

No. 80081-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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,

Petitioner

v.

ARMEN YOUSOUFIAN,

Respondent.

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SUPPLEMENTAL BRIEF OF RESPONDENT

BRETT & COATS, PLLC
By: Rand Jack, WSBA #1437
P. O. Box 216
Bellingham, WA 98227-0216
360/714-0900

LAW OFFICES OF
MICHAEL G. BRANNAN
By: Michael G. Brannan, WSBA#28838
2033 Sixth Avenue, Suite 800
Seattle, WA 98121
206/448-2065

ATTORNEYS FOR RESPONDENT

ORIGINAL

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I. INTRODUCTION

Petitioner Yousoufian requests that this Court affirm the decision of the Court of Appeals and modify that court's opinion by enumerating factors to guide the trial court's discretion in setting the per day penalty.

II. ASSIGNMENTS OF ERROR

1. Economic loss should not be considered as a special factor for assessing penalties.

2. Deterrence should be a primary consideration in setting per day penalties.

3. If this Court retains the Court of Appeals' WPI categories for assessing culpability, the trial court on remand should be free to classify at least some of King County's misconduct as wanton.

III. STATEMENT OF THE CASE

For his statement of the case, Respondent Yousoufian relies on his Brief of Appellant in the Court of Appeals, pp. 2-9.

IV. ARGUMENT

A. The Decision in this Case will Determine how the Per Day Penalty is Established in all Manner of Future PDA Cases.

Because King County withheld a substantial number of documents for over four years, the number of penalty days already determined by this Court is unusually high. The only element of the statutory penalty

formula yet to be finally decided is the per day penalty. When the large number of penalty days is multiplied by the per day penalty, the fine in this case will be substantial. King County argues that this alone is reason enough to keep the per day penalty low. But that is not the way that the legislature has determined that penalties are to be set for PDA violations. The statute requires that the final penalty be determined by multiplying together three independent elements, each of which must be established on its own merits

Few cases will have nearly so large a number of penalty days as this one. Seldom will a government withhold so many documents for so long and with such disregard for its PDA responsibilities. For all but the rarest of cases, the per day penalty will largely determine whether the penalty is sufficient to sanction the wrong doing, to deter future violations and to give incentive to citizens to take legal action to enforce the Act. In this final stage of Yousoufian, this Court will determine how the per day penalty is set in this case and how it is set in future cases that will seldom, if ever, have nearly so many penalty days. This precedent will significantly impact the vitality of the Public Disclosure Act values and whether penalties will be set under the Act with a degree of uniformity and predictability.

B. The Court of Appeals Correctly Held That the Trial Court Abused its Discretion in Awarding a \$15 Per Day Penalty for King County's Egregious Misconduct.

Given a mandatory penalty scale ranging from 5 to 100 dollars and King County's pervasive pattern of flagrant misconduct, no reasonable judgment could place the per day penalty near the bottom of the scale as the trial court did on remand.

In enacting the \$5-\$100 a day penalty scale, the legislature could not have intended anything other than that the full range of the scale be used in setting per day penalties. It is hard to think of an argument to the contrary. King County has agreed "that the legislature intended for courts to use the entire penalty range (\$5 to \$100). . . ." (King County's Brief on Remand at 7; CP 103).

Using the entire penalty scale, the most culpable and egregious misconduct would naturally place at the top on the scale and innocent, good faith mistakes at the bottom. King County has admitted as much. "[E]gregious misconduct . . . may well justify a per-day penalty at the high end of the range." (King County's Brief on Remand at 8; CP 103).

By any reasonable measure, King County engaged in a pervasive pattern of flagrant, egregious misconduct. The trial court found a lack of good faith; this court and two panels of the Court of Appeals characterized the misconduct as gross negligence. Arguing before this Court, the

Prosecuting Attorney for King County admitted that “for the trial court, it amounted to a finding of gross negligence.” (Plaintiff’s Trial Brief on Remand at 11; CP 11).

