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No. 73626-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CARLOS BENITEZ, JR.,
Appellant,

v.

SKAGIT COUNTY,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Charles R. Snyder, Judge

APPELLANT'S BRIEF

Carlos Benitez, Jr. #715131
Appellant

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2. The trial court erred in granting summary judgment and dismissal because there existed genuine issues of material fact precluding judgment in favor of the County.

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5. Did the trial court err in granting summary judgment and dismissal where genuine issues of material fact precluded judgment in favor of the County? (Assignment of Error 2.)

III. STATEMENT OF THE CASE

On June 17, 2012, Carlos Benitez, Jr. ("Benitez"), submitted a Public Records Act (PRA) request to Linda Routon, records officer for the Skagit County Interlocal Drug Enforcement Unit ("SCIDEU"), for records pertaining to SCIDEU case No. 09-TF049 and Benitez' criminal case. In this request, Benitez requeted:

1. Any and all application(s) requesting search and seizure, and the warrants associated with the requests;
2. Any and all application(s) and/or authorization(s) to intercept and/or record private conversation(s) or communication(s); and
3. Any transcript of any recorded private conversation(s) and/or communication(s).

Clerk's Papers ("CP") 110-11.

On June 27, 2012, Detective L. Craig responded to Benitez' records request, informing Benitez that additional time was needed to respond to his request and "[they] currently anticipate being able to respond on or around July 24, 2012." CP 139. Detective Craig gave no reason why additional time was needed, and he estimated around 30 days to respond. Id.

On July 26, 2012, after Detective Craig's estimated time to respond had elapsed, SCIDEU Chief, Tom Molitor ("Molitor"), responded to Benitez' record request, informing Benitez that additional time was needed to respond to his request and "[they] currently anticipate being able to respond by August 3, 2012." CP 140. Molitor gave no reason why additional time

was needed to respond, and he estimated around 14 days to respond. Id.

On August 6, 2012, Molitor responded to Benitez' request. In his response, Molitor stated (1) that the first installment of records was prepared, (2) that they anticipate being able to provide the next installment on or around September 10, 2012, (3) that they had not been able to locate any transcript of any recorded private conversation, and (4) that the cost of the records was $3.00 for 26 pages and upon receipt of payment the records would be mailed to Benitez. CP 141.

On August 21, 2012, after receiving payment for the records, Molitor sent Benitez 28 pages of documents. With the exception of two pages of documents (Search warrant pertaining to SCIDEU case No. 09-TF049), the documents Molitor provided pertained to Burlington Police Department case No. 09-B08177. The documents consisted of two blank pages and repetitious copies of a search warrant and affidavit pertaining to that case. CP 142-165.

On August 21, 2012, Benitez responded to the records Molitor had sent him. Benitez informed Molitor that the records Molitor had provided were nonresponsive to his request. Benitez' letter set forth an itemized list of the records that he had received, clarified his request, informed Molitor that Benitez had previously examined a transcript of the recorded conversation

that was intercepted on September 17, 2009, and again requested that Molitor produce the records requested. CP 170-73.

On September 5, 2012, Molitor responded to Benitez' August 21, 2012 letter, informing Benitez that additional time was needed to respond to his letter and "[they] currently anticipate being able to respond by September 28, 2012." CP 174. Molitor gave no reason why additional time was needed to respond, and he estimated [illegible]. Id.

On October 8, 2012, after not receiving a response by Molitor's estimated date, Benitez sent Molitor a letter inquiring why Molitor had not met his estimated response date. Benitez' letter informed Molitor that numerous additional time estimates to respond had been made without any reasonable explanation, yet Benitez still had not been provided with the records requested; that Benitez had provided more than a reasonable amount of time for Molitor to produce the records; that any further additional time estimates to respond would be interpreted as a denial of the records; and, that if the records were not provided within 10 days, Benitez would be filing a complaint for violations of his rights under the PRA. CP 175-76.

On October 17, 2012, Benitez received a letter from Molitor dated October 5, 2012, informing Benitez that additional time was needed to respond to his August 21, 2012 letter and

"[they] currently anticipate being able to respond by October 22, 2012." CP 177. Molitor gave no reason why additional time to respond was needed, and he estimated around 17 days to respond. Id.

On October 25, 2012, after Molitor's estimated time for a response had elapsed, Chief Don McDermott responded to Benitez' request, informing him that additional time was needed to respond to Benitez' August 21, 2012 letter and "[they] currently anticipate being able to respond by November 8, 2012." CP 178. Chief McDermott gave no reason why additional time was needed to respond, and he estimated around 14 days to respond. Id.

On November 8, 2012, Molitor again sent Benitez the two documents pertaining to SCIDEU case No. 09-TF049 which were previously provided on August 21, 2012. Molitor informed Benitez that 19 pages of documents were being withheld, claiming they were exempt from disclosure pursuant to (1) court orders signed by Judge Needy on March 23, 2011; May 25, 2011; and October 26, 2012, (2) Superior Court Criminal Rule 4.7, and (3) RCW 42.56.240(1) and (2). CP 179. Molitor did not provide Benitez any explanation of how the exemptions applied to the records requested. Id.

On November 18, 2012, Benitez appealed the October 26, 2012 order. CP 193. On appeal, Benitez argued that the October

26, 2012 order ("Order") barred him from obtaining from public agencies records that are presumptively available under the PRA and that the Order violated multiple provisions of the PRA, among other things. CP 196.

