No. 48186-3-II (consolidated with
48311-4-II, 48326-2-II, and 48372-6-II)

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellant.

OPENING CONSOLIDATED BRIEF OF APPELLANT

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I. INTRODUCTION

The Department of Corrections (Department) appeals the trial court's award of penalties under the Public Records Act to four inmate requesters for public records requests that they submitted for inmate phone logs. A private company, Global Tel-Link (GTL), operates the Department's inmate phone system. As part of its system, GTL generates a log of the calls made by an inmate or what is referred to as a phone log. The Department only accesses and uses phone logs for specific investigative purposes and a minority of all phone logs are accessed or used by the Department. In 2013, the Department took the position that inmate phone logs were not public records unless they were pulled from the GTL system for use in agency business. Apparently aware of the Department's decision, four inmates, all confined together at the Coyote Ridge Corrections Center, made separate requests for inmate phone logs. The Department denied each request based on its position.

After the Department denied the requests, the inmates sued the Department claiming a violation of the Public Records Act. The Department—having reevaluated its position on inmate phone logs as a result of other litigation by two inmates at the Coyote Ridge Corrections Center in Franklin County—promptly made the records available after receiving each of the lawsuits. In each case, the trial court found that the

Department's position that the requested records were not public records unless accessed or used by the Department was objectively reasonable and based on a good faith understanding of the law. Despite uncontested evidence that the requested records had never been accessed or used by the Department, the trial court found bad faith and awarded penalties to each requester because the Department failed to conduct a search for records and failed to inform the requesters that phone logs could be public records under different facts.

Under the facts of these cases neither the failure to search nor the failure to inform the requester caused the denial of the requested records. Based on the Department's position at the time—which again the trial court found reasonable—the Department would not have produced the requested phone logs even if such a search had been conducted or the requesters had been informed that phone logs could be public records. In finding bad faith, the trial court erroneously determined that there was no causation requirement in RCW 42.56.565(1), i.e. no requirement that the bad faith result in the denial of any record. This determination was error and this Court should reverse and remand.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in ruling that RCW 42.56.565(1) does not include a requirement that the agency's bad faith caused the denial of the requested records.

2. The trial court erred in finding the Department acted in bad faith under RCW 42.56.565(1).

3. The trial court erred in awarding the requesters all of their costs and attorney's fees in light of the absence of bad faith and the Department's offers of judgment.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Does the plain language of RCW 42.56.565(1), which states that "the agency acted in bad faith in denying the opportunity to inspect or copy a record," include a causation requirement?

2. Did the trial court err in ruling that the Department denied the requesters records in bad faith when it denied the records based on an objectively reasonable policy and its decision to not search for phone logs would not have resulted in the disclosure of records because none of the requested records were ever accessed or used by the Department?

3. If the trial court erred in finding bad faith, did the trial court also err in awarding the requesters all of their costs and attorney's fees?

IV. STATEMENT OF THE CASE

A. The Department's Determination That Logs of Phone Calls Made by Inmates to Members of Community and Maintained and Possessed by a Private Company Were Not Public Records

The Department contracts with a private company, Global Tel-Link (GTL), to run and maintain its inmate phone system. Cook CP 26; Evans CP 27; Jones CP 31; Robinson CP 214[1]. In 2013, the Department became aware of a significant security incident where an offender obtained a log of all calls made by another offender through public disclosure. Cook CP 26, 31; Evans CP 28, 33; Jones CP 32, 37; Robinson CP 212, 221. The requester was a member of a Security Threat Group[2] and the inmate whose call logs were requested was a confidential informant. Cook CP 26, 31; Evans CP 28, 33; Jones CP 32, 37; Robinson CP 212, 221. At the time of this 2013 request, the Department had been providing phone logs in response to public record requests by obtaining the records from the GTL system to provide to the requester. Cook CP 31; Evans CP 33; Jones CP 37; Robinson CP 221. Specifically, when the Department would receive a request for phone logs, the request would be forwarded to the Department's investigative staff who would obtain the

[1] The appeals were consolidated after the designation of clerk's papers. As such, each of the four cases has their own Clerks Papers and Reports of Proceedings. For clarity sake, the Department's citations to the trial court record identify the trial court record by case name.