Using the full range of the scale and ranking the most egregious misconduct at the top, King County’s blatant, pervasive wrongdoing could not reasonably justify a penalty near the bottom of the scale. After the initial Yousoufian trial, this Court agreed “with the Court of Appeals that assessing the minimum penalty of \$5 a day was unreasonable considering that the County acted with gross negligence.” Yousoufian, 152 Wn.2d at 439. The exact same reasoning again compels agreement with the Court of Appeals that assessing on remand a penalty of \$15 a day, a figure near the bottom 10% of the scale, is likewise unreasonable. Using the full penalty scale, any fair assessment of King County’s persuasive, egregious misconduct must rank close to the top of the scale, not near the very bottom.

C. The Five Categories Established by the Court of Appeals are Helpful But Not the Most Effective Way of Providing Guidance for Assessing Per Day Penalties.

The Court of Appeals took a step in the right direction when it aligned five categories of misconduct along the penalty scale to help guide the discretion of trial courts in setting per day penalties. These five categories, which range from non-negligent, good faith misinterpretation

of the act to willful bad faith violations properly, emphasized in conformity with this Court's decision in Yousoufian, the centrality of culpability in assessing per day penalties. Yousoufian II, 137 Wn.App. at 80. The problem with the categories is that they provide relatively little guidance as to the nature of the misconduct appropriate to each category and they are couched in language more appropriate to tort law than to misconduct under the PDA.

The Court of Appeals agreed with Yousoufian that the purposes of the PDA would be well served if trial courts were given some guidance in setting per day penalties along the penalty scale. However, the Court of Appeals felt constrained from articulating factors to be considered in the penalty setting process. "Because it appears that 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." Yousoufian II, 137 Wn.App at 77-78. Under this constraint, the Court of Appeals did what it could to offer needed guidance to trial courts.

While the Court of Appeals has made welcome progress in requiring the use of the full scale and emphasizing the degree of culpability in the use of the scale, Yousoufian urges this Court now to adopt a set of factors to guide the discretion of trial courts in determining

where a particular violation fits on the penalty scale. A recent PDA appellate case indicates the need for such a change. In remanding the case, the Court of Appeals directed the trial court to set per day penalties “in an amount it determines to be appropriate in light of the relevant circumstances.” Zink v. City of Mesa, 140 Wn.App. 328, 348, 166 P.3d 738, 747 (2007). Unfortunately, the appellate court did not, and perhaps felt that it could not, provide guidance as to what circumstances were relevant to consideration by the trial court. Factors would promote the purposes of the PDA and engender a degree of consistency in penalty decisions that would enable litigants to know what to expect in a given case.

The most effective way to sort cases along the penalty scale, placing worst cases at the top, middle cases in the middle, and the least egregious cases at the bottom, is to establish factors for evaluating and sorting misconduct. Guided by these factors, trial courts would exercise their discretion in evaluating the misconduct, weighing the factors, and assigning the offending to a place on the scale. The following are pertinent considerations for a trial court in setting the per day penalty across the spectrum of the penalty scale:

1. What degree of culpability was indicated by the conduct and attitude of the offending entity in unlawfully withholding documents?

2. Is the per day penalty sufficient to deter future PDA violations by the offending entity or another governmental entity with similar financial resources?

3. Did the request involve a matter of substance and interest to the public, or some subset of the public, including the financial interest of the person making the request?

4. Was the misconduct the work of an errant individual or a pervasive pattern involving a number of people so as to indicate an organizational culture of disregard for the purpose of the Public Disclosure Act?

5. Did the offending entity have an effective system for tracking and retrieving documents and for training and employing personnel?

6. Did the offending entity make a reasonable claim that a statutory exemption applied or that legitimate third party interests prevented production of documents?

7. Did the offending entity take prompt corrective action or was litigation necessary to compel production of the requested documents?

