No. 96424-6

COA No. 76825-5-I

SUPREME COURT

STATE OF WASHINGTON

JOEL ZELLMER

Petitioner,

v.

KING COUNTY, ET AL.,

Respondents,

SUPERIOR COURT No. 16-2-11607-8
KING COUNTY
HONORABLE BARBARA LINDE

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Case Authority

Court of Appeals Case Authority

A. IDENTITY OF PETITIONER

Joel Zellmer, petitioner below, hereby petitions for Supreme Court review of the Court of Appeals' decision identified in Section B, below.

B. COURT OF APPEALS DECISION

Petitioner Joel Zellmer ("Zellmer") seeks review of the unpublished opinion issued by the Court of Appeals for Division I in the case of *Joel Zellmer v. King County* (July 16, 2018) (Slip Opinion reprinted in Appendix) along with the Order Denying Motion to Reconsider (September 17, 2018) (Order reprinted in Appendix).

C. ISSUES PRESENTED FOR REVIEW

1. ERROR BELOW: In a matter involving vital and substantial public interest, and because the appealed decision from the Court of Appeals conflicts with published decisions by both this Supreme Court and the Court of Appeals regarding strict application of the PRA's fees and costs provisions, the lower court erred *by failing to award Zellmer, the prevailing party, his costs and fees incurred at the trial level* as required by caselaw precedent interpreting RCW 42.56.550(4) (2017) (The Public Records Act or PRA).

   ISSUE PRESENTED: In the event the appellate court elects, *sua sponte*, to supplant the trial court rather than reverse and remand, does an appellate court have adequate grounds to deny the PRA's mandatory

award of costs and fees incurred in connection with the prevailing party's legal action at the *trial* court level if a prevailing party fails to request an award of costs and fees pursuant to RAP 18.1(b)?

2. ERROR BELOW: In a matter involving vital and substantial public interest, and because the appealed decision from the Court of Appeals conflicts with published decisions by both this Supreme Court and the Court of Appeals regarding strict application of the PRA's fees and costs provisions, the lower court erred *by failing to award Zellmer, the prevailing party, his costs and fees incurred at the appellate level* as mandated by case law precedent interpreting the PRA and authorized by the Rules of Appellate Procedure.

   ISSUE PRESENTED: In the event the appellate court, *sua sponte*, elects to supplant the trial court rather than reverse and remand, does an appellate court have adequate grounds to deny the PRA's mandatory award of costs and fees incurred in connection with the prevailing party's legal action at the *appellate* court level if a prevailing party fails to request an award of costs and fees pursuant to RAP 18.1(b)?

3. ERROR BELOW: In a matter involving substantial public interest, and because the appealed decision from the Court of Appeals conflicts with published decisions by both this Supreme Court and the Court of Appeals regarding agency bad faith under the PRA, the lower court

erred by *not finding that the King County Prosecuting Attorney's Office (KCPAO) acted in bad faith*, despite the underlying spirit and purpose of the PRA promoting broad disclosure, virtually identical public disclosure requests, competent technical knowledge and experience by staff, no follow-up or clarification correspondence, claims of being "alerted to the possibility of missed records", and silently withholding responsive documents until Zellmer filed suit.

ISSUE PRESENTED: Does an agency's repeated failure to disclose and to silently withhold responsive public records amount bad faith under the PRA in the form of gross negligence or wanton disregard of potential liabilities for incomplete disclosure?

D. STATEMENT OF THE CASE

Factual Statement of the Case:

Petitioner Joel Zellmer was an inmate at Washington State Penitentiary in Walla Walla when he made the public disclosure requests (PDRs) at issue for "All photographs taken of the inside of the home". CP 2, 15, 28, 38 (January PDR), 59 (September PDR). KCPAO's Public Records Unit employs three individuals: the supervising Public Records Officer, a Public Records Specialist, and a Public Records Paralegal. CP 15, 29. Both the Public Records Specialist and Public Records Paralegal receive training, guidance, and supervision from the Public Records Officer. CP 15, 29, 55.

KCPAO has a codified employee policy describing procedures for how employees are to handle and respond to PDRs. CP 121-42. That policy instructs, "Agencies must respond promptly and *provide assistance to requestors*," CP 133 (emphasis added), and claims, "All Executive Branch Departments will follow the procedures outlined in this policy." CP 135. Further, KCPAO employees are directed that when responding to PDRs, "If the request is unclear or does not sufficiently identify the requested records, request clarification from the requestor". CP 135. Additionally, the Public Records Officer, Kristie Johnson, explained KCPAO's policy of sending out installment letters while a search is ongoing "if [the Public Records Unit is] not a hundred percent sure [they] have gone down every single path", thereby providing ample time for KCPAO staff to "be absolutely sure [they] have searched everywhere [they] could possibly think of." CP 200-01.

Petitioner Joel Zellmer submitted two separate-yet-related PDRs to KCPAO, requesting photographs relating to a single December 2005 search by law enforcement of his home. *See* CP 15-16, 18, 30, 55. *See also* CP 59 (September PDR), 38 (January PDR), 222-23. Both of Zellmer's PDRs requested "photographs *taken of the inside of the home*." CP 15, 18, 30, 38, 55, 59 (emphasis added). Zellmer's first (September) PDR requested and identified, in detail, photographs depicting "all rooms in the home as well [as] all of the other living areas within the inside of this home", language that KCPAO employees concede to be clear. CP 55, 59 (September PDR).

Zellmer did not identify these requested photographs by JPEG date. CP 223. *Compare* CP 59 (September PDR) *and* CP 38 (January PDR) *with* CP 218-220 (JPEG term not part of request, no confusion of request) *and* CP 210-13 (no confusion, no JPEG date). While processing each PDR, KCPAO never sent any follow-up correspondence or a clarification letter to Zellmer to discuss the existence of any undated photographs may have been responsive. CP 218-19. KCPAO produced 35 photographs in response to Zellmer's September 2015 PDR, then considered the response to be complete closed. CP 30, 34 (Dec. Close-Out), 197-199. Paralegal Nitura possessed knowledge that undisclosed hardcopy photographs existed, however no employee of KCPAO provided Zellmer no indication that any other photographs of "all rooms" existed. CP 34 (Dec. Close-Out), 46 (Mar. Close-Out), 55.

