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SUPREME COURT OF THE STATE OF WASHINGTON

WADE'S EASTSIDE GUN SHOP INC., a Washington corporation; et al.,
Plaintiffs,

v.

DEPARTMENT OF LABOR & INDUSTRIES, a Washington state
agency,

Appellant,

v.

SEATTLE TIMES COMPANY, a Washington corporation,

Respondent,

and

CHRISTOPHER SEAVOY and JANE DOE SEAVOY, husband and wife
and the marital community comprised thereof; et al.,

Defendants.

**DEPARTMENT OF LABOR & INDUSTRIES
REPLY BRIEF**

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I. INTRODUCTION

The Department of Labor and Industries (L&I) is committed to providing public access to its records under the Public Records Act consistent with the Act's purpose to ensure transparency in government. But responses to record requests are handled by people, not automatons. Mistakes inevitably happen. This case, however, involves a superior court that ordered penalties far beyond what the citizens and Legislature intended in RCW 42.56. The superior court improperly ordered L&I to pay a *per-page*, *per-day* penalty amounting to \$502,827.40. If this calculation is permissible, then the potential exists for penalties in the millions of dollars, and encourages requesters to submit very broad requests in the hope of obtaining a very large penalty. Tying the penalty to the number of responsive pages divorces culpability as the measuring stick to determine penalties. Had there been ten times as many responsive records, with no different culpability, the penalty would have been ten times greater.

The Public Records Act does not provide for a *per-page*, *per-day* penalty. Case law that has addressed grouping of records does not, contrary to the Seattle Times' arguments, authorize such a penalty structure.

The trial court found that L&I erred in not producing records on

August 9, 2013. L&I acknowledged that finding during the penalty phase, an acknowledgement that should not be construed as an admission. In any event, the trial court unambiguously erred in determining there was a violation prior to August 9; during that time L&I was investigating workplace safety violations, reviewing documents, and notifying affected third parties about the pending production as authorized by statute. As explained in detail in the Brief of Appellant, there is a sound basis for concluding L&I's actions were reasonable and statutorily authorized under the Public Records Act, such that no penalty at all should have been awarded and this case should have been dismissed. In the alternative, however, this Court should reverse the superior court's decision and remand for a correct calculation of the penalty, using the per-day formula provided in RCW 42.56.550, and imposed only from August 9 until the requested records were produced.

II. ARGUMENT

A. **L&I Thoroughly Investigated the Wade's Safety Complaint, Following RCW 49.17.120, Which Gives L&I Six Months To Investigate a Workplace Safety Complaint**

Upon receiving reports of elevated blood levels of lead in workers, L&I launched an investigation into allegations of lead exposure at Wade's Eastside Gun Shop involving multiple employers. CP 57, 60, 62-82, 84-85, 87-135, 139-50, 760, 766, 800-01, 812. The first complaint was

received in October 2012 and the investigation concluded in June 2013. CP 766, 801, 812. L&I investigates alleged workplace safety violations using a number of techniques, including sampling, interviewing, and other reasonable investigative techniques such as requesting and reviewing documents. WAC 296-900-12010; RCW 47.17.070; CP 762.

The Seattle Times mistakenly characterizes L&I as having performed the inspections in October and November 2012. Resp't's Br. 1. It references citations and notices of assessment that show that an inspection of the worksite was initiated on November 13, 2013, and that exposure monitoring was conducted on November 14 and November 27, 2012. Resp't's Br. 1 (citing, *inter alia*, to CP 65, 148). But the complete investigation did not conclude in November 2012, it concluded in June 2013. CP 801, 812. L&I was simultaneously investigating multiple employers. CP 812. For the investigation into Wade's own violations, the opening conference was on November 13, 2012, and the closing conference was on May 1, 2013. CP 65. A closing conference is a conference in which the inspector discusses with the employer's representatives hazards discovered, and how the employer can correct the hazards. *See A Guide to Workplace Safety and Health in Washington*

State at 5.¹ This was a complex investigation, and L&I found lead exposure-related violations for several employers, but it did not find violations for all employers on the site. CP 62-82, 85, 7-124, 126-27, 130-34, 137, 801, 812. L&I worked to make sure employers who were responsible for lead contamination were held accountable, and those who had no culpability were not inaccurately cited.

