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73624-0

No. 73626-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

CARLOS BENITEZ, JR,

Appellant,

v.

SKAGIT COUNTY,

Respondent.

SKAGIT COUNTY'S RESPONSE

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INTRODUCTION

In its briefing and argument before the Whatcom County Superior Court, Skagit County conceded:

> that Benitez, an inmate with the Washington State Department of Corrections, submitted a request for public records on June 17, 2012. Some records were released, but others were denied on November 8, 2012. On recent reconsideration, it was determined that the denied records, properly redacted, should have been provided to Benitez under the Public Records Act.

CP 213.

This concession left one issue for the superior court to decide: whether Benitez established that Skagit County acted in bad faith when it denied his June 17, 2012, request for public records. CP 221.

Benitez, who bears the burden of proving that Skagit County acted in bad faith, failed to offer any admissible evidence that overcame the county's evidence of good faith. Thus, the trial court properly held that Benitez was not entitled to an award of a penalty. CP 387.

ISSUE PRESENTED FOR REVIEW

Whether Benitez met his burden of proving that Skagit County acted in bad faith when it denied his request June 17, 2012, for public records?

STATEMENT OF THE CASE

Benitez was an inmate with the Washington State Department of Corrections at the time he submitted his June 17, 2012, request for public records. CP 292.

Following the county's receipt of Benitez' request of June 17, 2012, it was forwarded to DPA Miller, a lawyer with considerable Public Records Act (PRA) experience. CP 277-78. DPA Miller explained how she had considered Benitez' prior request for records and had denied them based on:

> . . . an order issued by the Skagit County Superior Court on May 25, 2011, in *State of Washington v. Carlos Benitez*, Skagit County Superior Court cause no. 09-1-00867-1. The trial court's order found that Benitez was a member of a gang engaged in a "sophisticated, ongoing drug and illegal weapons operation," that release of the SCIDEU's records, which could then be disseminated in the prison system and beyond through gang connections, would "pose a significant threat to the safety of the community and law enforcement" and place participants in the trial and the undercover officers involved in the investigation and future investigations at risk by revealing strategies used in undercover operations. The order also held that the records should not be disclosed to Mr. Benitez.

CP 278. Benitez did not appeal this decision.

DPA Miller then explained how she considered Benitez request of June 17, 2012:

> I learned of Mr. Benitez' second request for records, which is the subject of his appeal before the Whatcom County Superior Court, shortly after June 17, 2012.

Initially records staff thought that Mr. Benitez was seeking records not covered by the trial court's order of May 25, 2011. As a result, some non-SCIDEU records that were not a part of the undercover investigation were disclosed to him. Also, records that had been disclosed in court and filed with the Clerk were provided. However, Mr. Benitez clarified that he was seeking records prepared by SCIDEU as a part of its undercover investigation.

Even though Mr. Benitez was requesting a sub-set of the records he had requested in 2011, I determined to not rely on my prior decision and started a complete and independent review of his June 17, 2012, request.

One of the first things I did was to reconsider the Skagit court's 2011 order. I asked DPA Trisha Johnson, who had prosecuted Mr. Benitez and handled his post-trial motions, whether the trial court's order of May 25, 2011, covered the records held by SCIDEU. She determined that she needed to clarify that with the trial court.

I also took a second look at the potential exemptions from disclosure.

I determined that the findings in the Skagit court's 2011 order met the requirements for an exemption from disclosure under RCW 42.56.240(1) and (2), which provide:

> The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:
>
> (1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy;
>
> (2) Information revealing the identity of persons

> who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the commission, if disclosure would endanger any person's life, physical safety, or property. If at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure, such desire shall govern. However, all complaints filed with the commission about any elected official or candidate for public office must be made in writing and signed by the complainant under oath;
>
> . . .

The requested records met the statutory requirements for "specific investigative records." They contained specific intelligence information and were compiled by law enforcement for a criminal investigation. Also, the Skagit court's 2011 order established a specific rather than a generalized concern for effective law enforcement and endangerment to any person's life. This met the need for a non-generalized finding of concern for safety as set out in *Tacoma News v. Tacoma-Pierce County Health Dep't*, 55 Wn. App. 515, 522, 778 P.2d 1066 (1989), which also held that "disclosing sources in sensitive cases effectively would dilute law enforcement investigations."

I also reviewed two additional exemptions: (1) RCW 42.56.070(1), which provides that an other statute can exempt or prohibit disclosure of specific information or records and (2) RCW 42.56.290, which exempts records that "would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts." I thought that these exemptions would apply because the Skagit Court's order was a discovery order issued under authority of a court rule.

In *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 910, 25 P.3d 426 (2001) the court held that the civil rules are incorporated into the "other statute" provision of RCW 42.17.260(1). Thus, CrR 4.7, which the Skagit court relied upon to issue its discovery order

barring disclosure of the records held by SCIDEU to Mr. Benitez, qualified as a statutory exemption from the disclosure requirements under the Public Records Act. This conclusion was supported by *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006), which holds that the adoption of court rules is a legislatively delegated power of the judiciary and "[w]hen a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both."