Zellmer's second request, the January 2016 PDR, essentially reiterated the request for records described in his September 2015 PDR, along with expanding the request to include "all photographs taken on December 7, 2005, of the inside of the home that was searched." CP 59 (September PDR), 38 (January PDR). Neither PDR uses the term "JPEG", but both PDRs describe the requested records with the terms "photographs", "all rooms", and "inside of the home". CP 59 (September PDR), 38 (January PDR). Upon receiving Zellmer's January 2016 PDR, KCPAO's Public Records Unit was alerted to the possibility of responsive records being

omitted from KCPAO's response to Zellmer's September 2015 PDR. CP 30, 56. In response to Zellmer's January 2016 PDR, KCPAO Public Records Unit reviewed for a second time the contents of CDs for the JPEG dates, 12/6/05 and 12/7/05. CP 30. The Public Records Officer, however, possessed knowledge that digital file dates, such as JPEG dates, can change if a file is modified. CP 202. Despite possessing such technical knowledge, and the inability to determine whether the JPEG files were modified, cropped, or transferred, Public Records Officer Johnson and Paralegal Nitura relied on the JPEG dates as the ultimate factor to determine responsiveness. *Id.* Just like their processing of the September PDR, KCPAO's Public Records Unit did not consult with anyone outside the division when searching for records in response to Zellmer's January 2016 PDR. CP 212, 220. *See* CP 28-31, 54-57, 79-81 (describing the process followed in responding to Zellmer's PDRs).

Despite being on alert that still more photographs were sought depicting the interior of the home and the possibility of an omitted responsive record to the September PDR, KCPAO produced a mere 24 photographs in response to Zellmer's January 2016 PDR. CP 59 (September PDR); CP 56 ("we were alerted to the possibility that records responsive to the 2015 request had been missed"); CP 31 ("we were alerted to the possibility that records responsive to the 2015 request had been missed"); CP 38 (January PDR); CP 204 ("He's asking again").

KCPAO possessed almost three hundred photographs displaying the inside of Zellmer's home, *see* CP 83; however, rather than producing these hundreds of records, or even disclosing their existence, KCPAO responded to Zellmer's PDRs by producing 35 photographs, then 24 photographs, for an aggregate of 59 photographs. CP 46, 71; *see also* CP 17, 19. Those 59 photographs partially depicted a handful of home office settings—*only* home office settings. *See* CP 144-50. KCPAO did not produce any photographs depicting a kitchen, dining room, bedroom, or any other room typically present in a person's home, as contemplated by the PDRs' use of the descriptors "all rooms" and "living areas". *Id.* The Public Records Officer reviewed and signed each responsive letter sent to Zellmer indicating the response was complete and his request was closed. CP 17, 18, 31, 32, 34 (Dec. Close-Out), 46 (Mar. Close-Out).

In May 2016, Zellmer filed a lawsuit against KCPAO alleging a violation of the PRA. CP 109, 113-18, 223. Upon receiving Zellmer's lawsuit KCPAO re-reviewed the boxes of records accessible to KCPAO. CP 19, 81, 83. The employee, Public Records Specialist Meghan Moore, conducting this post-lawsuit review was the least experienced employee within the KCPAO's Public Records Unit. *Compare* CP 79-80 (Moore employed less than two years) *with* CP 29 (Johnson employed over five years) *and* CP 54 (Nitura employed for over five years). This post-lawsuit search by the less experienced Moore produced the original 59 photographs,

plus an additional batch of 235 previously undisclosed photographs, for a total of 294 photographs. CP 19, 81, 83, 223. This group of 294 photographs contains alternate angles of the same subject matter depicted in the originally produced 59 photographs. *Compare* CP 144-50 (Photo Exhibit A) *with* CP 152-84 (Photo Exhibit B). The 294 photographs discovered with the same limited search methods as the two previous searches: a review of CD contents. *Compare* CP 80 (describing Moore's search & production process) ("I identified 294 photographs that could be of the inside of the home" *with* CP 55-57 (describing Nitura's search & production process) *and* CP 29-30 (describing Public Record Officer's search & production process).

To date, KCPAO *still has not produced, nor even acknowledged the existence of any additional photographs* depicting other rooms and items within his home that was searched in December 2005, such as the contents of his gun safe, contents of various drawers in his offices, his daughter's room, various stacks of banker boxes labelled as "case files" and "attorney client-privilege".

Procedural Posture of the Case:

Zellmer filed his complaint in King County Superior Court alleging that King County, through the actions of the Prosecuting Attorney's Office, violated the PRA. CP 1. KCPAO, on behalf of itself and King County, filed a Motion for Summary Judgment, which was granted by King County

Superior Court's Honorable Barbara Linde. CP 14-27. Zellmer appealed, seeking only the reversal of the superior court's decision to strike one of Zellmer's filings and the subsequent order granting summary judgment. The Court of Appeals reversed the trial court's striking of Zellmer's filing, reversed the order of summary judgment, then, *sua sponte*, held that the KCPAO violated the PRA and that Zellmer was the prevailing party. *Zellmer v. King County*, Slip Op. No. 76825-5-I (July 16, 2018). The Court of Appeals, however, declined to award any of the PRA's mandatory costs and fees to Zellmer because Zellmer failed to strictly adhere to the RAP 18.1 procedure for requesting attorney fees on appeal. *Id.* at 12 n. 7. Despite Zellmer pointing to case law precedent and procedural flexibility explicitly expressed within the RAPs in his Motion for Reconsideration, the Court of Appeals declined Zellmer's Motion. Order Denying Mot. to Reconsider (September 17, 2018). Consequently, and pursuant to RAPs 13.3 and 13.4, this appeal follows.

E. ARGUMENT

1. The lower court erred by not awarding the prevailing party under the PRA his mandatory award of all costs and fees Zellmer incurred in connection to this legal action at the TRIAL level.

The first issue submitted to this Court for review is whether the lower court erred in failing to award Zellmer the costs and fees he incurred at the trial court level as the prevailing party.