8. With a reasonable effort, could the wrongfully withheld documents have been produced in a timely manner?

9. Was the document request confusing, unusually complex or subject to a good faith misunderstanding that delayed production?

10. Were documents unlawfully withheld in the face of time urgency?

Consideration of these factors would provide a rational, analytical framework leading to reasonably consistent and predictable outcomes without unduly burdening the trial courts' discretion.

D. Economic Loss is Not a Special Factor for Assessing Penalties.

At every stage of this case, King County has sought to elevate economic loss as a major factor in setting the per day penalty and as a justification for reducing the penalty assessed against King County. Yet, King County now acknowledges that "economic loss does not appear to be a factor in the vast majority of PDA cases. King County has uncovered only two published decisions in the past 15 years that mention this factor. *See Amren v. City of Kalama*, 131 Wn.2d 25, 37, 929 P.2d 389 (1997); *Yacobellis v. City of Bellingham*, 64 Wn.App. 295, 825 P.2d 324 (1992)." (King County's Reply in Support of Petition for Review at 1). In both cases the mention of economic loss was dicta; in neither did economic loss affect in the court's decision. The trial court on remand referred to the

economic loss factor, but it is not clear what weight, if any, was given to this factor. (Order on Remand at 4; CP 126).

Nothing in the history or purpose of the PDA suggests a special status for economic loss as a penalty factor. The overarching purpose of the penalty provisions of the Act is to discourage misconduct that thwarts citizens' right to access to information about the workings of government. The penalty provisions of the Public Disclosure Act are just that, a penalty, not a form of damages or recompense. Yacobellis v. City of Bellingham, 64 Wn.App. 295, 300, 825 P.2d 324 (1992). The statute levies a penalty for non compliance; it does not set up a structure for awarding damages. If damages are sought, tort litigation is appropriate.

At most, economic loss indicates that the document request was serious and substantial, but no more serious and substantial than a matter of significant public interest. Someone suffering financial loss due to the withholding of documents does not make a claim superior to a citizen acting as a private attorney general or to a neighborhood association that has lost a park. A developer who wants to fill a wetland and loses money because documents were withheld should not be awarded a higher per day penalty than an environmentalist who wants to protect the wetland and who, along with the community, loses the wetland because of documents withheld. To award higher penalty status to those acting in self interest

than to those acting in the public interest would turn the purposes of the PDA on their head. Given that the statute provides for fines and not damages, the citizen acting on principle or for the public good should not receive less than someone who loses money and has other recourse.

Formulation of a factor that focuses on the serious, substantial nature of a request and considers these various interests would ask whether the request for documents involves a matter of substance and significance interest to the public, or some subset of the public, including the personal interest of the person filing the request.

E. Deterrence Should be a Primary Consideration in Setting Per Day Penalties.

A central purpose of the penalty provisions of the Public Disclosure Act is “to discourage improper denial of access to public records. . . .” Yousoufian, 152 Wn.2d at 429-30, quoting Hearst Corp v. Hoppe, 90 Wn.2d 124, 140 (1978). For this reason, deterrence should be a primary factor in setting a per day penalty.

King County argues that “Courts are free to consider the amount necessary for deterrence.” (King County’s Reply in Support of Petition for Review at 3.) However, given the centrality of deterrence in the PDA penalty scheme, courts should not just be free to consider deterrence, but should be required to. Exactly how the trial court evaluates what is

needed for deterrence in a given case is up to the discretion of the trial court, but the requester of documents and the recipient of that request should know that deterrence will be considered if documents are unlawfully withheld and a fine is levied.

After stating that trial courts are free to consider “the amount necessary for deterrence,” King County goes on to say that “Indeed, that is precisely what the trial court did in this case. CP 55.” Id. King County fails to point out that its reference is to the Findings of the original trial court, not to the trial court on remand whose decision is now under review. In its written decision, the trial court on remand did not say a word about deterrence. That it assessed per day penalty practically at the bottom of the scale strongly suggests that deterrence was not a factor. Such neglect of a critical consideration would be avoided by this Court adopting a set of guiding factors.

