

by imposing a penalty at the low end of the PRA penalty range. Accordingly, we remand to the trial court with directions to recalculate the penalty in accordance with the guidance set forth in part III. A of this opinion.² Consequently, we affirm but modify the decision of the Court of Appeals.

I

The facts found by the original trial judge are unchallenged and the subject of three published opinions. See *Yousoufian v. Office of King County Executive*, 114 Wn. App. 836, 840-46, 60 P.3d 667 (2003) (*Yousoufian I*), *aff'd part, rev'd in part by Yousoufian v. Office of King County Executive*, 152 Wn.2d 421, 98 P.3d 463 (2005) (*Yousoufian II*); *Yousoufian II*, 152 Wn.2d at 425-29; *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 71-75, 151 P.3d 243 (2007) (*Yousoufian III*). Unchallenged findings of fact are “verities on appeal.” *Davis v. Dep’t of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

On May 30, 1997, Armen Yousoufian submitted a PRA request to the Office of the Executive of King County after Yousoufian heard King County Executive Ron Sims speak about the upcoming referendum election in which voters would decide on

² At oral argument counsel for King County invited this court to calculate the penalty should this court decide the trial court abused its discretion. We decline counsel’s invitation to determine an exact penalty as that is outside the authority of the PRA. See RCW 42.56.550(4) (granting discretion to determine the penalty to the court); *see also Yousoufian v. Office of King County Executive*, 152 Wn.2d 421, 431, 98 P.3d 463 (2005) (viewing discretion to calculate penalty rests with trial court not appellate court) (citing *King County v. Sheehan*, 114 Wn. App. 325, 350-51, 57 P.3d 307 (2002)).

June 17 whether to finance \$300 million for a new football stadium in Seattle. Sims referred to several studies regarding the impact of sports stadiums on the local economy. One of these studies was called the “Conway study.” Yousoufian asked to review all material relating to the Conway study and any other such studies, including a restaurant study concerning the effects of a fast food tax. Yousoufian’s PRA request was forwarded to office manager Pam Cole for a response.

On June 4, 1997, Cole acknowledged receipt of Yousoufian’s PRA request, stating the Conway study was available for review, but archives would have to be searched for other responsive documents. Cole said the archive search would take approximately three weeks; however, before sending this response Cole never inquired into the location of responsive documents. The trial judge found “much of Yousoufian’s [PRA] request involved documentation not yet stored in Archives.” Clerk’s Papers (CP) at 31. On June 10 Yousoufian reviewed the Conway study as well as another study.

The referendum was held on June 17 while most of the requested information was still withheld. On June 20, 1997, Yousoufian sent a letter to the Office of the Executive of King County protesting the three-week delay for the remaining documents responsive to his request. Yousoufian’s letter pointed out one study in particular should not be already archived because the tax it analyzed was recently passed. Cole responded and directed Yousoufian to request that study from the

Washington State Restaurant Association. Cole's letter also stated she would contact Yousoufian the following week regarding the rest of his request. The trial judge found nothing to indicate Cole ever followed up with Yousoufian.

Meanwhile, on June 12, 1997, Linda Meachum, who took over responsibility from Cole for managing Yousoufian's PRA request, contacted Susan Clawson in the King County Department of Stadium Administration, asking her to search for responsive documents. Clawson delegated this task to Steve Woo, her administrative assistant. Woo had no knowledge of the PRA or its requirements and was never trained in how to respond to a PRA request. Meachum never followed up with Clawson to ensure an adequate response.

On July 15, 1997, Woo spoke with Yousoufian by telephone, informing him of a second, earlier Conway study. On July 25, 1997, Woo sent Yousoufian the earlier Conway study along with cost information about this Conway study and another study commissioned by King County. Woo did not include any cost documentation, which Yousoufian requested, and the cost information Woo provided was incorrect. The trial judge found it "apparent from the correspondence that [Woo] did not carefully read or reasonably understand [Yousoufian's PRA] request." CP at 35.

On August 21, 1997, Yousoufian wrote the Office of the Executive of King County to reiterate his request for cost documentation. In response to this letter, Woo permitted Yousoufian to view four more studies. The trial judge found Woo

incrementally released information, rather than all at once, even after he realized Yousoufian's request was for all information.

