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Eric T. Quinn, Editor

Joseph F. Quinn, Staff Writer

The law firm of Quinn and Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

Our office is located at:

7403 Lakewood Drive West, Suite #11
Lakewood, WA 98499-7951

Mailing Address:
20 Forest Glen Lane SW
Lakewood, WA 98498

Office Telephone: 253-590-6628

Email Joe at firelaw@comcast.net
Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at:
firehouselawyer.com

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PUBLIC RECORDS ACT CASE – ESTIMATES OF TIME TO RESPOND

In a decision handed down on September 17, 2019, Division II of the Court of Appeals held that the Public Records Act requirement in the former version of RCW 42.56.520(3) with respect to providing an estimate of time to respond does not refer to the time to fully respond, but at least with a large request for documents produced in installments, may only refer to the estimated time to produce the first installment.

The salient facts were these in *Health Pros Northwest, Inc. v. State of Washington and Department of Corrections*, No. 52135-1-II:

After the Department of Corrections received a lengthy records request for voluminous documents, it acknowledged receipt of the request in a timely manner but did not provide an estimate of the time needed to respond to the request. It merely stated it "will respond further as to the status of your request within 45 business days…." The DOC produced the first installment of records within that 45 day time frame. HPNW filed a legal action, contending that DOC was violating the PRA by not fully responding within a reasonable time and asked the court to find that the DOC time estimate was unreasonable.

The superior court ruled that DOC did violate the statute by not responding to the PRA request within five business days by producing records, denying records, or providing an estimate of time when it would respond. Actually, all the DOC did was state that it would deal with the request within 45 further business days. The court in effect held that an estimate is required in the acknowledgment letter produced within the first 5-day period.

Interestingly, however, the court did rule in favor of the DOC with respect to the plaintiff's contention that the PRA requires the estimate to be the time for full and complete compliance, i.e. the time when all of the request would be completely fulfilled. Instead, the court held (especially with such large, voluminous records requests) that the responding agency must complete the first installment of records production within the estimated time.

Thus, there are two lessons to be learned from this case. The agency must provide an estimate in the initial "5-day letter" acknowledging receipt of the PRA request. Second, if the request is a large one, it will probably suffice if the estimate of time relates only to the first installment, i.e. batch of records produced. But do not ever fail to give a time estimate or you risk a penalty finding.

And speaking of penalties in PRA cases…

PRA PENALTY CASE

As this article is written on September 26, 2019, we are reporting on a case decided by the Washington Supreme Court today, sitting *en banc.* In *Hoffman v. Kittitas County and the Kittitas County Sheriff*, No. 96286-3, the Supreme Court of our state affirmed the lower court's decision, which had upheld the trial court's discretion in imposing a penalty of $15,498 for delay in producing public records.

In such PRA penalty cases, the appellate courts review the trial court decision to ensure there has been no abuse of discretion. However, the legislation makes it clear that the trial court is afforded a good deal of discretion, when applying what are called the *Yousoufian* factors (named after a seminal case that laid out a non-exclusive list of 7 mitigating factors and 9 aggravating factors for the trial court to consider).

In *Hoffman*, the trial court judge awarded $.50 per day per record (per page, per photo, or per video) for the 247 days of delay. This amounted to a daily penalty of about $63 per day, for a total penalty of $15,498.00. The Court of Appeals and the Supreme Court agreed that the trial court properly found no bad faith and no abuse of discretion by the trial court was found.

Briefly, here are the facts of this case:

Mr. Hoffman requested of the Kittitas Sheriff's Office all records, including photos and video, referencing a suspect named Erin Schnebly. The Sheriff's clerk who dealt with the records request apparently believed erroneously that the PRA's privacy statute created some concerns about producing such records, as she saw no connection whatsoever between Hoffman and Schnebly. Her initial search uncovered about 7

police reports on Schnebly, but she found no photos or video in the office's records system. Actually, there were 95 photographs and 2 videos.

The Clerk did call Hoffman for clarification, but added that she saw no connection of Hoffman to these incidents. Ultimately, Hoffman compromised and accepted only the "face sheets" for the incidents. The clerk then sent him the heavily redacted face sheets and an exemption log, relying on the inapplicable "privacy" exemption of RCW 42.56.050.

The clerk was preparing for retirement, and while working only part time she was training her replacement. That person reviewed the file and thought the first clerk may have been wrong. Later, while cleaning out the first clerk's desk, the second clerk found the paper copy of Hoffman's request. She discussed her concern that the request might not have been handled properly with her supervisors.

A few months later, Hoffman came into the office and spoke with the second clerk. He felt there were more incidents and more records that were not produced.

Shortly thereafter, Hoffman re-submitted his records request. He promptly received from the clerk the 7 incident reports with few redactions, the 95 photos and two videos.

After Hoffman sued, the trial court found that the county and Sheriff's office had violated the PRA by withholding the documents for 246 days. After weighing the mitigating and aggravating factors set out in *Yousoufian*, the court found the penalty of $15,498.00 or $.50 per day for each page of records, and each photo and each video.

And it could have been worse: The court found and the Supreme Court agreed that there was no bad faith on the part of the county (just ignorant mistakes by the first clerk).

For purposes of training, we include here the mitigating factors of *Yousoufian*: (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.

And the aggravating factors suggested by *Yousoufian:* (1) delayed response by the agency, especially in circumstances making time of the essence; (2) lack of strict compliance by the agency with all 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.

This list of factors is not necessarily exhaustive and is merely provided to give guidance to trial courts. However, we find the mitigating and aggravating factors to be very valuable to use in training your public records officer(s).

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