Relying on O'Connor v. Dept. of Soc. & Health Servs., Respondent's counsel, A.O. Denny,[1] argued that the Order did not "conflict with precedent that distinguishes between discovey obligations and PRA requests," acknowledging that Benitez "may seek public records ... under the pretrial rules of discovery but is not precluded from seeking those records under the Public Records Act." CP 59(quoting O'Connor, 143 Wn.2d at 907). Further, Mr. Denny argued that "there is no exemption under the PRA for post-conviction discovery even if a protective order has been issued" and that "RCW 42.56.290 does not apply because the police reports, etc. were available to Benitez as pretrial discovery." CP 59, n. 7.

On August 5, 2013, while the appeal of the Order was pending, Benitez filed a lawsuit against Skagit County ("County") for violations of the PRA. CP 3. Benitez alleged that the County violated the PRA by failing to provide valid exemptions for nondisclosure of the records requested, failing to make public records promptly available to Benitez,

1. A.O. Denny was counsel for the State in case No. 69440-1-I, not counsel for the County in the appeal [illegible].

failing to provide Benitez the fullest assistance, failing to explain why the records were not promptly produced, failing to provide any justification for the estimates of time needed to supply the records, and failing to supply the records within the estimated time for production. CP 9.

Further, Benitez alleged that the County acted in bad faith by intentionally violating the PRA and failing to supply the records requested, by distinguishing among persons requesting records, by substituting the records requested with non-responsive records, and by determining what information was and was not appropriate for Benitez to know. CP 9-10.

On December 10, 2013, Mr. Denny informed Benitez that, upon further review, he had determined the records could be released to Benitez with redactions, and thus provided Benitez with redacted copies of the records, including a copy of the transcript Molitor claimed he could not locate. CP 80-81.

On December 23, 2013, after the County failed to file an answer to Benitez comlaint, Benitez filed for default judgment against the County. CP 12-84.

On January 14, 2014,, the County filed its answer to Benitez' complaint. CP 85.

On April 28, 2014, in the appeal of the October 26, 2012 order, the Court of Appeals accepted the State's concession that the order should be vacated because Benitez was entitled

to notice and an opportunity to be heard on the motion and on entry of the order. CP 196-97. The Court remanded to vacate the order. CP 197.

On June 20, 2014, the Court of Appeals issued its Mandate terminating review in the appeal of the October 26, 2012. CP 198. And, on July 2, 2014, the Skagit County Superior Court vacated the order. CP 199.

On July 25, 2014, Benitez moved for partial summary judgment as to the County's liability for violations of the PRA. CP 90-101. The County did not oppose Benitez motion for summary judgment and conceded that it violated the PRA by not releasing the records to Benitez. CP 213-219. The trial court entered judgment in favor of Benitez, concluding that the County violated the PRA, and reserved the issue of whether Benitez was entitled to penalties. CP 221.

On March 23, 2015, the County moved for summary judgment on the issue of bad faith and per diem penalties. CP 223. Benitez filed a response to the County's summary judgment motion. CP 340-48. And the County filed a reply to Benitez' response. CP 371-76.

On May 18, 2015, the trial court held its hearing on the County's summary judgment motion regarding the issue of bad faith. At this hearing, Benitez provided documentary evidence demonstrating that the County acted in bad faith when it denied

Benitez' records request by (1) relying on invalid exemptions to withhold public records, (2) ignoring the PRA's procedural requirements, (3) delaying a response to Benitez' records request, (4) [illegible], (5) failing to provide any reason for numerous estimates of additional time needed to respond to Benitez' records request, (6) failing to respond by its estimated time for a response, (7) withholding public records based on its own motives and [illegible] on compliance with the PRA, (8) distinguishing among persons requesting public records, and (9) failing to provide an explanation of how the claimed exemptions applied.

Despite the evidence presented, the trial court granted the County's motion for summary judgment on the issue of bad faith and per diem penalties. The trial court concluded that Benitez failed to meet his burden of proving the County acted in bad faith, and the trial court found that Benitez was not entitled to penalties. CP 386-87.

On June 11, 2015, Benitez filed his Notice of Appeal in this matter. CP 383.

IV. ARGUMENT

A. [illegible]

Appellate courts review agency actions under the PRA de novo. RCW 42.56.550(3). This Court "stands in the same position as the trial court where the record consists only of affidavits

memoranda of law, and other documentary evidence." **Progressive Animal Welfare Soc'y v. University of Washington**, 125 Wn.2d 243, 252, 884 P.2d 592 (1995) ("PAWS"). Therefore, it is not bound by the trial court's conclusions or factual findings on whether or not the County acted in bad faith.

Granting summary judgment is appropriate when the pleadings, affidavits, interrogatories, depositions and exhibits show there are no genuine issues of material fact. The moving party is then entitled to judgment on the issues presented as a matter of law. **Havens v. C&D Plastics, Inc.**, 124 Wn.2d 158, 177, 876 P.2d 435 (1994). When reasonable minds could reach but one conclusion regarding the claims of disputed facts, such questions may be determined as a matter of law. **Corbally v. Kennewick School Dist.**, 94 Wn.App. 736, 740, 937 P.2d 1074 (1999). Any doubts as to the existence of genuine issues of material fact will be resolved against the movant. **Magula v. Benton Franklin Title Co.**, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact is a fact upon which the outcome of the case depends, in whole or in part. **Clements v. Travelers Indem. Co.**, 121 Wn2d 243, 249, 850 P.2d 1298 (1993)(citation omitted). When a trial court makes a evidentiary determination on summary judgment the appellate court conducts the same inquiry as the trial court. **Folsom v. Burger King**, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

B. JUDICIAL REVIEW OF AN AGENCY'S RESPONSE TO A PUBLIC RECORDS ACT REQUEST IS REVIEWED WITH ALL INFERENCES TO BE CONSTRUED IN FAVOR OF THE PARTY SEEKING THE RECORDS

The Public Records Act is set forth in RCW 42.56 to seq. "The purpose of the Public Records Act is to preserve 'the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.'" **O'Connor v. Dept. of Soc. & Health Servs.**, 143 Wn.2d 895, 25 P.3d 426 (2001)(quoting **PAWS**, 125 Wn.2d at 251).