On August 27, 1997, the Office of the Executive responded to Yousoufian's letter stating it interpreted all PRA requests as requests for records located within that office and any coordination with other agencies was a gratuity. The letter stated Meachum was searching the archives and asked if Yousoufian would like the stadium administration to search their archives as well. The trial judge found, "[i]t was not reasonable to ask [Yousoufian] where to search for the documents responsive to his request." CP at 36.

On October 2, 1997, Yousoufian sent yet another letter reiterating his request for cost documentation. Meachum responded on October 9 stating her office had provided all the documents in its possession pertaining to Yousoufian's May 30 request. Meachum admonished Yousoufian to be more specific in future PRA requests. On the same day, Yousoufian received another letter from the Office of the Executive notifying him that the archival search had been performed and responsive documents were being forwarded to King County's attorneys for review. This letter estimated the documents would be available within two weeks. Yet, there was no evidence an archival search was ever performed, or if one was performed why it took so long. Also on October 9 Woo faxed a letter to Yousoufian explaining more studies could be found on the King County web site. On October 10 Woo sent Yousoufian

two more studies, but he again failed to provide cost documentation.

On October 14, 1997, Yousoufian complained about the conflicting communications he was receiving from different county employees. Oma LaMothe, a King County deputy prosecuting attorney, replied to state she had reviewed Yousoufian's original request and believed it had been fully answered. She stated the archive search had been completed and two boxes of documents had been retrieved that she believed were not relevant to Yousoufian's original request, but she invited Yousoufian to view the documents. She ended the letter by commenting on her difficulty in interpreting Yousoufian's PRA request. However, the trial judge found Yousoufian's request was neither vague nor ambiguous, but clear on its face. Additionally, the trial court found at no time did anyone from King County ask Yousoufian to clarify his request.

On October 28, 1997, Yousoufian viewed the two boxes of documents. He made several attempts to arrange a time to view them sooner, but he was allowed to view them only during office hours in the presence of particular staff members.

After determining he had still not received all the documents he requested Yousoufian hired an attorney. On December 8, 1997, Yousoufian's attorney wrote to once again reiterate Yousoufian's original PRA request. This letter reiterated the types of records Yousoufian sought, including contracts and bills for the studies, bidding documents, and memos discussing the consultants who conducted the studies.

On December 10 Cole e-mailed Woo and others to request the documentation. On December 12 Woo responded, listing the documents he had already provided and stating he had completely responded to Yousoufian's request. The trial court found Woo's statement "demonstrated his ignorance of the initial request." CP at 38. Moreover, Woo indicated he would generate the additional information regarding cost documentation, but the trial judge found nothing to indicate Woo ever did so.

On December 15, 1997, John Wilson, Sims's chief of staff, wrote Yousoufian's attorney outlining the documents King County previously disclosed. Wilson told Yousoufian to direct any further requests for information to the public facility district. On December 31, 1997, Yousoufian's attorney responded, requesting disclosure of documents responsive to Yousoufian's original request, protesting the county's unresponsiveness, and warning Yousoufian would file a lawsuit if his request continued to be ignored. On January 14, 1998, LaMothe responded, stating the Office of the Executive was only responsible for providing documents within its office and that "hundreds of hours" had already been spent responding to Yousoufian's PRA request. CP at 39. The trial judge found this response by LaMothe to be "factually and legally incorrect." *Id.*

Yousoufian's attorney again wrote back, reiterating the request for the documents, but this time asking to be directed to the appropriate office if the records were housed elsewhere. LaMothe responded and advised Yousoufian to write the

finance department. On April 29, 1998, Yousoufian's attorney sent a PRA request to the finance department. After receiving no response, he sent another letter on June 8, 1998. On June 22, 1998, LaMothe wrote back, this time on behalf of the finance department, stating the department did not have the requested documents. But the trial judge found the finance department did, in fact, have the records.

