IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

RICHARD and GINGER LINDEMAN,	)	No. 38947-9-II
	)	
Appellants,	)	
	)	
v.	)	
	)	
KELSO SCHOOL DISTRICT NO. 458,	)	
	)	
Respondent.	)	
_____	)	UNPUBLISHED OPINION

Korsmo, J. — Despite the already over-lengthy history of this public disclosure case, we are compelled by recent Washington Supreme Court precedent to return this matter to the trial court once again. The trial court's decision to set a minimum penalty against the Kelso School District (District) is reversed and the matter remanded for hearing and consideration on the basis of the 16-factor test developed by our Supreme Court in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, ___ P.3d ___ (2010).

PROCEDURAL HISTORY

This case has its genesis in an assault on the appellants' son by another student in a school bus on October 8, 2003. The incident was recorded on videotape. Richard and Ginger Lindeman viewed the videotape the day of the assault. They subsequently submitted a public disclosure request for a copy of the videotape and other materials two months later. The District supplied the other materials but declined to provide a copy of the videotape, arguing that it was exempt from disclosure under both state and federal law.

Litigation ensued. The District offered to provide a copy of the videotape pursuant to a subpoena in a related civil case, but it conditioned doing so on the Lindemans dropping their public records complaint and settling without fees and costs. The Lindemans served the subpoena but declined to dismiss their case. The District refused to honor the subpoena.

The superior court sided with the District and ruled that the videotape was exempt from disclosure. This court affirmed. *Lindeman v. Kelso Sch. Dist. No. 458*, 127 Wn. App. 526, 111 P.3d 1235 (2005), *rev'd*, 162 Wn.2d 196 (2007). The Washington Supreme Court determined that the videotape was not exempt from disclosure and reversed. *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 172 P.3d 329 (2007).

The Court awarded the Lindemans their attorney fees, costs, and penalties as the prevailing party under the Public Records Act (PRA), chapter 42.56 RCW. *Id.* at 204. The matter was remanded for the trial court to award those items. *Id.*

The trial court concluded on remand that the District had acted in good faith and set the penalty at the statutory minimum of $5 per day. The Lindemans appealed directly to the Washington Supreme Court. That court ultimately transferred the case to this court.

While the action was pending here, the Washington Supreme Court released its opinion in *Yousoufian v. Office of Ron Sims*, 165 Wn.2d 439, 200 P.3d 232 (2009) (*Yousoufian* IV*)*. There a majority of the court adopted a 16-factor test for assessing penalty awards under the PRA.[1] The parties addressed *Yousoufian* IV at argument in this court. The Supreme Court subsequently withdrew its opinion in *Yousoufian* IV and ordered reargument. We stayed this matter pending the outcome of the *Yousoufian* IV reargument.

The revised *Yousoufian* IV opinion was released March 25, 2010, and featured one majority opinion and one dissenting opinion. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, ___ P.3d ___ (2010). We subsequently lifted our stay of this case.

[1] The court issued five opinions, none of which garnered more than four votes.

ANALYSIS

The parties agree that the videotape was wrongly withheld for 1,387 days. They strongly disagree on whether the trial court correctly determined that the District acted in good faith. We believe *Yousoufian* IV requires the trial court to once again take up the issue.

The revised *Yousoufian* IV opinion applies to this civil action because it issued before this case had become final. *Robinson v. City of Seattle,* 119 Wn.2d 34, 77-80, 830 P.2d 318 (1992) (new rule of law will be applied retroactively in civil cases unless procedural bar exists), *cert. denied*, 506 U.S. 1028 (1992).

Calculation of a PRA penalty requires a trial court to (1) determine the number of days the government entity has been in violation of the statute and (2) assess an appropriate *per diem* penalty. *Yousoufian* IV, 168 Wn.2d at 459. The PRA authorizes a daily penalty, in the discretion of the trial judge, of not less than $5 and not more than $100. RCW 42.56.550(4). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In the context of a PRA violation, the penalty must be proportionate to the government agency's misconduct. *Yousoufian* IV, 168 Wn.2d at 463.

The primary consideration in setting a penalty is the government's culpability.[2]

[2] Other relevant considerations include economic loss to the requesting party, the degree

Amren v. City of Kalama, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997). There need not be a showing of bad faith, but an agency's good faith likewise is not a defense. *Id.* at 36-38. To aid trial courts in setting an appropriate penalty, the Supreme Court identified a non-exclusive list of 16 factors that would guide trial court discretion in this area. *Yousoufian* IV, 168 Wn.2d at 465-468. Nine of those factors address aggravating circumstances that justify a steeper penalty. *Id.* at 467-468. Seven of those factors mitigate the agency's culpability. *Id.* at 467. No factor is determinative, and not all of them will apply in every case. *Id.* at 468.

The trial court did not have the benefit of the *Yousoufian* IV analysis when it made its penalty determination. Instead, the parties and the trial court here had applied the Court of Appeals' *Yousoufian* analysis subsequently found wanting by the Supreme Court. *Id.* at 463. Under these circumstances, we believe the trial court should have the opportunity to again consider the appropriate penalty in light of the guidance the Court recently supplied. While the primary thrust of the argument below was directed at whether the District acted in good faith or bad faith, that is not the sole issue in a PRA penalty award.[3] *Id.* at 460. *Yousoufian* IV now requires courts to consider additional

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of government intransigence on a matter of public importance, and the need to deter the agency. *Yousoufian* IV, 168 Wn.2d at 461-463.

[3] The parties had diametrically opposed views of the District's offer to turn over the videotape by subpoena if the PRA case was dropped. The Lindemans viewed the offer as an attempt to force them to give up a right under the PRA. In turn, the District treats the

factors. It is therefore appropriate to return this case to the superior court once again to fully consider the new analysis standard.

A claimant prevailing against an agency in a PRA action is entitled to recover costs and reasonable attorney fees. RCW 42.56.550(4). The Lindemans have timely requested costs and fees for this action. But they are not yet prevailing parties. If the trial court changes it penalty award on remand, it shall also award the Lindemans costs and reasonable attorney fees for this appeal.

Reversed and remanded.

A majority of the panel has determined this opinion will not be printed in the

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offer as an acknowledgement that there was another method to obtain the videotape and that when it was turned over, the PRA case would be moot if the attorney fees request were dropped. The trial court appears to have adopted the District's position. Nothing in this opinion requires the trial court to change its view of this situation, but it is free to reconsider that determination in light of the *Yousoufian* IV analysis.

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Korsmo, J.

WE CONCUR:

_____
Van Deren, C.J.

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Penoyar, J.