No. 42712-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHAWN D. FRANCIS, Appellant,

v.

DEPARTMENT OF CORRECTIONS, Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
PIERCE COUNTY

The Honorable John R. Hickman
No. 10-2-10630-3

BRIEF OF APPELLANT

SHAWN D. FRANCIS
Appellant, Pro se
Airway Heights Corrections Center
PO Box 2049; Unit: L-A-28-L
Airway Heights, WA 99001

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred by awarding a $5 per-day penalty and a $10 per-day penalty on the $0-$100 per-day statutory penalty scale in this Public Records Act case involving misconduct, gross negligence, and bad faith.

2. The trial court erred by failing to award Mr. Francis statutory costs as the prevailing party pursuant to RCW 42.56.550(4).

B. Issues Pertaining to Assignments of Error

1. Did the trial court err by not utilizing the full $0-$100 range of the statutory per-day penalty scale in assessing the per-day penalty for a Public Records Act violation amounting to gross negligence and bad faith?

2. Did the trial court err by not relying on the relative degree of DOC's culpability in assessing the per-day penalty as required by the Supreme Court's decision in Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 98 P.3d 463 (2005)?

3. Did the trial court err by not giving due weight to the size of penalty required to deter DOC from violating the Public Records Act?

4. Did the trial court err by assessing a per-day penalty so low as to undermine the enforcement mechanisms of the Act?

5. Did the trial court err by ignoring the statutory mandate to liberally construe the Act to accomplish the statutory purpose?

6. Did the trial court err in awarding two separate per-day penalty amounts without distinguishing DOC's culpability between the two penalty periods?

7. When adopting DOC's per-day penalty recommendation, did the trial court essentially penalize Mr. Francis by awarding a lower per-day penalty amount for the pre-lawsuit filing penalty period?

8. Did the trial court err by ignoring the statutorty mandate to award all costs to Mr. Francis as the prevailing party?

The Assignments of Error and underlying Issues are reviewed under an abuse of discretion standard. RCW 42.56.550(4); Yousoufian v. Sims, 168 Wn.2d 444, 458, 229 P.3d 735 (2010)

II. STATEMENT OF THE CASE

Factual History

On June 19, 2009, Shawn Francis submitted a public records request to the Department of Corrections ("DOC"). In this request, Mr. Francis requested:

> "Any and all documents related to any reason and/or justification for the reason why inmates at the McNeil Island Corrections Center are not allowed to retain fans and hot pots in their cells, as well as any policy that may be in place to substantiate such restrictions on these items also."

Prior to Mr. Francis' request, DOC was selling fans and hot pots to inmates through the inmate store. These were pre-approved items allowed for inmates to have for personal use in their cells/ rooms. However, once receiving payment for these items, DOC staff at McNeil Island would not provide these purchased items to the inmates, instead, they would tell inmates that, per a McNeil Island policy, inmates couldn't have these items in their rooms, and that the inmates could either dispose of the items, or place them in storage until they were released/transferred from the island. This prompted Mr. Francis to submit his records request.

On July 10, 2009, DOC representative - Brett Lorentson provided Mr. Francis with a DOC property policy in response to his records request. With this production, Mr. Lorentson informed Mr. Francis that these were all of the documents responsive to his request, and that DOC was now closing his request. The policy provided to Mr. Francis designated property that inmates were allowed to have in their rooms. Listed in this policy, as property allowed for inmates to retain, were fans and hot pots.

Since DOC failed to provide a single document explaining why inmates at McNeil Island could not have these items, and also because DOC closed his request asserting that they had conducted a thorough search for all responsive documents, Francis was misled to believe that there existed no documents addressing the restriction of these items.

Many months later, a fellow inmate showed Mr. Francis numerous documents, of which DOC withheld from him, explaining why inmates at McNeil Island weren't allowed to retain fans and hot pots in their rooms. Mr. Francis then filed his complaint within one year of DOC's last response to his public records request.

Procedural History

On June 28, 2010, Francis filed a lawsuit against the Department of Corrections. In his complaint, Francis alleged that DOC failed to provide him with records responsive to his request pursuant to the Public Records Act ("PRA"). RCW 42.56 et seq.

On August 31, 2010, two months after commencement of this action, DOC responded to discovery requests submitted by Francis. In their response, DOC produced two separate sets of records responsive to Francis' request of which they had previously failed to provide him with. Upon this production, and after reviewing the newly provided records, Francis realized that more responsive documents still existed of which DOC had not yet provided.

