NO. 42712-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHAWN D. FRANCIS,

Appellant/Cross-Respondent,

v.

DEPARTMENT OF CORRECTIONS,

Respondent/Cross-Appellant.

CORRECTED BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

The Appellant, Shawn Francis, is incarcerated by the Respondent, the Department of Corrections (the Department). The Superior Court granted summary judgment in Mr. Francis' favor in a Public Records Act (PRA or the Act) action. The Superior Court found that the Department violated the PRA, and further, that it acted in "bad faith" for purposes of the newly-enacted inmate penalty statute, RCW 42.56.565(1). The court awarded a penalty of $5 per day for part of the relevant time period and $10 per day for the remainder, but declined to award costs. Mr. Francis appeals those rulings.

The Department cross-appeals the trial court's determination that the Department acted in "bad faith" for purposes of RCW 42.56.565(1). The superior court erred in determining "bad faith" by using the sixteen *Yousoufian* factors[1]. These factors were established solely for use in determining the proper penalty amount under the PRA, not for determining whether an agency acted in "bad faith" under RCW 42.56.565(1). When considered under the proper standard---intentional, wrongful withholding---the Department's actions do not rise to the level of "bad faith", thus barring an award of penalties to Mr. Francis.

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[1] *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467-68, 229 P.3d 735 (2010) (*Yousoufian* V).

This Court should follow the historical definition of "bad faith" under the PRA and articulate the proper standard for assessing "bad faith" under RCW 42.56.565(1). This Court should then remand for the trial court to apply the proper standard, or alternatively, decide as a matter of law that the Department did not act in "bad faith". In either event, absent a proper finding of "bad faith" under RCW 42.56.565(1), Mr. Francis is not entitled to any penalties under the PRA. Accordingly, the Court need not address Mr. Francis' arguments about penalty amounts.

II. RESPONDENT'S ASSIGNMENT OF ERROR

The trial court erred in applying the sixteen *Yousoufian* factors to determine "bad faith" under RCW 42.56.565(1).

III. ISSUES PRESENTED

1. Whether the sixteen *Yousoufian* factors are the proper means to determine "bad faith" under RCW 42.56.565(1).

2. If the trial court properly determined "bad faith", whether the trial court acted within its discretion in awarding penalties toward the bottom of the statutory range.

3. If the trial court properly determined "bad faith", whether the trial court acted within its discretion in declining to award Mr. Francis costs and attorneys fees.

4. Whether the Department's cross-appeal was timely filed.

IV. STATEMENT OF THE CASE

A. Factual History

Mr. Francis submitted a public records request to the Department on June 22, 2009. CP 124. His request sought "[a]ny and all documents related to any reason and/or justification for the reason why inmates at the McNeil Island Corrections Center are not allowed to retain fans and hot pots in their cells, as well as any policy that may be in place to substantiate such restrictions on these items also." CP 128-29. Mr. Francis' request was assigned tracking number PDU-7430 by Brett Lorentson, one of the Department's Public Disclosure Specialists. *Id.*

As a Public Disclosure Specialist, Mr. Lorentson is tasked with tracking public records requests, and collecting responsive records. CP 124. He accomplishes this by sending emails to those individuals who likely have responsive records, and asking those individuals to perform searches. *See* CP 123-125. Mr. Lorentson has received three years of on-the-job training regarding the requirements of public disclosure, in addition to fourteen hours of dedicated training, some of which was provided by the Attorney General's Office. *Id.* He is one of thirteen employees that track the 10,000 public records requests that the Department receives on average each year. CP 126.

Mr. Lorentson responded to Mr. Francis' request by letter on July 1, 2009, explaining that he needed more time to respond. CP 124. Mr. Lorentson further indicated that he would respond to Mr. Francis' request within 20 business days, on or before July 30, 2009. *Id.*

On July 2, 2009, Mr. Lorentson sent another letter to Mr. Francis informing him that fifteen pages of responsive documents had been located. *Id.* These fifteen pages consisted of a copy of DOC Policy 440.000, Personal Property for Offenders, effective March 1, 2009, and Administrative Bulletin AB-09-009 for the same policy, effective March 23, 2009, as well as attachments one and three to the policy. *Id.*

Mr. Lorentson received a letter from Mr. Francis dated July 8, 2009, asking that the responsive records be e-mailed. CP 124. Mr. Lorentson e-mailed the responsive records on July 10, 2009, and indicated that Mr. Francis' request was now closed. *Id.*

Mr. Francis did not appeal this decision to the Department. CP 125.

