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No. 35920-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

HONORABLE RICHARD B. SANDERS,

Appellant,

vs.

STATE OF WASHINGTON,

Respondent and Cross-Appellant.

THE STATE OF WASHINGTON'S SUPPLEMENTAL BRIEFING REGARDING NEW *YOUSOUFIAN* OPINION

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I. INTRODUCTION

The Supreme Court's recent decision in *Yousoufian v. Office of Sims*, ___ Wn.2d ___, ___ P.3d ___, 2009 Wash. LEXIS 4 (Jan. 15, 2009) (hereafter, "*Yousoufian*"), does not affect the trial court's rulings in this case, nor require a remand.

Yousoufian does not change the established principle that the trial judge has discretion to set penalties under the PRA and that appeals courts are not authorized to "guide" the trial judge to a particular result. With the exception of the issues raised in the State's cross-appeal (which *Yousoufian* does not address), the trial court here did not abuse its discretion in its penalty Order. In fact, the trial court expressly addressed all but four of the 16 factors in *Yousoufian's* multi-factor test (and the effects of those four can be reasonably inferred, or are moot).

To the extent that *Yousoufian* provides a "new" standard to guide the trial court's discretion, or identifies any factors that the trial court did not expressly consider, *Yousoufian* should not apply retroactively to require a remand. During two years of briefing and argument, the State (and Justice Sanders) reasonably relied on well-established Washington law with respect to statutory penalties and related issues. The costs and delays involved with a remand in this case would be prejudicial, unjustified, and unnecessary.

II. RELEVANT FACTUAL BACKGROUND

The parties in this PRA case filed six motions in the trial court (not including stipulated motions), involving 20 memoranda and 19 declarations plus exhibits. By December 20, 2007, when the trial court issued its 27-page Order on Plaintiff's Motion for Penalties, Attorney's Fees and Costs ("Order on Penalties"),[1] the court had considered more than 700 pages of briefing and declarations, plus hundreds of pages of documents submitted for *in camera* review.

The State's conduct in this case, as reflected in the trial court's rulings, was the polar opposite of the conduct involved in *Yousoufian.* In *Yousoufian,* King County demonstrated an utter "lack of good faith"; there was "a complete lack of coordination," "absolutely no effective oversight," and no "effective system for tracking a PDA request to ensure compliance." The County made numerous misrepresentations to the requestor and "incorrect statements, both factual and legal" with "no effort . . . to verify the accuracy of those statements." The County staff responding to the document requests "had only a rudimentary understanding of the County's responsibilities under the PDA and apparently were not trained in how to locate and retrieve documentation,

or didn't take the trouble to do so." *Yousoufian v. Office of Ron Sims,* 137 Wn. App. 69, 72-73, 151 P.3d 243 (2007).

The *Yousoufian* court summarized the egregious nature of the County's conduct:

> [T]he unchallenged findings of fact demonstrate King County repeatedly deceived and misinformed Yousoufian for years. King County told Yousoufian it produced all the requested documents, when in fact it had not. King County told Yousoufian archives were being searched and records compiled, when in fact they were not. King County told Yousoufian the information was located elsewhere, when in fact it was not. After years of delay, misrepresentation and ineptitude on the part of King County, Yousoufian filed suit; nevertheless it would still take another year for King County to completely and accurately respond to Yousoufian's original request, well past the purpose of his request[:] the referendum on public financing of a sports stadium.

2009 Wash. LEXIS 4 at *10-11.

The State's conduct in the case at bar could not be more different. The trial court held that "the measure of success [in the PRA action] tips overwhelmingly in favor of the Attorney-General's Office ('AGO')."[2] The State "acted in good faith throughout this [PRA] process."[3] Its invocation of exemptions was "not evidence of some malice or negligence

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[1] On January 12, 2007, the trial court had issued a 77-page ruling, after *in camera* review, which addressed various issues of PRA interpretation as well as the State's claims of exemptions for 148 specific documents.

[2] CP 1846 (Order on Plaintiff's Motion for Penalties, Attorney's Fees and Costs ("Penalty Order"), CP 1866 (Oral Ruling incorporated by reference in Penalty Order).

