

NO. 49701-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ARMEN YOUSOUFIAN

Appellant

v.

THE OFFICE OF RON SIMS, KING COUNTY EXECUTIVE,
a subdivision of KING COUNTY, a municipal corporation;
THE KING COUNTY DEPARTMENT OF FINANCE, a subdivision of
KING COUNTY, a municipal corporation; and THE KING COUNTY
DEPARTMENT OF STADIUM ADMINISTRATION, a
subdivision of KING COUNTY, a municipal corporation,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE J. KATHLEEN LEARNED

BRIEF OF APPELLANTS

DAVID J. BALINT, PLLC

By: David J. Balint, WSBA #5881
Attorneys for Appellant
2033 Sixth Avenue, Suite 800
Seattle, WA 98121
(206) 728-7799

LAW OFFICES OF
MICHAEL G. BRANNAN

By: Michael G. Brannan WSBA# 28838
Attorneys for Appellant
4115 Roosevelt Way NE, Suite B
Seattle, WA 98105
(206) 448-2065

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I. ASSIGNMENTS OF ERROR¹

1. The Trial Court erred in ruling that King County did not act in bad faith. (Learned § D, pp. 17-19)
2. The Trial Court erred in assessing only the minimum statutory penalty of five dollars (\$5.00) per day. (Learned § F, pp. 26-27)
3. The Trial Court erred in failing to award penalties for each public record requested by arbitrarily grouping documents for purposes of assessing penalties. (Learned pp. 27-29)
4. The Trial Court erred in reducing penalties by subtracting 527 days from its calculation of the days late on account of plaintiff's inability to locate counsel during the pendency of his Public Disclosure Act request. (Learned 29/14-21)
5. The Trial Court erred in its multiple reductions of attorney's fees. (Learned § E, pp. 19-26)
6. The Trial Court erred in finding that as of the time of trial the County had made a "reasonable" disclosure of distinct records and that any records not yet produced were non-responsive and did not warrant production or relief under the PDA. (Learned § E, p. 13)

II. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Whether the Trial Court's conclusion of law that King County did not

¹ Findings of Fact and Conclusions of Law are found at CP 1009 through 1039. For the convenience of the Court the Findings and Conclusions are attached hereto as Appendix 1, and will be cited as "Learned x/1-2" where x equals page number and 1-2 equal line numbers.

act in bad faith (Error 1) is supportable under the Public Disclosure Act (hereafter “PDA”) when the Court found factually that the County:

Failed to act in good faith (Learned 17/24 –labeled as a conclusion of law)

Repeatedly failed to read and understand appellant’s PDA request for records. (Learned 3/7-8; 5/7-11; 5/25-27; 7/4-8; 7/17-22; 10/13-23)

Repeatedly misrepresented to appellant, his counsel and the Court that all responsive public records had been produced. (Learned 5/20-21; 8/6-8; 9/6-7; 10/11-13; 10/26-11/2; ex. 183; ex. 184; ex. 187; ex. 190; ex. 197; ex. 199; ex. 201; ex. 202; ex. 205)

Chronically failed to implement the PDA and train and supervise its staff. (Learned 3/27-4/4; 4/22-26; 5/3-6; 7/1-3; 7/15-16)

Consistently failed to promptly respond to appellant’s PDA request, and made false representations about responding. (Learned 3/7-8; 4/15-19; 5/2-3; 6/10-11; 10/24-26; 11/11-12)

Made frequent factual and legal misrepresentations about the non-existence of public records without adequate investigation. (Learned 3/18-20; 5/8-11; 5/16-20; 6/22-23; 7/11-15; 11/12-17)

Repeatedly placed the burden on the appellant and chronically failed to assist appellant in his PDA request. (Learned 6/22-26; 7/25-8/2; 8/1-2; 8/10-12)

Referred appellant to other sources instead of responding directly by producing records. (Learned 4/12-13; 10/26-11/2; 11/22-24; 11/18-12/2)

Affirmatively misrepresented the necessity of an archive search when there is no evidence that such an archive search was initiated until the records were finally produced in 2001. (Learned 3/16-21; 7/22-26; 8/13-23; ex. 184)

Misrepresented to requestor that the County had already spent hundreds of hours trying to comply with his request when such representation was false. (Learned 11/5-9)

Provided no explanation for why records ultimately produced in 2001 could not have been produced in 1997. (Learned 4, 6, 12/8-13/16; 13/22-23)

2. Whether the PDA, when liberally construed in favor of deterring nondisclosure and punishing noncompliance requires penalties to be assessed on a per-record per-day basis? (Error 3)
3. Whether the legislative history, plain language of the statute, and decisional law permit imposition of less than minimum penalties here, given the egregiousness and magnitude of the County’s violations of the Act? (Error 2)
4. Whether the Trial Court utilized the proper standards in awarding attorney’s fees? (Error 5)
5. Whether the Trial Court erred in requiring of King County only “reasonable” disclosure of public records when the Public Disclosure Act requires disclosure of “all public records” unless an exemption applies. (Error 6)
6. Whether the doctrine of laches supercedes the PDA’s statute of limitations and permits Trial Courts to reduce penalty days thereby placing financial and other burdens on requestors of public records to promptly retain counsel and file lawsuits upon an illegitimate denial of a public records request? (Error 4)
7. Whether the PDA permits a Trial Court finding that records improperly withheld do not merit imposition of penalties? (Error 6)
8. Whether the Trial Court should have required further production of distinct public records known to exist but not produced to date? (Error 6)

III. STATEMENT OF THE CASE

A. Introduction

No Washington Appellate Court has been asked to adjudicate a Public Disclosure Act case quite like this; where the quantity of records sought numbers into the hundreds, (CP 496) where the days between the initial request and last release of records numbers over a thousand, (CP 515) and where the magnitude of public interest at stake, as measured in monetary terms, numbers into the hundreds of millions.

This case began when King County failed to release, pursuant to Armen Yousoufian's² May 30, 1997, request certain public records relating to the vote on Referendum 48. The timing of Mr. Yousoufian's request was critical: On June 17, 1997, the public was to vote on the Referendum which, if passed, would provide for construction and financing at tremendous public expense of new stadium facilities for the Seattle Seahawks, a professional football team now owned by Paul Allen's Football Northwest. In the days and weeks leading to the election there was much heated debate on the issue of public funding of sports stadiums. As our Supreme Court, in the matter of *Brower v. State*, 137 Wn.2d 44, 63, 969 P.2d 42 (1998), wrote of the election:

There is no question that this case is unusual because a private entity funded a vote on a matter from which, if the voters approved, the private entity stood to benefit.

Referendum 48 ultimately passed by a margin of 51.1% with a voter turnout of 51%. *Id.*, 137 Wn.2d at 52. What may never be known is whether the records finally released – nearly four years too late – would

² Pronounced “You soo' fee un”

have tipped the scales against passage of the Referendum.

The County did not produce the records Mr. Yousoufian sought before the election was held, or even immediately after; instead records trickled out from various county departments over the next few months, and then, with a series of missives from the prosecuting attorney stating that the county had made full disclosure and would produce no further records, the County went silent. (CP 205) Mr. Yousoufian later filed this lawsuit. The commencement of this litigation did not spark a higher level of responsiveness from the County, and it was not until the pressures of imminent trial that the County finally produced many of the records requested. The most recent of these arrived 1,463 days late. (Learned at 30) Because the primary focus of this case is the character of the County's response to Mr. Yousoufian's public records request and whether that response embodies bad faith, and because an adequate record has been transmitted for this Court for its *de novo* review, only the highlights of Mr. Yousoufian's principal requests and the County's responses to reiterations of those requests will be presented in the paragraphs that follow.³

B. Statement of Facts

On May 30, 1997, Armen Yousoufian faxed and mailed a request to

³ While the plaintiff maintained that only one request was made, the Trial Court found two distinct records requests, the first occurring in May and the second occurring in December, 1997, which pertained to financial and other public records but not the studies themselves. (Learned, 2/26-3/5) Appellant does not appeal this adjustment by the Trial Court. In the interests of a fuller recitation of events, this Court is encouraged to review what the Plaintiff referred to as the "operative documents," or correspondence in furtherance of his records request, which appears at exhibits 171 through 221.

view public records to the Office of the Executive of King County. (Ex. 171) Prompted by comments that King County Executive Ron Sims made in a KUOW radio broadcast about the upcoming Referendum election, the outcome of which could adversely affect Mr. Yousoufian's interests, Mr. Yousoufian asked to see the studies to which Mr. Sims referred, and all file materials relating to "the widely quoted 'Conway Study.'" *Id.*

What I wish to see not only includes the study itself, including any and all addenda, attachments, updates, etc. but all related records including, but not limited to, how and why and by whom the study was ordered, its cost, and any previous or subsequent studies on sports stadiums.

