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I. INTRODUCTION

The trial court found the Attorney General's Office ("AGO") violated the Public Records Act ("PRA")¹ by wrongfully withholding documents and by failing to explain why withheld documents were allegedly exempt under the PRA. CP 1718, 1724-1725. The trial court, however, issued a penalty at the very bottom of the PRA penalty range.

In addition, as discussed in the Honorable Richard B. Sanders' ("Justice Sanders") briefs on appeal, the AGO violated the PRA when it waited until after the initiation of litigation to produce documents, incorrectly applied privilege claims to non-exempt documents and shifted its claims of exemptions multiple times.²

Two Supreme Court decisions issued subsequent to the briefing on appeal further confirm the trial court's error in the penalty assessed and the limited finding of PRA violation. In *Yousoufian v. Office of Sims* ("*Yousoufian III*"), No. 80081-2, 2009 WL 92066 (Wash. Jan. 15, 2009), the Supreme Court outlined a multifactor framework for awarding penalties for PRA violations. *Id.* at *8. *Yousoufian III's* framework

¹ Currently codified in chapter 42.56 RCW. Formerly chapter 42.17 RCW. Consistent with Justice Sanders' prior briefing, all citations to the PRA are made to the current codification.

² See Opening Brief of the Honorable Justice B. Sanders (hereinafter "Opening Br."), pp. 19-41; Response and Reply Brief of the Honorable Richard B. Sanders (hereinafter "Response and Reply Br."), pp 6-19.

examines the agency's response to the PRA request and prescribes higher penalties where an agency does not strictly comply with the law or creates barriers to accessing public records. *Id.* In this case, applying that framework mandates a penalty award on the higher end of the scale consistent with Justice Sanders' original request.

Moreover, in *Rental Housing Association of Puget Sound v. City of Des Moines* ("Rental Housing Association"), No. 80532-6, 2009 WL 146541 (Wash. Jan. 22, 2009), the Court held that responses to PRA requests that inadequately detail claims of exemption do not trigger the running of the PRA's one year statute of limitations. *Id.* at *1. The Court held that the city's response was inadequate because it did not inform the requestor which exemptions were being claimed for each withheld record and did not provide an explanation that allowed the requestor to assess the validity of each claimed privilege. *Id.* at *8. Application of *Rental Housing Association* demonstrates the inadequacy of the AGO's responses to Justice Sanders and its continual failure to comply with the PRA.

This recent guidance from the Supreme Court confirms the trial court erred (1) in its assessment of a PRA penalty and (2) in its determination that the AGO did not commit significant PRA violations in its handling of claims of exemptions. This Court should reverse as to those issues as well as those specified in earlier briefing.

II. SUPPLEMENTAL STATEMENT OF THE CASE

In 2004, Justice Sanders was defending himself against a complaint before the Commission on Judicial Conduct (“CJC”).³ CP 420-423. In an attempt to discover public documents that may aid in his defense, Justice Sanders delivered a written request for public records to the AGO on June 15, 2004. CP 422, 475, 478-479. In response, the AGO sent two letters to Justice Sanders. The first, on June 24, 2004, acknowledged receipt of Justice Sanders’ request. CP 481-482. The second, on July 8, 2004, enclosed documents that the AGO had provided to Tim Ford of the Building Industry Association of Washington to fulfill a different PRA request. CP 484. Neither of the AGO’s response letters expressed confusion over Justice Sanders’ PRA request nor asked for clarification of the request. CP 481-84.

Along with the documents produced to Mr. Ford, the AGO provided Justice Sanders with an “Entire Document Index” (“EDI”). CP 571-606. The EDI identified which public records were produced in their entirety and which were either withheld or redacted. CP 571-606. While the EDI included a “Privilege” column, it was left blank for many

³ Justice Sanders incorporates by reference the pertinent facts of this case as detailed in his Opening Brief and Response and Reply Brief.

documents and offered no explanation of the claimed exemptions. *See* CP 571-606.

The CJC issued its decision in Justice Sanders' case on March 22, 2005. CP 421.

Justice Sanders filed this case in the Thurston County Superior Court on July 21, 2005, along with a motion to show cause against the AGO. CP 5-50, 97-100. After the onset of litigation, the AGO produced records that it had originally claimed were exempt. CP 487-488. In its first subsequent production, on September 14, 2005, the AGO produced more than 200 pages of records and provided a second exemption log. CP 487, 608- 934. The AGO produced five more records on September 15, 2005, one record on September 27, 2005, and with this last record, produced a third exemption log. CP 488, 936-1011. In the second and third exemption logs, the claimed exemptions changed for some records and the logs still failed to provide an explanation of how the alleged exemptions actually applied to the withheld records. CP 919-932, 1001-11.