L&I did not wait until the full investigation was concluded in June 2013 to begin reviewing the records in response to the public records requests it had received. It provided documents in May 2013 after it issued citations for five employers. CP 809. While the *Seattle Times* second-guesses the length of the investigation, by statute L&I has six months to conduct a workplace safety investigation. RCW 49.17.120(4).

The *Seattle Times* conflates L&I's investigative response with its claims of a public records violation. For example, the *Seattle Times* asserts, without citation to the record, that “[w]orkers, their families, and patrons at the gun range continued to be exposed to toxic levels of lead without notice while the *Times* and public waited for responsive records from L&I for many months.” Resp’t’s Br. 2. That is not true. Workers were pulled off the site in November 2012. CP 56, 59, 760. Workers’ blood levels of lead dropped significantly after November 2012. CP 59.

¹ The Guide is available at <http://www.lni.wa.gov/IPUB/416-132-000.pdf>.

A notice was posted at Wade's that warned the public that the worksite posed a lead hazard. CP 59. An L&I occupational health expert publically discussed the blood level findings regarding the Wade's site. CP 59. All of this was reported by the Seattle Times in February 2013. CP 56-60.

B. L&I Did Not Violate the Public Records Act as Alleged

1. The Investigative Exemption Authorized L&I To Temporarily Withhold Investigative Records

The superior court erred in awarding the Seattle Times penalties for the time between January 31 to July 25, 2013. CP 861-62. In order to promote effective investigations, RCW 42.56.240(1) exempts investigative records from disclosure during the investigation. *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 389, 314 P.3d 1093 (2013). The Seattle Times argues that L&I cannot cite RCW 42.56.240(1) on appeal as to whether it was proper for L&I to withhold records under this exemption. Resp't's Br. 27. But under this Court's decisions, the issue is not whether the agency cited a particular exemption; it is whether the records are subject to the exemption. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) (because review is de novo, an agency may rely on an applicable exemption on review, even though it was not cited when responding to the request); *Sanders v. State*,

169 Wn.2d 827, 860-61, 240 P.3d 120 (2010) (“the right to inspect or copy turns on whether the document is actually exempt from disclosure, not whether the response contained a brief explanation of the claimed exemptions.”). The agency’s error in citation does not change whether an exemption applies, since it is not the agency but the Court that determines the applicable exemption.

Although L&I did not cite RCW 42.56.240 below, L&I consistently asserted that the records were part of an ongoing investigation and therefore not disclosable during the investigation. CP 807, 809. L&I explained in its superior court brief that the records “were part of open investigations and would not be available until after the investigations closed.” CP 318. The trial court acknowledged there was an investigation, but erroneously found it ended as of March 22, 2013, after which L&I had to produce the records. CP 861. The question of whether L&I could withhold records because of an open investigation was before the superior court and referenced repeatedly. *See, e.g.* CP 6, 25, 28 47, 265-67, 318-19, 354, 357, 374, 722-25, 730-32, 736, 739, 861; RP (9/12/13) 11, 28. No waiver exists when the specific basis for an argument is “apparent from the context.” *State v. Braham*, 67 Wn. App. 930, 935, 841 P.2d 785 (1992) (internal citation omitted).

The Seattle Times believes that the investigative exemption does

not apply because “the matter had been referred to a charging decision.” Resp’t’s Br. 28. There is a categorical exemption from disclosure during an investigation under RCW 42.56.240. *Newman v. King Cnty.*, 133 Wn.2d 565, 574, 947 P.2d 712 (1997). This applies in “situations where police have not yet referred the matter to a prosecutor for a charging decision and revelation to the defendant” because “nondisclosure of [such documents] . . . we are confident is always essential to effective law enforcement.” *Sargent*, 179 Wn.2d at 389. Thus, here, there is no question as to whether nondisclosure of the records was necessary; the question is when the investigation was completed.

