IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ARTHUR WEST, Appellant, v. CHRISTINE GREGOIRE, GOVERNOR OF THE STATE OF WASHINGTON; STATE OF WASHINGTON, Respondents.	No. 42779-6-II UNPUBLISHED OPINION

Penoyar, J. — Arthur West and the Governor's Office both challenge the trial court's award of penalties against the Governor's Office under the Public Records Act (PRA).[1] West contends that the trial court erred in the award calculation because it incorrectly determined (1) the number of penalty days and (2) the penalty amount. On cross appeal, the Governor's Office contends that the trial court erred when it determined that $25 was the appropriate daily penalty. Because the trial court properly excluded a reasonable period to respond to West's request from the penalty days and did not act unreasonably in determining the appropriate daily penalty to be $25, we affirm.

FACTS

I. Facts

On November 16, 2009, West submitted to the Governor's Office a memorandum addressed to "WASHINGTON STATE GOVERNOR CHRISTINE GREGOIRE AND [Washington Association of Counties (WSAC)] DIRECTOR ERIC JOHNSON." Clerk's Papers

[1] Chapter 42.56 RCW.

(CP) at 45. The memorandum began with the line, "RE: ATTENDANCE AT SECRET SHADOW GOVERNMENT EVENT, AKA (WSAC 2009 ANNUAL CONFERENCE)." CP at 45. West made a request for "all records of communications between the Office of the Governor and WSAC from 2007 to the present" in the last paragraph of his memorandum. CP at 45. The memorandum was routed to the Governor's Constituent Services Unit (CSU).

On December 1, West emailed the Communications Director for the Office of Financial Management and the Director of External Affairs and Senior Counsel to Governor Gregoire. West wrote that he had submitted a public records request to the Governor's Office but had not received a response. He also asked for additional public records, including an August 2, 2006 proclamation of the Governor relating to WSAC and speeches by the Governor to WSAC from 2005 to present. The directors forwarded West's email to the Public Records Officer for the Governor's Office, Melynda Campbell.

That same day, Campbell contacted the CSU and asked whether it had received West's request. CSU responded within an hour, sent a copy of West's memorandum, and explained that it had not seen the public records request on the memorandum. Campbell notified the Governor's Office's staff of West's public records request and directed the staff to advise her of documents responsive to his request. Campbell then emailed West to inform him that his memorandum had not initially been identified as a public records request. She also told West that she would provide an estimate of the time required to respond to his public records request within two days.

On December 2, West responded and stated that he had a deadline of December 7 in a case concerning the status of WSAC; he hoped to receive the requested proclamation and other available information by that date. Campbell then emailed the office staff to inform them of

West's deadline.

On December 3, Campbell emailed 57 pages of responsive documents to West, including the proclamation. Campbell informed West that the search was still ongoing and that she would let him know if additional documents were located.

On December 17, Campbell provided West with an additional 299 pages of documents and an exemption log. One 3-page document was withheld. The exemption log identified the document, "PRR 71-73;" its date, "April 8, 2009;" the author, "Kathleen Drew;" the recipient, "Governor Gregoire;" the type of document, "Briefing Document;" and exemption, "Executive Privilege." CP at 12. Kathleen Drew is one of the Governor's Executive Policy Advisors.

II. Procedural History

On January 11, 2010, West brought a lawsuit under the PRA, claiming that the assertion of executive privilege violated the PRA. The trial court issued an order to show cause to the Governor's Office, directing the Governor's Office to show cause why it should not be found in violation of the PRA. The show cause hearing was scheduled for January 22. West requested a continuance to February 5, which the trial court granted. West then requested a continuance to February 12, waiving any PRA penalties during this period.

On March 12, the trial court entered findings of fact, conclusions of law, and an order compelling disclosure. The trial court concluded, after reviewing, in camera, the document that the document at issue[2] did not contain advice to the Governor and thus would not be subject to a

[2] The document was a "Governor's Meeting Memorandum." CP at 305. "The document was prepared to outline for the Governor the considerations and recommendations by policy staff on the issues anticipated to be raised in a meeting of the Governor and her advisors and the Chair, executive director, and deputy director of the Washington Association of Counties . . . . The heading of the document states the purpose of the meeting as follows; 'Purpose: Discuss

claim of executive privilege even if such a privilege existed. The trial court concluded that it need not address the issue of whether an executive privilege exists in the State of Washington. That day, the Governor's Office provided a copy of the memorandum to West.

