

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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

THE HONORABLE J. KATHLEEN LEARNED

BRIEF OF RESPONDENTS

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A. ISSUES PRESENTED

- 1. SHOULD THE TRIAL COURT'S RULING THAT KING COUNTY DID NOT ACT IN BAD FAITH BE AFFIRMED WHERE THERE IS NO FACTUAL EVIDENCE OF BAD FAITH IN THE RECORD?**
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B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On June 1, 2000, Armen Yousoufian filed a Complaint for Violation of the Public Disclosure Act ("the Act"). CP 3-7. In it, he alleged violations of the Act by King County agencies in their response to a public disclosure request he made three years earlier. CP 3-7.

Pursuant to RCW 42.17.340, a trial based solely on affidavits was held before the Honorable J. Kathleen Learned on August 15, 2001. CP 1009. Each side submitted trial briefs and supporting affidavits, and after

presentation of oral argument by both parties, Judge Learned took the matter under advisement. CP 1009.

On September 21, 2001, Judge Learned issued a thirty-one page decision finding King County had violated the Act by not providing Mr. Yousoufian with all documents he requested in the timeframe required by the Act. CP 1009-1039. Judge Learned found that although King County's response was ineffective, the intent of the County was to be responsive to Mr. Yousoufian's public disclosure request. CP 1027. Judge Learned found no evidence of intentional nondisclosure or intent to conceal by the County and found the County did not act in bad faith. CP 1027.

Judge Learned assessed penalties against King County in the amount of \$25,440, well below the approximately \$30 million requested by Mr. Yousoufian. CP 689, 1039. In her written decision, Judge Learned described in detail how she arrived at this amount, basing it on the minimum penalty of five dollars per day. CP 1034-1039. Judge Learned also ordered the County to pay Mr. Yousoufian's costs in the amount of \$6,780 and \$82,196 in attorney fees. CP 1027, 1034. The amount assessed for attorney fees was well below the more than \$150,000 Mr. Yousoufian requested. CP 1027-1034. Again, Judge Learned provided a detailed description of how she arrived at the amount awarded for attorney

fees, describing the reason for each deduction she took from the total amount requested. CP 1027-1034.

A judgment in the total amount of \$114,416.26 was entered against King County on November 27, 2001. CP 1068-1070. King County paid the judgment that same day. CP 1272-1273.

On December 21, 2001, Mr. Yousoufian filed a Notice of Appeal to this division of the Washington State Court of Appeals.

2. SUBSTANTIVE FACTS

This case involves a May 30, 1997, public disclosure request submitted by Mr. Yousoufian to the King County Executive's Office (hereinafter "Executive's Office"). Ex. 171. Mr. Yousoufian requested two categories of documents, only one of which is at issue in this appeal. Ex. 171. Mr. Yousoufian described the relevant category of documents he sought as follows:

All file materials relating to, and including, the widely quoted 'Conway study' that many politicians have referred to in connection with the economic impacts of sports stadiums and any other such studies.

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.

Ex. 171. The Executive's Office provided an initial response to Mr. Yousoufian's request within the time frame required by the Public Disclosure Act. Ex. 174. The Executive's response informed Mr. Yousoufian the Conway Study was available for his review and he was advised to contact the Executive's Office to set up a time to review the study. Ex. 174. As to the remainder of his May 30, 1997 request, the Executive's Office estimated it would take approximately three weeks to gather and review the records. Ex. 174.

On June 20, 1997, the Executive's Office received another letter from Mr. Yousoufian in which he complained about the amount of time the Executive's Office estimated it would take to respond to his request. Ex. 175. The Executive's Office responded to Mr. Yousoufian's letter with information related to a portion of the request dealing with a study on the sales tax increase for fast food. Ex. 178. The Executive's Office told Mr. Yousoufian it would be in contact with him the following week regarding other documents responsive to the portion of his request dealing with the "economic impact of sports stadiums". Ex. 178.

Meanwhile, the Executive's Office contacted the King County Department of Stadium Administration (hereinafter "Stadium Administration") and asked that department to search for documents responsive to Mr. Yousoufian's request. CP 1248. Susan Clawson,

Finance and Administration Manager for Stadium Administration, assigned Steve Woo, her administrative assistant, the responsibility of responding to Mr. Yousoufian's request on behalf of Stadium Administration. CP 1260, 1262.

After receiving the assignment of responding to Mr. Yousoufian's request, Mr. Woo spoke with Mr. Yousoufian on multiple occasions regarding the request. CP 1263-1264; Ex. 181. On July 15, 1997, Mr. Woo spoke with Mr. Yousoufian by telephone, trying to narrow down and clarify what Mr. Yousoufian wanted to see. CP 1263; Ex. 181. Mr. Woo followed the conversation with a letter, telling Mr. Yousoufian that it was his understanding that Mr. Yousoufian's "request to view the 'Conway' study and 'all addenda, attachments, updates, etc' was taken care of in a subsequent visit to the Executive's office." CP 1263; Ex. 179, 181. With his letter, Mr. Woo enclosed a copy of the Seahawks Economic Impact and provided Mr. Yousoufian with information related to the who, why and how much, for both the Conway study and the Seahawks Economic Impact. CP 1263; Ex. 179, 181. In closing in his letter, Mr. Woo stated:

I hope this answers the remaining questions you had related to the Stadium's involvement with the above studies. If [you] need additional information, please feel free to call me at 296-3132.

Ex. 179.

Approximately one month later, Mr. Woo received a telephone call from Mr. Yousoufian. CP 1263; Ex. 181. Mr. Yousoufian asked more questions about the studies and requested a copy of the HOK study done for the Kingdome. CP 1263; Ex. 181. The HOK study Mr. Yousoufian requested was a large five-volume study, so Mr. Woo asked Mr. Yousoufian to view the study at the department and then request copies of any or all portions of the study. CP 1263-1264; Ex. 181. Mr. Yousoufian agreed to do so and came to the Stadium Administration offices on August 21, 2001. Mr. Woo made the following studies available to Mr.

Yousoufian:

- LMN (architects) Kingdome Master Plan
- King County Executive's Task Force on Stadium Alternatives (January 1995) dealing with Major League Baseball
- Kingdome Business Development and Capital Improvements Study (March 1996) by HOK on Kingdome capital improvements
- Seahawks/Kingdome Renovation Task Force Report (January 1997) which eventually recommended a new football stadium

CP 1264; Ex. 181. Mr. Yousoufian reviewed the studies and received copies of requested portions of the Business Development and Capital Improvements study. CP 1264; Ex. 181.