B. Procedural History

Mr. Francis filed this action on June 30, 2010, alleging that the Department had not provided him with all records responsive to his request.

On July 21, 2010, Mr. Lorentson sent another letter to Mr. Francis informing him that an additional eleven pages of responsive documents had been located. *Id.* These eleven pages consisted of a copy of McNeill Island Corrections Center Operational Memorandum 440.000, Personal Property for Offenders, effective May 10, 2010, as well as attachments to the operational memorandum. *Id.* Mr. Lorentson had initially been informed that McNeill Island Corrections Center did not have responsive documents. *Id.* These records were provided to Mr. Francis at no charge. *Id.* Mr. Lorentson again informed Mr. Francis that his request was now closed. *Id.*

Mr. Francis propounded two sets of discovery on the Department while this case was pending. In response, the Department produced minutes from a tier representative meeting, and an updated Operation Memorandum on September 30, 2010. CP 125-26. The last of these responsive documents was produced on March 10, 2011. *Id.* Mr. Lorentson indicated that as soon as he discovered any of these responsive documents, he promptly provided a copy to Mr. Francis. CP 125.

Mr. Francis filed a motion for Summary Judgment on June 14, 2011. CP 70-90. The Department responded on July 1, 2011, and Mr. Francis filed a reply on July 14, 2011. *See* CP 91-99; *see also* CP 145-154. The trial court heard oral argument on July 15, 2011, and concluded

that the Department had violated the PRA by failing to produce all documents responsive to Mr. Francis' request in a timely manner. CP 156. The trial court then ordered that "the issue of penalties . . . be decided by motion and declarations on September 16, 2011." *Id.*

On July 25, 2011, the inmate PRA penalty statute went into effect. Laws of 2011, ch. 300, §§ 1, 2 (amending RCW 42.56.565). The amended statute directs that "[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." RCW 42.56.565(1).

On October 12, 2011, the trial court considered penalties. CP 187-188. In doing so, the court relied on the briefing and declarations submitted on summary judgment, in addition to the Department's Response to Penalties. CP 187. The trial court concluded that RCW 42.56.565(1) applied to this action, and that Mr. Francis was an inmate at the time of his request. CP 187; RP 3. The trial court further found that an inmate plaintiff "has the burden of persuasion to show that the Department acted in bad faith in order to receive penalties." CP 188; RP 3.

The trial court then applied "the sixteen *Yousoufian* V mitigating and aggravating factors", and concluded that the Department acted in "bad faith" for purposes of the inmate penalty statute. CP 188; RP 4. Paradoxically, the trial court did not "find any recklessness or intentional noncompliance" on behalf of the Department, and no attempt to "mislead" or "hide information" from Mr. Francis. RP 6-9. The court considered each of the *Yousoufian* factors. RP 4-11. In doing so, the trial court found that the Department's actions supported many of the mitigating factors, including a finding that the Department attempted to respond to Mr. Francis' request in a timely manner, albeit without finding "all of the information that was there to be found." RP 5. The Department, the trial court noted, attempted "to cooperate and keep in contact with [Mr. Francis]" while his request was pending. RP 8. The trial court also determined that the Department's explanation for non-compliance was not unreasonable, and most importantly, that the Department was not misrepresenting or intentionally hiding documents from Mr. Francis. RP 6. As for the *Yousoufian* aggravating factors, the trial court noted that the Department staff lacked proper training and supervision. RP 5-6. The trial court also found that the time that Mr. Lorentson spent requesting responsive records was insufficient, and therefore, the Department's search was negligent. RP 7. Ultimately, the trial court concluded that the Department's actions did not support any of the six

remaining aggravating factors. RP 4-11. Because "enough of [the *Yousoufian*] factors" applied, the trial court held that the Department acted in "bad faith", and therefore, that Mr. Francis was entitled to penalties. RP 9.