In this case, the Skagit court's 2011 order was very specific and, being based on an "other statute" exemption to the Public Records Act, was readily harmonized with the Public Records Act because RCW 42.56.280 also exempted records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery. The Public Records Act exemptions based on police and witness safety and for discovery both promoted the safety of police and witnesses that the 2011 order sought to protect.

Because the court rule authorizing the Skagit court's order fell under the "other statute" exemption, it followed that redaction was not required and the records could be withheld in their entirety. *See Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) ([I]f another statute (1) does not conflict with the Act, and (2) either exempts or prohibits disclosure of specific public records in their entirety, then (3) the information may be withheld in its entirety notwithstanding the redaction requirement.")

From all of the information I held, including the detailed findings from the trial court in its 2011 order barring release of the records to Mr. Benitez, I determined that nondisclosure was essential to effective law enforcement and to the safety of officers and informants. In this case, based on Mr. Benitez' record of intimidation which I learned from DPA Johnson, the very high risk of retaliation against the undercover officers and informants, including neighbors who

provided information about the gang's activities, presented a concern that persons would be unwilling to come forward with information to help in future investigations. I certainly had a grave concern for officer and informant safety.

However, it was clear that Mr. Benitez' request raised an issue of first impression: whether denial could be on the discovery order. I was not aware that it had been addressed by any court at that time. Also, under my guidance, Skagit County had not had any PRA denials reversed and no penalties had been paid. I wanted to keep that record intact and not make a decision that would be reversed on appeal. Thus, this was not an easy decision to reach. My concern for making the correct decision, which was coupled with a having to deal with a major health issue that involved a significant invasive surgery, is a large part of the reason why I did not make a quick decision on Mr. Benitez' June 17, 2012, request. I took the time to get this right.

Additionally, I wanted to have the opportunity to raise this issue at a Washington Association of Public Records Officers (WAPRO) conference. One was scheduled for October 2012.

WAPRO provides training on the Public Records Act to public employees who have the responsibility of ensuring compliance with the Public Records Act. It usually hosts a fall and spring conference. One of the sessions at the October 18, 2012, WAPRO training, which I attended, was a Law Enforcement Records break-out session. This session was attended by a number of records managers and lawyers, including outside counsel who contract with Washington counties and cities. The attendees at the session were responsible for advising records managers and law enforcement on compliance with the Public Records Act and were conversant with current law and judicial precedent applicable to the disclosure of law enforcement records.

At the break-out session, I explained the facts and what law I had researched before "round tabling" my question about how the 2011 court order affected Mr.

Benitez' 2012 request for disclosure of records affected by that order. The consensus of the law enforcement group confirmed what I had concluded: that the trial court's order set out the facts necessary to establish two exemptions under RCW 42.56.240. The group also concurred that CrR 4.7 qualified as an "other statute" under RCW 42.56.070(1), exempt records that fall within an "other statute which exempts or prohibits disclosure of specific information or records" and that the records could be withheld in their entirety, without redaction.

In addition to the WAPRO forum, I took the time to discuss these exemptions, several times, with the county's Records Management Coordinator in an effort to ensure that I had not missed anything.

On October 26, 2012, DPA Johnson provided me with a copy of another post-trial order from the *Benitez* case. The order was entitled "Amended Findings of Fact and Conclusions of Law Re: Defense Post-Conviction Motion to Release Discovery." I observed that it was signed by Judge Needy, DPA Johnson, and Jennifer Bowens. Ms. Bowens' signature block indicated that she appeared as "Trial Counsel for Defendant Carlos Benitez." I had not appeared in the criminal case, but was able to determine from the signatures that the order was valid and represented the appearances of the participating attorneys and the court's findings. Nothing about this order caused me to change my analysis. If anything, because it clarified that the discovery order applied to discovery held by SCIDEU and the prosecutor, it reinforced my conclusion that the records Mr. Benitez sought were exempt from disclosure under the PRA.

Based on my research and on the advice of other municipal attorneys who advise their counties and cities on the Public Records Act, I determined that the records identified in Mr. Benitez' June 17, 2012, request should not be released to him. I suggested a response for Chief Molitor to send to Benitez. I understand that Chief

> Molitor formatted a denial on SCIDEU letterhead and mailed it to Mr. Benitez on November 8, 2012.
>
> I did not know Mr. Benitez and had not participated in his criminal trial. However, I learned of the supporting evidence that caused the Skagit court to enter its discovery orders from DPA Johnson, who prosecuted Mr. Benitez. Because of the recognition that he presented a threat to the safety of police and witnesses, I gave his request more attention that I would have the usual Public Records Act request. Certainly, the novel issues his request presented warranted the additional research and time.
>
> Making the correct decision was always paramount in this matter. Given the judicial precedent available to me at the time, I believe I made the correct decision when I advised the SCIDEU to deny Mr. Benitez' request of June 17, 2011.

CP 279-83.

Neither DPA Miller nor Chief Molitor knew Benitez or were involved in his investigation or trial. CP 283; CP 274. Chief Molitor believes in open government and the Public Records Act. CP 274. DPA Miller's concern was for making the correct decision about disclosure under the PRA and for complying with a court order that identified Benitez as a threat to undercover officers and witnesses. CP 283.

Acting on DPA Miller's legal advice, Chief Molitor denied Benitez' request on November 8, 2012. CP 275.