On September 21, 2010, Francis informed DOC that they were still improperly withholding responsive records - the McNeil Island Operational Memorandum #MICC 440.000 which had been in effect at the time of Francis' request. After waiting approximately four months for DOC to produce the last set of records, without a single response, it

was clear that DOC had simply ignored Francis' attempt to inform them of the records still being withheld. Francis then filed his second set of discovery requests specifically asking for the last set of responsive records.

On February 28, 2011, more than five months after Francis' September 21, 2010 letter, and 626 days after the submission of his records request, DOC finally provided Francis with the last set of responsive records.

On July 15, 2011, Francis moved for summary judgment. After hearing arguments from both parties, the trial court found DOC liable for violating the Public Records Act, and granted summary judgment in favor of Mr. Francis as to liability only. The trial court then set a separate hearing for its determination on penalties.

On September 16, 2011, the trial court heard oral arguments from both parties. At this hearing, Francis provided the court with documentation evidence that showed DOC knowingly failed to conduct any sort of search for the records he requested prior to closing his request. Ex. A.[1] Francis also showed that after filing suit he made numerous

[1] See attached Exhibits

requests to DOC for the responsive records, but despite these requests, DOC still took almost a year after Francis filed suit before finally providing him with the records he sought.

After hearing oral arguments, the trial court applied the mitigating and aggravating factors set out in Yousoufian v. Ron Sims, 168 Wn.2d 444, 229 P.3d 735 (2010)(Yousoufian V). In applying these factors, the trial court determined that numerous aggravating factors existed. RP 5-7. Among these factors, the trial court determined that DOC acted with "gross negligence" in responding to Francis' request, and also that DOC displayed "bad faith" by purposefully failing to conduct a reasonable search for the requested records. RP 6-7; and RP 8-9. The trial court suggested that DOC merely "rubber stamped" Francis' request. However, when setting the penalty amount, the trial court chose to adopt DOC's per-day penalty recommendation of $5 per-day for the time period between Francis' initial request and his filing of this action (353 days); and then $10 per-day for the remaining 273 penalty days after the lawsuit filing for which DOC failed to provide the requested records. RP 9.

Lastly, the trial court denied Francis' request to be awarded statutory costs as the prevailing party. RP 11.

On October 12, 2011, the Pierce County Superior Court entered its Order and Findings regarding penalties (attached to Petitioner's Notice of Appeal). Francis timely filed his Notice of Appeal in this matter on October 21, 2011, just nine days after the trial court entered its findings. Although untimely, DOC filed its Notice of Cross Appeal in this matter, 33 days after the trial court's findings were entered (24 days after Francis filed his Notice of Appeal). Petitioner Francis now timely appeals the October 12, 2011 Order and Findings of the Superior Court.

III. ARGUMENT

A. The Trial Court Abused Its Discretion By Failing To Award A Per-Day Penalty Reflective Of Its Findings.

Under the PRA, the appellate court will review a trial court's determination of appropriate daily penalties under an abuse of discretion standard. Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 458, 229 P.3d 735 (2010)(Yousoufian V)(quoting Yousoufian II, 152 Wn.2d 421, at 431 (2004)). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court's decision is manifestly unreasonable if the court, despite appling the correct legal standard to the supported facts, adopts a view that no reasonable person would take. Id. See also Yousoufian V, supra at 458.

In this case, the trial court abused its discretion by ignoring three critical criteria for determining the per-day penalty - use of full range of the penalty scale, reliance on relative culpability to appropriately set the per-day penalty between

$0 and $100, and consideration of deterrence in determining the per-day penalty.

1. The Full Per-Day Penalty Scale Must Be Utilized In Assessing The Per-Day Penalty.

When established by initiative in 1972, the Public Records Act included a per-day penalty of up to $25. Because this penalty provision was too constricted to promote the purpose of the Act, the legislature in 1992 discarded the $25 per-day limit and adopted a per-day penalty ranging from a minimum of $5 to a maximum of $100 per day. Yousoufian II, 152 Wn.2d at 433. When the legislature established this $5-$100 penalty scale, our state's Supreme Court determined that, in doing so, the legislature intended that trial courts take into account the entire penalty range, reserving the extremes for the most and least culpable conduct, allowing the rest to fall somewhere in between. Yousoufian IV, 165 Wn.2d at 457. Furthermore, because the PRA places the burden of proof upon the state agency to show its compliance , the PRA does not support the presumption of the lowest penalty. Thus, by considering the entire penalty range, the perception of bias associated with

presuming the lowest penalty is eliminated. Id., at 457-58; RCW 42.56.550(2).

