
NO. 76012-2-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellant,

v.

CHRISTOPHER COOK, KEVIN EVANS, JOSEPH JONES AND
CHRISTOPHER ROBINSON,

Appellees.

SUPPLEMENTAL BRIEFING

ROBERT W. FERGUSON
Attorney General

Timothy J. Feulner, WSBA #45396
Cassie B. vanRoojen, WSBA #44049
Assistant Attorneys General
Corrections Division; OID #91025
PO Box 40116
Olympia WA 98504-0116
360-586-1445
TimF1@atg.wa.gov
CassieV@atg.wa.gov

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. SUPPLEMENTAL BRIEFING1

 A. The *Hikel* Decision Supports the Department’s
 Interpretation of RCW 42.56.565(1).....2

 B. The *Hikel* Decision Confirms That the Trial Court’s
 Decision Would Allow Incarcerated Individuals a Greater
 Opportunity to Recover Penalties Than Non-Incarcerated
 Individuals.....4

III. CONCLUSION5

TABLE OF AUTHORITIES

Cases

Cook, et al., v. Department of Corrections,
No. 48186-2-I (Jan. 6, 2016)..... 1

Faulkner v. Wash. Department of Corrections,
183 Wn. App. 93, 332 P.3d 1136 (2014) 1

Hikel v. City of Lynnwood,
2016 WL 7468220, --- Wn. App. --- (Dec. 27, 2016) passim

Sanders v. State,
169 Wn.2d 827, 240 P.3d 120 (2010)..... 3

Statutes

RCW 42.56.550 3

RCW 42.56.550(4)..... 3

RCW 42.56.565 3

RCW 42.56.565(1)..... passim

I. INTRODUCTION

The Department of Corrections (Department) appeals the trial court's award of penalties to Respondents under the Public Records Act (PRA). As incarcerated individuals, Respondents were entitled to penalties only if they showed that the Department "acted in bad faith in denying the [Respondents] the opportunity to inspect or copy a public record." RCW 42.56.565(1). This Court heard oral argument on January 6, 2017. After argument, the Court granted Respondents' request for supplemental briefing related to *Hikel v. City of Lynnwood*, 2016 WL 7468220, --- Wn. App. --- (Dec. 27, 2016).

II. SUPPLEMENTAL BRIEFING

RCW 42.56.565(1)'s limitation on penalties to incarcerated requesters identifies two interrelated prerequisites to the award of penalties: 1) the requisite degree of culpability, i.e., bad faith and 2) the actions that the agency must have taken in bad faith, i.e. the denial of an opportunity to inspect or copy a record. On the first component, the parties agree that the appropriate standard for bad faith is outlined in *Faulkner v. Wash. Department of Corrections*, 183 Wn. App. 93, 332 P.3d 1136 (2014), and requires willful and wanton conduct that defeats the purpose of the PRA. Oral Argument, *Cook, et al., v. Department of Corrections*, No. 48186-2-I (Jan. 6, 2016), at 8:15-8:36. The *Hikel*

decision does not impact this issue. As the Department indicated at oral argument, the Court could reverse if it found that the trial court erred in finding bad faith.

The parties disagree about what is required to meet the second component. *Hikel* impacts this second question and supports the Department's interpretation of RCW 42.56.565(1). Specifically, *Hikel* supports the Department's argument that a trial court must conclude that the bad faith actions of the agency caused the denial of records. Because the trial court here premised an award of penalties on purported bad faith conduct that did not result in the denial of records, the trial court erred.

A. The *Hikel* Decision Supports the Department's Interpretation of RCW 42.56.565(1)

The *Hikel* decision supports the Department's argument that the phrase "in denying an individual the opportunity to inspect or copy a public record" in RCW 42.56.565(1) is a term of art under the PRA. *See* Opening Brief, at p. 16. In *Hikel*, the Court of Appeals found that an agency violated the PRA by failing to provide a reasonable estimate of time within five days. *Hikel*, 2016 WL 7468220, at *4. The court rejected *Hikel*'s argument, however, that he was entitled daily penalties. *Id.* at *5-6. In reaching this conclusion, the court found that "The PRA does not provide a freestanding penalty for procedural violations like the one that

occurred here.” *Id.* at *5 (citing *Sanders v. State*, 169 Wn.2d 827, 849, 240 P.3d 120 (2010)). The *Hikel* court based its decision on the language found in RCW 42.56.550(4) that distinguishes between a denial of the right to inspect or copy a record and the right to receive a response. *Id.* Under RCW 42.56.550, this distinction means that non-incarcerated individuals are entitled to daily penalties if denied an opportunity to inspect or copy a record but are not entitled to daily penalties for denials of the right to receive a response—what the *Hikel* court labelled procedural violations.

