



NEW TESTS GUIDE COURTS IN SETTING PENALTIES FOR PRA

Yousoufian v. Office of Ron Sims: Supreme Court reverses the LARGEST court-assessed Public Records Act penalty in Washington State history—because it was TOO SMALL: What agencies can learn
by Ramsey Ramerman

(WCRP obtained permission to reprint portions of the original complete article that appears in MRSC's Open Government Advisor column at: <http://www.mrsc.org>)

On the 15th of January, the Washington Supreme Court reversed a \$124,000 Public Records Act penalty—according to Justice Owens, the largest PRA penalty ever assessed—and return the case to the trial court for reconsideration. To assist the trial court, the Supreme Court offered several “factors” the trial court should consider when determining where on the \$5-to-\$100-per-day range the daily penalty should fall. The Court’s reasoning for reversal? - \$15 per day was too low. The decision suggests several steps agencies can take to better comply with the PRA and minimize their liability.

Factual and Procedural History

Armen Yousoufian made a request for public records to King County. After being denied records, Yousoufian waited until the end of the 5-year limitation period to file suit. This delay—no fault of the County’s—had the effect of increasing the potential penalty (up to \$100 per day). A trial court found that King County had been repeatedly negligent in how it had handled the records request, and that its conduct amounted to a lack of good faith. But, the trial court elected to impose the minimum daily penalty because the court found the

minimum amount was sufficient to penalize the County.

On the first trip to the Washington Supreme Court, that Court ruled that, given the uncontested finding of a lack of good faith, the minimum penalty was insufficient. It also ruled that the Court could not consider the length of delay in filing suit when calculating penalties because this was a decision the legislature made when it set the statute of limitations (the legislature promptly amended the Public Records Act (“PRA”) to reduce the statute of limitations to one year.) The Supreme Court refused to adopt any standards to guide the trial court on remand, other than holding that the minimum penalty should be reserved for instances where an agency acts in good faith.

Supreme Court Adopts Factors to Guide Trial Courts in Imposing Penalties

On remand, the trial court calculated the penalty at \$15-per-day and imposed a \$124,000 penalty, which amounted to the largest court-assessed PRA penalty in the state’s history. Yousoufian was not satisfied and appealed, again. The Supreme Court reversed the trial court a second time and remanded for a new (third) hearing on penalties. In a fractured opinion, the Court suggested numerous factors that a trial court should consider when imposing penalties.

In Part III, Section A, the opinion reads,

“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

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response or legitimate follow-up inquiry for clarification; (3) good faith, 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; and (7) 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 essence; (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 intentional noncompliance with the PRA; (6) dishonesty; (7) potential for public harm, including economic loss or loss of governmental accountability; (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.

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.”

Ramsey Ramerman continues in his MRSC Open Government Advisor column,

Three Steps Agencies Can Take to Minimize Liability

These factors suggest three steps an agency can take to minimize its liability, should a court find

the agency violated the PRA.

First, make sure agency staff approach their duties with the attitude that they are serving the public when responding to public records requests. And a good attitude starts at the top—agency executives need to put appropriate priority in the agency’s PRA compliance program. Every agency employee who works with public records should be encouraged to read and re-read RCW 42.56.030, dictating: “The people of this state do not yield their sovereignty to the agencies that serve them.”

Second, make sure agency staff are fully trained in the PRA. A properly trained staff will more quickly respond, fully comply with statutory requirements, and only withhold records on supportable grounds.

Third, agencies must adopt and enforce comprehensive PRA rules and procedures. The Supreme Court emphasized that the agency’s procedures must provide for the fullest assistance to requesters. The procedures should go beyond the minimum statutory requirements and address how communications with the requester will be handled, how searches should be conducted and how requests will be tracked.

More important than simply giving an agency a good argument that the minimum penalty should apply after a violation, these steps will help ensure that requests are handled properly and there is no violation in the first place.



The Risk Pool offers “The Public Records Act & E-Records” five times in February and March. The classes are presented by Ramsey Ramerman, Chair of the Public Disclosure Team of Foster Pepper PLLC. Ramsey specializes in representing cities, counties, public hospital districts, ports and other municipal entities on open government issues, including the Open Public Meetings Act, the Public Records Act and the Public Disclosure Act. He serves as the unofficial local government representative on the “Sunshine Committee” that is currently reviewing the exemptions to the Public Records Act.



Here is another Public Records Act case decision that may be of interest:

Rental Housing Association of Puget Sound, a Washington Non-Profit Public Benefit Corporation v. City of Des Moines, a Washington Municipal Corporation

RHA “is the largest association of rental housing owners in the Pacific Northwest. On November 11, 2004, the City [of Des Moines] considered and adopted the crime free rental housing program (Program) in ordinance number 1351. Rental property owners must pay an annual “crime-free housing endorsement fee” based upon the number of rental units each landlord owns, in addition to obtaining a business license.”