Yousoufian filed this lawsuit on March 30, 2000. In February 2001, another county employee, Pat Steel, was asked to assist in locating documents responsive to Yousoufian's request. Steel proceeded to locate a number of records in the Department of Finance not earlier disclosed because of the department's inability to retrieve records by subject. By April 20, 2001, Yousoufian finally received all the studies and cost documentation he originally requested on May 30, 1997.

To summarize, the unchallenged findings of fact demonstrate King County repeatedly deceived and misinformed Yousoufian for years. King County told Yousoufian it produced all the requested documents, when in fact it had not. King County told Yousoufian archives were being searched and records compiled, when in fact they were not. King County told Yousoufian the information was located elsewhere, when in fact it was not. After years of delay, misrepresentation, and ineptitude on the part of King County, Yousoufian filed suit; nevertheless, it would still take another year for King County to completely and accurately respond to Yousoufian's original request, well past the purpose of his request, the referendum on

public financing of a sports stadium.

According to the first trial court, “the County was negligent in the way it responded to [Yousoufian’s PRA] request at every step of the way, and this negligence amounted to a lack of good faith.” CP at 46. “[Yousoufian’s] requests were clear and the County had an obligation to respond to them in a prompt and accurate manner,” yet King County’s personnel were inadequately trained to handle PRA requests, and King County failed to coordinate any effort to comply with Yousoufian’s PRA request. CP at 40. The trial court found King County could have complied with Yousoufian’s PRA request within “five business days” following Yousoufian’s initial request; nevertheless, the trial court found King County did not act in “‘bad faith’ in the sense of intentional nondisclosure.” CP at 45.

The first trial court originally calculated the PRA penalty at \$5 per day, the lowest possible penalty. Yousoufian appealed and the Court of Appeals reversed, holding the trial court abused its discretion to impose the minimum daily penalty in light of King County’s gross negligence. *Yousoufian I*, 114 Wn. App. at 854. On review this court agreed the minimum daily penalty “was unreasonable considering that the county acted with gross negligence.” *Yousoufian II*, 152 Wn.2d at 439. We remanded to the trial court to impose an appropriately higher penalty.

On remand the trial court calculated the PRA penalty at \$15 per day. Yousoufian again appealed, and the Court of Appeals again reversed. *Yousoufian III*,

137 Wn. App. at 80. The Court of Appeals proposed tiering the penalty scale based on the degrees of culpability found in the *Washington Pattern Jury Instructions*. *Id.* at 78-80. King County petitioned for discretionary review, which we granted. *Yousoufian v. Office of Ron Sims*, 162 Wn.2d 1011, 175 P.3d 1095 (2008).

II

A

“[T]he trial court’s determination of appropriate daily penalties is properly reviewed for an abuse of discretion.” *Yousoufian II*, 152 Wn.2d at 431. The trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court’s decision is “‘manifestly unreasonable’ if ‘the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.’” *Id.* (internal quotation marks omitted) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

B

Determining a PRA penalty involves two steps: “(1) determine the amount of days the party was denied access and (2) determine the appropriate per day penalty between \$5 and \$100 depending on the agency’s actions.”³ *Yousoufian II*, 152 Wn.2d

³ The dissent claims this two-step process “allow[s] the court to consider the length of the violation when determining the [per-day] penalty.” Dissent at 6. But *Yousoufian II* does not support the proposition that the PRA allows a court to set a lower per-day penalty because an agency has continued to violate the act for a high number of days. According

at 438. Step 1 was decided in *Yousoufian II*, 152 Wn.2d at 440. The issue now is whether the \$15 per day penalty is appropriate under these circumstances.⁴

The PRA penalty is designed to “discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute.” *Yousoufian II*, 152 Wn. at 429-30 (alteration in original) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978)). “When determining the amount of the penalty to be imposed the ‘existence or absence of [an] agency’s bad faith is the principal factor which the trial court must consider.” *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997) (alteration in original) (quoting *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 303, 825 P.2d 324 (1992)).

However, no showing of bad faith is necessary to penalize an agency, nor does an agency’s good faith reliance on an exemption exonerate the agency from the penalty. *Id.* at 36-37.

