

No. _____

(Court of Appeals No. 49701-4-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ARMEN YOUSOUFIAN

Petitioner

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.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Armen Yousoufian¹ moves this Court for discretionary review of the Court of Appeals' decision in *Yousoufian v. Sims*, 114 Wn. App.836, 60 P.3d 667 (2003). See Appendix A.

B. COURT OF APPEALS DECISION

Yousoufian v. Sims misinterprets several key provisions of the Public Disclosure Act, RCW 42.17.250, et seq., (PDA) thereby conflicting with decisions of the Washington Supreme Court, Washington Courts of Appeal, and the clear mandate of the PDA itself. The *Yousoufian* decision therefore creates uncertainty and confusion in the interpretation and application of the PDA, and adversely affects the public's interests in open and accountable government.

Yousoufian was filed on January 6, 2003. The Respondents' timely motion for reconsideration was denied on February 11, 2003. Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in granting to trial courts a standardless discretion to "group" records for purposes of assessing penalties when the plain language and legislative intent of the PDA require courts to assess a penalty for each record requested from the date of the request until the date a judgment is rendered in the requestor's favor? RCW 42.17.340(4).

2. Whether the Court of Appeals erred in ruling that the PDA imposes a burden on persons requesting records to file a lawsuit within 120 days where all affirmative burdens in the statute are on agencies to promptly and fully comply with records requests, and that trial courts may waive penalties accrued after 120 days when the plain language and legislative intent of the PDA require courts to assess a penalty for

¹ Pronounced *you SOO fee un*.

each record requested from the date of the request until the date a judgment is rendered in the requestor's favor? RCW 42.17.340(4).

3. Whether the Court of Appeals erred in ruling that RCW 42.17.260(1) allows only "reasonable disclosure" of discrete, non-exempt public records requested when RCW 42.17.260(1) states that the agency "shall make available for public inspection and copying all [nonexempt] public records," and demands that its provisions "shall be liberally construed to promote . . . full access to public records . . . so as to assure that the public interest will be fully protected"? RCW 42.17.010(11); *see also* RCW 42.17.251; RCW 42.17.920.

4. Whether the Court of Appeals erred when it held that a trial court's assessment of penalties in a trial by affidavit is reviewed under the abuse of discretion standard when this Supreme Court has held that where the record consists entirely of declarations, affidavits and other documentary evidence, the appellate court stands in the same position as the trial court and is not bound by the trial court's factual determinations, and can and should engage in the same inquiry as the trial court and review all of the facts in the record together with the trial court's findings de novo and make an independent determination of all matters found to be in error? ²

5. Whether the Court of Appeals erred when it held that a trial court's assessment of penalties in a trial by affidavit is reviewed under the abuse of discretion standard when the plain language and legislative intent of the PDA mandate that "Judicial review of all agency actions taken or challenged under RCW 42.17.250 through 42.17.320 shall be de novo" (RCW 42.17.340(3)), and implicit in appellate review of a trial court's assessment of penalties is appellate review of agency action?

² *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994); *Ames v. City of Fircrest*, 71 Wn.App. 284, 292, 857 P.2d 1083 (1993).

6. Whether the Court of Appeals erred in its interpretation of RCW 42.17.340(4) *in toto* when “[t]he mandate of liberal construction requires the court to view with caution any interpretation of the statute that would frustrate its purpose”³ and the Court of Appeals’ interpretation of the statute which permits arbitrary subtraction of penalty days and arbitrary grouping of records (1) provides no guidance for courts, agencies or the public as to an appropriate measure of penalties, (2) frustrates and obfuscates the deterrent and punitive purposes of the statute, (3) chills citizen participation in our democratic form of government, and (4) improperly encroaches on a deliberate act of the people of this state and undermines over 30 years of directed legislative enhancement?

D. STATEMENT OF THE CASE⁴

1. Introduction

At stake in this case are two vital elements of sound democratic governance in Washington State: (1) the fundamental right of the public to know the workings of their government through reasonable records requests made under the Public Disclosure Act, RCW 42.17.250, et seq., and (2) the role of the judiciary in administering the punitive and deterrent provisions of the Act. Perhaps more acutely than any PDA case to come before this Court, this case reflects the ongoing struggle between ordinary Washington citizens who reasonably and responsibly seek access to public records under the 30-year old Act, the agencies who are reluctant to grant citizens access to the records they keep, and the lack of a clear standard by which agency bad faith is measured and penalties

³ *ACLU v. Blaine Sch. Dist. 503*, 86 Wash.App. 688, 693, 937 P.2d 1176 (1997) *citing Shoreline Community College Dist. 7 v. Employment Sec. Dep’t*, 120 Wash.2d 394, 406, 842 P.2d 938 (1992); *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 128, 580 P.2d 246 (1978).

