

1 retained 3 attorneys and appealed through the Court of Appeals and state Supreme Court. These
2 courts resolved several legal issues and remanded the case to this court to determine the appropriate
3 per-day penalty and the amount of reasonable attorney's fees under RCW 42.17.340(4).

4 This case involved lengthy delays by government agencies in responding to a large, complex
5 public record request. County staff attempting to respond to the request were not properly trained or
6 supervised, and this resulted in a negligent mishandling of the project over an extended period of
7 time. It ultimately took King County nearly four years to completely produce the 228 documents
8 Mr. Yousoufian sought.

9 Due to King County's negligence in handling Mr. Yousoufian's request, he is entitled to a
10 penalty and attorney's fees under RCW 42.17.340(4). King County asks that this court more than
11 triple the original penalty imposed by the trial court, resulting in a penalty figure of \$82,252.00.

12 This will be one of the largest penalties ever awarded under the Public Disclosure Act.

13 King County will address attorney's fees in a separate brief.

14 II. FACTS

15 The facts of this case are set forth in the decisions of the trial court, Court of Appeals, and state
16 Supreme Court, all of which are attached. What follows is in large part a summary of those facts.

17 On May 30, 1997, Armen Yousoufian sent a records disclosure request to King County
18 Executive Ron Sims. He sought records (1) describing how a fast food tax to finance stadium
19 construction would benefit consumers, and (2) related to the "Conway Study", which dealt with the
20 economic impacts of sports stadiums. King County responded by letter dated June 4, 1997, informing
21 Yousoufian that the Conway Study was available for review, but that it would take several weeks to
22 discover if there were other items within his request.

1 Over the next several months, King County produced a number of documents to Yousoufian.
2 He did not feel the information was complete, however, and he retained an attorney in December 1997.
3 On December 8, 1997, the attorney wrote King County a letter restating Yousoufian’s records request
4 of May 30, 1997, and requesting additional information about certain studies and the cost of the
5 studies.

6 The parties corresponded over the next 6 months. Then, on June 22, 1998, King County wrote
7 Yousoufian that the King County Finance Department had no documents related to the financing of
8 stadium studies.

9 Yousoufian filed suit on March 30, 2000. As this suit progressed, King County produced
10 more documents, some of which related to the stadium studies. Following a bench trial, the court
11 entered findings and conclusions. *See Yousoufian's Trial Brief on Remand, Attachment 2.*

12 The court found that Yousoufian had made two public records requests – one on May 30, 1997
13 and one on December 8, 1997. While the county eventually produced all records sought, its delay in
14 doing so violated the Public Disclosure Act. King County acted negligently, and this negligence
15 evidenced a lack of good faith. But the court could not find “bad faith” in the sense of intentional
16 nondisclosure.

17 The court then determined the amount of the penalty under RCW 42.17.340(4). Yousoufian
18 claimed his 2 requests covered 228 documents, and that the statutory penalty amount (anywhere
19 between \$5 and \$100 per day) should be applied to each. He requested fines in the range of \$1.5
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1 million to \$3.6 million.² The court rejected this approach, believing it would produce a penalty figure
2 totally out of proportion to the County’s negligence, the harm done, and the need for deterrence.³

3 Instead, the court found that Yousoufian’s request covered 18 responsive documents. It
4 divided these documents into 10 groups, based on the date of production and the subject matter
5 involved. For each group, the court determined the “days late” as the difference between the date the
6 records were due and the date King County produced the records. King County produced 6 of these
7 record groups after Yousoufian’s March 30, 2000 lawsuit. For these groups, the court deducted 527
8 days from the penalty period, reasoning that Yousoufian waited an unreasonable period of time to file
9 suit following King County’s final correspondence of June 22, 1998.⁴

10 The Penalty Calculation Table, shown below, is a combination of the two tables from the trial
11 court’s findings. Each of the 10 rows in the Penalty Calculation Table represents a document group.
12 The trial court numbered the documents from 1 to 18. *See Yousoufian's Trial Brief on Remand,*
13 *Attachment 2, pp. 30-31.* The numbers in the first column of the Penalty Calculation Table are the
14 numbers of the documents included in each group.

