

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

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellant Armen Yousoufian, plaintiff below, submits this reply brief in support of his appeal of the trial court's judgment.

II. REPLY TO COUNTERSTATEMENT OF FACTS

Respondents failed to address several key issues Mr. Yousoufian raises in his opening brief, and selectively stated, and effectively misstated, the law and the facts of this case. On page 2 of its brief, for example, the County states it "informed Mr. Yousoufian that its archival search for additional documents responsive to his request was not yet complete," and later, "all documents retrieved from archives . . . would be ready for his review on October 14." But the Trial Court found that "[t]here is no evidence whether such an archival search ever occurred, what was found if anything, or why it took so long to conduct it." CP 1016, lines 18-20; CP 1024, line 22.

On page 11 of its brief, the County asserts that stored documents in the Department of Finance can only be located by contract number, and that, as a result, when the Department of Finance was asked to produce all documents related to stadium finance studies, no documents appeared to be responsive. However, the Trial Court found that the Department of Finance was able to retrieve records by contractor names as well as contract numbers and that there was no evidence this could not have been discovered in 1997 or 1998 with appropriate and diligent inquiry. Learned, 13/2. Judge Learned rightfully rejected the County's excuse, finding that "[w]ith proper diligence, all of the material untimely provided could and should have been provided in June or

December of 1997.” *Id.*, 13/22.

The County repeatedly refers to a “June 8, 1998, public disclosure request.” (*See Brf. of Resp.*, at pages 9, 10, 11, 12). But a “third” PDA request is fiction. The trial court found Mr. Yousoufian made two requests, on May 30, 1997, and December 8, 1997. (CP 1092, et seq.; Ex. 183) In point of fact, the “second request” was so detailed and specific that no third request was necessary. (See Ex. 193, attached as Appendix 1).

A greater concern is Respondents’ failure to address misrepresentations the County made to Mr. Yousoufian over four years, not least of which was the Prosecuting Attorney’s January 14, 1998 letter. (Ex. 199; Respondents’ Reply at 9) A review of the circumstances surrounding this letter is instructive.

Mr. Yousoufian’s May 30, 1997 PDA request asked for all stadium studies (plural) and “all related records including (but not limited to) how and why and by whom ... [each] study was ordered, its cost, and any previous or subsequent studies on sports stadiums.” (Ex. 171, 172, 173) The County produced nothing. After months of nearly fruitless pursuit, due to the County’s stonewalling, Mr. Yousoufian’s attorney, Paul Fenton, wrote the County, and detailed the records which necessarily existed. (Ex. 193) On January 14, 1998, the Prosecuting Attorney, Oma LaMothe, replied, misstated the law, falsely claimed all records had been produced, and falsely claimed the County 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 . . . 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 they do not have.

Id. But the trial court found Ms. LaMothe’s statements were “factually and legally incorrect” (Learned, 11/8), and that “[n]o effort was made to verify the accuracy of those statements.” *Id.*, at 18/11. Indeed, the County produced no evidence that its efforts were “prompt” or “substantial,” or that a “generous effort” costing “hundreds of hours of staff time” ever was made. The County did produce hundreds of pages of records eventually—proof the records existed. Moreover, the trial court found these records were “located and produced within a couple of days”—without expending “hundreds of hours of staff time.” (Learned, 11/10)

Finally, the County adopts a double standard with respect to this court’s standard of review. On the one hand, the County’s statement of facts is crafted as though the County expects this Court to review the evidence *de novo* and draw conclusions that the trial court did not. At the same time, the County argues that the abuse-of-discretion standard applies and that the trial court’s finding of facts are correct. As established in the section below, the correct standard of review is *de novo*, and the County’s arguments to the contrary must fail.

III. REPLY ARGUMENT

A. Standard of Review Is *De Novo*

The County’s major assault on Mr. Yousoufian’s case is its argument that this Court reviews issues of bad faith, attorney’s fees, and penalties under the abuse-of-discretion standard rather than *de novo*. Beginning with a striking misquotation of the statute on which this issue turns, the County writes as

follows, adding a word it plucks from thin air:

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 theirs].