On August 22, 1997, the Executive's Office received a letter from Mr. Yousoufian complaining about the Executive's Office's response to his public disclosure request. Ex. 180. Mr. Yousoufian complained that his May 30, 1997 request was meant to include not only the Conway study

related to baseball, but also the Conway study related to football (which, by this time, Mr. Woo had already provided to Mr. Yousoufian). CP 1263; Ex. 179,180. The Executive's Office responded on August 27, 1997. Ex. 182.

Your letter of May 30, 1997 specifically mentions "financing of the new baseball stadium." For this reason, we interpreted your request as one for information related to baseball. We then released to you all of the information we had in the Executive Office pertaining to your request—specifically, the Conway Study referencing baseball. I apologize for any misunderstanding we have had. It is our intention to be cooperative and helpful.

Ex. 182. The Executive's Office also informed Mr. Yousoufian that its archival search for additional documents responsive to his request was not yet complete. Ex. 182. The Executive's Office told Mr. Yousoufian he would be contacted once the search was complete. Ex. 182.

On October 1, 1997, the Executive's Office sent Mr. Yousoufian a letter informing him all documents retrieved from archives that were responsive to his request would be ready for his review on October 14.

Ex. 184. Later that month, Mr. Yousoufian visited the Executive's Office and reviewed two large boxes of documents. CP 1247. As he requested, Mr. Yousoufian received copies of 132 pages of the documents and in a follow-up letter to Linda Meachum of the Executive's Office, Mr.

Yousoufian stated:

I will also take this opportunity to thank you for your highly cooperative attitude and pleasant and professional demeanor during my three hours inspecting, at long last, the documents I had originally requested in my May 30, 1997, Public Disclosure Request.

Emphasis added. CP 1247; Ex. 192. County employees believed Mr. Yousoufian's request had been answered and that he had access to the documents he sought. CP 1265-1266.

Approximately two months later, the Executive's Office received a letter from Mr. Yousoufian's attorney, Paul Fenton. Ex. 193. In the letter, Mr. Fenton complained of the delay in providing the above documents to his client and in one portion of his letter, states:

After four and one-half months, the county permitted Mr. Yousoufian to examine the contents of two large boxes, which contained several hundred documents relevant to his request.

Emphasis added. Ex. 193. Mr. Fenton also stated his belief that the County had not yet provided all documents his client requested. Ex. 193. The Executive's Office responded to Mr. Fenton's letter indicating that it believed all documents responsive to Mr. Yousoufian's request were provided to him. Ex. 197. The letter listed eight studies related to stadiums that the Executive's Office had provided to Mr. Yousoufian. Ex. 197.

Correspondence between Mr. Fenton and the County continued, with Mr. Fenton threatening litigation and alleging some type of cover up

by King County that Mr. Fenton compared to Watergate. Ex. 198. The County continued to respond by outlining the steps it took to respond to Mr. Yousoufian's request and the County re-iterated its belief that Mr. Yousoufian's request had been properly answered. Ex. 199, 201.

Meanwhile, the King County Department of Finance received a June 8, 1998, public disclosure request from Mr. Yousoufian. Ex. 285. Mr. Yousoufian's requested:

each and every document relating to all economic studies involving the Kingdome, the proposed baseball stadium for the Mariners, the proposed football stadium for the Seahawks and any other sports stadium.

Ex. 285. The request referenced an earlier letter that Mr. Yousoufian's attorney indicated he sent to the Department of Finance, but the department had no record of receiving the earlier letter. Ex. 205, 285.

The Department of Finance responded to Mr. Yousoufian's June 8, 1998, public disclosure request by indicating it had no documents responsive to his request. Ex. 205.

Two years later, on March 30, 2000, King County was served with Mr. Yousoufian's Complaint for alleged violations of the Public Disclosure Act. CP 1-7. In responding to Mr. Yousoufian's discovery requests, the King County Prosecutor's Office conferred with its clients and on February 8, 2001, spoke for the first time since this lawsuit had

been filed to Steve Woo, who no longer worked for King County. CP 1262, 1265. During the course of that conversation, King County learned that contrary to what it had asserted in 1997, it appeared that Mr. Yousoufian had not received all documents responsive to his May 30, 1997, request. CP 1265-1266. King County immediately informed Mr. Yousoufian's attorney of this information by a letter that was faxed to him the next day, February 9, 2001. CP 1169; Ex. 286.

Thereafter, Pat Steel, Chief of Staff for the King County Executive, was assigned to coordinate the effort of locating all records responsive to Mr. Yousoufian's May 30, 1997, and June 8, 1998, public disclosure requests. CP 1268. On February 22, 2001, at Ms. Steel's direction, Pam Cole, from the Executive's Office reviewed numerous boxes of archived documents that Ms. Steel had identified as possibly containing documents responsive to Mr. Yousoufian's public disclosure requests. CP 1248, 1268. Each file identified by Ms. Cole as possibly containing documents responsive to Mr. Yousoufian's requests was pulled. CP 1189, 1249. Copies were made of all documents in the files and the copies were delivered to the Mr. Yousoufian's attorney on March 7, 2001. CP 1189; Ex. 288.

In addition to searching Stadium Administration archived records, Ms. Cole worked with the Department of Finance to find any records that

department had that might be responsive to Mr. Yousoufian's May 30, 1997, and June 8, 1998, requests. CP 1249, 1268-1269. Due to the fact that documents in the Department of Finance are stored by contract number, when the Department of Finance was asked to produce all documents related to stadium finance studies, no documents appeared to be responsive. CP 1249. Consequently, Ms. Cole gathered the contract numbers from the documents she had retrieved from King County Archives and she was then able to retrieve financing documents related to each of the contracts. CP 1249. These documents were copied and delivered to Mr. Yousoufian's attorney. CP 1189, 1249.

On April 19, 2001, Janine Joly, Deputy Prosecuting Attorney, received a telephone message from Michael Brannan, attorney for Mr. Yousoufian. CP 1189. The message indicated that Mr. Brannan and his client wished to review the two boxes of documents that Mr. Yousoufian had already been given access to on October 28, 1997, and the studies that Mr. Yousoufian had seen in 1997. CP 1189, 1247. A conference room was reserved and the next day, Mr. Yousoufian and his attorney came to the Prosecutor's Office and reviewed the documents. CP 1189. Mr. Yousoufian tabbed pages and asked King County to make copies for him. CP 1189. The copies, which amounted to hundreds of pages, were

delivered to Mr. Yousoufian's attorney's office on May 2, 1997. CP 1189; Ex. 293.

