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Washington State Supreme Court

NO. 89629-1

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Ronald R. Carpenter  
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**SUPREME COURT OF THE STATE OF WASHINGTON**

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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.

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

The purpose of the Public Records Act is to ensure government accountability by providing access to public records. The Department of Labor and Industries (L&I) is committed to providing public access in full compliance with the Act.

This case, however, involves a distortion of the Public Records Act, RCW 42.56. The superior court awarded a disproportionately large public records penalty, disconnected from any measure of agency culpability, when it ordered L&I to pay a *per-page*, per-day penalty amounting to \$502,827.40. L&I contends it complied with the Act; but even if there were errors in compliance, they were minor and inadvertent, in no way warranting a half-million dollar penalty. Instead of determining the proper amount of penalty by assessing agency culpability, as this Court has directed, the superior court's penalty calculation rewarded the requester for making a public record request that resulted in a large number of responsive records. Using a per-page calculation, agency culpability fades into irrelevance—had there been ten times as many responsive records, with no different culpability, the penalty would have been ten times greater. This result is not consistent with the Public Records Act and this Court should reverse the superior court's decision.

## II. ASSIGNMENTS OF ERROR

1. The superior court erred in finding that “L&I has not identified for the Seattle Times all records responsive to its request nor stated any exemptions it contends justify their withholding” in its September 12, 2013 order regarding production of documents. CP 471, lines 6-7.<sup>1</sup> (Issues 1-2.)
2. The superior court erred in finding that “L&I has violated the PRA by failing to produce non-exempt responsive public records, by failing to identify responsive public records even if claimed to be exempt, failing to identify exemptions alleged to apply to these records or to explain how they apply to these records, and favoring the interest of the subjects of the records over the interests of the requestor and public in delaying production and voluntarily withholding records with no judicial order in place requiring such action” in its September 12, 2013 order. CP 471, lines 12-17. (Issues 2-3.)
3. The superior court erred in declaring the Seattle Times the prevailing party entitled to attorney’s fees, costs, and penalties in its September 12, 2013 order. CP 471, lines 20-22. (Issues 1-4).
4. The superior court erred in each of its findings of fact/conclusions of law listed as justification for awarding per-page, per-day penalties in its October 31, 2013 order regarding penalties. CP 861 line 2 through 863 line 8.<sup>2</sup> (Issues 1-4.)
5. The superior court erred in ordering per-page, per-day penalties amounting to \$502,827.40, and ordering a total amount due of \$545,235.10 in its October 31, 2013 order. CP 863, lines 9-14. (Issue 1-4.)

## III. STATEMENT OF THE ISSUES

1. Did the superior court err in finding that L&I failed to identify responsive public records and identify exemptions, where L&I

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<sup>1</sup> The superior court did not number its findings in the cited order.

<sup>2</sup> The superior court did not enter numbered findings or specify whether it was entering findings or conclusions in the cited order.

explained that the responsive records were obtained in ongoing, open investigations and would be produced when the investigations were concluded? Did that explanation provide notice that L&I was claiming the investigative exemption under RCW 42.56.240(1) as the statutory basis for the delay?

2. Does RCW 42.56.210(3) require a brief explanation as to how the investigative exemption applied to each record, where L&I explained that it was temporarily withholding the records obtained in open investigations until the investigations were concluded?
3. Without conceding a Public Records Act violation, did the superior court err in its penalty award by calculating the number of days without subtracting time required to conclude open investigations, to review records for exemptions and allow for third-party legal action under RCW 42.56.520 and .540, and otherwise rejecting L&I's reasons for delay in responding to the public record request?
4. Without conceding a Public Records Act violation, did the superior court erroneously award per-page, per-day penalties, when RCW 42.56.550 authorizes only a per-day penalty for an unlawful denial of public records, and otherwise abuse its discretion in imposing penalties totaling \$502,827.40?

#### IV. STATEMENT OF THE CASE

##### **A. Because the Responsive Records Were Being Obtained in Multiple Open Investigations, L&I Produced Records in Installments as They Became Available**

Beginning in January 2013, L&I investigated several companies for exposing workers to lead during remodeling work done at Wade's Eastside Gun Shop. This investigation under the Washington Industrial Safety & Health Act, RCW 49.17, was triggered by reports of elevated lead blood-levels in workers. CP 760. On January 31, 2013, the Seattle Times made a public record request to L&I for "access to all L&I records

on possible exposure of workers and/or customers to lead at Wade's Eastside Gun Shop." CP 805.

L&I produced a first installment of records on February 7, 2013, obtained in a 2010 investigation of Wade's Gun Shop.<sup>3</sup> CP 321-22, 800, 807. There were no redactions and no records were withheld. CP 800. However, L&I temporarily withheld other records because it had seven open investigations concerning lead exposure during the remodel. CP 800. It explained this temporary withholding in its February 7 letter:

[T]he remaining records you are requesting are part of open investigations and are not available until they are closed.\* Investigations of this type can take up to six months to complete.

I will continue to monitor the status of these investigations and by August 9, 2013, we will either:

- Mail you copies of the records.
- OR
- Update you on the status of the investigation.

\* RCW 49.17.260  
42.56.280

CP 807 (asterisk and statutory citations in original).

Although L&I's letter did not cite the investigative exemption in RCW 42.56.240(1), it explained that it was withholding the records because of "open investigations," that the investigative records would not

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<sup>3</sup> RCW 42.56.080 specifically authorizes the production of responsive records in installments as they "are assembled or made ready for inspection or disclosure."

be available until the investigations closed, and that investigations of this type can take up to six months to complete.<sup>4</sup> CP 800, 807.

Because L&I's investigations involved concurrent construction activities at a single establishment (Wade's Eastside Gun Shop), the investigations involved overlapping facts and generated duplicate documents. L&I ultimately issued five citations based on its investigations, which found toxic levels of lead in work areas. CP 801, 812. However, the citations and notices were not all issued at the same time. One citation was issued March 29, 2013. CP 87-91 [no. 316563311], 812. Two notices were issued May 7, 2013. CP 92-93 [no. 316583665], 94-95 [no. 316582907], 812. Two more citations were issued May 10, 2013. CP 96-103 [no. 316563576], 104-24 [no. 316558618], 812. A fourth citation was issued May 22, 2013. CP 130-35 [no. 316579655], 812. The fifth and final citation was issued June 7, 2013, and the coordinated inspections closed on that date. CP 743 [no. 602988778], 801, 812.

Disregarding the later issued citations, however, the Seattle Times asserts the investigation was completed in March 2013, based on a March

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<sup>4</sup> L&I's failure to cite RCW 42.56.240(1) may have resulted from its overlap with RCW 49.17.260 with respect to investigations such as the ones that were undertaken here. As explained below, RCW 49.17.260 provides that certain investigative reports are confidential and may be produced only as provided in that statute. Certain preliminary drafts, notes, recommendations, and intra-agency memoranda related to those reports would be exempt as provided in RCW 42.56.280.

22, 2013 letter L&I sent to a complainant, because the letter referred to a citation and notice of assessment. CP 557, 564-65. 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 801. L&I enclosed air sample test results with the letter, not a citation and notice. CP 801. The investigations were not concluded until early June 2013. CP 47 (Keith Ervin Declaration, acknowledging 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”).

L&I did not wait until the investigations were closed and the final citation issued to provide records from the investigations in response to the Seattle Times’ public record request. As noted above, the first installment of records, consisting of 120 documents, was sent on February 7, 2013, five business days after receiving the request. CP 321-22, 800, 807.