F. If this Court Retains the WPI Categories for Assessing Culpability, the Trial Court on Remand Should be Free to Classify at Least Some of King County’s Misconduct as Wanton.

King County’s misconduct has been repeatedly characterized as gross negligence – by this Court, by two panels of the Court of Appeals and by the County itself. However, if the conduct described in the Findings of Fact is analyzed in light of the five categories described by the

Court of Appeals at 80, wanton misconduct would seem to be a better fit than gross negligence, or at least there is a mix of gross negligence and wanton misconduct.

WPI 10.07 defines gross negligence:

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.

WPI 14.01 defines wanton misconduct:

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.

While the Findings by the original trial court undoubtedly describe acts of “substantially less than ordinary care,” they also describe the “intentional” doing of acts “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 violation of the PDA.

For instance, on October 9, 1997, a King County employee intentionally wrote to Yousoufian, in reckless disregard of the consequences, “that an Executive Office archival search had been

performed and that documents responsive to his request were being forwarded to their attorneys for review.” (Findings at 8; CP 35). This was not true. In fact, that same day a different employee wrote to Yousoufian “stating that there were no more responsive documents.” This too was not true. Id. Employees intentionally told Yousoufian that all responsive documents had been produced, that the documents were being complied, that Yousoufian could find the documents he sought in the Finance Office, that hundreds of hours had been spent trying to retrieve documents and that the Executive is only responsible for documents in the Executive’s office. (Findings at 4, 11 and 12; CP 31, 38 and 39). None of these representations were true. They were all done with reckless disregard for the consequences and under conditions that King County should have known that they would likely result in PDA violations. The failure to have trained personnel and a system for complying with document requests were likewise intentional omissions done in reckless disregard for readily knowable consequences.

A trial judge on remand should be free to weigh this wanton misconduct in assessing a penalty.

V. REQUEST FOR COSTS AND ATTORNEY FEES

RCW 42.17.340(4), now RCW 42.56.550(4), requires that “any person who prevails” in a PDA case “shall be awarded all costs, including

reasonable attorney's fees, incurred in connection with such legal action.”

This provision is mandatory and its “strict enforcement . . . discourages

improper denial of access to public records.” Spokane Research and

Defense Fund v. City of Spokane, 155 Wn.2d 89, 101, 117 P.3d 1117

(2005). Should Yousoufian prevail in this matter before this Court, he

respectfully requests costs and reasonable attorney's fees as provided by

statute. *See also* RAP 18.1(b).

V. CONCLUSION - RELIEF SOUGHT

Armen Yousoufian requests that this Court affirm the Court of

Appeals' reversal of the trial court and modify the opinion of the Court of

Appeals by enumerating factors to be considered by a trial court in

exercising its discretion to set the per day penalty for violation of the

PDA.

Though thinly veiled in legal arguments, King County's real and

repeated complaint is that the fine earned by the County is just too much;

rather than follow the three part legislative mandate, trial courts should

just make a lump sum penalty decision that feels right; somehow, the

penalties in this lawsuit are not King County's fault.

King County could have avoided these penalties, as have most

government entities in the State, by complying with the Act. Even a good

faith effort to comply would have minimized the penalties. King County chose neither course and as a result must face the consequences.

Many people believe that democratic institutions at the national level are now under stress. At times like this it is all the more important to shore up the underpinnings of democracy at the state level. No statute in Washington State is as explicitly committed to maintaining the principles and institutions of open government and the role of citizens in a democracy as the Public Disclosure Act. Events giving rise to this case happened years ago and may at this point seem a bit stale. But the precedent set by this Court will be fresh and will have a decisive effect on compliance with the Public Disclosure Act and the health of democracy in the State of Washington.

DATED this 7th day of February, 2008.



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