Id. With this initial request in mind,⁴ here are highlights of the County's responses to this request, and to subsequent repetitions of this request:

"[D]ocuments that may be responsive to your request are being identified and gathered[from Archives]."

June 4, 1997, letter to Armen Yousoufian by Chief of Staff Desiree Leigh, Office of the King County Executive. (Ex. 174)

"Since our office received your first request for information, we have, along with the Office of Stadium Administration, attempted to provide you with access to all of the information you were seeking."

August 28, 1997, letter to Armen Yousoufian by King County Executive Ron Sims. (Ex. 183)

"We have completed the archival search and documents that may be responsive to your request have been identified, gathered, and forwarded

⁴ Although Judge learned found that while Mr. Yousoufian's request was "extremely broad, it was not vague or ambiguous." Learned at 2. The Court further found, in accordance with Act, that if an agency believes a PDA request is vague, the agency has an obligation to clarify. Learned at 5. The County did not ask Mr. Yousoufian to clarify his request.

to our attorneys for review.”

October 1, 1997, letter to Armen Yousoufian by Chief of Staff Desiree Leigh, Office of the King County Executive. (Ex. 184)

“[T]he Executive Office has provided you with all documents in our possession . . .”

October 9, 1997, letter to Armen Yousoufian by Linda Meachum, (Ex. 187)

“It is my understanding that your original request for public disclosure has been fully answered.” “King County takes very seriously its responsibility to make its public records available.”

October 15, 1997, letter to Armen Yousoufian by Oma LaMothe, King County Prosecuting Attorney. (Ex. 190)

After receipt of the prosecuting attorney’s October 15, 1997 letter Mr. Yousoufian retained an attorney. On December 8, 1997, Mr. Paul Fenton wrote to Ron Sims outlining the salient circumstances and reiterating Mr. Yousoufian’s May 30, 1997 request. (Ex. 193) Among other things, Mr. Fenton wrote:

It is now more than six months since the original request and there remain substantial numbers of requested documents not supplied. As stated in the May 30, 1997 letter, at page 2, paragraph 2, Mr. Yousoufian requested documents relating to “how and why and by whom” the various studies were ordered and the costs of such studies.

It is inconceivable that there are not documents relating to these matters in your office and/or elsewhere in the county government. For example, there must have been letters or contracts of engagement, bills rendered and county checks making payment for each of these studies. Perhaps multiple parties made submissions to get the business of doing the studies. Perhaps there was competitive bidding. Perhaps the matter was debated and/or voted on by the county council. Perhaps there are memos discussing whom to hire and the

advantages of one party or another. These are merely examples of what Mr. Yousoufian is looking for. The specific request is contained in his May 30 letter quoted above.

Id. Mr. Fenton noted that Mr. Yousoufian made his PDA request before the election “not to make any accusations but to learn the facts,” and he advised the county that the next request, “should it be required, will be made in the King County Superior Court.” *Id.* Here are highlights of the County’s responses to Mr. Fenton’s requests:

“ . . . we believe we have complied with [Mr. Yousoufian’s] requests.”

December 15, 1997, letter to Yousoufian attorney Paul Fenton, by John Wilson, Office of the King County Executive. (Ex. 197)

“the Executive’s Office has made prompt and substantial efforts to locate the documents that were requested and to check and recheck, at your client’s request, to be sure no documents were overlooked. This generous effort on the part of the County has cost hundreds of hours of staff time. All nonexempt documents located in the Office of the King County Executive or with Stadium Administration which are responsive to Mr. Yousoufian’s request, have been produced. . . . The threat of litigation, or even actual litigation, will not alter the fact that the documents do not exist in that office. A Court will not order county agencies to produce documents that they do not have.”

January 14, 1998, letter to Yousoufian attorney Paul Fenton by Oma LaMothe, King County Prosecuting Attorney. (Ex. 199)

“[Mr. Yousoufian has] had access to all documents responsive to [his] requests.” “No documents were withheld from disclosure.”

March 24, 1998, letter to Yousoufian attorney Paul Fenton by Oma LaMothe, King County Prosecuting Attorney. (Ex. 201)

“No documents were withheld from disclosure. [S]ome documents may be available in the King County Department of Finance. You may correspond with them . . .”

April 2, 1998, letter to Yousoufian attorney Paul Fenton by Oma LaMothe, King County Prosecuting Attorney. (Ex. 202)

“. . . the Department [of Finance] has no documents related to the financing of stadium studies.”

June 22, 1998, letter to Yousoufian attorney Paul Fenton by Oma LaMothe, King County Prosecuting Attorney. (Ex. 205)

C. Procedural History

From May 30, 1997, through June 22, 1998 (Exs. 171, 205) Mr. Yousoufian and his lawyer, Paul Fenton, sought public records under the auspices of the PDA only. (CP 475-481; 536-539) When these efforts finally met with a dead end, petitioner sought trial counsel to initiate and prosecute an action to force the County’s compliance with the PDA. (CP 522-525) Mr. Yousoufian filed suit on March 30, 2000. (CP 1-7)

The mere filing of the lawsuit did not grab the County’s attention, and no further records were produced at this time, but as petitioner took the depositions of key King County personnel (CP 51-471) including Steve Woo (CP 79-205), Susan Clawson (CP 207-291), Patricia Steele (CP 293-359) and Pamela Cole (CP 361-471), and as discovery motions were made and the trial date approached, the County finally began to deliver many of the individual records sought in 1997. The exact listing and schedule of record production was provided to the court and appears at CP 496-515 and 630-641. Each record the County produced was made an exhibit in whole or in part. (Exs. 1, 6-169, 222-296, CP 730-765, 1040-1067) A detailed account of the dates on which various records were produced (as charted immediately

below) appears at CP 496-517.⁵

Record Name or Description	Date Requested	Date Produced	# of Records	Days late (Learned/Actual)	Record Days (Actual)
Conway Study #1 CP 498	5/30/97	6/10/97	1	4/4	4
Peat Marwick Study CP 498	5/30/97	6/10/97	1	4/7	4
Conway Study #2 CP 498 (Ex. 1)	5/30/97	7/25/97	1	49/49	49
HOK Study #1 CP 499	5/30/97	8/21/97	1	76/76	76
KC Task Force study CP 499	5/30/97	8/21/97	1	76/76	76
Seahawks Kingdome Renovation Study CP 499	5/30/97	8/21/97	1	76/76	76
Kingdome Future Report CP 500 (Ex. 7)	5/30/97	10/10/97	2	126/126	252
Conway #2 Cost Documentation CP 507-08 (Exs. 88-93)	5/30/97	3/7/01	6	843/1370	8220
HOK #1 cost documentation CP 501-07 (Exs. 16-87)	12/8/97	3/7/01	72	651/1178	84816
HOK #1 cost documentation CP 513-14 (Exs. 143-159)	12/8/97	3/19/01	17	0/1190	20230
CSL Cost Documentation CP 500-01 (Exs. 9-15)	12/8/97	3/7/01	7	651/651	8246
Peat Marwick Cost Documentation CP 508-10 (Exs. 94-113)	12/8/97	3/7/01	20	651/651	23560
Mariners Economic Impact Study	5/30/97	3/7/01	1	843/843	1370
Economic Impact of Mariners on King County	5/30/97	3/7/01	1	843/1370	1370
Conway #1 Cost Documentation CP	5/30/97	3/19/01	2	855/855	2764

⁵ See also Learned, at 31; CP 783.

514 (Exs. 160-161)					
HOK #2 cost documentation CP 510-13 (Exs. 114-142)	12/8/97	3/19/01	29	663/ 1190	34510
Seahawks/Kingdome Renovation Cost Documentation CP 511 (Ex. 127)	12/8/97	3/19/01	1	663/ 1190	1190
CSL Study CP 515 (Ex. 162)	5/30/97	4/20/01	1	887/ 1414	1414
HOK #2 Study CP 515 (Ex. 166)	5/30/97	6/8/01	1	936/ 1463	1463
Totals			166	8897/ 15884	189690

Trial was by affidavit, with oral argument taking place on August 15, 2001. (Learned p.1) At trial the Court asked the parties to submit lists of stadium studies alone, without regard to supporting public records such as financial records. See CP 789-794, 804-805 and 838-850. The Court entered its Findings of Fact and Conclusions of Law on September 21, 2001 (Learned pp.1-31)

After oral argument appellant discovered numerous additional records that the County had not produced by the time of the trial, and he asked for additional relief by way of an Order compelling production and penalties. A complete list of the public records not yet produced but which are known to exist can be found at CP 540-546 (submitted before argument) and CP 851-1005 (submitted after oral argument). Judgment was entered on November 27, 2001. (CP 168-170) On December 21, 2001, Mr. Yousoufian filed this appeal. The County did not cross appeal, and has lodged no objection to the Trial Court's Findings or Conclusions.