[3] CP 1847; CP 1866-68.

or other factor that would justify a higher penalty."[4] The State made timely responses,[5] conducted a "legally sufficient search for public records,"[6] and complied with the statutory requirement for a statement of specific exemptions.[7] The State prevailed on about 96% of its withheld documents (after factoring in duplicates),[8] and three of the four "major issues"[9] in the case.[10]

In setting the penalty at $5/day, the trial court reasoned:

> None of the arguments offered by Justice Sanders for a very high [penalty] rate are supported by the evidence before this court. There is no pattern of shifting claims of exemption here. Only one claim of exemption was made on all of the records that were ordered to be produced after wrongful withholding. That was Section .310(1)(j); the claim for exemption on those records was consistent from beginning to end.
>
> Second, the AGO prevailed in the vast majority of its claims of exemption. Where production has been ordered by this court, the issue presented has been complex and the decision a close decision. It hinged on how broadly I interpreted the "relevant to a controversy" requirement under .310(1)(j). Every record ordered to be produced was tied in some manner to the litigation that did qualify as relevant to a controversy. I determined that the connection was too remote for the records I ordered produced, but it was a close question.

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[4] CP 1868.

[5] CP 1866.

[6] CP 1846; CP 1852.

[7] CP 1847; CP 1852-53; CP 1363-69.

[8] CP 1846; 1854-55.

[9] CP 1846; CP 1858-61.

[10] *Id.*

> Finally in this respect, I find that the AGO acted in good faith throughout this process. The record here is that it made a timely disclosure initially and that disclosure was at least as broad, perhaps broader than the disclosure requested by Justice Sanders, because it also conformed to the request for disclosure made by the BIAW.
>
> Next, when Justice Sanders first responded to the production of documents, he did so by filing a lawsuit against the AGO. The AGO immediately contracted with an independent law firm to conduct a full examination of the exemptions that it had claimed. These exemptions were reviewed, and at the end of the process, no exemption was changed. However, the AGO did produce 33 additional documents, additional records that it concluded could be produced even though it maintained its right to claim exemption for those documents.
>
> I sustained the claim of exemption on 30 of the 33 documents.
>
> Applying the analysis of well established precedent, including *Yousoufian*, I conclude that a minimal penalty is appropriate here—$5 per day is justified—except I determined that the AGO had not complied with the brief explanation requirement of Section .310(4). I find this noncompliance had minimal impact on the case. No inquiry was made [by Justice Sanders], and no contact [with the AGO] was had at all until the case was filed. . . Nevertheless, this failure to comply justifies an additional amount of penalty. I determine this to be $3 per day . . . .[11] (emphasis added)

The trial court's penalty decision was firmly grounded in the then-controlling law, including *Yousoufian*, 137 Wn. App. 69, 151 P.3d 243 (2007). The "well established precedent" relied on in the Court of Appeals' *Yousoufian* case was quoted by the State in its penalty briefing:

> [T]he "minimum statutory penalty should be reserved for such

[11] CP 1865-67.

> 'instances in which the agency has acted in good faith, but through an understandable misinterpretation of the PDA or failure to locate records, has failed to respond adequately." Then, working up from the minimum on the penalty scale, instances where the agency acted with ordinary negligence would occupy the lower part of the penalty range. Instances where the agency's actions or inactions constituted gross negligence would call for a higher penalty than ordinary negligence, and instances where the agency acted wantonly would call for an even higher penalty. Finally, instances where the agency acted willfully and in bad faith would occupy the top end of the scale.[12]

In addition to *Yousoufian,* the "well-established precedent" (argued by the State on the penalty issue) included *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004) (in setting a penalty, the court must consider whether an agency claimed an exemption in bad faith); *Lindberg v. County of Kitsap*, 133 Wn.2d 729, 747, 948 P.2d 805 (1997) (when lack of bad faith exists, trial court acted within its discretion in awarding less than the maximum statutory penalty); and *Amren v. City of Kalama,* 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997) (a principal factor in setting a penalty is the presence or absence of the agency's good faith).[13]

The trial court closely followed this precedent when it assessed the State's conduct. The court held that the State acted in good faith and correctly applied the PRA in all respects except one: it misunderstood the need for a "brief explanation" on its exemption logs, separate from the

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[12] CP 1770 (State's Opposition at 10) (citing to *Yousoufian*, 137 Wn. App. at 80).

description of each document and the applicable exemptions. The court added a $3-per-day penalty for that omission, for a total penalty of $8 day. Applying that rate, the trial court assessed $18,112 in statutory penalties against the State (plus $55,443 in attorney's fees and costs). Justice Sanders had sought $614,670 in statutory penalties,[14] or an average of $134,336 for each of the six documents on which he "prevailed."