The PRA states explicitly, "Any person who prevails against an agency in *any action* in the courts . . . shall be awarded *all costs, including reasonable attorney fees, incurred in connection with such legal action*." RCW 42.56.550(4) (2017) (emphasis added). This Court has consistently interpreted and strictly enforced this provision as a penalty intended by the legislature to encourage broad disclosure of records and to penalize agencies for wrongfully withholding such documents. *See e.g. City of Lakewood v. Koenig*, 182 Wn.2d 87, 90 (2014); *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 382, 402 (2013); *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 728 (2011); *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 152 (2010); *Yousoufian v. Office of Ron Sims, King County Executive*, 168 Wn.2d 444, 459 (2010); *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 100-101 (2005); *Concerned Ratepayers v. PUD No. 1*, 138 Wn.2d 950, 964 (1999); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 616 (1998); *Amren v. City of Kalama*, 131 Wn.2d 25, 35-36 (1997); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 272 (1994) *(PAWS* II) (citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140 (1978)); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 686 (1990) (*PAWS* I). *See also Lindberg v. Kitsap County*, 133 Wn.2d 729, 748 (1997) (Durham, C.J. dissent). Accordingly, the Courts of Appeals have strictly enforced the PRA's costs and fees provisions in

accordance with Supreme Court jurisprudence. *See e.g. Adams v. Dep't of Corr.*, 189 Wn. App. 925, 956 (2015); *Francis v. Dep't of Corr.*, 178 Wn. App. 42, 68 (2013), *review denied*, 180 Wn.2d 1016 (2014); *Dep't of Transp. V. Mendoza de Sugiyama*, 182 An. App. 588, 605 (2014); *Zink v. City of Mesa*, 162 Wn. App. 688, 729 (2011); *Beal v. City of Seattle*, 150 Wn. App. 865, 877 (2009); *King County v. Sheehan*, 114 Wn. App. 325, 354 (2002); *ACLU v. Blaine Sch. Dist. No 503*, 95 Wn. App. 106, 111 (1999); *Lindberg v. Kitsap County*, 82 Wn. App. 566, 575 (1996).

In contrast to the PRA mandate, RAP 18.1(b) states, "A party must devote a section of its opening brief to the request for fees or expenses." RAP 18.1(b); *Gendler v. Batiste*, 174 Wn.2d 244, 264 (2012) (discussing the prevailing party's compliance with general rule of RAP 18.1(b) supporting an award of fees and costs on appeal). *But see* RAP 18.1(a) (states the general rule with contemplated exception); *and* RAP 18.1(i) (expenses and fees may be determined by trial court). Also, RAP 1.2(a) clearly and plainly states, "issues will not be determined on the basis of compliance or noncompliance with there rules". RAP 1.2(a).

Here, the lower court heard an appeal from an aggrieved requester seeking relief from an agency-favorable order of summary judgment. The appellate court agreed with Zellmer and reversed the lower court's rulings. Then the appellate court, on its own initiative, went beyond the relief

requested and found that KCPAO violated the PRA and held Zellmer to be the prevailing party. However, rather than staying consistent with established caselaw and PRA jurisprudence, the lower court here broke PRA precedent by declining to award Zellmer, the prevailing party, his PRA mandated costs and fees incurred in connection with the legal action at the trial level. This not only conflicts with clearly established precedent, the lower court's decision completely undermines the purpose and spirit of the PRA as described by this Supreme Court, "dicourag[ing] improper denial of access to public records." *Spokane Research*, 155 Wn.2d at 101 (citing *Amren*, 131 Wn.2d at 35-36); *Yousoufian*, 168 Wn.2d at 459 ("the PRA penalty is designed to discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute.") (internal citations and quotations omitted); *PAWS* I, 114 Wn.2d at 688 ("Attorneys' fees under our [PRA] are mandatory."). Additionally, it conflicts with the very rules with which the appellate court claims Zellmer failed to comply: the RAPs. The appellate court justified its denial of the statutorily mandated award because Zellmer's failure to strictly adhere to RAP 18.1 by omitting a section in his opening brief requesting an award of attorney fees and costs on appeal. *Zellmer*, Slip Op. at 12 n. 7.

These grounds are untenable and unreasonable for three reasons: (1) RAPs do not govern trial court proceedings, thus failing to adhere to RAP

18.1 is not adequate grounds to deny a prevailing party his PRA-mandated compensation; (2) RAP 1.2(a) specifically states that issues will not be determined based on noncompliance, thus deciding the issue of attorney fees based on noncompliance is unreasonable; and (3) established caselaw illustrates that awards to prevailing parties under the PRA are mandatory and strictly enforced in order to penalize agencies for wrongfully withholding public records and to promote broad disclosure, thus to decline to penalize a violating agency is in clear conflict with PRA precedent. Therefore, the lower appellate court's decision regarding Zellmer's attorney fees sits in direct conflict with its own prior decisions and this Supreme Court's decisions by letting a violating agency escape penalty while leaving the prevailing party with the bill. As a result, Zellmer requests that this Court reverse the lower court's decision denying all the costs and fees Zellmer incurred at the trial court level, and to hold that Zellmer, as the prevailing party under the PRA, shall be awarded his statutorily mandated fees and costs.

2. The lower court erred by not awarding the prevailing party under the PRA his mandatory award of all costs and fees Zellmer incurred in connection to this legal action at the APPELLATE level.

The second issue submitted to this Court for review is whether the lower court erred in failing to award Zellmer the costs and fees which he

incurred at the appellate court level, the only legal action where he was the prevailing party.

The rule for awarding appellate costs and fees to prevailing parties is the same as above, with the additional layer of the Rules of Appellate Procedure. In most cases, RAP 18.1 governs the sole process of obtaining attorney fees and expenses on appeal whereby a party must devote a certain section in its opening brief requesting such costs and fees. RAP 18.1(b).

Exceptions to this rule, however, are contemplated by the rule itself and have been recognized by caselaw. *See* RAP 18.1(a) ("unless statute specifies that the request is to be directed to the trial court."); RAP 18.1(i) (appellate court may direct trial court to determine costs and fees on remand). *See also PAWS* II, 125 Wn.2d at 271 ("Attorney fees incurred on appeal are included."); *O'Neill*, 170 Wn.2d at 152 (when further fact finding necessary to determine extent of PRA violation, then remand to trial court); *Koenig*, 182 Wn.2d at 97-99 (attorney fees awarded to prevailing party and remanded to trial court to determine penalties); *Yousoufian*, 168 Wn.2d at 469 (prevailing party on appeal entitled to recover attorney fees and costs incurred on appeal); *Limstrom*, 136 Wn.2d at 616 (attorney fees to be awarded if trial court on remand determine documents were subject to disclosure); *and see O'Neill v. City of Shoreline*, 145 Wn. App. 913, 940 (2008) ("The trial court shall determine the amount of fees"). Further, the

appellate court may waive or alter most RAP provisions "in order to serve the ends of justice". RAP 1.2(c); RAP 1.2(a) ("These rules will be liberally construed to promote justice"). *See also Nat'l Fed. of Retired Persons v. Insurance Comm'r*, 120 Wn.2d 101, 116-117 (1992) (appellate court may consider issue when nature of challenge is perfectly clear).