IV. ARGUMENT

A. Standard Of Review: De Novo

By statute and by well established authority, this Court reviews *de novo* the issue of bad faith and the correct assessment of penalties. RCW 42.17.340(3). Where the record consists entirely of declarations, affidavits and other documentary evidence, the appellate Court stands in the same position as the Trial Court and is not bound by the Trial Court's factual determinations. *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) ("*PAWS II*") In such instances the Court of Appeals can and should engage in the same inquiry as the Trial Court and review all of the facts in the record together with the Trial Court's findings *de novo* and make an independent determination of all matters found to be in error. *Ames v. City of Fircrest*, 71 Wn.App. 284, 292, 857 P.2d 1083 (1993) (with complete record, appellate Court can decide issues of fact and law).

In exercising such review, the statute commands that:

Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.

RCW 42.17.340(3) The statute further directs Courts that "The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy." RCW 42.17.251; *PAWS II*, *supra* at 251. "Strict enforcement of these [punitive] provisions . . . should discourage improper denial of access to public records and adherence to the goals and procedures dictated by the

statute.’” *Yacobellis v. City of Bellingham*, 64 Wn.App. 295, 300, 825 P.2d 324 (1992), quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978). Because awards of costs and attorney fees comprise part of the PDA’s “punitive provisions,” (*Hearst, supra*, 139-40), this Court should also review the attorney’s fees issue *de novo*.

B. Washington’s PDA Is A Strongly Worded Mandate For Broad Disclosure Of Public Records.

Established nearly 30 years ago by public initiative, over the objections of reluctant governmental agencies, Washington’s Public Disclosure Act is a strongly worded mandate for broad disclosure of public records. *Hearst, supra*. Containing one of the strongest public policy statements found in any state statute, the Act sets forth strict standards for agencies to meet. The Act requires that each agency PROMPTLY make available all non-exempt public records upon request. RCW 42.17.270; RCW 42.17.320; AGO 1991 No. 6. Within five business days of receiving a public record request, an agency must respond by either (1) providing the record; (2) acknowledging that the agency has received the request and providing a reasonable estimate of the time needed to respond to the request; or (3) denying the public record request. RCW 42.17.320. “Denials of requests must be accompanied by a written statement of the specific reasons therefor.” RCW 42.17.320.

The Act requires agencies to adopt and enforce rules and regulations consistent with the intent of the PDA to provide prompt and full public access to public records, and to protect public records from damage or

disorganization. RCW 42.17.290. “Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information.” *Id.* (emphasis added)

Any person having been denied an opportunity to inspect or copy a public record by an agency may petition the Superior Court to allow inspection or copying of a specific record or class of records. RCW 42.17.340 (1). “The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.” *Id.* Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. RCW 42.17.340(3) (emphasis added)

“[A]ny person who prevails against an agency in any action in the Courts 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 shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. 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).⁶ “The public records subdivision of this chapter shall

⁶ As discussed below, appellant urges that a “document” or “record” for purposes of per-record per-day penalties should be defined as “a single page or collection of sequentially related pages bound or stapled together.”

be liberally construed and its exemptions narrowly construed to promote this public policy.” RCW 42.17.251; RCW 42.17.010(11); RCW 42.17.920. “Strict enforcement of these provisions where warranted should discourage improper denial of access to public records and adherence to the goals and procedures dictated by the statute.” *Hearst, supra*.

1. In Enacting The PDA, The Legislature Intended To Facilitate Democratic Discourse By Facilitating Prompt Access To Public Records And Penalizing Noncompliant Agencies

The PDA was drafted to combat precisely the sort of disorganization, obfuscation and delay as demonstrated here by King County. Initiative 276, known as the Washington Public Records Disclosure Act, passed in November 1972, with an “extraordinarily broad range of citizen support.” *In re Rosier*, 105 Wn.2d 606, 618-19, 717 P.2d 1353 (1986) (Andersen, J., dissenting in part, concurring in part). As the voter’s pamphlet explained, “The initiative would require all . . . ‘public records’ of both state and local agencies to be made available for public inspection and copying by any person asking to see or copy a particular record. . . .” *Hearst, supra* at 128, *quoting* Official Voters Pamphlet, 1972 General Election, November 7, 1972, at pages 10, 108.

The Initiative sought to rectify a concern over “secrecy in government and the influence of private money on governmental decision making.” *Nast v. Michels*, 107 Wn.2d 300, 304, 730 P.2d 54 (1986), *quoting* 1972 Voters Pamphlet, at 10. Among other things, the statute requires full access to each and every public record to assure public

confidence in government and protection of the public interest. RCW 42.17.010(11). Significantly, the Act includes an incentive to citizens for private enforcement, and provides that any person who prevails against an agency “shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action [in addition to] statutory penalties. RCW 42.17.340(4).

At the time of its passage and since, Washington’s Public Disclosure Act has been one of the most liberal and punitive public disclosure laws in the nation.⁷ Born in the era of Watergate and modeled after the Federal Freedom of Information Act (FOIA), 5 U.S.C. §552, as amended, the PDA has evolved against a backdrop of “popular discontent with the unresponsiveness of government in dealing with felt social needs of the people.”⁸ It is the only public disclosure statute established directly by the electorate.⁹ Emphasizing the importance of open government and citizen participation, one early Washington decision admonishes:

The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country. During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with 'hanky panky' in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in

⁷ Comment, *Public Inspection of State and Municipal Executive Documents*, 45 *FORDHAM L. REV.* 1105, 1107 (1977). See also, H. CROSS, *THE PEOPLE’S RIGHT TO KNOW* 25-37 (1953); *Cathcart v. Andersen*, 85 Wn.2d 102, 107, 530 P.2d 313 (1975).

⁸ *Fritz v. Gorton*, 83 Wn.2d 275, 281, 517 P.2d 911 (1974).

⁹ Comment, *supra*, at 1138.

governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.

Cathcart v. Andersen, 85 Wn.2d 102, 108, 530 P.2d 313 (1975), quoting *Board of Public Instruction v. Doran*, 224 So.2d 693 (Fla.1969).

“[D]eclared by the sovereign people to be the public policy of the State of Washington,” the PDA mandates that:

[T]he people have the right to expect from their elected representatives at all levels of government the *utmost of integrity, honesty and fairness in their dealings*;

[P]ublic confidence in government at all levels is essential and must be promoted *by all possible means*;

[M]indful of the right of individuals to privacy and of the desirability of the efficient administration of government, *full access to information* concerning the conduct of government on every level must be assured *as a fundamental and necessary precondition to the sound governance of a free society*;

[T]he provisions of this act shall be liberally construed to promote . . . full access to public records so as to assure continuing confidence in . . . governmental processes, and so as to assure that the public interest will be fully protected.

RCW 42.17.010(2), (5), (11) (emphasis added). The statutory declaration of policy of Initiative 276 is no less emphatic:

The provisions of this chapter shall be liberally construed to promote . . . full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected.

RCW 42.17.010(11). Indeed, so important was the goal of open

government that the emphatic mandate issues again:

[t]he provisions of this act are to be liberally construed to effectuate the policies and purposes of this act.

RCW 42.17.920. The Washington Supreme Court held that this legislative intent embodies “some of the strongest language we have seen,” and affirmed that “the purpose of the [Act] is to allow the public to view the decision-making process at all stages.” *Cathcart v. Andersen, supra*, at 107.

In theory, the PDA is “a strongly worded mandate for broad disclosure of public records.” *Hearst, supra*. In practice, however, the PDA, “created by the people for the expressed purpose of fostering openness in their government,” has *not* been met with open arms by many Washington agencies. Moreover, Washington trial courts, intended to be guardians of the public interest under the Act, frequently enable wrongful withholding of records by their reluctance to impose the significant penalties contemplated by the Act. *See e.g. ACLU v. Blaine School District No. 503*, 95 Wn.App. 106, 975 P.2d 536 (1999); *Olsen v. King County*, 106 Wn.App. 616, 24 P.3d 467 (2001). As a brief survey of the Act’s legislative history shows, virtually every legislative modification of the already stringent Act has been to strengthen the policy of open government, often by strengthening the punitive and deterrent aspects of the Act.