III. ARGUMENT

A. *Yousoufian* Does Not Change the Result in this Case.

1. A majority of the Justices in *Yousoufian* agreed that the penalty decision is left to the trial court's discretion, and that the appeals court cannot, in effect, impose its "preferred" result.

RCW 42.56.440(4) (formerly RCW 42.17.340), provides:

> [I]t shall be within the discretion of the court to award an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(emphasis added). "The court" is the trial court. *See Yousoufian v. Office of King County Executive,* 152 Wn.2d 421, 431, 98 P.3d 463 (2005) (discretion to calculate penalty rests with trial court, not appellate court).

While acknowledging the trial court's discretion, *Yousoufian* "majority" opinion authored by Justice Sanders sought to supplant it. Five

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[13] *Id.*

[14] CP 1845; 1644-47 (Plaintiff's Mot. for Penalties, Attorney's Fees, and Costs at 12-15).

Justices, however, disagreed with that approach, stating that the trial court—not the appellate court—is authorized to make the penalty decision.

Yousoufian presents five separate opinions. In the "majority" opinion, Justice Sanders acknowledged that the appellate court is without legal authority to determine an appropriate penalty under the PRA. The majority opinion declined King County's invitation to "calculate the penalty should this court decide the trial court abused its discretion." 2009 Wash. LEXIS 4 at *2 n.2. The opinion by Justice Sanders states that the Court's "guidance is not meant to limit the trial court's discretion." *Id.* at *20.

That opinion, however, does not merely offer guidance to the trial court by identifying factors relevant to recalculation of the penalty, but also applies those factors: "Applying our guidance to these facts shows no mitigating factors but many aggravating ones." *Id.* at *27. The opinion concluded that "proper deterrence for King County and others clearly requires a penalty at the high end of the penalty range." *Id.* at *29.

A majority of the Court disagreed with that degree of appellate court intervention in trial court discretion. Five Justices, in concurrence or dissent, took issue with the majority's directions to the trial court with respect to the appropriate penalty in *Yousoufian*. Chief Justice Alexander,

concurring and dissenting, stated:

> I disagree . . . with the majority's direction to the trial court to impose a penalty "at the high end of the penalty range." I cannot say, at this point, that the trial court would necessarily abuse its discretion by imposing a penalty outside of the upper range, provided the penalty exceeds $15. In my view, we should let the trial court exercise its considerable discretion to determine the penalty based upon a full consideration of the relevant factors the majority has identified in its opinion. The trial court is fully capable of doing this without any kibitzing from this court as to what the penalty should be.

Id. at *38 (Alexander, C.J., dissenting) (emphasis added).

A dissent by Justice Owens, joined by Justice Madsen and Pro Tem Justice Seinfeld, also takes issue with the majority opinion's approach and makes the case for respecting trial court discretion:

> While claiming to review the trial court for abuse of discretion, the majority effectively instructs the trial court to reach the majority's preferred conclusion. . . .
>
> The PRA's mandate as to penalty calculations is simple: It is within the trial judge's discretion to set the amount. . . .
>
> . . . .
>
> The majority's view that the penalty here was unreasonably low is grounded on its assumption that the per day penalty must be assessed on a sliding scale that metes out progressively higher penalty amounts from $5 to $100 based on the government's "culpability" level. On the contrary, the $5-$100 penalty range gives the trial court discretion to assess an appropriate penalty for the violation, given all the circumstances, including the number of penalty days and the level of culpability at different points in the penalty period.
>
> . . . .
>
> It is simply not our place to substitute our judgment for that of the trial judge.

Id. at **38, 41-42, 45 (citations omitted).

In a fifth opinion, Justice Chambers identified "the real dispute" among Justices as "over the amount of deference to give the trial court." *Id.* at *31. He expressed his view that "it is inappropriate for an appellate judge to impose his or her subjective view of an appropriate penalty."[15]

Therefore, a majority of the Justices deciding *Yousoufian* agreed that the PRA requires that the penalty rate and calculation in the specific case be decided by the trial court, not dictated by an appeals court. As shown below, the trial court's penalty rulings in the case at bar are manifestly reasonable, and expressly considered nearly all of the *Yousoufian* factors. Because there was no abuse of discretion by the trial court, this Court should not change those rulings on appeal.