On May 16, 2013, L&I produced a second installment (six electronic documents, comprising 38 electronic pages). CP 809. L&I again stated that more records would be produced, explaining it needed more time to review the investigation files for information that is exempt from production, and again reminding the requester that the remaining records were part of an open investigation. CP 809. L&I again referred to

the August 9, 2013 target date it had set out in its first response to the public record request. CP 807, 809.

On July 12, 2013, L&I produced a third installment of 17 pages. CP 801, 814. L&I stated it was continuing to review the responsive records to determine whether they contained information that was statutorily exempt from disclosure, and estimated the next installment would be ready by the August 9, 2013, target date originally established. CP 814.

**B. Because the Businesses Providing Records to L&I in Its Investigation Claimed the Records Contained Proprietary Trade Secrets, L&I Notified Them of the Pending Release and Gave Them Time to Seek Court Protection, as Authorized in RCW 42.56.520 and .540**

Among the records L&I obtained in its investigations were documents obtained from the businesses being investigated which the businesses had marked as confidential or containing proprietary trade secrets. CP 801-02.<sup>5</sup> As L&I continued to process the investigative records for production on August 9, it reviewed those marked records and determined by July 25 that it believed none of the marked records were exempt. CP 801-03. On July 25, as authorized under RCW 42.56.520 and .540, L&I notified those businesses that it would release the marked

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<sup>5</sup> The one investigation file that did not contain alleged proprietary trade secret documents was provided in full in the July 12, 2013 installment. CP 801.

records on August 9, 2013, unless it received a copy of a motion for court protection to prevent the release of the records. CP 154-58, 801-02. L&I thus gave them 15 calendar days to take legal action.

On August 8, 2013, attorneys for two of the businesses formally notified L&I that they would be filing actions to enjoin disclosure of records. The “notice of intent” for Wade’s Eastside Gun Shop stated that a complaint would be filed the next day pursuant to RCW 42.56.540 and asked that L&I “abstain” from releasing the records on August 9. CP 802, 819-20. Wade’s also stated that a motion for preliminary injunction would be filed “immediately” once all the requesters were served; anticipating that it would take 10 days to serve all requesters,<sup>6</sup> Wade’s stated its intent to file the motion on August 19. CP 819. Wade’s filed its summons and complaint on August 9, as it said it would. CP 1-11.

The notice of intent filed by S.D. Deacon stated it would file a summons and complaint “in the coming days” and then work to schedule a hearing date. CP 822-23. L&I received a summons and complaint for injunctive relief from Deacon a few days later. CP 802. Deacon also

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<sup>6</sup> L&I had received nine requests for all or part of the records at issue. CP 284-95.

informed L&I that it had noted a show cause hearing for September 6.<sup>7</sup> CP 802 [Mackey Dec. ¶ 6].

The next morning, L&I notified the Seattle Times that the parties were seeking protective orders, and that L&I would release the remaining responsive records to the Seattle Times on September 13, 2013 (one week after the show cause order Deacon had noted), or update the Seattle Times on the status. CP 802.

**C. The Seattle Times Effectively Converted the Action to Enjoin Production Into One to Compel Production of Records, Which the Superior Court Granted**

On September 4, 2013, the Seattle Times answered Wade's complaint; counter-claimed against Wade's; cross-claimed against L&I; moved for production of the responsive records and for penalties, costs, and attorney fees; and noted its motion for hearing on September 12. CP 17-42, 161-75. At approximately that time, L&I learned that Deacon had canceled its show cause hearing, deciding instead to dismiss its lawsuit and participate in Wade's litigation. CP 323. On September 9, Deacon filed its answer and cross claim in Wade's action to enjoin production, and the following day filed its response to Seattle Times' motion to compel production. CP 208-17, 218-30. Deacon filed a motion for a

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<sup>7</sup> Wade's understood Deacon's show cause hearing was set for September 4. CP 246.

temporary restraining order on September 11, 2013, and Wade's filed a supporting pleading the next day. CP 324-37, 383-86. In support of its pleading, Wade's attached documents explaining its understanding of the need to join requesters as necessary parties in an action under RCW 42.56.540, the difficulties it had experienced in attempting to serve various requesters, and a copy of the motion for a preliminary injunction and supporting declarations it was prepared to file once all necessary parties were joined. CP 388-451.

On September 12, 2013, the superior court denied all relief to Deacon and Wade's, CP 464-67, and granted the Seattle Times' motion for production of the documents, penalties, costs, and attorney fees in amounts to be determined. CP 468-72. The court did not conduct in camera review of the records.

The next day, L&I produced the fourth installment, of approximately 2,000 pages,<sup>8</sup> consistent with its communication to the Seattle Times on August 9, 2013. CP 828-29. L&I redacted confidential medical information from the enclosed records, as authorized in RCW 42.56.360(2) and RCW 70.02.020, and provided an exemption log. CP

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<sup>8</sup> The actual number of pages is not clear from the record. The superior court adopted the Seattle Times' representation of 1,968 pages, which apparently comes from Neff's Declaration. CP 862. However, L&I stated that it provided 1,999 pages (1,075 scanned pages + 924 electronic pages). CP 828. The L&I Tracking Sheet indicates that the fourth installment consisted of 2,190 pages (1,232 scanned pages + 958 electronic pages), a DVD, and a tape. CP 837-40.

803, 828-29, 831-32. The Seattle Times responded by threatening L&I with a motion for contempt for not disclosing all remaining responsive records. CP 863.

L&I had intended to redact from the final installment more confidential medical information, believing it was exempt under RCW 42.56.360(2) and RCW 70.02.020, but reconsidered after reviewing the superior court's order. CP 803. It produced the fifth and final installment on September 19, 2013, without redactions or withholdings. The installment comprised approximately 3,400 pages.<sup>9</sup> CP 834, 863. L&I also provided unredacted copies of records provided in the fourth installment, from which medical information previously had been redacted. CP 803, 834.

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<sup>9</sup> The superior court accepted the Seattle Times' assertion that there were 3,445 previously undisclosed and unredacted pages (although both the Neff declaration and the superior court apparently treated each page as a "record"). CP 863; *cf.* CP 559 ¶11. In its cover letter, L&I stated it was producing 5,431 pages (2,350 scanned pages + 3,081 electronic pages), but that number included a second production of the fourth installment without redactions. CP 803, 834. As explained above, the fourth installment was either 1,968 pages (according to Neff (CP 559 ¶11)) or 1,999 pages (according to Ms. Mackey (CP 828)) or 2,190 pages (according to the L&I Tracking Sheet (CP 837-40)); using these numbers, L&I produced either 3,432 pages (5,431 – 1,999) or 3,463 pages (5,431 – 1,968) or 3,241 pages (5,431 – 2,190) that had not been provided in prior installments. The superior court did not review the installments to verify the actual numbers of pages produced.

The record also does not reveal how many discrete records were provided (since a single record may consist of multiple pages) or how many duplicate records were included. The Seattle Times estimated there were 2,035 distinct records in the fourth and fifth installments (CP 560)—a number almost two-thirds smaller than that used by the superior court to assess a per-page penalty—but the superior court did not independently verify the number of discrete records produced.

