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AUG 25 2005

DAVID J. BALINT, PLLC  
ATTORNEY AT LAW

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ARMEN YOUSOUFIAN, )  
 )  
 )  
 Petitioner, )  
 )  
 )  
 vs. )  
 )  
 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. )  
 )  
 \_\_\_\_\_ )

No.00-2-09581-3 SEA  
ORDER ON REMAND

This matter has been remanded from the Supreme Court for the imposition of penalties above the statutory minimum for each day that King County denied the petitioner timely access to public records under the public disclosure act (PDA), RCW 42.17.340 (4).

The case was originally decided by the Honorable Kathleen Learned in September 2001. It has been reassigned on remand due to Judge Learned's retirement from the King County Superior Court.

The facts of Mr. Yousoufian's document request to King County and the County's response are set forth in Judge Learned's detailed Findings of Fact and Conclusions of Law and in the opinions of Division One of the Court of Appeals, 114 Wn.App.836 (2003) and the Supreme Court, 152 Wn. 2d 421 (2004).

Although Judge Learned decision has been reversed in part, her factual findings were either unchallenged or affirmed on appeal and therefore form the basis for this court's ruling today. Furthermore, the conclusions of law expressed in her written opinion were affirmed in most regards.

Judge Learned was highly critical of the County's conduct throughout its response to the petitioner's PDA request. She concluded that the County had failed to demonstrate "a good faith effort...to read, understand and respond to Mr. Yousoufian's letter in a timely, accurate manner..." but she declined to find that the County had engaged in "intentional nondisclosure". She also concluded that the County had demonstrated a "complete lack of coordination...and effective oversight of this PDA request" and, finally, that the County was "negligent at every step of the way, and this negligence amounted to a lack of good faith."

The Court of Appeals agreed with Judge Learned that there was no suggestion that the County had intentionally withheld incriminating documents as had occurred in prior PDA cases. The Court concluded "that the County's violation of the PDA was due to poor training, failed communication and bureaucratic ineptitude rather than a desire to hide some dark secret

contained within its files." 114 Wn.App.at 853 Additionally, the Court found that the "factual and legal misrepresentations the County made were grossly negligent" and attributed the finding to Judge Learned's "characterization" of the County's conduct although the term "gross negligence" does not appear in the trial court order. The Supreme Court agreed with the determination that "assessing the minimum penalty of \$5 a day was unreasonable considering that the county acted with gross negligence." 152 Wn 2d 439

With that as background, it is this court's role to assess a penalty above the \$5 per day minimum based on the "gross negligence" of the County. The per day penalty must be multiplied by the amount of days that the party was denied access. That number has already been determined based on Judge Learned's factual findings and the decision of the Supreme Court which reinstated days that Judge Learned had subtracted from the calculation of penalty days. That number is 8,252.

The Supreme Court has directed this court to exercise discretion in determining the daily penalty and rejected the assertion by the petitioner that the appellate courts should subject the decision to *de novo* review.

At oral argument, both the petitioner and the respondents acknowledged that there is no rote formula to determine the per day penalty. The finding of "gross negligence" removes this case from those where the minimum penalty of \$5/day is appropriate but does little to guide this court as to how high the penalty should go. In *ACLU v Blaine Sch. Dist No. 503*, 95 Wn. App.106 (1999), the Court of Appeals, similarly, reversed the trial court for assessing the minimum penalty because of the erroneous finding that the school district had acted in good faith. The Court found that a letter from

the school district Superintendent was "startling evidence of the District's improper motives for refusing to copy and mail the requested documents." Rather than remand the case, however, the Court of Appeals concluded that "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."

Because the District had failed to act in good faith the Court imposed its own penalty of \$10/day. Following the Supreme Court's decision in the present case it is clear that the Court of Appeals will decline to set its own penalty in the future but its analysis is instructive. Even with startling evidence of improper motive, and having looked at "previous awards for guidance" the Court of Appeals set the per day penalty toward the low end of the statutory scale. Thus it may be concluded that the finding of "gross negligence" does not automatically mandate a per day penalty in the range of \$75-100 per day as requested by the petitioner.

Another factor that has been addressed by the appellate courts is whether the conduct of the non-responsive agency caused economic loss to the party requesting the documents. *Amren v. City of Kalama* 131 Wn 2d 25(1997); *Yacobellis v. Bellingham* 64 Wn App 295 (1992). In this case there has been no assertion that Mr. Yousoufian suffered any personal economic loss because of the County's intransigence. The petitioner requests this court to focus on the potential public harm because of the stadium issue that was pending at the time of the request. Although that factor is not addressed in any reported cases it is certainly reasonable to conclude that governmental intransigence on an issue of large public import is more culpable than foot

dragging on an issue of less consequence. But it is clear that the County did not have any documents that it was attempting to hide, or that the documents contained anything other than what had already been disclosed publicly.


In summary, this court does not regard the County's conduct to be significantly more egregious than that of the school district in *ACLU v Blaine School Dist, supra*. The delay in this case was longer and the records more voluminous. But those factors are already reflected in the multiplier which will be applied to the per day penalty. And the issue in this case was of considerable public interest. But in both cases the responding party misinterpreted the PDA and stalled the document request based on bad information or motive. In neither case was there an effort to hide governmental misconduct or to harm the requestor. In view of all these factors, this Court awards a daily penalty of \$15 for a total penalty of \$123,780.

The Supreme Court also remanded this matter for a determination of the petitioner's reasonable attorney's fees and costs for the appeal to the Court of Appeals and Supreme Court. The petitioner has requested \$181,100.35 based on 923 hours of work. The respondent asserts that the fees should be set at \$64,796.25. The respondent contends that the billing records from petitioner's attorneys reflect duplicative efforts, excessive communication with the client as well as each other, and billing for issues on which petitioner did not prevail. The respondent has provided a detailed analysis of the attorneys' timesheets. The respondent does not challenge the hourly

rate of the petitioner's attorneys, nor does the respondent assert that the attorneys inflated the number of hours actually worked.

The petitioner's attorneys have not requested a multiplier of their fees based on a lodestar formula. Clearly, the result which they achieved on appeal was excellent even though they did not prevail on every issue. The only area in which this Court feels that a reduction in the number of hours is justified is the large amount of time that the attorneys spent communicating with Mr. Yousoufian. Under the rules of professional conduct, attorneys have an absolute obligation to keep their clients informed of the progress of their case. This does not mean, however, that 100 hours of attorney-client communication is justified where the facts of a case have already been established at trial and the primary work on appeal is legal research, analysis, writing and argument. This court is subtracting \$10,000 from the requested attorneys' fees for excessive discussions with Mr. Yousoufian. Therefore, fees are awarded in the amount of \$171,100.35.

Dated this 25<sup>th</sup> day of August, 2005

  
Judge Michael Hayden