

8 MR. BARNES: I just have a couple clarifying
9 questions.

10 THE COURT: Go ahead.

11 MR. BARNES: Can you hear me?

12 THE COURT: Yes, go ahead, please.

13 MR. BARNES: I apologize for being outside
14 here.

15 THE COURT: That is okay. Go ahead.

16 MR. BARNES: You found that there were 16
17 records?

18 THE COURT: Yes.

19 MR. BARNES: Okay. And that is not document
20 -- that's between the citations, the correction reports,
21 and the inspection --

22 THE COURT: Yes, those are the documents that
23 were specifically requested in Mr. Bricker's October 1st
24 letter.

25 MR. BARNES: I understand all that.

1 And then you did find that the signed documents
2 that were other than the citations -- you found the
3 inspection reports were responsive to the request?

4 THE COURT: Yes.

5 MR. BARNES: Okay. And the only other thing I
6 have to say is that as far as the witnesses being
7 unprepared -- I realize that this is not a case that I
8 could win. It's a difficult case, but they were
9 subpoenaed on the very day that they were testified, so
10 they didn't have very much time to review.

11 THE COURT: Okay. Mr. Barnes, one thing I do
12 want to say - and I would like to say it to both of
13 you - is that I think the two of you did a good job,
14 and, Mr. Barnes, I don't think -- and I certainly did
15 not mean to imply that you were doing anything other
16 than a good job in a difficult set of circumstances. I
17 don't have a problem with what I saw or what I observed
18 during the course of the trial, so I don't have a
19 problem with what you were doing. If you thought I was
20 saying otherwise, I was not.

21 MR. BARNES: No, I appreciate your patience
22 with that. We were not very well organized.

23 THE COURT: No, you were not. Well, hopefully
24 everybody will learn a little bit from this and you
25 won't come back on another one.

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MR. BARNES: Hopefully.

THE COURT: Thank you. I am going to hang up
the phone, and we will be in recess.

(Recess.)

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C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF THURSTON)

I, Cheri L. Davidson, Notary Public, in and for the State of Washington, residing at Olympia, do hereby certify:

That the annexed and foregoing Verbatim Report of Proceedings, Ruling of the Court, was reported by me and reduced to typewriting by computer-aided transcription;

That said transcript is a full, true, and correct transcript of the ruling announced by Judge Anne Hirsch on the 12th day of June, 2009 at the Thurston County Courthouse, Olympia, Washington;

That I am not a relative or employee of counsel or to either of the parties herein or otherwise interested in said proceedings.

WITNESS MY HAND AND OFFICIAL SEAL THIS _____ day of _____, 2009.

Notary Public, in and for the State of Washington, residing at Olympia

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Dear Clerk of the Supreme Court:

Attached please find for filing Respondent Armen Yousoufian's answer to the State of Washington's amicus brief, together with a sub-joined proof of service.

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