⁴ This Petition assumes, but does not require, familiarity with the detailed descriptions of the history of this case which appear in the Briefs on the merits. This is based on counsel’s understanding that, under the Court’s current practice, any Justice reviewing this Petition will have access to the Briefs.

assessed consistent with the PDA's mandate that these provisions be strictly enforced to discourage improper denial of access to public records.⁵ Consequently, this case will permit this High Court to examine the question of agency liability for violations of the PDA, and to provide necessary guidance as to the correct measure of penalties to courts, agencies, and citizens of this state.⁶

2. Factual and Procedural History

On May 30, 1997, Petitioner Armen Yousoufian faxed and mailed a records request to King County. Mr. Yousoufian asked to review a limited and specific category of public records, namely, all public records under the county's control having to do with sports stadiums, including records pertaining to "how and why and by whom" sports stadium studies were ordered. The timing of Mr. Yousoufian's request was critical: On June 17, 1997, the public was to vote on the Referendum which, if passed, would provide for construction and financing, at tremendous public expense, of new stadium facilities for the Seattle Seahawks, a professional football team now owned by Paul Allen's Football Northwest.

In the days and weeks leading to the election there was much heated debate on the issue of public funding of sports stadiums. This Supreme Court, in the matter of

Brower v. State, 137 Wn.2d 44, 63, 969 P.2d 42 (1998), wrote of the election:

On May 2, 1997, prior to the June 17 date set for the special election, [Jordan] Brower filed a complaint in Thurston County Superior Court against the State seeking an injunction to prevent the election . . . on numerous grounds. On May 21, 1997, Football Northwest moved to intervene. . . . Referendum 48 was passed by a margin of 51.1% with a voter turnout of 51%.

⁵ RCW 42.17.340(4); *Amren v. City of Kalama*, 131 Wn.2d 25, 37, 929 P.2d 389 (1997).

⁶ Implicitly or explicitly, a resolution of the issues presented here will also permit the Supreme Court to "clarify the ambiguity in the law that is created by [*Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997) and *Lindberg v. Kitsap County*, 133 Wn.2d 729, 948 P.2d 805 (1997)]," as observed by Division One of the Court of Appeals in *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307, 322 (2002).

Brower v. State, 137 Wn.2d 44, 51-52, (1998). This court went on to note:

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

Id. at 63. Mr. Yousoufian also felt that circumstances surrounding the election and funding of the stadiums were unusual, and he made his public records request to better understand the political and economic facts, and thereby better guide his vote.

But the County did not cooperate. King County did not produce the records Mr. Yousoufian sought before the election was held, or even immediately after. Instead, numerous County officials, including Executive Ron Sims and various prosecuting attorneys responded to the Petitioner's many letters⁷ requesting access to public records by allowing a few records to trickle out from various county departments over the next few months. Then, with a series of misleading missives from the prosecuting attorney stating that the county had made full disclosure and would produce no further records, the County went silent.

In March, 2000, Mr. Yousoufian filed suit. The commencement of litigation did not spark a higher level of responsiveness from the County, and it was not until the pressures of imminent trial that the County finally produced many of the distinct records requested – over 150 of them in fact, the most recent of which arrived 1,463 days late. The County has never claimed that any of the records requested were exempt from disclosure, thus the focus at trial was on the positive duties of disclosure under the PDA unaffected by any exemptions, and upon a determination of bad faith and an assessment of appropriate statutory penalties.

Trial was by affidavit. The trial court found that King County egregiously mishandled Mr. Yousoufian's request and failed to act in good faith. The court found

⁷ See e.g. exhibits 171, 180, 183, 185, 189, 191, 193, 198, 200, 204.

that the County's failure to respond was not "bad faith" in the sense that it was intentional, but rather was the result of negligence, poor communication between County departments, and lack of diligence and care on the part of County employees. The court imposed minimal statutory penalties of \$25,440, based on its unexpected and enigmatic grouping of records and subtraction of 527 penalty days, and awarded Mr. Yousoufian \$82,196.16 in attorney's fees; far less than the fees he actually incurred. The trial court further found, despite that the County did not produce one item of correspondence between King County and Football Northwest, and despite that subsequent studies in the possession of the County were discovered, that as of the time of trial the County had made a "reasonable" disclosure of distinct records and that any records not yet produced were non-responsive and did not warrant production or relief under the PDA. Mr. Yousoufian appealed the decision to Division One of the Court of Appeals.

