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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

ARMEN YOUSOUFIAN,)	
)	
Petitioner)	
)	Case No. 00 2 09581 3 SEA
v.)	
)	
THE OFFICE OF RON SIMS, KING)	
COUNTY EXECUTIVE, a subdivision)	TRIAL BRIEF ON REMAND
of KING COUNTY, a municipal)	
corporation, et al.,)	
)	
Respondents.)	
_____)	

I. ISSUES

On remand from the State Supreme Court, the following issues remain to be resolved:

1. What is the appropriate per-day penalty on the \$5-to-\$100 penalty scale established in RCW 42.17.340(4) for each violation of the Public Disclosure Act (PDA) in this case? Given the egregious nature of King County’s misconduct, plaintiff believes that a penalty of \$90 per day would be appropriate for each of the 8252 penalty days already set by the State

1 Supreme Court.

2 2. What are the proper attorneys' fees to be awarded to Mr. Yousoufian for work
3 done on appeal of this case to the Court of Appeals and the State Supreme Court? Given the
4 time expended on appeal by plaintiff's attorneys on novel issues of public importance, the actual
5 fees incurred, \$179,167.75, would be a reasonable award of attorney fees.
6

7 **II. ATTACHMENTS**

- 8 1. RCW 42.17.340(4)
- 9 2. Trial Court's Findings of Fact and Conclusions of Law (Findings)
- 10 3. Court of Appeals decision
- 11 4. State Supreme Court decision
- 12 5. Chart of Penalty Days
- 13 6. Declarations of David J. Balint, Rand Jack, Michael Brannan, Kirsten Hofgaard.

14 **III. PROCEDURAL BACKGROUND**

15 The procedural history of this case can best be understood against the background of the
16 mandatory penalty provisions of the PDA. Once a violation of the act has been found, statutory
17 penalties are mandatory, as are reasonable attorneys' fees. Penalties are computed by
18 multiplying the number of documents or groups of documents not produced X the number of
19 days each document or group of documents was not produced X a penalty figure on a \$5-to-\$100
20 penalty scale = the penalty.

21 After trial in King County Superior Court, the trial judge made extensive Findings of Fact
22 and Conclusions of Law that are central to this case. She found egregious violations of the PDA,
23 ruled that King County had not acted in good faith, and awarded penalties and attorneys' fees.
24 (Attachment 2, Findings) In calculating the penalty, the trial court subtracted 527 days from the
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1 total days each of six groups of documents (E-J) that were late, for a total reduction of 3,162
2 penalty days. (Findings at 30-31)

3 The Court of Appeals, Division I, ruled that because of King County’s gross negligence,
4 Yousoufian was entitled to more than the statutory \$5 a day minimum penalty awarded by the
5 trial court. The appellate court upheld the trial court’s categorization of the documents withheld
6 into ten groups, constituting ten violations, and upheld the trial court’s computation of penalty
7 days that included the subtraction of some days from the penalty calculation. The Court of
8 Appeals also ruled that the size of an attorney fee award could not be used to justify a smaller
9 penalty award, as the trial court had done. Finally, the Court of Appeals required the award on
10 remand of reasonable attorneys’ fees for the appeal.
11

12 The Supreme Court affirmed the Court of Appeals ruling “that assessing the minimum
13 penalty of \$5 a day was unreasonable considering that the County acted with gross negligence.”
14 Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 438, 98 P.3d 463 (2005). The Court
15 reversed the Court of Appeals’ decision reducing the number of penalty days and ruled that “the
16 PDA does not allow a reduction of the penalty period.” Yousoufian, 152 Wn.2d at 438. The
17 Court also affirmed the Court of Appeals’ decision that the documents produced by King County
18 were properly placed in ten groups for purposes of the penalty calculation and ruled that on
19 remand Yousoufian was entitled to reasonable attorneys’ fees for the appeal to the Supreme
20 Court.
21

22 In summary, the appellate courts have now determined two of the three factors in the
23 penalty calculation – the number of days documents were not produced and the number of
24

1 documents or groups of documents, for a total of 8,252 penalty days.¹ This leaves for decision
2 on remand the third factor in the penalty formula, the per-day penalty on the \$5-to-\$100 penalty
3 scale, to be multiplied by the number of penalty days. Also remaining to be resolved are the
4 reasonable appellate attorney fees.

5 **IV. FACTUAL BACKGROUND**

6
7 On May 30, 1997, Arman Yousoufian made a Public Disclosure Act request to the King
8 County Executive. Mr. Yousoufian sought records relevant to a \$300 million June 17th
9 referendum on public financing for a new football stadium. With regard to his request, the trial
10 court made the following unchallenged Findings of Fact:

11 The letter plainly requested the following:

- 12 1. Studies indicating that the “fast food” tax had not been passed on to
13 consumers (referred to by Ron Sims in an interview on KUOW).
- 14 2. Stadium studies:
- 15 (a) The “Conway Study” and all related file materials. Because there
16 were two Conway Studies, one in 1994 and one in 1996, the letter must be
17 read as incorporating both Conway Studies.
- 18 (b) All records related to the Conway Studies; including how, why,
19 and by whom the studies were ordered and their costs.
- 20 (c) Any other studies, previous or subsequent to the Conway Studies,
21 regarding the economic impacts of sports stadiums.

22 Although Mr. Yousoufian’s request was extremely broad, it was not vague or
23 ambiguous.

24 (Findings at 2).

