

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

ARMEN YOUSOUFIAN,)	
)	
Petitioner)	
)	Case No. 00 2 09581 3 SEA
v.)	
)	
THE OFFICE OF RON SIMS, KING)	
COUNTY EXECUTIVE, a subdivision)	REPLY ON REMAND
of KING COUNTY, a municipal)	
corporation; THE KING COUNTY)	
DEPARTMENT OF FINANCE, a)	
subdivision of KING COUNTY, a)	
municipal corporation; and THE KING)	JUDGE MICHAEL HAYDEN
COUNTY DEPARTMENT OF)	
STADIUM ADMINISTRATION, a)	
subdivision of KING COUNTY, a)	
municipal corporation,)	
)	
Respondents.)	
_____)	

I. IN ITS BRIEF ON REMAND, KING COUNTY EXHIBITS THE SAME DISDAIN FOR THE PUBLIC DISCLOSURE ACT AND FOR THIS LAWSUIT THAT GOT IT INTO COURT IN THE FIRST PLACE.

Even at this late date, King County refuses to take this lawsuit or the underlying statute seriously. Not the trial court or a single one of the 12 appellate judges who have reviewed this

1 case agrees with the County's benign characterization of its misconduct. The County ignores
2 both the unchallenged Findings and Conclusions of the trial court and the rulings of the appellate
3 courts. For instance:

4 1. King County repeatedly describes its conduct as negligent. (King County's Brief
5 on Remand at 2, 3, 7, 8 and 14). In telling contrast, both the Court of Appeals and the Supreme
6 Court characterize the County's misconduct as gross negligence. Yousoufian v. Office of Ron
7 Sims, 114 Wn. App. 836, 847, 853, 854, 60 P.3d 667 (2003); Yousoufian v. Office of Ron Sims,
8 152 Wn.2d 421, 429, 439, 98 P.3d 463 (2005). Not one of the 12 appellate judges who have
9 reviewed this case dissented from that characterization.
10

11 2. King County's description of its initial response to Yousoufian's document
12 request is both misleading and directly contradicted by the trial court's uncontested Conclusions
13 of Law. As the County retells it: ". . . King County's initial estimate of three weeks for a job of
14 this size was not unreasonable. . . King County reasonably interacted with Mr. Yousoufian at the
15 outset of this case. Its initial efforts in communications with Mr. Yousoufian in June 1997 were
16 appropriate." (King County's Brief on Remand at 10-11). Though the statute allows for an
17 extension of time where necessary, the trial judge ruled that the County had not complied with
18 the statute in this regard and that the County ultimately demonstrated that additional time to
19 produce the documents was not necessary.
20

21 In response to Mr. Yousoufian's letter, the Executive's Office sent him
22 notification that, because the documents he requested were in Archives, three
23 weeks were required to respond to his request. However, the County failed to
24 provide evidence that any of the documents were in Archives at that time. This
25 notification suspiciously resembled a form letter, prohibited under the Act unless
it set forth reasons specific to the request in question. King County failed to
establish at trial that three weeks was necessary to respond to Mr. Yousoufian's

1 request, either in whole or in part. The specific evidence is to the contrary. When
2 Pat Steele finally reviewed Mr. Yousoufian's May 30 request, in February of
2001, she coordinated an effort and located the documents within a few days.

3 (Findings at 16-17, Attachment to Plaintiff's Trial Brief on Remand).

4 3. As it has throughout this litigation, King County continues to assert that "the
5 penalty imposed by the trial court was not a minimum penalty." (King County's Brief on
6 Remand at 5). Both the Court of Appeals and the Supreme Court repeatedly referred to the trial
7 court as imposing a minimum \$5 a day fee. Yousoufian v. Office of Ron Sims, 114 Wn. App. at
8 840, 847, 851, 853, and 854; 152 Wn.2d at 428, 429).

9 4. When King County solicits the sympathy of the Court, it talks of the burden of
10 producing 228 documents. (King County's Brief on Remand at 10). However, when the County
11 addresses the penalty calculation, it admits that the County was required to produce only 18
12 documents, not 228. (King County's Brief on Remand at 4). In fact, the trial court concluded
13 that 18 documents satisfied Yousoufian's request, that only two documents were produced
14 within a month and a half of that request, and only seven documents were produced prior to the
15 beginning of litigation. (Findings at 27-30, Attachment 2 to Plaintiff's Trial Brief on Remand;
16 King County's Brief on Remand at 5).