Over the next three months, each time Mr. Yousoufian requested additional documents, King County located any responsive documents it had and provided them to Mr. Yousoufian's attorneys. CP 1190-1191. This was done despite that fact that Mr. Yousoufian's additional requests were outside the scope of his May 30, 1997, and June 8, 1998, public disclosure requests, including hundreds of pages of documents related to unsuccessful bid proposals. CP 1191.

A trial by affidavit was held on August 15, 2001, and Judge Learned issued a detailed, thirty one-page decision on September 21, 2001. CP 1009-1039. Judge Learned found King County had violated the Public Disclosure Act and assessed penalties, attorney fees and costs against the County. CP 1009-1038.

Penalties were assessed in the amount of \$25,440. CP 1038. In determining this amount, Judge Learned "looked at the reasons for King County's failure to timely respond to Mr. Yousoufian's request" and "whether the amount would encourage King County to respond in a diligent manner to future PDA requests." CP 1035. Judge Learned's decision states:

A rate of \$5 a day is selected because the Court finds that the combined total of penalty and attorney fees is sufficient to deter future similar inappropriate conduct. The penalties are not assessed on a per document basis, as requested by plaintiff, as this results in a penalty totally out of proportion to the County's negligence, the harm done, and any amount needed for deterrence.

CP 1035. Judge Learned set out a table outlining in detail how she arrived at the total penalty amount. CP 1038. As the table demonstrates, the penalties were based on an assessment of five dollars for each day the documents were late. CP 1035-1038.

In her decision, Judge Learned also detailed the reasons for her assessment of \$82,196.16 in attorney fees and \$6780.10 in costs. CP 1027-1034. In addition to making specific deductions in the amounts Mr. Yousoufian's attorneys requested for fees, Judge Learned took an overall deduction from the total amount and stated:

... it does appear significant time and effort was spent searching for the elusive 'smoking gun' long after it should have been apparent that lack of diligence, not evil intent, was the cause of the problems.

...

The total award of attorney fees, even after specific itemized deductions, impresses the court as excessive in relation to the complexity of the issues and presentation. . . . For example, Brannan's 15.6 hour day on June 7th, 2001 (including Internet research) and 12 hours on June 8th, 2001, appear excessive. Certain claims were clearly unfounded, such as the ludicrous request for fines in the range of \$1.5 million to \$3.6 million.

...

The majority of the attorney's fees were generated after March 2001, the date on which the County produced most of the documents that it had not produced in 1997. . . . The amount of attorney time expended is out of proportion to what additional success was achieved on the merits. By this time, the County had become aware of its error and was doing its best to produce the requested documents.

CP 1033-1034.

A judgment in the total amount of \$114,416.26 was entered on November 27, 2001, and was paid by King County that same day. CP 1068-1070, 1272-1273. This appeal followed.

C. ARGUMENT

1. STANDARD OF REVIEW

At page 12 of his brief, Mr. Yousoufian argues this Court should review the trial court's ruling on penalties, fees and the absence of bad faith, de novo. Though the standard of review in determining whether the Act was violated is de novo, the fact that the County violated the Act is not disputed and not presented to this Court for review. The issues presented for review are the trial court's determination that King County did not act in bad faith, the amount of penalties and fees, and whether the County's response to the request is complete. Yousoufian's Brief, p. 1. Whether or not the County's response to the request is complete may be reviewed de novo, but the issues of bad faith, penalties and fees should be reviewed for abuse of discretion. RCW 42.17.340(3); RCW 42.17.340(4).

RCW 42.17.340(4) states, in part:

. . . it shall be within the discretion of the trial court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day he was denied the right to inspect or copy said public record.

Emphasis added. In Lindberg v. County of Kitsap, the Washington Supreme Court reviewed the trial court's award of costs, attorney fees and the statutory penalty under the abuse of discretion standard, stating, "[t]he Public Records Act gives the trial court discretion to award costs, attorney fees and a statutory penalty . . ." Lindberg v. County of Kitsap, 133 Wn.2d 729, 746, 948 P.2d 805 (1997). In Lindberg, the Supreme Court reversed the Court of Appeals' ruling that remanded the case to the trial court for a recalculation of statutory penalties. The Court said the trial court properly exercised its discretion "in awarding a judgment for \$507.70 and costs of \$602.30" even though the order did not otherwise specify the basis for the award.¹ The Supreme Court found the award reasonable and not an abuse of discretion. Similarly, in ACLU v. Blaine School District, this Division of the Court of Appeals used the abuse of discretion standard to review the trial court's award of statutory penalties

¹ The Court did remand the case for a recalculation of attorney fees and costs, but the recalculation was for the purpose of including attorney fees and costs on appeal. Lindberg v. Kitsap County, 82 Wn. App. 566, 575, 919 P.2d 89 (1996) *reversed in part, affirmed in part*, 133 Wn.2d 729, 948 P.2d 805 (1997).

and attorney fees under the Public Disclosure Act. ACLU v. Blaine School District, 95 Wn. App. 106, 118, 975 P.2d 536 (1999).

Thus, Mr. Yousoufian is incorrect in asserting that all issues before this Court should be reviewed de novo. The trial court's ruling on penalties and attorney fees should only be overturned if the trial judge is found to have abused her discretion. An abuse of discretion exists where "no reasonable person would take the position adopted by the trial court." Columbian Publishing Company v. City of Vancouver, 36 Wn. App. 25, 33, 671 P.2d 280 (1983), *citing* Griggs v. Averbek Realty, Inc., 92 Wn.2d 576, 599 P.2d 1289 (1979).

This Court should also review the trial court's finding that King County did not act in bad faith under an abuse of discretion standard. As stated above, it is clear that penalties under the Act are reviewed for abuse of discretion. RCW 42.17.340(4). Since trial courts look to the good or bad faith of an agency solely for the purpose of determining the amount of the penalty, the trial court's finding of good or bad faith is directly tied to that determination and should also be reviewed for an abuse of discretion.

In Lindberg, the Washington State Supreme Court declined to overturn the trial court's order on penalties. The Court denied the Lindbergs' request for the maximum penalties under the Act, based in

part, on the trial court's finding that Kitsap County did not act in bad faith.

The Court stated:

The claim of [the Lindbergs] that they are entitled to statutory penalties for 219 days at \$100.00 per day for a total of \$21,900.00 is negated by the finding of the trial court that Kitsap County did not act in bad faith in denying [the Lindbergs] copies of, or permission to copy, documents which the County, relying upon advice of its legal counsel, reasonably believed were restricted by the federal Copyright Act. The discretionary award by the trial court of \$1,100.00, which including 'award of some penalties,' was reasonable under the circumstances.