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do 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. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

RCW 42.56.030.

It is "strongly worded mandate for broad disclosure of public records." **Prison Legal News, Inc. v. Dept. of Corrections**, 154 Wn.2d 628, 635, 115 P.3d 316 (2005). The Public Records Act provides that "[j]udicial review of all agency actions taken or challenged under [RCW 42.56.030 through 42.56.520] shall be de novo." **O'Connor**, 143 Wn.2d at 904(quoting **PAWS**, 125 Wn.2d at 252; RCW 42.56.550(3)).

> [Courts] shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.

RCW 42.56.550(1); **Brouillet v. Cowles Publ'g Co.**, 114 Wn.2d 788, 794, 791 P.2d 426 (1990)("The agency must shoulder the burden of proving that one of the act's narrow exemptions shields the records it wishes to keep confidential.").

C. THE COUNTY IS LIABLE FOR PENALTIES BECAUSE IT ACTED IN BAD FAITH

A "person who prevails" has been defined by the Washington Supreme Court as a person who must seek judicial review to determine that the documents were wrongly withheld. **Spokane Research & Defense Fund v. City of Spokane**, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005). The Spokane Research Court held that filing need not be the direct cause of the disclosure, so long as the court determines that disclosure had been wrongfully denied at the time the suit was brought. Id. The disclosure of documents prior to judgment does not moot the issue. Fees and costs are still mandatory for the period of time that disclosure was improperly denied from the time of request to disclosure. Id., at 102. Good faith is not a defense. **Amren v. City of Kalama**, 131 Wn.2d 25, 35, 929 P.2d 389 (1997).

The Supreme Court in **PAWS** emphasized that "[a]gencies have a duty to provide 'the fullest assistance to inquirers

and the most timely possible action on requests for information.'" **PAWS**, 125 Wn.2d at 252(quoting RCW 42.17.20 (now 42.56.100)). This duty exists, despite the fact that "such examination may cause inconvenience or embarrassment to public officials or other." RCW 42.56.550(3). And it is abudantly clear that it is not for the agency to interpret the Act: "[L]eaving interpretation of the Act to those at whom it was aimed would be the most direct course to its devitalization." **Hearst Corp. v. Hoppe**, 90 Wn.2d 123, 131, 580 P.2d 246 (1978). There is no wiggle room for an agency - it must fulfill its obligations under the PRA. If there is question, the agency must seek clarification from the requestor.

RCW 42.56.565, the statute which requires bad faith on the part of the agency before a court can grant penalties to an inmate does not define what bad faith is. Our courts have determined that a showing of bad faith need not require an intentional bad act. **See Francis v. Dept of Corrections**, 178 Wn.App. 42, 313 P.3d 457 (2013). In discussing bad faith, Division Two focused on various cases in the PRA context to support its position. Id. at 463 (citations omitted). It also looked at cases outside the PRA. Id at 464 (citations omitted). It then considered [illegible] from the Restatement (Second) of Contracts § 205 cmt. d (1981), quoted in Black's Law Dictionary

(9th Cir. 2009). Finally, it looked to the federal Freedom of Information Act ("FOIA") for possible persuasive authority. After consideration, the **Francis** Court stated, "FOIA cases have no bearing on the meaning of bad faith in this appeal." **Francis**, 178 Wn.App at 465. Having rejected this argument, it looked to statutory interpretation of RCW 42.56.565.

In rejecting the intentional bad act requirement, the **Francis** Court lokked at the purpose of the PRA and the people's sovereingty. It also looked at how it is interpreted for the requestor to protect the public interest. **Francis**, 178 Wn.App. at 466. It concluded that inmates are entitled to penalties when an agency does not conduct a reasonable search but not when making a simple mistake or following the law as it existed at the time. Id. at 467.

Division Three was next to interpret RCW 42.56.565. **See Faulkner v. Wash. Dept. of Corrections**, 183 Wn.App. 93, 332 P.3d 1136 (2014). In **Faulkner**, the Court provided further guidelines on what defines bad faith. **Faulkner**, held that "[illegible] is associated with the most culpable acts by an agency." Id at 105. It seconded the bad faith finding in **Francis** that a cursory search and delayed disclosure fell "well short of even a generous reading of what is reasonable under the PRA." Id. (citing **Francis**, 178 Wn.App. at63.). **Faulkner** holds that a finding of bad faith requires a finding

of a higher level of culpability [illegible] it requires a finding of a wanton or willful act or omission by the agency. Id. The **Faulkner** Court applied Black's Law Dictionary to define these terms:

> "Wanton" is defined as "[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences." Further, "[w]anton differs from reckless both as to the actual state of mind and as to the degree of culpability. One acting wantonly may be creating no greater risk of harm, but he is not trying to avoid it and is indifferent to whether harm results or not."

