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Court of Appeals No. 68016-1-I

Turner Helton,

Respondent,

vs.

Seattle Police Department,

Petitioner,

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The trial court's award of a \$45 per day penalty in this case, the same amount awarded by the court in *Yousoufian*, was an abuse of discretion. The Seattle Police Department ("SPD") acted in good faith and in reasonable reliance on existing case law in responding to Helton's Public Records Act ("PRA") request. In addition, SPD disclosed the disputed records, and decided to revise its policy related to the assertion of the relevant exemptions, less than two weeks after the publication of controlling authority. This is not a case like *Yousoufian* that involved gross negligence and years of PRA non-compliance.

The trial court abused its discretion when it employed a flawed methodology in approving an unreasonable and excessive attorney fee petition. The trial court identified numerous deficiencies in Helton's original attorney fee petition, allowed Helton an opportunity to correct those deficiencies, but then upheld Helton's supplemental fee petition containing the same deficiencies. Moreover, the trial court refused to allow SPD leave of court to adequately respond to the court's methodology, and refused to consider SPD's challenge to that methodology on reconsideration.

It is undisputed that the trial court has some discretion over the level of a per day penalty and an award of attorney fees. But the trial court must do more than arbitrarily assign a per day penalty amount, or accept an attorney fee petition on its face. Where the Supreme Court has set forth legal factors to guide the trial court's discretion, and controlling case law exists that applies those factors, it is essential that those factors are applied appropriately. In addition, the trial court must employ a proper procedure in critically reviewing an attorney fee petition.

II. ARGUMENT

A. **SPD's good faith compliance with the PRA warrants the lowest level of any per day penalties.**

In denying a records request for a disciplinary investigative file involving unsubstantiated allegations of misconduct, SPD acted in reasonable reliance on then existing case law with a valid claim of both the "essential to effective law enforcement" and "employee privacy" exemptions to disclosure. These are facts similar to other "instances of less egregious agency conduct, such as those instances in which the agency has acted in good faith but, through an understandable misinterpretation of the [PRA] or failure to locate records, has failed to respond adequately." *Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 854, 60 P.3d 667, (2003), *aff'd in part, rev'd in part*, 152 Wn.2d 421

(2004). Even if there is a violation of the PRA, that type of agency action warrants the minimum statutory penalty. *Id.*

Moreover, courts have indicated that the lowest level of per day penalties is warranted when an agency's motivation in asserting exemptions is the protection of privacy rights. *See ACLU of Washington v. Blaine School District*, 95 Wn. App. 106, 114, 975 P.2d 536 (1999) (distinguishing the facts in that case from instances where the failure to disclose records was based on an agency's concern for a third party's privacy rights). *See also King County v. Sheehan*, 114 Wn. App. 325, 356-357, 57 P.3d 307 (2002) (recognizing that the County's denial of a records request was based on a concern for the privacy rights of its police officers, and therefore the County acted in good faith).

In determining an appropriate penalty amount, courts look to previous penalty awards in other cases for guidance. *ACLU of Washington*, 95 Wn. App. at 114. An appellate court will also consider the trial court's oral statements discussing the appropriate penalty. *Id.* Here, the trial court described the \$45 per day penalty amount as "in some sense of the word, an arbitrary figure." November 18, 2011 Report of Proceedings 42:14-16.

An appellate court should not uphold a per day penalty that is based on an incorrect application of the *Yousoufian* factors. *Zink v. City of Mesa*, 162 Wn. App. 688, 704-706, 256 P.3d 384 (2011). In the *Zink v. city of Mesa* case, the court declined to uphold a per day penalty amount that was based on the original *Yousoufian* factors before the decision was modified and the factors slightly amended.

1. Three separate trial courts upheld an identical application of the employee privacy exemption.

In applying exemptions to the content of the file involving unsubstantiated allegations of misconduct in response to Helton's request, SPD sought to protect the effectiveness of OPA's internal investigative process, and the subject officers' right to privacy. At the time, the *Bellevue John Does* case supported withholding the entire contents of an unsubstantiated internal investigative file if disclosing it in conjunction with an officer's name would reveal the subject employee's identity in connection with matters that serve no legitimate public interest. *Bellevue John Does 1-11 v. Bellevue School District #405*, 164 Wn.2d 199, 189 P.3d 139 (2007). At the time SPD responded to Helton's request, three separate trial courts reached the same conclusion. *See Bainbridge Island*, 172 Wn.2d at 406.