But the statute does not say “*trial court*”; it says “*court*,” and as the full statute and case law mandate, any court reviewing agency action has discretion to set penalties, whether this be a trial court, the Supreme Court, or this Court of Appeals. As noted in a recent case:

The public records act provides that “[j]udicial review of all agency actions taken or challenged under RCW 42.17.250 through 42.17.320 shall be *de novo*.” [T]he appellate court stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence.

O’Connor v. DSHS, 143 Wn.2d 895, 25 P.3d 426 (2001).¹ Thus, while the County is correct that the trial court has discretion to set penalties, that discretion is now, by legislative mandate, conferred to this court by virtue of *de novo* review.

In addition to “amending” the statute, the County tortures the interpretation of three PDA cases. In its treatment of *Limstrom v. Ladenburg*,

¹ Every appellate case cited at RCWA 42.17.340 (note 12), holds that the standard of review is *de novo*; e.g., *Ames v City of Fircrest*, 71 Wn. App. 284, 857 P.2d 1083 (1993); *Washington Citizen Action v. Office of Ins. Com’r*, 94 Wn. App. 64, 971 P.2d 527, *review denied*, 138 Wn.2d 1004, 139 Wn.2d 1004, 984 P.2d 1035 (1999); *CLEAN v. City of Spokane*, 133 Wn.2d 455, 947 P.2d 1169, *reconsideration denied, certiorari denied*, 119 S.Ct. 45, 142 L.Ed.2d 35 (1997); *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712, *reconsideration denied* (1997); *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997); *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592, *reconsideration denied* (1994); *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993); *Overlake Fund v. City of Bellevue*, 60 Wn. App. 787, 810 P.2d 507, *review denied*, 117 Wn.2d 1022, 818 P.2d 1098 (1991); *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978); *Ockerman v. King County Dept. of Developmental and Environmental Services*, 102 Wn. App. 212, 6 P.3d 1214 (2000).

136 Wn.2d 595, 963 P.2d 869 (1998), for example, the County accurately quotes the words of the Court, but eliminates all meaningful context, so as to skew the express holding of the case. (Brf. of Resp., 17). Contrary to the County's interpretation, *Limstrom* did *not* hold that an appellate tribunal reviews findings of fact under the abuse-of-discretion standard. *Limstrom* expressly reviewed the case *de novo* but remanded for findings pertaining to materials never considered by the trial court. *Id.*, at 612.

The County also distorts the holding of *ACLU v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 975 P.2d 536 (1999) (*Blaine II*). By selectively excerpting words from the opinion, the County contorts the import of the case. In *Blaine II*, this Court reviewed the issues *de novo*, and disregarding the trial court's findings, found bad faith. This Court then imposed penalties and established attorney's fees without remand to the trial court. *Id.*, at 114, 121.

The County also relies on *Lindberg v. Kitsap County*, 133 Wn.2d 729, 948 P.2d 805 (1997), for its proposition that the abuse-of-discretion standard applies. But the Supreme Court in *Lindberg* did not overtly discuss the standard of review, and to the extent the court did deal with the issue, the court did not reverse the Court of Appeals, which held: "We review *de novo* agency actions that are challenged under the public records act." *Lindberg v. Kitsap County*, 82 Wn. App. 566, 570, 919 P.2d 89, 570 (1996).

Consistent with the broad policy imperatives of the PDA, the plain language of RCW 42.17.340(3) suggests that *all* courts, not just *trial* courts, shall review agency action *de novo*. If the Legislature had wanted to limit

appellate review, it would have done as the County has, by inserting the word “trial” before “court,” and leaving to innumerable judges across the state, the correct implementation of the punitive provisions of the Act. But the Legislature did not, and in PDA cases of this magnitude, Courts of Appeal are best situated to fully review and decide all issues and facts, thereby affording guidance to the many individual judges who may only see one PDA case in their whole career.

B. Even If the Abuse of Discretion Standard Is Applied, the Trial Court Erred in Arbitrarily Grouping Distinct Public Records and Counting Them as a Single Record, Subtracting 527 Days from the Days Late, Assessing Less Than Minimum Penalties, and Reducing Attorney’s Fees

Against the overwhelming weight of authority, the County insists that an abuse-of-discretion standard limits this court’s review. *Brf of Resp.*, at 14, et seq. “The abuse of discretion standard recognizes that deference is owed to the judicial actor who is ‘better positioned than another to decide the issue in question.’” *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).² While the finder of fact is vested with wide discretion, this discretion is not unfettered; otherwise, there could be no “abuse of discretion.”