Cause to reconsider the denial of Benitez' request arose during an appeal under *State v. Benitez*, the criminal cause, of the court's order of October 26, 2012, which barred him from receiving discovery. CP 41.

The reconsideration led to the decision to release the requested records to Benitez. CP 335-36. It also led to the concession before the Whatcom County Superior Court in the cause under review here, *Benitez v. Skagit County*, Whatcom County Superior Court cause no. 13-2-02116-8, that the county had violated the PRA when it denied Benitez' request. CP 213. The county concession of error left only one issue for the trial court to consider: whether the county acted in bad faith when it denied Benitez' June 17, 2012, request for public records. CP 221.

ANALYSIS

Benitez' argues that the county's concession, following reconsideration, "that the denied records, properly redacted, should have been provided to Benitez under the Public Records Act," CP 215, establishes post hoc, ergo propter hoc[1] that the county acted in bad faith when it denied his records request.

However, this only demonstrates that there was a difference of opinion between two experienced lawyers when faced with an issue of first impression. Such differences of opinion do not prove that the initial opinion, the denial, was made in bad faith. *See Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC*, 180 Wn. App. 689, 704, 324 P.3d

[1] Post hoc, ergo propter hoc or "after this, therefore because of this" is a logical fallacy. *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 489, 84 P.3d 1231 (2004).

743 (2014) ("The exercise of judgment often contemplates having to choose among other reasonable alternatives. Thus, picking the wrong alternative is not negligence.") *citing* 4 Mallen & Smith, Legal Malpractice § 31:8, at 420 (footnote omitted).

A. Standard of review for issue of bad faith.

"Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo." RCW 42.56.550. Similarly, summary judgment rulings, such as the one under review, are reviewed de novo, engaging in the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

After conceding non-compliance with the PRA, Skagit County sought summary judgment on the issue of bad faith. Because the county established that it had acted in good faith, Benitez assumed the burden of proving that the county acted in bad faith. *See Gronquist v. Dep't of Corr.*, 177 Wn. App. 389, 396, 313 P.3d 416 (2013) ("RCW 42.56.565(1) prohibits an award of *any* PRA penalties to a prison inmate serving a criminal sentence absent a showing of bad faith.") (Emphasis in original). *Also see Francis v. Dep't of Corr.*, 178 Wn. App. 42, 58, 313 P.3d 457 (2013) (holding that trial court correctly placed the burden of showing bad faith on the plaintiff appealing the denial of his records request.); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989)

(When a defendant moves for summary judgment on a showing that there is an absence of evidence to support the plaintiff's case, the burden then shifts to the plaintiff to set forth specific facts showing a genuine issue of material fact for trial.")

When a plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment is proper. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216 at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)).

Whether a person acted in bad faith invites a review of the person's subjective state of mind. *See Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 717, 261 P.3d 119 (2011) ("the agency's motivation for failing to disclose or for withholding documents is relevant in a PRA action. Whether an agency withheld records in bad faith is the principal factor in determining the amount of a penalty"); *State v. Ladson*, 138 Wn.2d 343, 359 n. 11, 979 P.2d 833 (1999) ("Motives are, by definition, subjective"); *Chaplin v. Sanders*, 100 Wn.2d 853, 859, 676 P.2d 431 (1984) (recognizing intentions, motives and beliefs as subjective.)

"Although good faith is usually a question of fact, it may be resolved on summary judgment[.]" *Marthaller v. King County Hosp.*, 94 Wn. App. 911, 916, 973 P.2d 1098 (1999). See *Ruffer v. St. Frances Cabrini Hosp.,* 56 Wn. App. 625, 628, 784 P.2d 1288, *review denied,* 114 Wn.2d 1023, 792 P.2d 535 (1990) (Factual issues may be decided as a matter of law when reasonable minds could reach but one conclusion and when the factual dispute is so remote it is not material); *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65-66, 837 P.2d 618 (1992) ("where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment is appropriate.")

B. Skagit County established that its officers acted in good faith when they denied Benitez request for public records.

1. Bad faith requires more than an erroneous legal analysis.

Good faith is the "absence of malice and the absence of design to defraud or to seek unconscionable advantage." Black's Law Dictionary at 623 (5th Ed. 1979). It "is a state of mind indicating honesty and lawfulness of purpose." *Whaley v. Dep't. of Soc. & Health Serv.*, 90 Wn. App. 658, 669, 956 P.2d 1100 (1998) *citing Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385, 715 P.2d 1133 (1986).

The opposite of good faith is bad faith, "generally implying or involving actual or constructive fraud, or a design to mislead or deceive

another, or a neglect or refusal to fulfill some duty . . . not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." Black's Law Dictionary at 134 (5th Ed. 1979). "The concept of good faith appears broader than the negative concept of bad faith, and a party can fail to act in good faith without necessarily acting for bad or sinister reasons." *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 99, 248 P.3d 1067 (2011), Korsmo, dissenting.

An honest mistake, not prompted "by some interested or sinister motive" does not support a finding of bad faith. *Francis v. Dep't of Corr.*, 178 Wn. App. at 55 *citing In re Estate of Mumby*, 97 Wn. App. 385, 394, 982 P.2d 1219 (1999). *Also see In re Estate of Marks*, 91 Wn. App. 325, 336, 957 P.2d 235 (1998) ("Bad faith is defined as 'actual or constructive fraud' or a 'neglect or refusal to fulfill some duty . . . not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.') (Citation's omitted).