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20 ²*See Yousoufian's Trial Brief on Remand, Attachment 2, p. 25* (Trial Court's Findings of Fact and Conclusions
of Law). The page number refers to the pagination used by the trial court, not the CP number used at the Court of
Appeals.

21 ³*See id.*, at pp. 25, 27.

22 ⁴*See id.* at 29-31. A total of 647 days transpired between King County’s June 22, 1998 letter and the date
Yousoufian filed suit. The trial court reasoned that 120 days was a reasonable amount of time following King County’s
letter for Yousoufian to act. It arrived at the 527 day total by deducting the 120 days from the 647 day amount.

Norm Maleng, Prosecuting Attorney
CIVIL DIVISION
E550 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/SCAN 667-9015

PENALTY CALCULATION TABLE

	Document Number	Date requested	Date due	Date received	Penalty period	Days deducted	Adjusted period
1.	1&2	5/30/97	6/6/97	6/10/97	4	N/A	4
2.	3	5/30/97	6/6/97	7/25/97	49	N/A	49
3.	4, 5, 6	5/30/97	6/6/97	8/21/97	76	N/A	76
4.	7	5/30/97	6/6/97	10/10/97	126	N/A	126
5.	8	5/30/97	6/6/97	3/7/01	1370	527	843
6.	9, 10, 11	12/8/97	12/15/97	3/7/01	1178	527	651
7.	12, 13, 14	5/30/97	6/6/97	3/19/01	1382	527	855
8.	15, 16	12/8/97	12/15/97	3/19/01	1190	527	663
9.	17	5/30/97	6/6/97	4/20/01	1414	527	887
10.	18	5/30/97	6/6/97	6/8/01	1463	527	936
	TOTALS				8252	3162	5090

The trial court assessed a \$5 per day penalty (*see* RCW 42.17.340(4)) against King County for the total “adjusted days late” (5090), resulting in a penalty of \$25,450.00. *See id.*, at p. 31. The trial court also awarded Yousoufian attorney’s fees in the amount of \$82,196.16. To date, King County has paid Yousoufian \$114,416.26 in attorney’s fees, costs and penalties. This does not include attorney's fees and costs Yousoufian incurred at the appellate level. *See* Full Satisfaction of Judgment, Yousoufian v. Office of Ron Sims, No. 00-2-09581-3 SEA (Sub 63).

While the \$5 per day is the minimum daily penalty amount under RCW 42.17.340(4), the penalty imposed by the trial court was not a minimum penalty. The trial court could have determined the total number of penalty days based on Yousoufian’s two public disclosure requests. *See Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 849, 60 P.3d 667 (2003)⁵. Instead, the trial court created 10 groups of documents, and determined the number of days each group was late. This

⁵The Court of Appeals' decision is attached as Attachment 3 to Yousoufian's Trial Brief on Remand. Had the trial court calculated the number of penalty days based on Yousoufian's 2 requests of May 30, 1997 and December 8, 1997, the maximum number of penalty days would have been approximately 2,737. This is the sum of the number of days between May 30, 1997 and June 8, 2001 (approximately 4 years times 365 days = 1,460) and the number of days between December 8, 1997 and June 8, 2001 (approximately 3.5 years times 365 days = 1,277).

Norm Maleng, Prosecuting Attorney
 CIVIL DIVISION
 E550 King County Courthouse
 516 Third Avenue
 Seattle, Washington 98104
 (206) 296-9015/SCAN 667-9015

1 resulted in a substantial increase in the total number of penalty days, and a corresponding increase in
2 the total penalty amount.

3 By the time this case reached the state Supreme Court, the two main issues were (1) can
4 records be grouped for penalty purposes (or must the per-day penalty be applied to each separate
5 record that is delayed); and (2) did the trial court err in deducting 527 days from the penalty period for
6 the 6 record groups. The court ruled that records may be grouped for penalty purposes, but that days
7 could not be deducted from the penalty period for alleged delays in bringing suit. The court also held
8 that, given King County’s mishandling of the request, the \$5.00 per day penalty under RCW
9 42.17.340(4) was unreasonable.