In analyzing whether a trial court abused its discretion, the Washington Supreme Court has established a two-part test, the second of which is:

Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon

² Note that even if the clear mandate of RCW 42.17.340(3) is ignored, the Court of Appeals is not bound by the trial court’s findings when the trial court’s decision is based entirely upon documentary evidence because the trial judge is no “better positioned” than this panel “to decide the issue in question.” *Physicians Ins. Exch. v. Fisons Corp.*, *supra*; *Jenkins v. Snohomish County P.U.D.*, 105 Wn.2d 99, 102, 713 P.2d 79 (1986).

the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.

In re Schuoler, 106 Wn.2d 500, 512, 723 P.2d 1103 (1986), quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The second prong of the *Junker* analysis is the logical starting point for an abuse-of-discretion review.

Under *Junker*, this court must identify and weigh those interests relevant to the Public Disclosure Act and determine the “reasonableness” of the trial court’s decision in light of (1) the compelling interests of those affected by the decision and (2) the “comparative weight of the reasons for and against the decision one way or the other.” *In re Schuoler, supra*, at 512. The “compelling public [and] private interests”³ affected by the trial court’s decision include the right of every citizen in this state to access their public records. *See, e.g., Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994). The PDA was enacted to secure these very interests, and in order to encourage greater citizen participation in government, subsequent legislative amendments have strengthened the punitive provisions of the Act. If anything will chill ordinary citizens from seeking judicial review when their legitimate requests for public records are denied or delayed, it will be to affirm the Trial Court’s decision in this case. In view of the compelling interests at stake, it can only be said that the Trial Court erred and should be reversed?

³ Please see Appendix 3; Public Policy declarations contained in the PDA.

As to the “comparative weight of the reasons for and against” the trial court’s decision (*Junker, supra*), the reasons against the decision are many and the reasons for the decision are few. If this court affirms, the County saves money, but private citizens will be deterred from seeking representation and redress in the courts. This is not what the legislature intended. Moreover, if this court affirms, the County’s culture of obfuscation, misrepresentation and delay will be condoned. This is certainly not what the legislature intended. This court should reverse the trial court, and increase statutory penalties and attorney’s fees commensurate with the intent of the Act.

C. The Undisputed Evidence Establishes that King County Acted in Bad Faith

1. The Facts Regarding King County’s Bad Faith Are Not in Dispute

It is important to note the areas where there is no dispute. First, King County does not dispute that it repeatedly misrepresented to Mr. Yousoufian, his attorneys, and the trial court that it had “made full and good faith efforts to identify the documents responsive to each of Mr. Yousoufian’s PDA requests.” (Ex. 197) Neither does the County dispute its repeated misrepresentations that “no documents were withheld from disclosure” and that Mr. Yousoufian and counsel “have had access to all documents responsive to [Mr. Yousoufian’s] requests.” (Ex. 201, 202) And despite its purported “full and good faith efforts” to assist Mr. Yousoufian, the County does not dispute that it effectively denied Mr. Yousoufian access to the public records he sought until just a few months before trial. These undisputed facts are proof of the County’s bad faith.

Therefore, the trial court erred in assessing penalties well below the statutory minimum.

2. King County’s Factual and Legal” Misrepresentations to Mr. Yousoufian Prove Bad Faith.

Bad faith can be defined as “actual or constructive fraud.” *State v. Sizemore*, 48 Wn. App. 835, 837, 741 P.2d 572 (1987). Constructive fraud may be defined as:

a breach of legal or equitable duty which, irrespective of the moral guilt or intent of the fraud feisor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.

Lindquist v. Mullen, 45 Wn.2d 675, 690, 277 P.2d 724 (1954), quoting *Bell v. Bell*, 44 Ariz. 520, 39 P.2d 629, 637. The undisputed evidence establishes that the County engaged in actual or constructive fraud in its dealings with Mr. Yousoufian. Thus, the County acted in bad faith. Furthermore, “gross negligence [amounts] to bad faith constructively.” *Livermore v. Northwest Airlines*, 6 Wn.2d 1, 6, 106 P.2d 578 (1940).