Here, the lower appellate court accelerated the adjudication process and correctly determined that a violation of the PRA occurred. However, instead of remanding to the lower court to further proceedings, such as determining the extent of the violation and whether additional documents were still being withheld, both requiring additional findings-of-fact, the lower court took the initiative to adjudicate the entire case in Zellmer's favor, then penalized him for not foreseeing such a proactive judicial determination by leaving him with the costs incurred in connection with his successful legal action. Such a decision conflicts with both the letter and spirit of the PRA, illustrative caselaw, and the RAPs by effectively penalizing the prevailing party while permitting a violating agency to escape penalty. This does not serve the ends of justice and was axiomatically unreasonable. Instead, the lower court should have either remanded to the trial court for additional proceedings in accordance with

the appellate court's decision,[1] or it should have followed through and awarded the costs and fees Zellmer incurred in connection with the entire legal action in which he prevailed.[2] Notably, the only legal action where Zellmer prevailed was at the appellate level where the court, *sua sponte*, supplanted the trial court as adjudicator and ruled in favor of Zellmer as if it were the trial court. In such circumstances under the PRA with its statutory mandate, the application of RAP 18.1 should be through the lens of RAP 1.2 and should tend towards consistency with PRA precedent. In this context, justice requires an award to the prevailing party and a penalty to the violating agency. Therefore, Zellmer should be awarded all his costs and fees incurred in connection with that successful legal action. The substantive statutes and illustrative caselaw support such an award, as does the procedural flexibility structured within the RAPs.

Consequently, Zellmer respectfully requests that this Court reverse the lower appellate court and award Zellmer all his costs and fees, including those incurred on appeal. Zellmer also asks that this Court hold that in such rare cases where the appellate court chooses to go beyond the relief requested in the appeal and a requesting party prevails as result, then that

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[1] *See e.g. Spokane Research*, 155 Wn.2d 106; *O'Neill*, 170 Wn.2d at 154; *Limstrom*, 136 Wn.2d at 617; *PAWS* II, 125 Wn.2d at 272.
[2] *See e.g. Yousoufian*, 168 Wn.2d at 470; *Sanders*, 169 Wn.2d at 871; *ACLU*, 93 Wn. App. 120-21; *Adams*, 189 Wn. App. at 956.

prevailing party shall be automatically entitled to the attorney fees and costs incurred on appeal. Such a holding resolves the current question of law with a bright-line holding that reinforces the purpose of the PRA penalties against wrongful withholdings of records by public agencies. This holding would also provide appellate courts guidance if and when a court chooses, as it did here, to expedite the adjudication process in a manner that may deprive a prevailing party of the opportunity to seek complete statutory relief, as it did here.

3. KCPAO processing of Zellmer's PDRs amounts to bad faith because it acted in gross negligence by incompletely responding to Zellmer's September PDR, then acted wantonly in responding to Zellmer's January PDR.

The third issue submitted to this Court for review is whether the lower court erred in not finding that KCPAO responded to Zellmer's requests in a manner that amounts to bad faith under the PRA. This issue also provides this Court the opportunity to harmonize and synthesize the seemingly conflicting definitions of agency "bad faith" under the PRA.

Because Zellmer is an inmate-requester, the PRA requires a showing of agency bad faith before a court may award Zellmer the additional statutory per-diem penalties. RCW 42.56.565(1) (2011). Currently, the legal definition of bad faith appears to encompass a spectrum of unreasonable actions, from "gross negligence" at the low end, then

"reckless behavior", followed by "wanton, willful behavior", and up to "intentional misconduct". *See Livermore v. Northwest Airlines*, 6 Wn.2d 1, 6 (1940) (indicating existence of "gross negligence as will amount to bad faith constructively"). *See also Francis v. Dept. of Corr.*, 178 Wn. App. 42, 56-57 (2013) (quoting *State ex rel. Fowler v. Steiner*, 51 Wash. 239, 241 (1908)) (no intentional wrongful act but court finding bad faith when agency fails to follow its own policies); *Faulkner v. Dep't of Corr.*, 183 Wn. App. 93, 103 (2014) ("bad faith incorporates a higher level of culpability than simple or casual negligence"), *review denied*, 182 Wn.2d 1004 (2015); *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 79 (2007) ; *Benitez v. Skagit County*, 2016 Wn. App. LEXIS 800, 22 (2016) (unpublished opinion)[3] ("Bad faith is more than mere negligence or a mistake, but it need not be intentional") (citing *Faulkner*, 183 Wn. App. at 102). Distinct unto themselves, each of these categories can be considered as various "degrees of bad faith". In the specific context of the PRA, however, the Court of Appeals appear to struggle in reaching a clear and consistent definition. *Compare Faulkner*, 183 Wn. App. at 103 (inmate must show wanton, willful agency action) *with Francis*, 178 Wn. App. at 51 (determination of bad faith under PRA does not require intentional, wrongful act). *But see*