West then moved for an award of penalties and costs. The trial court found that the Governor's Office did not respond within the initial 5 business day period set forth in former RCW 42.56.520 (1995), that this was not excusable, but that the form of West's request was unclear and foreseeably contributed to the error. The trial court found that the public records officer for the Governor's Office was "properly-trained and systems were in place to track and respond to requests for records." CP at 168. The trial court also found that after December 1, 2009, "when the Governor's Office first recognized that Mr. West had made a public records request, it acted expeditiously to respond to this request and completed its response in a reasonably timely manner." CP at 168. The trial court concluded that the Governor's Office had acted in good faith throughout the case and in asserting executive privilege. The trial court considered the aggravating and mitigating factors as set forth in *Yousoufian v. Office of Ron Sims* (*Yousoufian V*), 168 Wn.2d 444, 229 P.3d 735 (2010), and concluded that none of the aggravating factors and all of the mitigating factors applied. The trial court determined the appropriate daily penalty to be $25, "a penalty at the lower end of the statutory range." CP at 169.

The trial court calculated the appropriate penalty period to be 87 days. In determining the penalty period, the trial court calculated the period between West's request on November 16, 2009 and March 12, 2010. The trial court then subtracted the 7 days West waived when he

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legislative bills and budget issues.'" CP at 305.

sought a second continuance of the show cause proceeding. The trial court also subtracted 22 days, which the trial court determined to be a reasonable period for the Governor's Office to respond to West's public records request.[3] West moved for reconsideration, and the trial court denied his motion.

West petitioned for direct review at the Supreme Court, primarily seeking review of the trial court's decision to decline considering the issue of whether executive privilege existed in the State of Washington. The Governor's Office filed a notice of cross appeal.

In its answer to West's statement of grounds for direct review, the Governor's Office argued that, under RAP 3.1, West was not aggrieved of the trial court's decision compelling disclosure of the requested document and could not challenge that decision on appeal. Accordingly, the Governor's Office moved to strike the portions of West's brief challenging the trial court's decision not to decide the executive privilege issue.

A Supreme Court Commissioner granted the Governor's Office's motion to strike, reasoning that West was not aggrieved of the trial court's decision compelling disclosure of the requested document. The commissioner then concluded, "And because the governor does not challenge that decision on appeal, Mr. West cannot raise the executive privilege issue as an alternative basis for upholding the superior court's decision." Ruling Granting Motion to Strike & Establishing Briefing Schedule (Supreme Court No. 84629-4) at 2. West then moved to modify the commissioner's ruling; the Supreme Court denied West's motion. The Supreme Court transferred this case to us.

[3] The trial court calculated 22 days to be reasonable by adding the 5 business days an agency is allowed to respond to a records request under former RCW 42.56.520 to the 17 days the Governor's Office took to locate and assemble the records once it responded to West's request.

ANALYSIS

I. Penalty Days

First, West contends that the trial court erred in calculating the penalty period. West contends that the "correct number of penalty days in this case [is] from the date the original request for records in this case was filed by West until the record was produced." Appellant's Br. at 50. In response, the Governor's Office asserts that the trial court properly included in its calculation a reasonable period for the Governor's Office to respond to West's request. The Governor's Office contends that "West's argument depends on the premise that a requester has the right to inspect or copy a record immediately upon request." Resp't's Br. at 21. Because the right to inspect or copy a public record, under the PRA, does not arise until after the agency has had a reasonable period to complete its response to the request, we agree with the Governor's Office.

We review questions of statutory meaning de novo. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 344, 217 P.3d 1172 (2009). The fundamental objective of statutory construction is to ascertain and carry out the legislature's intent. *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). If the statute's language is plain and unambiguous, then the statute's meaning must be derived from the wording of the statute itself. *Rozner*, 116 Wn.2d at 347.

Former RCW 42.56.550(4) (2005) states:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

Under the PRA, responses to requests for public records shall be made within five business days of receiving a public record request. Former RCW 42.56.520. The agency may respond in one of several ways; one option allows the agency to acknowledge that it has received the request and provide a reasonable estimate of the time the agency will require to respond to the request. Former RCW 42.56.520. "Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request." Former RCW 42.56.520.

Under the PRA's statutory language, the penalty period is "each day that [the requester] was denied the right to inspect or copy" the requested public record. Former RCW 42.56.550(4). The Governor's Office persuasively argues that the right arises "*after* the agency has been afforded a reasonable period to complete its response to the request." Resp't's Br. at 17-18. Indeed, under the PRA, an agency is allowed five business days to respond to the request, may respond by providing a reasonable estimate of the time required to respond to the request, and may require additional time to respond to a request based on the need to locate and assemble the requested information. *See* former RCW 42.56.520. These statutes support the trial court's conclusion that the PRA allows an agency a reasonable time to respond to a public record request and a requester is not denied his or her right under the PRA to inspect or copy the requested record during this time period. Accordingly, we hold that the trial court did not err by (1) concluding that an agency is afforded a reasonable time to respond to a public records request

under the PRA and (2) excluding a reasonable period of 22 days from the penalty period.