As the trial court’s opinion and the undisputed evidence establish, King County’s responses to Mr. Yousoufian’s PDA requests are replete with statements constituting actual or constructive fraud and gross negligence. Regardless of the County’s moral guilt or intent, its representations did deceive others, did violate public and private confidence, and did injure public interests. The County *repeatedly and falsely* told Mr. Yousoufian, his attorneys, and the trial court that it had produced all public records responsive to plaintiff’s request. (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). For example, the Prosecuting Attorney wrote that King County had made “prompt and substantial efforts to locate the documents [to] be sure no documents were overlooked.” (Ex. 199) But *in fact* the County had made no such efforts. The Prosecuting Attorney further represented that, in searching for responsive records, King County had spent “hundreds of hours of staff time.” *Id.* But in fact the County did not spend hundreds of hours searching And in letters dated March 24, 1998 and April 2, 1998, the Prosecuting Attorney wrote:

I have checked with the Executive’s office and with Steve Woo at the Kingdome. No documents were withheld from disclosure. You and your client have had access to all documents responsive to your requests. . . [emphasis added].

(Ex. 201)

The trial court found those statements were “factually and legally incorrect,” and “[n]o effort was made to verify the accuracy of those statements.” (Learned, 11) Those misrepresentations, among others, are startling evidence of the County’s bad faith in performing its simple but critical duties under the PDA. This court’s holding in *ACLU v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 975 P.2d 536 (1999) (*Blaine II*) supports this conclusion. In *Blaine II*, the Court of Appeals reviewed the issue of bad faith and penalties *de novo*, and agreed with appellant ACLU that the trial court had abused its discretion in awarding minimum penalties. *Id.*, at 110. The Court of Appeals found that the school district did not act in good faith where the superintendent made factual and legal misrepresentations to a parent. In doubling the trial court’s award, the Court of Appeals adopted a “should have known” standard

consistent with cases involving constructive fraud:

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." [emphasis added]

Blaine II, supra, at 113.

As evident from the record, an even more egregious situation presents here. Here not just one, but many of the County's letters contain "factual and legal misrepresentations," and are "startling evidence" of the County's bad faith. *Id.* The County *should have known* that the requested records could have been produced within a few days of the request, and that "hundreds of hours of staff time" had not been spent. (Exhibit 193) The County *should have known* that the records requested *did* exist in the County offices and should not have told Mr. Yousoufian that the records did not exist.

2. FOIA Principles Are Not Applicable In Applying the Punitive Washington Public Disclosure Act

The County endeavors to rely on the Federal Freedom of Information Act (FOIA) as an analytical framework by which to measure bad faith. But FOIA is inapplicable in the instant case. First, a party requesting a court to apply FOIA must make a showing that the portions of FOIA sought to be utilized are similar or identical to the respective language of the Washington Public Disclosure Act. *See ACLU v. Blaine School District No. 503*, 86 Wn. App. 688, 937 P.2d 1176 (1997) (*Blaine I*). No such claim can be made here. 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,⁴ requiring agencies to be sufficiently organized to respond "promptly" to records requests (RCW 42.17.290), placing all burdens on the agency to show that its actions are reasonable RCW 42.17.340(2), and requiring courts to strictly enforce the punitive provisions in favor of citizens who prevail. *Yacobellis v. City of Bellingham*, 64 Wn.App. 295, 300, 825 P.2d 324 (1992). FOIA is not nearly so punitive, as cases cited by the County aptly reveal.

In *Blaine I*, this court clarified and limited the application of FOIA to the PDA. The court held that there were significant differences between the PDA and FOIA, including FOIA's permissive award of attorney's fees versus the Washington law's mandatory imposition of attorney's fees:

The State Supreme Court has declined to consider FOIA cases when interpreting provisions in the state act that differ significantly from the parallel provisions in FOIA. For instance, in *Amren v. City of Kalama*, 13 Wn.2d 25, 929 P.2d 389 (1997), the court rejected the City of Kalama's argument that FOIA cases applied to the issue of attorney fees in favor of a prevailing record requester, while the state act indicates that the court "shall" impose fees against an agency that has improperly withheld records. In *Servais v. Port of Bellingham*, 127 Wn.2d 820, 904 P.2d 1124 (1995), the court noted that Washington's act parallels FOIA, but refused to consider interpretations of FOIA's statutory exemptions because the language of the nearest comparable exemption under FOIA contained significantly different language...