The Court of Appeals reviewed the case largely under an abuse of discretion standard, affirming the trial court's award of attorney's fees, grouping of records and subtraction of penalty days. The Court reversed the trial court's award of "the minimum statutory penalty," holding that the trial court's unchallenged findings of "egregious mishandling" of Mr. Yousoufian's record request and a lack of good faith by the County did not support a minimum penalty, and moreover, that the trial court improperly considered the amount of the attorney fee award in determining the appropriate statutory penalty.

In remanding the matter for a firmer assessment of penalties, however, the Court of Appeals also wrote that despite the Legislature's plain language command "that where a person prevails in seeking disclosure of 'any public record,' the person is entitled to '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,'" and despite the legislative and judicial command that courts liberally construe the statute to promote broad

disclosure, the trial court was within its discretion to not calculate penalties on a per-record per-day basis. *Yousoufian*, at 847-48. The Court then goes on to write:

The literal meaning of RCW 42.17.340(4) contemplates a penalty for each day a record request is unlawfully denied; the statute does not require the penalty to be multiplied by the number of records responsive to a single request. Further, even a statute's apparent literal meaning will not be followed if such a reading results in "{u}nlikely, absurd or strained consequences{.}"

But as the Petitioner argues in this brief below, the Court of Appeals did not read the statute "literally,"⁸ or construe the statute "liberally" in favor of promoting disclosure.⁹ Petitioner submits that the Court of Appeals erred in deferring to the trial judge's conservative construction and application of the punitive statute, particularly in stating that application of the requisite penalty under the facts of this case would result in consequences "totally out of proportion to the County's negligence, the harm done thereby, and any amount needed for deterrence." While the Court of Appeals did observe in its discussion of attorney fees that "it was the County's lack of response that caused those high fees," it inexplicably rejected this same valid reasoning in imposing or defining statutory penalties.

The *Yousoufian* Court also expounded on the de novo review provisions of the PDA, resulting in an interpretation that is at variance with this Supreme Court and other Courts of Appeal, and with the statute itself. At pages 846-47 of the opinion, the Court wrote:

Courts review agency actions de novo under the PDA. RCW 42.17.340(3). Once a violation of the PDA has been established, courts are required to award reasonable attorney fees and statutory penalties.

⁸ As argued below, Petitioner does not agree that a literal interpretation results in a penalty assessed on the basis of each request, but rather, as the statute plainly says, each record. See *Lindberg v. Kitsap Cy.*, 82 Wn.App. 566, 575, 919 P.2d 89 (1996), *reversed in part*, *Lindberg v. Kitsap County*, 133 Wn.2d 729, 948 P.2d 805 (1997).

⁹ *Amren v. City of Kalama*, 131 Wash.2d 25, 31, 929 P.2d 389 (1997); *Progressive Animal Welfare Soc'y, v. University of Washington*, 125 Wash.2d 243, 251, 884 P.2d 5921; *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712, (1997); RCW 42.17.251.

RCW 42.17.340(4); *King County v. Sheehan*, Wn.2d , 57 P.3d 307, 312, (2002). But the appropriate amount of penalties and attorney fees to award are matters within the trial court's discretion and subject to review only for an abuse of that discretion.

Id., citing *Sheehan*, 57 P.3d at 320, emphasis added. In a footnote to the above cited passage the Court added: “We do note, however, that principles of judicial economy and deference to the trial court militate against de novo review of factual issues, and we do not conduct a trial de novo every time the record consists solely of documentary evidence.”¹⁰ Citing *In re Marriage of Stern*, 68 Wn. App. 922, 928-29, 846 P.2d 1387 (1993). With all due respect, the Petitioner believes that the Court of Appeals is wrong.

Given the unique and special facts of this case, Petitioner believes that the *Yousoufian* decision, if allowed to stand, will “extract the teeth from our State’s public disclosure act.”¹¹ This, in turn, will seriously erode the nearly 30 years of conscious and deliberate development of the PDA by authorizing trial courts to “balance the equities,” allow only “reasonable” disclosure, assess only “reasonable” penalties, and impose new burdens on parties requesting records rather than strictly and predictably apply the statute as the people and the legislature have intended. The PDA is supposed to be a self-enforcing remedial statute with a maximum deterrent effect brought about by strict enforcement of its punitive provisions. *Yousoufian* does not fulfill the high purposes of the statute that the citizens of this state originally and all along intended.¹²