With the facts above in mind, the trial court awarded Mr. Francis $5 per day for the 353 days that the Department violated the Act before he filed suit, and $10 per day for the 273 days that the Department violated the Act after. CP 163-64, 188; RP 9-10. The trial court explained that the penalties were "reflective of this type of case and the effort that was made and the lack of deceit" on the part of the Department. RP 9. The trial court further surmised that "the penalty amount is sufficient to put [the Department] on notice that this kind of delay is not acceptable, and that it will be more than a flea bite on an elephant." *Id.* The court declined to award Mr. Francis costs or attorney fees. CP 188; RP 11. The trial court entered an order outlining these findings on October 12, 2011. CP 187-188.

Mr. Francis filed a Notice of Appeal on October 21, 2011, alleging that the trial court erred in the amount of penalties awarded, and in not awarding him costs. The Department filed a Notice of Cross-Appeal on November 14, 2011, assigning error to the trial court's use of the

Yousoufian V factors to determine "bad faith" for purposes of RCW 42.56.565(1).[2]

V. ARGUMENT

A. Standards Of Review

This court reviews a challenge to an agency's actions under the PRA *de novo*. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009); *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808, *review denied,* 169 Wn.2d 1007, 236 P.3d 206 (2009). Interpretations of law and grants of summary judgment are similarly reviewed *de novo*. *State v. Kintz*, 169 Wn.2d 537, 535, 238 P.3d 470 (2010); *Beal v. City of Seattle*, 150 Wn. App. 865, 872, 209 P.3d 872 (2009) (when record consists only of affidavits, memoranda of law, and other documentary evidence the appellate court stands in the same position as the lower court).

The "trial court's determination of appropriate daily penalties [under the PRA] is properly reviewed for an abuse of discretion." *Yousoufian II,* 152 Wn.2d at 431, 98 P.3d 463 (2004). This Court also reviews a trial court's decision on fees and costs under this standard.

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[2] Mr. Francis claims the Department's Notice of Cross Appeal was untimely. As explained below in Section F, the Notice was filed within the time provided in RAP 5.2(f) and was therefore timely.

Kitsap County Prosecuting Attorney's Guild v. Kitsap County, 156 Wn. App. 110, 120, 231 P.3d 219 (2010).

B. The Public Records Act

The Public Records Act (PRA) is a strongly-worded mandate for open government so as to provide the public with access to public records. *Burt v. Department of Corrections*, 168 Wn.2d 828, 832, 231 P.3d 191 (2010) (internal citations omitted). "Agencies are required to disclose any public record upon request unless it falls within a specific, enumerated exemption." *Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 714, 261 P.3d 119 (2011); RCW 42.56.070(1). An agency's search for records must also be reasonably calculated to uncover all relevant documents. *Neighborhood Alliance*, 172 Wn.2d at 720. A search that does not meet this standard constitutes a violation of the PRA, and subjects the agency to daily penalties. *Id.*, at 724. However, an agency is not subject to penalties for a violation if the requestor is an inmate and the trial court finds that the agency did not act "in bad faith in denying [him] the opportunity to inspect or copy a public record." RCW 42.56.565(1).

C. The Trial Court Incorrectly Used The Sixteen *Yousoufian* Factors To Determine "Bad Faith" Under RCW 42.56.565(1)

In 2011, the Legislature passed a statute regarding inmate plaintiffs in PRA actions. The law added a new subsection to RCW 42.56.565 that states:

> 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.

Laws of 2011, ch. 300, § 1 (adding RCW 42.56.565(1)). The Legislature provided further that

> [t]his act applies to all actions brought under RCW 42.56.550 in which final judgment has not been entered as of the effective date of this section.

Laws of 2011, ch. 300, § 2 (uncodified note attached to RCW 42.256.565). This law went into effect on July 25, 2011. *Id.*

Under this statute, an inmate plaintiff has the burden of persuasion to show an agency acted with "bad faith". The presence or absence of an agency's "bad faith" is a factor that can determine the *amount* of per-day penalty; but in most public records cases, no showing of "bad faith" is necessary before a penalty is imposed. *Yousoufian* V, 168 Wn.2d at 464. In contrast, no penalty may be awarded to an inmate plaintiff *unless* the court finds "bad faith" under RCW 42.56.565(1). The finding of "bad faith" under this new statute is a *prerequisite* for the award of *any* penalties to an inmate. *See Yousoufian* V, 168 Wn.2d 444.