10 When the previously-deducted days are added back in to the total, “penalty period” becomes
11 8,252 days. For the reasons set forth below, King County asks the court to set the per-day penalty
12 under RCW 42.17.340(4) at \$10, resulting in a total penalty amount of \$82,520.00 -- \$25,450.00 of
13 which King County has already paid.

14 III. ARGUMENT

15 Under the Public Disclosure Act (PDA), all state and local agencies must disclose any
16 requested public record, unless the record falls within a specific exemption. *Yousoufian*, 152 Wn.2d
17 421; *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 250, 884 P.2d 592 (1994).

18 The PDA includes a penalty provision that is intended to discourage improper denial of access to
19 public records and encourage adherence to the goals and procedures dictated by the statute. *Hearst*
20 *Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978).

21 The PDA’s penalty provision allows a prevailing party to recover attorneys fees, costs and
22 penalties where an agency improperly denies access to records:

1 Any person who prevails against an agency in any action in the courts seeking the right
2 to inspect or copy any public record or the right to receive a response to a public record
3 request within a reasonable amount of time shall be awarded all costs, including
4 reasonable attorneys fees, incurred in connection with such legal action. In addition, it
shall be within the discretion of the court to award such person an amount not less than
five dollars and not to exceed one hundred dollars for each day that he was denied the
right to inspect or copy said public record. [RCW 42.17.340(4)].

5 Where an agency violates the PDA, the trial court must impose a penalty under this provision.
6 *King County v. Sheehan*, 114 Wn. App. 325, 355, 57 P.3d 307 (2002). But the trial court has the
7 discretion to set the amount of the penalty anywhere between \$5.00 and \$100.00 per day. *See* RCW
8 42.17.340(4).

9 When determining the amount of the penalty to be imposed, the existence or absence of an
10 agency's bad faith is the principal factor which the trial court must consider. *Amren v. City of Kalama*,
11 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997). A requester's economic loss may also be a factor. *See id.*;
12 *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 303, 825 P.2d 324 (1992) (economic loss a factor,
13 but attorney's fees not covered under the Act do not qualify).

14 In this case, King County was negligent, but it did not act in bad faith.⁶ While the \$5.00 per-
15 day penalty may have been inappropriate under these circumstances, King County's proposal to double
16 the penalty to \$10.00 per day is reasonable. Combined with the fact that 3,162 days will be added
17 back in to the penalty period, this will lead to a penalty well over three times the \$25,450.00 penalty
18 originally imposed by the trial court.

19 King County generally agrees with Yousoufian that the legislature intended for courts to use
20 the entire penalty range (\$5 to \$100) set forth in RCW 42,17.340(4) in appropriate circumstances.

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22 ⁶ A careful review of Judge Learned's 31 page decision reveals that she never used the phrase "gross
negligence" in describing King County's conduct. *See* Yououfian's Trial Brief on Remand, Attachment 2. The Court of
Appeals mistakenly concluded that the trial court did find gross negligence. *See Yousoufian v. Office of Ron Sims*, 114
Wn. App. at 853.

1 Egregious misconduct, spoliation of evidence, and intentional non-disclosure of records may well
2 justify a per day penalty at the high end of the range. But for negligent misconduct, a figure towards
3 the low end of the range is appropriate, particularly when the court calculates the penalty award using a
4 large number of penalty days, as the trial court did here.

5 In a somewhat comparable case, *ACLU v. Blaine School District*, 95 Wn.App. 106, 975 P.2d
6 536 (1999), the court found a \$10.00 per-day penalty appropriate where the district failed to act in
7 good faith when responding to a public records request. The school district in that case refused to mail
8 the ACLU a copy of its disciplinary policy, even though the ACLU offered to pay the costs. Instead,
9 the district offered to make the records – totaling 13 pages – available for inspection at its offices. The
10 ACLU, however, was unable to send a representative to Blaine for an on-site inspection. *ACLU*, 95
11 Wn. App. at 109.

12 The case went to the Court of Appeals twice. The first time, the court ruled that the district
13 was required to mail the policy to the ACLU, and remanded for a determination of the penalty. *ACLU*,
14 95 Wn. App. at 109-110.