Id. at 103-04 (citing **Black's Law Dictionary**, 1719-20 (9th ed. 2009)(quoting Rollin M. Perkins & Ronald N. Boyce, **Criminal Law** 879-80 (3d ed. 1982))). Putting it more succinctly, "[p]enalties are owed when an agency acts unreasonably with utter indifference to the purpose of the PRA." Id. at 105. The **Faulkner** Court endorsed the decision in **Francis**:

> "**Francis** is an example of a wanton act made in bad faith--the agency knew it had a duty to conduct an adequate search for the requested records but instead performed a "cursory search and delayed disclosure well short of even a generous reading of what is reasonable under the PRA."

Id. (citing **Francis**, 178 Wn.App at 63).

Benitez will first show that the County is liable for penalties because the County acted in bad faith when it denied his request by claiming invalid exemptions, delaying a response to his request, and failing to provide any explanation of how the County's claimed exemptions applied. I will then ask the

Court to impose penalties based on individual groups of records, using the standard mitigating and aggravating factors the courts consider in determining the penalty amount.

1. The County Acted In Bad Faith When It Relied On Invalid And/Or Inapplicable Exemptions To Deny Benitez' Public Records Request.

The County acted in bad faith when it [illegible] Benitez' records request. The denial was based on invalid and/or inapplicable exemptions. First, RCW 42.56.070(1) did not apply because CrR 4.7 did not qualify as an "other statute" exemption from disclosure.

The interface of the "other statute" exemption with the rest of the PRA was described in **PAWS**, 125 Wn.2d at 261-62:

> The "other statute" exemption incorporates into the Act other statutes which exempt or prohibit disclosure of specific information or records. RCW 42.17.260(1). In other words, if such other statutes mesh with the Act, they operate to supplement it. However, in the event of a conflict between the Act and other statute, the provisions of the Act govern. RCW 42.17.920. Thus, if another statute (1) does not conflict with the Act, and (2) either exempts or prohibits disclosure of specific public records in their entirety, then (3) the information may be withheld in its entirety notwithstanding the redaction requirement. The rule applies only to those exemptions explicitly identified in other statutes; its language does not allow a court to imply exemptions but only allows specific exemptions to stand. **Brouillet v. Cowles Publ'g Co.**, 114 Wn.2d 788, 800, 791 P.2d 526 (1990).

To prohibit disclosure or to exempt records from copying or inspection, the "other statute" must specifically exempt

information from disclosure. A general reference that does not specifically make the records confidential or exempt is not sufficient to apply as an exception to the general policy of open records. **Brouillet**, 114 Wn.2d at 800.

Here, DPA Miller advised Molitor to deny Benitez' records request because she "thought" RCW 42.56.070(1) "would apply because the Skagit Court's order was a discovery order issued under authority of a court rule." CP 280. However, CrR 4.7 does not specifically exempt discovery records from disclosure. In fact, CrR 4.7 clearly allows a defense attorney "to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting attorney or order of the court." CrR 4.7(h)(3).

Further, the trial court's general reference that it "[g]rants a protective order under CrR 4.7(h)(4) relating to any discovery materials, law enforcement reports and investigative materials in the possession of defense counsel, the prosecuting attorney or law enforcement," CP 332, was "not sufficient" to apply as an exemption from disclosure. **Brouillet**, 114 Wn.2d 800. The "other statute" rule did not allow the trial court, [illegible] specific exemptions to control." Moreover, the trial court's order did not refer to a court rule adopted under the PRA. CP 69.

Because CrR 4.7 allowed for disclosure of the records Benitez was seeking and the trial court's order did not make the records exempt from disclosure, RCW 42.56.070(1) did not apply, and therefore the records were not exempt under that statute. DPA Miller was aware of this and of the judicial precedent setting forth how and when the "other statute" exemption applied. Yet she relied on the invalid and/or inapplicable exemption anyway when she advised Molitor to deny Benitez' records request.

Second, RCW 42.56.290 did not apply because the records were available to Benitez. As used in the PRA, "discovery exemptions" refer to those materials that would not be subject to production under the Rules of Civil procedure or other applicable rules or statutes that would prevent production of materials during the course of a legal proceeding in a Washington court. **See Limstrom v. Ladenburg**, 136 Wn.2d 595, 609, 963 P.2d (1998) (Limstrom II)(holding that the pretrial rules referred to in RCW 42.17.310(1)(i)/RCW 42.56.290 "are those set forth in the civil rules for superior court, CR 26").

The PRA exempts from public exemption and disclosure records "which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for cause pending in the superior courts." RCW 42.56.290. [illegible] language

interpretation of this provision is that:

> Records relevant to a controversy to which an agency is a party are exempt from public [inspection and] copying under the Public [Records] Act if those records would not be available to another party under [superior court] rules of pretrial discovery. The corollary is this is the records would not be exempt if they are available to another party under rules of pretrial discovery.

O'Connor, 143 Wn.2d at 912.

Here, the records Benitez was seeking were available to him as pretrial discovery. CP 59, n. 9. Therefore, because the records were available to Benitez as pretrial discovery, RCW 42.56.290 did not apply as an exemption from disclosure, "even if a protective order has been issued." Id.