25 On December 8, 1997, Yousoufian’s attorney sent a second letter to the County
26 Executive, reiterating the initial request and making “an additional request for documents related

¹ See Brannan Dec, Exhibit D. A copy of this exhibit is appended hereto for the convenience of the court.

1 to “how, why and by whom” the various studies (in addition to Conway) were ordered and the
2 cost of each study.” (Findings at 2-3).

3 In its Conclusions of Law, the trial court determined that these two communications
4 constituted two separate PDA requests for purposes of calculating penalties. (Findings at 28-29).

5 Not until June 8, 2001, over four years after Yousoufian’s initial request and on the eve
6 of trial, did Yousoufian receive the majority of final documents that the trial court deemed
7 responsive to his request. In the intervening period, Yousoufian was met with obfuscation,
8 misrepresentations, incorrect factual and legal statements, incompetence and gross negligence.
9 The trial court characterized the conduct of King County as demonstrating a lack of good faith.
10 (Findings at 17).

11
12 The court does not find that there was “bad faith” in the sense of intentional non-
13 disclosure. However, the court finds that there was not a good faith effort by the
14 involved County staff to read, understand and respond to Mr. Yousoufian’s letter
15 in a timely, accurate manner. There was a lack of coordination among the
16 departments and staff assigned to the task, and absolutely no effective oversight
17 of the PDA request. Certainly, King County did not render full assistance to Mr.
18 Yousoufian as required under the statute. Nor was there any effective system for
19 tracking PDA requests to ensure compliance with the law.

20 The County’s lack of good faith was also apparent in misrepresentations made in
21 correspondence to Mr. Yousoufian. Many of the letters contained incorrect
22 statements, both factual and legal. No effort was made to verify the accuracy of
23 those statements.

24 In summary, the County was negligent in the way it responded to Mr.
25 Yousoufian’s PDA request at every step of the way, and this negligence amounts
26 to a lack of good faith. There was a lack of coordination among the departments,
and there was a lack of oversight by the Executive’s office. The people given the
responsibility for this PDA request had only a rudimentary understanding of the
County’s responsibilities under the PDA and apparently were not trained in how
to locate and retrieve documentation, or didn’t take the trouble to do so. No one
ever took the time to carefully read Mr. Yousoufian’s letter.

1 (Findings at 17-18).

2 **V. KING COUNTY’S GROSS NEGLIGENCE, LACK OF GOOD FAITH, DECEPTION AND OTHER**
3 **EGREGIOUS CONDUCT MERIT AN AWARD OF \$90 PER DAY ON THE PENALTY SCALE.**

4 A. The Purpose of the Act Guides Its Application of the Penalty Provision.

5 The Public Disclosure Act contains principled, emphatic statements of purpose. These
6 are meant to guide judicial construction of the Act. “Declarations of policy in the act, although
7 without operative force in and of themselves, serve as an important guide in determining the
8 intended effect of the operative sections.” Hearst Corp. v. Hoppe, 90 Wn.2d 123, 128, 580 P.2d
9 246 (1978).

10 The Act emphasizes the unbreakable link between citizen access to information and a
11 free, democratic society.

13 The Public Disclosure Act was passed by popular initiative and stands for the
14 proposition that, ‘full access to information concerning the conduct of
15 government on every level must be assured as a fundamental and necessary
16 precondition to the sound governance of a free society. RCW 42.17.010(11).’
17 The stated purpose of the Public Records Act is nothing less than the preservation
of the most central tenets of representative government, namely, the sovereignty
of the people and the accountability to the people of public officials and
institutions. RCW 42.17.251.

18 Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d 243, 250-51, 884
19 P.2d 592 (1994). The Supreme Court has noted that “the Legislature leaves no doubt about its
20 intent” in passing the PDA:

21 “The people of this state do not yield their sovereignty to the agencies that serve
22 them. The people, in delegating authority, do not give their public servants the
23 right to decide what is good for the people to know and what is not good for them
24 to know. The people insist on remaining informed so that they may maintain
25 control over the instruments that they have created. The public records
subdivision of this chapter shall be liberally construed and its exceptions narrowly
construed to promote this public policy. RCW 41.17.251.”

1
2 Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d at 260. Three
3 times the Act mandates liberal construction to assure “full access to public records.” RCW
4 42.17.010(11); RCW 42.17.251; RCW 42.17.920.

5 This liberal construction requirement includes RCW 42.17.340(4), the penalty provision
6 of the statute. The penalty provision is an integral, critical support for the Act’s principled goals
7 and the sole tool to deter misconduct and encourage citizen enforcement of the PDA. “The PDA
8 includes a penalty provision that is intended to ‘discourage improper denial of access to public
9 records and [encourage] adherence to the goals and procedures dictated by the statute.”
10 Yousoufian, 152 Wn.2d at 430. “This provision has been treated by this court as a penalty to
11 enforce the strong public policies underlying the public disclosure act.... This court has
12 emphasized that ‘strict enforcement’ of this provision ‘will discourage improper denial of access
13 to public records.’” Amren v. City of Kalama, 131 Wn.2d 25, 35-6, 929 P.2d 389 (1997).