**D. The Superior Court Awarded Penalties Using a Per-Page, Per-Day Formula**

The Seattle Times moved for attorney fees and penalties, specifically requesting a per-page, per-day penalty that imposed different per-page penalties for different time periods. CP 510-21. On October 31, 2013, the superior court granted the motion, imposing a per-page, per-day penalty totaling \$502,827.40, broken down as follows:

January 31 (date of the public record request), to March 22 (date the superior court erroneously believed investigations had concluded); penalty based on “all of the [Yousoufian] factors” (CP 831); 5,431 pages x \$0.02 per page x 50 days	\$5,431.00
March 22 to July 25 (date L&I notified third parties under RCW 42.56.520 and .540); penalty based on erroneous belief that L&I investigations concluded on March 22 (CP 861); 5,431 pages x \$0.25 per page x 125 days	\$169,718.75
July 25 to August 9 (deadline L&I gave third parties under RCW 42.56.520 and .540); penalty based on conclusion that “L&I afforded [third parties] too much time to obtain a judicial order (CP 861-62); 5,431 pages x \$0.01 per page x 15 days	\$814.65
August 9 to September 12 (date of superior court’s order); penalty based on L&I’s withholding of records absent a court order (CP 862); 5,431 pages x \$1.00 per page x 34 days	\$184,654.00

September 12 to September 13 (date of fourth installment); penalty based on delay in production (CP 862-63);  
1,968 pages x \$5.00 x 1 day \$9,840.00

September 12 to September 19 (date of final installment); penalty based on delay in production (CP 862-63);  
3,445 pages x \$5.00 x 8 days \$137,800.00

L&I timely appealed.

#### **V. SUMMARY OF THE ARGUMENT**

The Department of Labor & Industries responded in good faith to the Seattle Times' request for records related to several open, ongoing investigations of alleged exposure of workers to hazardous materials. Within five working days, L&I responded, explaining that the records could not be produced until the investigations concluded and providing a reasonable estimate as to when the records could be produced. In the interim, L&I provided installments as some records could be produced. L&I also provided records created or obtained after the date of the request, even though not obliged to do so under the Public Records Act. L&I complied with RCW 42.56.520 and .540 in notifying affected businesses that they had an opportunity to seek an injunction, and in giving them a fair time period in which to do so. Within one week of the superior court's order that the records be produced, L&I produced all responsive records.

The superior court erred by concluding L&I had violated the Public Records Act and by imposing penalties based on the number of pages produced in response to the request. The Act has never authorized a per-page or per-record calculation of penalties. As confirmed both by case law and by legislative history, RCW 42.56.550(4) authorizes only a *per-day* penalty of up to \$100.00 per day for an impermissible refusal to provide records responsive to a public record request. A per-page penalty does not serve the purpose of the Act—to promote citizens’ access to public records—because it is disconnected from agency culpability. Instead, a per-page penalty incentivizes abusive requesters with the promise of a windfall—potentially many millions of dollars—if the agency stumbles in complying with a single large or complicated request. There is nothing in the history of the Act suggesting that the Legislature intended the penalty calculation to depend on the number of pages or records produced in response to a public record request.

## VI. STANDARD OF REVIEW

Agency action taken or challenged under the Public Records Act is reviewed de novo. RCW 42.56.550(3); *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). When reviewing decisions under the Act, the appellate court stands in the same position as the superior court where the record consists

only of affidavits, memoranda of law, and documentary evidence. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). Here, the superior court's decision was based solely on documentary evidence and the Court is not bound by the superior court's factual findings. *See Robbins, Geller, Rudman & Dowd, LLP v. State*, No. 44520-4-II, 2014 WL 839895 (Wash. Ct. App. Mar. 4, 2014).

The burden is on the agency to establish that an exemption to production applies under the Public Records Act. RCW 42.56.550(1). The imposition of penalties is reviewed for abuse of discretion. *See Sanders v. State*, 169 Wn.2d 827, 867, 240 P.3d 120 (2010). A superior court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010) (*Yousoufian V*).

## VII. ARGUMENT

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

#### 1. L&I Properly Withheld Records During Its Open Investigation

The superior court erred in imposing a penalty of \$5,431.00 for the time period between January 31 and March 22, 2013. CP 861. The superior court gave no reason for this award, except to recite the

*Yousoufian* factors. See CP 861. In granting the Seattle Times' motion to compel production, the superior court entered a conclusory finding that L&I did not produce non-exempt responsive public records, identify applicable exemptions, or explain how the exemptions apply. CP 471. None of these findings is supported by the record for this time period.

During this time, L&I was investigating seven different companies regarding possible lead exposure at Wade's Gun Shop. CP 801, 812. The Seattle Times made a public record request about this investigation. CP 800. Because the investigations were in process, L&I did not immediately provide the investigatory records in its possession; instead, as permitted in RCW 42.56.210(3), L&I provided records from a closed investigation, CP 321-22, 800, 807, and sent a letter to the Seattle Times explaining that the remaining responsive records were part of open investigations; that this type of investigation can take up to six months to complete; and that by August 9 (six months after the date of the letter), L&I would either produce the records or update Seattle Times on the status of the investigations. CP 807. 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 letter cited RCW 49.17.260 and RCW 42.56.280. RCW 49.17.260 is an exemption specific to L&I, under which certain investigative reports are confidential and may be produced only as provided in that statute. Certain preliminary drafts, notes, recommendations, and intra-agency memoranda related to those reports would be exempt as provided in RCW 42.56.280. Although the letter did not also cite the investigation exemption in RCW 42.56.240(1), it clearly explained that it was temporarily withholding the records because they were “part of open investigations.” CP 807. L&I did not “silently” withhold records or refuse to acknowledge their existence. It explained why it was temporarily withholding the records, cited applicable exemptions, and gave a reasonable estimate as to when the records would be produced. The investigation exemption in RCW 42.56.240(1) also applied and is properly asserted both in the superior court and on appeal. *See Progressive Animal Welfare Soc’y*, 125 Wn.2d at 253 (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); *Cowles Publ’g Co. v. City of Spokane*, 69 Wn. App. 678, 683, 849 P.2d 1271 (agency may rely on an applicable exemption in a show cause hearing,

even though it was not cited when responding to the request), *review denied*, 122 Wn.2d 1013 (1993).<sup>10</sup>

RCW 42.56.240(1) temporarily exempts investigative material from disclosure when essential for effective law enforcement:

Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy

RCW 42.56.240(1) applies to L&I because it is an investigative agency authorized to impose substantial civil penalties and to refer violations for criminal prosecution. *See* RCW 49.17.070 to .130, .170 to .190. The exercise of that investigative authority is essential to effective law enforcement, because the enforcement provisions in RCW 49.17— including actions taken to address violations involving “a substantial probability that death or serious physical harm could result to any employee,” RCW 49.17.130—all depend on L&I having performed an adequate investigation, and because the investigations lead toward

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<sup>10</sup> *See also Sanders*, 169 Wn.2d at 860-61 (“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 rule in *Sanders* logically applies here, where RCW 42.56.240(1) applies but was not cited in the brief explanation of the reason why the responsive records were temporarily withheld.

enforcement proceedings. *See Seattle Times Co. v. Serko*, 170 Wn.2d 581, 593, 243 P.3d 919 (2010).

L&I reasonably considered the records it was obtaining in its investigations to be categorically exempt from production under RCW 42.56.240(1) (and the other statutes it cited) until the investigations concluded. Washington courts have long held that agencies with investigative powers similar (or inferior) to those of L&I could assert the investigative records exemption, including the Consumer Protection Division of the Office of the Attorney General,<sup>11</sup> the Liquor Control Board,<sup>12</sup> the Public Disclosure Commission,<sup>13</sup> and county health departments.<sup>14</sup> For purposes of the exemption, records are “specific

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<sup>11</sup> *See, e.g., Ameriquist Mortgage Co. v. Office of the Attorney General*, 177 Wn.2d 467, 490, 300 P.3d 799 (2013) (records obtained in the civil investigation of alleged predatory lending practices were investigative records for purposes of RCW 42.56.240(1)).