O'Connor was available to DPA Miller at the time Benitez made his records request. In fact, DPA miller cited **O'Connor** in her declaration as controlling authority. CP 280. Thus, DPA Miller was [illegible] **O'Connor**, RCW 42.56.290 did not apply. Yet she relied on that statute [illegible] that the [illegible] should not be released [illegible]

[illegible] RCW 42.56.240(1) and (2) [illegible] did not apply as exemptions from disclosure. The Supreme Court has held that RCW 42.56.240(1) "ceases to apply categorically to investigative records once the case is first referred to a prosecutor for a charging decision." **Sargent v. Seattle Police Dept.**, 179 Wn.2d 376, 402, 314 P.3d 1093 (2013); **Seatlle Times v. Serkoo**, 170 Wn.2d 581, 594, 243 P.3d 919 (2010); **Cowles Publ'g Co., v.**

Spokane Police Dept., 139 Wn.2d 472, 481, 987 P.2d 260 (1999). Where the exemption does not apply categorically, application would depend on a "record-by-record analysis, with the requested records subject to in camera review by the court." **Seatlle Times Co.**, 170 Wn.2d at 594. The burden is on the agency to establish that nondisclosure is in accordance with one of the PRA's exemptions. RCW 42.56.550(1)("The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.").

Here, Benitez' case had been prosecuted, tried to a jury, and was on appeal at the time he made his records request. DPA Miller was aware of this information. She also had available to her the above judicial precedent holding that RCW 42.56.240 (1) did not apply categorically exempting the records Benitez requested, and she was aware that the burden was on the County to establish that nondisclosure was in accordance with the claimed exemption. Yet she did not pursue any of the remedies available to her, or advise Molitor to pursue one of the remedies. See RCW 42.56.540 and 42.56.565. Instead, [illegible] released to Benitez.

RCW 42.56.240(2) also did not apply to exempt the records in their entirety. RCW 42.56.240(2) provides protection of witness identities by exempting witness identities where "disclosure would endanger any person's life, physical safety, or property" or where the witness requests nondisclosure. The burden is on the agency to show that disclosure would endanger a person's life, physical safety, or property, or that a witness had requested nondisclosure under RCW 42.56.240(2). RCW 42.56.550(1).

However, if a portion of a record is exempt from disclosure, but the rest is not, an agency generally is required to redact the exempt portion and then provide the remainder. RCW 42.56.210(1).

> In general, the Public Records Act does not allow withholding of records in their entirety. Instead, agencies must parse individual records and must withhold only those portions which come under a specific exemption. Portions of records which do not come under a specific exemption must be disclosed.

PAWS, 125 Wn.2d at 261 (citations omitted).

Here, DPA Miller did not show that release of the records would endanger any person's life, physical safety, or property, or that a witness had requested nondisclosure. Even if DPA Miller had made such a showing, [illegible] witnesses, and informants became exempt, the PRA required that the portions of the records which were not exempt be disclosed. DPA Miller was aware of this requirement and that RCW 42.56.240(2)

did not apply categorically and automatically, yet she relied on the statute anyway to advise Molitor that the records should not be released to Benitez.

As the County asserted below, the question of bad faith necessarily focuses on the actions of DPA Miller who provided the legal advise to Molitor that resulted in the denial of Benitez' request. CP 373. DPA Miller is "a competent lawyer skilled in the Public Records Act." CP 375. She has been advising "[her] Skagit County clients on the [PRA] since 2003" and has attended numerous PRA seminars and, because of her training, has qualified to provide training on the PRA. CP 277-78.

In this case, the statutes and judicial precedent were clear that the exemptions DPA Miller claimed exempted the records from disclosure did not apply. At least, they did not apply to withhold the records in their entirety. Yet DPA Miller disregarded the statutes and judicial precedent and, instead, relied on her own personal interpretation of the exemptions to advise Molitor that the records should not be released to Benitez. Further, DPA Miller was well aware of the strict requirements of the PRA, and she was well aware that she had, or that the PRA provided, procedural remedies to resolve any question of whether the records were exempt, yet she disregarded these procedural remedies as well. Furthermore, DPA Miller was

well aware of the consequences of noncompliance with the PRA.

Thus, given that DPA Miller is very adept in the PRA, it cannot be said that her decisions were based on compliance with the PRA. She knowingly relied on invalid and/or inapplicable exemptions in advising Molitor that the records Benitez requested should not be released to him. Such action was certainly willful and wanton—DPA Miller acted "unreasonably or maliciously risking harm while being utterly indifferent to the consequences" of noncompliance with the requirements of the PRA. **Faulkner**, 183 Wn.App. at 105. Therefore, the County acted in bad faith when it relied on invalid and/or inapplicable exemptions to deny Benitez' public records request.

Additionally, Division Two of this Court, recently held that an agency acted in bad faith in denying public records to a requester where the agency had no right to rely on another agency's position in determining whether records were exempt from disclosure, and the agency relied on an indefensible position for withholding records. **Adams v. Washington State Dept. of Corrections**, 2015 WL 5124168.

In **Adams**, the appellant, Department of Corrections ("DOC"), argued that the Washington State Patrol took the position that Washington State criminal history information was exempt from the PRA under RCW 10.97.050 and RCW 10.97.080, and DOC employees feared they would violate the agency's user agreement

with the patrol and lose access to information if the DOC did not abide by the patrol's interpretation. Adams at ¶ 55. Further, the DOC argued that, because the WSP was vested with the authority to administer all operating phases of the Washington Crime Information Center which encompassed the records which are the subject of RCW 10.97, the DOC was reasonable to rely on the WSP's position. Id.