In adopting similar language in RCW 42.56.565(1), the legislature limited the award of penalties to circumstances in which a court finds that the bad faith of an agency resulted in the denial of the right to inspect or copy a record. *See* Opening Brief, at p. 16 (citing *Sanders v. State*, 169 Wn.2d 827, 848, 240 P.3d 120 (2010)). The legislature could have, but did not, use language in RCW 42.56.565 that would allow the award of penalties when an agency acted in bad faith in denying an individual an opportunity to receive a response. Thus, the plain language focuses the bad faith inquiry on the denial of the record and requires that the bad faith result in the denial of a record.

Here, the trial court awarded penalties despite concluding that the Department’s policy governing inmate phone logs was objectively

reasonable and based on a good faith understanding of the law. The trial court's award was based on its conclusion that the Department acted in bad faith in failing to conduct a search for responsive records in a location where it is uncontested these records could not have been found and for failing to explain an "exception" to the Department's policy that would not have applied to Respondents. Because these actions did not result in the denial of an opportunity to inspect or copy a record, they were not an appropriate basis for an award of penalties under the plain language of RCW 42.56.565(1).

B. The *Hikel* Decision Confirms That the Trial Court's Decision Would Allow Incarcerated Individuals a Greater Opportunity to Recover Penalties Than Non-Incarcerated Individuals

The trial court's interpretation of RCW 42.56.565(1) would expand liability for agencies responding to requests by incarcerated individuals to include circumstances in which non-incarcerated individuals could not recover daily penalties. Opening Brief, at p. 19. *Hikel* confirms that this is the natural consequence of the trial court's interpretation of RCW 42.56.565(1). In *Hikel*, the Court of Appeals found that a non-incarcerated requester was not entitled to daily penalties for the agency's failure to provide a reasonable estimate within five days. *Hikel*, 2016 WL 7468220, *5-6.

The trial court in this case awarded daily penalties based on conduct that did not result in the denial of records. The trial court explicitly stated that it did not believe that there was a causation requirement in RCW 42.56.565(1). Cook October 9, 2015, VRP at 18-19. The logic of the trial court's decision would allow an award of penalties based on a conclusion that the agency acted in bad faith in responding to the request even if such alleged bad faith is completely unrelated to the denial of records. As such, in direct conflict with *Hikel*, a trial court could award penalties to an inmate based on its conclusion that the agency acted in bad faith in failing to provide a reasonable estimate within five days. This result would be contrary to RCW 42.56.565(1)'s purpose of limiting the circumstances in which an incarcerated individual could recover penalties. Thus, *Hikel* confirms that the trial court decision in this case has expanded penalties for inmates in contravention of its intended purpose.

III. CONCLUSION

The trial court erred in finding bad faith and imposing penalties upon the Department despite the fact that the purported bad faith did not result in the denial of any records. The *Hikel* decision confirms that the

//

//

trial court's decision is contrary to the plain language and purpose of RCW 42.56.565(1). This Court should reverse.

RESPECTFULLY SUBMITTED this 20th day of January, 2017.

ROBERT W. FERGUSON
Attorney General

s/ Timothy J. Feulner
TIMOTHY J. FEULNER, WSBA #45396
CASSIE B. vanROOJEN, WSBA #44049
Assistant Attorneys General
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
TimF1@atg.wa.gov
CassieV@atg.wa.gov

CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the SUPPLEMENTAL BRIEFING with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following participant:

CHRISTOPHER TAYLOR
FT LAW, P.S.
402 LEGION WAY SW SUITE 101
OLYMPIA WA 98501-1494

MICHAEL KAHR
KAHRS LAW FIRM, P.S.
5215 BALLARD AVENUE NW SUITE 2
SEATTLE WA 98107-4838

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

EXECUTED this 20th day of January, 2017, at Olympia, WA.

s/ Amy Jones
AMY JONES
Legal Assistant
Corrections Division OID#91025
PO Box 40116
Olympia WA 98504-0116
AmyJ@atg.wa.gov