In 2011, the legislature again amended the PRA. The first of two adopted amendments established a provision requiring incarcerated individuals to prove the existence of an agency's bad faith in violating the PRA before a court awards a penalty. RCW 42.56.565(1)(as amended by Laws of 2011, ch.300, §§ 1,2). This law went into effect on July 22, 2011. The second adopted provision amended the per-day penalty by allowing a court to simply award a penalty not to exceed $100 for each day the agency violates the PRA. RCW 42.56.550(4)(as amended by Laws of 2011). Despite these amendments, the determination that the legislature's intent requiring consideration that the full penalty range be utilized has not changed. In this case, the trial court did not make use of the full range of the scale.

As described by the trial court, the Department of Corrections mishandling of Mr. Francis' request not only amounted to "gross negligence", but also that DOC displayed bad faith when responding. RP 8-9 (Court's Oral Ruling).

In the Yousoufian case, there the trial court

found that King County demonstrated "gross negligence", but failed to find that the county acted with bad faith, instead finding a "lack of good faith". Yousoufian II, 152 Wn.2d at 427. After the trial court awarded a penalty of $5 per-day, both the Court of Appeals and our State's Supreme Court agreed that the trial judge did not properly use the penalty scale as established by the legislature. The Supreme Court stated, "[W]e agree with the Court of Appeals that assessing the minimum penalty of $5 a day was unreasonable considering that the County acted with gross negligence." Id. at 439. This same assessment of unreasonableness applies to the $5 and $10 per-day penalty imposed by the trial judge in Mr. Francis' case.

Typically, garden-variety violations should fall somewhere toward the lower middle portion of the scale. Less serious violations should be penalized less severely, and more culpable and egregious violations, like in Mr. Francis' case, should rise to the top of the scale. Considering the degree of DOC's culpability, including all of the aggravating factors found by the trial court, the trial court should have utilized the full scale in setting a per day penalty

at the top end of the range. To ignore the statutory structure for awarding the per-day penalty is an abuse of discretion.

2. Culpability Is The Critical Determinent Of The Per-Day Penalty.

The Washington Supreme Court in Yousoufian held that the purpose of the PRA "is better served by increasing the penalty based on an agency's culpability". Id. at 440, Fairhurst concurring.

When determining the amount of the penalty to be imposed, the existence or absence of an agency's bad faith is the principal factor which the trial court "must consider". Yousoufian V, 168 Wn.2d at 460 (quoting Amren v. City of Kalama, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997)). As such, the good faith/bad faith dichotomy merely establishes the book ends of the penalty range. Id. The Supreme Court's use of the term culpability in Yousoufian shifted the focus from the either/or dichotomy by now allowing courts to consider matters of degree as well. Therefore, in considering the difficulties established in proving an agency's bad faith, when a requestor is required by statute to prove such a high level of

culpability, and succeeds in doing so, the penalty determination should begin around the $75 per-day range, still allowing for the trial court's discretion to consider other outlined mitigating and aggravating factors in determining whether to increase the penalty above that $75 per-day range.

In this case, not only did the trial court find that DOC displayed "bad faith" and "gross negligence", but it further found numerous other aggravating factors outlined in Yousoufian V,[2] (i.e. delayed response, lack of strict compliance, lack of proper training, lack of proper supervision). RP 5-6 (Court's Oral Ruling). The most compelling factor attributed to the trial court's finding of bad faith was a "Public Disclosure Routing Slip" provided by Francis. Ex. A. This Routing Slip is a form used by DOC to track how and where records are located, and also how much time is spent searching for the requested records. This evidence showed that, similar to the facts in Yousoufian, Francis' request was shuffled down through 7 agency employees landing on the desk of an administrative secretary, and furthermore, that between these 7 individuals, less than 15 minutes was spent searching for the records. Ex. A, B, & C.

[2] These factors are outlined in Yousoufian V, 168 Wn.2d at 467-68.

Furthermore, that of the 18 commonly known records locations listed on the Routing Slip, not a single location had been searched by any of these individuals, depite DOC's claim of conducting a thorough search. Ex. A. This knowing and deliberate failure to conduct any sort of search flies in the face of the PRA, and thus deserves the harshest penalty. Had DOC simply demonstrated minimal effort, compliance could have been accurate and timely.

With culpability as the measure, the trial court did not have the discretion to set the per-day penalty so low.

