

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

ARTHUR S. WEST, WALTER	)	
JORGENSEN and EVE JOHNSON,	)	No. 67293-2-I
	)	
Appellants,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
PORT OF OLYMPIA, a municipal	)	
corporation,	)	
	)	FILED: March 5, 2012
Respondent.	)	

Grosse, J. — An appellate court reviews a trial court’s award of penalties under the Public Disclosure Act<sup>1</sup> for an abuse of discretion. Where, as here, substantial evidence supports the trial court’s penalty award, we will not substitute our judgment. We affirm the trial court.

**FACTS**

This is the second appeal in this case which involved three separate public disclosure requests for documents from the Port of Olympia regarding lease negotiations with the Weyerhaeuser Company. In the first trial, the court ordered partial disclosure of certain records and awarded the requestors statutory penalties of \$60 per day and attorney fees to the two represented parties. In 2008, this court found that the trial court incorrectly applied the

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<sup>1</sup> Former ch. 42.17 RCW (2003) (recodified as the Public Records Act, ch. 42.56 RCW, Laws of 2005, ch. 274, § 103).

deliberative process exemption to certain documents and remanded the matter to the trial court to determine whether additional exemptions claimed by the Port applied to those records. This court also upheld the trial court's imposition of a daily penalty of \$60, rather than a per record penalty for improperly withheld documents. But because this court was unable to determine whether that same penalty would have applied to the withheld documents had the trial court applied the correct legal standard, this court held that on remand the "trial court may choose to impose a more stringent penalty."<sup>2</sup> The Port waived the other exemptions claimed and released all of the records which had been claimed exempt under the deliberative process exemption.

On remand the trial court imposed a lower penalty of \$30 per day for the remanded records for the original 123 days and a \$15 per day penalty for the 861 days it took to disclose the documents on remand. The trial court further found that additional documents which the appellants sought to include were not part of the original disclosure request and therefore were not included in the calculation of the penalty.

Walter Jorgenson and Eve Johnson (collectively Jorgenson) and Arthur West (pro se) appeal, contending this court should revisit the entire penalty fee, arguing that the trial court was required to impose at least the same penalty or a greater penalty by virtue of this court's decision. Jorgenson and West also claim that there were additional documents which were newly discovered and had not

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<sup>2</sup> West v. Port of Olympia, (West I), 146 Wn. App. 108, 122, 192 P.3d 926 (2008).

been reviewed by the trial court in its original in camera inspection. The majority of these documents were exhibits in litigation on various Port projects. The trial court found these documents were not responsive to their original records request.

#### ANALYSIS

On remand, the appellants requested an award of \$38 million in penalties, but in any event, not less than \$250,000 each. Jorgensen and West also moved the court to redetermine the number of records withheld. The parties contend that the delayed response was critical for their challenge of several of the Port's actions regarding the Weyerhaeuser lease, both before hearing examiners and in the superior court, and that these documents would have strengthened all of their arguments in these ancillary matters. Hence, they argue the Port should be subject to a higher penalty.

The trial court rejected this argument both because many of the newly released documents were earlier versions of the Weyerhaeuser lease and would have had no impact on these other proceedings since the parties had the actual lease, and because the other matters referenced by appellants were dismissed on procedural grounds, not substantive grounds.

For its part, the Port requested that the penalty be reduced to \$10 a day for both the original withholding and for the additional time.<sup>3</sup>

The trial court declined to recalculate the number of days originally

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<sup>3</sup> The Port calculated 876 days as the total, but the court noted that the correct total calculation was 984 days and thus the Port's penalty would be \$9,480.

withheld, but added 861 additional days until the disclosure of the documents following remand.<sup>4</sup> Subsequent to our remand to the trial court in 2008, the Supreme Court issued its decision in Yousoufian v. Office of Ron Sims.<sup>5</sup> Yousoufian held that a trial court could exercise “considerable discretion” in determining where to begin a penalty determination.<sup>6</sup> To guide trial courts, the Yousoufian court set forth multiple factors which a trial court could consider in establishing penalties for wrongfully withheld documents.<sup>7</sup>

Here, the trial court undertook an analysis in which it considered the entire range of penalties that were possible as dictated by Yousoufian, and addressed the arguments put forth by the appellants. The trial court’s order indicates its careful consideration of the Yousoufian factors before imposing the penalties.

We apply the abuse of discretion standard when reviewing an award of statutory public disclosure penalties.<sup>8</sup> As noted in West I,<sup>9</sup>

A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. We do not substitute our judgment for that of the trial court’s but seek only to determine if substantial evidence supports the trial court’s conclusion.

Substantial evidence supports the trial court’s decision. Under these circumstances, we cannot say that the trial court abused its discretion.

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<sup>4</sup> The amount of days documents were withheld is not in dispute.

<sup>5</sup> 168 Wn.2d 444, 229 P.3d 735 (2010).

<sup>6</sup> 168 Wn.2d at 466-67.

<sup>7</sup> 168 Wn.2d at 467.

<sup>8</sup> West I, 146 Wn. App. at 122 (citing Yousoufian v. Office of the King County Executive, 152 Wn.2d 421, 431, 98 P.3d 463 (2004)).

<sup>9</sup> 146 Wn. App. 108, 122, 192 P.3d 926 (2008) (internal footnotes omitted).

Nor is there any merit to the claim that the law of the case demanded a harsher penalty and prohibited the lower penalty issued by the court. While this court did state that on remand, the court “may choose to impose a more stringent penalty,”<sup>10</sup> we did not limit the trial court’s discretion. This court’s use of the permissive word “may” left the decision of what penalty to impose to the trial court. The fact that the trial court chose to impose a different penalty does not defy this court’s previous order so long as that penalty is a reasonable one under the circumstances. This is particularly true given the clarification of the law by the Supreme Court in Yousoufian.<sup>11</sup>

On remand the remaining parties, West and Jorgensen, submitted 284 pages of documents to the court alleging they were wrongfully withheld and not disclosed on the earlier privilege log reviewed by the trial court and this court. Eighty-three of those pages are e-mail transmittals or e-mail threads concerning transmittals or questions regarding the Northwest Cargo Yard grading, sewage, and electrical work for the Port. Only one of them specifically refers to the Weyerhaeuser project in which the Port transmitted the project schedule for the Weyerhaeuser project to Reid Middleton, the engineers coordinating the electrical, sewer, and water projects for the Northwest Cargo Yard.

The remaining documents deal with the agreement for professional services for the Marine Terminal Log Yard project with Reid Middleton. Several documents are minutes from the Port’s meetings regarding the Northwest Cargo

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<sup>10</sup> West I, 146 Wn. App. at 122 (emphasis added).

<sup>11</sup> 168 Wn.2d 444, 229 P.3d 735 (2010).

Yard. In a related case, the superior court found that the cargo yard project was not a portion of a larger project, that is, the re-paving activity was not dependent on the Weyerhaeuser lease, the potential truck traffic related thereto, or the Port's routine maintenance berth dredging.

Any mention of Weyerhaeuser in these documents pertains to ordinarily scheduled yard maintenance and to the necessity that Northwest Cargo Yard's schedule be coordinated with that of the Weyerhaeuser schedule. In sum, the additional documents sought to be introduced dealt with different projects on the Port's property. Although the projects may be related, they were independent of the Weyerhaeuser lease and that records request.

Accordingly, we affirm the trial court.

Grosse, J.

WE CONCUR:

Schiveller, J.

Cox, J.