15 B. Under the Extreme Facts of This Case, a Penalty on the Per Day Penalty Scale of
16 \$90 Is Appropriate.

17 With 72% voter approval, a 1972 initiative established the Public Disclosure Act,
18 including a per-day penalty of up to \$25. Because this penalty provision was too constricted to
19 promote the purposes of the Act, the legislature in 1992 discarded the \$25 per-day limit and
20 adopted a per-day penalty ranging from a minimum of \$5 to a maximum of \$100 a day.

21 When the legislature established a \$5-to-\$100 penalty scale, it must have intended that
22 the whole scale would be used and that penalties would be assessed along the full spectrum of
23 the scale according to the circumstances of the case. Why else would the legislature have set the
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1 daily penalty according to a range from \$5 to \$100? No other interpretation of the statute is
2 reasonable.

3 The degree of culpability, extent of misconduct, and need for deterrence dictate where
4 violations place on the scale. Typical, garden-variety violations should fall somewhere toward
5 the middle of the scale. Less serious violations should be penalized less severely, and more
6 culpable and egregious violations should rise to the top of the scale. The purpose of the PDA,
7 “to promote access to public records,” is best “served by increasing the penalty based on an
8 agency’s culpability. . . .” Yousoufian, 152 Wn.2d at 436.

9
10 Consistent with the statutory penalty scale, the Supreme Court in Yousoufian redefined
11 the landscape for the penalty assessment phase of PDA litigation. The Court made clear that
12 statutory penalties are to be taken seriously as instruments for advancing prompt and full public
13 disclosure. For the first time, a Supreme Court case focused on the penalty provisions of the Act,
14 and the Court ruled that pernicious conduct must be dealt with sternly.

15
16 Both the Court of Appeals and the State Supreme Court agree that the trial judge in this
17 case did not properly use the penalty scale as established by the legislature. “[W]e agree with the
18 Court of Appeals that assessing the minimum penalty of \$5 a day was unreasonable considering
19 that the County acted with gross negligence.” Yousoufian, 152 Wn.2d at 439. Justice Sanders,
20 the only justice to address the question of what the per-day penalty assessed against King County
21 should have been, pegs the number at or near the top of the scale. King County’s “failure to
22 comply with Mr. Yousoufian’s PDA request affected the ‘public concern’ far more than any
23 other failure resulting in a mere inconsequential inconvenience to the litigant *alone*.
24 Accordingly, a penalty at or near \$100 per day is not only necessary but also required to punish
25

1 King County’s misconduct.” Yousoufian, 152 Wn.2d at 448. “I agree a minimum penalty is
2 plainly insufficient. Rather, the plain language of the PDA as well as its purposes demand a
3 penalty closer to \$100.” Yousoufian, 152 Wn.2d at 445.

4 The Supreme Court and the Court of Appeals characterized King County’s conduct as
5 “gross negligence.” Yousoufian v. Office of Ron Sims, 152 Wn.2d at 429 and 439; 114 Wn.
6 App. 836, 854, 60 P.3d 667 (2003). Both courts concurred in the trial court’s finding that King
7 County demonstrated a lack of good faith. The Court of Appeals described the County’s conduct
8 as “egregious mishandling of Yousoufian’s record request.” Yousoufian, 114 Wn. App. at 840.
9 Sanders characterized King County’s conduct as “egregious misconduct” and “devious
10 misconduct.” Yousoufian, 152 Wn.2d at 447 and 448.

12 The Findings and Conclusions of the trial court demonstrate that this is a case of extreme
13 misconduct.

14 King County made statements to Mr. Yousoufian that were deceptive and misleading.
15 (Findings at 5, 11 and 18). Several times it told him that all documents had been produced when
16 they had not. (Findings at 5 and 11). It told him that the archives were being searched when
17 they were not. (Findings at 2 and 8). It told him that documents were being compiled when
18 they were not. (Findings at 4). It told him that hundreds of hours had been spend trying to
19 retrieve requested documents when they had not. (Findings at 11). It told him that the Executive
20 is only responsible for retrieving documents in its office, which is not the case. (Findings at 11).

21 The same prosecuting attorney told Mr. Yousoufian to contact the Finance Office for the
22 documents he sought and shortly thereafter wrote to him on behalf of the Finance Office that it
23 did not have the documents. In fact, it did. (Findings at 11-12).

1 On October 9th, an employee wrote to Mr. Yousoufian that an archival search was
2 underway and that documents would be produced in two weeks. That same day a different staff
3 person wrote informing Mr. Yousoufian “that there were no more responsive documents.”
4 (Findings at 8).

5 The Findings and Conclusions are riddled with phrases like “untimely and unreasonable”
6 (Findings at 3), “no evidence that Mr. Woo had the appropriate training or experience” (Findings
7 at 5), “negligently overlooked” (Findings at 5), “negligence of county staff” (Findings at 6), “no
8 action to investigate the problem” (Findings at 6), “not adequately trained or knowledgeable”
9 (Findings at 7), “did not carefully read nor reasonably understand” (Findings at 7), “made no
10 attempt to find ... continued to disregard” (Findings at 7), “this explanation was not reasonable”
11 (Findings at 7), “not reasonable to ask Mr. Yousoufian where to search” (Findings at 8), “lack of
12 coordination” (Findings at 8), “response was inadequate” (Findings at 11), “factually and legally
13 incorrect” (Findings at 11), “statements were unsubstantiated.... Did have the documents”
14 (Findings at 11-12), “lack of communication and coordinated effort” (Findings at 12), “lack of
15 good faith” (Findings at 17), “complete lack of coordination ... no effective oversight” (Findings
16 at 18), “misrepresentations made in correspondence” (Findings at 18), “letters contained
17 incorrect statements both factual and legal” (Findings at 18), “negligent ... at every step of the
18 way and this negligence amounted to a lack of good faith” (Findings at 18), “only a rudimentary
19 understanding of the County’s responsibilities ... were not trained in how to locate and retrieve
20 documentation, or didn’t take the trouble to do so” (Findings at 18).