The trial court erred by employing the sixteen *Yousoufian* factors to determine whether the Department acted in "bad faith" for purposes of

RCW 42.56.565(1). These factors were designed for the sole purpose of determining the *amount* of penalties under the PRA. *Yousoufian* V, 168 Wn.2d at 464.[3] While a court has yet to specifically define "bad faith" relative to this statute, the *Yousoufian V* factors encompass concepts well beyond the historical definition of "bad faith" in PRA case law, or for that matter, other instructive state law and federal Freedom of Information Act (FOIA) law. As a result, the trial court erred by applying the *Yousoufian* factors to RCW 42.56.565(1).

While the "bad faith" requirement for incarcerated requestors is new, the concept of "bad faith" in withholding responsive records has been discussed. *See Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 60 P.3d 667 (2003) (*Yousoufian* I), *aff'd in part and rev'd in part on other grounds*, 152 Wn.2d 421, 98 P.3d 463 (2004) (*Yousoufian* II)[4]; *King County v. Sheehan*, 114 Wn. App. 325, 357, 57 P.3d 307 (2002). "Bad faith" exists when an agency knows it has records that should be disclosed, but intentionally fails to disclose them; it is more than negligence, or even "gross negligence". *See Yousoufian* I, 114 Wn.

[3] The Court explained that because of the long history of the *Yousoufian* case, "we need to provide additional guidance on the setting of PRA penalty amounts. Hence, this review provides us an appropriate opportunity to set forth relevant factors for trial courts to consider in their penalty determination." *Yousoufian* V, 114 Wn.2d at 464.

[4] While the *Yousoufian* appellate history is long, culminating in *Yousoufian* V, 168 Wn.2d 444, 229 P.3d 735 (2010), the analysis of "bad faith" in *Yousoufian* I has not been overturned.

App. at 853. Even reliance on an invalid basis for nondisclosure will not result in a finding of "bad faith", so long as the basis is not "so farfetched" or asserted with knowledge of its invalidity, or motivated by a desire to avoid the cost or inconvenience of compliance. *See Sheehan*, 114 Wn. App. at 356-57.

The concept that "bad faith" equates to an intentional, wrongful act is further supported by state cases outside the PRA. For example, one of the four recognized equitable grounds to award attorney fees is bad faith. *Wright v. Dave Johnson Ins. Inc.*, No. 40531–8–II, 2012 WL 1416147 (Wash. Ct. App. Div. II, Feb. 22, 2012). In that context, "substantive bad faith occurs when a party intentionally brings a frivolous claim, counterclaim, or defense with improper motive." *Rogerson Hiller Corp. v. Port of Port Angeles,* 96 Wn. App. 918, 929, 982 P.2d 131 (1999). Similarly, contesting a will in bad faith has been defined as "'actual or constructive fraud' or 'prompted [not] by an honest mistake as to one's rights or duties, but by some interested or sinister motive.'" *In re Estate of Mumby,* 97 Wn. App. 385, 394, 982 P.2d 1219 (1999) (quoting *Bentzen v. Demmons,* 68 Wn. App. 339, 349 n.8, 842 P.2d 1015 (1993)).

Apart from state law, the Federal Freedom of Information Act (FOIA) provides guidance in defining "bad faith" as well as the party burdened with proving it. *See Hearst Corp. v. Hoppe*, 90 Wn.2d 123,

580 P.2d 246 (1978) (Washington's PRA closely resembles the FIOA, and thus, when appropriate, Washington Courts look to judicial interpretations of the FOIA). Under the FOIA, agency actions are entitled to a presumption of good faith unless overcome by evidence of bad faith. *U.S. Dep't of State v. Ray,* 502 U.S. 164, 179, 112 S. Ct. 541, 116 L.Ed.2d 526 (1991). In this way, the plaintiff has the burden of proving bad faith and "must point to evidence sufficient to put the [a]gency's good faith into doubt." *Ground Saucer Watch, Inc. v. C.I.A.,* 692 F.2d 770, 771 (D.C. Cir. 1981). As for "bad faith" itself, an agency's delay in the production of documents, even after litigation commenced, "cannot be said to indicate an absence of good faith." *Goland v. CIA,* 607 F.2d 339, 355 (D.C. Cir. 1978); *see also Minier v. Central Intelligence Agency*, 88 F.3d 796 (9th Cir. 1996) (no bad faith where delay was due to agency's "first-in, first-out" processing policy for FOIA requests). Furthermore, "subsequent production cannot serve as proof that the agency conducted an unreasonable search initially or acted in bad faith." *People for the Ethical Treatment of Animals, Inc. v. Bureau of Indian Affairs*, 800 F. Supp. 2d 173, 179 (D.D.C. 2011).