2. The county offered substantial admissible evidence that it acted in good faith when it denied Benitez' 2012 PRA request.

Benitez agrees with the county's position that "[t]he question of bad faith necessarily focuses on the actions of DPA Miller"[2] who researched the law applicable to Benitez' PRA request and provided the legal advice to Chief Molitor that resulted in the denial of Benitez' request. *See* Appellant's Brief at 22.

While investigative records are generally subject to release once they have been forwarded to the prosecutor for a charging decision, the specific records that Benitez requested were subject to a court order that plainly and unambiguously precluded their disclosure to him. Facially, the 2012 court order satisfied the requirements for an exemption under RCW 42.56.240(1) and (2), which exempted specific investigative records "the nondisclosure or which is essential to effective law enforcement or the protection of any person's right to privacy" and "[i]nformation revealing the identity of persons who are witnesses to or victims of crime . . . if disclosure would endanger any person's life, physical safety, or property."

In 2012, when Benitez made his request, the question of whether a court order regulating the discovery of investigative records to a particular

[2] There is no evidence in the record that any county officer involved in the processing of Benitez' request knew him or had any personal motivation to prevent him from receiving the requested records. Benitez does not argue otherwise.

person, a party, could preclude disclosure of the same records under the PRA had not yet been decided by an appellate court. It was – and remains – an issue of first impression, as DPA Miller determined.

Rather than rely on a prior denial of Benitez' request for similar investigative records, DPA Miller engaged in a comprehensive and independent[3] review of this issue.

She asked for clarification of a 2011 discovery order in *State v. Benitez*, a criminal prosecution. She engaged in an independent review of the PRA for potentially applicable exemptions. At all times, she held a valid concern for the safety of undercover officers and witnesses. The 2011 discovery order included the following findings:

. . .

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[3] Benitez erroneously argues that *Adams v. Dep't of Corr.*, 189 Wn. App. 925, ___ P.3d ___ (2015) holds that bad faith can arise from a faulty legal analysis of the PRA. *See* Appellant's Brief at 24. In *Adams*, DOC, in addition to wrongfully withholding requested records, failed to conduct its own analysis of the PRA. It "simply deferred to what it was being told by individuals with the Washington State Patrol (WSP), without engaging in any critical analysis of its own." *Adams*, 189 Wn. App. at 929. Benitez fails to demonstrate that Skagit County "fail[ed] to engage in any serious independent analysis of the exempt status of documents it withholds," the controlling factor that caused the *Adams* court to ascribe bad faith to DOC. *See Adams*, 189 Wn. App. at 929. DPA Miller conducted an independent, critical review and did not simply defer to another's interpretation. She considered the advice of other PRA professionals, but not as a substitute for an independent critical analysis. She sought to ensure that her analysis of an issue of first impression was correct. *See* CP 275 (DPA Miller's initial advice was to deny the request.) *Also see* CP 282 ("I wanted to have the opportunity to raise this issue at a [WAPRO] conference.")

3. The Court finds that undercover detectives and a confidential informant testified in this case and assisted in the investigation.

4. The Court finds that the discovery materials in this case would reveal strategies used in undercover operations and multi-agency operations, information on how law enforcement infiltrates organizations such as the one involved in the defendant's case, and would reveal security details involved in the investigation.

5. The Court finds that release of the discovery in this case would disadvantage undercover officers, investigations, and the agencies involved in these investigations.

6. The Court finds that the discovery materials would be released to the defendant in prison and can be disseminated in the prison system and beyond.

7. The court finds that the defendant has connections outside of prison.

8. The court finds that there were many incidents of alleged intimidation during the trial of the defendant.

9. The court finds that the defendant's request for discovery is disingenuous.

. . .

11. The Court finds the most important concern in the present case is for community and law enforcement safety and that the release of the discovery materials would pose a significant threat to the safety of the community and law enforcement.

CP 308-309.

The 2012 order, which was provided during the course of DPA Miller's review, contained the following findings:

. . .

3. The Court considered a number of factors, including the nature of the case. The Court finds that this case involved a multi-agency undercover investigation of a sophisticated, ongoing drug and illegal weapons operation. An entire block was controlled by the operation with surveillance individuals patrolling the area. The defendant here was not the kingpin of the operation, but a member of the operation. The organization was gang related.

4. The Court finds that undercover detectives and a confidential informant testified in this case and assisted in the investigation.

5. The Court finds that the release of any discovery materials, law enforcement reports and investigative materials in this case would reveal specific strategies and tactics used in undercover operations and multi-agency operations, would reveal information on how law enforcement infiltrates organizations such as the one involved in the defendant's case, and would reveal security details involved in the investigation.

6. The Court finds that release of any discovery materials, law enforcement reports and investigative materials in this case would disadvantage undercover officers and agents, compromise and impair undercover operations and the agencies involved in these investigations.

7. The Court finds that release of any discovery materials, law enforcement reports and investigative materials held by defense counsel, prosecuting attorney or law enforcement in this case would endanger the safety of undercover officers and agents, put undercover officers and agents at risk by revealing identifying information, and would be extremely detrimental, if not life threatening, to undercover officers.