The framework of “referral for a charging decision” is not relevant when the investigation involves an investigative agency that both investigates and issues the citation, without referral to a prosecutor. The Seattle Times claims “with this state agency, it completed its investigation phase before its referral for a charging decision, and before its ultimate charging decision: issuing a citation.” Resp’t’s Br. 4 (citing CP 754-55, 759-64, 774-75). But this statement is not found on CP 754-55, 759-64, and the conclusory statement on CP 774-75 is a declaration from the Seattle Times’ attorney. A statement made by an attorney should not be considered by this Court as fact. *See* RPC 3.7 Comments 1-2. In fact, L&I issues the citations and there is no referral to a prosecutor. CP 65, 97,

105, 801, 812; RCW 49.17.120. The construct of “referral for a charging decision” as contemplated in *Sargent* should not apply when the investigative agency is the agency that investigates and issues a citation. RCW 49.17.120. L&I decides, internally, whether to issue a citation or whether to investigate a matter further before doing so, so it would be artificial to say that L&I referred the matter to itself for a “charging decision.”

In any event, it is unclear what date the Seattle Times believes “the referral for a charging decision” was made. It may believe it was after the March 22, 2013 letter to Mr. Dunn, or maybe the Seattle Times believes it occurred when the closing conferences with the business were conducted. Resp’t’s Br. 3-4, 28-29.

Contrary to the Seattle Times’ implication, the March 22, 2013, letter does not show that L&I had completed its multi-employer investigation. Resp’t’s Br. 3. The letter references a citation, but in fact, the citation and notice was not issued until a week later, and the reference in the letter was a clerical error, as L&I explained. CP 564-65, 801, 812. L&I enclosed air sample test results with the letter, not a citation and notice. CP 801. But more significantly, this involved only one employer, Advanced Masonry Services; the investigations of several other employers, including Wade’s and general contractor S.D. Deacon, were

still open and in process. CP 812 (showing citation number for Advanced Masonry Services citation); CP 565 (same citation number). Keith Ervin, the Seattle Times news reporter, acknowledges receiving a telephone call from L&I on May 31, 2013, informing him “that the investigations were being wrapped up” and that “one inspection was still not closed.” CP 47.

The Seattle Times acknowledges that the citations document closing conferences (which occurred well after March 2013), but it asserts the closing conference “occur[ed] weeks before citations were officially issued to the businesses.” Resp’t’s Br. 4. In fact, the closing conferences occurred shortly before L&I either issued the citations or found that no violation had occurred. CP 65 (closing conference on May 1, citation on May 10); CP 88 (closing conference on March 22, citation on March 29); CP 97 (closing conference on May 1, citation on May 10); CP 93 (closing conference on April 25, no violation letter on May 7). The closing conferences took place ten days before the citations were issued, not “weeks before” the citations were issued, as the Seattle Times claims.

Significantly, shortly after the closing conferences, L&I took action on the public records request. On May 16, 2013, L&I informed the Seattle Times that it had issued five citations, that it needed “[a]dditional time” to review the records, and that the remaining records were “part of open investigations and are not available until they are closed.” CP 809.

The last citation was issued on June 7, 2013. CP 812.²

These were intertwined investigations into a large multi-employer worksite. There was no unreasonable delay, and L&I regularly updated the Seattle Times as to the status.

Contrary to the Seattle Times' argument, L&I is not claiming the investigative exemption for the entire nine months at issue here. Resp't's Br. 29. L&I claims the categorical investigative exemption for four months: from February 7, the day of the five-day letter sent to Mr. Neff, to June 7, the date the last citation was issued. CP 807, 812. L&I acted consistent with this understanding by notifying the Seattle Times in mid-May that it issued five citations, that it was reviewing those investigative files for exemptions, and that for the remaining records the investigation was ongoing. CP 809. In July it completed its review. CP 801-02.