The Court of Appeals held that the DOC had a right to rely on the position of the state patrol in determining whether the requested records were exempt from disclosure. **Adams** at ¶ 60. The Court reasoned that under the PRA, "[t]he agency must shoulder the burden of proving that one of the [A]ct's narrow exemptions shields the records it wishes to keep confidential." **Adams** at 59 (quoting **Brouillet**, 114 Wn.2d at 794).

The DOC also argued that standing alone, an agency's reliance on an invalid basis for nondisclosure is not a basis for finding bad faith. **Adams** at ¶ 35. The DOC sought to show that its position was not "farfetched." Id. The Court rejected the DOC's arguments, however, and upheld the trial court's finding that the DOC's reliance on an "indefensible position" to withhold the records Adams requested was a basis for finding bad faith. **Adams** at ¶ 56.

Similarly, in this case, DOC Miller relied on the trial court's position that the records need not [illegible]

released to Benitez. And the County argued below that "[r]eliance on an invalid basis for nondisclosure, so long as the basis is not 'farfetched,' or asserted with knowledge of its invalidity, is not a culpable act of bad faith." CP 240.

Given that PDA Miller is highly skilled in the PRA, he was well aware of the exemptions invalidity, as argued above. Further, the County later conceded that denying Benitez' records request violated the PRA, CP 213, and the trial court found that the County violated the PRA. CP 221. Thus, here, just as in **Adams**, PDA Miller relied on an "indefensible position" to withhold the records Benitez requested.

Therefore, this Court court should find that the County acted in bad faith when it relied on invalid and/or inapplicable exemptions to deny Benitez' public records request.

2. The County Acted In Bad Faith When It Failed To Promptly Respond To Benitez' Public Records Request.

RCW 42.56.100 requires that agencies "shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." The PRA unequivocally commands an agency to respond promptly to a public records request. **Yousoufian v. Offic of Ron Sims**, 168 Wn.2d 444, 465, 229 P.3d 735 (2010); RCW 42.56.520. Specifically, within five business days of receiving a public records request, an agency must respond by either (1) providing the record,

acknowledging that the agency has received the request and providing a reasonable estimate of time required to respond, or (3) denying the request. **RCW 42.56.520.** The agency may have additional time to respond if it needs to (1) clarify the intent of the request, (2) locate and assemble the information, (3) notify third parties or agencies affected by the request, or (4) determine whether the requested information is exempt. Id.

In this case, Benitez received serial notices of time needed to respond from several SCIDEU personnel. CP 139; 140; 174; 177; 178. Each estimate failed to explain why additional time was needed to respond. Id. Each estimate of time to respond was unreasonable given the clarity of Benitez' request, and each estimate of time went unmet. Id

As argued above, DPA Miller is a competent lawyer skilled in the Public Records Act." CP 235. Thus, she was fully aware of the PRA's strict response requirements and of the consequences of not complying with those requirements. Yet, despite her skills and her awareness of the consequences of noncompliance, she failed to promptly respond to Benitez' records request as required by the PRA, she was the one reviewing Benitez' request after all. And she failed to properly advise her client, Molitor, on the response required by the PRA. Instead, she just simply allowed Molitor to

provide Benitez with repetitious copies of nonresponsive records, CP 142-169, and with serial, unjustified notices of additional time needed to respond to his request. CP 140; 141; 170-73; 174.

There was no excuse for DPA Miller not to comply with the PRA's response requirements or for her not to advise Molitor on those requirements, whether she was providing Benitez' records request or not. Her total disregard of the PRA's response requirements was an unreasonable and willful delay in responding to Benitez' request. Such action is certainly "wanton." **Faulkner**, 183 Wn.App. at 105, and "well short of what is reasonable under the PRA." Id. Therefore, the County acted in bad faith when it failed to promptly respond to Benitez' public records request.

3. The County Acted In Bad Faith By Ditinguishing Among Persons Requesting Public Records.

RCW 42.56.080 requires an agency to provide a public record to "any person." "And the PRA specifically forbids agencies from distinguish[ing] among persons requesting records." **DeLong v. Parmelee**, 157 Wn.App. 119, 146, 236 P.3d 936 (2010) (citing RCW 42.56.080), review granted, cause remanded on other grounds, 171 Wn.2d 1004 (2011).

> **The statute specifically forbids intent, regardless of whether it is malicious in design, from being used to determine if records are subject to disclosure.**

Id. (Emphasis added). Here, the trial court's [illegible] was based on Benitez' identity and possible intended use of the records. CP 329-33.

In her declaration, DPA Miller stated:

> From all the information I held, **including the detailed findings from the trial court in its 2011 order** barring release of the records to Mr. Benitez, **I determined that nondisclosure was essential to effective law enforcement** and to the safety of officers and informants. In this case, based on Mr. Benitez' record of intimidation which I learned from DPA Johnson, the very high risk of retaliation against the under cover officers and informants, including neighbors who provided information about the gang's activities, presented a concern that persons would be unwilling to come forward with information to help in future investigations.

CP 291 (Emphasis added). Thus, DPA Miller used information which RCW 42.56.080 forbids from being used in determining whether records are subject to disclosure. Had anyone else made the same request, DPA Miller would not have used this information.

[illegible]

DPA [illegible]

[illegible] taken such action had anyone else made the same request. As such, DPA Miller distinguished

Benitez from anyone else making the same request.