The AGO's failure to explain how its claimed exemptions applied to the documents in question forced Justice Sanders to note a CR 30(b)(6) deposition on this topic. CP 499-501. The AGO's CR 30(b)(6) designee could not explain the grounds for exemption and only read what was

written on the exemption logs in response to questions. CP 564-565.

On November 4, 2005, the AGO moved for summary judgment. CP 106-126. Attached to its motion, the AGO submitted a document entitled "Appendix A," which for the first time provided an explanation of how the AGO's exemptions purportedly applied. CP 127-154. Justice Sanders then filed a cross-motion for summary judgment. CP 391-415.

On January 12, 2007, the trial court ruled on the cross-motions for summary judgment. CP 1361-1437.⁴ The court ruled that the AGO wrongfully withheld records. CP 1724-1725. The court also ruled that the AGO violated the PRA because "the part of [the PRA] requiring a brief explanation of how the exemption applies to the record withheld has not been satisfied. It is clear that the Entire Document Index is devoid of any explanation." CP 1718.

Justice Sanders then moved for fees and penalties. CP 1633-1649. Justice Sanders requested the court award a penalty of \$70 per day for each record wrongfully withheld based on the fact that the AGO intentionally withheld documents, shifted its claims for exemptions, produced numerous exemption logs, contradicted its own 30(b)(6) witness, and did not provide any means to assess the validity of claimed

⁴ The court's amended opinion was issued July 27, 2007. CP 1712-1725.

exemptions until dispositive motions were filed. CP 1644-47. Justice Sanders also requested an award of all of his fees and costs. CP 1640.

Despite the fact that the court found the AGO wrongfully withheld records, the court only imposed a penalty rate at the statutory minimum of five dollars per day. CP 1867. The court based this penalty amount on its finding that “the AGO acted in good faith throughout this process.” CP 1866. The court then added a penalty of three dollars per day for the AGO’s failure to provide a brief explanation of its claimed exemptions. CP 1868. The court found three dollars per day appropriate because it determined that this separate violation of the PRA was of “minimal impact.” CP 1867.

Following entry of judgment, this appeal proceeded.

III. ARGUMENT

The framework set forth by the Supreme Court in *Yousoufian III* to determine the appropriate penalty for PRA violations demonstrates the inadequacy of the trial court’s assessment in this case. In his Assignments of Error, Justice Sanders asked “[w]hether more than de minimis penalties are required where the AGO violated the PRA in multiple respects, including the withholding of non-exempt documents and the failure to provide explanations of documents it withheld?” Opening Br., at p. 6.

Yousoufian III dictates that this question should be answered in the affirmative and Justice Sanders awarded his requested penalties.

A. *Yousoufian III* Requires Examination of Multiple Factors to Assess the Proper PRA Penalty.

The Supreme Court's opinion in *Yousoufian III* confirms that the trial court erred by awarding only minimal penalties to Justice Sanders for the AGO's violations of the PRA.⁵ The Court in *Yousoufian III* stated that "the trial court must consider the entire penalty range established by the legislature...reserving the extremes for the most and least culpable conduct, allowing the rest to fall somewhere in between."⁶ *Yousoufian III*, at *8. The Court then enumerated seven mitigating and nine aggravating non-exclusive factors to assist courts in determining the appropriate per day penalty.⁷ *Id.* Additionally, the Court warned that to presume the minimum penalty as a starting point is error. *Id.* The Supreme Court provided this framework in order to prevent piecemeal penalty awards such as that awarded by the trial court. *Id.* at *9. Moreover, in *Yousoufian*

⁵ Determining the appropriate PRA penalty involves two steps: (1) determination of the amount of days the PRA was violated and (2) determination of the appropriate per day penalty depending on the agency's actions. *Yousoufian III*, at *5. The Supreme Court's opinion in *Yousoufian III* only addresses the second step. *Id.*

⁶ The PRA allows penalties to range between five dollars and one hundred dollars per day. RCW 42.56.550(4) (former RCW 42.17.340(4)).

⁷ The factors may overlap and many of the aggravating factors are simply the inverse of mitigating factors. *See Yousoufian III*, at *8.

III, the Court rejected application of a simple good faith/bad faith dichotomy to determine penalties. *Id.* at *5-6.