<sup>12</sup> *See, e.g., Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 37, 769 P.2d 283 (1989) (Liquor Control Board is an investigative agency because it administers and enforces the law and regulations pertaining to alcoholic beverages). When *Spokane Police Guild* was decided, the investigative records exemption was codified at RCW 42.17.310(1)(d). The exemption was recodified in 2005 at RCW 42.56.240(1). Laws of 2005, ch. 274, §§ 401, 404. For consistency and clarity, this brief cites the current codification of the investigative records, even when discussing cases decided before 2005.

<sup>13</sup> *See, e.g., Ashley v. Wash. State Pub. Disclosure Comm'n*, 16 Wn. App. 830, 834-35, 560 P.2d 1156 (Public Disclosure Commission is an “investigative agency” and the pending “investigative file” was exempt under RCW 42.56.240(1)), *review denied*, 89 Wn.2d 1010 (1977).

<sup>14</sup> *See, e.g., Tacoma News, Inc. v. Tacoma-Pierce Cnty. Health Dep't*, 55 Wn. App. 515, 520, 778 P.2d 1066 (1989) (records obtained in investigation of ambulance service were investigative records for purposes of RCW 42.56.240(1), and the local health department was “an investigative and law enforcement agency” because it was

investigative records” if they are “compiled as a result of a specific investigation focusing with special intensity upon a particular party” and “designed to ferret out criminal activity or to shed light on some other allegation of malfeasance.” *Dawson v. Daly*, 120 Wn.2d 782, 792-93, 845 P.2d 995 (1993) (citations omitted), *abrogated in part on other grounds*, *Soter*, 162 Wn.2d 716. The investigations here were of that type.

In *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997), this Court held that an open police investigation is categorically exempt from production under the Public Records Act. *Id.* at 574. The superior court had ordered in camera review of the entire investigation file to determine which records should be disclosed. *Id.* at 567. The next year, the Court described *Newman* as having interpreted the investigative records exemption “as providing a broad categorical exemption from disclosure for all information contained in an open, active police investigation file.” *Limstrom v. Ladenburg*, 136 Wn.2d 595, 613, 963 P.2d 869 (1998). In *Cowles Publishing Co. v. Spokane Police Department*, 139 Wn.2d 472, 987 P.2d 620 (1999), the Court affirmed the categorical exemption for open, active police investigation files, but held that the categorical exemption lasted only until the investigation was

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required to “[e]nforce the public health statutes of the state, rules and regulations of the state board of health and the secretary of social and health services, and all local health rules, regulations and ordinances within his jurisdiction”) (citation omitted), *review denied*, 113 Wn.2d 1037 (1990).

concluded and the matter was referred to the prosecutor. *Cowles Publ'g Co.*, 139 Wn.2d at 479-80. That holding was reaffirmed in *Seattle Times Co. v. Serko*, 170 Wn.2d at 594 (categorical exemption did not apply because investigation was concluded).

In *Sargent v. Seattle Police Department*, 179 Wn.2d 376, 314 P.3d 1093 (2013), the Court clarified that the *Newman* categorical exemption applies to investigative records of “investigative, law enforcement, and penology agencies,” but not to “state agencies vested with the responsibility to discipline members of any profession.” *Id.* at 393. As explained above, L&I is an investigative agency. Although *Sargent* was decided after the events in this case, it confirms L&I’s determination that the investigative records were temporarily exempt until the investigations concluded.

In the superior court, the *Seattle Times* argued that L&I should have provided a further explanation for temporarily withholding the investigative records. CP 166. The Public Records Act does not require a further explanation; it 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. *Ockerman v. King Cnty. Dep’t of Dev’l & Envtl. Servs.*, 102 Wn. App. 212, 214, 6 P.3d 1214 (2000). L&I provided an adequate explanation by explaining that there were multiple

ongoing investigations, that the requested records would be provided when the investigations were concluded, and that the estimated date of production was August 9, 2013. There is no requirement that the five-day letter describe all the records that ultimately will be produced and cite a statutory exemption for any record that is not provided immediately. Any such requirement would be inconsistent with the language of RCW 42.56.520 which allows an agency to provide a reasonable estimate of the time necessary to respond to the request. The requirement would be inconsistent with exemptions like RCW 42.56.240(1) and .280, which allow temporary withholding in defined circumstances. Moreover, because the investigations were ongoing, L&I had not yet obtained or created all the records that ultimately were provided to the Seattle Times. The obligation to provide an exemption log and brief explanation is imposed when a record request is denied, not when an agency provides a reasonable estimate of the time necessary to respond. RCW 42.56.210(3).

An agency is specifically granted a reasonable amount of time to respond to a request. RCW 42.56.520, .550; *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 863, 288 P.3d 384 (2012), *review denied*, 177 Wn.2d 1002 (2013). The Public Records Act does not require an agency to locate, assemble, and process all records responsive to a request within five business days. *See* RCW 42.56.520. But the Seattle Times' assertion

that the five-day letter should have contained more detailed information assumes exactly that requirement, since it would not be possible to provide the kind of exemption log the Seattle Times seeks without finding, compiling, and reviewing all the records that ultimately would be produced. The superior court erred in ruling that the absence of an exemption log in the five-day letter was a violation of the Public Records Act.

As explained above, at pages 5-6, the evidence flatly contradicts the trial court's finding that the investigations were concluded by March 22, 2013. The final investigation did not close until June 7, when the final citation was issued. CP 801, 812. The evidence simply does not support a finding that L&I had all 5,431 pages of responsive records in its possession on January 31, that the investigations had concluded by March 22, or that it refused to acknowledge the existence of records in its investigative files. To the contrary, the record shows that L&I cited statutory exemptions, explained that it had multiple open investigations, explained how long such investigations normally take, and provided a reasonable estimated date by which the requested records would be available. On this record, for the superior court to find a violation of the Public Records Act and to impose penalties of any amount for the period between January 31 and March 22, 2013, was error.

**2. L&I Finished Its Investigations in June and Continued to Process Records for the Production Scheduled for August 9**

The record also does not support any imposition of penalties between March 22 and July 25, 2013. Even while its investigations were continuing, L&I was processing the records obtained in the investigation in preparation for production on August 9, the date it had reasonably estimated in its five-day letter on February 7. CP 807. Many of those records had been marked as confidential by the businesses subject to investigation, primarily in reliance on the trade secrets exemption.<sup>15</sup> CP 801-02. By July 25, however, L&I had concluded that it could determine no basis for withholding those records under that exemption. CP 801-02. As specifically authorized in RCW 42.56.520 and .540, L&I notified the businesses claiming confidentiality that it would produce the requested records on August 9 unless L&I received “a motion for court protection to withhold them” and also would release the records in response to any similar request in the future, “unless a court order prevents it.” CP 154-58.

The superior court imposed a penalty of \$169,718.75 on L&I for the time period of March 22 to July 25, 2013, because the court believed the records should have been produced on March 22 (the date the court

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<sup>15</sup> See RCW 42.56.270; RCW 19.108.

erroneously believed the investigations had concluded), and because it believed L&I did not adequately justify its delay in producing records or in notifying the subjects of the records of their opportunity to seek an injunction. CP 861. The record does not support the superior court's determination.