Emphasis added. Lindberg, 133 Wn.2d at 747. The Court's language indicating this was a discretionary award and reasonable because the trial court did not find bad faith, shows the Supreme Court allowed the trial court discretion to set the penalty and in doing so, determine whether or not bad faith existed.

In another Public Disclosure Act case, the Washington Supreme Court recognized the principal factor in determining the amount of an award under the Act, is the existence or absence of bad faith by the agency. Limstrom v. Ladenburg, 136 Wn.2d 595, 617, 963 P.2d 869 (1998). Rather than determining either the amount of penalties or whether there was bad faith, the Court stated, "Because that determination necessitates a fact finding, we remand to the trial court to make any such award." Limstrom at 617.

The amount of penalties awarded under the Public Disclosure Act, is a matter solely within the trial court's discretion. Because the existence of absence or bad faith depends on factual findings and is the primary consideration for the trial court in assessing penalties, the issue of bad faith should also be reviewed under an abuse of discretion standard. Unless this Court finds the trial court's rulings regarding bad faith, penalties and fees, are positions that no reasonable person could take, the trial court's rulings on these issues should be affirmed.

2. THE TRIAL COURT'S RULING THAT KING COUNTY DID NOT ACT IN BAD FAITH SHOULD BE AFFIRMED WHERE THERE IS NO FACTUAL EVIDENCE OF BAD FAITH IN THE RECORD.

As argued above, this Court should review the trial court's finding that there was no bad faith by the County, for an abuse of discretion. Here, there was no abuse of the trial court's discretion and even if review was de novo, there is no factual evidence in the record to support a finding by this Court that the County acted in bad faith.

a. Case Law Interpreting the Public Disclosure Act Sets the Standard for Determining Whether or Not Bad Faith Exists.

The Washington State Supreme Court and this Division of the Court of Appeals, have set the standard for determining whether or not bad faith exists in Public Disclosure Act cases. There is no need to look to

other areas of the law, such as insurance law, as the standards for bad faith under the Public Disclosure are well established.

In ACLU v. Blaine School District, this Division of the Court of Appeals found improper motives and instances of misconduct on the part of an agency under the Public Disclosure Act and reversed the trial court's assessment of minimum penalties that was based on the trial court's finding that the agency acted in good faith. ACLU v. Blaine School District, 95 Wn. App. 106, 114, 975 P.2d 536 (1999). This Court overturned the trial court's ruling regarding good faith, based in part, on this Court's prior review of the case in which it found the agency's refusal to mail requested records, unreasonable. When reviewing the trial court's order on penalties, this Court cited to its earlier decision and specific facts in the record that provided a basis to overturn the trial court's ruling of good faith. In ACLU, the District refused to mail requested records to the ACLU despite the ACLU's offer to pay for copies and mailing costs. On remand, the trial court was presented with a letter the District Superintendent wrote to a parent discussing the denial. ACLU at 112-113. The Superintendent's letter said the request did not consist of a "few pages, but thousands of them," and that significant employee time was spent collecting the records and he was reluctant to have school employees copy the records at taxpayer expense. ACLU at 112-113. This Court

found these specific facts to be the basis of the District's improper motives in refusing to mail the records.

The Superintendent's letter is startling evidence of the District's improper motives for refusing to copy and mail the requested documents to the ACLU. First, the Superintendent's letter was sent after the documents were mailed to the ACLU. Thus, the Superintendent clearly should have known that the ACLU's request asked the District for only 13 pages, not 'thousands of pages.' Second, not wanting to expend employee time copying the records is not a valid reason for denying the ACLU's request because the act requires states agencies to make the documents available and prohibits them from charging for locating public documents and making them available for copying . . . Third, the Superintendent also stated that the District was reluctant to spend taxpayer money to assist the ACLU in preparing their case against the District. This is clearly contrary to the act's policy 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.

ACLU at 112-114. As the trial court correctly found in the present case, no such improper motives exist. Though the trial court found the County did not display a "good faith effort" in responding to the request, the trial court did not find that there was "'bad faith' in the sense of intentional nondisclosure." CP 1025-1026. The trial court stated:

Although there was [a] clear mishandling of Mr. Yousoufian's request, the Court finds no intentional nondisclosure or intent to conceal. Although not effective, it appears that the county's intent was to be responsive to Mr. Yousoufian's request.

CP 1027.

In its pleadings, the County admitted that it mishandled Mr. Yousoufian's request. CP 700. In early 2001, the County realized it had not responded to Mr. Yousoufian's request with the thoroughness required under the Public Disclosure Act and quickly admitted its error and took immediate steps to collect, copy, and deliver, not only the documents responsive to Mr. Yousoufian's original request, but additional documents that in 2001 he stated he wanted to see. CP 1190-1191, 1265-1266; Ex. 286. The trial judge found that the County's actions in 2001 to respond to the request were appropriate and complete. CP 1020-1021. In part, the trial judge based her finding of an absence of bad faith on the County's action in 2001 to remedy its mistakes. The trial judge also found no factual evidence of improper motives by King County that would lead to a finding of bad faith.

Though Mr. Yousoufian devotes several pages of his brief to arguing the trial court's finding of no bad faith should be overturned, he fails to cite to any specific facts in the record that evidence improper motives by the County. In fact, as the trial court found, the record contains significant evidence that while the County did not properly handle the request, its intent was to be responsive. CP 1027. The trial court stated that King County "tried to act in good faith, had good intentions, and "believed it was responding appropriately". CP 1035.

No where in the record is there any evidence of an attempt to hide or otherwise intentionally withhold documents from Mr. Yousoufian. Many times over in his brief, Mr. Yousoufian makes unsupported insinuations and accusations that there was some sinister motive in King County's failure to provide documents—some illegal or embarrassing situation the County sought to conceal. Yousoufian's Brief, p. 24, 30, 32-35. But his accusations do not support his arguments for a finding of bad faith, as they are not based on the factual record. In fact, when King County did produce all the records in 2001, it withheld none, copying and delivering them all to Mr. Yousoufian. Moreover, no where in his brief does Mr. Yousoufian point out what are the embarrassing documents or information he alleges the County sought to conceal. Nor does he provide any evidence that there is information within the documents produced that would have, as he alleges,

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) or void any contract under RCW 42.30.060(1).

Yousoufian's Brief, p. 34. In fact, the trial court specifically found no showing that proper disclosure in 1997 "would have had any material impact on issues of public concern." CP 1035.