“On July 20, 2005, the RHA, in a letter, made its first PRA request to the city, seeking 12 different categories of documents relating to the Program. The letter asked for a privilege log for each record claimed to be exempt from disclosure.” The City acknowledged the request on July 21, 2005, estimating a response within two weeks.

In an August 17, 2005 letter, the City provided 593 pages of documents relating to the Program, but refused to provide others, claiming exemptions. The letter “from the city attorney did not describe individual documents and did not provide a privilege exemption log...” RHA complained about the documents withheld by the City on October 7, 2005, and again requested the City provide a privilege log describing each withheld document and the basis for withholding each document.

Through a series of letters, RHA and the City corresponded about the PRA requests until June 16, 2006, when RHA indicated that “unless a number of withheld documents were produced, the RHA would file suits against the City under the PRA,” which they subsequently did on January 16, 2007. RHA alleged the City “improperly withheld public records under the PRA since at least April 14, 2006, the date that the City first provided a privilege log purporting to identify individual records it was withholding.”

In February of 2007, RHA filed a third PRA request with the City. The City acknowledged the request, but did not respond with any records. “In May 2007, RHA and the City commenced settlement negotiations.” During those negotiations, the City provided copies of the withheld documents “on the condition that the City was not admitting that it improperly withheld documents.” They did not reach a settlement agreement.

“On June 11, 2007, the City filed a motion to dismiss, contending that RHA failed to file its PRA suit within the one-year statute of limitations. The trial court entered an order granting the City’s motion to dismiss. RHA timely appealed and sought direct review” from the Washington Supreme Court.

The Court agreed with RHA “that the limitation period did not begin to run until at least April 14, 2006, when the City first provided a privilege log identifying individual records it was withholding under a claim of exemption.”

In the opinion, the Court stated, “The PRA’s disclosure provisions must be liberally construed and its exemptions narrowly construed. The burden of proof is on the agency to establish that any

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refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part. Administrative inconvenience or difficulty does not excuse strict compliance with the PRA.... The key issue is when a “claim of exemption” under RCW 42.56.550(6) is effectively made. ... a valid claim of exemption under the PRA should include the sort of “identifying information” a privilege log provides.” “Without the information a privilege log provides, a public citizen and a reviewing court

cannot know (1) what individual records are being withheld, (2) which exemptions are being claimed for individual records, and (3) whether there is a valid basis for a claimed exemption for an individual record. Failure to provide the sort of identifying information a detailed privilege log contains defeats the very purpose of the PRA to achieve broad public access to agency records.”

The Court, sitting en banc, reversed the trial court’s order granting the City’s motion to dismiss and remanded for further proceedings.

Duty to Defend Triggered Unless Insured’s Actions “Clearly” Not Covered by Policy

by Jeffrey D. Eberhard of Smith Freed & Eberhard

Claims Pointer: An insurer’s duty to defend is quite broad and will be triggered any time a claim is made against an insured unless the insured’s alleged behavior is “clearly” beyond the scope of the insured’s coverage. Any facts uncovered by an insurer’s investigation may only be used to trigger the duty to defend and may not be used to deny coverage.

One of the duties an insurer owes to an insured under a standard liability policy is the duty to defend the insured against legal actions brought against them. While this duty is broad, it is not absolute. This often places insurers in the difficult position of having to determine whether to provide defense counsel to an insured when it is unclear whether the insured’s alleged behavior is beyond the scope of the insured’s liability policy. In the case of Australia Unlimited, Inc. v. Hartford Casualty Ins. Co., a Washington Court of Appeals provide some guidance to insurers on what to do in these circumstances.

Australia Unlimited, Inc. (AU) is a Washington Corporation that produces and distributes NothinZ brand shoes. Crocs, another shoe corporation, brought suit against AU in 2006 for, among other things, patent and trade dress infringement (i.e. improperly using the image or label of another product or company). AU tendered defense of these claims to its insurer, Hartford Casualty Insurance Company (Hartford), and Hartford denied tender of both claims. AU proceeded to bring claims of bad faith, breach of contract and violation

of the Consumer Protection Act against Hartford for its refusal to defend AU. Hartford brought a motion of summary judgment and the trial court granted it. AU appealed that decision.

The court explained that the duty to defend is quite broad and is triggered when an insured is faced with a complaint that, when “construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy’s coverage.” An insurer’s duty to defend is only absent if “the claim alleged in the complaint is *clearly* not covered by the policy.” (Emphasis added.) If a complaint is ambiguous, it will be decided in favor of triggering the duty to defend.