21 The County failed to maintain an indexing and retrieval system as required by RCW
22 42.17.290, and it failed to conduct a thorough and careful search. It turned compliance with the
23

1 request over to the most untrained, inexperienced personnel. It never claimed an exemption and
2 never gave notice that additional time was needed. No third party enjoined access to the
3 documents. The violation involved a matter affecting substantial public resources and a matter
4 of significant public concern. Mr. Yousoufian made his document request shortly before a
5 public referendum vote on a subject central to the request involving \$300 million in taxpayer
6 money. See Brannan Declaration, § VI. King County has been involved in numerous Public
7 Disclosure Act cases, but judging from its performance in Yousoufian, it has learned little from
8 the experience. Given the size of the King County's 2005 \$3.35 billion dollar budget revenue
9 forecast and the amount at stake in the referendum, only a significant penalty will serve as a
10 deterrent.
11

12 In arguing this case before the State Supreme Court, Senior Deputy Prosecuting Attorney
13 Mark Stockdale could find little or nothing to say in King County's defense.
14

15 Stockdale: I am saying that all documents were produced; most in an
untimely manner. I'm not challenging that Finding at all.

16

17 Judge Madsen: The County could have, you know, the County at any time
18 could have come forward with the records is what I'm trying to say. It didn't need to be three or two years.

19 Stockdale: I agree, Your Honor. I don't dispute that at all.

20 * * * *

21 Stockdale: There's nothing to fall back on, Your Honor. You know, I,
22 I would love to come up here and say "Yeah, we had exemptions" or "We had some really great reasons why we
23 didn't –" the trial judge nailed it. Lack of training, miscommunication, misunderstanding, lack of diligence –
24 no, for the trial court, it amounted to a finding of gross
25 negligence.

1 Judge Madsen: . . . I'm not sure that having you confess the guilt of your
2 client is very helpful in helping us to decide whether or not

3 Stockdale: No, I understand.

4 See Hofgaard Declaration.²

5 While it is too early to see the impact of the Supreme Court's Yousoufian ruling on
6 penalty assessments under the PDA, small glimpses of the impact of the much less expansive
7 Court of Appeals' decision are beginning to appear. For instance, in Building Industry
8 Association of Washington v. State Department of Labor & Industries, 123 Wn. App. 656, 661,
9 98 P.3d 537 (2004), the appellate court noted that "[t]he trial court followed Division I's January
10 6, 2003 opinion in Yousoufian. . . ." The Thurston County Superior Court ordered that certain
11 L&I reports be made available, subject to some redaction. The court subsequently ruled that the
12 proposed L&I redaction was not done in good faith and assessed a \$75-per-day fine. Unlike
13 Yousoufian, the Building Industry case consisted of an isolated act of lack of good faith that was
14 quickly cured, rather than a pernicious, ongoing pattern of deceit and gross negligence that
15 stretched on for years and was not cured until the remedy was compelled by litigation. The
16 Court of Appeals reversed the trial court on grounds unrelated to the \$75 per-day penalty.
17

18
19 Though a trial court has discretion to consider the full range of circumstances,
20 culpability, and mitigating and aggravating factors, a reasonable distribution across the statutory
21 penalty scale looks something like this:
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25 ² See also Washington State's TVW website, for full audio file containing oral argument:
www.tvw.org/search/eventResults.cfm?StartPage=12&CFID=1996628&CFTOKEN=99904685

1 1. \$5-\$20 - no culpability, innocent mistakes, good faith, violation minimal in scope
2 and time, prompt corrective action, significant mitigating factors

3 2. \$20-\$40 - low culpability, mild negligence, good faith, limited mitigating factors,
4 reasonable corrective action, violation moderate in scope and time

5 3. \$40-\$60 - moderate culpability, negligence, good faith more tenuous, modest
6 aggravating factors, slight mitigating factors, violation substantial in scope and time

7 4. \$60-\$80 - significant culpability, blatant repeated negligence, no finding of good
8 faith, no serious corrective action, some public interest in request, violation more substantial in
9 scope and time, aggravating factors far outweigh any mitigating factors

10 5. \$80-\$95 - high culpability, gross negligence, finding of lack of good faith,
11 violation expansive in scope and time, request time sensitive, corrective action negligible,
12 documents produced in response to litigation, deception, no mitigating factors, substantial
13 aggravating factors, high public interest in request, deterrence only by large penalty

14 6. \$95-\$100 - maximum culpability, intentional, bad faith, deceptive withholding

15 The trial court must set the per-day penalty amount independent of any consideration of
16 the award of reasonable attorneys' fees. Yousoufian v. Office of Ron Sims, 114 Wn. App. at
17 854. High attorney fees cannot justify a low penalty award, or vice versa. The imposition of
18 penalties and the award of attorneys' fees serve distinct functions under the statutory scheme.
19 "[T]he compensatory purpose of attorney fee awards is separate and distinct from the punitive
20 purpose of statutory penalties. Accordingly, in order to effectuate the strong public policy in
21 favor of public disclosure, courts should not justify a low penalty award on the basis of a high
22 attorney fee award. RCW 42.17.251." Yousoufian v. Office of Ron Sims, 114 Wn. App. at 854.