For example, one significant setback to the policy of openness mandated by the Act occurred in 1986, when the State Supreme Court, in

In re Rosier, 105 Wn.2d 606, 717 P.2d 1353 (1986), effectively restricted access to certain public records. In a strongly worded dissent, Justice Anderson wrote that “the majority [was] tampering [with] a direct enactment of the people.” *Rosier*, at 618. Referring to the *Hearst* decision¹⁰, Justice Anderson criticized the majority’s derogation of “[t]he statutory scheme [which] establishes a positive duty to disclose public records unless they fall within the specific exemptions.” *Id.*, at 623.

I do not see how the act itself or *Hearst* could be clearer—public records must be disclosed *unless* they come within one of the statutory exemptions.

A unanimous Legislature agreed. As the Supreme Court later wrote in *State v. Maxfield*, 125 Wn.2d 378, 390, 886 P.2d 123 (1994), the legislative findings were unusually specific:

The legislature intends to restore the law relating to the release of public records largely to that which existed prior to the Washington Supreme Court decision in *In re Rosier*, 105 Wn.2d 606 (1986). The intent of this legislation is to make clear that: (1) Absent statutory provisions to the contrary, agencies possessing records should in responding to requests for disclosure not make any distinctions in releasing or not releasing records based upon the identity of the person or agency which requested the records, and (2) agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records. . . .

Id., quoting Laws of 1987, ch. 403, § 1, p. 1546. Five years later the Legislature was compelled to restore and strengthen the Act again.

In 1992, noting the erosion of the effectiveness of the PDA, and in

¹⁰ *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978).

response to the difficulties citizens were facing with agency denials of requests for public records, the Legislature revisited and revitalized the Act again. Polling citizens, the media and agencies, and analyzing freedom of information acts developed in other states, the Legislature took to heart citizen, agency, and community concern. Amidst the hue and cry a common theme rang out; agencies do not adequately respond to legitimate records requests, and ordinary citizens cannot afford to hire a lawyer to challenge recalcitrant agencies in Superior Court. Following are representative samples of the many voices the Legislature heard (see Appendix 2):

[The public disclosure laws] have very few teeth. Many sections of RCW 42.17 and 42.30 are, for the most part, not enforced by any state agency. They are run on the honor system. Honor is not a hindrance to wrongdoing.

John Servais to then Senator Harriett Spanel.[Appendix 2-2]¹¹

[T]he only remedy which is currently available for any person who has been denied access to a public record is to initiate litigation in superior Court. . . . In this state, ordinary citizens rarely file litigation when they are denied access. Apparently few people have the financial incentive necessary to take the risk that they will be required to pay a lawyer to challenge an agency's action on public records.

Washington Attorney General, in a memorandum submitted to the Joint Select Committee on Open Government, dated January 14, 1992. [Appendix 2-3]

¹¹ Servais, like apparently many of the few citizens who have the requisite skills or financial wherewithal to challenge agency compliance under the PDA, happens to be an attorney, e.g. *Servais v. Port of Bellingham*, 72 Wn.App. 183, 864 P.2d 4 (1993); *Ockerman v. King County*, 102 Wn.App. 212, 6 P.3d 1214 (2000); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998); *Wood v. Lowe*, 102 Wn.App. 872, 10 P.3d 494 (2000).

The language of the Final Bill Report, ESHB 2876, issued February 18, 1992, reflects the concerns raised in the preceding hearings:

This bill represents a tinkering with the laws to put the whip back into the hands of the people. Testimony against this bill is testimony from an uncomfortable government. There are a number of ambiguities in the existing law. This bill offers a major tune-up, but more remains to be done. [Appendix 2-19]

Thus, in response to the citizen complaints that agencies did not heed the PDA and as a result citizens could not easily access “their” public records, and that ordinary citizens could not afford to hire a lawyer and take agencies to Court, the Legislature took a great stride forward by instituting major changes compelling disclosure, insulating officials for wrongful disclosure made in good faith, and significantly increasing the penalty provisions. These changes included:

Addition of a new section setting forth the strong public policy of the act, and stating that public records statutes are to be liberally construed and record exemptions narrowly construed to promote the public policy of openness; RCW 42.17.251

- * A significant increase in penalties by making penalties mandatory where a person prevails against an agency, and establishing a range of “no less than \$5 per day and no greater than \$100 per day for each day that the person was denied access to the record.” RCW 42.17.340 (4)

A definition of what constitutes a “prompt” response by requiring an agency to respond to a public records request within five business days; RCW 42.17.320

A section permitting Superior Court review if the citizen believes an agency has not made a reasonable estimate of the time required to respond, and placing the burden of proof on the agency to show the estimate is reasonable; RCW 42.17.340 (2)

A section establishing immunity from liability for release of exempt

records provided the actor was acting in good faith. RCW 42.17.258
Staff Memorandum to State Government Committee, dated 2/5/1992.
(Appendix 2-8)

Perhaps the most important of all changes was a clear directive issued to agencies and to Courts, that has the effect of binding the above enumerated provisions together and empowering public policy with the full force of law:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

RCW 42.17.251. This statutory declaration of purpose is indispensable to this Court in ascertaining the intent of the Legislature, and in understanding and applying the intended punitive and deterrent provisions of the statute. *Hartman v. Washington State Game Commission*, 85 Wn.2d 176, 179, 532 P.2d 614 (1975).

2. The Statute’s Mandate For Liberal Construction Includes A Liberal Construction Of The Statute’s Penalty Provision.

The PDA itself mandates that its provisions “shall be liberally construed and its exemptions narrowly construed” to promote the policy of open government. RCW 42.17.251; RCW 42.17.010(11); RCW 42.17.920; *Hearst, supra*. A liberal construction of the statute is “made even more compelling because of the voters’ intent in passing this

initiative.” *Nast v. Michels, supra* at 310. “Strict enforcement of these provisions where warranted should discourage improper denial of access to public records and adherence to the goals and procedures dictated by the statute.” *Hearst, supra*. “When determining the amount of the penalty to be imposed ‘the existence or absence of [an] agency’s bad faith is the principal factor which the Trial Court must consider.’ ” *Amren v. City of Kalama*, 131 Wn.2d 25, 37-8, 929 P.2d 389 (1997), quoting *Yacobellis, supra* at 303. However, few touchstones exist in PDA jurisprudence by which to ascertain and measure the full extent of King County’s bad faith.

Here, the Trial Court found (*see* Issue 1, *supra*) that King County: (1) did not act in good faith (Learned 17/24-18/25), (2) did not render the “fullest” assistance to Mr. Yousoufian, (3) delivered not records but factual and legal misrepresentations to Mr. Yousoufian, (4) did not promptly respond to his repeated requests, (5) failed to conduct a reasonable search of its records, (6) was not sufficiently organized so as to respond timely to the request, (7) repeatedly misled Mr. Yousoufian and the Trial Court by asserting that it had given Mr. Yousoufian access to all records responsive to his request, (8) was openly hostile in its responses to Mr. Yousoufian and indeed was “peeved” by Mr. Yousoufian’s request (ex. 195), (9) was nearly four years late in adequately responding to the PDA request, (10) was repeatedly [grossly] negligent in the execution of its statutory duties, and (11) after almost 30 years had not implemented the indexing or tracking system required by RCW 42.17.290, or adequately trained its staff. The Court nevertheless did not enter findings of bad faith,

but instead forgave the County from significant penalties because the defendants admitted they did not provide all requested records (Learned, p. 27) and because now the County purportedly has taken steps to correct the longstanding error of its ways.¹² *Id.* (Learned 18/26-19/3) The Court’s decision fully undercuts the policy behind the Act, and will encourage further transgressions where agencies, or individuals in control of an agency, opt to suffer the minor nuisance of typical PDA fines rather than release potentially embarrassing or politically damaging public records. If anything will make a shambles of the PDA, it will be the judicial legitimization of “negligent withholding” and erosion of the positive duty of disclosure by imposition of minimum penalties.

Given the County’s positive duty of full disclosure, its global violations of the PDA can readily be characterized as fully subversive to a legitimate request for records, if not merely “inappropriate and improper behavior.” In *Wilson v. Henkle*, 45 Wn.App. 162, 175, 724 P.2d 1069 (1986), the Court of Appeals held that a finding of mere “inappropriate and improper” conduct in litigation is tantamount to a finding of bad faith. King County’s actions here went far beyond “inappropriate and improper.” King County acted in bad faith and the Trial Court erred in assessing minimum penalties.