The dichotomy of good faith and bad faith, therefore, merely establishes the

to *Yousoufian II*, “[t]he determination of days is a question of fact,” while the PDA’s purpose “is better served by increasing the penalty based on an agency’s culpability” 152 Wn.2d at 439, 435.

⁴ In *Yousoufian II*, eight justices of this court agreed the statutory minimum penalty of \$5 a day was insufficient and unreasonable considering the county acted with gross negligence. 152 Wn.2d at 439 (majority by Alexander, C.J.); *id.* at 440-41 (Fairhurst, J., concurring); *id.* at 441 (Madsen, J., concurring in part, dissenting in part); *id.* at 445-46 (Sanders, J., concurring in part, dissenting in part). It remains unclear why, if a penalty of \$5 a day was an abuse of discretion then, some justices now think \$15 a day is sufficiently different, given the conduct involved, and that the legislature set the maximum fine at \$100 a day.

bookends of the penalty. *Yousoufian II*, 152 Wn.2d at 435, 438. But there are other considerations as well; in *Yousoufian II* eight justices of this court agreed agency culpability is a major factor in determining the PRA penalty. *Id.* at 438 (“determine the appropriate per day penalty . . . depending on the agency’s actions”); *id.* at 441 (Fairhurst, J., concurring) (“the trial court should determine the proper amount of the penalty based on the agency’s culpability”); *id.* at 446-47 (Sanders, J., concurring in part, dissenting in part) (positing a penalty based on factors including culpability).

Setting the penalty at \$15 per day, the trial court analogized King County’s conduct to that of the school district in *American Civil Liberties Union v. Blaine School District No. 503*, 95 Wn. App. 106, 975 P.2d 536 (1999) (*ACLU*). In *ACLU* the Court of Appeals held a penalty of \$10 per day was appropriate where the school district did not act in good faith.⁵ *Id.* at 115. The school district refused to mail documents that amounted to 13 pages to the ACLU because it incorrectly interpreted the PRA as not requiring it to mail its response. *Id.* at 109. Instead, the school district made the requested documents available for viewing during business hours. *Id.* To calculate the penalty, the Court of Appeals observed the school district refused to mail the documents because it wished to avoid the cost and inconvenience of complying with the PRA. *Id.* at 114. According to *ACLU*, because the district did not act in good

⁵ Despite the dissent’s insistence that the trial judge “aptly analogized this case to [ACLU],” we are not bound by opinions of the Court of Appeals. Dissent at 3. Similarly, the trial court should give more weight to Supreme Court precedent.

faith, a \$10 per day penalty was appropriate. *Id.* at 115.

However, after our decision in *Yousoufian II*, a strict and singular emphasis on good faith or bad faith is inadequate to fully consider a PRA penalty determination. *Yousoufian III*, 137 Wn. App. at 78-79 (noting *Yousoufian II* and stating, “a simple emphasis on the presence or absence of an agency’s bad faith does little more than to suggest what the two poles are on the penalty range and is inadequate to guide the trial court’s discretion in locating violations that call for a penalty somewhere in the middle of the expansive range the legislature has provided”).

Moreover, the conduct in *ACLU*, promptly making records available but refusing to mail them, is fundamentally different from King County’s conduct. The trial court should not have viewed *ACLU* as the guiding precedent to calculate King County’s penalty. In addition to *ACLU* the trial court also considered two factors, economic loss and public harm.

This Court has stated economic loss is a relevant factor. *Amren*, 131 Wn.2d at 38 (citing *Yacobellis*, 64 Wn. App. at 303). As *Yousoufian* points out, however, the harm suffered by PRA noncompliance is the same regardless of economic loss: the denial of access to public records and the lack of governmental transparency. The penalty’s purpose is to promote access to public records and governmental transparency; it is not meant as compensation for damages. *Yousoufian II*, 152 Wn.2d at 429, 435; *see also Yacobellis*, 64 Wn. App. at 301. At most, actual economic loss

calls for a higher penalty, but the absence of economic damages does not call for a lower one.

As to the second factor considered by the trial court, the court correctly reasoned governmental intransigence on an issue of public importance is relevant. King County agrees the penalty should reflect the significance of the project to which the PRA request relates. However, the trial court and King County go too far by requiring *actual* public harm.