2. <u>As a matter of law, the trial court here did not abuse its discretion in its penalty rulings, so no remand is required.</u>

As *Yousoufian* correctly recites,

> [a] trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Mayer v. Sto. Indus., Inc.,* 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court's decision is "'manifestly unreasonable' if 'the court, despite applying the correct legal standards to the supported facts, adopts a view that no reasonable person would take.'" *Id.*

[15] Justice Chambers stated that he did not think the trial judges had abused their discretion, but he stated that remand was appropriate to give the judges "the benefit of the analytical framework the court provides today." 2009 Wash. LEXIS 4 at *31.

2009 Wash. LEXIS 4 at *13 (additional citations omitted).

In *Yousoufian,* the Supreme Court held that the trial court abused its discretion by imposing a penalty of $15 per day, near the lowest end of the statutory range, under circumstances that, as shown above, are completely distinguishable from those in the case at bar. The trial judge in present case, who spent scores of hours pouring over the parties' pleadings and the State's documents and authoring its opinions, arrived at manifestly reasonable conclusions with respect to the penalty rate and calculations.[16]

The trial court's two Orders in this case—one on the underlying PRA legal issues and the applicability of PRA exemptions[17] and the other on fees and penalties[18]—are thoughtful, detailed and thorough. It is inconceivable that this Court could find that the trial court "adopted a view that no reasonable person would take."

Moreover, the trial court undisputedly applied then-current controlling precedent, summarized in the *Yousoufian* Court of Appeals opinion. *See* 137 Wn. App. at 76 ("'When determining the amount of the penalty to be imposed[,] 'the existence or absence of [an] agency's bad faith is the principal factor which the trial court must consider.'").

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[16] The State, of course, excludes from this conclusion the trial court assessment of $3 per day based on omission of the "brief explanation" requirement, which is the subject of its cross-appeal. This error, however, can be rectified without requiring a remand.

[17] CP 1361-1437.

Nothing in the Supreme Court's *Yousoufian* decision suggests otherwise. The State also noted three other Washington Supreme Court opinions hinging on the good faith of the party responding to a PRA request: *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004); *Lindberg v. County of Kitsap*, 133 Wn.2d 729, 747, 948 P.2d 805 (1997); and *Amren v. City of Kalama,* 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997). Both parties argued, and the trial court applied, this settled law.

3. The trial court already has considered virtually all of the factors in the new *Yousoufian* "multi-factor test," and the few that it did not expressly address are moot or implicit in the penalty analysis.

Even in the absence of the Supreme Court's *Yousoufian* opinion, the trial court expressly considered the "mitigating" and "aggravating" factors identified in *Yousoufian* in the course of its good faith analysis, with the exception of "proper training and supervision of personnel"; "existence of systems to track and retrieve public records"; "potential for public harm"; and "deter[rence of] future misconduct considering the size of the agency and the facts of the case." Those factors, however, were either moot (given the express findings), or were considered and implicitly

[18] CP 1844-70.

satisfied. *See* Appendix A.[19]

The trial court's penalty analysis expressly includes the following mitigating factors identified in *Yousoufian*: the AGO "act[ed] in good faith throughout this process";[20] the adequacy of the State's search for records;[21] the State's prompt response and legitimate follow-up;[22] the State's honest, timely, and strict compliance with PRA procedural requirements and exceptions;[23] and the reasonableness of the State's exemptions and explanations.[24]

Similarly, the trial court found an absence of *Yousoufian's* "aggravating factors that increase a penalty": there was no delayed response; the State strictly complied with PRA procedural requirements and exceptions (except for omission of the "brief explanation," for which the trial court attached an additional penalty); and the trial court found no negligent, reckless, wanton, bad faith, dishonesty, or intentional non-compliance with the PRA.[25]

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[19] Appendix A lists each of the mitigating and aggravating factors identified in the Supreme Court's *Yousoufian* opinion, and indicates where and how the trial court in this case considered each factor.

[20] CP 1847; CP 1866.