17 5. King County's belated conduct in the face of litigation further undermines its plea
18 that County government was overwhelmed by Mr. Yousoufian's PDA request. The County now
19 claims the task of responding to Yousoufian's request in a timely manner was practically
20 impossible, despite the unchallenged Finding of the trial court (acknowledged on the same page
21 of the County's brief) that the County could have responded in a few days. (King County's Brief
22
23
24
25
26

1 on Remand at 10). Once the County finally decided to be responsive after being taken to court, it
2 proved that it could respond efficiently when it wanted to.

3 When the County did make an informed effort to find the documents, they were
4 located and produced within a couple of days by Pat Steele. . . . In February of
5 2001, Pat Steele was recruited to assist in efforts to locate documents responsive
6 to Mr. Yousoufian’s request. She immediately began coordinating an effort to
7 locate the documents responsive to the request. . . . This was the appropriate way
to handle a PDA request, and the procedure could and should have been employed
in 1997.

8 (Findings at 11-12, Attachment 2 to Plaintiff’s Trial Brief on Remand).

9 6. King County’s description of the facts in this case belies its casual attitude toward
10 the Public Disclosure Act. “He [Yousoufian] did not feel the information was complete. . . . The
11 parties corresponded over the next six months. . . . As the suit progressed, King County
12 produced more documents. . . .” (King County’s Brief on Remand at 3). The Public Disclosure
13 Act requires the prompt disclosure of public records. Yousoufian v. Office of Ron Sims, 152
14 Wn.2d at 429. It is not about feelings regarding the completeness of disclosure, and it does not
15 authorize correspondence over a period of months and gradual production of documents years
16 after they are requested.

18 **II. KING COUNTY MISINTERPRETS THE PENALTY CALCULATION REQUIRED BY THE**
19 **PUBLIC DISCLOSURE ACT.**

20 Under RCW 42.17.340, the document count is multiplied by the number of days
21 documents are withheld to give you the number of penalty days in the calculation. The number
22 of penalty days is then multiplied by a per-day amount on the \$5-100 penalty scale.

23 The process for determining the appropriate PDA award is best described as
24 requiring two steps: (1) determine the amount of days the party was denied
25 access [penalty days] and (2) determine the appropriate per-day penalty between
\$5 and \$100 depending on the agency’s actions.

1
2 Yousoufian v. Office of Ron Sims, 152 Wn.2d at 439. The determination of the per-day penalty
3 is a distinct, independent determination.

4 The legislature included these three elements in the penalty calculation because the
5 volume of documents withheld, the time they were withheld, and the circumstances and
6 culpability of the withholding are all relevant to the seriousness of the violation and the purpose
7 of the Act to assure full, prompt access to public documents. Each of the three elements is to be
8 independently and rationally determined by the trial court.

9 The trial court in this case divided the 18 documents produced by King County into ten
10 categories based on subject matter and the date made available to Yousoufian. The Court of
11 Appeals found that “[t]hese categories were not arbitrary, but were based on reasonable criteria”
12 and did not constitute an abuse of discretion. Yousoufian v. Office of Ron Sims, 114 Wn. App.
13 at 849. King County did not challenge on appeal this division of documents into ten groups, and
14 the Supreme Court affirmed the division as the law of the case.

15
16 The Court of Appeals correctly ignored the manner in which the records were
17 grouped because the County failed to assign error to the trial court’s method of
18 calculation. Therefore, we agree with the Court of Appeals that assessing the
19 minimum penalty of \$5 a day was unreasonable considering that the County acted
20 with gross negligence.

21 Yousoufian v. Office of Ron Sims, 152 Wn.2d at 439.

22 The Supreme Court also determined the number of days each group of documents was
23 unlawfully withheld, fixing the number of penalty days (groups of documents X days withheld)
24 at 8,252. It now remains for the trial court on remand to independently and rationally determine
25 the third factor in the equation based on the circumstances of King County’s failure to comply

1 with the law, its culpability, and what it will take to deter a large, wealthy jurisdiction like King
2 County from future violations.

3 Despite having argued in the Court of Appeals for the trial court’s discretion to group
4 records, King County now apparently argues that the three elements of the penalty calculations
5 are not to be determined independently and rationally, but are interdependent so that if one factor
6 is high, it should be offset by lowering another factor. “A daily penalty toward the low end of
7 the range is fair given the court’s creation of ten document groups, which resulted in a
8 substantial increase in the number of penalty days.” (King County’s Brief on Remand at 13).
9 “But for negligent misconduct, a figure towards the lower end of the range is appropriate,
10 particularly when the court calculates the penalty award using a large number of penalty days, as
11 the trial court did here.” (King County’s Brief on Remand at 8).