1 The undisputed Findings of Fact by the trial court and the characterization of those facts
2 by every court that has looked at this case place the violations at the upper end of the \$80-\$95
3 tier of this outline. Assuming a reasonable distribution of cases across the scale, a rationale
4 argument that does not place this case near the upper end is hard to imagine. That only a hair's
5 breadth separates this case from an intentional, bad faith, \$100 a day violation is suggested by
6 the Chief Justice's rhetorical question that brought laughter in the courtroom at oral argument:
7 "The [trial] court said there wasn't bad faith but there wasn't good faith – where – that one –
8 where are we on that?" That puts us at the top of the scale at about the \$90 per day mark.

10 **VI. YOUSOUFIAN IS ENTITLED TO \$180,728.25 IN REASONABLE ATTORNEYS' FEES FOR**
11 **APPEAL OF THIS CASE TO THE COURT OF APPEALS AND THE STATE SUPREME COURT.**

12 Both the Supreme Court and the Court of Appeals awarded Armen Yousoufian
13 reasonable attorney fees on appeal. Yousoufian, 152 Wn.2d at 439; Yousoufian, 114 Wn.App. at
14 858. These holdings are consistent with the operative statute, RCW 42.17.340(4), which awards
15 costs and fees to prevailing parties, and with the policy of the Public Disclosure Act, which is to
16 make it financially feasible for private citizens to enforce the public's right to access public
17 records without having to rely on government action. See e.g. A.C.L.U. v. Blaine School Dist.
18 No. 503, 95 Wn.App. 106, 115, 975 P.2d 536 (1999); Fritz v. Gorton, 83 Wn.2d 275, 312, 517
19 P.2d 911 (1974).

21 Through his lawyers, Mr. Yousoufian successfully navigated this case through the
22 Washington Court of Appeals and the Washington Supreme Court, achieving in both tribunals a
23 remarkable success. Mr. Yousoufian raised novel issues of law of considerable public
24 importance, and both courts substantially resolved these issues in Mr. Yousoufian's favor. For
25 this excellent result, the culmination of over 40 months of litigation fraught with substantial risk

1 that each appellate tribunal would affirm the lower court's ruling, Mr. Yousoufian requests the
2 full measure of his fees. As detailed in the fee statements of his lawyers, between September
3 2001, (when the trial court issued its decision), and February 2005, (when the Supreme Court
4 issued its mandate), Mr. Yousoufian's lawyers extensively researched and briefed all issues on
5 appeal, which included concerns raised by eight amicus curiae at the Supreme Court, and tended
6 to the innumerable day-to-day details that accompanies any significant litigation. The fees Mr.
7 Yousoufian requests are compelled as fair and reasonable when measured against the applicable
8 standards discussed below.

10 A. The Statute's 'Mandate For Liberal Construction Includes A Liberal Construction
11 Of The Provision For Award Of Reasonable Attorneys' Fees

12 The Public Disclosure Act "is a strongly worded mandate for broad disclosure of public
13 records." Hearst Corp. v. Hoppe, 90 Wash.2d 123, 127, 580 P.2d 246 (1978). Its disclosure
14 provisions "shall be liberally construed and its exemptions narrowly construed" to promote the
15 policy of open government. RCW 42.17.251; RCW 42.17.010(11); RCW 42.17.920; Hearst,
16 supra. "The statute's 'mandate for liberal construction includes a liberal construction of the
17 statute's provision for award of reasonable attorneys' fees.'" Coalition on Government Spying
18 v. King County Dept. of Public Safety, 59 Wn.App. 856, 862, (1990), quoting Progressive
19 Animal Welfare Soc'y v. University of Wash., 114 Wn.2d 677, 683 (1990) (emphasis added). A
20 liberal construction of the statute is "made even more compelling because of the voters' intent in
21 passing this initiative." Nast v. Michels, 107 Wn.2d 300, 310, 730 P.2d 54 (1986).

23 The rationale behind shifting the burden of fees to public agencies is sound. First, few
24 people have the financial incentive necessary to take the risk that they will be required to pay a
25 lawyer to challenge an agency's action on public records. Similarly, few attorneys in the private

1 marketplace are inclined to forego more certain (and more lucrative) hourly or contingent fee
2 matters when faced with the prospect of battling a heavily armed agency when payment for
3 services rendered is, at best, uncertain. Fully compensating attorneys for time spent in furthering
4 the public interest through PDA litigation closely aligns with the attorney's interest in being paid
5 a fair fee and the enforcement provisions of the PDA:
6

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

11 Fritz v. Gorton, 83 Wn.2d 275, 312, 517 P.2d 911 (1974). As the Court of Appeals confirmed in
12 Coalition on Government Spying case, (supra, 59 Wn.App. at 862), the award of attorney's fees
13 is an "entitlement" which flows to the plaintiff. Where "a liberal recovery of costs is consistent
14 with the policy behind the act by making it financially feasible for private citizens to enforce the
15 public's right to access public records," it cannot be overemphasized that permitting a liberal
16 recovery of fees is an even more critical component in effectuating these same governmental
17 goals. A.C.L.U. v. Blaine School Dist. No. 503, 95 Wn.App. 106, 115, 975 P.2d 536 (1999).
18 "The determination of a reasonable fee begins with the calculation of a lodestar figure." Id. at
19 118, citing Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983).
20