II. Daily Penalty

Both parties challenge the trial court's conclusion that $25 was an appropriate daily penalty. West contends that the amount was too low and that the trial court erred by failing to decide the executive privilege issue, "in finding all of the mitigating factors to be present when such a finding was not supported in the record, and in failing to find that any of the aggravating factors were present." Appellant's Br. at 43. Conversely, the Governor's Office asserts that the $25 award was too high. Because the trial court's award was not manifestly unreasonable, we disagree with both parties and affirm the trial court.

A. Standard of Review

We review a trial court's determination of appropriate daily penalties to determine whether the decision is manifestly unreasonable or based on untenable grounds or reasons. *Yousoufian V*, 168 Wn.2d at 458-59. A trial court's decision is manifestly unreasonable if it adopts a view that no reasonable person would take despite applying the correct legal standard to the supported facts. *Yousoufian V*, 168 Wn.2d at 458-59 (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

"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.'" *Yousoufian V*, 168 Wn.2d at 459 (quoting *Yousoufian v. Office of King County Executive* (*Yousoufian II*), 152 Wn.2d 421, 438, 98 P.3d 463 (2004)). "Trial courts may exercise their considerable discretion under the PRA's penalty provisions in deciding where to begin a penalty determination." *Yousoufian V*, 168 Wn.2d at 466-67 (citing former RCW 42.56.550(4)). "There is no presumptive starting point, not even the midpoint of

this range; the trial court should use its discretion in determining where to begin." *Sanders v. State*, 169 Wn.2d 827, 862, 240 P.3d 120 (2010).

In *Yousoufian V*, the Supreme Court set forth a number of mitigating and aggravating factors a trial court may consider in determining the appropriate per day penalty. 168 Wn.2d 467-68. Mitigating factors that may decrease the penalty are

> (1) a lack of clarity in the PRA request; (2) the agency's prompt response or legitimate follow-up inquiry for clarification; (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions; (4) proper training and supervision of the agency's personnel; (5) the reasonableness of any explanation for noncompliance by the agency; (6) the helpfulness of the agency to the requestor; and (7) the existence of agency systems to track and retrieve public records.

Yousoufian V, 168 Wn.2d at 467 (footnotes omitted). Aggravating factors that may increase the penalty are

> (1) a delayed response by the agency, especially in circumstances making time of the essence; (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions; (3) lack of proper training and supervision of the agency's personnel; (4) unreasonableness of any explanation for noncompliance by the agency; (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency; (6) agency dishonesty; (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency; (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency; and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

Yousoufian V, 168 Wn.2d at 467-68 (footnotes omitted). "[These] factors may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate considerations. Additionally, no one factor should control. These factors should not infringe upon the considerable discretion of trial courts to determine PRA penalties."

Yousoufian V, 168 Wn.2d at 468.

B. West's Argument

First, West contends that the trial court's penalty was too low and that the trial court erred by finding all of the mitigating factors to be present and by failing to find that any of the aggravating factors were present when the information withheld concerning the operations of the governor's office, as well as those of the [Office of Financial Management] OFM and the WSAC were of foreseeable public importance, when the agency misrepresented the content of the record in an attempt to evade an in camera review completely."[4] Appellant's Br. at 43-44. West does not cite the record or legal authority, contrary to the requirements of RAP 10.3(a)(6); accordingly, we decline to consider this argument. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (declining to consider arguments not supported by any reference to the record nor by any citation of authority). West fails to prove aggravating factor 7, that the request was related to an issue of public importance and that the importance was foreseeable to the agency. Furthermore, aside from his bare assertion that the "agency misrepresented the content of the record," West fails to offer proof of aggravating factors 5 and 6, that the agency acted in bad faith or acted dishonestly. Appellant's Br. at 44.

West also contends that the trial court failed to consider the "lack of strict compliance with the 5 day response period requirement." Appellant's Br. at 45. But the trial court did consider this fact. In finding of fact 19, the trial court specifically found:

> The Governor's Office did not respond to Plaintiff's November 16, 2010 public records request within the initial 5 day period set forth in RCW 42.56.520. While

[4] West also "takes exemption [sic] to each and every one of the mixed findings of fact and law entered by the Court." Appellant's Br. at 44. West does not, however, provide argument to support his assertion.

> [the delayed response was] not excusable, the form of Mr. West's request was unclear and foreseeably would contribute to this error. The public records officer for the Governor's office was properly trained and systems were in place to track and respond to requests for records.