First, as explained above, L&I provided a reasonable estimated date for producing the records—August 9, 2013. Although not required by RCW 42.56.520, L&I justified that estimate by explaining that there were multiple open investigations and citing exemptions providing confidentiality of records obtained during investigations. No further explanation was necessary. *Ockerman*, 102 Wn. App. at 214.

Second, even while its investigations were continuing, L&I was processing the records obtained in the investigation in preparation for production on August 9, the date it had reasonably estimated in its five-day letter on February 7. CP 807. L&I continued to provide installments, where possible, without waiting for all of the investigations to conclude.<sup>16</sup>

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<sup>16</sup> In a good faith effort to respond to the Seattle Times' request, L&I produced documents that were created after the time of the request. *E.g.*, CP 62-82. An agency is required to produce responsive public records it possesses as of the date of a request; it has no duty to produce records it obtained or prepared after that date. The record reveals that L&I provided many records created after the request to the Seattle Times. *See, e.g.*, CP 62-82, 87-124, 130-35, 139-150, 564-65, 766. An agency is not required to produce a record that does not "exist" at the time of a public record request. *West v. Wash. State Dep't of Natural Res.*, 163 Wn. App. 235, 245, 258 P.3d 78 (2011), *review denied*, 173 Wn.2d 1020 (2012). For purposes of the Public Records Act, a record created by

On May 16, 2013, L&I produced a second installment, consisting of the five citations that were issued days before, without redaction and without withholding. CP 800, 809. L&I stated that more records would be produced, explaining it was still reviewing the inspection records supporting those five citations for exemptions. CP 800, 809. L&I also stated that not all investigations were concluded and the records in those investigations would not be produced until they were closed, and reiterated its intent to provide all non-exempt responsive records by August 9. CP 801, 809.

On June 7, 2013, L&I issued the last citation. CP 801. On July 12, L&I produced the citations and notices of assessment resulting from the last two investigations, along with the remainder of the inspection file for one of the businesses. CP 801. In its cover letter to the July 12, 2013 release, L&I said it was continuing to review the requested records to determine whether they contained information that was exempt from

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someone other than the agency does not “exist” until it is “owned, used, or retained” by the agency. RCW 42.56.010(3); *accord* WAC 44-14-04004(4)(a) (“An agency is only required to provide access to public records it has or has used.”). Moreover, the Public Records Act does not require agencies to supplement responses to a public record request with records that are produced or obtained after the date of the request. *Sargent v. Seattle Police Dep’t*, 167 Wn. App. 1, 11, 260 P.3d 1006 (2011) (citing Washington State Bar Ass’n, *Public Records Act Deskbook*, § 5.3, at 5-31 (2006); WAC 44-14-04004(4)(a)), *aff’d in part, rev’d in part on other grounds*, 179 Wn.2d 376 (2013).

Although not legally required to do so, L&I nevertheless produced copies of records it obtained or that were created after the date of the Seattle Times’ public record request, and did so without any objection. This is but one example of L&I’s effort to provide the “fullest” assistance to the Seattle Times. RCW 42.56.100.

disclosure. CP 814. Again, L&I reiterated its intent to adhere to the August 9 disclosure date. CP 801, 814.

As L&I's investigations started coming to a close, L&I proactively began reviewing the documents for exemptions. It is not unreasonable for that review to take several weeks, where there are thousands of records, obtained in overlapping investigations, that include sensitive health-related information for workers that could be exempt under federal or state law, and that include records the investigated businesses had marked as confidential. That period of time is not unreasonable for an agency that receives some 500 public record requests and mails out over 105,000 records every month.<sup>17</sup> CP 799. The Public Records Act accommodates the reality that agency resources for responding to records requests are finite, by specifically recognizing a need to "prevent excessive interference with other essential functions of the agency," RCW 42.56.100, and by allowing agencies a reasonable amount of time to respond to requests. RCW 42.56.520; *see Soter*, 162 Wn.2d at 750; *Forbes*, 171 Wn. App. at 863; *Ockerman*, 102 Wn. App. at 218.

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<sup>17</sup> In 2013, L&I employed nine persons in its Public Records Unit to handle this volume of public record requests and production. CP 799. As in other state agencies, funds to support those employees are pulled from available operating appropriations, because the Legislature allocates no dedicated funding to staff the Public Records Unit. Similarly, there is no special fund established to pay penalties imposed on an agency under the Public Records Act; penalties also must be pulled from operating appropriations.

It was error for the superior court to find a violation of the Public Records Act and impose penalties for the period between March 22 and July 25, 2013. Multiple investigations were continuing during most of that period, justifying temporary withholding of the investigative records even while the citations were produced. There was no unreasonable delay in processing the records, and the agency was continuing to work toward meeting the August 9 date it had reasonably estimated from the outset.

**3. L&I Reasonably Gave the Companies Who Claimed an Exemption 15 Calendar Days To Take Court Action**

RCW 42.56.520 specifically authorizes an agency “to notify third persons or agencies affected by the request,” and RCW 42.56.540 specifically provides an agency with “the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested,” to allow those persons to seek an injunction against production. In *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998), the Court held that it was reasonable to delay the production of records in recognition of the right established for persons impacted by the production of public records to seek an injunction prohibiting or limiting production. *Id.* at 757-58; *accord Soter*, 162 Wn.2d at 750.

L&I reasonably exercised that statutory option. L&I is charged with enforcing statutes and rules that protect workers from hazardous job conditions, inspecting thousands of workplaces each year. It depends on cooperation from both employers and employees, which will exist only if L&I is perceived as fair and just in its dealings with them. Here, as in many instances in which a business claims the information it provided in an investigation is a protected trade secret, L&I lacks the specific expertise or factual context to assess the validity of the claim. In such instances, it is both prudent and fair to the business to give it the opportunity to prove its claim of exemption, which RCW 42.56.520 and .540 explicitly provide. It is not a violation of the Public Records Act to provide that opportunity, even where the business subsequently is unable to demonstrate that the exemption applies. *See Confederated Tribes*, 135 Wn.2d at 757-58 (Gambling Commission did not unreasonably delay production by withholding records to give affected tribes an opportunity to request injunction, even though tribes proved unable to demonstrate that trade secrets exemption applied).

The right of persons named in public records to obtain an injunction under RCW 42.56.540 would be hollow without reasonable time to exercise that right. The statute provides no guidance as to what is a reasonable time. L&I provided fifteen days, from July 24 through

August 9, 2013. CP 154-58. The superior found that time period to be too long and imposed penalties. CP 861-62.<sup>18</sup>

In fact, that time period turned out not to be long enough for Wade's to exercise its right to seek an injunction. Under *Burt v. Department of Corrections*, 168 Wn.2d 828, 231 P.3d 191 (2010), a requester is a necessary party to an injunction action under RCW 42.56.540. *Burt*, 168 Wn.2d at 833-37. In this case, Seattle Times was not the only requester—there were nine separate requesters requesting various parts of the investigative files at issue here. CP 430-41. Despite reporting diligent efforts to locate and serve all requesters—some of whom were outside the state, and some of whom could not be served through their attorneys—Wade's attorneys were not able to complete service within the fifteen days L&I had provided. CP 392-95, 425-28, 450-51. Although the superior court faulted Wade's for not obtaining a preliminary injunction by August 9, no valid preliminary injunction could issue without notice to the other requesters. CR 65(a); see *In re Estates of Smaldino*, 151 Wn. App. 356, 367, 212 P.3d 579 (2009) (due process requires notice and an opportunity to be heard before a preliminary

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<sup>18</sup> Because the superior court awarded penalties for the entire 15-day period between July 25 and August 9, it would appear that the superior court considered any time at all allowed to a third party to be "too long." That is not a reasonable construction of RCW 42.56.520 and .540.

injunction can issue), *review denied*, 168 Wn.2d 1033 (2010) (citing *In re Groen*, 22 Wash. 53, 60 P. 123 (1900)). And proper service of the summons and complaint was necessary to invoke the superior court's jurisdiction over the other requesters. *Lee v. W. Processing Co., Inc.*, 35 Wn. App. 466, 469, 667 P.2d 638 (1983) (citing RCW 4.28.020, .080; CR 4; *Interior Warehouse Co. v. Hays*, 91 Wash. 507, 158 P. 99 (1916)).