“Although a showing of bad faith or economic loss is not required in

¹² One reason for remand, appellant alleges, is because post-trial investigations have uncovered evidence that the County has not taken seriously its promise to the Court to remedy its defective delivery systems.

the determination of whether an award for delay in disclosure should be granted, they are factors for the Trial Court to consider in determining the amount to be awarded.” *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997). King County’s “inappropriate and improper” conduct, in the circumstances of Mr. Yousoufian’s request, merits a finding of bad faith. Two analogous cases make this plain. In *ACLU v. Blaine School District No. 503*, 95 Wn.App. 106, 975 P.2d 536 (1999), this Court held that “improper motives” constituted bad faith. The Court referred to a letter written by the Blaine School District Superintendent to a parent which contained factual misrepresentations. In the letter the superintendent misrepresented the nature of the ACLU’s request for records by stating that the request was for “thousands of pages” when the request involved only 13 pages, and that the district was reluctant to have school employees copy such voluminous records at taxpayer expense. *Id.*, at 112. The Court held that the superintendent’s letter was “startling evidence of the District’s improper motives” because the letter was mailed after the ACLU’s request had been met, and no valid reason existed for denying the document request. *Id.* Noting that “strict enforcement of fees and fines will discourage improper denial of access to public records,” the Court of Appeals doubled the Trial Court’s penalty assessment by imposing a fine of \$10 per day.

Similarly, in *Amren, supra*, the Court of Appeals was asked to make a determination of agency bad faith. In footnote 11, the Court references the facts which would support a finding of bad faith:

Appellant also notes that the Mayor in his affidavit and the City in its brief misled this Court stating that the City had adopted the state civil service laws in the instance of police personnel when, in fact, they had not. Additionally, in the letter denying Amren's disclosure request the City Attorney stated that he intended to confer with Assistant Attorney General Smith and that if after conferring with her he found that the City's basis for denial was unfounded he would notify Amren. The Appellant alleges that the City Attorney was in contact with the Attorney General's office and, thus, was aware of the Attorney General's position that RCW 42.17.295 and RCW 41.06.450 have no applicability to local governments. In spite of the Attorney General's response, the City continued to rely on these statutes as its basis for withholding the report. Finally, the Appellant argues that the Mayor, who removed himself from the investigation after complaints that he was "too close to the Chief," should not have then placed himself as the final judge as to whether the report had merit and whether it would be released to the public. See CP at 37.

Id., at 37-38. The Court of Appeals remanded for further findings and imposition of a proper penalty, and the Court wrote that "*the arguments made by Amren are compelling as potential evidence of bad faith.*" *Id.*, (emphasis added).

The instant case contains far more compelling evidence of bad faith than both *Amren* and *Blaine II* combined (See Issue 1, *supra*). Like the defendants in *Amren* and *Blaine*, the County had no reasonable basis in law for withholding the requested records, yet it withheld many of these records for over 1500 days and, the appellant alleges, continues to withhold records responsive to his request. (CP 540-546, 851-1005) In addition, the County made "factual and legal" misrepresentations to Mr. Yousoufian and the Court by repeatedly asserting that "Plaintiff has had

access to all records responsive to his . . . public disclosure requests.” As distinguished from *Amren* and *Blaine*, the instant case involves public funding in excess of \$300 million, thousands of pages of records and hundreds of days of delay. The Trial Court erred in not finding bad faith.

Because so few PDA cases have dealt explicitly with the question of bad faith, analogy to similar areas of law is appropriate. Ample authority exists in insurance cases by which to measure the County’s bad faith. For example, like the PDA, RCW 48.01.030 involves public interest, positive duty, and a requirement to act in good faith in situations involving insurance. RCW 48.01.030 provides in pertinent part:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. [emphasis added]

This is the key statute in determining whether an insurance company has acted in bad faith in dealing with its insured. *Prima facie*, where King County practiced, by default or design, deception, dishonesty and inequity in its dealings with Mr. Yousoufian and his public records request, King County acted in bad faith.

The “public interest” affected by insurance pales when compared to the public interest affected by the PDA. As the Washington Court of Appeals reiterated in *Cathcart v. Andersen, supra* at 435-36:

Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire decision-making process that the legislature intended to affect by the enactment of the statute before us. This act is a declaration of public policy, the frustration of which

constitutes irreparable injury to the public interest. Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action.

Id., quoting *Times Publishing Co. v. Williams*, 222 So.2d 470, 473 (Fla.App.1969) (emphasis added).

The analogy to insurance law is apposite. By legislative decree, insurance companies, like public agencies, must act in accord with their statutory duty. The failure to act in good faith is deemed bad faith. Unlike the Trial Court below, Washington case law makes no distinction between “negligence” and “bad faith” where a breach of a positive, statutorily imposed duty is involved. *Hamilton v. State Farm*, 83 Wn.2d 787, 523 P.2d 193 (1974). The seminal case of *Tyler v. Grange Insurance Association*, 3 Wn.App. 167, 473 P.2d 193 (1970), is instructive. At page 173 of the opinion the Court defined bad faith as the breach of a duty to use good faith:

When Courts speak of liability for bad faith or the duty to use good faith, they are usually referring to the same obligation. Generally speaking in the context of these cases, good faith means being faithful to one’s duty or obligation; bad faith means being recreant thereto. [citation omitted] [emphasis added]

The *Tyler* Court went on to discuss insurance bad faith in terms applicable to the County’s treatment of Mr. Yousoufian here. It noted, for example, that an insurance company can be found to have acted in bad faith if it failed to properly investigate a claim or took action which was actuated more by self interest than concern for its insured. Further, the refusal to negotiate with its insured by flatly denying coverage where

coverage later is found is, by definition, “bad faith.”

In the instant case, the County failed to properly investigate, and it misrepresented facts and law to Mr. Yousoufian, his lawyers and the court. The County’s false representations include statements that the County had conducted an archive search, had spent “hundreds of hours of staff time” searching for responsive documents, and that all responsive documents had been produced. (See Issue 1, *supra*) It was not until the eve of trial, that King County “discovered” its error and within hours located and produced many of the individual public records ultimately produced.

In the analogous situation of automobile insurance coverage in first party cases, nearly every appellate decision has held that the failure to properly investigate a claim before denying it automatically constitutes bad faith, *e.g.*, *Keith v. Allstate Indem. Co.*, 105 Wn.App. 251, 19 P.3d 1077 (2001); *Griffin v. Allstate Ins. Co.*, 108 Wn.App. 133, 29 P.3d 777 (2001); *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 961 P.2d 933 (1998); *Stouffer and Knight v. Continental Cas. Co.*, 96 Wn.App. 741, 961 P.2d 933 (1999), (*rev. den.* 139 Wn.2d 1018).

Similarly, by standards established in Washington Consumer Protection Act cases, the County acted in bad faith. The heart of the Washington Consumer Protection Act is RCW 19.86.020, which states in pertinent part:

. . . deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Id.

“Bad faith requires a showing of a frivolous and unfounded

denial of benefits.” [citation omitted] In order to make a showing of bad faith sufficient enough to invoke the Consumer Protection Act, the insurance company must have acted in a way that was both unlawful and contrary to public policy. [citation omitted]

Farmers Ins. Co. of Washington v. Romas, 88 Wn.App. 801, 810, 947 P.2d 754 (1997). See also *State v. WWJ Corporation*, 138 Wn.2d 595, 606, 980 P.2d 1257 (1999) (\$500,000 fine for 250 violations of CPA and Mortgage Broker Practices Act).

As discussed throughout this brief, King County’s acts and practices, in all the circumstances of this case, were frivolous, unfounded, contrary to public policy, and deceptive.

b. Because King County Acted In Bad Faith, Minimum Penalties Were Inappropriate Under The PDA.

Because little precedent exists in PDA jurisprudence by which to objectively measure bad faith, this brief will analogize to principles enunciated in punitive damage cases. As established by *Amren* and *Blaine II*, and by analogy to insurance, tort and consumer protection law as stated above, King County acted in bad faith. As the *Amren* case holds, no finding of bad faith is required for imposition of minimum penalties, but a finding of bad faith will act as a multiplier in determining the full measure of penalties. In light of *Amren* and *Blaine II*, one question raised by this case is what level of bad faith is required to assess the maximum penalty of \$100 per day? Stated conversely, if a Trial Court levied against an agency a penalty of \$100 per day, what standard does this Court apply to

determine that the award is just?¹³

Although the “penalty” award under the PDA is not a “damage” award per se, the analogy is nevertheless apt. Washington Courts will assess punitive damages when expressly authorized by the Legislature, e.g. *Winchester v. Stein*, 135 Wn.2d 835, 858, 959 P.2d 1077 (1998). One recent case, *Campbell v. State Farm*, 2001 UT 89, 432 Utah Adv. Rep. 44 (2001), affords clear insight into the salient factors for a Court to consider when assessing the correct measure of punitive damages:

(i) the relative wealth of the defendant; (ii) the nature of the alleged misconduct; (iii) the facts and circumstances surrounding such conduct; (iv) the effect thereof on the lives of the plaintiff and others; (v) the probability of future recurrence of the misconduct; (vi) the relationship of the parties; and (vii) the amount of actual damages awarded.