FOIA is significantly different from Washington's act with respect to the provisions cited by ACLU. FOIA does not contain a mandate for liberal interpretation. It does not provide that agencies may

⁴ 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).

recover the costs of mailing. It contains no provision requiring agencies to honor requests by mail. Nor does FOIA contain the statements of policy that the Washington act does indicating the Legislature's intent to ensure full access to public records.

D. The Trial Court Erred in Arbitrarily Combining Records and in Assessing Less Than Minimum Penalties

The Trial Court ruled correctly that penalties are to be assessed on a per record per day basis. Learned, 26.⁵ This holding, which the County does not cross-appeal or dispute, is thus the law of the case.

Despite this legislative mandate, and despite its own holding, the trial court employed a unique and unfounded method of assessing penalties. The County observes that the Trial Court set penalties by categorizing the documents into two categories—(1) studies and (2) cost documentation supporting each study—and asserts that these categories make perfect sense (*see Brf. of Resp.* at 32). However, this simplistic analysis disregards the fact that *each* of the 166 records that the Trial Court lumped into 18 “documents” is relevant, distinguishable, responsive to the records request, and important to Mr. Yousoufian.. Mr. Yousoufian could have made a separate request for any one of the 166 records—a one-page payment history report, for example, or a progress payment warrant request or a single check—and the failure to produce the individual record would have subjected the County to statutory penalties based on the number of days late. RCW 42.17.340(3)

⁵ 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.” *Lindberg v. Kitsap County*, 82 Wn. App. 566, 575, 919 P.2d 89, 570 (1996). While 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, a multiple penalty result is consistent with the overriding import of the PDA.

The fact that the County fortuitously produced multiple documents on the same day which were ultimately determined to relate in some way to the same study should not entitle the County to a windfall reduction in penalties. Instead, each one of these 166 records should be recognized as a separate document that was improperly withheld from disclosure. Accordingly, penalties should have been and should be assessed on the basis of 166 withheld documents, not 18 as the trial court did. (See Learned, at page 30 for a list of the 18 “documents” identified by the trial court.)

Having consolidated the 166 records into 18 “documents,” thereby reducing the “one record, one day” multiplier in the penalties calculation by a factor of nine, the Trial Court then further condensed these 18 “documents” into 10 “document productions” (See Learned, at 31 for the list of “productions”) The result was to cut the already-reduced multiplier in the penalties formula by almost 50 Thus, without a word of explanation, the trial court compressed 18 “documents” into 10 document groups based on two factors: the date requested and the date produced. If several “documents” had both of those dates in common, the trial court deemed them a single “document production,” no matter how unrelated they might be, and counted them as a *single record* for purposes of the “one record, one day” calculation of penalties. See Learned, 30-31, and Appendix 2. For example, the Mariners Baseball Club Economic Impact Study dated October 19, 1991, the Economic Impact of Mariners on King County completed October 28, 1991, and the Conway study #2 cost documentation (each identified as a separate document on the trial court’s list of

18) were all requested on May 30, 1997 and produced on March 7, 2001—all 843 days late by the trial court’s calculations.⁶ (See lines 8, 13 and 14 of Appendix 2 and Learned, 30.) Inexplicably, the trial court then lumped all three unrelated documents together and counted them as a single record, ignoring the “one record, one day” rule it had said applied. The trial court then calculated the penalty with respect to the three documents using the formula 843 days late x *one* x \$5.00, for a penalty of \$4,215. If the trial court had calculated penalties based on three documents, multiplying 843 x *three* x \$5.00, the penalty would have been \$12,645. And if the trial court had truly applied the “one record, one day” rule plainly stated in the statute, it would have computed 843 x *eight* x \$5.00, for a penalty of \$33,720.

Thus, using this two-step compression process, without any statutory underpinning, the trial court shrinks, and then shrinks again, the multiplier used in calculating statutory penalties. Not only does this approach violate the letter of the law; it also violates the spirit. In the trial court’s own words: “The statutory award is a penalty designed to encourage broad disclosure and to deter improper denial of access to public records.” (Learned, 26/20) When, as here, the penalty imposed is but a slap on the wrist in relation to King County’s budget, it has no deterrent effect and does nothing to encourage broad disclosure by public agencies.