21 B. The Lodestar Method Results In An Award Of \$180,728.25 In Reasonable
22 Attorneys' Fees For The Two Appeals

23 1. Lodestar Introduction And Overview

24 In Mahler v. Szucs, 135 Wn.2d 398, 433, 957 P.2d 62 (1998), the Washington Supreme
25 Court explained the lodestar methodology. Under the lodestar method, the court first determines
26

1 whether counsel expended a reasonable number of hours. Mahler, 135 Wn.2d at 434 (emphasis
2 added). Second, the court determines the reasonableness of the hourly rate of counsel. Mahler,
3 135 Wn.2d at 434 (emphasis added). Third, the court calculates the lodestar fee by multiplying
4 the reasonable hourly rate by the reasonable number of hours counsel expends. Mahler, 135
5 Wn.2d at 434. In ‘rare instances,’ the court has the discretion to adjust the fee upward or
6 downward. Mahler, 135 Wn.2d at 434.

8 Outlined below and supported by the declarations of counsel is the correct lodestar
9 analysis to apply here. While counsel do not ask this court for an upward adjustment of their fee,
10 neither is this one of those “rare instances” which support a downward adjustment. Mahler, 135
11 Wn.2d at 434. Counsel submit that the lodestar factors applied to the facts of this case, along
12 with the rationale supporting a multiplier, will serve as a cross-check on the reasonableness of
13 Mr. Yousoufian’s claimed fees and support his position that any downward adjustment is
14 inappropriate.³ This is particularly evident where counsel took this case on a contingency basis
15 thereby foregoing hourly work to litigate in the public interest, and in view of the substantial risk
16 that they could lose the case at either or both levels and recover no fees. See Declaration of
17 Michael Brannan.

19 2. The Total Number Of Hours Expended During More Than 40 Months of
20 Litigation Is Reasonable

21 The formidable tasks associated with this litigation were shared between two and
22 eventually three attorneys working in concert with one another. The total hours each attorney
23 expended is detailed in their respective fee statements, with a sum total of 912.15 incurred.

1 Plaintiff's counsel seek full reimbursement of their claimed fees and submit this request is
2 reasonable under the circumstances of this case taking into account the factors discussed below
3 and in the Brannan Declaration.

4
5 3. Counsel's Hourly Rates Are Reasonable

6 Counsel submit that each attorney's hourly rate charged in this matter is reasonable, and
7 in the case of attorney Rand Jack, economical due to geographic differences in rates. Counsel
8 are confident this court is well aware of the prevailing rates charged by lawyers in Seattle, so no
9 independent research as to prevailing hourly rates has been conducted.

10 As for the hourly rates charged here, as discussed in the respective declarations of
11 counsel, David Balint has been practicing law since 1974, and is an experienced litigator with
12 significant successes in trial and appellate courts across this state. Mr. Balint presently charges
13 \$275 per hour. His rate throughout the Yousoufian litigation is \$250 per hour.

14 Mr. Jack was admitted to practice in Washington in 1969. During his many years in
15 practice Mr. Jack has prevailed in two matters heard by the U.S. Supreme Court, a First
16 Amendment case and a death penalty case, and he has actively participated in a great number of
17 trials and appeals litigated by the Bellingham law firm of Brett & Daugert. Mr. Jack has been
18 associated with the Brett & Daugert firm for over thirty years, and presently charges \$185 per
19 hour.
20

21 Mr. Brannan has been in practice since 1999, and performed much of the work typically
22 delegated to an associate attorney. As set forth in his declaration, this included day to day case
23

24
25 ³ Counsel do not argue that an upward adjustment is inappropriate, and encourage the court to use a multiplier if the
court determines a multiplier is warranted.

1 management, including communications with opposing counsel, outside consultants and the
2 court, most of the research and drafting, and assisting with review of the oral arguments. Mr.
3 Brannan currently charges \$200 per hour, however he has capped his hourly rate in the
4 Yousoufian litigation at \$185.

5
6 4. “After calculating a lodestar fee, the court should consider whether it
7 needs adjustment either upward or downward to reflect factors not already
8 taken into consideration.”

9 “After calculating a lodestar fee, the court should consider whether it needs adjustment
10 either upward or downward to reflect factors not already taken into consideration.” Bowers, 100
11 Wn.2d at 598-99. In ‘rare instances,’ the court has the discretion to adjust the fee upward or
12 downward. Mahler, 135 Wn.2d at 434. In view of the statutory mandate that courts award “all
13 costs, including reasonable attorney fees,” to “any person who prevails against an agency in any
14 action in the Courts,” (RCW 42.17.340(4)), and in view of the mandate of both the State
15 Supreme Court and the Court of Appeals remanding this matter to this court, the plaintiff
16 respectfully submits that this matter is not one of those “rare instances” wherein the court has
17 discretion to reduce or enlarge the incurred fees.