> 8. The Court finds that the discovery materials, law enforcement reports and investigative materials, if released, would be released to the defendant in prison and could then be disseminated in the prison system and beyond.
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> 9. The court finds that the defendant has connections outside of prison.
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> 10. The court finds that there were many incidents of alleged intimidation during the trial of the defendant.
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> 11. The court finds that the defendant's request for discovery is disingenuous.
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> . . .
>
> 13. The Court finds the most important concern in the present case is for community and law enforcement safety and that the release of the discovery materials, law enforcement reports and investigative records in the possession of defense counsel, prosecuting attorney or law enforcement would pose a significant threat to the safety of the community and law enforcement.

CP 329-331.

DPA Miller was entitled to rely upon the orders because they were facially valid, having been signed by a judge, a deputy prosecutor, and Benitez' defense counsel. (She had no cause to believe that the 2012 order would later be reversed on appeal.) Thus, they provided valid grounds for concern for the personal safety of officers, witnesses, and informants and for application of the exemptions for investigative records and witness identities. *See* RCW 42.56.240(1), (2).

Admittedly, it took several continuances,[4] necessary because of a significant, invasive surgery, before DPA Miller completed her review. However, she was motivated by a professional desire to render the correct advice on a novel issue and she did not receive the "clarification" or have the opportunity to present her issue of first impression to other PRA professionals until October 2012. CP 282.

The totality of the evidence shows that DPA Miller acted with reasonable caution in an attempt to comply with the law and a facially valid order[5] that provided reason for concern for the safety of undercover

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[4] Benitez does not dispute that the county kept him apprised, albeit imperfectly, of the need for additional time to review his request. *See* Appellant's Brief at 2-5.

[5] Generally, where legal matters are at issue a defendant does not have the right to be present. *Matter of Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835, 844 *decision clarified sub nom*; *In re Pers. Restraint Petition of Lord*, 123 Wn.2d 737, 870 P.2d 964 (1994); *State v. Walker*, 13 Wn. App. 545, 556-57, 536 P.2d 657, *review denied,* 86 Wn.2d 1005 (1975) ("An accused need not be present during deliberations between court and counsel or during arguments on questions of law.) Also, the attorney present during the presentation of evidence is generally allowed to appear and sign off on findings and conclusions even though the lawyer has withdrawn from the case and appellate counsel has been appointed. *See State v. Corbin*, 79 Wn. App. 446, 451, 903 P.2d 999 (1995) ("it is the defendant's trial counsel who should participate in the post-trial presentation of findings and conclusions memorializing that decision.") Further, when Benitez' counsel appeared before the trial court to address the State's motion for clarification, her appearance satisfied Washington's 100 year old doctrine of substantial compliance with the appearance rules. *See Meade v. Nelson*, 174 Wn. App. 740, 750, 300 P.3d 828, 833 (2013) *citing Morin v. Burris*, 160 Wn.2d 745, 749, 161 P.3d 956, 958 (2007) ("Substantial compliance with the appearance requirement may be

officers and witnesses. She determined that a court order made under a court rule regarding discovery that was entered to protect undercover officers and witnesses with the PRA established several grounds for denying a PRA request. That her analysis was reconsidered and a differing opinion resulted in the release of the requested records does not demonstrate that DPA Miller acted in bad faith.

C. Benitez failed to meet his burden of proving that the county acted in bad faith.

Because the county offered credible evidence that it acted in good faith, the burden at trial shifted to him to establish bad faith, an element essential to his case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d at 225. A "scintilla" of evidence, evidence that is "merely colorable," or evidence that "is not significantly probative," will not meet the burden. *Herron v. Tribune Publ'g Co.,* 108 Wn.2d 162, 170, 736 P.2d 249 (1987).

Benitez does not dispute the facts that show that county officers acted, at all times, in good faith. He argues instead that the county is guilty of acting in bad faith simply because the county has conceded that the decision to deny his June 17, 2012, request for records was wrong.

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satisfied informally."); *State v. Superior Court of Clallam County*, 52 Wash. 13, 15, 100 P. 155, 156 (1909) ("It therefore follows that the service of the interrogatories was a substantial compliance with the statute, and that in legal effect it gave the relator written notice that the defendant had appeared.")

If a denial based on a misinterpretation of the PRA under a unique set of facts establishes bad faith, then the requirement that an inmate prove bad faith before being awarded penalties would be rendered meaningless. *See* RCW 42.56.565(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.")

Benitez' legal analysis, which focuses on the noncompliance that the county conceded, does not defeat the uncontroverted evidence that the county acted in good faith. To do that, Benitez must demonstrate that DPA Miller's analysis was so far-fetched that it was irresponsible. He cannot use hindsight – developed during appellate review of the 2102 discovery order in an appeal under *State v. Benitez*, which appeal raised PRA issues and led to the "discovery" that Benitez' defense counsel could not represent him on what was basically a new order[6] – to meet his burden. *See State v. Greenwood*, 120 Wn.2d 585, 602, 845 P.2d 971 (1993) (Court

[6] In conceding error for the failure to give Benitez notice of the hearing on the clarification, the State established that the error was concealed by the defense counsel's appearance, argument, and signing of the amended order. CP 55.

agreed with trial court's holding that "while the defendant, with hindsight, could have been located through his attorney or through his parents, the State had met its burden of a diligent good faith effort.")