The superior court also criticized L&I's decision to give the companies notice because L&I itself did not believe the trade secrets exemption applied. CP 861. By this logic, a state agency can give notice to a third party only if the agency believes an exemption applies. But RCW 42.56.520 and .540 provide no such limitation. Indeed, if the agency believed the records were exempt, it would withhold them.

L&I did not favor the interests of the investigated businesses over those of the requesters by following a procedure that is explicitly authorized in the Public Records Act. The superior court erred by so finding. CP 471. It erred by awarding a penalty for the period between July 25 and August 9, 2013.

**4. L&I Acted Reasonably Under the Circumstances in Extending the Date for Production to Wait for the Superior Court's Ruling**

The superior court found that L&I violated the Public Records Act by continuing to withhold records after August 9 in the absence of a court

order enjoining production, and imposed a penalty of \$184,654 for the period between August 9 and September 12, 2013. CP 471. As explained above, it is not a violation of the Public Records Act to delay production for a reasonable time to provide affected persons an opportunity to exercise their right under RCW 42.56.540 to request an injunction prohibiting or limiting production. *Confederated Tribes*, 135 Wn.2d at 757-58.<sup>19</sup>

In the superior court, the Seattle Times cited *Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn. App. 110, 231 P.3d 219 (2010), for its argument that L&I could not continue to withhold

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<sup>19</sup> In hindsight, it would have been possible for L&I to have released records on August 9 that were not contested by Wade's or Deacon in their efforts to obtain an injunction. At the time, however, it was not clear which records would be placed at issue. While Deacon was specific, listing seven records it would seek to enjoin, CP 822, Wade's stated only that it would seek to enjoin L&I from releasing "the records." CP 819. L&I could have inquired of Wade's as to which records it would seek to enjoin, and then produce the rest.

But L&I's failure to provide an additional installment on August 9 is not a violation of the Public Records Act:

It may be proper, under appropriate circumstances, for a responding agency to make public records available on a piecemeal basis. But there is no requirement in the statute for the agency to do so.

*Ockerman*, 102 Wn. App. at 219-20. After *Ockerman*, RCW 42.56.080 was amended to allow (but not require) records to be produced in installments, leaving to agencies the discretion whether and how to do so. See *Forbes*, 171 Wn. App. at 865 ("Pursuant to RCW 42.56.080 an agency is *permitted* to make records available on a partial or installment basis as additional records are assembled to complete the request.") (emphasis added).

records after August 9 without a court order enjoining their production.<sup>20</sup> CP 169. In *Kitsap County*, the county received a public record request for a database of information about county employees. The county's five-day letter provided a date for responding to the request. *Id.* at 114. On that date, the county provided all responsive information except "town of residence," which the county thought may be exempt under RCW 42.56.250, and notified its employees of the record request. *Kitsap Cnty.*, 156 Wn. App. at 114-15. The county also told the requester it would decide what to do by August 20, but it did not do so. *Id.* at 115. On August 22, employee guilds filed an action to enjoin production of "town of residence" information, but no injunction was ever issued. *Id.* at 116. Finally, in mid-October the requester filed an action to compel production, in which it ultimately prevailed. *Id.* at 116-17.

The Court of Appeals affirmed the superior court's award of attorney fees and a \$845 penalty (169 days x \$5 per day). The court held the county had requested a reasonable amount of time to determine whether the responsive information could be produced, but thereafter, without an order enjoining production, the county should have provided

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<sup>20</sup> Although *Kitsap County* is not cited, it appears to be the "binding case law" referred to in the superior court's order imposing penalties. CP 878. As explained here, *Kitsap County* is distinguishable and limited by *Confederated Tribes* and RCW 42.56.540.

the responsive information instead of waiting for a ruling on the legality of the exemption. *Id.* at 120.

The situation here is distinguishable. L&I did not wait until the deadline (August 9, 2013) it had established for producing the rest of the investigative records to notify the affected businesses. It notified them two weeks in advance, warning them that it would produce the responsive records unless there was a judicial order preventing it from doing so. CP 154-58. Before that deadline, on the afternoon of August 8, L&I received two written notices of intent to file an action to enjoin production of the records. One of the actions was filed the next day; the other a few days later. On that basis, L&I elected to delay production of the last installment of records to allow those businesses their day in court. CP 802. The next morning, L&I promptly notified the Seattle Times. CP 802, 825-26. Unlike *Kitsap County*, an action to enjoin production was filed by the deadline L&I established for doing so.

Wade's stated its motion for preliminary injunction would be filed on August 19, and Deacon served L&I with a notice of hearing indicating a show cause hearing would be held on September 6. CP 802, 819. Based on that information, L&I rescheduled the production of records for September 13 to allow for that hearing. CP 802. Shortly before that hearing date, however, it became clear that the hearing would not take

place. The Seattle Times responded by answering Wade's complaint, filing a counter-claim and cross-claim, and noting a hearing the day before L&I planned to release the records. CP 17-39. A flurry of filings followed, presenting the superior court with cross motions by the Seattle Times, Wade's, and Deacon to compel production or enjoin production. CP 208-17, 218-30, 306-07, 308-13, 324-37, 352-61, 370-78, 379-82, 383-87. Unlike the county in *Kitsap County*, L&I did not support Wade's and Deacon on the merits of their exemption claims, but it did support their right to be heard under RCW 42.56.540. CP 317-20.

L&I's actions here are on all fours with those of the Gambling Commission in *Confederated Tribes*. RCW 42.56.540 specifically allows an agency to delay production for a reasonable time to provide affected persons an opportunity to exercise their right under RCW 42.56.540 to request an injunction prohibiting or limiting production. *Confederated Tribes*, 135 Wn.2d at 757-58. The Seattle Times' reading of *Kitsap County* conflicts with *Confederated Tribes* and rewrites RCW 42.56.540. To be consistent with *Confederated Tribes* and the express language of RCW 42.56.540, *Kitsap County* should be limited to the situation where an agency provides the statutory opportunity for a third party to seek an injunction, the third party fails to do so, and the agency nevertheless continues to withhold the records. Here, the superior court ruled on the

competing motions on September 12, 2013. Under *Confederated Tribes* and RCW 42.56.540, it was error for the superior court to award penalties for the period between August 9 and September 12, 2013.