The County suggests that some individual records, such as monthly

⁶ In addition, the trial court arbitrarily subtracted 527 days from the days late for each of these three documents, allowing only 120 days as a “reasonable” time for Appellant to find an attorney. *Learned*, 30.

payment history reports, should not be counted because, in the County's view, they are of no real importance. Under the PDA, no such judgment may be made. It is for the individual citizen to determine which public records she or he wishes to see, and if an agency unjustifiably refuses the request, it is then for 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).

The statute is very clear. If a statute is clear on its face, its meaning is to be derived from the language of the statute alone. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). An unambiguous statute is not subject to judicial construction, (*id.*), and courts should decline to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it. *Washington State Coalition for the Homeless v. DSHS*, 133 Wn.2d 894, 904, 949 P.2d 1291 (1997); *Marquis v. City of Spokane*, 130 Wn.2d 97, 107, 922 P.2d 43 (1996). When a court applies a statute to a given set of facts, it must give effect to the intent of the Legislature in creating it. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 607, 963 P.2d 869 (1998).

The intent behind 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.

Progressive Animal Welfare Soc'y v. University of Wash., 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

Applying the foregoing principles to this case leads to the only

conclusions possible: (1) that the proper rule for computing penalties is per distinct record (*and not per group of records*), per day; and (2) that the Legislature deliberately set the penalties high enough to have a strongly deterrent and punitive effect in order to safeguard “the accountability to the people of public officials and institutions.” RCW 42.17.251. Accordingly, the Court should have separately computed penalties for each one of the 166 distinct documents.

E. The Trial Court Erred in Subtracting 527 days

The trial court’s subtraction of 527 days from the number of days late improperly imposes a burden on citizens to find an attorney and file suit within 120 days of an agency’s denial. Nowhere does the PDA authorize a court to subtract days, and nowhere does the PDA require a citizen to so act. As the appellant has argued (and to which there has been no response), RCW 42.17.410 allows five years to file a complaint after an agency has improperly denied access to public records. To arbitrarily lop off over a year’s worth of penalties is to reward, not punish, violators of the Act.

The County’s authority is inapposite. Their case, *Doe I v. Washington State Patrol*, 80 Wn.App. 296, 908 P.2d 914 (1996), involved a citizen seeking to enjoin the release of public records. Properly read, *Doe* supports Mr. Yousoufian. The filing of the lawsuit prohibited the State Patrol from releasing the record, and therefore the delay was not attributable to the agency.

F. The Trial Court Erred in Finding that a “Reasonable Disclosure of Documents” Was Sufficient When the Statute Requires that “ALL” Records Be Produced.

The Trial Court erred in requiring of King County only “reasonable” disclosure of public records when the PDA requires disclosure of “all public records” unless an exemption applies. (Learned 13/17). 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. Nowhere in the statute and nowhere in decisions interpreting the statute does authority exist for a trial court to find that “reasonable disclosure of documents” is sufficient.

Although the County argues that some of the records sought here are trivial, such as the records attached as appendices to their brief, to allow an agency to decide what public record is trivial and therefore not worthy of a PDA request is to tread on dangerous ground and is contrary to the meaning and intent of the Act, initially passed by referendum and because of ongoing recalcitrance by public agencies, strengthened by the legislature at every turn. Nowhere in the PDA is there an exemption for a “trivial record.”

In *Smith v. Okanogan County*, 100 Wn. App. 7, 994 P.2d 857 (2000), the requester sought multiple public records, many of which an independent observer might consider trivial. However, the Court of Appeals treated none as frivolous or trivial, reviewing each request to determine whether a record existed, and whether it should have been produced, and whether penalties should be assessed. For example, one request related to the number of fringes on the County courtroom flag. *Id.*, at 21. It is not for the public agency to decide which public record to produce--each public record belongs to each citizen unless exempted by statute. The County’s argument on allegedly trivial public

records shows continued arrogance toward PDA requests.

G. Attorneys Fees

The County resists full payment of attorneys fees and costs by repeatedly asserting that it admitted it violated the PDA, and made full disclosure long before the case went to trial. This position is contradicted by the pleadings and the procedural facts.