¹⁰ While the Court of Appeals seems to use the terms de novo review and trial de novo interchangeably, strictly speaking de novo review of the trial court’s record should be distinguished from a trial de novo. The latter means a completely new trial at which witnesses are heard and new evidence is taken while the de novo standard of review applies to issues of law, to motions for summary judgment, and, at times, to mixed questions of law and fact. See Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U.L. REV. 11, 28 (1994); *Johnson v. Employment Sec.*, 112 Wash. 2d 172, 175, 769 P.2d 305, 306 (1989)

¹¹ *Progressive Animal Welfare Soc’y v. U.W.*, 114 Wash.2d 677, 681, 790 P.2d 604 (1990) (PAWS I).

¹² Washington Superior Court judges often have little or no experience in assessing punitive damages against a defendant, and few Supreme Court decision to look to for guidance. Traditionally punitive damages should be sufficient to discourage the defendant, or anyone similarly situated, from repeating such conduct in the future. Here, King County operates on an annual budget of approximately \$3 billion. Proportionally speaking, the penalty award here, \$25,500, is .00085%, or

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Overview

By its conservative construction of RCW 42.17.340(4), and its holding that appellate courts defer to the discretion of trial courts in setting an appropriate penalty, the Court of Appeals essentially eviscerates the intentionally punitive PDA. This will effectively chill citizen challenges to agencies who wrongfully withhold public records, and eventually make a shambles of the Act. As it stands, the Yousoufian decision creates a tremendous disincentive to ordinary citizens who have been wrongfully denied access to records and who may have no recourse but to challenge an agency's action in court, because very few citizens can afford the high price of a lawyer, very few citizens are competent to take on a well-funded agency's legal team, and very few lawyers will accept a PDA case on a contingent fee basis. The punitive provisions of the PDA, along with its injunction for a "liberal construction," were carefully designed by the legislature to make the PDA entirely self enforcing, and rather than create an agency to police the agencies, the statute operates to allow private citizens to be private attorneys general. Unless significant aspects of the decision are reversed, Yousoufian as a paradigm stands for the proposition that if a large agency provides only *some* of the records a citizen requests, that citizen ought to leave well enough alone.

2. The Yousoufian Court Did Not "Liberally Construe" the Act's Disclosure Provisions or "Strictly Enforce" its Penalty Provisions and is thus in Derogation of the Sound Public Policy of the Act.

By erring in its analysis and construction of the PDA in a manner that chills citizen challenges to improper withholding of records and favors recalcitrant agencies, the Court of Appeals turns back the clock in the evolution of open government, and

less than one thousandth of one percent of the County's annual budget. Petitioner submits that this amount is grossly insufficient to deter wrongful withholding of records, and if this is the "worst case scenario" under the egregious accompanying facts, the decision may encourage a bureaucratic culture of improper withholding, obfuscation and delay.

citizen participation in that government, in Washington state. At the time of its passage and since, Washington's Public Disclosure Act has been hailed as one of the most liberal¹³ and punitive¹⁴ public disclosure laws in the nation. Employing "some of the strongest language used in any legislation,"¹⁵ the PDA is a "strongly worded mandate for broad disclosure of public records."¹⁶

To back up this strict mandate, the legislature has deliberately expanded the penalty requirements of the statute by (1) making penalties mandatory where a person prevails against an agency and establishing a range of "no less than \$5 per day and no greater than \$100 per day for each day that the person was denied access to the record," (RCW 42.17.340 (4)); (2) defining what constitutes a "prompt" response and requiring an agency to respond to a public records request within five business days (RCW 42.17.320); (3) establishing immunity from liability for mistaken release of exempt records, provided the actor was acting in good faith (RCW 42.17.258); (4) explicitly setting forth the strong public policy of the act (RCW 42.17.251); and (5) stating that public records statutes are to be liberally construed and record exemptions narrowly construed to promote the public policy of openness. *Id.*

In imposing penalties under RCW 42.17.340(4), once a citizen has established that the agency either (1) wrongfully prevented the citizen from exercising their "right to inspect or copy any public record," OR (2) wrongfully prevented the citizen from exercising their "right to receive a response to a public record request within a reasonable amount of time," the trial court has NO discretion to fashion a creative or equitable remedy. *Id.*, (emphasis added). While this section of the statute technically is silent on

¹³ Gould, *Open Access of Public Records*, 26 Wash. St. Bar News 11 (July 1972)

¹⁴ *Cathcart v. Andersen*, 85 Wash.2d 102, 530 P.2d 313 (1975).