**5. L&I Did Not Unreasonably Delay in Producing All Responsive Records Within One Week After the Superior Court Ordered Them Produced**

At no time did L&I deny the Seattle Times' public record request. At the outset, L&I provided a reasonable estimate of the time it would take to respond—until August 9, 2013—and it explained the basis for that estimate, as permitted in RCW 42.56.520. Along the way, it provided records that were not temporarily exempted under the investigative records exemption in RCW 42.56.240(1). When affected businesses exercised their statutory right to seek an injunction as provided in RCW 42.56.540, L&I notified the Seattle Times it would delay the response until the superior court ruled on the actions that were filed. On September 13, 2003, the day after the superior court ordered the records to be released, L&I attempted to produce the records through an electronic connection with the Seattle Times, as requested by the Seattle Times. CP 802. That attempt was unsuccessful because of the volume of records, and the Seattle Times agreed to receive the records via overnight mail. CP 802.

In preparing the records for production to the Seattle Times, L&I had redacted medical information obtained in the investigations, as authorized in RCW 42.56.360(2) and RCW 70.02.020; those redactions were in the September 13 production, which was accompanied by an exemption log explaining the redactions. CP 802, 828, 831-32. After reviewing the superior court order, however, L&I produced unredacted copies of those records in its final installment on September 19. CP 802. In these two installments, L&I produced approximately 5,400 pages, not counting the second production of the fourth installment without redactions. CP 834-35. No records were withheld and the time taken to make these records ready for production was not unreasonable.

All responsive records were disclosed by September 19, one week after the superior court ordered them produced. CP 834. The superior court imposed penalties totaling \$136,816.00 for not having produced them on the same day the superior court ordered their production. CP 862. As explained in the next section of this brief, this penalty amount—and every penalty imposed in this case—is not authorized by RCW 42.56.550 and constitutes an abuse of discretion.

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

Determining a penalty under RCW 42.56.550 involves two steps: (1) determining the number of days the party was denied access, and (2) determining the appropriate per-day penalty, depending on the agency's actions. *Yousoufian V*, 168 Wn.2d at 458. The Public Records Act does not authorize a penalty based on the number of pages produced in response to a public record request.

**1. RCW 42.56.550 Does Not Provide for Per-Page Per-Day Penalties**

Had the Legislature intended to impose a per-page per-day penalty, it would have said so in its penalty statute. It did not. 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 can the definition of "public record" in RCW 42.56.010(3) be understood to mean "page." Incorporating the cross-reference to "writing" in RCW 42.56.010(4), each of the following may be a "public record": a magnetic tape, a motion picture, a video recording, a computer storage

disk or diskette, a sound recording, and a data compilation. In each of these categories, the concept of a “page” is without meaning.<sup>21</sup>

Moreover, the Legislature—and the voters in approving Initiative 276—have shown that they know how to refer to pages instead of records. See RCW 42.56.070(7) (allowing agencies to recover per-page costs for providing copies of records); RCW 42.56.120 (same).

The goal of statutory interpretation is to discern and implement the Legislature’s intent. *Ellensburg Cement Prods., Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 743, 317 P.3d 1037 (2014). In doing so, the Court looks first to the plain meaning of the language of the statute. *Id.* When determining a statute’s plain meaning, the court considers all related statutes. *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.2d 1020 (2007). If the plain language of the statute is unambiguous, the Court’s inquiry is at an end. *Manary v. Anderson*, 176 Wn.2d 342, 352, 292 P.3d 96 (2013). If ambiguous, the Court uses tools of statutory construction to interpret the statute. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007).

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<sup>21</sup> Even a common sense understanding of what constitutes a “record” yields the same result. Many records—such as reports, memos, planning documents, databases, etc.—comprise multiple pages. A public record request for a particular report may result in production of one document 200 pages long, while a request for a different report may produce a two-page document. As explained below, there is no plausible rationale for a 100-fold difference in penalty where the only difference is the size of the document requested. But that is the result under the Seattle Times’ per-page theory.

This Court already has held that the penalty language in RCW 42.56.550(4) is ambiguous. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 434, 98 P.3d 463 (2004) (*Yousoufian II*).<sup>22</sup> The Court resolved that ambiguity by holding that the purpose of the Public Records Act—promoting access to public records—is “better served by basing the penalty on an agency’s culpability than it is by basing the penalty on the size of the plaintiff’s request.” *Id.* at 435.<sup>23</sup>

That holding is consistent with the use of the phrase “public record request” in the Act. The Act uses that phrase to describe the request that triggers an agency’s duty to respond under the Act: “Within five business days of receiving a *public record request*, an agency . . . must respond . . . .” RCW 42.56.520. In describing the permissible response, the statute uses the plural and the singular interchangeably, allowing the agency to (1) provide “the record”; (2) provide an internet link to “the specific records requested”; (3) acknowledge the request; or (4) deny the request. RCW 42.56.550(1) refers to an agency’s refusal to allow inspection or

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<sup>22</sup> When *Yousoufian II* was decided, the penalty provision was codified at RCW 42.17.340. The exemption was recodified in 2005 at RCW 42.56.550. Laws of 2005, ch. 274, § 288. For consistency and clarity, this brief cites the current codification of the penalty section.

<sup>23</sup> The Court of Appeals had reached the same conclusion, reasoning that under the per-record per-day approach the requester advanced, “agencies that acted in good faith but failed to respond adequately to broad requests for multiple documents would often pay higher penalties than agencies that refused to disclose a single document in bad faith.” *Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 848, 60 P.3d 667 (2003) (*Yousoufian I*), *aff’d in part, rev’d in part on other grounds*, 152 Wn.2d 421 (2004).

copying of “a specific public record or class of records” and places the burden on the agency to justify the withholding of “specific information or records.” Consequently, the availability of a penalty in RCW 42.56.550(4) for each day “said public record” is improperly withheld must be understood as referring to all the records that are improperly withheld in response to a “public record request.” It does not authorize a per-record penalty, much less a per-page penalty.<sup>24</sup>

The Court’s holding in *Yousoufian II* also is consistent with the available legislative history of Laws of 2011, ch. 273, the 2011 legislation that reduced the minimum daily penalty to zero. The House Bill Report used the plural to describe the effect of the bill: “Changes the range of the monetary penalty that may be assessed against an agency under the Public Records Act from a minimum of \$0 up to a maximum of \$100 *for each day the agency has unlawfully failed to provide requested records.*”<sup>25</sup> The Senate Bill Report used the singular when closely paraphrasing the existing statutory language, but it referred only to a “per day” requirement when summarizing the proposed amendment: “The court’s discretion to award a monetary amount to the prevailing person in a law suit under the

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<sup>24</sup> See also RCW 1.12.050 (in construing statutes, singular and plural words may be used interchangeably).

<sup>25</sup> H.B. Report on S.H.B. 1899, 62nd Leg., Reg. Sess. (Wash. 2011), 1 (emphasis added), available at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1899&year=2011>.

PRA is changed to an amount not to exceed \$100 *per day*.”<sup>26</sup> Nowhere does the legislative history indicate there was any discussion of or intent to award a per-page or per-record penalty.<sup>27</sup>

Moreover, the potential penalties available had the Legislature authorized a per-page penalty are completely untethered from any possible agency culpability. In this case, if per-day penalties were available for 5,431 pages withheld for 233 days (L&I does not concede that either value is correct), the maximum potential penalty would be \$126,542,300.00 (5,431 pages x 233 days x \$100.00 per page per day). It is inconceivable that the Legislature would have intended a potential award of this magnitude in a single public records case.

Between 1992 and 2011, the Public Records Act mandated a minimum daily penalty for a public records violation of five dollars per day.<sup>28</sup> If the Seattle Times were correct that the penalty should be calculated per page, the *minimum* penalty before 2011 in this case would

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<sup>26</sup> Sub. S.B. Report on S.H.B. 1899, 62nd Leg., Reg. Sess. (Wash. 2011), 2 (emphasis added), available at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1899&year=2011>.