The proper formulation of the factor is the *potential* for public harm; assessing a penalty under the PRA should not be contingent on uncovering the proverbial smoking gun, but whether there is the potential for public harm. *See* RCW 42.56.030 (“The people insist on remaining informed so that they may maintain control over the instruments that they have created.”). Here, the requested records dealt with a \$300 million, publicly financed project that was subject to referendum, where time was of the essence. The potential for public harm is obvious; however, the lack of actual public harm is irrelevant to penalizing King County for its misconduct. *See Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 100, 117 P.3d 1117 (2005) (“We interpret the PRA liberally to promote full disclosure of government activity that the people might know how their representatives have executed the public trust placed in them and so hold them accountable.”).

Finally, the trial court failed to consider deterrence as a factor to determine the

penalty. The purpose of the PDA's penalty provision is to deter improper denials of access to public records. *Yousoufian II*, 152 Wn.2d at 429-30. The penalty must be an adequate incentive to induce future compliance. King County agrees deterrence is a factor. Yet nowhere does the trial court mention deterrence.

As *Yousoufian* points out, the trial court implicitly averted the deterrence factor by analogizing to *ACLU*. In *ACLU* the agency in question was a small school district, but King County is the wealthiest county in the state. What it takes to deter a small school district and what it takes to deter the wealthiest county in the state may not be the same thing.

To conclude, the trial court on remand recognized King County's grossly negligent noncompliance with the PRA but failed to impose a penalty proportionate to King County's misconduct, imposing instead a penalty at the extreme low end of the penalty range. As recognized in *Yousoufian II* such a low penalty is inappropriate and manifestly unreasonable in light of King County's extreme misconduct. *Yousoufian II*, 152 Wn.2d at 439.

III

A

Because we hold the trial court abused its discretion, but decline King County's invitation to set the penalty ourselves, we take this opportunity to provide guidance to the trial court when determining a PRA penalty. This guidance is not meant to limit

the trial court's discretion.⁶ To the contrary, appellate courts frequently guide trial court discretion so as to render those decisions consistent and susceptible to meaningful appellate review. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 595, 675 P.2d 193 (1983).

For example, in *Bowers* this Court adopted an analytical framework to calculate reasonable attorney fees under the Consumer Protection Act, chapter 19.86 RCW. 100 Wn.2d at 593-99. Before providing its guidance the Court noted the Consumer Protection Act “provide[d] no specific indication of how attorney fees [were] to be calculated,” but recognized the Consumer Protection Act exhorted it “to liberally construe the act, ‘that its beneficial purposes may be served’.” *Id.* at 594 (quoting RCW 19.86.920).

Similarly, here the PRA provides no specific indication of how the penalty is to be calculated. However, the PRA exhorts us to liberally construe it “to assure that the public interest will be fully protected.” RCW 42.56.030. The PRA is a “strongly worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978); *see also* RCW 42.56.030. The PRA's mandate

⁶ Rather, we provide the considerations below to avoid a *Yousoufian V*, or similar protracted litigation. The dissent characterizes our guidance as a “16-part test” that “endangers trial courts’ discretion and will also prove unhelpful for litigants and courts alike.” Dissent at 7. But how then are trial courts and litigants supposed to avoid a Goldilocks-like scenario whereby appellate courts find penalties too low or too high but provide no meaningful guidance as to where, on a vast range, they should fall? Here, King County, the party against whom the penalty was assessed, is so ready to put this matter to rest that it asked this court to set the penalty.

is unequivocal: “Responses to requests for public records *shall be made promptly by agencies . . .*” RCW 42.56.520 (emphasis added). The PRA is a forceful reminder that agencies remain accountable to the people of the State of Washington:

[t]he people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030.

To begin, the trial court must consider the entire penalty range established by the legislature. *See* Laws of 1992, ch. 139, § 8 (amending the penalty from a \$25 per day limit to the current \$5-100 per day range). Taking into account the entire penalty range fulfills the legislative objective by reserving the extremes for the most and least culpable conduct, allowing the rest to fall somewhere in between.