[3] Cited as nonbinding persuasive authority pursuant to GR 14.1

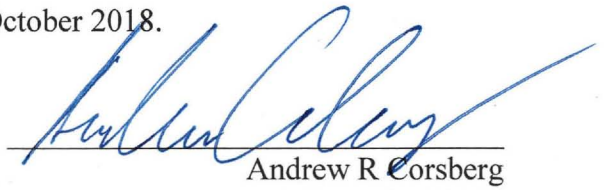
Faulkner, 183 Wn. App. at 106 (describing legislative intent) ("the legislature allows penalties for inmates only when *the conduct of the agency defeats the purpose of the PRA* and deserves harsh punishment") (emphasis added). *Francis* contemplated the legislative intent of the PRA's underlying purpose in the context of inmate requesters, "to afford prisoners an effective records search, while insulating agencies from penalties so long as they did not act in bad faith." *Francis*, 178 Wn. App. at 60. The court's focus on the search for records, however, is relatively shortsighted considering the different phases of agency action where any one phase could be compromised by an employee's bad faith, thereby jeopardizing an agency's good faith response. *See PAWS* II, 125 Wn.2d at 269 ("agency's compliance with the [PRA] is only as reliable as the weakest link in the chain"); *and see Sanders v. State*, 169 Wn.2d 827, 839 (2010) (recognized distinction between an agency's search, disclosure, and production). Therefore, Zellmer requests that this Court clearly define agency bad faith under the PRA includes three distinct degrees: (1) intentional misconduct equals first degree; (2) wanton, willful conduct equals second degree; and (3) gross negligence equals third degree. This structured definition of bad faith his helpful for determining whether the statutory threshold has been met to award per-diem penalties to incarcerated requesters, and it is helpful for determining penalties in any PRA case in conjunction with the *Yousoufian*

aggravating factors. Further, it should be held that a showing of agency bad faith at any one phase of the response process (search, disclosure, production) will support an award of per-diem penalties to the inmate-requester under RCW 42.56.565(1). Such a holding reconciles the conflicting lower court definitions of bad faith and provides a more structured guidance for lower courts in a manner that reinforces the ultimate purpose of the PRA.

F. CONCLUSION

For all of the foregoing reasons, Zellmer respectfully requests that this Court grant his petition for review and to: (1) reverse the lower court's decision to not award any attorney fees to Zellmer, the prevailing party; (2) award Zellmer all his costs and fees incurred in connection with his successful legal action, including his appeal; (3) hold that KCPAO did act in bad faith; and (5) remand to the trial court to assess penalties consistent with this Court's rulings, including a determination if additional records are still being wrongfully withheld by KCPAO.

DATED THIS 17th day of October 2018.



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Appendix

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JOEL ZELLMER, Appellant v. KING COUNTY, Respondent.	)	No. 76825-5-I DIVISION ONE UNPUBLISHED OPINION FILED: July 16, 2018

SPEARMAN, J. — Washington's Public Records Act (PRA) chapter 42.56 RCW requires agencies to respond to a public records request by conducting a reasonable search and providing all identifiable records. Prison inmate Joel Zellmer submitted two public records requests to the King County Prosecuting Attorney's Office (KCPAO) asking for photographs of the inside of his home that were taken on two specific dates. Zellmer argued that King County violated the PRA and acted in bad faith by failing to produce 235 digital photographs of the inside of his home until after his lawsuit was filed. The trial court dismissed the lawsuit. Because the KCPAO used an unreliable method for determining the date on which the photographs were taken, we conclude that the search was inadequate. However, because the undisputed record establishes that the agency did not act in bad faith, we conclude that Zellmer is not entitled to an award of penalties and affirm the dismissal.

FACTS

Zellmer has been an inmate at the Washington State Penitentiary in Walla Walla since 2010. The KCPAO's public records unit is comprised of a public records officer, Kristie Johnson, a public records paralegal, Myralynn Nitura, and a public records specialist, Meghan Moore. The KCPAO stores 59 banker's boxes of records relating to Zellmer's criminal case. Of these, 54 boxes are kept in the King County Courthouse and another five boxes are kept in the Appellate Unit in the King County Administration Building. Since his conviction, Zellmer has made 24 separate public records requests to the KCPAO.

On September 29, 2015, Zellmer submitted a public records request to the KCPAO (2015 Request) specifically asking for "[a]ll photographs taken of the inside of the home that was done on December 6, 2005. This group of photo's [sic] were taken just prior to a full search of this home (Pre-search photographs). The photographs would be of all rooms in the home as well all of the other living areas within the inside of this home." Clerk's Papers (CP) at 59. On October 6, 2015, the KCPAO sent a letter to Zellmer acknowledging the request and stating that it would provide an update by November 12, 2015. On November 12, 2015, the KCPAO sent a letter to Zellmer informing him that more time was needed to complete his request due to the number of boxes to be searched, and providing a new response deadline of December 10, 2015.

Nitura began by searching 53 of the 54 banker's boxes kept in the King County Courthouse for photographs taken on December 6, 2005.[1] Nitura did not search the

[1] Nitura did not search the remaining box because it was labeled "DO NOT USE! ARRANGE FOR PICK UP BY NATIONAL MERIT AGENT" and "Contains a Disputed File Re: Zellmer v. Zellmer Wrongful Death Inv. National Merit Ins. DO NOT REVIEW w/o checking with Brenneman." CP at 65-66. On December 6, 2016, Moore reviewed the contents of the box and determined that it contained no photographs responsive to Zellmer's requests.

boxes stored in the KCPAO Appellate Unit because, based on her previous experience with Zellmer's numerous public records requests, she knew that they did not contain photographs of the inside of the home. Her search produced a number of labeled disks containing digital photographs.[2] She checked the face of each disk for a content notation indicating that the disks contained photographs of the inside of the home, or a date notation of December 6, 2015. If the label met either of these criteria, or the label was not clear, then Nitura reviewed the contents of the disk on her computer.[3]

The digital photographs were stored on the disks in .JPG (image file) format. The data fields that appeared on the computer screen included a list of the digital photographs by file name, file type, file size, and "Date modified." CP at 42-44. If a photograph appeared to be of the inside of the home, and the "Date modified" data field showed December 6, 2005, she identified it as responsive to the request. This yielded a total of 31 digital photographs, which Nitura placed in a shared electronic folder. She inadvertently placed four additional photographs dated December 7, 2005 in the same folder, for a total of 35 photographs. On December 10, 2015, the KCPAO sent a letter to Zellmer indicating that it had identified 34 public records responsive to his request.[4] Zellmer paid the fee, and on January 19, 2015, the KCPAO sent him 35 digital photographs along with a close-out letter stating that the search was complete.

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[2] Nitura also found printed photographs that appeared to be of the inside of the home, but none of them bore a date label, and KCPAO did not provide them.

[3] Nitura was unable to open three disks of the disks labeled December 6, 2005. She gave these disks to Johnson, who opened them and found a video but no photographs.