[21] CP 1846; CP 1852.

[22] CP 1847; 1866-67.

[23] CP 1846-47; CP 1852-56; CP 1860-61; CP 1865-68.

[24] CP 1854-55; CP 1861-62; CP 1865-68.

[25] In addition to those factors, the trial court addressed others alleged by Justice Sanders as relevant to the penalty rate. For example, it held:

Although not expressly mentioned by the trial court in its Penalty Order, the "supervision" of PRA personnel at the AGO, and the "existence of systems to track and retrieve public records" were presented to the trial court in the Nov. 3, 2005 Declaration of La Dona Jensen. Ms. Jensen, the Public Records Manager for the Attorney General's Office, responded to the 2004 PRA request from Justice Sanders' counsel (and the earlier request by Tim Ford for the BIAW).[26] She described the process by which the PRA requests were handled within the Attorney Genera's Office, initially through "Public Records Request Coordinators" in various divisions of the AGO, and then by supervisory personnel. Ms. Jenson described the multiple levels of document review by these Coordinators, a Public Records Officer, and Assistant Attorneys General.[27] The trial court expressly incorporated by reference Ms. Jenson's Declaration in its January 12, 2007 Penalty Opinion.[28]

Similarly, it is not necessary to remand this case for findings regarding "potential for public harm" or "deter[ring] future misconduct

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> There is no pattern of shifting claims of exemption here. Only one claim of exemption was made on all of the records that was ordered to be produced after wrongful withholding. That was Section .310(1)(j); the claim for exemption on those records was consistent from beginning to end.

Oral Opinion at 17, CP 1865.

[26] CP 165-224.

[27] *Id.*, ¶¶8-18, 20-26.

considering the size of the agency and the facts of the case." The trial court implicitly found the absence of these concerns. Obviously, where the trial court found that the AGO's "disclosure complied with the PDA," that it acted in good faith throughout the PRA process, and that the AGO's exemptions were properly invoked 96 percent of the time and its interpretation of the PRA was correct in virtually all respects, there is no conceivable "potential for public harm" from the State's conduct.[29]

A concern about "deterring future misconduct" also was not implicated, where the trial court correctly found no misconduct by the State, but instead that it had acted in "good faith throughout." In light of the trial court's finding that "the AGO made a legally sufficient search for public records . . . and that its disclosure complied with the PDA," there was simply no finding of misconduct, and therefore no issue of deterring "future misconduct."

A remand of this matter to the trial court would be unjustified and unnecessary when the court correctly ruled on the basis of then-existing

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[28] CP 1363-66.

[29] The facts regarding "public harm" in *Yousoufian* are completely distinguishable from the facts involved here. In *Yousoufian,* documents were requested in connection with a referendum election to authorize a $300 million football stadium. They pertained to studies that had been done on the impact of sports stadiums on the local economy—clearly an issue with broad public ramifications. 2009 Wash. LEXIS 4 at **3-6. In stark contrast, Justice Sanders requested documents in connection with ethics charges brought personally against him by the Commission on Judicial Conduct.

law, and in fact already has considered the various factors identified by *Yousoufian.*

B. *Yousoufian* Should Not Be Applied Retroactively.

Justice Sanders filed this action, for the first time objecting to the sufficiency of the AGO's disclosures under the PRA, in 2005—more than a year after his original PRA request. Summary judgment argument occurred in early 2006. Eleven months later the trial court, having engaged in an extraordinarily extensive *in camera* review, issued a 76-page Opinion based on existing statutory and case law standards, and then—upon the State's Motion for Partial Reconsideration—an Amended Opinion. Five months later, after extensive additional briefing and oral arguments, the trial court issued its Order on Plaintiff's Motion for Penalties, Attorney's Fees and Costs, which, in applying well-settled statutory and case law requirements, considered in detail the State's conduct in responding to Justice Sanders' PRA requests.

The parties and the trial court justifiably relied on established law in briefing and arguing the penalty issues. A remand to the trial court to retroactively apply *Yousoufian* would be wasteful and harmful to the State's taxpayers.