The Seattle Times appears to believe that the L&I public records officer did not need to review all 5431 pages of documents after L&I concluded the investigation. Resp't's Br. 8, 30. However, the Public Records Act authorizes L&I to look at all the records to determine if exemptions apply. RCW 42.56.520. Even if some records are kept in an envelope that is marked "confidential", the public records officer needs to examine all

² On July 12, 2013, L&I produced additional records and informed the Seattle Times that it needed more time to review the records. CP 814.

records to determine if an exemption applies to any of them.³

The Seattle Times points to an index that it says disproves L&I's claim that it needed time to review the records. Resp't's Br. 8. But the index was created in September 2013, well after the time L&I responded in its five-day letter in January. CP 771. The index itself notes that it was for "PPR 91624 350 4th installment," indicating the index was created for the purpose of responding to the public records request. CP 771. (The fourth installment was in September. CP 803.) Creation of an index reveals nothing about how much time it takes to review the records, especially when the agency responds to approximately 500 requests a month, reviewing an average of 105,500 pages of requested records per month. CP 799.

After providing some records to the Seattle Times in installments, L&I timely completed its review of the remaining documents on July 25, two months from L&I's May 2013 letter informing the Seattle Times it needed time to review the records. CP 800-02.⁴ L&I also acted

³ The Seattle Times asserts, without citation, that L&I said "it needed time to review records because the subjects had marked records confidential and such records were located throughout the files." Resp't's Br. 7. What L&I actually said was that it needed time to review the documents because "[m]any of those records had been marked as confidential by the businesses subject to investigation, primarily in reliance on the trade secrets exemption." App's Br. 24. As the Seattle Times brief acknowledges, there were hundreds of pages of confidential material in the Wade's file alone. Resp't's Br. 8.

⁴ It would appear that some of these documents were created after January 31, 2013. Contrary to the Seattle Times' arguments, L&I has not conceded on this issue—the record simply is not clear. The Seattle Times says there is not one "single record on

consistently with its initial five-day letter and update letters that gave a reasonable estimate of time, based on the statutory period authorized for these inspections, to be August 9. CP 807, 809, 814. That response complies with the Public Records Act. RCW 42.56.520; *see Levy v. Snohomish Cnty.*, 167 Wn. App. 94, 99, 272 P.3d 874 (2012).

2. The Public Records Act Did Not Require L&I To Provide an Explanatory Statement During Its Investigation and Review Periods

L&I's five-day letter properly notified the Seattle Times that it was withholding records temporarily during the investigation, and the Public Records Act required no further explanation. Providing a reasonable estimate of the time the agency will take to respond to the request is a permissible response to a public record request. RCW 42.56.520; *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 750, 174 P.3d 60 (2007). The Seattle Times argues that L&I should have provided a further explanation of the records. Resp't's Br. 30. L&I did not need to produce an explanation of the records because the categorical investigation exemption applied during the investigation. *See Newman*, 133 Wn.2d at 574. Thus, the Seattle

appeal" identified that was created after January 31. Resp't's Brief. 20. But the Seattle Times admitted below that only 76 percent of the documents predated January 31, 2013, yet it sought penalties for all pages. CP 755, n.1. Moreover, the Seattle Times has heavily relied on the March 22, 2013 letter to George Dunn. Resp't's Br. 3; CP 564-65. That letter proves nothing about January 31, because it postdates January 31. But, in any event, this issue is not relevant because the measure of the penalty is not based on the number of documents.

Times' citation to *Sanders* for the proposition that there needed to be a clearer explanation is irrelevant. Resp't's Br. 31-33 (citing *Sanders*, 169 Wn.2d 827). *Sanders* does not apply to records that are subject to a temporary categorical exemption. The fact that an agency does not have to provide a further explanation of the records when the investigative exemption applies makes sense, as an agency is still assembling records and learning what is relevant to the investigation.

Because the temporary categorical investigation exemption applied, the Public Records Act did not require L&I to stop in the middle of its investigation to assemble and list records for the Seattle Times. See *Sargent*, 179 Wn.2d at 389; *Newman*, 133 Wn.2d at 574. Such a requirement would be nonsensical in an ongoing investigation, since new records and new information continue to be assembled. Under the Seattle Times' theory, an agency would be required to list each new record as it arrives and immediately notify a requester that it had arrived. That theory is not consistent with RCW 42.56.240.

The Seattle Times points to the index that L&I created in September 2013, and argues that L&I could have sent the index in February 2013. Resp't's Br. 30. But as explained above, that index was created in September for the purpose of providing the fourth installment. CP 771. L&I could not have sent the September index in February.