In addition, considering the entire penalty range eliminates the perception of bias associated with presuming the lowest penalty. Because the minimum penalty is mandatory for violations regardless of an agency’s good faith efforts, starting from the lowest penalty presumes the least violative conduct. The PRA does not support that presumption. *See* RCW 42.56.550(1) (placing the burden of proof upon the state agency to show its compliance).

Courts should bear in mind the following factors, which may overlap and are

not meant to comprise an exclusive list of considerations. Factors that can serve to mitigate the penalty are (1) the lack of clarity of the PRA request; (2) an agency's prompt response or legitimate follow-up inquiry for clarification⁷; (3) good faith,⁸ honest, timely, and strict compliance with all the PRA procedural requirements and exceptions; (4) proper training and supervision of personnel; (5) reasonableness of any explanation for noncompliance; (6) helpfulness of the agency to the requestor;⁹ and (6) the existence of systems to track and retrieve public records.

Conversely, aggravating factors that increase a penalty are (1) a delayed response, especially in circumstances making time of the essence¹⁰; (2) lack of strict compliance with all the PRA procedural requirements and exceptions; (3) lack of proper training and supervision of personnel and response; (4) unreasonableness of any explanation for noncompliance; (5) negligent, reckless, wanton, bad faith, or

⁷ RCW 42.56.520 gives agencies five days to respond either by producing the documents, giving a time needed to produce the documents, requesting clarification of the request, or denying portions pursuant to exceptions. Furthermore, RCW 42.56.550(2) specifically grants the public the right to ask a court to review an agency's inaction if its estimate of the time needed to produce a record is unreasonable.

⁸ Good faith, while not a shield against the imposition of a penalty, is a factor to be taken into account in setting the amount. *Amren*, 131 Wn.2d 25, 38.

⁹ RCW 42.56.100 states that "rules and regulations shall provide for the *fullest assistance* to inquirers and the most timely possible action on requests for information." (Emphasis added.)

¹⁰ While obvious, it bears repeating that delaying documents long past their ability to influence a public vote defeats the PRA's purpose of keeping people informed "so that they may maintain control over the instruments that they have created." RCW 42.56.030.

intentional noncompliance with the PRA; (6) dishonesty; (7) potential for public harm, including economic loss or loss of governmental accountability¹¹; (8) personal economic loss; and (9) a penalty amount necessary to deter future misconduct considering the size of the agency and the facts of the case.¹²

As discussed above this court already recognizes some of these factors: the endpoints of good faith and bad faith, deterrence, the public interest, economic loss, and compliance with the PRA procedures. Providing this analytical framework guides the trial court's discretion "in light of the complex issues and circumstances presented" without substituting the opinion of the appellate judge. *Yousoufian II*, 152 Wn.2d at 450 (Chambers, J., dissenting).

In sum, the legislature established a penalty range between \$5 and \$100 a day to contrast between the least and the most violative conduct, expecting extreme cases to fall at either endpoint with the rest falling in between. Our multifactor analysis is consistent with the PRA and our precedents and provides guidance to the trial court, more predictability to the parties, and a framework for meaningful appellate review.

B

The Court of Appeals in *Yousoufian III* proposed a tiered approach based on degrees of culpability. 137 Wn. App. at 78. Under this approach the culpability tiers

¹¹ RCW 42.56.550(3) states that records may not be withheld because they cause embarrassment to public officials.

¹² A flea bite does little to deter an elephant.

provide the baseline from which the trial court applies other factors to determine the appropriate penalty. *Id.* at 80.

Both parties point out the shortcomings of this approach: culpability definitions do not lend themselves to the complexity of a PRA penalty analysis. The parties agree a nuanced multifactored approach is more appropriate to a PRA penalty determination. King County, however, argues trial courts are sufficiently guided by the current good faith/bad faith dichotomy.