3. Deterrence Must Be Considered When Setting The Per-Day Penalty.

Our state's Supreme Court has held that the PRA includes a penalty provision that is designed to "discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute." Yousoufian V, 168 Wn.2d at 459 (internal quotation marks omitted) (quoting Yousoufian II, supra at 429-30 (quoting Hearst Corp. v. Hoppe, 90 Wn.2s 123, 140, 580 P.2d

246 (1978))). Furthermore, that the penalty must be an adequate incentive to induce future compliance. Yousoufian V, 168 Wn.2d at 462-63. This deterrent effect is an essential function of the penalty provisions of the Act. Given the size of DOC's budget, the trial court could not have seriously considered deterrence when setting the $5 and $10 per-day penalty. Considering their nearly $1.6 billion budget, only a significant penalty would serve as a deterrent. Setting a penalty that does not function as a deterrent is an abuse of discretion.

It is clear that the trial court did not utilize the full penalty scale, culpability, and deterrence in setting the per-day penalty. In a case where the trial court found the existence of bad faith, gross negligence, numerous other aggravating factors, and a purposeful failure to conduct any sort of meaningful search, by an agency in the wealthiest class of local governments, these criteria cannot lead to a per-day penalty in the bottom 10% of the scale.

B. The Trial Court's Award Of A $5 And $10 Per-Day Penalty Undermines The Statutory Enforcement Mechanism Of The Public Disclosure Act.

Lawsuits by aggrieved citizens are the only mechanism provided for enforcement of the Public Records Act. If citizens improperly denied access do not force the issue, compliance with the Act becomes discretionary with public agencies, and the purposes of the Act are thwarted. By ignoring appropriate criteria and setting an unreasonably low per-day penalty, the trial court abused its discretion and perpetuated the uncertainty of those denied access to documents when deciding whether to file a lawsuit to enforce compliance with the statute. Such uncertainty cripples the sole enforcement mechanism established by the legislature. Without a reasonable expectation of appropriate penalties, an aggrieved citizen often will not be willing to invest the time, energy, and emotion necessary to serve as a private attorney general enforcing the Act.

Without substantial penalties for egregious cases, aggrieved parties have no incentive to serve as private attorneys general, and the Act is left

without an effective enforcement mechanism. Inappropriately small penalties deter, not the governmental agency, but the taxpayer. If Yousoufian, and a case that entails a finding of bad faith, such as this one, warrants a per-day penalty at the bottom end of the scale, what kind of penalty can the citizen enforcer expect for more typical and modest violations? A private attorney general simply will not represent the public interest, as anticipated by the PRA, without a penalty incentive that is reasonable and reasonably predictable. Such an incentive for private enforcement was intended by the legislature in establishing the penalty range up to $100 per-day, with cases distributed according to the seriousness of the misbehavior. Is a finding of bad faith not serious?

To give attorneys incentive to represent aggrieved parties, the Act provides for reasonable attorneys' fees; to give incentive to parties wrongfully denied access to documents, the Act provides for penalties, including a per-day penalty on a scale ranging up to $100 a day.

The trial court did not have discretion to set a penalty that undermined the only enforcement mechanism of the Public Records Act.

C. The Trial Court Abused Its Discretion By Ignoring The Statutory Mandate For Liberal Construction Of The Public Records Act Including The Penalty Provision.

The Legislature, along with our appellate courts, have emphasized the close relationship between the PRA and maintenance of a free democratic society. This relationship indicates that a judicial decision threatening the efficient functioning of the Act is not within a trial court's discretion.

The Public Records Act was passed by popular initiative and stands for the proposition that, "full access to information concerning the conduct of govervment on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society. Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d 243, 250-51, 884 P.2d 592 (1994)(PAWS). The stated purpose of the Act is nothing less than the preservation of the most central tenets of the people and the accountability to the people of public officials and institutions. Id.

The PRA enables citizens to retain their sovereignty over their government and to demand full

access to information relating to their government's action. RCW 42.56.030; Yousoufian II, 152 Wn.2d at 429-30. As the PAWS court noted,

> "The Legislature leaves no room for doubt about its intent:
>
> > The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. The public records subdivision of this chapter shall be liberally construed and its exceptions narrowly construed to promote this public policy. RCW 42.17.251."

PAWS, 125 Wn.2d at 260; (RCW 42.17.251 has now been recodified as RCW 42.56.030).