[4] According to KCPAO, this was a scrivener's error. The installment actually consisted of 35 photographs.

On February 5, 2016, the KCPAO received another public records request from Zellmer (2016 Request) asking for "1. All photographs taken on December 7, 2005 of the inside of the home that was searched. 2. Please include anything that was not produced in the photograph request previously for December 6, 2005. The photographs would be of all rooms in the house and any property within the home." CP at 38. On February 12, 2016, the KCPAO sent Zellmer a letter acknowledging receipt of the request and stating that it would provide an update by approximately March 21, 2016.

Given that the 2016 request asked for anything not produced in response to the 2015 request, the KCPAO realized that there was a possibility that responsive records had been missed. Accordingly, Nitura again searched the disks for photographs taken on December 6, 2005, but she did not find anything that had not already been provided to Zellmer. Nitura then reviewed the faces of the discs for a notation that the contents of the discs were from December 7, 2005, or that the photographs were of the inside of the home, or were unclear about the contents. Nitura provided Johnson a box of disks to review. Johnson also reviewed the face of the disks for a notation indicating that the disks related to December 6 or 7, 2005, or that they contained photographs of the inside of the home. She found one disk containing 24 photographs with a "Date modified" of December 7, 2005 and that were of the inside of the home. She did not find any photographs with a "Date modified" of December 6, 2005 that had not already been provided to Zellmer.

On March 21, 2005, the KCPAO sent Zellmer a letter indicating that it had identified 24 records responsive to his request for photographs of the inside of the home taken on December 7, 2005, and that it found nothing responsive to his request for additional photographs taken on December 6, 2005. Zellmer paid the fee, and the

KCPAO provided the 24 photographs, along with a close out letter stating that the search was complete.

On May 17, 2016, Zellmer filed a lawsuit alleging that the KCPAO violated the PRA by failing to produce all requested records for the 2015 and 2016 requests. In an effort to ascertain that nothing had been missed, Moore repeated the search. She identified a total of 294 digital photographs that "could be of the inside of the home and that could have been taken on 12/6/05 or 12/7/05." CP at 80. These included the 35 photographs with a "Date modified" of December 6, 2005 provided in response to the 2015 request and the 24 photographs with a "Date modified" of December 7, 2005 provided in response to the 2016 request. The remaining 235 photographs showed a "date modified" of December 9, 2005 or April 20, 2007.

The KCPAO decided that it could not rule out the possibility that these 235 photographs had been taken on December 6 or 7, 2005. Accordingly, on June 30, 2016, the KCPAO sent a letter to Zellmer indicating that it had again reviewed the boxes of documents related to his criminal prosecution and that "[a]s a result of that review we have enclosed 294 photographs that appear to be the inside of your home. This production includes the 59 photographs which were previously provided to you." CP at 83. The letter did not explain why the additional 235 photographs had been previously excluded from production.

Moore subsequently examined the metadata for the additional 235 photographs. She found that the metadata for all photographs with a date "modified" of December 9, 2005 also showed a date "Created" of December 9, 2005. CP at 277-78. And the metadata for all photographs with a date "modified" of April 20, 2007 also showed a date "Created" of April 20, 2007. CP at 280-81.

On March 17, 2017, King County moved for summary judgment dismissal of Zellmer's claims, arguing that the court could decide as a matter of law that it did not violate the PRA in responding to Zellmer's requests. The motion was set for April 21. On April 14, counsel for Zellmer filed a supplemental declaration with attachments, and King County objected that it was untimely filed. The supplemental declaration included excerpts from the deposition testimony of Johnson, Nitura, and Moore. On April 18, the trial court informed the parties that it needed to reschedule the hearing due to a last-minute conflict, and it moved the hearing to April 28. At the hearing, the trial court granted King County's motion to strike counsel for Zellmer's supplemental declaration as untimely. And on May 2, 2017, the trial court granted summary judgment to King County. Zellmer appealed.

DISCUSSION

Motion to Strike

Zellmer argues that the trial court erred in striking his counsel's supplemental declaration as untimely, because it was timely filed based on the actual hearing date. We review the interpretation of court rules de novo. Seto v. American Elevator, Inc., 159 Wn.2d 767, 772, 154 P.3d 189 (2007). "CR 1 requires Washington courts to interpret the court rules in a manner 'that advances the underlying purpose of the rules, which is to reach a just determination in every action.'" Spokane County v. Specialty Auto and Truck Painting, Inc., 153 Wn.2d 238, 245, 103 P.3d 792 (2004) (quoting Burnet v. Spokane Ambulance, 131 Wn.2d 484, 498, 933 P.2d 1036 (1997)). "In general, court rules 'contain a preference for deciding cases on their merits rather than on procedural technicalities.'" Buckner, Inc. v. Berkey Irr. Supply, 89 Wn. App. 906, 914, 951 P.2d 338 (1998) (quoting Vaughn v. Chung, 119 Wn.2d 273, 280, 830 P.2d 668 (1992)).

King County argues that the trial court properly struck the supplemental declaration because it was untimely based on the original hearing date. We disagree. CR 56(c) provides that the adverse party on summary judgment "may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days prior to the hearing."[5] On its face, CR 56(c) unambiguously states documentation must be filed "not later than 11 calendar days before the hearing." CR 56(c) does not specify that the deadline strictly applies to the date the hearing was originally scheduled. Counsel for Zellmer filed the supplemental declaration on April 14, 2017, seven days prior to the scheduled hearing date of April 21. If the hearing had taken place as originally scheduled, the supplemental declaration would have been untimely. But the trial court on its own initiative rescheduled the hearing for April 28. As a result, the supplemental declaration was filed 14 days prior to the actual hearing date. King County had more than 11 days to review the information in the supplemental declaration, as the rules require. It suffered no prejudice. Accordingly, we conclude that the trial court erred in striking the supplemental declaration, and we include it as part of the record on review.

Dismissal of Lawsuit

Zellmer argues that the trial court erred in granting summary judgment dismissal because KCPAO violated the PRA by withholding 235 digital photographs until after this lawsuit was filed. "We review *de novo* the superior court's grant of summary judgment, using the same legal standard as that court." Bonamy v. City of Seattle, 92 Wn. App.