1. Benitez does not show that DPA Miller's determination that a discovery order issued pursuant to a court rule is an other statute under the PRA is so far-fetched as to constitute bad faith.

Benitez argument that CrR 4.7 is not an "other statute" ignores the legislature's specific exception for "records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts[.]"

Court rules, such as CrR 4.7, the equivalent of statutes. They are harmonized with statutes when there is an apparent conflict. If the statute and the rule "cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." *Putman v. Wenatchee Valley Med. Ctr., PS*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009). Thus, a court rule may establish an exemption under the PRA. *See* RCW 42.56.070(1) ("Each agency . . . shall make available for public inspection and copying all public records, unless the record falls within . . . [an] other statute which exempts or prohibits disclosure of specific information or records.")

Neither *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994) nor *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990), which Benitez cited for his argument that CrR 4.7 cannot be an other statute, addresses court rules.

Limstrom v. Ladenburg, 136 Wn.2d 595, 963 P.2d 869 (1998) does not support Benitez' argument that a court rule cannot prohibit disclosure under the PRA either. The issue before the *Ladenburg* court was whether a non-party could obtain records from a prosecutor's criminal files. The prosecutor opposed release arguing that the records were work product; however, the *Ladenburg* court held that the work product exemption was "limited to work product as defined in the superior court criminal discovery rule." *Limstrom v. Ladenburg*, 136 Wn.2d at 602 *citing* CrR 4.7. The *Ladenburg* court did not hold that investigative files could not be subject to a specific discovery order or other PRA exemptions.

In 2012, when DPA Miller considered the effect of a court order issued under CrR 4.7, the issue of whether a discovery order in a criminal case that barred a specific person from receiving copies of records would control disclosure under the Public Records Act had not yet been addressed by an appellate court. This issue was not addressed until 2014, when the court of appeals issued its decision in *Dep't of Transp. v.*

Mendoza de Sugiyama, 182 Wn. App. 588, 330 P.3d 209 (2014).[7] In *Mendoza de Sugiyama* the trial court granted the Department of Transportation's (DOT) request for a discovery order because the disclosure of more than 174,000 e-mails would have been unduly burdensome for DOT to produce. *Mendoza de Sugiyama*, 182 Wn. App. at 593. Mendoza de Sugiyama then sought the same records under the Public Records Act. Relying on the discovery order, DOT denied the request. On appeal, the court determined that "whether a protective order resulting from an unduly burdensome discovery request in a separate employment action between the same parties makes the same requested records unavailable within the purview of RCW 42.56.290" was an "issue of first impression in Washington." *Mendoza de Sugiyama*, 182 Wn. App. at 598.

The key fact before the *Sugiyama* court is similar to a distinction involved in DPA Miller's analysis: when does a discovery order control disclosure of the same records under the PRA? Essentially, the *Mendoza*

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[7] *State v. Chargualaf*, Slip Op. no. 44712-6-II (Aug. 12, 2014) is another decision that may have changed the DPA Miller's advice because it addressed the issue of whether a trial court could deny release of discovery to a criminal defendant post-trial. CP 248-52. If this issue had been addressed by the courts in 2011 or 2012, (1) the trial court would not have issued the clarifying order or (2) DPA Miller would not have relied on it. (The county is aware that it may not cite unpublished opinions for precedential authority and is not doing so in this matter. As argued before the trial court, *Chargualaf* is mentioned because it provides useful guidance that the county would have considered if it had been available in 2012. CP 235)

de Sugiyama court held that a general discovery order that was not founded on a privilege did not qualify as an exemption under the PRA.

Had the *Mendoza de Sugiyama* decision been available to DPA Miller, she would have recognized the limitation of CrR 4.7, found that the discovery order was not founded on a privilege, and released the records. On the other hand, that the State's Attorney General argued that a discovery order trumped a request for records indicates that the county's analysis was not so far-fetched that the court can find that it was made in bad faith. *See Dep't of Transp. v. Mendoza de Sugiyama*, 182 Wn. App. at 602 ("DOT argues further that RCW 42.56.290's exemption applies because under its reading of *O'Connor*, any time a superior court enters a protective order under CR 26, those records are "not available to another party under the superior court rules of pretrial discovery.") *Also see Limstrom v. Ladenburg*, 136 Wn.2d 595, 606, 963 P.2d 869 (1998)[8] (holding that a PRA exemption that did not state which superior court rules govern "can result in differing interpretations of the statute, depending on the records requested, the nature of the action to which the records relate, or the forum in which the underlying action is filed.")

[8] The issue in *Ladenburg* was whether the discovery rules under CR 26 or CrR 4.7 applied to determine what records constituted work product that would be exempt from disclosure.

2. Benitez does not establish that the county failed to conduct a reasonable search for responsive records.

Benitez cites *Francis v. Dep't of Corr.*, 178 Wn. App. 42, 313 P.3d 457 (2013) for the proposition "that inmates are entitled to penalties when an agency does not conduct a reasonable search." Appellant's Brief at 14. However, he offers no evidence to show that the county failed to conduct a reasonable search or sent the unresponsive records in an attempt to deceive him.