18 While few Washington cases discuss fee multipliers, our courts have established that
19 multipliers are appropriate in contingent fee cases. Physicians Insurance Exchange v. Fisons
20 Corp., 122 Wn.2d 299, 334, 858 P.2d 1054 (1993) (1.5 multiplier based on quality of work and
21 contingency of case). See also Ethridge v. Hwang, 105 Wn.App. 447, 462, 20 P.3d 958 (Div. I,
22 2001) (1.25 multiplier, citing “the risk [of losing the case], the difficulty of the case, and the
23 quality of work”). Counsel submit that these factors are relevant here; that “the risk [of losing
24 the case], the difficulty of the case, and the quality of work,” as well as the factors discussed
25

1 below, warrant a full recovery of fees. Ethridge, 105 Wn.App. at 462; Fisons, 122 Wn.2d at 334.

2 a. The Contingent Nature Of The Fee And The Financial Burden
3 Carried By The Plaintiff

4 A determination of a fair fee must include consideration of the contingent nature of the
5 fee and the difficulties that were overcome in obtaining the settlement. It is an established
6 practice in the private legal market to reward attorneys for taking the risk of non-payment by
7 paying them a premium over their normal hourly rates for winning contingency cases. See
8 Richard Posner, Economic Analysis of Law §21.9, at 534-35 (3d ed. 1986). Indeed, contingent
9 fees that may far exceed the market value of the services if rendered on a non-contingent basis
10 are accepted in the legal profession as a legitimate way of assuring competent representation for
11 plaintiffs who could not afford to pay on an hourly basis. Because Mr. Yousoufian's counsel
12 took this case on a contingent fee basis, and because the vitality and strength of the PDA
13 demands competent representation, Mr. Yousoufian is entitled to a full award of fees. To rule
14 otherwise is to undercut the primary enforcement provision of the PDA by discouraging
15 competent attorneys from representing ordinary citizens in meritorious cases on a contingent fee
16 basis.
17

18 Mr. Yousoufian's counsel have received no compensation for their efforts during the
19 course of the appellate litigation. They have expended a substantial amount of attorney and
20 paralegal time – over 900 hours total – in obtaining this result and any fee award or cost
21 reimbursement has always been fraught with risk and completely contingent on the result
22 achieved and on this Court's exercise of its discretion in making an award. Contingent fee
23 awards should adequately compensate counsel for the substantial risk of nonpayment,
24 particularly here, where the award of attorney's fees is an additional "penalty" intended to deter
25

1 agencies from future misconduct, and where the agency is large enough to bear the burden of its
2 own misconduct itself. Amren v. City of Kalama, 131 Wn.2d 25, 35-36, (1997).

3 b. Results Obtained And Quality of Work Performed

4 Courts have recognized that the result achieved is an important factor to be considered in
5 making a fee award. Hensley v. Eckerhart, 461 U.S. 424, 436 (1983) (“most critical factor is the
6 degree of success obtained”). Because this is a case affecting the public interest and not a
7 personal injury or contract case, the results are best measured not by the ultimate dollar value but
8 by the mere fact that the Supreme Court accepted review and favorably resolved important
9 questions of law. The quality of the work performed may be inferred by the plaintiff’s success at
10 both levels of appeal, including both appellate courts’ recognition of Mr. Yousoufian as the
11 prevailing party by their award to him of costs and fees.

12
13 In Washington the result achieved also has a subjective component. In A.C.L.U. v.
14 Blaine, 95 Wn.App. 106 (1999), the Court suggests at page 119 of the opinion that “the relative
15 importance of the case for both sides or the correspondingly different levels of importance that
16 the parties would place on the trial and appeal” are relevant factors for consideration in making
17 an award of fees. Mr. Yousoufian and his lawyers attributed great importance to this case, as
18 established by the time invested at the expense of gainful employment.

19
20 Even the defendants admitted at trial that the citizens of King County, and of this state,
21 gained tremendous ground because of Mr. Yousoufian’s lawyers’ efforts this case. As Pat Steel
22 testified in her Trial Affidavit:

23
24 In light of the present case, King County is making changes to its public
25 disclosure practices to insure thorough searches for records responsive to every
26 public disclosure request. A contact list is being created which will list contact
information for each division employee responsible for that division’s public

1 disclosure requests. The list will be widely distributed throughout the county and
2 available if requested by any member of the public. The list will be utilized by
3 each division to facilitate communication between divisions to insure that all
4 records responsive to a request are produced, regardless of the executive branch
5 division in which they are held.

6 The Prosecuting Attorney's Office is beginning a new training program for
7 division public disclosure officers focused on public disclosure law and
8 responsibilities. Training sessions will be held on a regular basis for all division
9 employees who are responsible for public disclosure requests. The sessions will
10 be held approximately every six months to update each division's public
11 disclosure officers on new public disclosure issues, including changes to the
12 statute and applicable case law. In addition, division managers will be updated on
13 changes to public disclosure laws and policies during executive cabinet meetings
14 as necessary.

15 *Id.*, at page 5. See Brannan Dec., Exhibit C.

16 On appeal the Yousoufian matter has become a watershed, forever changing the PDA
17 landscape by requiring trial courts to utilize the full spectrum of penalties when assessing
18 statutory fines for agency noncompliance.

19 c. Time And Labor Required, And Preclusion Of Other Employment
20 By The Attorney Due To Acceptance Of The Case

21 In A.C.L.U. v. Blaine School Dist. No. 503, 95 Wn.App. 106, 975 P.2d 536 (1999), the
22 Court of Appeals aptly observed that "the nature of preparation for an appeal often requires
23 additional and more extensive research than preparing for trial." *Id.*, at 120. This case is no
24 exception. On appeal counsel were required to research the legislative history of the PDA and
25 review virtually all published cases and secondary materials to enable them to properly and
26 thoroughly educate and inform the appellate courts, and thereby provide the court with adequate
information to make a fully informed decision affecting the public interest. This included a
necessary review of Freedom of Information Act and "open government" litigation from federal
and other state jurisdictions.