[5] The King County Local Civil Rules adopt the filing standards of CR 56. "The deadlines for moving, opposing, and reply documents shall be as set forth in CR 56 and the Order Setting Case Schedule." KCLCR 56(c)(2).

403, 407, 960 P.2d 447 (1998). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

The PRA "is a strongly-worded mandate for broad disclosure of public records." Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). "The Act's disclosure provisions must be liberally construed, and its exemptions narrowly construed." Progressive Animal Welfare Soc. v. University of Washington, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (citing RCW 42.17.010(11); .251; .920). When a public records lawsuit is dismissed on summary judgment, "the agency bears the burden, beyond material doubt, of showing its search was adequate." Neighborhood Alliance of Spokane County v. Spokane County, 172 Wn.2d 702, 721, 261 P.3d 119 (2011) (citing Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 325 (D.C. Cir. 1999).[6] "The adequacy of a [records] search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents." Neighborhood Alliance, 172 Wash.2d at 719-20 (citing Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1353-51 (D.C. Cir. 1983)). "To determine whether a search is reasonable, we focus not on whether a document exists that is responsive to the request, but on the nature of the search process." Rufin v. City of Seattle, 199 Wn. App. 348, 357, 398 P.3d 1237 (2017) review denied, 189 wn.2d 1034, 407 P.3d 1154 (2018).

King County asserts that the KCPAO properly provided Zellmer with all records that could be identified as responsive to his requests for photographs of the inside of the home that were taken on December 6 and 7, 2005. Zellmer concedes that the KCPAO

[6] Interpretations of the federal Freedom of information Act (FOIA) are useful in construing the language of Washington's PRA. Hearst, 90 Wn.2d at 128.

reasonably searched all locations where responsive records might be found. However, he contends that the KCPAO's search process was unreasonable because it relied on the "Date modified" data field to determine which digital photographs of the inside of the home were responsive to his request, despite knowing that the "Date modified" might not accurately reflect the date the photograph was actually taken.

The PRA requires agencies to produce "identifiable public records." RCW 42.56.080(2). A person seeking documents under the PRA must identify the documents with sufficient clarity to allow the agency to locate them. Wood v. Lowe, 102 Wn. App. 872, 878, 10 P.3d 494 (2000). "[T]his requirement of identification is satisfied when there is 'a reasonable description enabling the government employee to locate the requested records.'" Bonamy, 92 Wn. App. at 410 (quoting Bristol-Myers Co. v. F.T.C., 424 F.2d 935, 938 (C.A.D.C. 1970)).

Here, Zellmer made clear and unambiguous requests for photographs of the inside of the home taken on December 6 and 7, 2005, thereby satisfying the identification requirement. The KCPAO properly interpreted Zellmer's request for photographs of the inside of the house to be limited to photographs taken on the specific dates he requested. The agency correctly began its search by gathering all photographs of the inside of the home. However, KCPAO relied solely on the "Date modified" data field to determine which digital photographs of the inside of the home were responsive to Zellmer's requests. If the "Date modified" was December 6 or 7, 2005, KCPAO provided the photographs. If the "Date modified" was any other date, it did not provide the photographs.

Accordingly, the question is whether the KCPAO acted reasonably in eliminating from its production all photographs of the inside of the house that did not show a "date

modified" of December 6 and 7, 2005. King County contends that this approach was entirely reasonable because a photograph's date is a clear, useful tool to guide the search for date-limited requests such as Zellmer's. But here, it is apparent that the KCPAO simply assumed that the "Date modified" was the date the photographs were actually taken, even though there is evidence they should have known that this assumption was unwarranted. At deposition, Johnson acknowledged that the date that appears in the "date modified" data field "depends upon whether or not you modified it." CP at 202. She admitted she did not know when the photographs were taken off the camera and put onto the disks. She further admitted that if a photograph was taken on one date but electronically stored under a different date label, "[w]e would not know that was responsive." CP at 249. Despite this, KCPAO assumed the "Date modified" accurately reflected the date the photographs were taken.

King County also contends that the KCPAO properly provided all photographs that it was able to identify as taken on the two requested dates. But Johnson explained that the KCPAO decided to provide Zellmer with an additional 235 photographs of the inside of the home "[b]ecause we could not eliminate them as possibly being taken" on the requested dates. CP at 250. Similarly, Moore testified that the additional photographs "could not be ruled out as being non-responsive" and that the KCPAO decided to provide them out of "an abundance of caution." CP at 272. This appears to be a tacit admission that the KCPAO realized that it could not be certain whether the "Date modified" accurately reflected the date the photographs were taken.

After the KCPAO provided the additional 235 photographs to Zellmer in response to his lawsuit, it took the additional step of checking the metadata which showed the date created was the same as the date modified for all of the photographs. But this

belated discovery does not make KCPAO's original decision to rely solely on "date modified" reasonable. In Neighborhood Alliance, a public disclosure request was made for documents related to questionable hiring practices by county officials. 172 Wn.2d at 710-11. The request specifically asked for "the information in the 'date created' data field for the document as it exists on the specific Microsoft Publisher electronic document file created for the referenced seating chart. The requested information should also include, but not be limited to, the computer operating system(s) data record indicating the date of creation and dates of modification for the referenced seating chart document." Id. at 710. In response, the County produced a log showing the requested data fields. However, the "date created" field was later than the "date modified" field for each of the documents, and the agency offered no explanation. Id. at 711. It was discovered that the computer that generated the document had been replaced, and when the files were copied from the old hard drive to the new hard drive, the date of copying became the date of creation. Id. at 711. Thus, it is apparent that "date created" and "date modified" are an inherently unreliable way to ascertain the actual date that a document was created. Indeed, Moore acknowledged that the metadata for the 235 photographs in the post-lawsuit production indicates the date the photographs were "created" but "does not state the date that the photographs were taken." CP at 275.

In sum, KCPAO knew or should have known that the methodology it used to parse responsive from non-responsive records was inherently unreliable. The KCPAO did not communicate with Zellmer to explain that it was unable to conclusively determine the dates on which the photographs were actually taken and ask how he wished to proceed. Zellmer therefore had no way of knowing that KCPAO had excluded many photographs of the inside of the home on an unreliable basis. This was not

reasonable. Accordingly, we conclude that the trial court erred in dismissing Zellmer's lawsuit on summary judgment.