B. The *Yousoufian III* Factors Mandate a Penalty in the Upper Part of the Penalty Range.

As in *Yousoufian III*, this case presents several aggravating factors and no mitigating ones. *Yousoufian III*, at *9. The AGO violated the PRA in disregard not only of the law, but also of its own rules and regulations. The AGO's response to Justice Sanders' PRA request provided an elusive target by involving multiple exemption logs, with varying claims of exemption, a failure to explain how documents fit into those exemptions, and an unprepared CR 30(b)(6) witness. Overall, the AGO created an increased risk of public harm by failing to disclose non-exempt records in a timely manner. An award in the higher end of the penalty range is appropriate.

1. The AGO's Response to Justice Sanders Violated the PRA and was Marked with Hostility and Unreasonable Explanations.

A number of *Yousoufian III* factors focus on the agency's response to the PRA request. These include whether the agency promptly responds or legitimately follow-ups for clarification, whether the agency acts in good faith and honest, timely, and strict compliance with the PRA, whether the agency acts with negligent, reckless, wanton, bad faith, or

intentional noncompliance with the PRA, the agency's helpfulness to the requestor, and the reasonableness of any explanation for noncompliance.

Yousoufian III, at *8.

Here, it required protracted litigation for the AGO to provide non-exempt documents to Justice Sanders and a compliant exemption log. CP 1782. Justice Sanders submitted his PRA request to the AGO on June 15, 2004. CP 475, 478-479. Some documents were produced but hundreds of pages of documents were wrongfully withheld. An exemption log with mostly blanks for exemptions was produced. It was not until after this case was filed that the AGO began to produce hundreds of pages of documents it had originally claimed were exempt from production. CP 487-488. Although the wrongful withholding of documents until after a requestor institutes litigation is a violation of the PRA, the trial court did not find the AGO's actions here to be a violation. Opening Br., pp 19-20. The litigation resulted in the production of nine additional documents that the trial court ruled were inappropriately claimed as exempt constituting a violation of the PRA. The AGO's wrongful withholding and untimely responses call for a higher penalty. *Yousoufian III*, at *8.

The AGO's noncompliance with the PRA's basic requirements is exacerbated by the lack of reasonable explanation for its noncompliance, despite multiple opportunities for the AGO to provide such explanation.

See Yousofian III, at *8-9. Indeed, not only did the AGO fail to provide reasonable explanations, it shifted its claimed exemptions and failed to explain how any exemptions applied. As a result, Justice Sanders was denied the chance to test or rebut the AGO's assertions relative to particular documents.

The significance of the AGO's misconduct in this respect is highlighted by the Supreme Court's decision in *Rental Housing Association*. In that case, the Court held that "[f]ailure to provide the sort of identifying information a detailed privilege log contains defeats the very purpose of the PRA to achieve broad public access to agency records." *Rental Housing Association*, at *8. Required information includes "(1) what individual records are being withheld, (2) which exemptions are claimed for individual records, and (3) whether there is a valid basis for a claimed exemption for an individual record." *Id.* Indeed, the Court pointed to the AGO's own rules to emphasize that an agency must provide information that "allow[s] a requestor to make a threshold determination of whether the agency has properly invoked the exemption." *Id.* (quoting WAC 44-14-04004(4)(b)(ii)); *see also* RCW 42.56.210(3).⁸

The burden to produce all non-exempt documents and explain exemptions rests with the AGO. RCW 42.56.210(3). Here, the AGO

submitted three different exemption logs in this case, all of which failed to meet the statutory standard as confirmed by *Rental Housing Association*. The initial exemption log, the EDI, contained a column labeled “Privilege” which provided only statutory references. CP 571-606. Justice Sanders was unable to ascertain the reasonableness of the AGO’s withholding because the EDI was “devoid of any explanation.” CP 1718. Further, the attorney-client privilege, RCW 5.60.060(2), was the claimed basis of exemption for only one document in the EDI. CP 604.

After Justice Sanders initiated litigation, the AGO issued to Justice Sanders a second exemption log, along with its first subsequent production of documents. CP 914-917. The second log repeated the initial violations of the PRA by providing only a statutory reference with no explanation of the privilege claimed or how it applied to the withheld document. CP 914-917. Further, the basis for exemption changed for some documents, with the attorney-client privilege statute now asserted for five documents. CP 914-917.