12 King County gets nowhere by arguing about what the trial court could have done – that
13 because the trial court could have counted a lower number of document groups, the court on
14 remand should set a lower per-day penalty as the scale. (“The trial court could have simply
15 calculated the number of days King County delayed responding to Yousoufian’s two record
16 requests, with the result being far fewer penalty days overall.” (King County’s Brief on Remand
17 at 13). The two factors are independent and must be rationally determined. The trial court ruled
18 that King County produced ten groups of responsive documents, and the Court of Appeals and
19 the Supreme Court affirmed that the trial court acted within its discretion in determining this
20 factor in the penalty equation. On the other hand, the appellate courts ruled that the trial court
21 abused its discretion in setting the per-day penalty because of King County’s egregious
22 misconduct. Thus, the job of the court on remand is now to set the per-day penalty based on
23
24
25

1 culpability and deterrence; the per-day penalty does not get adjusted downward because of what
2 the trial court could have done. Nothing in the statute or case law suggests that a high number of
3 days or multiple groups of documents reduces culpability or the need for deterrence.

4 King County’s argument that a low per-day penalty is reasonable because “days will be
5 added back to the penalty period” is similarly misguided. (“ . . . King County’s proposal to
6 double the penalty to \$10 per day is reasonable. Combined with the fact that 3,162 days will be
7 added back into the penalty period, this will lead to a penalty well over three times the \$25,450
8 penalty originally imposed by the trial court.” (King County’s Brief on Remand at 7)). The per-
9 day penalty must be based on culpability and deterrence, not on the number of days that King
10 County withheld documents. These days are not being gratuitously “added back in.” The
11 Supreme Court ruled that the number of days in the penalty calculation were set as a matter of
12 law and that the trial court had no discretion to reduce them. The legislature provided for an
13 independent time factor in the penalty calculation because the statute requires prompt disclosure,
14 and time matters. The County argues that as the number of days of wrongdoing goes up, the per-
15 day penalty should go down, so that the County might actually be rewarded for increased delay
16 in production of documents. This argument flies in the face of a three-factor penalty calculation
17 established by the legislature and finds not even a hint of support in any Public Disclosure Act
18 case.
19
20

21 **III. THE SUPREME COURT IN YOUSOUFIAN MADE A SUBTLE BUT CRITICAL SHIFT IN HOW**
22 **TO DETERMINE THE APPROPRIATE PLACE FOR A PDA VIOLATION ON THE \$5-\$100**
23 **PENALTY SCALE.**

24 Previous decisions indicated that deterrence and the presence or absence of bad faith are
25 primary determinants of the per-day penalty. (King County’s Brief on Remand at 7). The

1 requirement for bad faith suggests an either/or determination, either you have bad faith or you
2 don't have it. It is not a matter of degree. This either/or mentality compelled courts to ignore the
3 full range of the penalty scale established by the legislature. The trial court's determination in
4 this case of a lack of good faith but an absence of bad faith demonstrated the need for more
5 subtle distinctions of degree in order to place violations along the full spectrum of the penalty
6 scale. The Chief Justice focused on this quandary at oral argument when he suggested that the
7 difference between lack of good faith and presence of bad faith is difficult to discern. In its
8 decision, the Supreme Court addressed this need for flexibility in measuring violations by
9 degrees of wrongdoing. For the first time in a PDA case, the Court held that culpability is the
10 proper measure. Unlike bad faith or no bad faith, culpability comes in increments and can be
11 stated as a matter of degree. The purpose of the PDA "is better served by increasing the penalty
12 based on an agency's culpability. . . ." Yousoufian v. Office of Ron Sims, 152 Wn.2d at 436.
13 "After determining the number of days that the agency has denied a request, the trial court
14 should determine the proper amount of the penalty based on the agency's culpability." ."
15 Yousoufian v. Office of Ron Sims, 152 Wn.2d at 440, Fairhurst concurring. The Supreme
16 Court's use of the term culpability steers PDA jurisprudence away from the either/or thinking
17 that almost invariably resulted in a very low per-day penalty and encourages the full use of the
18 penalty scale as required by the legislature.