It appears that Justice Sanders himself did not think that the *Yousoufian* opinion he authored would apply retroactively to his own

pending appeal. If there was any potential that it would have applied retroactively to his own PRA case, Justice Sanders should have recused himself from the Supreme Court's consideration of *Yousoufian.*[30]

While decisional law that overrules prior law may be applied retroactively, this result is "neither constitutionally nor statutorily compelled," and the "general rule" is subject to "recognized exceptions." *Bradbury v. Aetna Cas. & Sur. Co.*, 91 Wn.2d 504, 507-8, 589 P.2d 785 (1979).

In *Bradbury*, the issue was whether the Court of Appeals erred in giving retroactive effect to a new judicial decision, *Cammel,* interpreting a Washington insurance law as allowing "stacking" of multiple coverages where multiple premiums had been paid for uninsured motorist coverage.

> On a number of occasions, . . . we have recognized exceptions to the general rule and have applied decisional law either prospectively or with only limited retroactive effect. . . . . We said in *Haines* [*v. Anaconda Aluminum*, 87 Wn.2d 28, 439 P.2d 13 (1976)] at page 34:

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[30] Both *Yousoufian* and this appeal involve the proper measure of penalties under the Public Records Act. *See* CJC Canon 3(D)(1) (c) ("Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including . . . [where] the judge knows that, individually . . . , the judge . . . has an economic interest in the subject matter in controversy . . . or has any other interest that could be substantially affected by the outcome of the proceeding, unless there is a remittal of disqualification; . . .). This is the second case involving interpretation of the PRA, including its penalty provisions, that has been authored by Justice Sanders during the pendency of his PRA case. *See Spokane Research & Defense Fund v. City of Spokane,* 155 Wn.2d 89, 117 P.3d 1117 (2005). The latter case was decided on August 11, 2005. Justice Sanders filed his PRA case in Thurston County Superior Court three weeks earlier, on July 21, 2005.

> In determining the general or unlimited retroactive effect of an overruling opinion, courts customarily focus on whether particular persons have relied justifiably upon the overruled decision. If so, the court must ascertain whether a retroactive application of the overruling decision would defeat these reliance interests.

> Finally, *justifiable reliance* was the basic reason in the contractual setting for prospective rather than retroactive application of newly declared decisional law in *Cascade* [*Sec. Bank v. Butler,* 88 Wn.2d 28, 549 P.2d 13 (1976). We said at page 784:
>
> > [R]etroactive application of the decision may result in substantial hardships to the parties who have *relied in good faith* on the rule.
>
> The national trend is similar to our own. The factor of justifiable reliance has been given the greatest attention in determining whether newly declared decisional law should be applied retroactively or prospectively.

Id. at 508 (citations omitted).

In *Bradley*, the Court held that the insurer, Aetna, had not established its justifiable or reasonable reliance on prior decisional law to prevent the retroactive application of *Cammel*, which was a case of first impression on an unsettled issue. *Id.* at 511.

The same cannot be said here. The law regarding the proper considerations in a PRA penalty decision was not unsettled when the trial court issued its penalty rulings. The State, as well as Justice Sanders and the trial court, relied on the Court of Appeals decision in the then-

controlling *Yousoufian* opinion, 137 Wn. App. 69, 151 P.3d 243 (2007), as well as on *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004); *Lindberg v. County of Kitsap*, 133 Wn.2d 729, 747, 948 P.2d 805 (1997); and *Amren v. City of Kalama,* 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997). The State justifiably relied on that well-established law, and would be significantly prejudiced by additional expense and delay if the penalty rulings were remanded to the trial court (which is the only court with discretion to make them), under the new *Yousoufian* opinion.

C. The *Rental Housing Ass'n* Decision is Not Relevant to any Issue Being Appealed.

By Order issued two days ago on February 26, 2009, the Court also asked the parties to address the Supreme Court's decision in *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, ___ Wn.2d ___, 199 P.3d 393, 2009 Wash. LEXIS 5 (Jan. 22, 2009).

In *Rental Housing*, the Supreme Court held that the limitations period did not begin until the City provided a privilege log identifying withheld documents and claimed exemptions. The City's letter, which it claimed triggered the statute of limitations, was inadequate because it did not describe individually the withheld records, nor "explain which individual exemptions applied to which individual record." *Id.* at 24.

In the case at bar, the State provided its privilege log from the

outset (and revised versions), individually identifying each document, and claiming a specific exemption for each.