King County's argument is unpersuasive for two reasons. First, only three published cases have reviewed a penalty for its sufficiency: *Lindberg v. Kitsap County*, 133 Wn.2d 729, 746-47, 948 P.2d 805 (1997) (upholding a trial court's order awarding a combination of attorney fees and penalties); *ACLU*, 95 Wn. App. 106; *Yousoufian II*, 152 Wn.2d 421. Given the paucity of published cases after 35 years of PRA case law, a piecemeal approach insufficiently addresses the current need for guidance. *See Zink v. City of Mesa*, 140 Wn. App. 328, 348, 166 P.3d 738 (2007) (remanding for penalty determination "in an amount [the trial court] determines to be appropriate in light of the relevant circumstances").

Second, King County ignores the procedural history of this case. This is the second time this court has reviewed the sufficiency of the penalty. This review provides the appropriate opportunity to set forth relevant considerations to guide a trial court's penalty determination. *Cf. Progressive Animal Welfare Soc'y v. Univ. of*

Wash., 125 Wn.2d 243, 272, 884 P.2d 592 (1994) (declining to create a penalty standard because of the procedural posture of the case).

C

Applying our guidance to these facts shows no mitigating factors but many aggravating ones. King County failed to reply to Yousoufian's clear request promptly or accurately. King County failed to train its responding personnel or supervise its response. King County did not comply strictly to the procedures set forth in RCW 42.56.520, failing to seek clarification from Yousoufian when necessary, failing to give any reason for its delay, failing to set forth an exception for its refusal, failing to provide any estimate of its delayed response time, and making Yousoufian contact King County more than 11 times over the course of two years to obtain the requested information when under the statute only one request should suffice. *See* RCW 42.56.520. King County either made no explanation of its noncompliance or misrepresented the truth. As the trial judge found, with proper diligence and attention, King County could have responded accurately to Yousoufian within five days. The potential for public harm was high; the requested records tested the veracity of King County's assertions regarding a pending referendum on a \$300 million public financing scheme. The request was time-sensitive, seeking documents relevant to the upcoming referendum, whereas the disclosure of these documents was delayed years beyond the election day without justification.¹³

Finally, proper deterrence for King County and others clearly requires a penalty at the high end of the penalty range.¹⁴

IV

Yousoufian properly requests an award of attorney fees and costs incurred in connection with this appeal. *See* RAP 18.1(a). RCW 42.56.550(4) authorizes “all costs, including reasonable attorney fees” to be awarded to “[a]ny person who prevails” in a PRA case. Yousoufian is entitled to an award of all reasonable attorney fees and costs incurred in connection with this appeal plus a supplemental award to be calculated by the trial court for additional fees and expenses incurred on remand. RCW 42.56.550(4).

V

We affirm, but modify, the Court of Appeals’ decision, and remand this case to the trial court for recalculation of the penalty consistent with this opinion plus all

¹³ The dissent argues the total penalty of \$123,780 serves the PRA’s deterrence purpose because, “The legislature did not intend to bankrupt government agencies with huge penalties, as evidenced by its imposition of a one-year statute of limitations for PRA claims.” Dissent at 6 n.2. First, the legislature added the one-year limitation in 2005, so it cannot be used as evidence of legislative intent several years earlier, when the violations occurred and Yousoufian filed suit. Second, even if the statute of limitations had been in effect then, Yousoufian would have met it, and the penalty amount would not have been affected. Third, the trial judge found King County could have responded to Yousoufian’s request within five days, whereas the county was found to have violated the PRA over nearly four years. The dissent’s argument seems counterintuitive: that the longer the flagrant violations continued, the smaller the per-day penalty should be.

¹⁴ King County argues the historic significance of the penalty must be considered when determining the penalty. King County’s argument evades the express language of the statute: “inconvenience or embarrassment” are irrelevant considerations under the PRA. RCW 42.56.550(3).

reasonable attorney fees and expenses incurred by Yousoufian on remand.¹⁵

¹⁵ In addition, we reverse the Court of Appeals' failure to strike portions of an amicus brief noncompliant with RAP 9.11 and RAP 10.3. *See Spokane Research & Def. Fund*, 155 Wn.2d at 98; *United States v. Hoffman*, 154 Wn.2d 730, 735 n.3, 116 P.3d 999 (2005).

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:

Justice Charles W. Johnson

Justice Mary E. Fairhurst

Justice James M. Johnson