The Act mandates liberal construction to assure full access to public records. This liberal construction requirement includes RCW 42.56.550(4), the penalty provision of the statute. The penalty provision is an integral, critical support for the Act's important goals and the sole tool to deter misconduct and encourage citizen enforcement of the PRA. "The P[R]A includes a penalty provision that is intended to 'discourage improper denial of access to public records and [encourage] adherence to the

goals and procedures dictated by the statute." Yousoufian II, 152 Wn.2d at 430. "This provision has been treated by [the Washington Supreme Court] as a penalty to enforce the strong public policies underlying the public disclosure act... [The Washington Supreme Court] has emphasized that 'strict enforcement' of this provision 'will discourage improper denial of access to public records.' " Amren v. City of Kalama, 131 Wn.2d 25, 35-36, 929 P.2d 389 (1997).

Because the penalty provision of the Act is essential to its effectiveness, a judicial ruling that undermines the penalty provision endangers the high public purpose of the Act. Awarding a $5 and $10 per-day penalty, when considering DOC's high level of culpability, the trial court abused its discretion by acting inconsistently with the statutes purpose and liberal construction mandates.

D. The Trial Court Abused Its Discretion When Adopting DOC's Penalty Assessment.

After finding DOC liable for violating the PRA, the trial court set a September 16, 2011 hearing for a determination of penalties and asked both parties to brief the matter. At the hearing, DOC asked the trial court to impose a penalty of $5 per-day for the time between Francis' initial request and his filing (353 days); and then $10 per-day for the remaining 273 penalty days. (see Defendant's Response Re: Penalties, at 8). After finding numerous of the Yousoufian aggravators, including bad faith and gross negligence, the trial court declined Francis' proposed penalty assessment, instead adopting DOC's proposed penalty assessment. RP 9 (Court's Oral Ruling).

1. When Distinguishing Two Levels Of Culpability In A Penalty Determination, Culpability Must Also Be Separately Defined.

As previously established, it has long been held that under the PRA an agency's culpability is

the defining measure in assessing an appropriate per-day penalty amount. Yousoufian II, supra at 436. In this case, the trial court chose to adopt DOC's proposed split per-day penalty assessment, despite their egregious conduct, yet failed to provide any distinguishing factors for why DOC was less culpable for the pre-lawsuit filing time period. RP 9 (Court's Oral Ruling). Simply put, the trial court's penalty determination suggests that DOC's conduct prior to being sued was less violative as opposed to their conduct after the filing of suit. However, neither the record, nor the trial court's findings support this suggestion. DOC's willful failure to provide Francis with the records he sought began when he first requested them, and so continued for 626 days. With culpability as the critical measure, when a portion of a trial court's penalty determination suggests that an agency is less culpable, failure to distinguish such differences in culpability is an abuse of discretion.

2. The PRA Does Not Allow Reduction Of The Penalty Based Upon A Requestor's Timely Action.

When providing the trial court with its proposed penalty assessment, DOC argued that a lesser penalty should apply to the pre-lawsuit time period - 353 days - simply because Francis could have filed suit sooner.[3] By doing so, DOC attempted to establish some sort of contrived causal connection between their failure to provide the requested records, and that of Francis' decision to timely file suit.

The trial court's silence on why it chose to adopt DOC's penalty assessment evinces its reliance on DOC's provided reasoning - that because Francis could have filed suit sooner, DOC should be penalized lesser. Recently, this Appellate Court relied on an earlier holding , stating that, "[a] trial court may not reduce the penalty period under the PRA even if it finds that the requestor could have achieved the disclosure of the records in a more timely fashion." City of Lakewood v. Koenig, 160 Wn.App. 883, 894, 250 P.3d 113 (2011)(citing

[3] Francis filed this action within the one-year statute of limitations, as provided by RCW 42.56.550(6).

Yousoufian II, 152 Wn.2d at 438).

In Koenig, the City tried to show that Koenig regularly delayed the filing of lawsuits until the final day of the PRA's statute of limitations period as a way of maximizing his penalty award, and therefore, the penalty period should have been reduced. However, this Court held that, "[a]s long as Koenig acted within the statute of limitations, we are not concerned with when he brings a PRA lawsuit." Koenig, at 984. This inherently objective axiom should not only apply to the penalty period, but to an improper reduction in the penalty itself as well. To hold otherwise would call into question the well established principle of assessing the penalty based upon the agency's conduct. For the trial court to ignore such principle is an abuse of discretion.

E. The Trial Court Abused Its Discretion When Ignoring The Statutory Mandate Requiring All Costs Be Awarded To The Prevailing Party, Under The PRA.