Because the State did not initially provide a "brief explanation" on its logs, the trial court imposed an additional penalty. The State has cross-appealed that portion of the penalty, since nothing in the PRA authorizes a separate penalty for omissions of "brief explanations." But *Rental Housing* does not address the issue presented by the cross-appeal, nor have any barring on any other issue in this appeal.

IV. CONCLUSION

For the reasons stated above, neither the Supreme Court's recent *Yousoufian*, nor the *Rental Housing* decision, has any effect on the appeal pending in this Court.

DATED this 2nd day of March, 2009.

DANIELSON HARRIGAN LEYH & TOLLEFSON LLP

By _____

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APPENDIX A

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YOUSOUFIAN "MITIGATING" FACTORS

(1) Lack of clarity of the PRA request	Initial PRA Opinion, CP 1363-65. Oral Penalty Opinion, CP 1866-67. The trial court expressly incorporated by reference its Initial PRA Opinion in its Penalty Order. CP 1844.	The Initial PRA Opinion compares the initial Tim Ford request for documents relating to CJC proceedings against Justice Sanders, and the later request by Kurt Bulmer on behalf of Justice Sanders; the State reasonably believed to be broader than the second, although Justice Sanders argued to the contrary. The Oral Opinion briefly addresses the same, and notes that Justice Sanders did not challenge the State's PRA responses until filing suit.
(2) Agency's prompt response to PRA request	Oral Penalty Opinion, CP 1866-67. *See also* Written Penalty Opinion, CP 1847.	"The record here is that [the AGO"] made a timely disclosure initially . . . ." Justice Sanders did not contest the disclosures until he filed suit nearly a year later, at which time the AGO "immediately contracted with an independent law firm" to conduct re-review, and then produced additional documents, most of which were held to be exempt.
(3) Agency's good faith	Oral Penalty Opinion, CP 1866, 1868; Written Penalty Opinion, CP 1847.	"I find that the AGO acted in good faith throughout this process . . . "; AGO's assertions of the "controversy" exemption were "not evidence of some malice or negligence or other factor that would justify a higher penalty."

(4) Honest, timely, and strict compliance with PRA procedural requirements and exceptions	Oral Penalty Opinion, CP 1852-54; Written Penalty Opinion, CP 1847; Initial PRA Opinion, CP 1363-1369.	"[T]he AGO made a legally sufficient search for public records in response to Mr. Bulmer's request and . . . its disclosure complied with the PDA." AGO complied with statutory requirement for statement of specific exemptions; AGO did not provide "brief explanation" but court ordered, as remedy, additional penalty (challenged in State's cross-appeal), not production of otherwise exempt documents. AGO "prevailed on nearly 96 percent of its [exemption] claims"; disclosure was "at least as broad, perhaps broader than the disclosure requested by Justice Sanders, because it also conformed to the request for disclosure made by the BIAW."
(5) Proper training and supervision of personnel	Oral Penalty Opinion, CP 1852-53; Written Penalty Opinion, CP 1847; Initial PRA Opinion, CP 1363-1369. The Jensen Declarations are found at CP 165-224 and CP 1256-59.	Not expressly addressed, but implicit or moot under court's finding that "the AGO made a legally sufficient search for public records . . . and that its disclosure complied with the PDA." The trial court had before it the Declarations of LaDona Jensen, which described the "customary and ordinary steps that Public Records Request Coordinators follow in responding to notice of a public records request," and the multiple reviews undertaken by supervisory personnel.[1]

[1] Declaration of LaDona Jenson dated November 3, 2005, CP __ - __.

(6) Reasonableness of explanation for non-compliance	Oral Penalty Opinion, CP 1866-68; Written Penalty Opinion, CP 1846-47; Initial Opinion, CP 1366-1370.	The State was not "non-compliant" except for a handful of documents and the omission of the "brief explanation" requirement, for which the trial court imposed a $3-day penalty. With regard to the six documents ordered produced, the trial court noted that each one was "tied in some manner to the litigation that did qualify as relevant to a controversy," and the question of required production was "a close question."
(7) Helpfulness of the agency to the requestor	Oral Penalty Opinion, CP 1866-68; Initial Opinion, CP 1363-1366. *See also* Jensen Declarations at CP 165-224 and 1256-59, clearly considered by the trial court, CP 1365-66.	AGO initially produced broader range of documents than Justice Sanders requested; Justice Sanders did not contact AGO or challenge production until lawsuit was filed.
(8) Existence of systems to track and retrieve public records	Oral Penalty Opinion, CP 1852-53; Written Penalty Opinion, CP 1847; Initial PRA Opinion, CP 1363-1369. The Jensen Declarations are found at CP 165-224 and CP 1256-59.	Not expressly addressed, but implicit under court's finding that "the AGO made a legally sufficient search for public records . . . and that its disclosure complied with the PDA." The trial court had before it the Declarations of LaDona Jensen, which described the systems and processes used to track and retrieve public records.[2]