The Sheriff did provide some records that Benitez had not requested under the belief that they were responsive; however, Benitez quickly clarified the Sheriff's confusion.

> On August 6, 2012, I mailed Mr. Benitez some records that I believed were responsive to his request. The letter also explained that the county had "not been able to locate any transcripts of any recorded or private conversation and/or communications." Mr. Benitez responded, in a letter dated August 21, 2012, that most of the records were unresponsive to his request. Once the misunderstanding about the requested records was cleared up, I was advised by legal counsel that, except for a Motion and Affidavit for Search Warrant, the requested records were exempt from disclosure.

CP 275. Neither the Sheriff nor DPA Miller ignored Benitez' clarification.

The disclosure of non-responsive records does not establish that the county failed to conduct a reasonable search. DPA Miller never mis-identified the requested records or would have advised that they be

released until she requested her review. Benitez' claim that the release of non-responsive records demonstrates deceit is unsupported by fact, logic, or authority and is belied by Benitez lack of confusion and the Sheriff's response. He does not offer any evidence that the non-responsive records were doctored to make them look responsive, that the Sheriff fabricated records, or that the Sheriff made false statements about the records. The records were, simply, non-responsive. *See* CP 274 (Chief Molitor declared that he "mailed Mr. Benitez some records that [he] believed were responsive to his request.") Certainly, Benitez does not claim that he was ever deceived.

3. The record does not support Benitez' argument that the denial was made in bad faith because he had previously seen the records.

Benitez argues that the records should have been released to him because he had previously received the records from his trial defense counsel. However, he points to nothing in the record that shows that this "fact" was known to the county.

Neither the 2011 nor the 2012 discovery order would have caused DPA Miller to believe that Benitez had ever received the requested records. Absent contrary evidence, DPA Miller would have relied on CrR 4.7(h)(3), which provides that "any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the

attorney . . ." and that any copies provided to the defendant required redactions approved by the prosecutor or the trial court. Given the criminal court's discovery orders and the absence of evidence that Benitez had ever received the requested records, CrR 4.7 allows for the reasonable assumption that Benitez never had the documents.

Even if he had seen the records previously, such prior disclosure would not necessarily require disclosure of the same records under the PRA. That also is an issue of first impression – whether disclosure can be denied under an applicable exemption if the requester had previously seen the records – that this court need not address because it was not raised before the trial court. *See State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (Court "will not reverse the trial court's decision based on an argument raised for the first time on appeal.")

4. Benitez does not deny that DPA Miller had a good faith reason to find that he presented a threat to undercover officers and witnesses.

Benitez would have the court construe the investigative exemptions narrowly; however, *Haines-Marchel v. Dep't of Corrections*, 183 Wn. App. 655, 334 P.3d 99 (2014) gave DPA Miller leeway for a broader reading where nondisclosure is considered essential to effective law enforcement and protection of personal privacy when disclosure would endanger individuals' lives or physical safety:

> As shown, under *Fischer [v. Department of Corrections*, 160 Wn. App. 722, 726-28, 254 P.3d 824 (2011)] and *Gronquist [v. Department of Corrections*, 177 Wn. App. 389, 399-401, 313 P.3d 416 (2013), *review denied*, 180 Wn.2d 1004 (2014)], intelligence information can include information about methods of investigation, while investigative records must focus on a particular party. By their nature, the methods of investigation at issue here apply to all informant tips in the prison. If information about general methods must focus on a particular individual, it would never be exempt, contrary to both *Fischer* and *Gronquist*. Further, such a reading would risk shrinking the scope of intelligence information to that of investigative records, reducing the former to the superfluous. This would offend the canon of statutory construction that courts should avoid interpretations of a statute that render certain provisions superfluous. *See Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). To avoid these snares, the term "specific" in the exemption for specific intelligence information must be read to require not that the information concern particular individuals, but that it disclose particular methods or procedures for gathering or evaluating intelligence information. The preprinted text described above dealing with methods of evaluating informant statements meets this requirement.

Haines-Marchel v. Dep't of Corrections, 183 Wn. App. at 669.

The findings made by the Skagit County Superior Court that Benitez presented a significant threat to undercover officers and witnesses supports the broad reading DPA Miller gave to the exemptions. Certainly,

Benitez offers no evidence or argument to contradict DPA Miller's concern about the threat he posed:

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

CP 281.

In *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002), the court concluded, "[a]lthough we do not find the County's arguments against disclosure to be persuasive, they are not so farfetched as to constitute bad faith." *King County v. Sheehan*, 114 Wn. App. at 356-357. In finding an absence of bad faith, the *Sheehan* court noted the County's motivation to protect the safety and privacy of its officers. *Sheehan*, 114 Wn. App. at 356-57. The *Sheehan* court explained:

> We sympathize with these concerns; indeed, we empathize with them, for judges are not immune from threats by angry litigants. We also are not insulated from news reports about physicians who perform abortions being identified by name and residential address on anti-abortion websites and

> subsequently being murdered, and are not so naive as to believe that police officers who are identified on anti-police websites, such as those run by Sheehan and Rosenstein, by name and home address, and perhaps by residential telephone number and social security number as well, could not thereby be placed in danger or subjected to harassment or identity theft.