<sup>27</sup> There is no indication in the record of legislative hearings regarding SHB 1899 that any legislator viewed RCW 42.56.550 as imposing per-page or per-record penalties. Links to those hearings are at [apps.leg.wa.gov/billinfo/summary.aspx?bill=1899&year=2011](http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1899&year=2011).

<sup>28</sup> Before 1992, the Public Records Act provided for a penalty of up to \$25.00 per day. In 1992, the Legislature amended the Act to provide a penalty between \$5.00 and \$100.00 per day. Laws of 1992, ch. 139, § 8. In 2011, the Legislature amended RCW 42.56.550(4) to authorize a penalty of up to \$100.00 per day, with no minimum mandated penalty. Laws of 2011, ch. 273, § 1.

have been \$6,327,115 (5,431 pages x 233 days x \$5.00 per page per day). It is inconceivable that even the “minimum” penalty would have been intended by the Legislature in a public records case such as this one.

One hypothetical, but realistic, example further illustrates this point. It is not uncommon for agencies to receive broad record requests that result in tens of thousands—or even hundreds of thousands—of electronic records. Suppose an agency receives such a request, conducts a reasonable search, and discovers 50,000 one-page electronic records. Suppose further (as in this case) that the superior court determines the agency takes too long to produce the records. Under the Seattle Times’ theory, that agency would be subject to a potential penalty of *five million dollars* for every single *day* the court determines the records should have been produced (50,000 pages x 1 day x \$100.00 per page per day). The Legislature cannot have intended this possibility.<sup>29</sup>

Finally, it must be noted that RCW 42.56.550(4) also does not allow records to be grouped as a substitute for a per-page or per-record penalty calculation. The Court in *Sanders* characterized *Yousoufian II* as giving that discretion to the superior court. *Sanders*, 169 Wn.2d at 864

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<sup>29</sup> Under the Seattle Times’ theory, even in this case—which is not an egregious example of agency indifference to the Public Records Act—L&I would be subject to a potential penalty of \$543,100.00—over a *half million dollars—per day* (5,431 pages x 1 day x \$100.00 per page per day).

(citing *Yousoufian II*, 152 Wn.2d at 435-36); accord *Bricker v. Dep't of Labor & Indus.*, 164 Wn. App. 16, 21-24, 262 P.3d 121 (2011) (citing *Sanders*, 169 Wn.2d 827, and *Yousoufian II*, 152 Wn.2d 421). But *Yousoufian II* did not hold that a superior court has that discretion. In *Yousoufian II*, the county did not cross-appeal the superior court's decision to group the records, so that issue was not before the Court. *Yousoufian II*, 152 Wn.2d at 436 n.9. To the contrary, the Court in *Yousoufian II* seemed more concerned with the ability of a requester to unfairly enlarge a daily penalty by submitting individual requests for each record sought, rather than a coherent single request. *See id.* at 436 n.10. The appropriate response to that behavior would be to group such public record requests if there is reason to calculate a daily penalty.

To the extent *Sanders* allows a penalty beyond a penalty for each day requested records were improperly withheld, it conflicts directly 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*, 168 Wn.2d at 459 (quoting *Yousoufian II*, 152 Wn.2d at 438) (emphasis added; penalty range modified to reflect 2011

amendment to RCW 42.56.550).<sup>30</sup> In that respect, *Sanders* also is inconsistent with other Supreme Court decisions. 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); accord *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).

**2. Public Policy Is Not Served By Rewarding Requesters for the Number of Responsive Records**

It is no answer to say that the superior court here awarded small per-page penalties rather than the statutory maximum. Discerning whether the Legislature intended a penalty of up to \$100 per day or up to \$100 per-page per-day is not determined by what the superior court did in this case. The question is whether the Legislature intended to confer such broad

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<sup>30</sup> The five dollar minimum penalty is no longer in the statute. Laws of 2011, ch. 273, § 1. Accordingly, a penalty no longer is mandated in every instance in which an agency failed to comply with the Public Records Act. In removing a mandated penalty, the Legislature returned to the original vision of the Act adopted in Initiative 276, which provided for a penalty up to \$25, with no minimum mandated penalty. See Laws of 1973, ch. 1, § 34.

discretion on a superior court that it could impose a penalty in the millions of dollars—or, as shown above, in the hundreds of millions of dollars—for even the most severe violations of the Public Records Act.

The answer must be no, since the prospect of such large penalties goes well beyond the purpose of the penalty provision, which is to “discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute,” *Yousoufian II*, 152 Wn.2d at 429-30 (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978)). A penalty based on the number of responsive pages or records is disproportionate to agency culpability, precisely because it is disconnected from agency culpability. A clever or lucky requester could receive a financial windfall at taxpayer expense by filing a public record request for which there are a large number of responsive records or pages, and then waiting for a mistake in production. Because responding to public records is a human endeavor, mistakes inevitably occur—not through indifference or malevolence, but simply because people are imperfect and make mistakes.

There is nothing in the history of the Public Records Act that remotely suggests the Legislature intended the Act’s penalty provision to provide potential windfalls to requesters who abuse the Act, or to allow such requesters to drain the public treasury and potentially cripple

agencies. Yet those are consequences that naturally flow from the Seattle Times' per-page penalty theory.

For nearly four decades, Washington courts have interpreted the penalty provision as authorizing a per-day penalty for improperly denying a public record request, not a per-record or per-page penalty. *See, e.g. Hearst Corp.*, 90 Wn.2d at 129 (penalties are recoverable against the agency “up to \$25 *per day* for each day the *documents* are wrongfully withheld”) (emphasis added); *Sargent*, 179 Wn.2d at 397 (the Act “requires imposition of *per diem* penalties up to \$100 per day whenever a violation is found”) (emphasis added).

Although the penalty provision in the Public Records Act has been amended at least six times since its enactment, most recently in 2011, the Legislature has not acted to change that understanding, apparently believing per-day penalties, plus attorney fees and costs, are sufficient compliance incentives.

In this case, the agency acted in good faith to comply with the Act, provided a reasonable estimate of the time required to provide responsive records, explained the basis for that estimate, communicated regularly with the requester while the request was pending, provided early installments as records became available, and attempted to be fair and responsive to all parties involved in the litigation. This is not a

circumstance in which the Legislature would have contemplated or intentionally authorized a half-million dollar penalty.

### VIII. 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. 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 any nonexempt records that are responsive to the request; in doing so, the Court should clarify that a per-page or per-record penalty calculation is not authorized by RCW 42.56.550. The Court should reverse the superior court and remand with directions to dismiss the Seattle Times' action.

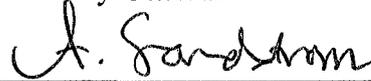
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If the Court were to conclude that L&I may have violated the Public Records Act, it should nevertheless hold (1) that L&I properly relied on the investigative records exemption in RCW 42.56.240(1) during the open investigations, (2) that L&I provided a reasonable estimate of time necessary to produce the responsive records, and (3) that L&I acted in compliance with RCW 42.56.520 and .540 in allowing Wade's and Deacon a fair opportunity to seek an injunction against production. On remand, the Court should direct that any penalty be calculated using a per-day formula as provided in RCW 42.56.550(4).

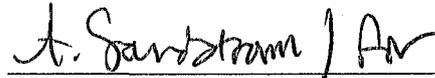
RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of May, 2014.

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