[2] Declaration of LaDona Jenson dated November 3, 2005, CP __ - __.

YOUSOUFIAN "AGGRAVATING" FACTORS

(1) Delayed response to PRA request		*See* Mitigating Factors (1), (2)
(2) Lack of strict compliance with PRA procedural requirements and exceptions		*See* Mitigating Factor (4)
(3) Lack of proper training and supervision of personnel		*See* Mitigating Factor (5)
(4) Unreasonableness of any explanation for non-compliance		*See* Mitigating Factor (6)
(5) Negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA		*See* Mitigating Factor (3). The trial court's Initial Order, Penalty Order, and Oral Opinion are replete with descriptions of the State's good faith, compliance with the PRA, and the reasonableness of its conduct.
(6) Dishonesty	Oral Penalty Opinion, CP 1852-54, 1866-68; Written Penalty Opinion, CP 1846-47; Initial Opinion, CP 1366-1370.	*See* Mitigating Factor (3). The trial court's Initial Order, Penalty Order, and Oral Opinion are replete with descriptions of the State's good faith, compliance with the PRA, and the reasonableness of its conduct.
(7) Potential for Public Harm	Oral Penalty Opinion, CP 1852-54, 1866-68; Written Penalty Opinion, CP 1846-47; Initial Opinion, CP 1366-1370.	Not expressly addressed, but implicit in trial court's descriptions of the State's good faith, compliance with the PRA, and the reasonableness of its conduct.
(8) Personal economic loss	Oral Penalty Opinion, CP 1858-65; Written Penalty Order, CP 1845-48.	The only loss alleged by Justice Sanders was attorney's fees and costs, which the trial court fully addressed in awarding Justice Sanders $55,443.12, based on an allocation of "prevailing party" status between the State and Justice Sanders

(9) Penalty sufficient to deter future misconduct	Oral Penalty Opinion, CP 1852-54, 1866-68; Written Penalty Opinion, CP 1846-47; Initial Opinion, CP 1366-1370.	Not at issue, since the State did not engage in misconduct, The trial court's Initial Order, Penalty Order, and Oral Opinion are replete with descriptions of the State's good faith, compliance with the PRA, and the reasonableness of its conduct.

No. 35920-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

HONORABLE RICHARD B. SANDERS,

Appellant,

vs.

STATE OF WASHINGTON,

Respondent and Cross-Appellant.

AFFIDAVIT OF SERVICE

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FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

ORIGINAL

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Susie Clifford, being first duly sworn, upon oath deposes and says:

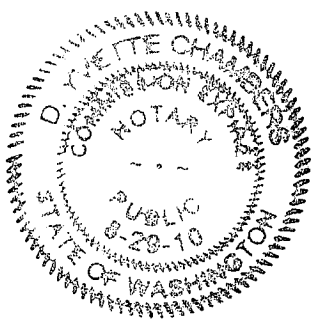
1. That I am over the age of twenty-one years, not a party hereto and am competent to testify to the facts set forth herein.

2. That on March 2, 2009, I caused a copy of the **THE STATE OF WASHINGTON'S SUPPLEMENTAL BRIEFING REGARDING NEW *YOUSOUFIAN* OPINION** to be served on counsel of record list below by email.

Paul Lawrence
Matthew Segal
Gregory J. Wong
Preston Gates & Ellis
925 Fourth Avenue, Suite 2900
Seattle, WA 98104

Susie Clifford
SUSIE CLIFFORD

SUBSCRIBED AND SWORN TO this 2nd day of March, 2009.



NOTARY PUBLIC in and for the State of Washington, residing at Puyallup, WA.
My commission expires 8-29-10