Campbell, supra, [citation omitted]. With the exception of item (vi), these considerations are consistent with the philosophy of penalty provisions, and in harmony with the overall purpose and methodology of the PDA. An application of these considerations here makes clear the fact that the Trial Court erred in assessing minimum penalties.

(i) The Relative Wealth Of King County.

Punitive damages should be sufficient to discourage the defendant, or anyone similarly situated, from repeating such conduct in the future. According to King County’s website, <http://www.metrokc.gov>, visited May 20, 2002, King County operates on an annual budget of nearly \$3

¹³ See also *State v. WWJ Corporation*, 138 Wn.2d 595, 606, 980 P.2d 1257 (1999).

billion.¹⁴ Proportionally speaking, the total award in the instant case, \$115,000, is 0.0038%, or less than four thousandths of one percent of the County's annual budget.

(ii) The Nature Of The Alleged Misconduct.

This factor specifically analyzes the nature of the defendant's conduct in terms of its wrongfulness, maliciousness and reprehensibility.

. . . the defendant's misconduct is "perhaps the most important indicium of the reasonableness of a punitive damages award."
. . . . "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive" also warrant larger awards. [citations omitted]

As a review of the record below reveals, King County acted in bad faith, and its actions and omissions were wrongful, malicious and reprehensible where, as discussed throughout this brief, it acted with reckless disregard for the public interest via its reckless disregard for the strict mandate of the PDA.

(iii) The Facts And Circumstances Surrounding Such Conduct

This factor looks to the circumstances surrounding the illegal conduct, particularly with respect to what the defendant knew and what was motivating his or her actions. Here the entire record is replete with evidence that King County and Paul Allen were working in concert toward the same goal. The information contained in the records Mr. Yousoufian sought could potentially have interfered with the County's and Mr. Allen's

¹⁴ The executive has noted that the county may suffer a \$41 million shortfall for the year 2002. *Id.*

achieving this goal.

(iv) Effects On The Lives Of The Plaintiff And Others

This factor examines how the defendant's conduct affected other people as well as Mr. Yousoufian. The larger the number of people affected, the greater the justification for higher punitive damages. King County ranks as the 12th most populous county in the nation. *See* <http://www.metrokc.gov/about.htm>, visited May 20, 2002. 1.5 million people reside here. *Id.* Even if the harm to Mr. Yousoufian can be characterized as minimal,¹⁵ the harm is massive in the aggregate. Here information critical to the issues Referendum 48 implicated was locked up in the records Mr. Yousoufian sought. The County has had over 28 years to implement a reasonable records delivery system commensurate with the mandate of the PDA. The County breached its duty to the public.

It is inconceivable that this will be the last PDA request ever made of King County, and that King County's conduct overall has not adversely impacted every citizen in the county, and perhaps every citizen in the state. The intent of the PDA is:

nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. RCW 42.17.251.

PAWS II, supra at 251. Every violation of the PDA harms every citizen of

¹⁵ Because the public funding of the stadium was to be financed in part by increased hotel and restaurant taxes, the Petitioner's personal and business income and interests were implicated. (CP 526-530).

this state. On this basis alone an award beyond the minimum penalties should be required.

(v) Probability Of Future Recurrence Of The Misconduct

This factor analyzes the likelihood that the defendant will repeat or continue engaging in its wrongful behavior. A high probability of recidivism justifies a higher than normal punitive damage award. In light of King County's decades-long policy of disregard of the mandate of the PDA, it is difficult to imagine how such ingrained policies of bureaucratic culture can be easily or quickly changed. "This would be true even in a case where the perpetrator was fully aware of and remorseful for its conduct." While King County has exhibited some awareness of its misconduct in this case, and has asserted that it will institute positive change, presently little incentive exists where Courts seem inclined to award minimum penalties and it is cheaper for the County to pay such penalties than to bear the costs and inconvenience of open government.

(vi) The Relationship Of The Parties

The greater the trust placed in the defendant, the more appropriate the imposition of a large punitive damage award for a breach of that trust. *Id.* It cannot be gainsaid that the operation of government is coextensive with the public trust, and that any violation of the PDA is cause for the most serious concern. The County's persistent and extended violations of the statute are especially troubling here.

The public interest in the public funding of sports stadiums, and in particular, in Referendum 48, is perhaps too self-evident to discuss. *See*

e.g. Brower v. State, 137 Wn.2d 44, 63, 969 P.2d 42 (1998). Referendum 48 passed by a margin of 51%. *Id.* The degree to which private gain might have overcome public trust was locked up in the records Mr. Yousoufian sought. It may never be known whether the documents Mr. Yousoufian requested would have tipped the scales against passage of the Referendum, created embarrassment for public officials, or permitted an action to void the election under RCW 42.17.390(1)¹⁶ or void any contract under RCW 42.30.060(1).¹⁷

What is known, however, is that the extent to which the County's violations have postponed or rendered impossible the dissemination of important information that should have been readily obtainable by the requesting citizen, or the taking of action based on that information, these failures undermine the purposes, principles and quality of democratic governance. The Public Records Act establishes a process vital for public access to, and control over government. Without such a process and the openness it requires, it becomes difficult, if not impossible, to hold public officials accountable for their acts and decisions affecting the public. Here the public officials involved spanned the full spectrum, from the lowest of

¹⁶ If the Court finds that the violation of any provision of this chapter by any candidate or political committee probably affected the outcome of any election, the result of said election may be held void and a special election held within sixty days of such finding. Any action to void an election shall be commenced within one year of the date of the election in question. It is intended that this remedy be imposed freely in all appropriate cases to protect the right of the electorate to an informed and knowledgeable vote.

¹⁷ No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void.

office assistants, up to Ron Sims and Pat Steel (Budget Director), and the prosecuting attorney Oma LaMothe. In keeping with the liberal construction and deterrent aspect of the PDA, this Court must send a strong message to all agencies, not just King County, by holding the county accountable for its failings. This is not achieved by imposing the minimum daily fine based on an arbitrary groupings of records. The Trial Court erred in assessing minimum penalties.

c. The Trial Court Erred In Arbitrarily Grouping Distinct Public Records

Although the Trial Court correctly held that the “Public Disclosure Act mandates a penalty of between \$5 and \$100 per document per day for each day that documents were improperly withheld from disclosure,” (Learned, 26/18), the Court escaped this mandate by arbitrarily grouping distinct records thereby reducing fines. There is no precedent for this grouping. The salient portion of RCW 42.17.340(4) states:

[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.¹⁸

At least one Court has determined that when an award of a statutory penalty is appropriate, a separate penalty should be awarded for each person denied access to a public record “for each record . . . requested.”

¹⁸ Although RCW 42.17.020 states that “the singular shall take the plural and any gender, the other, as the context requires,” the overriding mandate of the Act, including the mandate that the act’s punitive provisions be liberally construed to effectuate its purposes, requires that “record” means “record,” and not “records.”

Lindberg v. Kitsap Cy., 82 Wn.App. 566, 575, 919 P.2d 89 (1996), reversed on other grounds, *Lindberg v. Kitsap County*, 133 Wn.2d 729, 948 P.2d 805 (1997). Although the Court did not clarify whether multiple records contained within a single document request would result in the imposition of multiple penalties or a single penalty, given that a liberal construction is mandated for purposes of assessing penalties, it stands to reason that each record requested, when improperly withheld, will result in a discrete penalty. If the Legislature had intended that penalties be based on each request, as opposed to each record requested, it would have said so by replacing the term “record” with “record or records.”

The question raised by the Court’s grouping of distinct public records is one easily resolved by reference to the plain language of the statute, and by resort to common sense. What constitutes a record for purposes of levying penalties? RCW 42.17.020 (36) defines “public record” as:

any writing¹⁹ containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

Consistent with a liberal construction of the penalty provision of the statute, and with the judicial goal of avoiding absurd and unjust results, appellant submits that a “record” for penalty purposes should be defined as “a single page or collection of sequentially related pages bound or

¹⁹ “Writing” is defined at RCW 42.17.020(42)

stapled together.” A “record” therefore may be a one-page letter, or a five-volume study contained in five 3-ring notebooks. Again consistent with the statute’s mandate for a liberal construction, at least minimum penalties must to be assessed for each record withheld, and Courts always have the discretion to increase the daily award contingent upon whether a full or complete record was produced. Arguably where an agency produces a five-volume “record” but withholds critical pages, Courts will find no compliance for purposes of assessing penalties until the entire record is released.