In determining whether a duty to defend is owed, the general rule is that insurers must base their decision solely on the complaint. If the complaint does not make clear whether coverage exists, the insurer must investigate. As Washington is a notice pleading state (meaning plaintiffs need only plead a short statement of the claim without needing to provide detailed facts), this can place a significant burden on insurers. If the investigation yields information that supports a finding of no coverage, the insurer may not consider its findings when determining its duty to defend. Facts that are not contained within the complaint may only be used to trigger the duty to defend and may not be used to deny coverage. If the investigation leaves an ambiguity as to coverage, the insured is to be

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SAFETY NEWS



TRACKS

Several years ago I watched a thirty minute video produced by a company called Commonwealth Films, Inc. (www.commonwealthfilms.com)



It was such a compelling message, and one worth recalling from time to time, that occasionally I pull the video out of the drawer and review it.

The video is about a highly motivated, aggressive sales rep in a fleet car and a stressed out, over-scheduled truck operator colliding at an intersection. The ensuing accident investigation allows the viewer to glimpse the lives of these two drivers during the previous days and weeks leading up to the accident. Along the way, the viewer is led through a discovery process of identifying signs that if anyone had paid attention to, the accident, and the resultant fatality, could have been averted. Hence, the title of the video, "Tracks".

Just as a hunter reads the signs to track his/her quarry, there are signs or "red flags" leading up to every preventable accident.

The idea behind the video is to bring about viewer awareness of the many red flags prior to an accident in the making. Then, hopefully, with this knowledge the viewer will take preventative action before it is too late.

While it is unlikely someone will identify all the red flags leading up to an accident, usually correcting just one of the flags is enough to break the sequence of events and avert the accident.

Are there red flags in your life right now that are going unnoticed? Perhaps with a little self analysis, you might be able to identify some of these flags, and alter something in time to prevent a serious accident? If so, what might some of these red flags be?

While such a list is sure to be woefully incomplete, here are some red flags that are intended to get you thinking about your own red flags.

Red Flags

Is your health not what it should be? Have you felt lightheaded at times? Do you sometimes have blurred vision? Do you experience a heaviness or tightness in your chest or are you seemingly unable to get a deep breath? There are a myriad of symptoms that could be warning signs of losing consciousness, having a heart attack, stroke, seizure, or other serious medical complication that would be disastrous while behind the wheel. Don't ignore these red flags. Get to a doctor now.

Do you get angry with other drivers, and then act to teach them a lesson? Or, do you get angry with just about everyone? Do you feel depressed most of the time? Do you feel others are out to get you? Do you forget recent events or seem to get easily confused? You may be having mental difficulties which could be from a chemical imbalance, the result of other health issues, or you could be suffering from a mental disorder. You should seek a doctor's advice as to how to proceed.

Do you find yourself distracted when you should be paying attention to your driving? Perhaps there are things in your life that are keeping you from performing your job. Deteriorating relationships, money problems, or the health of a loved one, are just a few that come to mind. It is easy for me to say to you, "don't let those things bother you, pay attention to your driving," but we all know that is easier said than done. However, unless you can minimize those thoughts while you are driving, sooner or later such distractions are going to lead to an accident.



Are you an aggressive driver? Do you take risks while driving? Are you constantly on the lookout for the "Man" because you are speeding? Do you talk on the cell phone or engage in other distractions while driving? Taking risks is a part of living. You might be surprised at the number of people injured each year just from brushing their teeth or taking a shower! But, taking too much risk is inviting disaster. The more risk you take, the

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SAFETY NEWS



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higher the odds are that you will have an accident.

Do you often find yourself struggling to stay awake while driving? Have you been startled awake recently when you heard and felt the rumble strips? Are you always tired because you never seem able to get a good night's sleep? Has someone suggested that you might have a sleeping disorder? Whatever the reasons for your being tired while you are driving, you need to make changes. Driving while tired is definitely a red flag.

Do you push the maintenance intervals on your vehicle? Do you try to squeeze the last mile out of your tires? Do you routinely just jump into your vehicle and drive off without first doing a walk around inspection? These are risky behaviors that can lead to equipment failure and an accident.

I could go on for quite a few more paragraphs of possible red flags, but the idea here is to get you to think about your own life. Don't just put down this newsletter and go back to your routine. Take some time to reflect on your life and try to identify some of your own red flags, before you have that life altering accident.

(This article was written for the February 2009 issues of *Courier Safety Topics Newsletter* by Tim White, Senior Loss Control Consultant for Gallagher Transportation Services. He has given his permission to reprint.)

"The information contained in this report was obtained from sources which, to the best of the writer's knowledge, are authentic and reliable. Arthur J. Gallagher Risk Management Services, Inc. and WCRP makes no guarantee of results, and assumes no liability in connection with either the information herein contained, or the safety suggestions herein made. Moreover, it cannot be assumed that every acceptable safety procedure is contained herein, or that abnormal or unusual circumstances may not warrant or require further or additional procedures."