¹⁵ *Equitable Shipyards, Inc. v. State By and Through Dept. of Transp.*, 93 Wn.2d 465, 482, 611 P.2d 396, 406 (1980), citing *Cathcart v. Andersen*, 85 Wash.2d 102, 530 P.2d 313 (1975).

¹⁶ *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978).

how a court should fine an agency for violations of #2 above – e.g. for wrongfully preventing a citizen from exercising their “right to receive a response to a public record request within a reasonable amount of time” – the statute is loud and clear that the court can only award such persons in category #1 (citizens wrongfully prevented from exercising their “right to inspect or copy any public record”) “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.”¹⁷ RCW 42.17.340(4) (emphasis added). Contrary to the *Yousoufian* decision (at 848), a literal reading of this provision would result in a per-record per-day penalty, not a per request per day penalty, as would erring in favor of a liberal construction where any ambiguity might exist. RCW 42.17.920; 42.17.010(11); 42.17.251.¹⁸

“The mandate of liberal construction requires the court to view with caution any interpretation of the statute that would frustrate its purpose.”¹⁹ What is the purpose of the PDA? Nothing less than “full access to information concerning the conduct of government on every level [as] a fundamental and necessary precondition to the sound governance of a free society.” RCW 42.17.010(2), (5), (11). Unless this Supreme Court pays more than just lip service to the repeatedly stated policies of liberal construction, the errors of the *Yousoufian* court will trickle down to trial courts and agencies, and divest the Act of what limited power it retains. Petitioner respectfully submits that the *Yousoufian* decision frustrates the purpose of the PDA by weakening its fundamental

¹⁷ Although RCW 42.17.020 states that “the singular shall take the plural and any gender, the other, as the context requires,” the overriding mandate of the Act, including the mandate that the act’s punitive provisions be liberally construed to effectuate its purposes, requires that “record” means “record,” and not “records.”

¹⁸ In construing remedial statutes, such as the PDA, “that construction will be preferred . . . which will subserve the right rather than that which may perpetuate a wrong.” *Ingersoll v. Gourley*, 72 Wash. 462, 472, 130 P. 743 (1913).

¹⁹ *ACLU v. Blaine Sch. Dist. 503*, 86 Wash.App. 688, 693, 937 P.2d 1176 (1997) citing *Shoreline Community College Dist. 7 v. Employment Sec. Dep’t*, 120 Wash.2d 394, 406, 842 P.2d 938 (1992); *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 128, 580 P.2d 246 (1978).

enforcement provisions, and thereby adversely affects the public interest.

To enable trial courts to affect the firm policies of the Act, this Supreme Court must properly interpret and clarify how the punitive provisions of the Act are to be applied. The *Yousoufian* decision, by diluting the import of the statute and prior decisions of this Supreme Court and Courts of Appeal to the point of near meaninglessness, establishes new standards without providing guidelines for lower courts to follow, and establishes new legal principles with no prior support. This court should now take the opportunity to review the provisions of the PDA by reviewing the *Yousoufian* case, and provide guidance for the hundreds of courts, thousands of agencies and millions of affected citizens of Washington State. Under RAP 13.4(b), review of the *Yousoufian* decision is proper.

3. Clarification of Key Provisions of the Far Reaching PDA Must Be Resolved By This Supreme Court.

This court has recognized that cases involving statutory interpretation are appropriate for its review.²⁰ This is true because the interpretation of a statute presents a pure question of law as to which this court is the final arbiter, and because the proper interpretation and application of a statute affects broad classes of cases. It cannot be gainsaid that the *Yousoufian* case, properly decided or not, will have a far-reaching public effect where “full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society,”²¹ and the *Yousoufian* case speaks to how transgressors may be lightly punished and deterred, and private citizens partially compensated for bringing an agency to task. *Yousoufian* does little promote “continuing confidence in . . .

²⁰ *National Elec. Contractors Ass'n, Cascade Chapter v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481, 486 (1999); *Multicare Med. Ctr. v. Department of Soc. & Health Servs.*, 114 Wash.2d 572, 582-83, 790 P.2d 124 (1990).

²¹ RCW 42.17.010(5).

governmental processes,” little to “assure that the public interest will be fully protected,²² and much to derail the intent of the citizens, the legislature, and prior Supreme Court decisions.

This Supreme Court also has held that in interpreting a statute courts are to give effect to the intent and purpose of the Legislature in creating the statute.²³ The “intent and purpose” of the PDA is anything but unclear.