By arbitrarily grouping records the Trial Court disregarded the distinction between each individual record requested and artificially created *groups* of records. The Court paid no attention to the individual records requested. The chart on pages 10 and 11 of this brief documents that the “record-days” are 189,690 because of the large number of records withheld from Mr. Yousoufian. This chart counts each day that each public record was withheld.

d. The Trial Court Erred In Reducing Penalties By Subtracting 527 Days

When a person prevails against an agency in litigation over a public records request, RCW 42.17.340 requires courts to impose a fine of “no less than \$5 per day and no greater than \$100 per day for each day that the person was denied access to the record.” Here Mr. Yousoufian prevailed against an agency, and the Court then refused to impose the required penalty for 527 of the days that he was denied access to public records.

Even though RCW 42.17.410 allows a citizen to file suit up to “five years after the date when the violation occurred,” the Trial Court arbitrarily selected “120 days [as a] reasonable amount of time for Mr. Yousoufian to find an attorney to represent him.” (Learned 29) The court wrote that imposition of penalties for the additional 527 days that elapsed before the County produced certain records “would encourage future plaintiffs to delay in filing suit in order to incur additional penalties.” *Id.* Where the Act aggressively requires agencies to promptly produce nonexempt records and mandates penalties for unreasonable delay, the Trial Court’s placing of a burden on the plaintiff to marshal potentially scarce resources within a severely limited time flies in the face of the letter and spirit of the Act.

Despite that the plain language of RCW 42.17.410 defeats the Trial Court’s reasoning, a glimpse at the underlying spirit in analogous cases under the PDA may further illuminate the correct resolution of this question. In *Coalition on Government Spying v. King County Dept. of Public Safety*, 59 Wn.App. 856, 801 P.2d 1009 (1990), Division One of the Court of Appeals evaluated the liberal attorney’s fees provision set out in the PDA. Quoting *Animal Welfare Soc. v. UW*, 114 Wn.2d 677, 790 P.2d 604 (1990) (*PAWS I*), the Court noted that “a plaintiff’s failure to negotiate with a public entity for the release of records was not a basis for reducing the amount of attorney fees a plaintiff is entitled to under RCW 42.17.340(3).”

[Requiring a plaintiff to negotiate would] allow an agency to deny a request for information in its entirety and by the simple act of offering to discuss

the matter with the requester put the recovery of attorneys' fees mandated by the statute (RCW 42.17.340(3)) at risk. *This undercuts the public policy of the act, which is to require public entities to promptly answer requests for public records.*

(Emphasis added) *Id.* at 685, 790 P.2d 604. The Court thus indicated that imposing a duty on the plaintiff to negotiate jeopardizes the plaintiff's right to attorney fees, undercutting the policy of the Act. By analogy, permitting an agency to avoid attorney fees by disclosing the documents after the plaintiff has been forced to file a lawsuit also would undercut the policy behind the Act. This we refuse to do.

Id., at 862.

Imposing an undue financial burden on plaintiffs to locate and secure competent counsel within 120 days after an agency or the agency's attorney has flatly stated that all nonexempt documents have been produced, jeopardizes the public's right to access public records, absent a willingness and ability to retain competent counsel and litigate. In the case at bar, despite Mr. Yousoufian's willingness and ability to retain competent counsel, and because of the misrepresentations of Oma LaMothe, (Ex. 199) he could not get an attorney interested in his case:.

After Ms. LaMothe delivered the county's last words on my public records request, that the county had not withheld any documents from disclosure . . . I began to search for an attorney who would take the case. . . . Unfortunately because the county repeatedly denied in writing having any documents responsive to my request, many of the lawyers with whom I met thought that I was wasting my time with a frivolous claim, that the county was telling the truth. Consequently I spent approximately another 25 or more hours meeting and discussing my case with several lawyers before I was able to find a lawyer who was willing to do more than review my claim and decline representation. It was not until the summer of 1999 that I found [an attorney willing] to take my case.

(CP 522-525)

Laches has been viewed by the Washington courts as an equitable doctrine grounded in the principle of equitable estoppel. Although the trial court seemed to apply laches in reducing the penalty by 527 days, the doctrine does not apply to the facts of this case. As Washington courts have long held:

The doctrine of laches is a creature of equity and is grounded upon the principles of equitable estoppel. It does not bar an action short of the statute of limitations applicable thereto, unless it is made to appear that, by reason of the delay in asserting a claim, the other party has altered his position or has been otherwise injured by the delay. [citing cases]

Luellen v. City of Aberdeen, 20 Wn.2d 594, 602, 148 P.2d 849 (1944).

The doctrine of laches was designed by the courts of equity to be used against a party with unclean hands. Mr. Yousoufian does not have unclean hands – King County does. There is no evidence that any delay caused King County to alter its position. In fact, the lawsuit was ignored by the County until vigorous discovery and the imminence of trial finally produced a response.

Although the Trial Court appears concerned with discouraging future plaintiffs from delaying a lawsuit in order to maximize penalties, the Court overlooks the deterrent aspect of the Act, the affirmative burdens placed on agencies by the Act, and the fact that its opinion encourages future defendants to delay in hopes that any penalties assessed will not present a real problem. As a practical concern, the Trial Court's award of only minimum penalties and less than the full measure of

attorneys fees, if embodied in a published decision, will make it difficult for ordinary citizens to retain competent counsel in meritorious cases, and will encourage recalcitrant agencies to avoid the thrust of the Act by “negligent” withholding, which will be virtually impossible to disprove in a trial by affidavit.

4. The Mandate For Liberal Construction Includes A Liberal Construction Of The Attorney Fee Provision

As noted above, enforcement of the Act – and indeed, meaningful democratic discourse – depends upon private citizens. Accordingly the Act provides that any person who prevails against an agency “shall be awarded all costs, including reasonable attorney fees, [and penalties] for each day that he was denied the right to inspect or copy said public record.” RCW 42.17.340.

Penalties and attorney’s fees under the statute are in essence a codification of the ancient common law 'qui tam' procedure or doctrine. Essentially a Qui tam action is brought by an 'informer' or volunteer for violation of a particular civil or criminal statute which generally provides that the informer, if successful, may recover his costs and attorney fees, as well as a share of the penalty. It is called a “qui tam action” because the plaintiff states that he sues for the state as well as himself. Black's Law Dictionary 1414 (rev. 4th ed. 1968).

Fritz v. Gorton, 83 Wn.2d 275, 312, 517 P.2d 911 (1974). As this Court of Appeals confirmed in *A.C.L.U. v. Blaine School Dist. No. 503*, 95 Wn.App. 106, 115, 975 P.2d 536 (1999), “permitting a liberal recovery of costs is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public’s right to access public records.” (emphasis added). It cannot be gainsaid that permitting a liberal

recovery of fees is an even more critical component in effectuating these same governmental goals.

Here Mr. Yousoufian incurred more than \$140,000 in actual attorney's fees. The Trial Court returned only a fraction of this; \$82,196.16 in fees, and \$25,450.00 in penalties. The Trial Court abused its discretion by passing the burden of enforcement of the PDA to a private citizen, and by functionally encouraging "negligent" withholding of critical records without fear of reprisal. Our Supreme Court has overturned attorney fees awards when it has disapproved of the basis or method used by the Trial Court, or when the record fails to state a basis supporting the award. *PAWS I, supra* at 688-89, *citing Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987); *Brand v. Department of Labor and Industries of State of Wash.*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999). This Court should do the same here.

In *Brand v. Dept. of L&I, supra*, the Supreme Court reversed the Court of Appeals on discretionary review of an attorney fees issue. The Supreme Court maintained that "[c]entral to the calculation of an attorney fees award [is] the underlying purpose of the statute authorizing the attorney fees," *Id.*, at 667, and accordingly "it is important to evaluate the purpose of the specific attorney fees provision and to apply the statute in accordance with that purpose." *Id.*

The actual attorneys fees for Mr. Balint through August 23, 2001, totaled \$48,700. (Learned, at 22) The actual attorney's fees for Mr. Brannan through August 27, 2001, totaled \$85,248. (Learned, at 25) The actual

attorney's fees for Mr. Fenton totaled \$16,095. (Learned, at 19) The Trial Court applied an apparent lodestar formula in reducing attorney's fees based upon the results on the individual but distinct issues. Obviously in any case involving a trial there are large numbers of issues at stake. During the course of trial, in most cases, both parties are successful on evidentiary issues and both parties lose on evidentiary issues. This was the case here. Although Mr. Yousoufian was the prevailing party in this litigation, the Court improperly reduced fees based on the results of individual issues litigated.

