NO. 90786-2

SUPREME COURT OF THE STATE OF WASHINGTON

CLARENCE J. FAULKNER,

Appellant-Plaintiff,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent-Defendant.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Clarence Jay Faulkner is a Washington State prisoner. Faulkner submitted a public records request to the Department of Corrections (Department) that sought, among other things, a signed legal mail signature sheet. Based on an inadvertent mistake, the Department searched for and produced a record that was identical to the requested record in all respects except it lacked signatures. Once Faulkner notified the Department of this mistake, it located and produced the signed legal mail signature sheet. The trial court concluded that Faulkner was not entitled to penalties under RCW 42.56.565(1) because he failed to show that the Department acted in bad faith. *See* RCW 42.56.565(1) (prohibiting penalty awards to inmates in the absence of bad faith). Division Three of the Court of Appeals affirmed the trial court's finding and specifically held that the Department did not act in bad faith when "[t]he error in production was the result of an inadvertent mistake in summarizing the request." *Faulkner v. Washington Dep't of Corr.*, ____ Wn. App. ____, 332 P.3d 1136, 1143 (2014). Faulkner now seeks review.

This Court should deny review because the Court of Appeals decision is well-reasoned, does not conflict with decisions of this Court or other courts, and the issues are not significant. The Court of Appeals decision is consistent with, not contrary to, the holding in *Francis v.*

Department of Corrections, 178 Wn. App 42, 313 P.3d 457 (2013) because the Court of Appeals thoroughly analyzed *Francis* and both courts held that bad faith requires more than mere negligence. *See Faulkner*, 332 P.3d at 1141; *Francis*, 178 Wn. App at 43. In clarifying the *Francis* decision, the *Faulkner* Court explained that under its bad faith analysis, the result in *Francis* would be the same. Finally, the decision below is supported by prior Public Records Act (PRA) case law and principles of statutory interpretation.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

This Court should deny review because the decision below does not meet any of the RAP 13.4(b) criteria. However, if the Court were to accept review, the following issue would be presented: When the PRA does not expressly define bad faith in the context of RCW 42.56.565(1), did the Court of Appeals properly conclude that the Department did not act in bad faith when the error in production was the result of an inadvertent mistake in summarizing the request?

III. STATEMENT OF FACTS

Faulkner submitted a public record request to the Department, in part, seeking a copy of the Coyote Ridge Corrections Center's legal mail "signature sheet" received on July 2, 2012. CP 84. Faulkner specified that the version of the record he sought had a notation next to his name of

"'NOT RECEIVED' and is signed by prison guard V. Miller and possibly another prison guard." CP 84. After receiving the request, Public Disclosure Specialist Paula Terrell contacted Coyote Ridge Corrections Center and requested that staff gather responsive records. CP 88. Because she did not understand that her summary would change the nature of the request, Ms. Terrell requested that staff search for "1. A copy of the Coyote Ridge Corrections Center 'signature sheet' for the issuance of incoming legal mail from the Thurston County Superior Court addressed to you Clarence Faulkner #842107 and received on July 2, 2012 and logged in at 11:36 a.m. by OA3 Michael True...." CP 88. Ms. Terrell's summary left out the specification regarding the "not received" notation and the signature of Correctional Officer Miller. CP 88.

After searching for records, the Department informed Faulkner that one page of responsive records had been gathered and would be promptly provided to him upon payment. CP 91. The Department received payment from Faulkner and provided him with the Coyote Ridge Corrections Center July 2, 2012, legal mail signature sheet. CP 93-94. However this record did not contain the associated signatures or notations. CP 93-94.

Faulkner sent letters to the Department stating that the record produced was a "blank original" and that the form, as produced, "was prior to the line where my legal mail was written 'NOT RECEIVED.'" CP

96 and 98. Faulkner also submitted an agency appeal stating that he had been provided an incomplete copy of the legal mail signature sheet. CP 119.