RCW 42.56.565(1) prohibits an award of penalties to an inmate requester in a PRA action unless the court finds the agency acted in "bad faith" in denying requested records. The statute does not define "bad faith."

But because a finding of "bad faith" is a threshold for awarding *any* penalty, the use of the *Yousoufian* V factors is inappropriate, since their explicit focus is on the *amount* of penalty to be awarded, not the threshold question of whether there can be any penalty at all. Instead, the analysis of bad faith in *Yousoufian* I and *Sheehan* provides a better test for addressing the threshold issue in RCW 42.56.565(1). Only if the inmate plaintiff can demonstrate the agency knows it has records that should be disclosed, and intentionally fails to disclose them, should the court determine that the agency acted in "bad faith".[5]

D. Even If The Trial Court Properly Determined "Bad Faith", The Trial Court Did Not Abuse Its Discretion In Awarding Penalties Toward The Bottom Of The Statutory Range

Mr. Francis alleges that the trial court abused its discretion in awarding penalties at $5 and $10 per day because the trial court's findings support some of the *Yousoufian* aggravating factors. Opening Brief at 22-23. This argument, however, fails to take into account both the breadth of the trial court's discretion in awarding penalties, and the comprehensive approach envisioned by *Yousoufian* V.

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[5] For example, an agency that identified records responsive to an inmate request but refused to produce them without explanation or notice likely would be found to have acted in "bad faith". But an agency that inadvertently failed to identify some responsive records would not have acted in "bad faith", even though the failure might constitute a technical violation of the PRA.

"[T]he trial court's determination of appropriate daily penalties [under the PRA] is properly reviewed for an abuse of discretion." *Yousoufian* II, 152 Wn.2d at 431, 98 P.3d 463. A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds. *Mayer v. Sto Indus., Inc.,* 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court's decision is "manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. *Id.*, quoting *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (internal quotes and citations omitted). In this way, an appellate court should determine penalties for PRA violations only in exceptional cases. *Yousoufian* V, 168 Wn.2d at 468-69 (setting the penalty amount only because of "the unique circumstances and procedural history of this case," while emphasizing that "[i]t is generally not the function of an appellate court to set the penalty").

A trial court must take only two things into consideration when determining per-day penalties for a violation of the PRA. The first is that any per-day penalty imposed must fall between zero and one hundred dollars. RCW 42.56.550(4); *Yousoufian* V, 168 Wn.2d at 466-67 (a penalty calculation need not begin at the midpoint of the range; trial courts may exercise their "considerable discretion" under the PRA's penalty provisions in deciding where to begin a penalty determination.).

The second consideration is the non-exclusive sixteen-factor *Yousoufian* test. *Id.*

In *Yousoufian* V, the Court outlined both mitigating and aggravating factors for a trial court to consider in determining penalties. *Yousoufian V*, 168 Wn.2d at 467-68. The Court emphasized that these "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." *Id.* at 468. The Court further cautioned that "no one factor should control." *Id.*

The parties agree that the trial court considered each applicable *Yousoufian* factor. Instead, Mr. Francis argues that because the trial court found many of the *Yousoufian* aggravating factors it could not award penalties toward the bottom of the statutory range.[6] Opening Brief at 22. But the *Yousoufian* factors are not a balancing test where mitigating factors are weighed against aggravating factors to decide which side of some middle value the penalty should fall. *See Yousoufian* V, 168 Wn.2d at 466 (specifically rejecting argument that trial court should begin penalty determinations at midpoint of statutory range). Instead, the factors were

[6] Mr. Francis also claims the trial court did not consider "the full per-day penalty scale" when it determined penalties and did not consider deterrence when arriving at penalties. Opening Brief at 10-13, 15-16. Nothing in the record supports these claims. Moreover, the trial court specifically stated that "the penalty amount is sufficient to put [the Department] on notice that this kind of delay is not acceptable, and that it will be more than a flea bite on an elephant." RP 9. His claims are unfounded.

intended to encourage a trial court to take a comprehensive approach when determining penalties, to look at an agency's individual actions in the bigger picture, and to weigh each of the factors as the circumstances of the case require.