DPA Miller's decision to distinguish Benitez from other person making the same request, in violation of the PRA, was a "willful" and "wanton" act. **Faulkner**, 183 Wn.App. at 105. Therefore, the County acted in bad faith when it denied Benitez the records by distinguishing among persons requesting public records.

4. The County Acted In Bad Faith When It Failed To Provide Benitez With An Explanation Of How The Claimed Exemptions Applied.

"When an agency withholds or redacts records, its response 'shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.'" **City of Lakewood v. Koenig**, 182 Wn.2d 84, 87, 343 P.3d 335 (2014) (quoting RCW 42.56.210(3)). "The purpose of the requirement is to inform the requestor why the documents are being withheld and provide for meaningful judicial review of agency action." Id. (citing **PAWS**, 125 Wn.2d at 270; **State v. Sanders**, 169 Wn.2d 827, 846, 240 P.3d 120 (2010). It is improper under the PRA to provide exemption information in such vague terms that "the burden [is] shifted to the requestor to sift through the statutes cited ... and parse out possible exemption claims." **Lakewood**, 182 Wn.2d at95. The remedy for violation of the PRA

by [illegible] failure to [illegible] a brief explanation of how claimed exemption applied to records requested by requestor, is to consider agency's failure to explain as an aggravating factor in awarding costs, fees, and penalties against agency. **Sanders**, 169 Wn.2d at 846-49. Here, Molitor's letter claiming the records were exempt gave no explanation how the exemptions applied, it simply cited the court rule and statutes Molitor relied on. CP 333.

As argued previously, [illegible] Miller is well skilled in the PRA; therefore, she was aware that RCW 42.56.210(3) required an explanation of how the claimed exemptions applied. Further, as the attorney who "prepared" the response for Molitor, she had a duty to ensure that the response complied with the requirements of the PRA. [illegible]. However, [illegible] disregarded this requirement [illegible] others, and there was no excuse for this.

The County's "omission" of an explanation of how the claimed exemptions applied was not a simple mistake. It was an intentional act by the County to force Benitez to sift through the claimed exemptions and figure out for himself whether they were valid and/or applied. Such an act is most certainly "wanton." **Faulkner**, 173 Wn.App. at 105. Therefore, the County acted in bad faith when it failed to provide Benitez with an explanation of [illegible] exemptions applied.

5. The County Is Liable For Penalties Because It Acted In Bad Faith; Therefore, This Court Should Impose Penalties Consistent With The **Yousoufian IV** Factors.

When evaluating penalties, courts use the standard mitigating and aggravating factors promulgated by the Supreme Court in **Yousoufian v. King County**, 168 Wn.2d 444, 229 P.3d 735 (2010)(**Yousoufian IV**). The **Yousoufian** mitigating factors are as follows:

> (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.

The **Yousoufian** aggravating factors are as follows:

> (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

Id. at 467-68.

> Although these are the listed factors, the **Yousoufian IV** Court made it clear that it was a non-exclusive list. We emphasize that the 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.

Id. at 427.

In this case, there are three groupings of records. Grouping documents when evaluating penalties is a standard approach to handling cases with more than one violation or involve the withholding of more than one document. How a trial court handles its penalty calculation can only be overturned for an abuse of discretion. **Linberg v. Kitsap County**, 133 Wn.2d 729, 747, 948 P.2d 805 (1997). Groupings can be based on different factors including how many requests were made, the time it took to produce them, subject matter, among others. **Yousoufian v. King County**, 114 Wn.App. 836, 848, 60 P.3d 667 (2003)(**Yousoufian I**)(**rev'd on other grounds, Yousoufian v. King County**, 152 Wn.2d 421, 437, 98 P.3d 463 (2004)(**Yousoufian II**). **Yousoufian I** and **II** involved eighteen missing records grouped into ten groups. **Yousoufian II**, 152 Wn.2d 448 fn. 4. The groupings were separated into two types of documents. Four studies were withheld. The documents were separated into the number of days documents were made unavailable to yousoufi

The trial court did not abuse its discretion. **Yousoufian I**, 114 Wn.App. at 849.

Subsequently, the Court of Appeals decided **Zink v. City of Mesa**, 162 Wn.App. 688, 256 P.3d 384 (2011). The decision involved a great number of different and overlapping requests. An important and relevant takeaway is that grouping based on a common legal error are not always supported when they do not have in common the same number of days they were withheld. Id. at 722. It is usually the trial court's discretion on this matter which derives the groupings, even if the grouping is done by subject matter. See **Sanders**, 169 Wn.2d at 836.

Documents can be grouped to look at the agency culpability, the type of withholding claimed, the number of days withheld, the nature of the document withheld, why it was withheld, and any other relevant consideration. Here, this Court is entitled to determine grouping because the trial court has not addressed this issue. The grouping is by the number of days and type of documents withheld. Group I is those portions of the applications requesting search and seizure and the warrants associated with the requests that were not provided on November 8, 2012, withheld 541 days. Group II is the applications and/or authorizations to intercept and/or record private conversations, withheld 541 days. Group III is the transcript of any recorded conversations and/or communications, withheld 773 days.

Looking first at the **Yousoufian IV** mitigating factors, the County's actions negate all mitigating factors with the exception of factor (7). There was no lack in clarity in Benitez' request. The county failed to promotly respond. There was no good faith, honest, timely, and strict compliance with all the PRA procedural requirements and exceptions. Although DPA Miller was properly trained, she failed to exercise that training, and she failed to properly supervise Molitor who she was advising on Benitez' request. There is no reasonable explanation for the County's noncompliance. And the County failed to provide the fullest assistance to Benitez.