15 After the trial court imposed a \$5 per day penalty, the ACLU appealed again. The Court of
16 Appeals reversed, finding that the minimum penalty was inappropriate because the district had not
17 acted in good faith. As evidence of its improper motives, the court relied on letters the district wrote to
18 parents explaining its conduct, falsely representing that the ACLU's request involved thousands of
19 pages of documents, and that significant employee time would be needed to locate the documents.
20 The district had also said that it was reluctant to spend taxpayer money to assist the ACLU in
21 preparing a case against it. *ACLU*, 95 Wn. App. at 114.

1 The minimum penalty, the court observed, was generally reserved for situations where an
2 agency's refusal to disclose records was motivated by a desire to protect the rights of a third party.
3 This concern was not what motivated the school district. Because the district did not act in good faith,
4 the \$10 per day minimum penalty was appropriate. The court noted this amount “was in accord with
5 prior case law,...”. *ACLU*, 95 Wn. App. at 115.

6 There was a lack of good faith in the *ACLU* case due to the district’s deliberate misconduct –
7 or at least intransigence – involving a small record request. This case involved negligent handling by
8 county employees of a much larger, more complicated request.

9 This case has some similarities to the *ACLU* fact pattern, including misrepresentations by the
10 government agency.⁷ The County's factual and legal misrepresentations were due to negligence,
11 however, whereas the district's misrepresentations in *ACLU* were intentional. *See Yousoufian v. Office*
12 *of Ron Sims*, 114 Wn. App. 836, 853. Despite extensive discovery by Yousoufian, the trial court
13 found “no intentional disclosure or intent to conceal.” *See Yousoufian's Trial Brief on Remand*,
14 Attachment 2, p. 19. King County’s negligence is lesser on the scale of culpability than intentional
15 misconduct, and the penalty amount here should be no more than the \$10.00 figure imposed in *ACLU*.

16 The argument can be made that the penalty amount should reflect the significance of the
17 project the records request was related to, as well as the imminence of the election concerning these
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20 ⁷On several occasions, King County mistakenly represented to Mr. Yousoufian that it had fully responded to his
21 requests, when in fact it had not. *See Yousoufian's Trial Brief on Remand*, Attachment 2, pp. 9, 11-12. The trial court
22 also found that, in early 1998, King County represented to Yousoufian that “hundreds of hours” had been spent trying to
retrieve responsive documents.” The court found this statement to be “factually and legally incorrect.” *Id.*, p. 11.
While there may have been some exaggeration in the time estimate, it is clear that by January 1998, King County had
devoted a considerable amount of time to Mr. Yousoufian’s public record request. The trial court’s description of King
County’s activities from June 1997 through January 1998, *see id.* pp. 3-11, is eight pages in length.

1 projects.⁸ The courts have not, however, recognized these factors as a basis to increase penalty
2 amounts in past PDA cases.

3 The records Mr. Yousoufian sought were related to sports stadiums requiring public financing
4 of about \$300 million. At the time Mr. Yousoufian made his request, a special election regarding the
5 public financing was less than 3 weeks away. The trial court found King County could have produced
6 the records by June 6, 1997 – a total of eleven days before the election. *See* Yousoufian's Trial Brief
7 on Remand, Attachment 2, p. 17.

8 This finding assumes several divisions of county government would produce sufficient
9 personnel to locate up to 228⁹ documents from a number of different locations, have them copied,
10 have them reviewed by counsel to determine the potential applicability of approximately 40 PDA
11 exemptions¹⁰, make any necessary redactions, prepare a complete privilege log, have the entire
12 production copied again, and then shipped to the requestor, all within one week. This might be
13 possible under perfect circumstances, but King County's initial estimate of 3 weeks for a job of this
14 size was not unreasonable. By way of comparison, parties in civil litigation have at least 30 days to
15 produce documents requested in discovery.