The Department considered Faulkner's administrative appeal, and Barbara Parry of the Public Disclosure Appeal Unit notified Faulkner that an additional search for responsive records would be conducted and he would receive further communication from the Department on or before December 10, 2012. CP 116, CP 121. As a result of this appeal and the subsequent search, the Department provided Faulkner with the July 2, 2012, Coyote Ridge Corrections Center legal mail signature sheet with the associated signatures and notations on December 7, 2012. CP 112. This concluded the Department's response to Faulkner's request. CP 112.

While his departmental appeal was pending, Faulkner filed suit. CP 225. The trial court considered Faulkner's show cause motion and the Department's response and found that the Department violated the PRA by initially producing an incomplete version of the record, but it did not do so in bad faith because it was an unfortunate mistake. CP 3-4. Faulkner appealed, and the Court of Appeals affirmed. In doing so, the court held "to establish bad faith, an inmate must demonstrate a wanton or willful act or omission by the agency." *Faulkner*, 332 P.3d at 1141. The court found that the violation resulted from an incomplete summary of the request and

that "Mr. Faulkner fails to show that such inadvertent error by Ms. Terrell in transmitting the request was unreasonable or lacked diligence." *Id.* at 1143.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court Of Appeals Ruling That Bad Faith Under RCW 42.56.565(1) Requires A Wanton Or Willful Act Or Omission Does Not Conflict With Any Decision Of This Court Or The Court Of Appeals

The Court of Appeals decision applied well-known principles of statutory interpretation to conclude that bad faith "incorporates a higher level of culpability than simple or casual negligence." *Faulkner*, 332 P.3d at 1141. The court held that "to establish bad faith, an inmate must demonstrate a wanton or willful act or omission by the agency." *Id.* Faulkner claims that the Court of Appeals decision below conflicts with Division Two's ruling in *Francis v. Department of Corrections*, 178 Wn. App 42, 313 P.3d 457 (2013).[1] This Court should deny review because the decision below is well-reasoned and does not conflict with *Francis.* Instead, the *Faulkner* Court thoroughly analyzed *Francis* and sought to clarify what constitutes bad faith by building from the *Francis* Court's analysis.

[1] Faulkner identifies a number of issues for review, many of which concern RCW 42.56.565's bad faith standard. Regarding the other issues, Faulkner fails to identify or argue grounds warranting review under RAP 13.4(b). For this reason, his petition regarding these issues should be denied.

In 2011, the Legislature passed a statute limiting the award of penalties to inmate requestors in PRA actions. RCW 42.56.565(1) prohibits an award of penalties to inmates "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). The statute does not define bad faith. *See generally* RCW 42.56. Division Two of the Court of Appeals first interpreted the statute in *Francis v. Department of Corrections*, 178 Wn. App 42, 313 P.3d 457 (2013). Affirming a finding of bad faith in that case, the *Francis* Court recognized that bad faith requires more than mere negligence, but rejected the agency's argument that bad faith required an intentionally wrongful act. *Id.* at 43.

Rather than conflicting with *Francis*, the decision below expands on *Francis* and provides a framework to guide lower courts in exercising discretion regarding findings of bad faith. *Faulkner,* 332 P.3d at 1141. The court in this case held that bad faith constitutes "the high end of the culpability spectrum in PRA cases" and further clarified that the PRA allows penalties to inmate requestors "when an agency acts unreasonably with utter indifference to the purpose of the PRA" and the agency's conduct "defeats the purpose of the PRA and deserves harsh punishment." *Faulkner,* 332 P.3d at 1142.

In reaching its conclusion, the Court of Appeals soundly relied on the reasoning in prior PRA cases. Specifically, the court looked to the discussion of bad faith in *Yousoufian v. Office of Ron Sims*, 137 Wn. App 69, 151 P.3d 243 (2007), *affirmed on other grounds by Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010). There, Division One held bad faith includes conduct "where the agency refused to disclose information it knew it had a duty to disclose in an intentional effort to conceal government wrongdoing and/or harm members of the public" which constituted "the top end of the scale" and "deserve the harshest penalties." *Id* at 80.