1 The attorney fees incurred on appeal are attributable to litigating this case over the course
2 of 40 solid months, from about October 2001 through February 2005. This case was taken on a
3 contingent basis, at the expense of hourly or more certain contingent fee matters. See. Brannan
4 Dec. The total hours reflect time spent primarily in researching, drafting, and revising all of the
5 many briefs, motions and responsive memoranda, corresponding and communicating with
6 opposing counsel, including the several attorneys representing the amicus curiae,⁴ and various
7 related tasks including assembling and digesting clerk's papers, exhibits, the verbatim report of
8 proceedings, proof-reading, and so on.

10 Because this matter raised and resolved new and important issues of law, the research,
11 briefing and preparation of the matter was far more involved than might otherwise be the case.
12 Nevertheless, appellate counsel have made every effort to ensure the fees requested are not
13 duplicative or unrelated to the direct tasks on appeal, and indeed are reasonable.

14
15 d. Novelty And Difficulty Of The Questions Involved

16 There are no "typical" or "run of the mill" PDA cases; the questions presented are
17 infrequently litigated, and indeed, most lawyers and some judges may never see a single PDA
18 case in their entire career. Here, through the diligence and skill of appellate counsel, the
19 appellate courts resolved open questions of law and clarified ambiguous statutory language,

21
22 ⁴ The list of participating attorneys includes: Janine Joly and Mark Gibson Stockdale, Seattle, for Respondents;
23 Michael John Killeen, Alison Page Howard, Seattle, Davis Wright Tremaine LLP, for Amicus Curiae (Allied Daily
24 Newspapers of Wa) for Amicus Curiae (Wa Newspapers Publishers Assn.); Timothy Dunning Ford, Olympia, for
25 Amicus Curiae (Building Industry Assn. of Wa); Jan Elizabeth Brucker, Seattle, for Amicus Curiae (Citizens for a
Livable Northgate) for Amicus Curiae (Seattle Neighborhood Coalition); William John Crittenden, Patrick Denis
Brown, Seattle, for Amicus Curiae (League of Women Voters of Seattle); Maureen A. Hart, Olympia, for Amicus
Curiae (State of Washington); Edwin Klaich Inkley, Seattle City Attorneys Office, Seattle, for Amicus Curiae
(Washington Association of Municipal Attorneys).

1 including clarification of the correct computation for days late. Most importantly, both the
2 Supreme Court and the Court of Appeals sent a clear message to trial courts to utilize the entire
3 penalty spectrum when assessing fines for non-compliance.

4 e. The “Undesirability” Of The Case, Risks of Litigation, And Other
5 Factors

6 “According to Yousoufian’s declaration, he spent “25 or more” hours discussing his case
7 with different lawyers before one took his case. Yousoufian further stated that he was not able to
8 find a lawyer until the summer of 1999, about one year after the last communication from the
9 County.” Yousoufian v. Office of Ron Sims, 114 Wn.App. 836, 850, 60 P.3d 667, 677 (2003).
10 The reason Mr. Yousoufian could not find an attorney is because few attorneys are inclined to
11 take a case where the prospect of litigation is high and the promise of compensation is uncertain.
12 Both the undesirability of the case and the uncertainty that an ultimate recovery will be obtained
13 are highly relevant in determining risk. In re Washington Pub. Power Supply Sys. Sec. Litig., 19
14 F.3d 1291, 1300 (9th Cir. 1994).

16 In evaluating the services rendered in this case, appropriate consideration must be
17 given to the risks assumed by plaintiffs’ counsel in undertaking the litigation. The
18 prospects of success were by no means certain at the outset, and indeed, the
chances of success were highly speculative and problematical.

19 In re King Resources Co. Sec. Litig., 420 F. Supp. 610, 632, 636-37 (D. Colo. 1976)

20 Similarly, the three attorneys here rendered their services for a period of over four years,
21 sharing the known risks that either the Court of Appeals or the Supreme Court would simply
22 affirm the decision below and effectively divest them of any compensation for their labor. Here,
23 the County was represented by what is probably the second largest law firm in the state (after the
24 Attorney General), with resources vastly superior to that of the plaintiff and his lawyers. The
25

1 County's briefing was excellent at all stages of the litigation, and the County raised serious
2 issues supported by appellate decisions which the plaintiff had to overcome. In the face of these
3 very real risks and the County's possibility of success, Mr. Yousoufian's counsel achieved an
4 excellent result.

5 **VII. CONCLUSION**

6
7 Without any assurance of success, Mr. Yousoufian and his counsel pursued this litigation
8 to an excellent conclusion. Accordingly, plaintiff submits that for the reasons set forth above,
9 this Court should award Mr. Yousoufian not less than \$90 per day for each of the 8252 penalty
10 days for a total penalty of \$742,680, and \$179,167.75 for fees incurred on appeal to the Court of
11 Appeals and the Washington Supreme Court.

12 RESPECTFULLY submitted this 15th day of July, 2005.

13
14
15 _____
16 Rand Jack, WSBA #1437
17 Michael Brannan, WSBA #28838
18 David J. Balint, WSBA #5881
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20
21
22
23
24
25