L&I was not “silently withholding records.” The Seattle Times argues that L&I should have identified each specific document to Ervin in its February 7, 2013 letter.⁵ Resp’t’s Br. 33. In its February 2013 letter, L&I explained why it was temporarily withholding the records, cited applicable exemptions, and gave a reasonable estimate as to when the records would be produced. CP 807. Although the letter did not cite the investigative exemption, it clearly said L&I was temporarily withholding the records as part of an “open investigation.” CP 807.

After the investigation concluded, L&I reviewed the documents. No explanation need be provided until the review is completed. *See Ockerman v. King Cnty. Dep’t of Dev’l & Envtl. Servs.*, 102 Wn. App. 212, 214, 217, 6 P.3d 1214 (2000). The Public Records Act does not require an agency to provide a written explanation of its reasonable estimate of time when it provides that estimate in its five-day response letter. *See Ockerman*, 102 Wn. App. at 214, 217; RCW 42.56.520.

3. L&I Reasonably Gave the Companies Who Claimed an Exemption Time To Take Court Action

The superior court erred by awarding penalties from the time period of July 25, 2013, to August 9, 2013. CP 861. This 15-day time period was a reasonable amount of time to give the companies time to pursue

⁵ We explained above why that argument is not consistent with RCW 42.56.240.

their claim in court that L&I should not disclose certain documents. The companies claimed that the records it provided contained trade secrets. CP 801-02. L&I did not agree with them, but gave them the opportunity to get a ruling from the court, as specifically authorized in RCW 42.56.540. CP 801-02.

It is the Legislature that provided for notification of affected parties, not L&I. L&I works to give the fullest assistance to requesters, under RCW 42.56.100, but it also assists affected parties as authorized in RCW 42.56.540. The Seattle Times relies on *Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn. App. 110, 231 P.3d 219 (2010), but that case does not discuss whether RCW 42.56.540 authorizes notification of affected parties.⁶ Under *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 758, 958 P.2d 260 (1998), a case the Seattle Times does not cite, the Court held that RCW 42.56.540 specifically allows an agency to delay production for a reasonable time to provide affected persons an opportunity to request an injunction prohibiting or limiting production. Fifteen days (or more) is a reasonable time given the number of requesters (nine) in this case and the fact that the companies would have to serve all nine of them to initiate

⁶ The Seattle Times also relies on *Doe I v. Wash. State Patrol*, 80 Wn. App. 296, 303, 908 P.2d 914 (1996), a case where the agency did not send a five-day letter to the requester, a fact-pattern not present here.

action. *See Burt v. Dep't of Corrections*, 168 Wn.2d 828, 833-37, 231 P.3d 191 (2010) (requester is necessary party).

Regarding the time period after August 9, the Seattle Times relies on L&I's statement below that in hindsight there was a violation after this time. Resp't's Br. 21; CP 733-34, 739. L&I's statement to the trial court should not be treated as an admission, since the trial court already had found L&I to have violated the Public Records Act. CP 468-72. L&I's references to August 9 were in the context of responding to the Seattle Times' argument that penalties should be assessed all the way back to January 31. *See* CP 518-22. L&I responded that there was no unreasonable delay in providing records under the circumstances, but "[i]f there was any delay, it occurred after August 9, 2013 when the Department did not receive a court order blocking the release of further records." CP 734 (emphasis added). As detailed in the Brief of Appellant 31-37, any violation between August 9 and September 20 was unintentional and reasonable under the circumstances, and certainly does not warrant the imposition of a penalty of \$332,294.00. Any mistakes were made as part of an attempt to balance the needs of the public, the requesters, and the affected parties as authorized in the Act. Nothing L&I

did was in bad faith, nor is there any finding of bad faith.⁷ And, in any event, the fact that L&I stated conditionally that if there was a delay, it occurred as of August 9 does not, as the Seattle Times suggests, support the inference that L&I was violating the Public Records Act during all of the previous time periods.