The embarrassment in this case is that the County failed to fulfill its duties under the Public Disclosure Act, by not providing Mr. Yousoufian with the requested documents in a timely manner. Mr. Yousoufian's unsupported accusations that something far more sinister is going on, are without merit and should be rejected. There is no evidence to support his allegations and the standard for a finding of bad faith as established in ACLU v. Blaine School District, is not met in the present case.

Other Public Disclosure Act cases also support the trial court's finding that the County did not act in bad faith. In Lindberg v. County of Kitsap, the county relied on the advice of legal counsel to withhold records based on the Federal Copyright Act. Lindberg v. County of Kitsap, 133 Wn.2d 729, 747, 948 P.2d 805 (1997). Though the court found the withholding improper, it affirmed the Court of Appeals' ruling that the agency did not act in bad faith. The Court of Appeals found reliance on legal advice was reasonable and provided no evidence of bad faith. Lindberg at 747. The same type of reasonable reliance exists in the present case. Though it was incorrect, in 1997, the County reasonably relied on Mr. Yousoufian's statements that he had received what he wanted from Stadium Administration and the Executive's Office. Ex.

192. County employees believed they had provided Mr. Yousoufian with the documents and information he sought. CP 1265-1266.

Federal court rulings regarding bad faith under the Freedom of Information Act (“FOIA”) are also helpful in interpreting our state act.² In Ellis v. U.S., the plaintiff alleged FOIA violations related to her request for documents arising out of an incident in a national park where two hikers drowned. Ellis v. U.S., 941 F.Supp. 1068 (D. Utah 1996). The court found the plaintiff to be the prevailing party and in assessing fees, addressed the issue of bad faith. The court ruled that although the National Park Service was slow in producing documents, the facts did not indicate that the agency purposely delayed its FOIA response to prevent embarrassment or to thwart the requester. Ellis at 1080. The Ellis court cited to numerous other FOIA cases where federal courts found the statute had been violated, but the facts were insufficient to justify a finding of bad faith. See Frydman v. Department of Justice, 852 F.Supp. 1497, 1508 (D. Kan. 1994), *aff’d* 57 F.3d 1080 (10th Cir. 1995) (finding that although eight-month delay in disclosing document after it was discovered was sluggish, it did not show bad faith); Republic of New Afrika v. FBI, 645 F.Supp. 117, 122 (D.C.C. 1986) (stating that plaintiff must show

² In interpreting the Public Disclosure Act, our state courts look to the federal courts and their interpretation of FOIA. Bonamy v. City of Seattle, 92 Wn. App. 403, 960 P.2d 447 (1998), *review denied* 137 Wn.2d 1012, 978 P.2d 1099 (1999).

government purposely withheld documents, not that it merely delayed in producing them); Guam Contractors Ass'n v. United States Dep't of Labor, 570 F.Supp. 163, 170 (N.D. Cal. 1983) (declining to award fees where plaintiff's requests were met with some "foot-dragging" and lack of cooperation by the government, but where there was no actual basis to justify a finding of bad faith).

Rather than relying on standards of bad faith from Public Disclosure Act and FOIA cases, Mr. Yousoufian relies on bad faith standards set forth in insurance law.³ The present case is not an insurance case and the bad faith standards in that area of the law are not applicable.

An insurer's duty to act in good faith is statutory and based on a fiduciary relationship which involves more than just the usual "honesty and lawfulness of purpose" which constitutes the standard definition of good faith. RCW 48.01.030; Tank v. State Farm & Cas. Co., 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986). The Washington Supreme Court has held this fiduciary relationship implies broader obligations of fair dealing and a responsibility to give equal consideration to the insured's interests. Tank at 385-86. The fiduciary relationship between the parties is the source of the statutory duty of good faith in the insurance industry and the

³ In his arguments before the trial court, Mr. Yousoufian relied standards of bad faith under contract law. CP 656-661. He has apparently abandoned that argument and replaced it with an insurance analogy for purposes of this appeal.

statute and rules are the basis for findings of good and bad faith in insurance cases. American Manufacturers Mutual Insurance Company v. Osborn, 104 Wn. App. 686, 17 P.3d 1229, *review denied* 144 Wn.2d 1005, 29 P.3d 717 (2001). As between a government agency and an individual requesting documents under the Public Disclosure Act, there is no such fiduciary relationship.

Moreover, for Public Disclosure Act cases, the standards for conduct that if violated, will lead to a finding of bad faith, are not set in statute or administrative rule. The specific situations that rise to the level of bad faith in insurance cases are set out in RCW 48.01.030; WAC 284-30-330. Refusal to negotiate with an insured, failure to properly investigate a claim, taking action that was more actuated by self-interest than concern for its insured—these are all violations of statutes and administrative rules promulgated specifically for the insurance industry based on the special fiduciary relationship between the parties. RCW 48.01.030; WAC 284-30-330.

Additionally, Mr. Yousoufian's argument that bad faith standards in insurance cases should apply to Public Disclosure Act cases, would require overturning much of the existing case law interpreting the Public Disclosure Act, including many Washington State Supreme Court cases. As he states in his brief, Mr. Yousoufian asks this Court to adopt the

standard set forth in insurance cases where the mere violation of a duty constitutes bad faith, regardless of motive or intent. Yousoufian's Brief, p. 28. Thus, as Mr. Yousoufian argues it, any violation of the Public Disclosure Act should also constitute bad faith without regard for intent or motive. This is contrary to our state courts' interpretations of the Act. The Act gives a trial court discretion to determine penalties in an amount between \$5 and \$100 for each day the record was improperly withheld. RCW 42.17.340(4); Amren v. City of Kalama, 131 Wn.2d 25, 37, 929 P.2d 389 (1997). The ability to choose an amount within the statutory range is within the sound discretion of the trial court and our state courts have consistently held that the primary factor in the trial court's determination is the existence or absence of bad faith. Concerned Ratepayers v. Clark County, 138 Wn.2d 950, 963, 983 P.3d 635 (1999); Limstrom v. Ladenburg, 136 Wn.2d 595, 617, 963 P.2d 869 (1998). If Mr. Yousoufian's standard of bad faith were accepted, every violation of the Act would be bad faith and the trial courts' ability to exercise the discretion granted them by statute, would be severely diminished. Moreover, the range of penalties set forth in the Act would be meaningless since all violations would constitute bad faith, favoring a penalty more than the minimum. The fact that a minimum penalty is authorized by RCW 42.17.340(4) would be meaningless.