16 Public disclosure can be an immensely challenging process for governmental agencies under
17 the best of circumstances. It often requires close interaction and communication between agency and
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19 ⁸*See Yousoufian*, 152 Wn.2d 421, 444, 98 P.3d 463 (“the amount at issue in the special election concerning
20 Seahawks Stadium (now Qwest Field) was \$300 million. A just penalty must reflect these realities.” (Sanders, J.,
21 dissenting)).

22 ⁹At the trial court, Yousoufian argued that there were 228 separate records responsive to his request. *See*
Yousoufian v. Office of Ron Sims, 152 Wn.2d at 427. The trial court ultimately grouped these items into 18 complete
studies. *See* Yousoufian's Brief, attach. 2, p. 30.

¹⁰*See* RCW 42.17.310(1)(a) - (rr). These are the specific exemptions under the Public Disclosure Act as of
1999. The number of exemptions now goes from (a) through (fff).

1 requestor to define and then locate the information sought. Large requests can take considerable time
2 and resources to compile. The Public Disclosure Act recognizes that it may not always be possible to
3 produce requested records within 5 days.¹¹ It requires the government agency to interact with the
4 requester to determine what he or she is asking for, and to work out reasonable time frames for
5 producing this information.

6 King County reasonably interacted with Mr. Yousoufian at the outset of this case. Its initial
7 efforts and communications with Mr. Yousoufian in June 1997 were appropriate. King County sent
8 Mr. Yousoufian a response to his request within 5 business days as required by RCW 42.17.320. *See*
9 Yousoufian's Trial Brief on Remand, Attachment 2, p. 3. The County representative, Pam Cole,
10 informed Mr. Yousoufian that one study was available for immediate review, and in fact, Mr.
11 Yousoufian had already examined one of the documents he requested. Ms. Cole estimated three
12 weeks would be needed to retrieve the other materials. *Id.* The County gave Yousoufian additional
13 attachments and another study on June 10, 1997. *Id.*, p. 4.

14 In the period prior to the special election (June 17, 1997),¹² Mr. Yousoufian voiced no concern
15 over King County's 3-week estimate for producing the records. He wrote a letter complaining of the
16 delay one day after the election, but did not mention the election specifically. *See* Yousoufian's Trial
17 Brief on Remand, Attachment 2, p. 4. There is nothing to suggest that the timing of the production in
18 relation to the upcoming election was an issue for Mr. Yousoufian at the time. There is no basis for the
19 charge that King County attempted to delay its production of records until after the election. Given the

21 ¹¹*See* RCW 42.17.320. The statute requires the agency to respond to a request within 5 business days. This
22 does not mean a complete production of documents must occur within 5 days. It is permissible for agencies to respond
to the requestor by providing a reasonable estimate of the time needed by the agency to respond.

¹²*See Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 447 (2004) (Sanders, J. dissenting) (special election
was June 17, 1997).

1 size and complexity of his request, a 3 week estimate for production was reasonable, even with the
2 pending election.

3 Yousoufian suggests that King County's failure to produce the documents he requested prior to
4 the special election significantly impacted the public at large, not just him individually. Yousoufian's
5 Trial Brief on Remand, at 8, 11. Even if this impact could be tangibly demonstrated, the issue still
6 boils down to the County's intent, and whether the County's 3 week initial estimate to produce the
7 records was unreasonable. Absent intentional misconduct, it makes little sense to enhance a penalty
8 award simply because the requestor made a large document request shortly before an election.

9 The appellate courts in this case clarified the law regarding document grouping and deduction
10 of penalty days. But regarding the penalty issue, the decisions go no further than stating that the \$5.00
11 per day penalty under RCW 42.17.340(4) is unwarranted. This set no new precedent. In fact, it is
12 exactly what the court did in *ACLU v. Blaine School District*. See *ACLU*, 95 Wn. App. 106, 114
13 (because district did not act in good faith, minimum \$5 per day penalty awarded by trial court
14 insufficient).