The purpose of the public records act is to ensure the sovereignty of the people and the accountability of the governmental agencies that serve them. RCW 42.17.251; *Newman v. King County*, 133 Wash.2d 565, 570, 947 P.2d 712 (1997); *PAWS*, 125 Wash.2d at 251, 884 P.2d 592.

Limstrom v. Ladenburg, 136 Wn.2d 595, 963 P.2d 869, (1998). Under the *Yousoufian* court’s interpretation, the sovereignty of the people and accountability of governmental agencies may now depend upon the abilities or relative wealth of the person or entity complaining of non-disclosure. This is a far cry from the true intent of the people in originally drafting the Act.

This Court further has held that

If a statute is clear on its face, its meaning is to be derived from the language of the statute alone. [citation] This court has repeatedly held that an unambiguous statute is not subject to judicial construction [citation] and has declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it. [citation] A statute is ambiguous if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because different interpretations are conceivable. [citation] If a statute is ambiguous, this court resorts to principles of statutory construction, legislative history, and relevant case law to assist in interpreting it. [citation]

Id., (emphasis added).

Courts will not construe a statute that is clear and unambiguous on its face.²⁴

²² Declaration of policy of Initiative 276.

²³ *Kilian v. Atkinson*, 147 Wn.2d 16, 50 P.3d 638, (2002).

We assume that the legislature means exactly what it says, [citation] and we give words their plain and ordinary meaning. [citation] Statutes are construed as a whole, to give effect to all language and to harmonize all provisions.

Petitioner submits that generally, and certainly in the context of the instant case, the operative provisions of RCW 42.17.340(4) are not ambiguous; it means exactly what it says:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record [shall be awarded] not less than five dollars and not [more than] one hundred dollars for each day that he was denied the right to inspect or copy said public record.

In full view of the overriding mandate of the Act, especially the mandate that the act's punitive provisions be liberally construed to effectuate its purposes, the statute must be read so that "record" means "record" and not "records." Otherwise agencies will be at liberty to substantially comply with the statute by producing or making available *most* of the requested public records while withholding parts of those records that may cause embarrassment, without suffering the punitive effects of the Act.

Virtually every legislative modification of the already stringent Act has been to strengthen the policy of open government, by strengthening the punitive and deterrent aspects of the Act. Under *Yousoufian*, penalties may now be arbitrarily reduced by trial courts, and burdens imposed on citizens where before there were none.

4. Under *Yousoufian*, Courts Now Have Discretion to Forgive Statutory Penalties Under the PDA.

The question whether a separate penalty should be awarded for each person denied access to a public record "for each record . . . requested" is an unanalyzed question in this State. The issue was discussed in the Court of Appeals ruling in *Lindberg v. Kitsap Cy.*, 82 Wn.App. 566, 575, 919 P.2d 89 (1996), which decision was

²⁴ *Ockerman v. King County Dept. of Developmental and Environmental Services*, 102 Wn. App. 212, 217, 6 P.3d 1214, (2000), citing *Food Servs. of America v. Royal Heights, Inc.*, 123 Wash.2d 779, 784-85, 871 P.2d 590 (1994).

then reversed by a sharply divided Supreme Court without analysis or discussion of the issue. See *Lindberg v. Kitsap County*, 133 Wn.2d 729, 948 P.2d 805 (1997). Although the *Yousoufian* court ruled that the Supreme Court “necessarily rejected [the per-record per day] argument when it reversed the Court of Appeals, stating simply that the trial court’s penalty award was within its discretion,” (*citing Lindberg*, at 747), the plaintiffs in *Lindberg* were non-lawyers appearing pro se, and it is highly likely that the Supreme Court lacked the full and complete briefing on this particular issue necessary to fully analyze and resolve the merits. The Court of Appeals decision did analyze the issue, however, noting simply that “[t]he statutory use of singular phrasing is significant,” and holding:

In addition to their mandatory award for costs and attorney fees, Ms. Lindberg and her father are each entitled to a statutory penalty award for each record they requested, from the date he or she first requested it until the December 23, 1993 judgment in their favor.

Lindberg v. Kitsap County, 82 Wn.App. 566, 919 P.2d 89; (1996).