Subsequent to the second log, the AGO produced more documents. CP 936. Finally, on September 27, 2005, the AGO sent Justice Sanders an additional document and a *third* exemption log. CP 995, 1001-1011. Despite producing three different exemption logs, including two after the

⁸ Former RCW 42.17.310(4).

onset of litigation, the AGO never provided Justice Sanders with the explanation for its claimed exemptions that was required from the very beginning. *See Rental Housing Association*, at *8.

It was not until this dispute came to cross-motions for summary judgment, 17 months after Justice Sanders filed his PRA request, that the AGO produced “Appendix A” which, for the first time, purportedly explained why certain exemptions applied to specific documents. CP 127-154. Moreover, in Appendix A, the AGO continued to change its claimed exemptions, invoking the Other Statute Exemption for five documents where it was only invoked once in the EDI. CP 443. Tellingly, the AGO claimed at least 20 documents as exempt by virtue of the attorney-client privilege in Appendix A. CP 443-444. Yet, in the EDI, the AGO only invoked the attorney-client privilege once. CP 442. And, significantly, Appendix A raised the AGO’s “common interest” claim for the first time. CP 442-443.

The AGO further exacerbated its violations when Justice Sanders specifically sought discovery to understand the AGO’s rationale and justification for invoking each individual exemption through a CR 30(b)(6) deposition. CP 499-501. The AGO should have produced a CR 30(b)(6) witnesses to address the request or, alternatively, prepared its CR 30(b)(6) designee to provide meaningful answers. *Flower v. T.R.A.*

Indus., Inc., 127 Wn. App. 13, 39, 111 P.3d 1192 (2005) (“produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete, knowledgeable and binding answers’”) (citations omitted).

The record reflects the inadequacy of the AGO’s response to the CR 30(b)(6) deposition notice. The very first subject on which Justice Sanders requested discovery from the AGO’s CR 30(b)(6) witness was “[t]he grounds for each exemption claimed....” CP 501 (emphasis added). Justice Sanders further requested discovery into “[t]he existence of, the nature of, and parties to any attorney-client relationship claimed” and “[t]he nature of any claimed case or controversy claimed as a basis for any exemption....” CP 501. Ms. Shirley Battan, the AGO’s designated CR 30(b)(6) witness, admitted at the deposition that she could not explain the grounds for exemption for any of the documents beyond reading the EDI and parroting what was written on the paper. *See* CP 563-565. Ms. Battan’s testimony illustrates the AGO’s failure to comply with both its CR 30(b)(6) obligations and its duty under the PRA to “provide for the fullest assistance to [Justice Sanders] and the most timely possible action....” RCW 42.56.100;⁹ *see also Yousoufian III*, *8.

⁹ Former RCW 42.17.290.

These actions go beyond mere technical violations of the PRA. The AGO's unhelpfulness, lack of timely and strict compliance with the PRA and lack of reasonable explanations are aggravating factors in the penalty analysis. *Yousoufian III*, at *8.

2. The AGO Failed to Properly Train Personnel and Supervise the Response to Justice Sanders PRA Request.

Yousoufian III identifies several penalty factors that focus on the agency's internal procedures. *Yousoufian III*, at *8. Aggravating penalty factors include lack of proper training and supervision of personnel and the response. *Id.* A penalty may be mitigated if adequate systems to track and retrieve records exist. *Id.*

The Court must at least presume that such factors further aggravate the penalty required in this case. The AGO is legal adviser to the state and promulgates administrative rules and guidance for the PRA. *See* ch. 44-14 WAC. Indeed, the AGO's website proclaims that:

Attorney General Rob McKenna believes access to open government is vitally important in a free society. That's why he's made government accountability, open records and access one of the top priorities in his administration.... [C]itizens have faced increasing obstacles and frustration in their efforts to gain access to government and information. Strong 'sunshine laws' are crucial to assuring government accountability and transparency."¹⁰

¹⁰ <http://www.atg.wa.gov/OpenGovernment/default.aspx>.

As the Supreme Court pointed out, the AGO knows (or certainly should know) the requirements of the PRA with respect to the creation of a proper exemption log. *Rental Housing Association*, at *8 (citing WAC 44-14-04004(4)(b)(ii)). The fact that the AGO did not provide an explanation of allegedly exempt records here, and then continually refused to do so given multiple opportunities to comply, suggests at least lack of adequate preparation and oversight.

3. The AGO's PRA Violations Created Serious Consequences for Justice Sanders and the Public.

The Court in *Yousoufian III* considered the effect of the PRA violation on both the requestor and the public in its penalty analysis. *Yousoufian III*, at *8. The potential for public harm, including loss of government accountability, aggravates a penalty award. *Id.* The Court clarified that actual public harm is not required in order to award a higher penalty. *Id.* at *6. The penalty should also reflect an amount necessary to deter future misconduct considering the size of the agency and the particular facts. *Id.* at *8.

