

## Consulting Attorney Need Not Formally Appear in Litigation for Fees to be Recoverable Under Washington Public Records Act

Legal Alert  
April 17, 2019

In an unpublished decision, the Washington Court of Appeals held that an attorney need not appear as counsel of record in a Public Records Act (“PRA”) action for legal services to be compensable, as long as the services were reasonably incurred in litigating a matter on which the PRA plaintiff prevailed. The court also found that the trial court did not abuse its discretion in awarding the plaintiffs only a fraction of the requested penalties for withholding of records. [Strand v. Spokane County](#).

Concerned that the Spokane County Assessor had been overvaluing their residential property, the Strands submitted a public records request to the County, asking for the basis of its valuation. Despite the County’s production of nearly 1,000 pages of responsive documents, the Strands believed records were being withheld. They sued, alleging delayed production and wrongful withholding. The lawsuit triggered a further review by the County of its earlier response, which revealed that four responsive documents had not been produced. The Strands requested attorney fees in addition to the maximum statutory penalty of \$100 per day the records were withheld, on a per page basis.

The trial court denied the request for attorney fees because the plaintiffs had represented themselves *pro se* throughout the proceedings. Although Ms. Strand had consulted with a lawyer, the lawyer had never appeared as counsel of record in the action. The trial court therefore found no basis for an award of attorney fees.

The Washington Court of Appeals disagreed, emphasizing that the PRA provides for a mandatory award to a prevailing record requestor of “all costs,” including “all of the reasonable expenses

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[the prevailing party] incurred in gaining access to the requested records.” Here, the Strands were not asking to be compensated for Ms. Strand’s own time and effort, but rather for legal fees they demonstrably incurred. The court remanded the case for the trial court to determine whether any part of the Strands’ consulting attorney fees should be awarded.

With respect to penalties, however, the Court of Appeals determined that the trial court did not abuse its discretion when it awarded only a fraction of the plaintiffs’ requested penalties. Applying the Washington Supreme Court’s sixteen-factor test to determine the penalty amount, the trial court acted within its discretion in finding no aggravating factors applied and that the mitigating factors applied “across the board” to the County’s actions, supporting a total statutory penalty of \$841 (\$1 per day penalty for two groups of withheld records).

If you have any questions, contact a member of our [Public Records & Open Government](#) team.