Penalty on Agency for Unlawfully Withholding Hundreds of Public Records, and Releasing Them from Time to Time Over a Period of Two Years, May Be Calculated as Though They Are All One Record

by Michael B. Gillett*

The Washington Court of Appeals has held that in calculating a penalty to be assessed against a government agency that violated the Public Records Act (PRA) by withholding hundreds of records, eventually releasing them from time-to-time on nine occasions over two years, all of the records may be considered as part of one group (as though they are a single record) where they relate to the same subject matter.

In *Double H, L.P. v. Washington Dep't of Ecology* (No. 29918-0-III, Feb. 23, 2012), the Court of Appeals, Division III, affirmed the decision of the trial court to place all of the records in a single group, instead of grouping the records according to the dates on which they were requested and produced. Ironically, before the trial court, both parties – Double H and Ecology – had agreed that the groups should be based on the time of production (measured from the date of each request to the date of production). In this case, where the per day penalty set by the trial court was $27, the practical difference is between a penalty of $18,441 (single group) and $141,237 (multiple groups).

The PRA requires that all state and local government agencies make all public records available to the public for inspection and copying unless the record falls within a specific statutory exemption. RCW 42.56.070(1). A person who has been denied the right to inspect or copy a non-exempt record may bring a lawsuit against the agency. RCW 42.56.550(1). Any person who prevails in such a lawsuit is entitled to an award of a penalty against the agency of up to $100 "for each day that he or she was denied the right to inspect or copy said public record." RCW 42.56.550(4). Determining the penalty has been described as a two-step process. First, the court determines the number of days the person was denied access. Second, it determines the appropriate per day penalty. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 438, 98 P.3d 463 (2004). Over the last several years, the caselaw has made it clear that the PRA "does not require the assessment of per day penalties for each requested record." Id. at 436. Instead, the trial court may sort the records into appropriate groups, count the number of days each group was wrongfully withheld, and multiply by the per day penalty. Placing records into groups based on their time of production and the subject matter of the requests have both been found acceptable by the Supreme Court. *Sanders v. State*, 169 Wn.2d 827, 864, 240 P.3d 120 (2010). In *Double H v. Ecology*, for the first time it was held that this may result in a single record group.

The trial court created one group, rather than the multiple groups for which both parties argued, because it was concerned that "[d]ividing the records into groups by response date is artificial and would actually discourage governmental agencies from producing records over

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time as they are discovered and reviewed." But, argued Double H, under the PRA, the records are not supposed to be produced over time. Under the PRA, an agency is required to do no more and no less than produce those records that are revealed after conducting a reasonable search in those places where the requested records are reasonably likely to be found. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 719-20, 261 P.3d 119 (2011). Nevertheless, the Court of Appeals concluded that the trial court had not abused its discretion in placing all of the records into a single group, stating: "The trial court made a balanced, reasonable decision supported by tenable grounds when selecting the same-subject group: Avoid strained groupings to encourage agencies not to withhold records until fully assembled, promote early segmented record production, and undercut the risk of creating multiple penalty-increasing groups. In essence, the trial court in its discretion decided Ecology should not be punished more severely for its continuous review and release of records under the circumstances of this case."

Although the Court of Appeals was not persuaded by Double H's arguments, the trial court's single-record group perhaps undermines the reasonable search requirement under *Neighborhood Alliance*. Double H argued that establishing multiple groups by time of production would send a clear message to agencies that they can, and should, reduce their exposure to PRA penalties by conducting a reasonable search up front. If they do so, they have met their obligations under the PRA, even if records are later found that were not uncovered during the reasonable search; but, if they do not conduct a reasonable search, they will suffer increasingly severe penalties until, sooner or later, they comply with the law. For now, at least, the opportunity to send this message has not been grasped.