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given the benefit of doubt and a defense must be provided.

The court concluded that Croc's complaint against AU stated allegations that were not "clearly" beyond the terms of AU's coverage. In fact, it alleged an injury that fit quite neatly within the terms of the policy. Therefore, Hartford did have a duty to defend AU.

—Full Case Available at: www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=611135MAJ

This article is intended to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.

This article first appeared in *TCAA, February 2009*; Jeffrey D. Eberhard of the law firm Smith Freed & Eberhard of Portland, Oregon, has allowed the Risk Pool to reprint this article in its entirety.

Thank you, Jeffrey!

There's still time to register for the Spring Conference!
(Please note some program changes below.)

Wednesday, March 25th

- 8:30 am—2:45 pm CPO Risk Management Course (with lunch)
- 1:15 pm—2:45 pm Intro to Insurance (and maybe Intro to Claims) course review(s)
- 3:00 pm—5:00 pm Proctored exam(s) for Intro course(s)
- 6:00 pm—8:30 pm Orientation for new WCRP member designees (with dinner)
- Evening On your own, but there's a rumor floating around there may be a reception at Marilyn's home, maybe even some friendly poker competition.

Thursday, March 26th

- 8:30 am—Noon Roundtable for County Claims Administrators and County Risk Managers
- Noon—1:00 pm Lunch - Property Appraisals, Mark Hessel of Hiron's & Associates
- 1:00 pm—2:30 pm Presentations . . . Contracting Items of Importance with Bronson Potter; Mega Trends in Workers Comp, Midwest Employers/A.J.G.
- 2:30 pm—5:00 pm Reserved for Standing Committee Meetings: Finance, Personnel, Risk Management, and Underwriting
- 6:00 pm—8:30 pm Executive (and Nominating) Committee Meeting (with dinner); all others on your own.

Friday, March 27th

- 8:30 am—Noon (??) WCRP Spring 2009 Board Meeting

To register, simply logon to the WCRP home-page (<http://www.wcrp.info>) and click on the "Events & Training Calendar" link in the (upper) left column, then onto the "Online Registration Form" in the middle. From the "Events" drop-down, select "Spring Conference" and fill in the applicable boxes. Driving directions and other details will be provided after completing your online registration.

A block of overnight rooms has been set aside for Tuesday (CPO *Risk Management*

Course instructors and participants), and Wednesday and Thursday (conference attendees) for the \$120 per diem rate (\$106 room and \$14 resort fee) plus taxes. Phone Skamania Lodge at 800-221-7117, identify yourself as part of the "Washington Counties Risk Pool Group" and be prepared to provide your name, home/office address, e-address (if any), requested room type, and check-in/check-out dates. This block will remain available until Wednesday, February 25, 2009.





TRAINING & EVENTS



February 2009

2/24/09—2/26/09—Management & Supervisory Training, Columbia County

March 2009

3/4/09—Public Records Act & E-Records, Clark County

3/9/09—3/11/09—AGRiP Spring Conference, Daytona Beach

3/24/09—3/26/09—Management & Supervisory Training, Cowlitz County

3/25/09—CPO Risk Management Training, Introduction to Claims, Skamania County

3/26/09—3/27/09—WCRP Spring 2009 Conference and Board Meeting, Skamania County

3/31/09—4/2/09—Management & Supervisory Training, Yakima County

April 2009

4/7/09—4/9/09—Management & Supervisory Training, Thurston County

4/14/09—Legal Concepts Training: Risks & Roads Workshop, Tacoma

4/19/09—4/23/09—RIMS Annual Conference, Orlando, FL

4/22/09—Legal Concepts Training: Risks & Roads Workshop, Moses Lake

May 2009

5/5/09—Law Enforcement Liability Training, Moses Lake

5/6/09—Law Enforcement Liability Training, Burien

5/19/09—Legal Concepts Training: Avoiding County Liability in Land Use Disputes, Tacoma

5/20/09—Legal Concepts Training: Avoiding County Liability in Land Use Disputes, Moses Lake

5/31/09—6/3/09—PRIMA Conference with AGRiP Pooling Track, Dallas

July 2009

7/29/09—7/31/09—WCRP Summer 2009 Conference and Board Meeting, The Enzien, Leavenworth

You can get more information, access driving directions, and register for classes and events at:

www.wcrp.info

POLICY INFORMATION NOW ON LINE

Our website has a lot to offer. Members can now access policy information on line. From the Home page, click on Members Only/Insurance Documents. After entering your user name and password, you can view liability and property policies for the last three years. We will be adding older policies in the weeks ahead. If you need assistance with your user name and password, please contact Claire@wcrp.wa.gov.