"A PRA claimant 'prevails' against an agency if the agency wrongfully withheld the documents." Gronquist v. Washington State Dep't of Licensing, 175 Wn. App. 729, 756, 309 P.3d 538 (2013). Here, given our conclusion that the KCPAO acted unreasonably, we conclude that Zellmer is the prevailing party and address the question of penalties.[7]

"The PRA requires imposition of per diem penalties up to $100 per day whenever a violation is found." Sargent v. City of Seattle, 179 Wn.2d 376, 397, 314 P.3d 1093 (2013) (citing RCW 42.56.550(4)). However, an inmate may be awarded penalties under the PRA only if "the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record." RCW 42.56.565(1). "[T]he legislature plainly intended to afford prisoners an effective records search, while insulating agencies from penalties as long as they did not act in bad faith." Francis v. Washington State Dept. Of Corrections, 183 Wn. App. 42, 60, 313 P.3d 457 (2013).

"In the PRA context, bad faith incorporates a higher level of culpability than simple or casual negligence." Faulkner v. Washington Dept. of Corrections, 183 Wn. App. 93, 103, 332 P.3d 1136 (2014).

> [T]o establish bad faith, an inmate must demonstrate a wanton or willful act or omission by the agency. 'Wanton' is defined as '[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences.' Black's Law Dictionary 1719-720 (9th ed. 2009). Further, "'[w]anton differs from reckless both as to the actual state of mind and as

[7] RCW 42.56.550(4) provides that "[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record ... shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action . . . ." However, Zellmer did not request an award of attorney fees or costs below. Nor did he request fees and costs on appeal. Accordingly, we do not award them.

> to the degree of culpability. . . . One who is 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 1720 (quoting Rollin M. Perkins & Ronald N. Boyce, Criminal Law 879-80 (3d ed. 1982)).

Id. at 103-04.

Zellmer argues that KCPAO acted in bad faith by inexplicably withholding 235 responsive records until he filed suit. We disagree. The KCPAO conducted a thorough search for photographs of the inside of the home, and provided all of the photographs which were labeled with a date of December 6 or 7, 2005. None of the additional 235 photographs had a date "created" or "modified" that matched the dates that Zellmer requested. Moreover, in April 2015, KCPAO sent the 235 photographs at issue to Zellmer's former attorney Nancy Collins in response to one of Zellmer's earlier public records requests. Although the agency should have recognized that "Date modified" was not a reliable way of determining the date the photographs were taken, the evidence does not support a finding that the KCPAO acted unreasonably or maliciously while being utterly indifferent to the consequences.

Affirmed

WE CONCUR:

Spearman, J.

Leach, J.

Schindler, J.

FILED
9/17/2018
Court of Appeals
Division I
State of Washington

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JOEL ZELLMER, Appellant v. KING COUNTY, Respondent.	No. 76825-5-I DIVISION ONE ORDER DENYING MOTION TO RECONSIDER

Appellant filed a motion to reconsider the opinion filed in the above matter on July 16, 2018. Counsel for respondent filed an answer to the motion. A majority of the panel has determined this motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion to reconsider is denied.

Presiding Judge

RCW 42.56.550

Judicial review of agency actions.

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. 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.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request or a reasonable estimate of the charges to produce copies of public records, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW **42.56.030** through **42.56.520** shall be de novo. 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. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) 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. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(5) For actions under this section against counties, the venue provisions of RCW **36.01.050** apply.

(6) Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

[**2017 c 304 § 5; 2011 c 273 § 1.** Prior: **2005 c 483 § 5; 2005 c 274 § 288; 1992 c 139 § 8; 1987 c 403 § 5; 1975 1st ex.s. c 294 § 20;** 1973 c 1 § 34 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW **42.17.340**.]

NOTES:

Intent—Severability—1987 c 403: See notes following RCW **42.56.050**.

*Application of chapter 300, Laws of 2011: See note following RCW **42.56.565**.*

RCW 42.56.565

Inspection or copying by persons serving criminal sentences—Injunction.

(1) A court shall not award penalties under RCW **42.56.550**(4) to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made, unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record.

(2) The inspection or copying of any nonexempt public record by persons serving criminal sentences in state, local, or privately operated correctional facilities may be enjoined pursuant to this section.

(a) The injunction may be requested by: (i) An agency or its representative; (ii) a person named in the record or his or her representative; or (iii) a person to whom the requests specifically pertains or his or her representative.

(b) The request must be filed in: (i) The superior court in which the movant resides; or (ii) the superior court in the county in which the record is maintained.

(c) In order to issue an injunction, the court must find that:

(i) The request was made to harass or intimidate the agency or its employees;

(ii) Fulfilling the request would likely threaten the security of correctional facilities;

(iii) Fulfilling the request would likely threaten the safety or security of staff, inmates, family members of staff, family members of other inmates, or any other person; or

(iv) Fulfilling the request may assist criminal activity.

(3) In deciding whether to enjoin a request under subsection (2) of this section, the court may consider all relevant factors including, but not limited to:

(a) Other requests by the requestor;

(b) The type of record or records sought;

(c) Statements offered by the requestor concerning the purpose for the request;

(d) Whether disclosure of the requested records would likely harm any person or vital government interest;

(e) Whether the request seeks a significant and burdensome number of documents;

(f) The impact of disclosure on correctional facility security and order, the safety or security of correctional facility staff, inmates, or others; and

(g) The deterrence of criminal activity.

(4) The motion proceeding described in this section shall be a summary proceeding based on affidavits or declarations, unless the court orders otherwise. Upon a showing by a preponderance of the evidence, the court may enjoin all or any part of a request or requests. Based on the evidence, the court may also enjoin, for a period of time the court deems reasonable, future requests by:

(a) The same requestor; or

(b) An entity owned or controlled in whole or in part by the same requestor.

(5) An agency shall not be liable for penalties under RCW **42.56.550**(4) for any period during which an order under this section is in effect, including during an appeal of an order under this section, regardless of the outcome of the appeal.

[**2011 c 300 § 1; 2009 c 10 § 1.**]

NOTES:

Application—2011 c 300: "This act applies to all actions brought under RCW **42.56.550** in which final judgment has not been entered as of July 22, 2011." [**2011 c 300 § 2.**]

Effective date—2009 c 10: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 20, 2009]." [**2009 c 10 § 2.**]

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