Here, the trial court took the comprehensive approach envisioned by *Yousoufian* V, and considered all sixteen factors. RP 4-11. In doing so, the trial court reasonably concluded that the facts of this case merited penalties at the bottom of the range, especially since the facts here did not approach the egregiousness of those in *Yousoufian* V. *Id.*

Unlike in *Yousoufian* V, the trial court found the Department's violations were the result of negligence, and not "any recklessness or intentional non-compliance." RP 6-7. The trial court noted that it did not "see any attempt [on the part of the Department] to mislead [Mr. Francis] in the wrong direction, the things you saw in . . . *Yousoufian* V." RP 9. Even though the Department failed to find some records, the trial court found that the Department "did attempt to respond in a timely manner." RP 5. The Department's effort to respond in good faith was further illustrated by the fact that after the Department realized that it had not initially provided all responsive documents, it promptly provided the documents to Mr. Francis at no expense. CP 125-26. Further, nothing in the record indicates any attempt by the Department to hide records, to

avoid the inconvenience of complying with the PRA, or to disadvantage or inconvenience Mr. Francis as was the case in *Yousoufian* V. With these facts in mind, and in consideration of the *Yousoufian* factors, the trial court acted within its discretion to award penalties toward the bottom of the range.

E. The Trial Court Acted Within Its Discretion In Not Awarding Mr. Francis Costs And Fees

Mr. Francis also claims that the trial court was required to award him costs and attorney fees as a prevailing party in a PRA action. Opening Brief at 26-27. This argument, however, oversimplifies the statute on the award of fees and costs. *See* RCW 42.56.550(4).

This court reviews a trial court's decision on fees and costs in a PRA action for an abuse of discretion. *Kitsap County Prosecuting Attorney's Guild*, 156 Wn. App. 110, 120, 231 P.3d 219 (2010). "A trial court does not abuse its discretion unless the exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Progressive Animal Welfare Soc. v. University of Washington*, 114 Wn.2d 677, 689, 790 P.2d 604 (1990), citing *Allard v. First Interstate Bank*, 112 Wn.2d 145, 148, 768 P.2d 998 (1989).

"Any person who prevails against an agency in [a PRA action] shall be awarded all costs, including reasonable attorney fees, incurred in

connection with such legal action". RCW 42.56.550(4); *Neighborhood Alliance*, 172 Wn.2d at 726. But this Court has found no abuse of discretion where a trial court restricted an inmate's recovery of costs to clerk's fees and postage due to the inmate's use of the "PRA as a vehicle of personal profit through false, inaccurate, [and] inflated costs." *Mitchell v. Washington State Institute of Public Policy*, 153 Wn. App. 803, 830, 225 P.3d 280 (2009). Additionally, *pro se* litigants are generally not entitled to attorney fees when representing themselves. *In re Marriage of Brown,* 159 Wn. App. 931, 939–39, 247 P.3d 466 (2011). As this Court recently explained, "the plain language of RCW 42.56.550(4) . . . awards 'reasonable attorney fees,' not fees in lieu of attorney fees to non-attorneys who represent themselves in PRA actions." *West v. Thurston County*, No. 41085–1–II, 2012 WL 1604838 at *15, ¶ 62 (Wash. Ct. App. Div. II, May 8, 2012).

Mr. Francis is not an attorney and has "neither earned attorney fees nor is entitled to such an award under the PRA." *Id.* at *16, ¶ 63. Here, the trial court properly declined to grant Mr. Francis any costs or attorneys fees. RP 11. Mr. Francis was acting *pro se*, and therefore not entitled to attorney's fees, statutory or otherwise.

As for other costs, Mr. Francis did not provide the trial court with a basis to award costs: he provided no invoices or declarations in support of

his request. *See* CPs. As such, the trial court was without the means to award costs, and therefore acted within its discretion by denying them.