[2] A Security Threat Group is the term that the Department uses for prison gangs.

records from GTL and forward them to the Department's Public Disclosure Unit. Cook CP 31; Evans CP 33; Jones CP 37; Robinson CP 221.

In light of the significant security concerns and potential for violence that could come from inmates obtaining copies of inmate phone logs, the Department evaluated whether such logs were subject to public disclosure under the PRA. Cook CP 24-25, 27, 31; Evans CP 26-27, 29, 33; Jones CP 33-31, 33, 37; Robinson CP 213-14, 216-17, 221. The Department considered that it had no role in the operation, maintenance, or charging for phone services. Cook CP 25-26; Evans CP 27-28; Jones CP 31-32; Robinson CP 214-216. Additionally, although the Department investigators may access phone records or monitor phone calls for possible criminal activity or other malfeasance, the Department does not retrieve call logs from the GTL servers or otherwise use or maintain the logs, except for narrow investigative circumstances. Cook CP 26, 31; Evans CP 28, 33; Jones CP 32, 37; Robinson CP 216, 221. In fact, the majority of the Department's over 16,000 offenders are never part of any investigation, and of those offenders who are the subject of an investigation, only a minority would ever have their phone logs pulled and accessed by the Department's investigators. Evans CP 266; Jones CP 421; Robinson CP 334.

After considering the nature of the requested records, the definition of a public record and the applicable case law, as well as consulting with members of the Attorney General's Office, the Department determined that inmate phone logs maintained and possessed by GTL were not public records unless the Department accessed and used the logs for agency business. Cook CP 31; Evans CP 33; Jones CP 37; Robinson CP 221. As such, the Department took the position that such logs did not need to be produced in response to public records requests. Cook CP 31; Evans CP 33; Jones CP 37; Robinson CP 221.

In June 2013, the Department issued Newsbrief[3] 13-01 to provide guidance to its staff regarding how to process public record requests for phone logs. Cook CP 30, 34, 36, 168-169; Evans CP 32, 36, 38, 262-263; Jones CP 36, 40, 42, 418; Robinson CP 220, 224, 226, 330-331. Because phone logs were maintained within the GTL system, Newsbrief 13-01 directed staff to notify requesters that the Department did not consider inmate phone logs to be public records. Cook CP 30, 34, 36, 168-169; Evans CP 32, 36, 38, 262-263; Jones CP 36, 40, 42, 418; Robinson CP 220, 224, 226, 330-331. The Newsbrief recognized that records pulled from the GTL system and used in agency business might be public

[3] Newsbriefs are internal memoranda issued by the Department's Public Records Officer containing written guidelines to provide public disclosure staff guidance on specific public disclosure issues. Cook CP 30; Evans CP 32; Jones CP 36; Robinson CP 220.

records. Cook CP 30, 34, 36, 168-169; Evans CP 32, 36, 38, 262-263; Jones CP 36, 40, 42, 418; Robinson CP 220, 224, 226, 330-331. The Newsbrief, however, did not direct staff to search for these records, but rather was intended to assist staff in handling phone logs which had already been retrieved from the third party phone system for use in agency business and may turn up in other record searches. Cook CP 168-168; Evans CP 262-263; Jones CP 418; Robinson CP 330-331. However, if staff had a specific reason to believe the requested records were pulled and used as part of an investigation, staff would be expected to search. Cook CP 169; Evans CP 263; Jones CP 418; Robinson CP 331.

B. The Phone Log Requests at Issue in This Case

In September 2013 and February 2014, the Department's position on phone logs was the subject of two lawsuits in Franklin County Superior Court brought by inmate Joseph Jones and former inmate Karl Tobey. Cook CP 32; Evans CP 34; Jones CP 38; Robinson CP 222. The trial court held that phone logs were public records but denied Jones and Tobey penalties because it found that the Department did not act in bad faith in denying the records and its position was reasonable. Cook CP 32, 55-63; Evans CP 34, 53-61; Jones CP 38, 58-67; Robinson CP 222, 242-254.