As authorized by RCW 42.56.540, L&I notified affected parties that it would be producing records the affected parties claimed contained exceptions unless they sought court action. The Seattle Times argues that L&I “admitted it favored the interest of those it investigates—the subjects of the records—over the interests of the requestor and public.” Resp’t’s Br. 33. No such admission exists. The fact that L&I relies on the cooperation of the businesses it investigates such that it would give notice to a business about a public disclosure request does not mean that L&I favors one particular party. It is consistent with the Legislature’s decision that an agency can notify an affected party about a request. RCW 42.56.540. By legislative design, the interests considered under the Public

⁷ The superior court did not make a finding of bad faith in its October 31, 2013 order determining the amount of the award. CP 857-64. Nor did it make such a finding in its judgment entered November 14, 2013. CP 865-67. Although the oral ruling said that L&I did not act in good faith, that statement was not incorporated into the findings of fact and conclusions of law and is to be disregarded. *See State v. Mallory*, 69 Wn.2d 532, 533, 419 P.2d 324 (1966). Although the superior court considered the *Yousoufian* factors, it made no findings regarding them in its orders. *See* CP 857-64, 865-67. The Seattle Times mistakenly points to “findings” of the superior court under the *Yousoufian* factors. Resp’t’s Br. 16-17. These were merely oral rulings. *See* RP (10/31/13) 19-23. None of these were findings. CP 857-64.

Records Act are not those solely of the requester.⁸

On August 8, Wade's and S.D. Deacon told L&I they would be filing summons and complaints to enjoin L&I from releasing the records. CP 802. L&I received one from Wade's on August 9, and one from S.D. Deacon a few days later. CP 802. Wade's told L&I that it needed a week to serve all ten defendants and would then immediately file its motion for preliminary injunction. CP 819. Along with its complaint, S.D. Deacon served a show cause motion with a hearing date for September 6, 2013. CP 802. L&I promptly told the Seattle Times about the recent developments. CP 802.

L&I's reliance on the statements of Wade's and S.D. Deacon proved to be misplaced. Wade's did not file its motion for preliminary injunction by August 19, 2013, as it said it would. L&I's actions in reliance were not unreasonable such as to justify the imposition of unprecedented public records penalties. Here there is a dispute about how much time should be allowed for an interested person to seek court review, but it is beyond dispute that the Public Records Act authorized L&I to provide a reasonable amount of time. The superior court awarded penalties for *all* of the time given, disregarding the plain language of RCW 42.56.540.

⁸ Although the Seattle Times claims there was some sort of "secret agreement" to delay release of records (Resp't's Br. 10), the record reveals that L&I was in timely communication with the Seattle Times about the delay. CP 559, 802.

C. The Public Records Act Does Not Authorize Per-Page Per-Day Penalties

The trial court abused its discretion in awarding a per-page, per-day penalty. The Legislature has not authorized a per-page per-day penalty for violations of the Public Records Act. RCW 42.56.550(4) entitles a person who prevails against an agency in an action “seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time” to a penalty assessed against the agency. The superior court has discretion “to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.” RCW 42.56.550(4). There is no mention of any per-page penalty.

Nor does case law support such a per-page penalty scheme. The Seattle Times’ theory is that because this Court has upheld penalty awards that involved the grouping of records, that it has authorized a per-page per-day penalty as well. Resp’t’s Br. 38-43. But a per-page penalty rewards the requester for the size of the request, which this Court has disapproved. In *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004) (*Yousoufian II*), the Court rejected a mandatory per-record approach, recognizing that the purpose of the Public Records Act is to promote access to public records, and it held that “this purpose is

better served by increasing the penalty based on the agency's culpability than it is by basing the penalty on the size of the plaintiff's request." *Yousoufian II*, 152 Wn.2d at 435. The *Yousoufian II* Court concluded that it was not the Legislature's intent to authorize the award of penalties as *Yousoufian* requested (a per-record, per-day penalty). *Id.* at 436. As explained in Brief of Appellant at 42-48, there is no evidence whatsoever that the Legislature intended the Public Records Act to be abused for financial gain by allowing the type of windfall that could result from a per-page, per-day penalty.