The *Faulkner* Court also considered the statutory intent behind RCW 42.56.565(1) and the policy of the PRA. As recognized in *Francis*, the Legislature enacted RCW 42.56.565 "to afford prisoners an effective records search, while insulating agencies from penalties [to prisoners] as long as [the agency] did not act in bad faith." *Francis*, 178 Wn. App. at 60. The *Faulkner* Court's interpretation of bad faith is consistent with principles of statutory intent and open government policies because it permits access to records and incentivizes agency compliance with the PRA while allowing penalties where the agency's response defeats the purpose of the PRA and deserves harsh punishment. *Faulkner*, 332 P.3d at 1142-43. Based on these principles of statutory interpretation, the court

concluded that bad faith under RCW 42.56.565(1) requires the inmate to demonstrate a wanton or willful act or omission by the agency. Relying on Black's Law Dictionary, the court explained that "'Wanton' is defined as '[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences.'" *Id.* at 1141.

These principles do not conflict with the *Francis* decision, and in fact, the *Faulkner* Court explained that under its bad faith analysis, the result in *Francis* would be the same. *Faulkner*, 332 P.3d at 1142. In *Francis*, the Court of Appeals held that "among other potential circumstances, bad faith is present under RCW 42.56.565(1) if the agency fails to conduct a search that is both reasonable and consistent with its policies." *Id.* at 63 n.5. The *Francis* Court carefully looked to specific circumstances of the request and resultant search to determine reasonableness. *Id.* The court affirmed the trial court's finding of bad faith when the agency only searched for 15 minutes, failed to search in any of the usual places that the record would be found, and produced only unresponsive records. *Id.* at 64. In addition, the court considered the agency's delay in ultimately producing the responsive records eight months after the commencement of the judicial action. *Id.* The court found that the agency's actions revealed a plainly "cursory search and delayed disclosure well short of even a generous reading of what is reasonable

under the PRA." *Id.* at 63. Still, the *Francis* Court carefully noted its standard "does not make an agency liable for the penalties to incarcerated persons simply for making a mistake in a record search or for following a legal position that was subsequently reversed." *Id.*

The Court of Appeals decision in this case built on the principles elucidated in *Francis* by taking the "opportunity to further clarify the standard." *Faulkner,* 332 P.3d at 1141. The *Faulkner* Court emphasized that "[i]n the PRA context, bad faith incorporates a higher level of culpability than simple or casual negligence." *Id.* As noted by the court below, "*Francis* is an example of a wanton act made in bad faith" because the agency disregarded its known duty to perform an adequate search contrary to agency policy. *Id.* at 1142.

In addition, the *Francis* opinion plainly omitted inadvertent mistakes, such as those here, from the definition of bad faith. Specifically, the court held that an agency is not liable for penalties under RCW 42.56.565(1) "simply for making a mistake in a record search or for following a legal position that was subsequently reversed." *Francis*, 178 Wn. App at 63. The record on appeal reveals that the initial failure to provide Faulkner the record he sought was based on Ms. Terrell's inadvertent mischaracterization of the request. The finding of bad faith based on such an inadvertent mistake was plainly not contemplated by the

Francis Court, and therefore the Court of Appeals ruling is entirely consistent with *Francis*.

Finally, the Court of Appeals decision is also consistent with *Francis* because both courts looked at the factual circumstances surrounding the handling of the request and the agency's conduct as a whole to determine if the agency acted in bad faith. Both courts recognized that a bad faith determination is a very fact specific inquiry. Specifically, the *Francis* Court relied heavily on a number of factors in affirming the trial court's finding of bad faith: delayed agency response even after commencement of the action, lack of compliance with PRA procedures, lack of proper training and supervision, negligence or gross negligence, and sufficient clarity in the request. *Francis*, 178 Wn. App at 63-64. The *Francis* Court also repeatedly highlighted what it deemed to be the agency's unreasonable actions in performing a clearly cursory search, initial disclosure of unresponsive records, and a significantly delayed production. *Id.* Based on those facts, the court determined that the trial court had correctly concluded that the agency acted in bad faith.