The Public Records Act provides, in pertinent part:

> "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.

RCW 42.56.550(4).(Emphasis added)

Based upon the plain language of the statute, if a court determines that the requested records do not fall within an exemption to the PRA, and that the requestor was improperly denied requested records, as the prevailing party, the requestor is entitled to reimbursement of all his costs incurred during the pendency of litigation. Attorney's Guild v. Kitsap County, 156 Wn.App. 110, 118-119, 231 P.3d 219 (2010). Simply put, costs are "mandatory". Id. at 118. In this case, it is undisputed that Francis is the prevailing party. At the September 16, 2011 hearing, Francis asked the trial court to

award him all his costs which he incurred in connection with this matter. Upon ruling on the per-day penalty, the trial court declined to award Francis his statutorily mandated costs. RP 11 (Court's Oral Ruling).

By failing to award Francis all his costs, the trial court abused its discretion.

IV. REQUEST FOR COSTS AND REASONABLE FEES ON APPEAL

A. The Prevailing Party Against A State Agency Is Entitled To Costs Pursuant To RAP 18.1 And The PRA.

RAP 18.1 permits the reimbursement of all costs on appeal to the prevailing party if the applicable law grants this right for an appeal. Under the PRA, an individual who prevails against a state agency is entitled to all costs. RCW 42.56.550(4). The appellate court in PAWS determined that the PRA authorizes attorney fees and costs on appeal. PAWS, 114 Wn.2d at 690; see also PAWS II, 125 Wn.2d 243, 271, 884 P.2d 592 (1994). If this Court overturns any of the trial court's decisions,

regarding the issues raised by Francis, Mr. Francis asks this Court to award him all his costs incurred during this appeal.

B. The Prevailing Party Against A State Agency Is Entitled To Reasonable Paralegal Fees Incurred During The Appeal.

As previously established, RAP 18.1 and the PRA allow for costs as well as reasonable attorney fees to the prevailing party on appeal. It has long been held that a trial court must hold pro se parties to the same standards to which they hold attorneys. Westberg v. All-Purpose Structures Inc., 86 Wn.App. 405, 411, 936 P.2d 1175 (1997); Edwards v. Le Duc, 157 Wn.App. 455, 460, 238 P.3d 1187 (2010). Equally, when a statute includes "reasonable attorney fees" as part of the costs provision, a pro se litigant should be eligible for paralegal fees at market rate as well.

Our State's Supreme Court has held the term "reasonable attorney's fees" as used in 42 U.S.C. § 1988 "must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others [i.e. paralegals]

whose labor contributes to the work product for which an attorney bills [their] client..." Louisiana-Pac. Corp. v. Asarco Inc., 131 Wn.2d 587, 605, 934 P.2d 685 (1997)(citing Missouri v. Jenkins, 491 U.S. 274, 285, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989)).

The PRA statute is clear, reasonable attorney fees are included in the provision, and it plainly states that "any person" who prevails is entitled to such fees. The Ninth Circuit Court of Appeals recently held the term "reasonable attorney fees" in the context of inmate "paralegals". Perez v. Cate, 632 F.3d 553, 554-55 (9th Cir. 2011)(citing Missouri v. Jenkins, supra.

The Perez case involved 33 inmates who brought an action under 42 U.S.C. § 1983 against California prison officials alleging an Eighth Amendment claim. Upon a stipulated order and settlement, the inmates submitted attorney's fees statements asking for payment for "paralegal" services, at a rate of $169.50 per hour. The prison officials challenged the rate. The district court held that the rate was reasonable for the work performed and was below the market rate for paralegals in the Bay area.

Therefore, the District Court ordered prison officials to pay the inmates their requested rate. On appeal, the Ninth Circuit upheld the district court's ruling. Although this Court is not bound by federal statute, Perez is offered as persuasive authority on this matter.

Although not "certified" as a paralegal, Francis is more than qualified to be considered as such, and so considers himself. This is clearly evidenced by his ability to secure a favorable judgment pro se. Despite being uncertified, this state holds no requirement that an individual be licensed or certified before holding the title of "paralegal".

As previously established, the PRA mandates that its provisions be liberally construed, this includes the penalty provision of the statute. RCW 42.56.030. Therefore, based upon the Act's liberal construction, and the plain language of RCW 42.56.550(4); and in the absence of a provision requiring that "any person" must retain an actual attorney before being afforded the benefits of such award; it must be presumed that the legislature says in the statute what it means, and means in the statute what it says - that "any person" who prevails

in a PRA action is entitled to reasonable attorney's fees, which would also amount to paralegal fees incurred during the course of appeal. Therefore, based upon the plain language of the statute, Mr. Francis requests that this Court award him his paralegal fees, at market rate, incurred during the pendency of this appeal.