As discussed in the Brief of Appellant, to the extent that *Sanders* allows a penalty beyond a per-day penalty, it conflicts with the explicit direction in this Court's *Yousoufian* decisions that "[d]etermining a PRA penalty involves two steps: '(1) determine the *amount of days* the party was denied access and (2) determine the appropriate *per day* penalty [up to \$100] depending on the agency's actions.'" *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459, 229 P.3d 735 (2010) (*Yousoufian V*) (quoting *Yousoufian II*, 152 Wn.2d at 438) (emphasis added; penalty range modified to reflect 2011 amendment to RCW 42.56.550).⁹

⁹ Although the Court in *Sanders* characterized *Yousoufian II* as giving discretion to a superior court regarding grouping, the Court did not enter a holding regarding grouping in *Yousoufian II*, because the issue was uncontested. *Yousoufian II*, 152 Wn.2d at 436 n.9. Likewise in *Yousoufian V*, the Court did not hold that grouping is proper when assessing penalties in that case, since that issue was not contested in that decision,

Contrary to the Seattle Times' arguments, this Court's decisions do not authorize a superior court to award multi-million dollar penalties based on the size of the request, rather than the culpability of the parties. Indeed, the Court has explained subsequent to *Sanders* that a per-day penalty is to be used. In *Soter*, 162 Wn.2d at 751, the Court held that the superior court's discretion lay in "the amount of the *per day* penalty" (emphasis added). It explained that the per-day penalty is assessed "for each *day* the *records* were wrongfully withheld." *Id.* (emphasis added). In *Sargent*, 179 Wn.2d at 397, the Court held that the Public Records Act "requires imposition of *per diem* penalties up to \$100 per day whenever a violation is found" (emphasis added); see *Franklin Cnty. Sheriff's Office v. Parmelee*, 175 Wn.2d 476, 480 n.3, 285 P.3d 67 (2012) (court may "award penalties on a *per-day* basis as authorized by the statute") (emphasis added). These cases are consistent with the principle stated in *Yousoufian II*, 152 Wn.2d at 435, that penalties not be based on the size of the request.

Even if the Act authorized a *per-record* approach (and we explained why it does not do so, in Brief of Appellant 37-48), it is an unsupportable leap from that to assume that each page is a separate

contrary to the Seattle Times' argument. *Yousoufian V*, 168 Wn.2d at 457, 470. The use of grouping also was not contested in *Bricker v. Department of Labor & Industries*, 164 Wn. App. 16, 24, 262 P.3d 121 (2011), and the court affirmed the trial court's rejection of a per-record penalty.

record.¹⁰ It would be absurd to consider a four-page letter to be four separate records. Such an absurdity is not contemplated either by the Act or by any decision of this Court.

The fact that the individual daily penalties ranged in size from \$.01 to \$5 does not justify using a per page approach. The Seattle Times argues that the per day amounts were “minuscule” and that this somehow justifies the superior court’s approach. Resp’t’s Br. 44. But \$502,827.40 is not a “minuscule” amount for the taxpayers to pay. And if the approach were approved, the maximum potential penalty could be \$126,542,300.00 (5,431 pages x 233 days x \$100.00 per page per day)—more than 40 percent of L&I’s annual budget. Much larger penalties easily could be imagined. The Legislature could not have intended such a result. The fact that a smaller amount was awarded here does not change that the Seattle Times argues for a rule of law that would allow for exorbitant awards.

Nor does the fact that L&I has a \$600 million dollar biennial budget justify imposing a half million dollar penalty against it, contrary to the Seattle Times’ arguments. Resp’t’s Br. 46. The primary object of the Public Records Act is to ensure that requesters obtain records, not to pun-

¹⁰ The Seattle Times argues that the trial court used a “per record basis, counting each page as a record.” Resp’t’s Br. 44. But the Seattle Times has provided no authority to support treating an individual page as a record. Denominating something a record does not mean it is one.