In its decision reversing the Court of Appeals, the Supreme Court focused primarily on the joinder and “fair use” issues raised, and in two brief paragraphs at the end of the decision cursorily addressed the question “whether the statutory penalty for wrongful withholding of public records under the Public Disclosure Act should be imposed by the trial court in this case.” *Lindberg v. Kitsap County*, 133 Wn.2d 729, 732, 948 P.2d 805 (1997). Writing that the Lindbergs were not entitled to the statutory maximum penalty of \$100 per day because Kitsap County did not act in bad faith the majority simply held that “[t]he discretionary award by the trial court of \$1,110.00, which included ‘award of some penalties,’ was reasonable under the circumstances.” *Id.*, 133 Wn.2d at 747. Four justices dissented with this aspect of the majority’s holding.

In her dissent, with which the three other dissenting justices concurred, Chief Justice Durham wrote that the majority “erroneously reverses the Court of Appeals order remanding for recalculation of the statutory penalty.” *Id.*, 133 Wn.2d at 748.

The Court of Appeals correctly held that, upon the trial court's decision to award penalties, the Lindbergs were entitled to an award within the statutory range for each day they were denied the right to copy the engineering plans. The trial court erred by computing the award in a vacuum. In order to comply with the statutory mandate, the trial court should have entered findings regarding the number of days the Lindbergs were denied the right to copy the plans and then applied a multiplier within the statutory range. Having failed to do so, the matter was correctly remanded for recalculation. Although the Lindbergs have asked this court to compute the statutory penalty instead of remanding, [citation] the parties dispute the number of days at issue; therefore, remand is necessary to resolve this question of fact. The Court of Appeals decision should be affirmed in its entirety.

Id.

The Yousoufian court's decision also passes to the discretion of a trial court the new option of “grouping” records for purposes of assessing statutory penalties, and it imposes new burdens on persons challenging agency action by requiring them to secure a competent attorney and file a lawsuit within 120 days of the agency's last response.

5. Yousoufian Misinterprets the De Novo Review Provision and Must be Corrected

The Yousoufian court concludes that penalties and attorney fees “are matters within the trial court's discretion and subject to review only for an abuse of that discretion.” *Yousoufian*, at 847. This holding conflicts with this Court's clear decisions on the issue, and is at odds with the governing statute. In pertinent part, the *Yousoufian* court wrote:

Courts review agency actions de novo under the PDA. RCW 42.17.340(3). Once a violation of the PDA has been established, courts are required to award reasonable attorney fees and statutory penalties. RCW 42.17.340(4); *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307, 312, (2002). But the appropriate amount of penalties and attorney fees to award are matters within the trial court's discretion and subject to review only for an abuse of that discretion. *Sheehan*, 57 P.3d

at 320 (noting that PDA "grants discretion to the trial court, not to this appellate court, to set the amount of the penalty within the minimum and maximum ranges."). [citation]

The *Yousoufian* Court's reliance on *Sheehan*, is mistaken, because *Sheehan* itself is mistaken. In *Sheehan* the Court of Appeals weaves into the statute a grant of discretion to the trial court, but not to courts of appeal, that neither the legislature nor prior construing courts have apprehended. In pertinent part the *Sheehan* Court wrote:

We first note that this statute grants discretion to the trial court, not to this appellate court, to set the amount of the penalty within the minimum and maximum ranges. Our function is to review claims of abuse of trial court discretion with respect to the imposition or lack of imposition of a penalty, not to exercise such discretion ourselves.

Sheehan, 57 p.3d at 320. *But see* *ACLU v. Blaine School District No. 503*, 95 Wn.App. 106, 975 P.2d 536 (1999), (Court of Appeals imposing penalty itself). *Sheehan* did not cite to any authority for the above quoted conclusion, though earlier in its opinion provides a clue as to the source of this authority when it writes:

Courts review agency denials of disclosure de novo. RCW 42.17.340(3). Courts review the award and amount of penalties under the abuse of discretion standard. *Progressive Animal Welfare Soc'y v. U.W.*, 114 Wash.2d 677, 683-84, 790 P.2d 604 (1990) ("PAWS I").

King County v. Sheehan, 114 Wn. App. ___, 57 P.3d 307, (2002).

But PAWS I did not hold that the Court of Appeals or the Supreme Court has no discretion to consider the issues de novo. PAWS I merely quoted the former RCW 42.17.340(3) which referenced penalties, and then analyzed what factors the trier of fact should consider in fashioning an award of fees. *Progressive Animal Welfare Soc'y v. U.W.*, 114 Wash.2d 677, 683-84, 790 P.2d 604 (1990). Counsel's research on this point indicates that both courts of appeal in *Sheehan* and *Lindberg* erroneously rely on pages 683-84 of the PAWS I decision for the proposition that "The court reviews the amount of penalties under the abuse of discretion standard." As the PAWS I Court itself stated, the

case dealt entirely with “the proper criteria for the award of attorneys’ fees under the State of Washington’s freedom of information act.” PAWS I, at 679.