Furthermore, the fact that there are reported Public Disclosure Act cases where government agencies have been found to have violated the Act, but have not been found to have acted in bad faith, also demonstrates that Mr. Yousoufian's theory based on insurance law standards must fail. Lindberg v. County of Kitsap, 133 Wn.2d 729, 747, 948 P.2d 805 (1997) . If, as Mr. Yousoufian argues, in every case where a duty under the Act is breached, bad faith exists, the Washington State Supreme Court must have decided Lindberg v. County of Kitsap incorrectly. In Lindberg, though the Court found the county violated the Act, it found no bad faith. Lindberg at 47.

Related to his insurance law analogy, Mr. Yousoufian cites to the Consumer Protection Act and argues interpretations of it, should apply to the present case. Yousoufian's Brief, p. 29. As he states in his brief, the Consumer Protection Act states, in part:

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

RCW 19.86.020; Yousoufian's Brief, p. 29. The Consumer Protection Act specifically applies to trade and commerce, obviously not at issue in the present case as King County's actions and duties under the Public Disclosure Act are not part of either a commercial or an entrepreneurial endeavor. Demopolis v. Peoples National Bank, 59 Wn. App. 105, 796

p.2d 426 (1990). Moreover, there has been no showing in the present case that any actions by County employees were “deceptive”. Deception refers to actions that are intentional and willful. Black’s Law Dictionary, Sixth Edition, p. 406. Based on the evidence presented, the trial court specifically found that King County did not intentionally conceal documents from Mr. Yousoufian. CP 1027. Furthermore, the cases Mr. Yousoufian cites to in support of his Consumer Protection Act argument, are all insurance cases. Yousoufian’s Brief, p. 29-30. As discussed above, the bad faith at issue in insurance cases is based on the fiduciary relationship between the insurer and the insured, and the legislature has specifically set out rules which if violated, constitute bad faith. RCW 48.01.030; WAC 248-30-330. The same is not true for the Public Disclosure Act, and cases interpreting the insurance statute and the Consumer Protection Act are inapplicable to the present case.

The County is not now arguing, nor did it argue before the trial court, that the Public Disclosure Act was not violated. It was, and the County is liable for the mistakes it made. However, as the trial court specifically considered and decided, there was no intent to hide or withhold records and there is no evidence of bad faith. The trial court’s ruling that the County did not act in bad faith should be affirmed.

3. THE TRIAL COURT'S RULING ON PENALTIES SHOULD BE AFFIRMED AS THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION.

When an agency erroneously denies a public record and a party prevails against the agency in obtaining the record, an award under RCW 42.17.340(4) is warranted. Amren v. City of Kalama, 131 Wn.2d 25, 37, 929 P.2d 389 (1997). The County has not disputed that Mr. Yousoufian is entitled to a penalty. However, he is not entitled to the more than \$30 million he sought from the trial court. CP 689. The trial court properly exercised its discretion in awarding Mr. Yousoufian \$25,440 in penalties.

Although a showing of bad faith or economic loss is not required in the determination of whether an award for delay should be granted, they are factors for the trial court to consider in determining the amount of the award, with the existence or absence of an agency's bad faith being the principal factor the trial court must consider. Amren at 37-38, *citing* Yacobellis v. Bellingham, 64 Wn. App. 295, 303, 825 P.2d 324 (1992)(Trial court erred in its award determination because it did not consider evidence of the city's bad faith when determining the amount of the award). Here, Judge Learned based her award determination, in large part, on her finding that King County did not act in bad faith. The decision states:

. . . In determining whether to award a penalty in excess of the minimum, the court will take into account an amount necessary to effectuate the purpose behind the statute of encouraging broad disclosure. The court will look to the good faith efforts made by the agency in responding to the particular request. If there was little or no good faith effort to provide the fullest assistance possible, the court will set the penalty at an amount deemed necessary to deter future inappropriate conduct.

In deciding to whether to award penalties over the minimum allowable amount, the Court looked at the reasons for King County's failure to timely respond to Mr. Yousoufian's request. The Court also considered whether the amount would encourage King County to respond in a diligent manner to future PDA requests.

A rate of \$5 per day is selected because the Court finds that the combined total of penalty and attorney fees is sufficient to deter future similar inappropriate conduct. The penalties are not assessed on a per document basis, as requested by plaintiff, as this results in a penalty totally out of proportion to the County's negligence, the harm done thereby, and any amount needed for deterrence.

CP 1034-1035. The trial court found that King County employees tried to be cooperative with Mr. Yousoufian. CP 1015. The court also found that though the County mishandled Mr. Yousoufian's request, there was no intentional nondisclosure or intent to conceal by the County. CP 1027. And when the documents were produced in 2001, the court found they were appropriately retrieved and all responsive documents were provided to Mr. Yousoufian. CP 1020. These findings were the basis for the trial court's decision to assess penalties at the rate of \$5 per day. This decision was within the court's discretion and can only be reversed if "no

reasonable person would take the position adopted by the trial court.”

Columbian Publishing Company v. City of Vancouver, 36 Wn. App. 25, 33, 671 P.2d 280 (1983), *citing* Griggs v. Averback Realty, Inc., 92 Wn.2d 576, 599 P.2d 1289 (1979). Here, there was no abuse of discretion.

Though the trial court found a violation of the Act, it found no intentional nondisclosure of documents and found that even though it did not succeed, the County’s intent was to be responsive to Mr. Yousoufian’s request. CP 1027. This absence of bad faith is the primary factor in to be considered determining a penalty, and in the present case, a penalty of \$5 per day is appropriate.

Though Mr. Yousoufian claims it to be arbitrary, the trial court’s grouping of documents on which it based penalties was appropriate and well within the court’s discretion. Yousoufian’s Brief, p. 36. Rather than being arbitrary, the categories by which the trial court set penalties make perfect sense. They are in two categories—studies and the cost documentation supporting each study. CP 1038. These are the two types of documents Mr. Yousoufian requested and the grouping is the basis of a reasonable method by which to calculate penalties.