During the Franklin County litigation, the Department received numerous additional inmate requests for inmate phone logs. The

Department received the four requests at issue in this appeal over a period of four months.[4] Cook CP 43; Evans CP 45; Jones CP 49; Robinson CP 233. Three of these four requests were received before the Franklin County judge's oral ruling that inmate phone logs were public records. Cook CP 43; Evans CP 45, 282; Jones CP 49; Robinson CP 233. The last of the four requests, from Evans, was received eleven business days after the Franklin County judge's oral ruling on June 25, 2014, and prior to the entry of the court's written order. Evans CP 282. Each of these requesters was housed at Coyote Ridge Corrections Center. Cook CP 43; Evans CP 45; Jones CP 49; Robinson CP 233. All of the requesters in this appeal, except for Joseph Jones, sought their own phone logs. Cook CP 43; Evans CP 45; Jones CP 49; Robinson CP 233. Jones sought the phone logs of Karl Tobey, the other plaintiff in the 2013 Franklin County lawsuits. Jones CP 49. In response to each of these requests, the Department timely notified the requesters that phone logs are not public records because the phone system is run and maintained by an outside vendor. Cook CP 45; Evans CP 47; Jones CP 51; Robinson CP 235.

In response to the rulings in Franklin County, the Department evaluated its options, including appealing the Franklin County decisions

[4] The Department received Cook's request on April 3, 2014, Jones's request on May 1, 2014, Robinson's request on May 5, 2014, and Evans's request on July 11, 2014.

and requesting legislation to address the issue. However, in February 2015, it decided to begin producing phone logs again in response to public record requests by obtaining the records from the GTL system and providing the records to the requester. Cook CP 32, 40; Evans CP 34, 42; Jones CP 38, 46; Robinson CP 222, 230. Meanwhile, the four plaintiffs in this case filed lawsuits in Thurston County[5] challenging the Department's response to their public records requests and seeking monetary penalties.[6] Cook CP 1-4; Evans CP 1-4; Jones CP 4-7; Robinson CP 5-8. Upon receiving notice of the four lawsuits at issue in this matter, the Department promptly made the requested phone logs available to the requesters.[7] Cook CP 41, 51; Evans CP 43, 49; Jones CP 46, 53-54; Robinson CP 231, 237.

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[5] The record shows that Jones, who filed his lawsuit in Thurston County first, was blatantly forum shopping for a more favorable result when he decided to file in Thurston County. Jones stated that he filed in Thurston County because he had "not [had] much success in Franklin County." Jones CP 432.

[6] Jones filed his lawsuit on January 7, 2015, Robinson filed his lawsuit on January 8, 2016, Evans filed his lawsuit on February 5, 2015, and Cook filed his lawsuit on March 12, 2015. Cook CP 1-4; Evans CP 1-4; Jones CP 4-7; Robinson CP 5-8.

[7] In total, inmates filed nine separate actions in Thurston County Superior Court over inmate phone logs in 2015. Four of those cases are consolidated here, another case before this Court is stayed pending resolution of this appeal, two cases are in the process of perfecting the appeals, another case was voluntarily dismissed in the superior court, and the final, ninth case is stayed in the superior court pending resolution of this appeal. *See Larry Givens v. DOC*, Division II Court of Appeals Case No. 48768-3-II; *Kevin Evans v. DOC*, Division II Court of Appeals Case No. 48764-1-II; *Sean Lancaster v. DOC*, Division II Court of Appeals Case No. 48707-0-II; *Joseph Henry v. DOC*, Thurston County Superior Court Cause No. 15-2-00045-1; *Brady Lewis v. DOC*, Thurston County Superior Court Cause No. 15-2-01279-4.