19
20
21 "King County generally agrees with Yousoufian that the legislature intended for courts to
22 use the entire penalty range (\$5 to \$100)." (King County's Brief on Remand at 7). If King
23 County agrees that the entire penalty scale should be used and yet argues that this is a \$10-a-day
24 case, what kind of cases fill in the scale between \$10 a day and \$100 a day? If the court on
25

1 remand is to use the full penalty scale, and if culpability, along with deterrence, is to be the
2 measure of where a violation fits on the penalty scale, what would a case look like that fell
3 somewhere in the \$85-\$90 range? It would be a case that looked like Yousoufian, a case of
4 repeated and prolonged gross negligence, an unchallenged Finding of a lack of good faith, an
5 extensive pattern of misrepresentation and deception, no claim of exceptions or the need to
6 protect third party interests, documents withheld until compelled by litigation, a demonstration
7 that with a little effort, compliance could have been timely, no mitigating factors, a matter of
8 high public interest, a time urgency and an offender that can only be deterred by a very
9 substantial fine.

11 **IV. KING COUNTY'S RELIANCE ON AMERICAN CIVIL LIBERTIES UNION V. BLAINE SCHOOL**
12 **DISTRICT NO. 503, IS MISPLACED.**

13 ACLU v. Blaine School District, 95 Wn. App. 106, 975 P.3d 536 (1999), was decided six
14 years ago by the Court of Appeals. It has now been superseded by the Supreme Court's rationale
15 in Yousoufian that places evaluation of misconduct on a culpability continuum for purposes of
16 determining the per-day penalty. The case involved only one act of malfeasance, and it plainly
17 did not utilize the full range of the penalty scale. The court was likely influenced by the fact that
18 it was dealing with a school district in a very small town, a school district where a relatively
19 small fine would be a huge deterrence and a large fine would be devastating. Like Building
20 Industry Association (Plaintiff's Brief on Remand at 12), the Blaine School District case is no
21 more than an example of the exercise of discretionary judgment in particular circumstances at a
22 particular time. It is of no precedential value.

1 King County's reliance on the Blaine School District case is at odds with its statement
2 that the legislature intended for courts to use the full range of the \$5-\$100 penalty scale. If a lack
3 of good faith and the school district's intentional misconduct merits only a minimal per-day
4 penalty, what fills in the rest of the scale? The best explanation is that in the time of the Blaine
5 School District case, the deciding court was not using the full scale.
6

7 The intentional misconduct in the Blaine School District case was not a bad-faith intent to
8 hide documents in violation of the statute. In fact, the documents were made available but were
9 not mailed as requested. Rather, the court found intentional conduct that showed a lack of good
10 faith in complying with the statute. King County demonstrated exactly the same kind of intent in
11 telling Mr. Yousoufian that all responsive documents had been produced, that the archives were
12 being searched, that documents were being compiled, that hundreds of hours had been spent
13 retrieving documents, that the Executive is only responsible for retrieving documents from his
14 office, that the Finance Office did not have responsive documents – all of which were not true.
15 The decision not to train personnel to handle document requests and the decision not to have an
16 effective retrieval system in place were certainly intentional, reflecting a disregard for the Public
17 Disclosure Act.
18

19 Under the statutory scheme, King County was in complete control of the number of
20 documents or groups of documents it failed to produce and of the lapse of time before the
21 requested documents were finally produced. In some real sense King County made a choice not
22 to produce the documents as demonstrated by the efficiency and effectiveness with which the
23 documents were produced once the request was placed in the hands of Pat Steele after the
24 commencement of litigation.
25

1 **V. CASES OF GROSS NEGLIGENCE, LACK OF GOOD FAITH AND EGREGIOUS MISCONDUCT**
2 **PLACE HIGH ON THE PENALTY SCALE.**

3 King County admits that a case of “egregious misconduct. . . may well justify a per-day
4 penalty at the high end of the range. (King County’s Brief on Remand at 8). That is exactly
5 what we have here. As the Court of Appeals said, “The trial court’s unchallenged findings of
6 egregious mishandling of Yousoufian’s record request and a lack of good faith by the County do
7 not support a minimum penalty.” Yousoufian v. Office of Ron Sims, 114 Wn. App. at 840
8 (emphasis added).

9 DATED this _____ day of July, 2005.

10
11
12 _____
13 Rand Jack, WSBA #1437
14 Michael Brannan, WSBA #28838
15 David J. Balint, WSBA #5881
16 Attorneys for Plaintiff
17
18
19
20
21
22
23
24
25