As the trial court found, Mr. Yousoufian’s request that penalties be based on each record requested, leads to absurd results and “a penalty totally out of proportion to the County’s negligence, the harm done

thereby, and any amount needed for deterrence.” CP 1035. Mr. Yousoufian claims that calculations of penalties should be based on each document, of which he argues there are 166. Yousoufian’s Brief, p. 10.⁴ In order to arrive at this large number, Mr. Yousoufian includes every possible document. For example, in row nine of his table, Mr. Yousoufian includes 72 pages of cost documentation for the “HOK #1” study. Yousoufian’s Brief, p. 10. Within this category, Mr. Yousoufian includes payment history reports. Ex. 24, 26, 30, 38, 46, 50, 59, 63, 66, 75. This report is updated each time a payment is made to a contractor and Mr. Yousoufian asserts he should get over \$58,900 for these ten pieces of paper (reproduced at Appendix A), despite the fact that the last page is a summary of the previous nine pages. And, the figure of \$58,900 is based on a \$5 per day penalty—Mr. Yousoufian is alleging he is entitled to much more. Also related to the “HOK #1” study, for each of ten payments, Mr. Yousoufian seeks penalties for “Progress Payment Warrant Requests”,

⁴ It appears to the County that by Mr. Yousoufian’s own data, his figure of 189,690 at page ten of his brief is overstated by more than 15,000. Mr. Yousoufian’s calculations for rows 2, 11, 12, 13, and 15 appear to be in error and in fact, the figure for total “Record Days (Actual)” exceeds the sum of the data in rows 11, 12, 13, and 15. Additionally, the second total in column five is not a correct total of Mr. Yousoufian’s own data under “Days Late (Actual)”.

Based on the arguments in this brief and these significant errors, Mr. Yousoufian’s table at page ten of his brief should be disregarded by this Court. What Mr. Yousoufian might characterize as minor mathematical errors would, under his theory, result in almost \$80,000 in penalties wrongly awarded. And, the \$80,000 figure is based only on a minimum penalty of \$5 per day.

“Progress Payment Summaries” and “Certificates of Payment”. Ex. 22, 23, 24. (Examples of the payment forms are found at Appendix B.) These three forms are generated for each payment made under the County contracts and Mr. Yousoufian submits versions of these three forms for almost every payment made to HOK (and payments made to different contractors for other studies). He then argues he should receive penalties for each page at over \$1178 each. (\$1178 is based on five dollars per day. Mr. Yousoufian is asking for much more.) For the “HOK #1” study alone, at a minimum, this would be over \$41,000.

The trial court properly rejected Mr. Yousoufian’s attempts to use an unintentional violation of the Public Disclosure Act to generate an award totally out of proportion to the harm suffered and the negligence committed.

Moreover, the case law does not support Mr. Yousoufian’s argument that the trial court’s refusal to assess penalties per document is unreasonable. Yousoufian’s Brief, p. 37. Contrary to Mr. Yousoufian’s assertions that the Washington State Supreme 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”, in Lindberg v. County of Kitsap, the Court specifically rejected the idea that a per day, per document penalty is required by the statute. Lindberg v.

Kitsap County, 82 Wn. App. 566, 575, 919 P.2d 89 (1996), *reversed in part, affirmed in part* 133 Wn.2d 729, 948 P.2d 805 (1987). On appeal, the Lindbergs argued they were entitled to per day, per document penalties. Lindberg, 82 Wn. App. at 575. Just as Mr. Yousoufian has, the Lindbergs argued per document penalties were required by the statute and that it was an abuse of the trial court's discretion to refuse to order them. The Court of Appeals agreed with the Lindbergs and remanded the case for the per day, per document calculation requested. Lindberg, 82 Wn. App. at 575. The state Supreme Court reversed, finding the trial court's calculation of penalties, which were not based on a per document calculation, to be within the trial court's discretion. The Supreme Court stated:

The Public Records Act gives the trial court discretion to award costs, attorney fees, and a statutory penalty of \$5.00 to \$100.00 for each day a requester is 'denied the right to inspect or copy [a] public record' to which the requester is entitled. . . . The trial court exercised its discretion in awarding a judgment for \$507.70 and costs of \$602.30. The order did not otherwise specify the basis for the award, although the court did indicate the award of \$1,100.00 was 'a combination of attorney fees and . . . award of some penalties. This was within the discretion of the trial court. There is no evidence of abuse of that discretion. The Court of Appeals was in error in remanding the case to the trial court for recalculation of statutory penalties . . .

Lindberg, 133 Wn.2d at 747.

Additionally, in ACLU v. Blaine, at issue were multiple records including a disciplinary policy and disciplinary notices for several students. ACLU v. Blaine, 95 Wn. App. 106, 109, 975 P.2d 536 (1999). Despite the fact that multiple records were improperly withheld, this Court assessed a penalty of \$10 per day, not per day and per document. ACLU at 115. Moreover, ACLU was a case where specific instances of misconduct and improper motives were found in the record. ACLU at 113-114.

The trial court's subtraction of 527 days from the calculation of penalties was also within the court's discretion. CP 1037. The court found that there were 647 days between the County's last letter to Mr. Yousoufian and the filing of the lawsuit. CP 1037. The trial court allowed 120 days as the time needed to find an attorney and removed the remaining 527 days from the penalty calculation. CP 1037. The trial court found inclusion of the 527 days in which Mr. Yousoufian waited to file his suit, would only encourage future plaintiffs to delay filing suit in order to incur additional penalties under the Act. CP 1037. It was not an abuse of discretion for the trial court to limit penalties in this way. See Doe I v. Washington State Patrol, 80 Wn. App. 296, 305, 908 P.2d 914 (1996)(Trial court did not abuse its discretion in denying penalties during the period when the action was pending).

4. THE TRIAL COURT’S RULING ON ATTORNEY FEES SHOULD BE AFFIRMED AS THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION.

The trial court’s ruling on attorney fees should be reviewed for abuse of discretion and reversed only if this Court finds “no reasonable person would take the position adopted by the trial court.” Columbian Publishing Company v. City of Vancouver, 36 Wn. App.25, 33, 671 P.2d 280 (1983), *citing* Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 599 P.2d 1289 (1979). The trial court properly exercised its discretion in this case, granting Mr. Yousoufian his reasonable attorney fees. RCW 42.17.340(4).

In Lindberg v. County of Kitsap, the Washington Supreme Court upheld the trial court’s judgment for “costs of \$602.30.” Lindberg at 743. Though the trial court did not otherwise specify the basis for its overall \$1,100.00 award, it said the award was “a combination of attorney fees and . . . award of some penalties.” Lindberg at 743-47. Even without setting the basis for its attorney fees and costs award, the trial court’s judgment was upheld because the Washington Supreme Court found it to be “within the discretion of the trial court.” Lindberg at 747.

Mr. Yousoufian argues this Court should overturn the attorney fee award in this matter “when the record fails to state a basis supporting the

award.” Yousoufian’s Brief, p. 43. In fact, the trial court provided a very detailed accounting of each deduction made in the total attorney fees requested by Mr. Yousoufian. CP 1027-1034. The basis supporting every aspect of the award is clearly set out in the trial court’s decision. CP 1027-1034.