The issue of who was a prevailing party was updated in *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997). In that case the Supreme Court held that the plaintiff was entitled to all his attorney's fees. It held that the definition of prevailing party depended on the practical result of trial, not the result of each and every issue, especially where the issues were inseparable:

In general, a prevailing party is one who receives an affirmative judgment in his or her favor. [citation] If neither wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded the parties. [emphasis added]

Id.

In the instant case the trial took three days, with the actual "hearings," including two motions and trial, lasting several hours. The vast majority of effort has been centered on whether the County had disclosed all disclosable documents, and if not, how extensive was its bad

faith. The Court compelled the County to produce records the County denied it had, and even after the plaintiff's second motion to compel, the county disgorged more documents. Mr. Yousoufian was the substantially prevailing party. To penalize Mr. Yousoufian by not returning his full allotment of attorney's fees a contravention of the strict penalty provisions of the PDA.

Generally speaking, the Courts of Washington have been result oriented in determining who is the prevailing party. If the result of the litigation is the measure of success, then Mr. Yousoufian clearly is the prevailing party. Given the strict mandate of the PDA, affirmation of the Trial Court's ruling on attorney's fees is a dereliction of the Act. As numerous cases have held, the prevailing party is the party who has an affirmative judgment rendered in his favor when the case is viewed as a whole:

The prevailing party is the party who has an affirmative judgment rendered in his favor at the conclusion of the *entire case*. *Moritzky v. Heberlein*, 40 Wn.App. 181, 183, 697 P.2d 1023 (1985). The Trial Court granted First Union's and Trust's motion to dismiss the lien foreclosure action. They are therefore the prevailing parties.

Statutory attorney fees awarded to a prevailing party should not be denied or reduced when the party was not successful on only one of several related claims. [citations] Reductions in fees are appropriate only when the fees are unreasonable because they were generated by claims that were distinct in all respects from successful claims. *Hensley*, 461 U.S. at 440. First Union was unsuccessful in an appeal regarding proper verification of the notice of claim of lien. But that claim was related to the lien foreclosure action on which it prevailed. The Court did not abuse its discretion in the award of attorney

fees to First Union and Trust.

Schumacher Painting v. First Union Mgt., 69 Wn.App. 693, 850 P.2d 1361 (1993).

Under RCW 42.17.340(4) and numerous PDA cases, the same definition of “prevailing party” is utilized. For example, in *Doe I v. Washington State Patrol*, 80 Wn.App. 296, 908 P.2d 914 (1996), it was held that:

A prevailing party generally "is the one who has an affirmative judgment rendered in his favor at the conclusion of the entire case." [citing cases] In a different context, Division One of this Court has held a party has prevailed when "'prosecution of the action could reasonably be regarded as necessary to obtain the information,' and 'the existence of the lawsuit had a causative effect on the release of the information.'" [citing cases]

As the legislative history of the PDA reveals, the Legislature strengthened the penalties provision of the act considerably in 1992, because apparently “few people have the financial incentive necessary to take the risk that they will be required to pay a lawyer to challenge an agency’s action on public records.” (Appendix 2) This Court should be very wary of turning the clock back by affirming the Trial Court’s minimum award of attorney’s fees thereby making it difficult, if not impossible, for ordinary citizens to interest qualified attorneys to represent them in PDA litigation.

B. The Trial Court Erred In Requiring Only “Reasonable Disclosure”

The Trial Court held that “a reasonable disclosure of documents has now been made. Any miscellaneous documents not yet produced are non-responsive not warranting either findings or a fine.” (Learned 13) This

holding contravenes the letter and the intent of the PDA, and the facts of this case. In pertinent part, RCW 42.17.260(1) states:

Each agency [] shall make available for public inspection and copying all public records, unless the record falls within [specific] exemptions . . . (emphasis added)

At CP 540-46 and 851-1005, Mr. Yousoufian provides details of records not yet produced. More records have since been added to this list. It is inconceivable that at least some of these documents do not exist, and reversible error to not require their production.

V. Relief Requested

In light of the foregoing argument and authority, Mr. Yousoufian respectfully requests this Court grant him the following relief: (1) a recalculation by this court of penalties based on a per-record per-day calculation with no deduction of 527 days, i.e., based on 189690 “record days”, (2) the full allotment of all attorney’s fees incurred, (3) remand for purposes of further production of records and imposition of penalties based thereon, and (4) remand for purposes of ascertaining whether King County has changed its handling of PDA requests. Pursuant to RAP 18.1, appellant respectfully requests reimbursement of all attorney’s fees and costs incurred in this appeal.

VI. Conclusion

King County has demonstrated an unacceptable disregard for the strict requirements of the PDA. For approximately four years, King County was inexcusably derelict its duty to “promptly” make available all

non-exempt records. The Trial Court also deviated from the mandate of the Act, and in so doing has crafted an opinion which threatens to seriously erode the PDA's unyielding punitive and deterrent provisions. The Court reasoned its way to a finding of negligence by reference to various of the County's unlawful and irresponsible acts, and concluded that while the county did not act in good faith, neither did it act in bad faith. The Trial Court's reasoning makes no sense. Stated as a syllogism, the Trial Court's reasoning is as follows:

Major Premise: Misrepresentation, breaches of duties owed, and violations of statute constitute bad faith.

Minor Premise: King County misrepresented facts and law, breached duties owed, and violated multiple statutes. (Learned, 17, 18)

Conclusion: King County therefore was negligent. (Learned, *passim*)

The Trial Court's reasoning is invalid, based on which the Court erred in assessing minimum penalties.

In determining the correct measure of penalties Courts must bear in mind the powerful democratic principles underlying the Act, the mandate of liberal construction demanded by the act, and the far-reaching effects of this Court's determination.

Just how much should the penalties in this case be? This Court need look no further than the magnitude of withholding as occurred in this case, the consequence of such withholding in general, the as-yet unascertained consequences of continued withholding, and the imperative of the PDA.

The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of

representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. RCW 42.17.251. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests.

PAWS II, supra at 251.

King County exhibited a pattern, indeed, a culture, for over 28 years, of institutional disorganization, obfuscation and delay. The glacial rate at which nonexempt records were produced violates the clear mandate of the Act. The failure to be adequately organized violates the clear mandate of the Act. The failure to render the fullest assistance possible violates the clear mandate of the Act. The misrepresentations, factual and legal, violate the clear mandate of the Act. The County's entire response in this case violates the clear mandate of the Act.

Correctly applying the law to the facts of this case results in a significant penalty to be imposed on the recalcitrant agency, King County. The number of days in which distinct public records were withheld from Mr. Yousoufian is 189,690. This is a function of the large number of public records requested and withheld multiplied by the large number of days which have passed since the requests and the actual production of records. The County controlled its own fate in this scenario. It continues to withhold records. Governmental agencies are always short of revenues necessary to fund required services and it is difficult for a Superior Court or a Court of Appeals to impose a significant judgment on a local agency but this must be done so that King County and other agencies (and the

courts) get the message that the Public Disclosure Act must be taken seriously not only in theory but in practice.

Notwithstanding Mr. Yousoufian's §interests in this case, the real parties in interest are the citizens and voters of Washington State, each of whom is endowed with a fundamental right to know the workings of their government, to participate actively and in an informed manner, to vote and to be heard. An award of minimum penalties and less than the full measure of attorneys' fees sought unquestionably will chill future citizen participation under the auspices of the PDA. This is not what the Legislature or the people of this State, in enacting the PDA, intended. This is not what the people of this State deserve.

VII. Appendix

The Appendixes consist of: 1) The Trial Court's Findings of Fact and Conclusions of Law, and 2) Documents referred to in the Legislative History portion of the brief as copied from the State Historical Archives.

Respectfully submitted this 4th day of June, 2002.

DAVID J. BALINT, PLLC

LAW OFFICES OF
MICHAEL G. BRANNAN

By: David J. Balint, WSBA #5881
Attorneys for Appellant
2033 Sixth Avenue, Suite 800
Seattle, WA 98121

By: Michael G. Brannan WSBA# 28838
Attorneys for Appellant
4115 Roosevelt Way NE, Suite B
Seattle, WA 98105

(206) 728-7799

(206) 448-2065