Under the pressures of an imminent trial date, King County finally took Mr. Yousoufian's request seriously. Even then, documents only came in sporadically, as shown in the production schedule attached at Appendix 2 hereto. It was only when their failure to timely produce records was irrefutable that Respondents finally "admitted" violating the PDA.

The County's arguments rely almost solely on its contention that the Trial Court had discretion to award attorneys fees and the Appellate Court cannot review this *de novo*. But as this brief establishes above, this Court exercises full discretion over this issue too. To guide this Court's review, Plaintiff's material on attorneys fees and costs issues are found at CP 482-495, 777-782, 808-814, 806-807 (for David J. Balint), CP 835-837, 830-834, 766-776 (for Michael G. Brannan), and CP 830-834 (for Paul Fenton).

This Court should observe that attorneys fees incurred were greater than fees Plaintiff claimed, because Plaintiff's counsel deducted most if not all overlapping work between them. Because of the persuasiveness of the County's recalcitrance, however, and the sheer volume of records finally produced, there is no showing that one attorney could have been more efficient, or even that one

attorney could adequately have handled a case of this magnitude.

The Trial Court's findings on attorneys fees and costs are found at Learned 19-26. The Court reduced attorneys fees on specific issues (such as discovery motions and particular legal research projects) and on time spent on discovery which was not, in the Court's view. The court then further reduced fees for perceived general unreasonableness, and then reduced fees again by imposing a 10% penalty for perceived lack of clarity of presentation.

To justify penalizing the plaintiff (or any ordinary citizen) in this way, the Court had to assume that plaintiff's attorneys could have known in advance what the result of discovery would be, particularly given the County's continued representations that all records had been produced, e.g. CP 8-11.

While the County's Reply dismisses Appellant's extensive "prevailing party" discussion, the importance of that authority is manifest in view of the fact that but for the filing and prosecution of this litigation the King County Prosecutor's June, 1998, denial that any further records existed would have stood forever.

How should this court determine an adequate and fair award of fees? As established in *Coalition Against Government Spying v. Department of Public Safety*, 59 Wn. App. 856, 801 P.2d 1009 (1990) (at 862):

Washington courts have held that the WPDA must be liberally construed to promote full access to public records. *Progressive Animal Welfare Soc'y v. UW*, 114 Wn.2d 677, [683] 682, 790 P.2d 604 (1990). The statute's "mandate for liberal construction includes a liberal construction of the statute's provision for award of

reasonable attorney's fees."⁷

Further, *O'Connor v. DSHS*, 143 Wn.2d 895, 25 P.3d 426 (2001), establishes that despite the number and complexity of issues and their interrelationship with the Rules of Discovery, once the court ruled that the petitioner had prevailed on the principle issue in the case, the Supreme Court ordered reimbursement for petitioner's attorneys fees and costs at all levels of the litigation, to be determined by the clerk of the Supreme Court (*de novo*).

H. Relief Requested

The footnote on page 33 of Respondent's Brief points out math errors on the grid showing an accounting of the dates various records were produced, including the number of days each record was late. This chart includes the finding of the Court that the time line for certain documents was initiated by Mr. Yousoufian's original PDA request of May 30, 1997 and a second timeline was initiated by Mr. Fenton's December 8, 1997 letter. The County's finding of this error caused Appellant to review carefully the chart and compare it to the Trial Court's calculations as discussed in the section above. A corrected and amplified chart is attached to this brief as Appendix 2. The original chart was correct except some of the totals in the last column were in error as described by the County and in many instances the 527 days subtraction by the Court was not corrected.

Beginning on page 41 of the Brief of Respondents, the County asserts the Trial Court was correct in finding that additional stadium studies found by

⁷ See Appendix 3 for all of the repeated injunctions to the courts concerning the public policy behind the PDA and its mandate for liberal construction.