Mr. Yousoufian’s only specific argument regarding attorney fees is his allegation that the trial court improperly reduced attorney fees based on the results of individual issues, such as motions in limine and declarations that were not admitted. Yousoufian’s Brief, p. 44. In fact, this is exactly what the Washington Supreme Court directs courts to do when awarding attorney fees.

The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort or otherwise unproductive time.

Bowers v. Transamerica Title Insurance Company, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). In this case, the trial court spelled out each deduction made for unsuccessful motions and declarations. CP 1027-1034. The court further detailed each deduction for duplicated efforts and otherwise unproductive time. CP 1027-1034. Each of these deductions was not only well within the trial court’s discretion, but required under the Supreme Court’s holding in Bowers.

Mr. Yousoufian spends pages of his brief arguing that he is the prevailing party in this case. Yousoufian's Brief, p. 44-46. There is no dispute he is the prevailing party in the overall lawsuit. King County admitted it violated the Act long before this case even went to trial. However, as the prevailing party, Mr. Yousoufian is still only entitled to his reasonable attorney fees. RCW 42.17.340(4). Mr. Yousoufian's arguments at page 45 of his brief that by not awarding him "his full allotment of attorney's fees" is a "contravention of the strict penalty provisions of the of the PDA" is without merit where the "penalty provisions" of the Act provide for exactly what he got—reasonable attorney fees. RCW 42.17.340(4).

Mr. Yousoufian also argues that the trial court's award of attorney fees is so minimal that it will be impossible for citizens to interest qualified attorneys in Public Disclosure Act cases. Yousoufian's Brief, p. 46. The attorney fees awarded by the trial court were not minimal and each deduction from the total amount requested was based on findings by the trial court those fees were not warranted. The trial court found a significant portion of the fees requested and work done by Mr. Yousoufian's attorneys in this case, was unreasonable (CP 1027), unproductive (CP 1027), not reasonably necessary to the litigation (CP 1028), excessive and not reasonably related to the success of the case (CP

(1028), duplicative and unnecessary (CP 1029), and excessive in relation to the complexity of issues and presentation (CP 1033). The court further found:

Certain claims were clearly unfounded, such as the ludicrous request for fines in the range of \$1.5 to \$3.6 million. Further, plaintiff's presentation of the case could have been clearer for the court. . . .

The majority of the attorney's fees were generated after March 2001, the date on which the County produced most of the documents that it had not produced in 1997. The County asserted, but could not prove, that it had produced the HOK2 study in 1997. Therefore, the Court deemed it produced in June of 2001. As such, it was the only document of substance not produced by March/April, 2001. The amount of attorney time expended is out of proportion to what additional success was achieved on the merits. By this time, the County had become aware of its error and was doing its best to produce the requested documents.

Emphasis added. CP 1034. The trial court did not award Mr. Yousoufian "minimal" attorney fees. It awarded him reasonable attorney fees. Instead of arguing why the trial court's deductions were an abuse of discretion, Mr. Yousoufian simply argues that he should get all his attorney fees. His argument fails because there was no abuse of discretion. The trial court's award of attorney fees should be affirmed.

5. THE TRIAL COURT’S RULING THAT ALL DOCUMENTS RESPONSIVE TO MR. YOUSOUFIAN’S REQUEST HAVE BEEN PROVIDED TO HIM, SHOULD BE AFFIRMED.

At pages 46-47, Mr. Yousoufian devotes one paragraph of his brief to the argument that records he requested still have not been produced by the County. Besides general, unsupported statements that he thinks more documents must exist, Mr. Yousoufian provides no evidence to support his allegations that the County is withholding any documents from him. Moreover, Mr. Yousoufian’s unsupported allegations that he has conducted “post-trial investigations” and found more documents to add to his “list”, should be rejected as unsupported and outside the scope of this Court’s review. Yousoufian’s Brief, p. 24, 47.

At CP 851-1005, Mr. Yousoufian made a post-hearing motion asking the trial court to award increased penalties based on additional studies Mr. Yousoufian argued were responsive to his request. As the trial court correctly found, these documents were not responsive to the request. The studies were a proposed financing plan for the Public Facilities District, an analysis of lease negotiations between the Public Facilities District and the Mariners, a report regarding subsidies to the Mariners from the new stadium, and the report of the Independent Financial Review Committee relating to the financing plan for the new stadium. CP 851-

1005. The trial court properly found these documents and many others presented by Mr. Yousoufian, nonresponsive to his public disclosure request as they did not concern the “economic impacts of sports stadiums”. CP 1037.

Mr. Yousoufian also submitted a list to the trial court of all the documents he claimed were responsive to his request, but had not yet been produced. However, even before he submitted his list, virtually every document on it had already been provided to Mr. Yousoufian. In fact, at the same time he was claiming there were particular documents he had not yet seen, Mr. Yousoufian was submitting those same documents as exhibits for trial. Two examples are the \$18,000 invoice from KPMG Peat Marwick and the corresponding “Payment Voucher Form”. CP 543-544, Ex. 98, 99. (Appendix C.) Though most documents on the list had already been provided, the County searched for all other documents and if located, they were provided to Mr. Yousoufian before trial. CP 1189-1245. As the trial court properly found, Mr. Yousoufian’s request has been fully answered by the County. CP 1021.

6. MR. YOUSOUFIAN’S UNSUPPORTED AND IRRELEVANT ARGUMENTS SHOULD BE REJECTED BY THIS COURT.

In his brief, Mr. Yousoufian asks this Court to remand the case to the trial court for “purposes of ascertaining whether King County has changed its handling of PDA requests.” Yousoufian’s Brief, p. 47. In another section of his brief, Mr. Yousoufian, without any supporting reference to the record, states that his “post-trial investigations have uncovered evidence that the County has not taken seriously its promise to the Court to remedy its defective delivery systems.” Yousoufian’s Brief, p. 24. The County’s practices after the conclusion of the case were not at issue before the Superior Court and they are not at issue in this appeal. This Court should reject Mr. Yousoufian’s arguments related to his “post-trial investigations” and should deny him the related relief he requests.

D. CONCLUSION

This is a case of an unintentional violation of the Public Disclosure Act. As the trial court found, King County had good intentions, tried to act in good faith and believed it was responding appropriately. CP 1035. The trial court was correct in refusing to award the penalties and fees requested by Mr. Yousoufian, where those amounts are totally out of proportion to the errors made by the County, the harm done, and the

amount needed for deterrence. The trial court's rulings are well supported in the record and should be affirmed.

DATED this _____ day of July, 2002.

RESPECTFULLY submitted,

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