ish the agency (and taxpayers) if the agency makes inadvertent mistakes in processing a large public records request. The problem with the Seattle Times' rule of law is that it encourages people to file big requests with big agencies to get big judgments, which turns the Act on its head. The purpose of the Act should be to get records, not to get paid. The Public Records Act provides for an effective deterrent effect under its normal interpretation of per-day penalties, especially when accompanied by mandatory attorney fees for prevailing requesters. Had the trial court properly followed the Public Records Act here, it could have assessed a penalty against L&I in the amount of \$24,000, plus \$44,000 in fees and costs, which would hardly have been a negligible amount. The penalty could have been up to \$36,500 had violations been for a year. With 500 requests a month, CP 799; this works out to an annual potential exposure to L&I of \$219,000,000 ($\$36,500 \times 500 \text{ requests/month} \times 12 \text{ months}$) if it were to ignore the Public Records Act. Contrary to the Seattle Times' arguments, the per-day penalty provided by the Public Records Act provides risk to the public purse.

D. The Seattle Times' Remaining Arguments Are Without Merit

L&I has appealed the appropriate judgment and orders. The Seattle Times argues that L&I has not appealed the correct order, noting that the judgment references a November 1, 2013 order. Resp't's Br. 36-

37; CP 866. It claims that order amended the October 31, 2013 order that set the penalties. Resp't's Br. 18. However, a search of the superior court's docket at the Washington Courts website reveals no order dated November 1, 2013.¹¹ The Court has before it all the docketed orders. In any event, L&I appealed from the judgment (CP 865-67), which is sufficient under RAP 5.3(a).

The Seattle Times argues that it should receive attorney fees if it prevails "in any respect," citing *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998). Resp't's Br. 49. The Seattle Times overstates *Limstrom*. That case approved of the award of appellate fees only if, upon remand from an appellate decision, the superior court found a public records violation. *Id.* at 616. L&I seeks reversal of the superior court decision finding a violation or calculating amount of days of violation, and the use of the per-page penalties, and if it prevails attorney fees should not be awarded. See *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 152, 240 P.3d 1149 (2010).

III. CONCLUSION

The Court should hold that there were no violations of the Public Records Act in this case and that an award of penalties, costs, and attorney fees was not warranted. Alternatively, the Court should hold that any

¹¹ Available at www.courts.wa.gov at "Search Case Records".

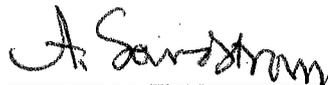
violation of the Public Records Act did not begin until August 9, 2013.

The Court also should hold that RCW 42.56.550 authorizes a penalty of up to \$100.00 per day for each day a person filing a public record request is wrongfully denied the right to inspect or copy nonexempt records that are responsive to the request, and that RCW 42.56.550 does not authorize a per-page or per-record penalty calculation.

The Court should reverse the superior court and remand with directions to dismiss the Seattle Times action or, alternatively, to revise the award of penalties consistent with the per-day calculation authorized in RCW 42.56.550.

RESPECTFULLY SUBMITTED this 9th day of September, 2014.

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SUPREME COURT OF THE STATE OF WASHINGTON

WADE'S EASTSIDE GUN SHOP
INC., a Washington corporation; et
al,

Plaintiffs,

v.

DEPARTMENT OF LABOR &
INDUSTRIES, a Washington state
agency,

Appellant,

v.

SEATTLE TIMES COMPANY, a
Washington corporation,

Respondent,

and

CHRISTOPHER SEAVOY and
JANE DOE SEAVOY, husband and
wife and the marital community
comprised thereof; et al.

Defendants.

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Reply Brief and this Certificate of Service in the below described manner:

//
//

Via Email filing to:

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Supreme Court
Supreme@courts.wa.gov

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DATED this 9th day of September, 2014.



SHANA PACARRO-MULLER
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OFFICE RECEPTIONIST, CLERK

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Rec'd 9/9/14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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RE: *Wade's Eastside Gun Shop Inc., et al v. DLI v. Seattle Times Company and Christopher Seavoy and Jane Doe Seavoy*
Case Number: 89629-1

Dear Mr. Carpenter:

Attached for filing is the Department's Reply Brief and Certificate of Service in the above referenced matter.

Thank you,

Shana Pacarro-Muller

Legal Assistant

to Marta Lowy, Anastasia Sandstrom & Lisa Brock

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