The AGO's denial of access to public records posed a particularly acute potential for public harm in this case. Justice Sanders sought the records in connection with his defense before the CJC. CP 419-423. Timely and proper compliance with the PRA was required in order for

Justice Sanders to assess his position in the ethics proceeding, a proceeding which ended almost four years ago. CP 421. Where, as here, an agency's noncompliance with the PRA moots the usefulness of the documents a larger penalty is required. *Yousoufian III*, *8 n. 10. This is particularly true when the documents pertain to pending legal proceedings.

Further, the penalty amount should fall on the high end of the spectrum to deter future misconduct considering the size of the agency and the facts. *Yousoufian III*, at *8 n. 12 (“A flea bite does little to deter an elephant.”). As noted above, the AGO is the state's legal advisor. The AGO is a large, statewide office and the facts of this case indicate that the only reason the AGO ultimately complied with the PRA was because Justice Sanders filed suit. That the violations continued to occur even after the onset of litigation indicates that a large penalty is required so that in the future the AGO will comply with the PRA from the beginning.

4. Justice Sanders' Submitted a Clear PRA Request.

The Court in *Yousoufian III* also examined the PRA request itself. Lack of clarity in a PRA request may mitigate the penalty amount. *Yousoufian III*, at *8. Where, however, a request is “neither vague nor ambiguous, but clear on its face,” mitigation of the penalty is not appropriate. *Id.* at *2.

Justice Sanders submitted a request that clearly asked for documents and communications related to his visit to McNeil Island and subsequent actions by the CJC. CP 478-479. The request contains no ambiguity as to its scope or intent. Indeed, that the AGO readily understood Justice Sanders' request is demonstrated by the fact that it did not ask for clarification in its initial response. CP 481-482; *see Yousofian III*, at *2. Nor did the AGO express confusion over the request or ask for clarification in its letter producing records. CP 484. If an agency is unclear as to the scope of the PRA request, the law allows the agency to ask for clarification. RCW 42.56.520.¹¹ The substance of Justice Sanders' request is not a mitigating factor that would suggest a lower penalty rate.

IV. CONCLUSION

The Supreme Court's opinion in *Yousofian III* confirms the factors Justice Sanders has advocated are relevant to calculating the appropriate per day penalty for PRA violations. Applying the *Yousofian III* factors to the AGO's conduct in response to Justice Sanders' PRA request demonstrates the trial court abused its discretion by awarding a penalty near the bottom of the penalty range. Justice Sanders respectfully requests this Court hold that the trial court erred in its penalty award,

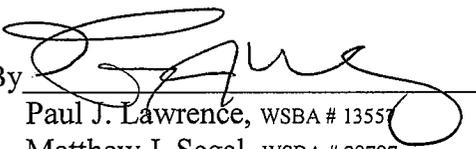
¹¹ Former RCW 42.17.320.

determine all issues on appeal, including the proper amount of penalties under *Yousoufian III*, and award Justice Sanders a penalty of \$70 per day. Such an award is appropriate in light of the many aggravating penalty factors present and absence of mitigating ones.

DATED this 2nd day of March, 2009.

Respectfully submitted,

K & L GATES LLP

By 

Paul J. Lawrence, WSBA # 13557

Matthew J. Segal, WSBA # 29797

Gregory J. Wong, WSBA # 39329

Attorneys for Appellant/Cross-Respondent

The Honorable Richard B. Sanders

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DIVISION II

Honorable Richard B. Sanders,

Appellant,

v.

State of Washington,

Respondent.

No. 35920-1-II

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on the 2nd day of March, 2009, I caused true and correct copies of the Honorable Richard B. Sanders' Supplemental Brief re: *Yousoufian v. Office of Sims* to be delivered to the following:

Peter R. Jarvis Esq.
Hinshaw & Culbertson
1000 SW Broadway, Suite 1950
Portland, OR 97205-3078
Phone: (503) 243-3243

Via U.S. Mail

Timothy G. Leyh
Randall Thompson
Katherine Kennedy
Danielson Harrigan Leyh &
Tollefson LLP
999 3rd Avenue, Suite 4400
Seattle, WA 98104-4017
Phone: (206) 623-1700

Via Legal Messenger

Dated this 2nd of March, 2009.


Katie Melchior