King County v. Sheehan, 114 Wn. App. at 340. Thus, bad faith should not be found when reasonable arguments for denial are based on the need to protect the safety and privacy of others. *See Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 155, 930 P.2d 288 (1997) ("Acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct[.]")

Skagit County's conduct is much like King County's conduct in *Sheehan*. Like King County, DPA Miller had an overriding concern for the safety and privacy of undercover officers and witnesses in the fact of judicial findings that Benitez presented a specific threat to them. Although the *Sheehan* court determined that King County erred when it denied a PRA request for the names of all law enforcement officers employed by the county, it also held that erroneous reliance on an exemption did not constitute bad faith:

> There is no similar evidence of bad faith here. While the County may dislike Sheehan and his incendiary website, the County's refusal to disclose the full names of its police officers appears primarily to have been motivated by a

> desire to protect their safety and privacy--and it is undisputed that Sheehan had, in fact, previously published police officers' home addresses on his website. The County made its decision before the legislature enacted RCW 4.24.680-.700, so that the County did not have an alternate means of attempting to preserve its officers' privacy. Although we do not find the County's arguments against disclosure to be persuasive, they are not so farfetched as to constitute bad faith. Therefore, we hold that the trial court did not abuse its discretion in finding that the County acted in good faith. But remand is necessary because good faith does not justify failing to impose at least the minimum statutory penalty of $5 per day.

King County v. Sheehan, 114 Wn. App. at 356-357.[9]

The *Sheehan* court observed that a dislike for a person requesting public records does not negate good faith. Here, there is no evidence that any county official had any animus toward Benitez. The decision to deny Benitez' request of June 17, 2012, arose solely from concerns for compliance with the Skagit County Superior Court's orders, compliance with the PRA, and the safety of the public and undercover officers.

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[9] The *Sheehan* court only remanded for imposition of a penalty because, at the time of its decision, the PRA mandated a minimum penalty of 5 dollars per day. At the present time, the PRA does not set a minimum penalty. *See* RCW 42.56.550(4) ("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.") Even so, there would have been no remand had the *Sheehan* plaintiffs been incarcerated at the time of their request.

5. The county's explanation of its denial met the requirement for a "brief explanation" and does not demonstrate bad faith.

The county conceded that it "violated the Public Records Act by not providing all of the records Benitez requested in his letter dated June 17, 2012." CP 213. The county did not concede that its denial letter failed to provide "a brief explanation of how the exemption applies to the record withheld." *See* RCW 42.56.210(3). *Also see* RCW 42.56.520 ("Denials of requests [for public records] must be accompanied by a written statement of the specific reasons therefor.")

Because of the county's concession, the trial court did not have a need to address the adequacy of the county's explanation when it granted Benitez' motion for partial summary judgment. Further, Benitez did not present any argument or legal analysis on this issue in his response to the county's motion for summary judgment on the issue good faith, making this another issue raised for the first time on appeal that the court need not address.

Should the court undertake the review of an issue that Benitez did not present to the trial court, it will find that the county' explanation satisfies the requirement for a "brief explanation of how the exemption applies to the record withheld." *See* RCW 42.56.210(3).

The county's response provided, in part:

> . . . These 19 pages are exempt from disclosure pursuant to Court Orders signed by Judge Needy on Marcy 23, 2011, May 25, 2011 and October 26, 2012 (enclosed) finding that release of this information would both hinder effective law enforcement and would jeopardize the personal safety of law enforcement and witnesses, Superior Court Criminal Rule 4.7, and RCW 42.56.240(1) and (2).

CP 32. This explanation, which was also given for the denial of the recording,[10] does more than cite the exemptions the county relied upon. It briefly explains how they apply. That Benitez is now unsatisfied with the explanation does not establish bad faith or a violation of the PRA requirement for a brief explanation.

CONCLUSION

Benitez presented no evidence that any county official acted with dishonesty or malice or ignored the PRA in favor of some personal or agency motive to hide records. He fails to demonstrate that DPA Miller failed to conduct a reasonable research into what was then a novel issue or that her analysis was so far-fetched as to amount to bad faith noncompliance with the PRA. He only shows what the county has conceded – that the denial was erroneous.

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[10] The transcript of the recording was not created until after the county reconsidered the 2012 denial to facilitate the disclosure of requested records. CP 335.

The court should find that the trial court did not err when it granted Skagit County's motion upon a finding that Benitez did not demonstrate that Skagit County acted in bad faith when it denied his June 17, 2012, request for public records. This appeal should be dismissed without an award of penalties, which in any event should be set by the trial court.

RESPECTFULLY SUBMITTED this 22nd day of December, 2015.

RICHARD A. WEYRICH
Skagit County Prosecuting Attorney

By: _____
A. O. DENNY, WSBA #14021
Deputy Prosecuting Attorney

DECLARATION OF DELIVERY

I, Judy L. Kiesser, declare as follows:

I sent for delivery by; [xx]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to CARLOS BENITEZ, JR., DOC 715131, AHCC, PO BOX 2049, AIRWAY HEIGHTS, WA 99001.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington, this 22 day of Dec., 2015.

Judy K. Kiesser
JUDY L. KIESSER