As for the **Yousoufian IV** aggravating factors, the only factor which is case specific is whether or not there is an economic loss. This factor does not apply in this case. Every other factor applies, in spades. The county delayed a response well short of what is reasonable under the PRA. The County failed to strictly comply with all of the PRA's procedural requirements and exceptions. DPA Miller failed to properly supervise Molitor who she was advising on Benitez' request. There is no reasonable explanation for the County's failure to comply with the PRA's requirements. The County's non-compliance with the PRA was intentional, negligent, wanton, and done in bad faith. The County was dishonest in providing Benitez with as copies of a document he did not

request in place of the records he requested, and in claiming it could not locate records which it later disclosed. The issue of law enforcement agencys' conduct is an important public issue, and the importance of this issue was foreseeable to the County because the request to review law enforcement records is a common and well known request. And a penalty [illegible] deter future misconduct by the County, and for failing to provide an explanation how the County's claimed exemptions applied.

There must be a penalty sufficient to deter future misconduct by the County. Given the actions of the County were wanton, in bad faith, and in total disregard of the PRA's strict requirements, this Court must send send the message to the County that it cannot simply ignore the law. The County's deliberate choice to ignore the law overrides all other concerns about minimizing any penalty.

[illegible] the County's bad faith and the nature of the violations, Benitez is entitled to a penalty of $50 per day. He asks this Court to award this amount , f[illegible] is remanded, instruct the trial court to provide an appropriate per-day penalty given the [illegible] factors described above.

D. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AND DISMISSAL BECAUSE GENUINE ISSUES OF MATERIAL FACT PRECLUDED JUDGMENT IN FAVOR OF THE COUNTY

In this case, the question of whether the County acted in bad faith presented unresolved factual questions that could not be resolved by summary judgment. First, [illegible] that DPA Miller or Chief Molitor ignored the PRA in favor of some personal or agency motive to hide records." CP 240; 378. However, DPA Miller stated in her declaration that, "under her guidance, Skagit County had not had any PRA denials reversed and no penalties had been paid. I wanted to keep that record intact and not make a decision that would be reversed on appeal." CP 282.

Thus, this raised a question of DPA Miller's motivation for determining that the records should not be released to Benitez. Was DPA Miller genuinely concerned with complying with the PRA, or was she more concerned with maintaining the County's PRA requests record intact? DPA Miller's motive for advising Molitor to deny Benitez' request is relevant to the issue of bad faith. See **Neighborhood Alliance of Spokane County v. Spokane County**, 172 Wn.2d 702, 717, 261 P.3d 119 (2011)("the agency's motivation for failing to disclose or for withholding documents is relevant [illegible] a PRA action").

Accordingly, because a question of DPA Miller's motive for [illegible] that the records should not be released to Benitez remained, the question of whether the County acted in bad faith in denying Benitez' request could not be resolved at summary judgment. **Lowe v. Rowe**, 173 Wn.App. 253, 262, 294 P.3d 6 (2012)(Question ofdefendant's motivation remained, and thus whether defendant acted in bad faith could not be resolved at summary judgment).

Second, Molitor stated in his declaration that Linda Routon immediately forwarded Benitez' request to DPA Miller. CP 274. However, Benitez presented evidence showing that his request was passed around between different people, CP 139; 141; 178, and that it was handled by Molitor up until he denied the request. CP 140; 170-73; 174; 175-76; 177; 179. Thus, the evidence conflicted and raised an issue of credibility that could not be resolved at summary judgment. **American Exp. Centurion bank v. Stratman**, 172 Wn.App 667, 676, ___P.3d___ (2012).

[illegible] **Neighborhood Alliance** [illegible] in

the light most favorable to the nonmoving party."). Further, whether Benitez' request was forwarded to PRA Miller, is relevant to the question of whether the county acted in bad faith, because if it was not forwarded to PRA Miller, then PRA Miller's review of Benitez' request never occurred, and the County most certainly acted in bad faith and "unreasonably" in denying Benitez' records request. **Faulkner**, 193 Wn.App. at 105.

Because genuine issues of material fact remained, which could not be resolved at summary judgment, the trial court erred in granting summary judgment and dismissal in favor of the County.

E. BENITEZ IS ENTITLED TO FEES AND COSTS

If this Court finds that the County acted in bad faith, Benitez asks that fees and costts be granted. RAP 18.1 permits fees and costs on appeal if the applicable law grants this right for an appeal. The Washington supreme Court has determined that under the PRA, an individual who prevails against the agency is entitled to all costs, including reasonable attorney fees. RCW 42.56.550(4); **Progressive Animal Welfare Soc'y v. Univ. of Wash.**, 114 Wn.2d 667, 690, 790 P.2d 604 (1990).

V. CONCLUSION

For the reasons stated above, this Court should find Skagit County acted in bad faith and that penalties for three groups of records must be awarded to Benitez along with fees and costs.

DATED this 7th day of December, 2015.

Respectfully submitted,

Carlos Benitez

Carlos Benitez, Jr.
Appellant

DECLARATION OF FILING AND SERVICE

I, Carlos Benitez, Jr., declare that, on December 7, 2015, I deposited the foregoing Appellant's Brief, or copies thereof, in the internal mail system of Airway Heights Corrections Center and made arrangements for postage addressed to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of December, 2015, at Airway Heights, Washington.

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