The Court of Appeals in this case similarly engaged in a careful review of the factual circumstances surrounding the Department's violation of the PRA and found that the Department's initial production of the wrong record was an unfortunate mistake and that the Department

made a timely and reasonable effort to obtain the requested record once its mistake became apparent. Contrasted with the facts in *Francis*, the agency's response to Faulkner's request does not reveal a delayed response, lack of compliance with the PRA procedures, lack of agency training or supervision, nor negligence or gross negligence. Instead, the Court of Appeals properly concluded that the factual circumstances surrounding this request did not constitute bad faith.

Accordingly, the Court of Appeals willful and wanton bad faith standard does not conflict with prior decisions of this Court or the Court of Appeals. The fact-specific reasonableness standard espoused in *Francis* is complemented by the Court of Appeals ruling because the agency's conduct in *Francis* was willful and wanton. Moreover, the court reasonably considered the agency's conduct in this case and determined that the inadvertent summarizing of the request did not amount to bad faith. The Court of Appeals analysis was careful and its conclusion is consistent with precedent, statutory intent, and the PRA's policy. Consequently, discretionary review should be denied.

B. The Decision Below Does Not Raise A Significant Constitutional Question Nor An Issue Of Substantial Public Interest

Faulkner claims that the distinction between inmate and non-inmate requestors as related to PRA penalties is an issue of substantial public interest requiring review by this Court. Pet. at 7. Faulkner provides no analysis or support for this proposition. *Id.* While many matters relating to prisoners including criminal prosecutions, conditions of confinement, and issues affecting length of confinement may be of public and constitutional significance, the entitlement to penalties under the PRA is not of similar import. Indeed, there is no constitutional right to submit public records requests, and as such, no constitutional right to receive penalties flowing from such requests. *See DeLong v. Parmelee,* 157 Wn. App 119, 161, 236 P.3d 936 (2010); *King Cnty. Dep't. of Adult & Juvenile Detention v. Parmelee*, 162 Wn. App 337, 254 P.3d 927 (2011). Because there is no constitutional right to penalties under the PRA, the Legislature is entitled to define the showing required to obtain penalties and define those individuals who are entitled to receive such penalties. Moreover, inmates are not a protected class requiring heightened scrutiny, and Washington Courts have upheld disparate treatment of inmates as related to the PRA. *King Cnty. Dep't. of Adult & Juvenile Detention v. Parmelee*, 162 Wn. App 337, 254 P.3d 927 (2011). Thus, the Legislature's enactment

of RCW 42.56.565(1) subjecting inmate requesters to a higher standard in order to receive penalties under the PRA does not raise a significant constitutional question or an issue of substantial public interest. As such, Faulkner has failed to meet the requirements of RAP 13.4(b) and discretionary review should be denied.

V. CONCLUSION

The Court of Appeals decision in this case is carefully reasoned, consistent with *Francis*, and correctly interprets and applies RCW 42.56.565(1). None of the criteria for accepting review under RAP 13.4(b) are satisfied. Therefore, the Department asks this Court to deny review.

RESPECTFULLY SUBMITTED this 5th day of December, 2014.

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CERTIFICATE OF SERVICE

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

CLARANCE J. FAULKNER, DOC #842107
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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 5th day of December, 2014, at Olympia, WA.

s/ Tera Linford
TERA LINFORD
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Linford, Tera N (ATG)
Subject: RE: Faulkner v. DOC WSSC Cause No. 90786-2

Rec'd 12/5/2014

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To: OFFICE RECEPTIONIST, CLERK
Subject: Faulkner v. DOC WSSC Cause No. 90786-2

Good morning. Please find attached Respondent's Answer to Petition for Review for filing with the Court.

Case Name: Clarence J. Faulkner v. Washington State Department of Corrections
WSSC Cause No: 90786-2
Filer: Cassie B. vanRoojen, WSBA #44049
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Thank you and have a great weekend.

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