Contrary to *Yousoufian and Sheehan*, the correct standard of review has been stated repeatedly by this and other courts of appeal throughout this state. For example, in *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 744, 958 P.2d 260, (1998), the Court writes:

This court previously has permitted an agency to argue new legal theories for nondisclosure on review of a public disclosure decision. In *Progressive Animal Welfare Soc’y (PAWS) v. University of Wash.*, 125 Wash. 2d 243, 253, 884 P.2d 592 (1994), we allowed new grounds to be raised on review where the agency had had little time or opportunity to develop its legal position before being required to act, and where review was de novo. Similar reasons justify our consideration of the new arguments presented by the Tribes in this case. (emphasis added).

There is no question that appellate tribunals have discretion to fashion remedies in a de novo review context,²⁵ as does the trial court, but this does not mean, as the *Yousoufian* Court holds, that de novo review is not available to litigants because appellate courts’ hands are tied by the discretion exercised by trial courts. Many notable PDA cases are in accord, including: *Ames v. City of Fircrest*, 71 Wn.App. 284, 292, 857 P.2d 1083 (1993) (with complete record, appellate Court can decide issues of fact and law); *Progressive Animal Welfare Soc’y v. University of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) (Where the record consists entirely of declarations, affidavits and other documentary evidence, the appellate Court stands in the same position as the Trial Court and is not bound by the Trial Court’s factual determinations); *O’Connor v. Washington State Dept. of Social and Health Services*, 143 Wn.2d 895, 25 P.3d 426,

²⁵ See *ACLU v. Blaine School District No. 503*, 95 Wn.App. 106, 975 P.2d 536 (1999), where the Court of Appeals held “all the relevant information that is necessary to impose an appropriate penalty is in the record on review. In an attempt to bring this dispute to closure, we will determine the penalty.”

(2001) ([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);

The holding in *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, ___, 580 P.2d 246, 250 (1978), is instructive:

The action of the agency in withholding any record is explicitly made subject to de novo judicial review

* * * *

Our conclusion is similar to that reached by the federal court in *Department of Air Force v. Rose*, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976). There the court found in the federal FOIA, particularly in its provision for a trial de novo, a clear design to have the court make the determination as to the scope of disclosure and exemption provisions, without limitation to the abuse of discretion standard.

Here too, the Supreme Court must emphasize the meaning of the de novo review provisions, and provide guidance as to how penalties must be imposed for bad faith without deference to the abuse of discretion standard.

F. CONCLUSION

The public's interest in open government, as reflected by the facts of this case, began with a legitimate records request concerning a troubled election in which an estimated 700,000 citizens voted on an \$800 million project where one of the five richest men in the world stood to significantly gain. It progressed through four years of repeated requests for full disclosure met by repeated misrepresentation and delay, and ended in litigation with the trial court imposing a minimal penalty that, Petitioner maintains, knocks the teeth out of the act.²⁶ Because of the magnitude of the key statutory elements

²⁶ Washington Superior Court judges often have little or no experience in assessing punitive damages against a defendant, and few Supreme Court decisions to look to for guidance. Traditionally punitive damages should be sufficient to discourage the defendant, or anyone similarly situated, from repeating such conduct in the future. Here, King County operates on an annual budget of approximately \$3 billion. Proportionally speaking, the penalty award here, \$25,500, is .00085%, or less than one thousandth of one percent of the County's annual budget.

in this case, and the relatively small penalty and lack of standards or guidelines offered by the opinion, this case undoubtedly will be cited by defending agencies for years to come to support their arguments for minimal disclosure and creative penalties contrary to the letter and spirit of the Public Disclosure Act.

In many ways, the Petitioner respectfully submits, this may be *the* case for the Supreme Court to reexamine the question of agency liability for violations of the PDA, and to establish clear and unequivocal guidance for courts, agencies, and citizens of this state as to whether and how penalties ought to be assessed for improper withholding of public records, and how to measure, punish and deter agency bad faith. This is because no other PDA case yet decided by a Washington Appellate Court has involved an agency wrongfully withholding so many non-exempt records for so many days. Nor has any case involved a public interest component of such magnitude.

Respectfully submitted this 13th day of March, 2003.

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Petitioner submits that this amount is grossly insufficient to deter wrongful withholding of records, and if this is the “worst case scenario” under the egregious accompanying facts, the decision may encourage a bureaucratic culture of improper withholding, obfuscation and delay.