Those trial court decisions were a reasonable interpretation of the law as it existed at the time. For example, PRA exemptions are applied categorically in other contexts. In the *Newman* case, newspaper articles were appropriately withheld in the context of a request for active investigative records. *Newman v. King County*, 133 Wn.2d 565, 573, 947 P.2d 712 (1997). Similarly, factual information gathered by an investigator working for an attorney was properly withheld as attorney work product. *Soter v. Cowles Publishing*, 162 Wn.2d 716, 747-748, 174 P.3d 60 (2008).

In *Koenig v. Pierce County*, a requester submitted separate requests for identical investigative records to the Pierce County Sheriff's Office and the Pierce County Prosecuting Attorney. *Koenig v. Pierce County*, 151 Wn. App. 221, 234, 211 P.3d 423, 429 (2009). The Prosecuting Attorney withheld the investigative records as work product, while the same records were provided to the requester by the Sheriff's Office. *Id.* The court in that case held that the prosecutor's office properly withheld the records. *Id.* at 231. In so doing, the court focused on the nature of the file rather than the nature of the records.

As previously explained, in response to the *Bainbridge Island Police Guild* case, SPD changed its policy with respect to the disclosure of disciplinary investigative records involving unsubstantiated allegations of

misconduct records, and it is no longer an issue. But SPD's reliance on existing case law and rationale is important in this case because it supports a minimal award of any per day penalties.

Helton focuses on the nature of attachments and exhibits contained within the file, but the relevant fact is the nature of the file itself.

Assuming no other exemptions applied, the SPD Public Records Unit would provide a 911 recording in response to a request. But here, Helton requested the contents of an OPA file involving unsubstantiated allegations of misconduct with reference to the subject officer's name. In that context, SPD reasonably relied upon existing case law in applying the employee privacy exemption. Instead of an aggravating factor, SPD's reasonable reliance is more properly considered a mitigating factor.

2. The employee privacy exemption applies, even if a third party does not file a lawsuit seeking an injunction.

Helton dismisses any privacy-exemption related argument in this case because the officers subject to the allegations of misconduct did not file a lawsuit under RCW 42.56.540 seeking an injunction.

There is no authority for the proposition that a third party must file a lawsuit seeking an injunction in order for the RCW 42.56.230(3) "employee privacy" exemption to apply. The third party injunction

provision in RCW 42.56.540 is merely a procedural avenue for use by a third party in order to protect their privacy interests. Whether or not a third party pursues an injunction is irrelevant to the question of whether the employee privacy exemption applies. Otherwise, an agency itself would never be able to assert a privacy-related exemption.

3. Helton misinterprets established case law setting the parameters of the employee privacy exemption.

Helton argues that SPD did not make a showing that the employee privacy exemption applied in this case because disclosure of the specific investigative records was (1) highly offensive to a reasonable person; and (2) not of legitimate concern to the public under the test enunciated in *Hearst v. Hoppe*, 90 Wn.2d 123, 135-136, 580 P.2d 246 (1978). But the *Bellevue John Does* case established as a matter of law that disclosure of employee identity in conjunction with unsubstantiated allegations of misconduct met both prongs of the *Hearst v. Hoppe* test. *Bellevue John Does*, 164 Wn.2d at 215-216. Thus, disclosure of records in that context is a violation of the employee's right to privacy. As in this case, once an agency establishes that context, then the *Bellevue John Does* case controls. The *Bainbridge Island Police Guild* case upheld that rationale, and only clarified that any privacy concerns are satisfied by redaction of employee

identity, even if the records are requested with reference to the specific employee's name.

4. Helton dismisses other controlling PRA cases establishing a per day penalty amount as “largely irrelevant.”

As with any other reported appellate case, this court should compare the facts in *Yousoufian* and other cases setting an amount of per day penalties with the facts here. *See Sargent* 260 P.3d at 1017-1018 (comparing the facts of the *Yousoufian* case with the facts in the case at hand to determine whether the assessed per day penalty was proportionate). In fact, when it established the multi-factor test, the *Yousoufian* Court noted that at that time the “paucity of published cases” providing guidance on the proper amount of per day penalties supported a conclusion that the “abuse of discretion standard is insufficient guidance for trial courts.” *Yousoufian*, 168 Wn.2d at 464.