15 Nor have the courts in this case suggested what the appropriate per-day penalty should be.
16 This is not generally the role of an appellate court. See *Yousoufian v. Office of Ron Sims*, 114 Wn.
17 App. 836, 847 (2003) (PDA grants discretion to the trial court, not appellate court, to set the penalty
18 within the minimum and maximum ranges). Justice Chambers, however, in practical recognition of
19 the complexities and challenges of public disclosure, believed the trial court was within its discretion
20 to set the per day penalty at \$5.00:

21 I disagree with the majority's conclusion that the trial court abused its discretion in
22 assessing the minimum daily penalty of \$5. Issues involved in a public disclosure
request may become complex. The form and timing of a request or series of requests
for public records may raise issues with respect to how many requests were made, how

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many records were requested, whether the right to inspect or copy was denied, and if so, for how many days. These issues should be left to the sound discretion of the trial judge.... [*Yousoufian v. Office of Ron Sims*, 152 Wn.2d at 441 (Chambers, J. concurring)].

Justice Chambers' comments implicitly recognize that the trial court considered a number of factors in arriving at what it considered a just penalty, not just the per day fine. A daily penalty toward the low end of the range is fair given the court's creation of 10 document groups, which resulted in a substantial increase in the number of penalty days. The trial court could have simply calculated the number of days King County delayed responding to Yousoufian's 2 record requests, with the result being far fewer penalty days overall. See *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 441 (2004) (Fairhurst, J. concurring) ("I would simply hold that the PDA requires penalty assessments to be based on the number of days a request has been denied by an agency"); *Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 849 (trial court would have been within its discretion to award penalty based on number of days 2 requests went unanswered).

Yousoufian claims his case has changed the landscape of public disclosure, clearing the way for penalties far in excess of what has been awarded in the past. As evidence of this, he cites *BIAW v. Department of Labor & Industries*, 123 Wn. App. 656, 98 P.3d 537 (2004). The trial court in *BIAW* did rely on *Yousoufian*, noting that based on that case, penalties need not be assessed per record. *BIAW*, 123 Wn. App. at 661. The court made the following comments on the penalty amount:

[T]he trial court awarded a penalty of \$10 per day from April 2, 2002, until its October 25, 2002 redaction order and \$75 per day from October 25, 2002, until the November 18 disclosure. This resulted in a penalty award of \$3,925 for BIAW and \$2,305 for the Newspapers. [*BIAW*, 123 Wn. App. at 661].

1 The penalty of \$75 per day -- for less than one month -- was triggered by L&I's lack of good faith in
2 failing to follow the court's oral ruling regarding redaction of information. *See BIAW*, 123 Wn. App. at
3 661.

4 *BIAW* does not represent a change in penalty jurisprudence under the PDA. A \$75 day penalty
5 for 24 days due to an agency's failure to abide by a court's ruling breaks no new ground, and is not
6 comparable to a case involving negligence and 8,252 penalty days.

7 From the standpoint of government culpability, there is nothing to distinguish this case from
8 prior decisions where courts have approved a \$10 per day. The presence or absence of bad faith is the
9 principal consideration the trial court considers in setting a penalty under RCW 42.17.340(4), and
10 King County did not act in bad faith. A penalty of \$10.00 per day for King County's negligence is
11 consistent with PDA precedent, particularly given a large penalty period of 8,252 days. A penalty of
12 \$82,252.00, less penalty amounts previously paid, is reasonable, and King County asks that it be
13 imposed.

14 III. CONCLUSION

15 For the foregoing reasons, King County asks the court to award plaintiff \$82,252.00 in
16 penalties under RCW 42.17.340(4), which reflects a \$10 per-day penalty for 8,252 days. The penalty
17 amount King County previously paid, \$25,450, should be deducted from this amount.

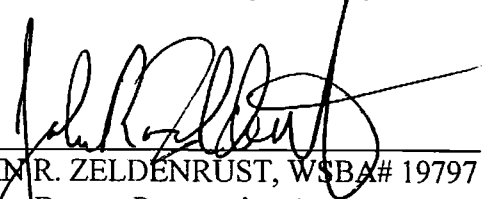
18 RESPECTFULLY SUBMITTED this 22 day of July, 2005.

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NORM MALENG
King County Prosecuting Attorney

By: 
JOHN R. ZELDENRUST, WSBA# 19797
Senior Deputy Prosecuting Attorneys
Attorneys for King County