Mr. Francis similarly asks this Court to award him costs on appeal for "paralegal services". Opening Brief at 28-30. For the same reason he is not entitled to attorney fees in the trial court, Mr. Francis is not entitled to paralegal costs on appeal.

This Court should reject Mr. Francis' argument that he is entitled "paralegal" fees. Mr. Francis has offered no evidence of that any paralegal services performed on his behalf were supervised by an attorney. *See Absher Const. Co. v. Kent School District No. 415*, 79 Wn. App. 841, 845, 917 P.2d 1086 (1995) (in order to consider reimbursement of nonlawyer services, a court must find six factors, including that the performance of such services was supervised by an attorney, and that the person providing the work is qualified by virtue of education, training, or work experience to perform such work.). Moreover, Mr. Francis' reliance on federal civil rights cases is unavailing. In *Missouri v. Jenkins*, 491 U.S. 274, 285, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989), the Supreme Court held that only for purposes of 42 U.S.C. § 1988, the statutory phrase "reasonable attorney's fee" must be understood to include the attorney's expense for "secretaries, messengers, librarians, janitors, and others *whose labor contributes to the work product for which an attorney bills her*

client; and it must also take account of other expenses and profit." *Id.* (emphasis added). In *Perez v. Cate*, 632 F.3d 553 (9th Cir. 2011), the *attorneys* representing prisoners in class action litigation sought attorney fees for paralegal services; the legal issue was the reasonable hourly rate for paralegal services, not whether a *pro se* party could obtain paralegal costs independent of legal representation. Neither federal case supports Mr. Francis' claim for attorney fees for his *pro se* representation, especially in light of controlling state law.

F. The Department Filed A Timely Notice Of Cross-Appeal

Finally, Mr. Francis alleges that the Department filed an untimely notice of cross-appeal. Opening Brief at 31-32; RAP 5.2. He is incorrect.

RAP 5.2(f) states that "[i]f a timely notice of appeal . . . is filed by a party, any other party who wants relief from the decision must file a notice of appeal . . . within the later of (1) 14 days after service of the notice filed by the other party, or (2) the time within which notice must be given as provided in sections (a), (b), (d) or (e)." *See also National Christian Assoc. v. Simpson*, 21 Wash. 16, 56 P. 844 (1899). The day the decision or judgment is filed is not included in this computation. RAP 18.6. The last day of the computation period is included, unless it is a weekend or legal holiday. *Id.* Veteran's Day, November 11, is a legal holiday. RCW 1.16.050.

The trial court entered a final order in this case on October 12, 2011. *See* CP 187-88. The thirty-day period to file a notice of appeal began to run on the following day, October 13, 2011, and ended on Saturday, November 12, 2011. The Department filed a Notice of Cross-Appeal on November 14, 2011, the first business day following Saturday, November 12, 2011.[7] The Department's Notice of Cross-Appeal was therefore timely filed, making Mr. Francis' claim without merit.

VI. CONCLUSION

For the reasons set forth above, the Department respectfully asks that this Court hold that the trial court applied an incorrect legal test in determining "bad faith" under RCW 42.56.565(1). This Court should hold that a finding of "bad faith" under RCW 42.56.565(1) is appropriate only if an inmate plaintiff can demonstrate both that the agency knows it has responsive records that should be disclosed, and intentionally fails to disclose them. With this proper legal standard in mind, this Court should reverse the trial court and remand for a redetermination as to

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[7] Even if the thirty day period had begun to run on October 12, the last day to file an appeal would be Friday, November 11, 2011, a legal holiday, allowing timely filing on November 14, 2011.

whether the Department acted in "bad faith" under RCW 42.56.565(1), or in the alternative, hold that the Department did not act in "bad faith".

RESPECTFULLY SUBMITTED this 22nd day of June, 2012.

ROBERT M. MCKENNA
Attorney General

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CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of CORRECTED BRIEF OF RESPONDENT on all parties or their counsel of record on the date below as follows:

X U.S. Mail, Postage Prepaid
United Parcel Service, Next Day Air
ABC/Legal Messenger
State Campus Delivery
Hand Delivered by: _____
Facsimile

TO:

SHAWN D. FRANCIS #749717
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

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

EXECUTED this 22nd day of June, 2012, at Olympia, Washington.

Katrina Toal

KATRINAL TOAL
Legal Assistant