The *Yousoufian* case does not require a finding of gross negligence before a court may award a \$45 per day penalty under the PRA. But the facts in that case are nevertheless instructive as to what circumstances warrant a \$45 per day penalty.

Helton argues that in establishing the sixteen factors to guide the imposition of per day penalties, the *Yousoufian* Court stated that they did

not constitute an exclusive list of factors to consider. That is correct. But in this case, the trial court did rely exclusively on two *Yousoufian* aggravating factors, and three mitigating factors in its \$45 per day penalty assessment. To the extent that the court applied and considered an incorrect *Yousoufian* factor, it relied upon an incorrect legal standard and abused its discretion. Similarly, to the extent that substantial evidence does not support a finding that an aggravating factor was present, it is an abuse of discretion to rely upon that factor.

Here, Helton does not address SPD's argument that a per day penalty award in an amount necessary to serve a punitive purpose with respect to all law enforcement agencies is fundamentally different from an award necessary to serve a punitive purpose with respect to SPD only, and thus Helton does not counter the incorrect application of that specific *Yousoufian* factor. Moreover, as discussed, SPD acted in reasonable reliance on existing case law in asserting PRA exemptions, and thus substantial evidence does not support a finding that SPD "relied upon a narrow reading of PRA exemptions by agency in its own interests."

5. Helton mischaracterizes the incomplete testimony of one witness as an "admission."

Helton cites to excerpts from the incomplete testimony of Captain Gleason, takes his statements out of context, and argues that they support

an admission that SPD inappropriately relied upon the RCW 42.56.240(1) “essential to effective law enforcement” exemption. First, Captain Gleason presented evidence regarding the OPA investigation process. Specifically, he described an OPA investigator’s reliance on an expectation of confidentiality regarding the contents of an OPA investigative file when there was no finding of misconduct, at least prior to the SPD policy change after the *Bainbridge Island Police Guild* case. Captain Gleason testified that the expectation of confidentiality served as an incentive for individuals to provide information related to an investigation. August 5, 2011 Report of Proceedings (“August RP”) 47-48. Further, without that expectation, Captain Gleason explained that the OPA investigator may feel an obligation to function as a “screen” and not include records of baseless allegations in the investigative file. *Id.* at 48, lines 14-19.

Second, Helton’s argument on this alleged “admission” is based solely on Captain Gleason’s incomplete testimony and responses to questions during cross-examination, where there was no opportunity for re-direct examination. During that cross-examination, Captain Gleason opined that OPA may release certain information, such as a witness statement or medical records, to the actual complainant involved in an OPA investigation. *Id.*; RP 71-72. But Captain Gleason was not

providing testimony or speaking to SPD's procedure in response to a public records request.

Although a complainant's medical records may be provided to a complainant in the context of an OPA investigation, that fact does not necessarily mean the records are disclosed in response to a PRA request. This is particularly the case when, under the PRA, an agency may not distinguish between records requesters based on identity. RCW 42.56.080. In the context of a PRA request, SPD is not able to selectively release information to a particular requester based on his identity. Helton ignores this principle by arguing that his medical records should have been provided in response to a records request, while simultaneously seeking a motion to seal the same records in the court file. CP 81-85.

Finally, Helton fails to mention other evidence supporting the "essential to effective law enforcement" exemption provided in the form of declarations from an SPD Assistant Chief and an SPD Captain explaining SPD's reasoning for withholding investigative records of unsubstantiated allegations of misconduct in conjunction with a subject officer's identity, at least before the *Bainbridge Island Police Guild* decision. RP 660-669; RP 676-681. This reasoning included the negative effects on officer recruitment, selection and psychological well-being. *Id.*

In sum, Helton cites to incomplete testimony from one witness and claims this is an “admission” that SPD inappropriately claimed an exemption under RCW 42.56.240(1). That out-of-context citation ignores the complete picture. More importantly, this alleged “admission” does not address the separate exemption relied upon by SPD, the RCW 42.56.230(3) privacy based exemption.