V. DEFENDANT'S MOTION FOR CROSS APPEAL IS UNTIMELY

A party seeking cross-review must file a timely notice of appeal. RAP 5.2(f). Under RAP 5.2(f), the notice is due within the later of: 1) 14 days after service of the notice filed by the other party, or 2) the time within which notice must otherwise be given under RAP 5.2. Farnam v. CRISTA Ministries, 116 Wn.2d 659, 807 P.2d 830 (1991). This deadline is applied strictly. The heavy presumption against extending the time limit for filing a notice of appeal apply to cross-review also. Bostwick v. Ballard Marine, Inc., 127 Wn.App. 762, 112 P.3d 571 (2005).

In this case, the trial court entered its Order of Findings RE; Penalties on October 12, 2011.

This is the Order and Finding for which the defendant seeks cross-review on. Francis filed his notice of appeal on October 21, 2011, therefore, at the very latest, defendant's deadline to file their cross notice of appeal should have been filed not later than end of business on November 11, 2011, according to RAP 5.2; and RAP 18.6. Defendant's Notice of cross-appeal wasn't filed until November 14, 2011 - 33 days after the order defendant is challenging was entered. Therefore, Defendant's Notice of Cross-Appeal, and any added issues they wish to present on appeal should not be considered by this court.

VI. CONCLUSION

For the reasons stated herein, Mr. Francis requests that this Court overturn the trial court's penalty assessment and remand back to the trial court for a higher penalty determination consistent with a "bad faith" and "gross negligence" finding. Mr. Francis further requests this court instruct the trial court to award Mr. Francis all costs

that he incurred during the course of this lawsuit, for the time period prior to appeal. Lastly, Mr. Francis asks this Court to award him all costs incurred during the course of this appeal, and to also award him his paralegal fees, at market rate, which he has incurred during the course of this appeal.

DATED this 14th day of February, 2012.

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Appellant, Pro Se
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Airway Heights Corrections Center
PO Box 2049; Unit: L-A-28-L
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EXHIBIT A

(Exhibit "G-17", as noted in original trial court record)

Public Disclosure Routing Slip

The Public Disclosure Unit (PDU) has received a request for DOC records. Please review the attached request to determine if your location/facility has any responsive records.

Assignment Date: 062609 **Tracking #:** PDU-7430 **Location/Facility:** MICC

Requestor's name: Francis **PDC:** Murphy

Assigned PDS: Brett (360) 725-8219 bwlorentson@doc1.wa.gov

Records requested: Shawn Francis (749717) has requested: Any and all documents related to any reason and/ or justification for the reason why inmates at MICC are not allowed to retain fans and hot pots in their cells, as well as any policy that may be in place to substantiate such restrictions on these items.

DUE DATE/RESPONSIE TIME:
On or before, July 17, 2009, please provide a copy of the responsive records to the assigned PDS. If this due date does not work, please contact the assigned PDS immediately.

TRACKING TIME: Please compile from all staff at your location.

Use 15 minute increments : ____ hours 15 minutes

RESPONSIVE RECORDS: Identify and coordinate with all appropriate parties at your location/facility.

Check all appropriate boxes for records location that have been searched.

☐ Records/Central file	☐ Inmate Accounts	☐ IMU Staff
☐ Hearings Office	☐ Property/Mail Room	☐ Superintendent
☐ I & I Office	☐ Shift Security	☐ Associates
☐ Living Unit Staff	☐ Chapel	☐ Sgt./Lts
☐ Medical Dept./Medical File	☐ Inmate Store	☐ Grievance Office
☐ Maintenance	☐ Inmate Visiting	☐ Other

☐ All documents gathered. Single sided, unstapled copy of the records **AND** a **completed** copy of this routing slip to the assigned PDS. MS: 41118 OR PDU PO Box 41118, Olympia WA 98504

☐ All supporting documents attached and send copy of this routing slip to the assigned PDS. MS: 41118

☐ Date mailed documents to the assigned PDS Date Mailed

NO RECORDS: if you have no responsive records to this request:

☐ Notify the PDS named above via e-mail, check the box to the left, and return this routing slip to the assigned PDS at MS 41118. Include all e-mails, noting who was asked for records and had none.