CP at 168.

Finally, West repeatedly asserts that the trial court erred by declining to determine whether an executive privilege exists in this state. He contends that the privilege is "improper" and the trial court's ruling "encouraged the continuing use of the phantom exemption by the Governor." Appellant's Br. at 46. Again, West fails to support his argument with citations to the record or legal authority; thus, we decline to address this issue. *See* RAP 10.3(a)(6); *See Cowiche Canyon Conservancy*, 118 Wn.2d at 809. To the extent that West is arguing that the Governor's Office's claim of the constitutionally-based executive privilege is inconsistent with good faith, we disagree. The Governor's Office provides extensive argument that the "privilege is firmly grounded in the law and recognized by courts throughout the country." Resp't's Br. at 24. The Governor's Office cites to case law recognizing this privilege in Alaska, Vermont, Delaware, and Ohio. The Governor's Office's claim that an executive privilege exists in this state can hardly be characterized as frivolous or made in bad faith.[5] In sum, we reject West's assertion that the trial court's penalty was unreasonably low.

[5] The issue of whether an executive privilege exists in this state is not before this court and does not need to be addressed in order to determine whether the Governor's Office acted in good faith.

C. Governor's Office's Argument

On cross appeal, the Governor's Office argues that the trial court erred by awarding a daily penalty of $25 per day. The Governor's Office contends that "a daily penalty five times the then-statutory minimum was 'manifestly unreasonable'" and a reasonably daily penalty would be $5 per day.[6] Resp't's Br. at 36. Because the trial court properly exercised its considerable discretion, we disagree.

In support of its argument, the Governor's Office cites three cases in which an appellate court set or affirmed a penalty of less than $25 per day. These cases are not instructive. In *American Civil Liberties Union of Washington v. Blaine School District No. 503* (*ACLU*), 95 Wn. App. 106, 109, 115, 975 P.2d 536 (1999), Division One vacated the trial court's award and set the penalty at $10 per day on the basis that it was clear that the District did not act in good faith when it made requested records available for review and copying but refused to copy and mail the requested 13 pages of documents.[7] In *Sanders*, the Supreme Court affirmed the trial court's selection of an $8 per day penalty when the trial court did not presume any starting point, considered the full statutory range, determined that the agency had acted in good faith, and noted

[6] Former RCW 42.56.550(4) states, "[I]t shall be within the discretion of the court to award such person an amount *not less than five dollars* and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record." (Emphasis added). The statute has since been amended to not include a statutory minimum. RCW 42.56.550(4).

[7] In *Yousoufian V*, the Supreme Court concluded that the strict and singular emphasis on good faith or bad faith, seen in *ACLU*, is inadequate to consider fully a PRA penalty determination. 168 Wn.2d at 461.

that the agency had not strictly complied with the PRA's brief explanation requirement.[8] 169 Wn.2d 827, 863, 240 P.2d 120 (2010). In *Yousoufian V*, the Supreme Court set a penalty of $45 per day when "over a period of several years the county repeatedly failed to meet its responsibilities under the PRA with regard to [the plaintiff's] request"; the county was negligent; and the negligence amounted to bad faith. 168 Wn.2d at 456, 469. Certainly, each case has similarities and differences from the present case. All of these cases, however, demonstrate the court's considerable discretion in determining a PRA daily penalty amount.

Here, the trial court properly considered a number of factors before determining the PRA penalty. The trial court considered the mitigating and aggravating factors, concluding that all of the mitigating factors and none of the aggravating factors applied. The trial court also concluded that the Governor's Office exercised good faith in responding to West's requests and in asserting executive privilege. But the Governor's Office failed to recognize West's request for records for several weeks. The trial court found that the Governor's Office did not respond to West's public records request within the initial 5-day period set forth in former RCW 42.56.520 and that this was "not excusable" but the "form of Mr. West's request was unclear and foreseeably would contribute to this error." CP at 168.

Yousoufian V provides guidance for trial courts in setting PRA penalties. *Yousoufian V* does not hold, however, as the Governor's Office appears to argue, that in the absence of all aggravating factors and the presence of all mitigating factors, the trial court must award the statutory minimum penalty. Trial courts have considerable discretion to determine PRA penalties

[8] The Supreme Court noted that the trial court did not expressly examine all of the *Yousoufian V* factors, as the factors had not yet been announced. *Sanders*, 169 Wn.2d at 863.

and the trial court did not adopt a view that no reasonable person would take despite applying the correct legal standard to the supported facts. Accordingly, we reject the Governor's Office's argument and affirm the trial court's award.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Armstrong, J.

Hunt, J.