6. Helton requested only the contents of an internal disciplinary investigative file.

Where the record consists solely of affidavits, and the trial court has not received testimony to assess witness credibility, an appellate court’s review is de novo. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d at 407.¹

Helton’s records request to SPD attached a letter that he received from the SPD Office of Professional Accountability (“OPA”) that listed the contents of an OPA internal investigative file. CP 53. In handwriting, Helton bracketed that list and wrote “I would like this information please.” *Id.* SPD’s final response to the request explained that the contents of OPA-IS file No. 09-0451 were exempt based on the “essential to effective law enforcement” and “employee privacy” exemptions. SPD’s response

¹ The only witness in this case was Captain Gleason, who provided incomplete testimony regarding the OPA investigative process. No witnesses testified regarding the intent or interpretation of Helton’s written request.

notified Mr. Helton that he could request an administrative review of the denial if he felt that information was withheld in error. CP 60. Helton did not pursue that option. Subsequently, Helton submitted a request for “a copy of my 2010 Public Disclosure Request for items from IIS Case file # 09-0451.” Thus, SPD reasonably interpreted his request as one for only the contents of an internal disciplinary investigative file.

B. The trial court’s abuse of discretion in awarding unreasonable attorney’s fees does not further the purposes of the PRA.

This case involved a show cause motion and a half day hearing before the disputed records were disclosed in their entirety. The trial court did not properly perform its obligation to closely scrutinize Helton’s attorney fee petition, instead shifting the burden to justify the reasonableness of the requested fees to SPD, and then not allowing SPD an adequate opportunity to respond.

In a case involving a statutory award of attorney’s fees, “there is a great hazard that the lawyers involved will spend undue amounts of time and unnecessary effort to present the case.” *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208, 212 (1987). The trial court must make an independent determination that the requested fees are

reasonable. *Id.* “The amount actually spent by the plaintiff’s attorney may be relevant, but is in no way dispositive.” *Id.*

1. This court should not accept Helton’s attempt to justify his attorney fees by blaming SPD for its defense of this case.

Helton spends much of his brief attempting to characterize SPD’s actions in this case as “overly litigious” and a “litigation onslaught.” Yet the only litigation of PRA exemptions in this case was a hearing on a motion to show cause that constituted a half day of court time including argument and the partial testimony of one witness, Captain Thomas Gleason. In addition, in its opening brief, SPD compared the approximately \$125,000 amount of awarded fees with the fee awards in other PRA cases. That number does not even include the additional fees awarded for attorney work at the hearing on fees, or the attorney work on a response to a motion for reconsideration, which together totaled approximately an additional \$20,000 in awarded fees.

SPD’s decision to present live testimony was based on clear precedent, and even necessary in the context of the essential to effective law enforcement exemption. In *Cowles*, the central case on SPD’s assertion of that exemption, the Supreme Court emphasized that it was the factual showing made by the State Patrol, including live testimony, which

demonstrated that confidentiality was warranted. *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 734, 748 P.2d 597 (1988).

Even so, the extent of live testimony occupied a portion of the half-day hearing on the motion to show cause. After that hearing, and less than two weeks after the *Bainbridge Island Police Guild* decision, the disputed records were disclosed in their entirety, and the only remaining issues were attorney fees and any per day penalties.

Helton argues that SPD's "overly litigious" approach required the submission of multiple fee petitions. That is not correct. After SPD disclosed the disputed records in their entirety, Helton submitted a motion for "mandatory award of fees and costs as prevailing party under the PRA" and noted the motion for the court's consideration. CP 383. At the hearing on the motion, it was the trial court, not SPD, that directed and required Helton's counsel to address deficiencies in his fee petition before any award of fees. At that point, even before the second hearing on attorney's fees, and before SPD's motion for reconsideration, it is undisputed that Helton requested and received virtually 100% of \$125,000 in fees pursuant to his "supplemental" fee petition. CP 1016.

2. The trial court's abuse of discretion is not remedied by the court's written order.

SPD agrees that the trial court did not make a ruling on attorney's fees at the September 28, 2011 hearing on Helton's initial fee petition. But the court's oral ruling is a clear indication of the methodology that the trial court employed in eventually awarding virtually 100% of the requested fees. A trial court "should not determine a reasonable attorney fee merely by reference to the number of hours which the law firm representing the prevailing party bills." *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). It is undisputed that, after the trial court identified numerous deficiencies in his original fee petition, Helton submitted the identical fee petition along with a declaration from an attorney at another law firm claiming that the award was reasonable.