C. The Trial Judge Concluded the Department's Policy Was Objectively Reasonable but Its Failure to Conduct a Search Was Bad Faith Regardless of Whether It Would Have Resulted in the Production of Records Under the Department's Policy

In each of these four cases, the Department ultimately conceded that inmate phone logs were public records. The Department argued, however, that the requesters were not entitled to penalties under RCW 42.56.565(1) because the Department did not deny records in bad faith. Cook CP 5-16; Evans CP 8-22; Jones CP 11-26; Robinson CP 189-209. The Department contended it had initially denied the requested records in good faith because it reasonably believed the phone logs were not public records. Cook CP 5-16; Evans CP 8-22; Jones CP 11-26; Robinson CP 189-209. The Department also argued that because no responsive records would have been found had it searched for the specific phone logs (except for on the GTL servers) the absence of a search was not bad faith. Cook CP 156-164; Evans CP 250-258; Jones CP 406-413; Robinson CP 319-327.

The trial court agreed with the Department and found that the Department did not act in bad faith when the Department decided inmate phone logs possessed only by GTL were not public records. The court concluded the Department's position was objectively reasonable and not bad faith. Cook CP 141-149; Evans CP 242-249; Jones CP 366-375;

Robinson CP 309-318. However, the trial court found that the Department acted in bad faith because the Department failed to search its files to see if the specific phone logs had ever been accessed for agency business and failed to inform the requester that inmate phone logs could be public records if they had been accessed for use in agency business. Cook CP 141-149; Evans CP 242-249; Jones CP 366-375; Robinson CP 309-318.

Despite uncontested evidence that the Department had never accessed the requested phone logs for agency business and had never used the particular phone logs, the trial court found the absence of a search constituted bad faith. Cook CP 171-172, 188-214; Evans CP 265-280; Jones CP 420-429; Robinson CP 333-349. The trial court reached this conclusion despite the evidence that the denial of records resulted from the objectively reasonable policy and a search would not have changed the outcome of the request based on the policy at the time. In reaching this conclusion, the trial court rejected the argument that there is a causation requirement in RCW 42.56.565, i.e. that the failure to search must cause the denial of records. Cook CP 236-237; Evans CP 293; Jones CP 460-461; Robinson CP 374; Cook RP October 9, 2015, p. 13. Based on its finding of bad faith, the trial court awarded each of the requesters penalties in the amount of $25 per day. Cook CP 236-237; Evans CP 293; Jones CP 460-461; Robinson CP 374.

The trial court denied the Department's motions for reconsideration. Cook CP 236-237; Evans CP 293; Jones CP 460-461; Robinson CP 374. The Department filed timely notices of appeal for each of these four cases. Cook CP 238-239; Evans CP 354-355; Jones CP 462-463; Robinson CP 375-376. On March 11, 2016, the Court consolidated these matters under the *Cook* cause number.

V. STANDARD OF REVIEW

The Court reviews challenges to agency 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 (2009). Appellate courts stand in the same position as the trial courts when the record on a show cause motion consists only of affidavits, memoranda of law, and other documentary evidence. *Mitchell v. Washington State Dep't of Corr.*, 164 Wn. App. 597, 602, 277 P.3d 670 (2011), *as amended on reconsideration in part*. The trial court's determination that an agency acted in bad faith under RCW 42.56.565(1) is a mixed question of law and fact that is reviewed de novo. *Faulkner v. Dep't of Corrections*, 183 Wn. App. 93, 101-02, 332 P.3d 1136 (2014), *review denied*, 182 Wn.2d 1004 (2015); *Francis v. Dep't of Corrections*, 178 Wn. App. 42, 51-52, 313 P.3d 457 (2013), *review denied*, 180 Wn.2d 1016 (2014).

VI. ARGUMENT

An inmate is not entitled to daily penalties under the Public Records Act unless the agency acted in bad faith "in denying the person the opportunity to inspect or copy a public record." RCW 42.56.565(1). To demonstrate bad faith, an inmate must show a wanton or willful act or omission by the agency. *Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 938-39, 361 P.3d 749 (2015).