I verify that I have conducted a thorough staff search and I report that I do not have any responsive documents in regards to this request.

Francis Shawn — Printed Name

Signature — Date Signed

EXHIBIT B

(Exhibit "G-2", as noted in original trial court record)

REQUEST FOR PRODUCTION NO. 1: Please produce each and every document related to your answer to Interrogatory No. 1.

OBJECTIONS: This request fails to identify the documents being sought with reasonable particularity as required by CR 34. Additionally, this request is overbroad and unduly burdensome as it fails to specify a time frame. Moreover, this request is vague as to the term "related."

RESPONSE: Without waiving the above objections, there are no responsive documents.

INTERROGATORY NO. 2: Please identify each and every person or persons involved in acknowledging Plaintiff's June 22 2009 public records request.

ANSWER: Brett Lorentson, Public Disclosure Specialist.

REQUEST FOR PRODUCTION NO. 2: Please produce each and every document related to your answer to Interrogatory No. 2.

OBJECTIONS: This request fails to identify the documents being sought with reasonable particularity as required by CR 34. Additionally, this request is overbroad and unduly burdensome as it fails to specify a time frame. Moreover, this request is vague as to the term "related."

RESPONSE: Without waiving the above objections, see documents produced at DEFS 2, DEFS 4 – DEFS 5.

INTERROGATORY NO. 3: Please identify each and every person or persons responsible for responding to Plaintiff's June 22, 2009 public records request.

ANSWER: Brett Lorentson, Public Disclosure Specialist.

ATTORNEY GENERAL OF WASHINGTON
Corrections Division
P.O. Box 40116
Olympia, WA 98504-0116
(360) 586-1445

EXHIBIT C

(Exhibit "G-4", as noted in original trial court record)

RESPONSE: Without waiving the above objections, see documents produced at DEFS 40 – DEFS 47.

INTERROGATORY NO. 5: Please identify each and every person or persons having knowledge of Plaintiff's June 22, 2009 public records request for which you did not identify in your Answers to these interrogatories.

OBJECTIONS: This interrogatory assumes facts not in evidence. Moreover, this interrogatory is nonsensical.

ANSWER: Without waiving the above objections, see below:

- Lynda West, DOC Public Disclosure Administrative Assistant
- Denise Vaughan, DOC Program Manager-Public Disclosure
- Tammie Stark, Public Disclosure Secretary, MICC
- Brenda Murphy, Public Disclosure Coordinator, MICC
- Yolanda Logan, Administrative Assistant 3, MICC
- Kenneth Bratten, Correction Captain, MICC

REQUEST FOR PRODUCTION NO. 5: Please produce each and every document related to your answer to Interrogatory No. 5.

OBJECTIONS: This request fails to identify the documents being sought with reasonable particularity as required by CR 34. Additionally, this request is overbroad and unduly burdensome as it fails to specify a time frame. Moreover, this request is vague as to the term "related."

RESPONSE: Without waiving the above objections, see documents produced at DEFS 26 - DEFS 27.

ATTORNEY GENERAL OF WASHINGTON
Corrections Division
P.O. Box 40116
Olympia, WA 98504-0116
(360) 586-1445

DECLARATION OF MAILING

I, Shawn D. Francis, declare that on 2/14/2012 I deposited the foregoing documents, or a copy thereof, into the internal legal mail system of the Airway Heights Corrections Center, U.S. Postage Prepaid, 1st Class Mail, to all parties listed below. I further declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

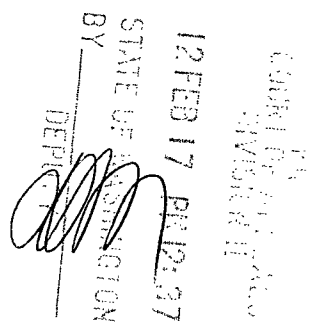
Documents

1- Brief of Appellant (Opening Brief)
1- Verbatim Report of Proceedings - Court's Oral Ruling (Sent to Andrea Vingo Only)

Parties Served

1) Andrea Vingo
Assistant Attorney General
Corrections Division
PO Box 40116
Olympia, WA 98504-0116

2) Washington Court of Appeals, Division II
Office of the Clerk
950 Broadway; Suite 300
Tacoma, WA 98402-4454



DATED this 14th day of February, 2012.

Shawn D. Francis
Airway Heights Corrections Center
PO Box 2049; Unit: L-A-28-L
Airway Heights, WA 99001