Appellant after the “trial” but before the Trial Court’s ruling were non-responsive to his PDA requests. Plaintiff’s motion and supporting declaration and the documents themselves can be found at CP 851-1005. The Court of Appeals is invited to look at each of those five exhibits (A-E). By no stretch of the imagination can they be said not to be responsive to Mr. Yousoufian’s PDA request. Exhibit A, “Proposed District Finance Plan,” dated November 25, 1996, is an economic analysis of possible economic impacts on the County’s expense fund and bond rating should it issue “General Obligation” baseball stadium bonds for which the public would be liable. Exhibit B, “Stadium Lease Analysis,” dated December 6, 1996, presents information about economic issues including revenue and costs involved in various sport tenant leases in various stadiums including the economic impact of the rent to be paid by the baseball team and estimates of stadium revenues. Exhibit C, “An Estimate of the Subsidies to the Seattle Mariner’s from the Proposed New Baseball Stadium.”, dated February 1997, is an economic professor’s analysis of the public subsidy involved in the new baseball stadium and the economic impact on the public as well as alternative uses of the stadium. Exhibit D, “ Report to the Metropolitan King County Council from the Independent Financial Review Committee.”, dated December 16, 1996, covers the development of a financial plan for the proposed new stadium so that it would generate maximum resources while at the same time protecting the County taxpayers’ exposure and bond rating and discusses how revenues are to cover expenses and includes both short term and long term economic impact analysis. Exhibit E is a document

entitled “Appendix B” to a report dated November 17, 1996 containing financial assumptions the organization hired by the County was expected to follow in their economic analysis. This Exhibit B was not attached nor ever produced.

As mentioned earlier, numerous documents must exist but were never produced to date including correspondence with Paul Allen’s organization about the financing of various studies, any document showing negotiations for how much was going to be paid for several of the studies, etc.. These documents which were never produced were outlined in Mr. Yousoufian’s Declaration so labeled which can be found at CP 540-546, attached hereto as Appendix 4. It is true that some of these documents were produced as trial was approaching but others have not been, specifically items 1 (partially) and 2-4, 7-10, 18, 21-22 and 27.⁸

Therefore, what is requested for relief is first and foremost a proper assessment of penalties for each public record that was in fact produced although on a greatly delayed basis in accordance with Appendix 2, restoration of plaintiff’s attorneys fees and costs deducted by the trial court, attorneys fees on Appeal, and a remand to the Trial Court to order further public record disclosure by the County of records not yet produced or considered by the Trial Court in the assessment of penalties.

IV. APPENDICES

For the convenience of this Court of Appeals there are three attached

⁸ Item 27 at CP 546 should have said, “Per 25 above” not “Per 30 above.”

appendices. Appendix 1 is the Paul Fenton letter of December 8, 1997 (Ex. 193). Appendix 2 is the corrected spreadsheet detailing the schedule of when each public record was requested and produced which explains and shows the Trial Court's calculations as against the statutory calculations and minimum fines. Appendix 3 contains a verbatim quotation of the Public Disclosure Act's internal statements of public policy so that they can be easily referenced by each of the judges without reviewing the statute. Appendix 4 is Mr. Yousoufian's July 20, 2001 declaration regarding documents known to exist but not yet produced. (CP 540-546).

V. CONCLUSION

A transparent government is fundamental to democracy. The Washington PDA expressly and repeatedly admonishes courts, as guarantors of the public trust, that each public record, not exempt, shall be made available to any citizen requesting it, and the burden is on the agency to justify nondisclosure, delay, failure to render the fullest assistance to the public, and to ensure that record delivery systems are functional and public employees properly trained. When and how will the government of King County "get the message?" The Act has been in force since 1972. At every opportunity the legislature has strengthened, not diluted various provisions of the Act. From May 30, 1997 to date the County has not complied, has engaged in misrepresentations and outright fabrications, has failed to train and equip employees with responsibilities under the Act, has failed to coordinate among various county offices, and has taken the attitude that it is the Agency, not the

citizen, who decides which public record is important enough to be produced. Regrettably the Trial Court seemed to agree with the County.

This Court has the opportunity to clarify and confirm the policy behind the PDA, and to implement the statute and to tell King County (and every other public agency not in compliance) that enough is enough. Without such a statement from this court to this effect, very few private citizens will follow in Armen Yousoufian's footsteps, and very few lawyers will be willing to assist ordinary private citizens to secure from the government public records sought. No one in Washington should require the services of a lawyer to cut through the deception and obfuscation thrown up by King County in this case. Unless the punitive provisions of the statute is vigorously enforced here, not only will Mr. Yousoufian and his attorneys suffer prejudice for their public spirited efforts, but health and welfare of the entire public will suffer and a dangerous precedent will govern.

Respectfully submitted this 23rd day of August, 2002.

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