



CASE REPORT

PUBLIC RECORDS ACT - VIOLATION - IMPOSITION OF PENALTIES. In determining penalties for a Public Records Act violation, a trial court judge should consider several mitigating factors and aggravating factors. *Yousoufian v. Office of Ron Sims*, ___ Wn.2d ___ (March 25, 2010).

I. Facts. In 1997 Mr. Yousoufian made two public records requests to the Office of the King County Executive for records related to studies on sports stadiums. Over the course of several months, King County released many of the records requested, but not all. In March of 2000, Mr. Yousoufian filed suit against the County. King County located additional responsive records and provided those records to Mr. Yousoufian. The trial court found that King County's delay in releasing the records violated the Public Records Act ("PRA") and awarded penalties to Yousoufian at the rate of \$5 per day. Yousoufian appealed the method of calculation and penalty to the Court of Appeals. In 2004 the Court of Appeals held that the method of calculation was appropriate (per category of records vs. per record), but that a penalty of \$5 per day was an abuse of judicial discretion. On review, the Supreme Court agreed that the \$5 penalty was unreasonable considering that the County acted with gross negligence and remanded to the trial court for imposition of penalties greater than the \$5 per day minimum. On remand, the trial court imposed a penalty of \$15 per day. Yousoufian again appealed, claiming the \$15 per day penalty was not enough. The Court of Appeals agreed. The County then petitioned for review by the Supreme Court.

II. Applicable Law and Analysis. In a 5-to-4 decision, the Supreme Court affirmed the Court of Appeals, holding that the trial court's penalty of \$15 per day was an abuse of discretion. In its analysis, the Court began by recognizing the PRA provides no specific indication on how a penalty is to be calculated, then turned to the few reported cases dealing with penalties. Those cases provide that the existence or absence of bad faith and agency culpability are factors to consider in setting the penalty, along with foreseeable economic loss and the public importance of the issue to which the request relates. In addition, the Court stated that deterrence is another factor to consider in determining the penalty. The Court determined that the abuse of discretion standard was not enough, and given the few published cases to offer guidance to trial courts, followed past precedence of reviewing courts providing guidance to trial court judges in exercising their discretionary authority. The Court set out mitigating factors that may serve to decrease the penalty, including: (1) lack of clarity of the request; (2) agency's prompt response or legitimate follow-up inquiry for clarification; (3) agency's good faith, honest, timely and strict compliance with PRA procedural requirements; (4) proper training and supervision; (5) reasonableness of explanation for noncompliance; (6) helpfulness of the agency; and (7) the existence of agency systems to track and retrieve public records. The aggravating factors that may support increasing the penalty include: (1) delayed response by the agency, especially in

circumstances when time is of the essence; (2) lack of strict compliance with procedural requirements (3) lack of proper training and supervision; (4) unreasonableness of any explanation for noncompliance; (5) negligent, reckless, wanton, bad faith or intentional noncompliance with the PRA; (6) dishonesty; (7) public importance of the issue to which the request is related (where importance was foreseeable to the agency); (8) personal economic loss (where foreseeable to the agency); and (9) deterrence considering the size of the agency and the facts of the case. To finally bring this case to a close, the Court, considering the stated factors, held that the appropriate penalty was \$45 per day for 8,252 days (differing lengths of time for various categories of records), for a total penalty of \$371,340. Attorneys fees will be added to this total.

III. Conclusion. The guidance to judges in setting penalties given by the Supreme Court is a helpful roadmap for agencies to consider as they process public records requests. Training is essential to avoid violations in the first place, but it may also mitigate penalties in the event a violation is found. If you would like to schedule staff training or if you have any other questions relating to the Public Records Act, please contact your city attorney.