The supplemental petition included a token reduction of \$3,690 for work on an unsuccessful motion to seal, but did not include any changes to address the deficiencies identified by the trial court related to block billing, conferencing and duplicative or excessive attorney work. When it became apparent that the trial court was reversing course regarding the previously identified deficiencies in the fee petition, the court declined to provide SPD with leave of court to provide additional evidence, and declined to consider additional evidence presented with SPD's motion for

reconsideration. Reliance upon such a flawed methodology is an abuse of discretion. See *Progressive Animal Welfare Soc. v. University of Washington*, 114 Wn.2d 677, 689, 790 P.2d 604 (1990) (holding that the trial court inappropriately concluded that a “failure to negotiate” justified a reduction in an award of attorney’s fees).

Moreover, Helton continues to assign significant importance to the Shelly Hall declaration. But Helton does not address SPD’s argument that it incorrectly states that attorney fees should serve a punitive purpose, and incorrectly claims that a “complete” award of fees is necessary for effective PRA enforcement. Those are incorrect legal standards, and reliance on those assertions is an abuse of discretion.

3. The declaration of Ramsey Ramerman is properly considered by this Court.

As described by Helton, the trial court refused to consider Ramsey Ramerman’s declaration with exhibits as part of its consideration of SPD’s motion for reconsideration. But the trial court did consider this evidence when Helton reopened the attorney fee issue with respect to an additional fee request for work responding to SPD’s motion for reconsideration. SPD responded to this additional fee request by reiterating its argument on the overall excessiveness of the requested fees in this case. The trial court reduced Helton’s additional fee request to account for block billing

inadequacies. Thus, the Ramsey Ramerman declaration and exhibits were considered by the trial court in the context of Helton's additional fee request, and were properly included in the record on appeal. There is no reason this evidence should not be considered by this court.

4. Attorney's fees awarded in this case are double or quadruple those awarded in other PRA cases.

In its written order awarding nearly 100% of the requested attorney fees in this case, the court included a finding that the requested fees were "reasonable." CP 1151. The trial court's only other finding with regard to the volume of requested attorney's fees was that "[t]he scope and extent of courtroom hearings and underlying briefing may have exceeded the amount of work necessary to present a typical PRA case." *Id.* Presumably, the court based this conclusion on Shelly Hall's declaration that included her assertions, but no discussion, citation or reference to any actual PRA cases.

The Ramerman declaration did provide discussion and documentation of PRA cases involving much more extensive litigation, and much lower fee awards. Helton dismisses these cases as not current, not representative of the Seattle legal market, and not relevant because a court cannot determine the details of the litigation.

First, all of the cases cited by Mr. Ramerman were litigated within the last four years, and two within the last two years. CP 1327; CP 1499. Second, a venue in King County does not change the number of hours reasonably necessary to litigate a PRA case. And even if there is a slightly different prevailing hourly rate in a different county, that fact would not justify a fee award that is double or quadruple the award in those cases.

Finally, Mr. Ramerman's declaration details the volume of litigation involved in those cases. For example, Mr. Ramerman litigated the *Zink v. Mesa* case and explained that the case involved dozens of alleged PRA violations, a four day trial, an appeal, and three days of hearings on remand. CP 1327; CP 1499. Further, Mr. Ramerman's declaration includes exhibits related to each case that provide extensive detail and analysis of the litigation and justification for the fee awards. CP 1330-1400; CP 1502-1572. Instead of accepting Helton's fee petition on its face, the trial court should have at least considered these directly relevant cases.

III. CONCLUSION

The PRA, and court decisions interpreting it, impose strict requirements on public agencies. One of the central purposes of those requirements is to ensure that the expenditure of public funds is not

wasteful or unjustified. This central tenet is directly undercut, and public funds are wasted, when the trial court does not properly perform its obligations.

This Court should reverse the trial court's imposition of a \$45 per day penalty amount, and reverse the trial court's award of attorney's fees totaling approximately \$145,000 for trial court work on a case with limited legal issues.

DATED this 11th day of July, 2012

PETER S. HOLMES
Seattle City Attorney

By: 

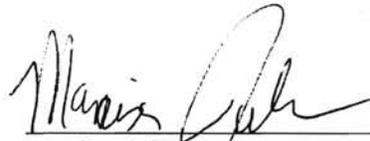
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CERTIFICATE OF SERVICE

I, certify that on this date I caused a copy of Appellant's Reply
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Signed at Seattle, Washington, this 11 day of July, 2012.



Marisa Johnson

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