The trial court erred in finding bad faith in this case. The Department denied the requests for phone logs based on its determination that inmate phone logs generated and held by a vender and never used by the Department were not public records. As the trial court found, the Department's position was objectively reasonable. The trial court found though that that the Department acted in bad faith by not searching to see if the requested phone logs had ever been accessed by the Department for agency business. But it is undisputed that no such phone logs would have been found if the Department had conducted this search at the time of the requests. Thus, the failure to search did not cause the denial of records. In concluding that bad faith was present, the trial court erroneously concluded that the alleged bad faith could exist on its own, and did not need to cause the denial of the records. This interpretation of RCW 42.56.565(1) conflicts with the

plain language of that provision as well as the legislative history and existing Public Records Act case law. When applying the correct standard, the trial court erred in finding bad faith because the denial of records was caused by the Department's objectively reasonable policy not the failure to search for records. Because the trial court erred in finding bad faith despite the absence of causation, its decision to award the phone log requesters penalties is error and should be reversed.

A. RCW 42.56.565(1) Requires the Bad Faith to Have Caused the Denial of Records

In interpreting statutes, courts "try to determine and give effect to the legislature's intent." *Francis*, 178 Wn. App. at 59-60. When the statute's meaning is plain on its face, then courts give full effect to the plain meaning. *Id.*; *Robbins, Geller, Rudman, & Dowd, LLP v. State*, 179 Wn. App. 711, 720-21, 328 P.3d 905 (2014). When the plain language is ambiguous, courts look to principles of statutory construction and legislative history. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 469, 98 P.3d 463 (2004).

In 2011, faced with increasing abuse by inmates of the Public Records Act, the legislature passed Substitute Senate Bill 5025. This provision, codified as RCW 42.56.565(1), severely restricts an inmate's ability to obtain penalties for public records requests. *Faulkner*, 183 Wn.

App. at 105-06 (citing S.B. 5025, 62nd Leg. Reg. Sess. (Wash. 2011)). RCW 42.56.565(1) prohibits a court from awarding daily penalties to an inmate "unless the court finds that the agency acted in bad faith *in denying* the person the opportunity to inspect or copy a public record" (emphasis added). Under this statute, an inmate seeking PRA penalties has the burden of persuasion to show the Department acted with bad faith in denying the requester the opportunity to inspect or copy a public record. *See Adams*, 189 Wn. App. at 952.

The trial court's holding that RCW 42.56.565 did not require causation was in error. The causation requirement, i.e. the requirement that the agency's bad faith must have caused the denial of the record, is plain on the face of the statute. Both the grammatical structure of the statute and its plain language demonstrate that RCW 42.56.565(1) has a causation element.

In full, RCW 42.56.565(1) 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.* (Emphasis added).

Here, the term "bad faith" is modified by the last clause ("in denying the person the opportunity to inspect or copy a public record") and there is no comma before the clause. The absence of a comma makes the clause a

restrictive modifier that limits the essential meaning of the term "bad faith." *See* William Strunk Jr. & E.B. White, *The Elements of Style* 94 (4th Ed. 2000). The clause explicitly restricts the type of bad faith that the court must find in order to award penalties to an inmate requester—only bad faith that results in the denial of records.

Moreover, the phrase used in that restrictive clause is a term of art in the penalty provisions of the Public Records Act. Terms of art must be given their technical meaning. *See Swinomish Indian Tribal Cmty. v. Wash. State Dep't of Ecology*, 178 Wn.2d 571, 581, 311 P.3d 6 (2013). RCW 42.56.550(1) authorizes penalties where a requester was wrongfully "denied an opportunity to inspect or copy a public record by an agency." RCW 42.56.550(4) repeats that language in setting the permissible range of penalty, authorizing a daily penalty only where the requester "was denied the right to inspect or copy said public record." The denial of "an opportunity to inspect or copy a public record" is distinct from the right to receive a response. *See Sanders v. State*, 169 Wn.2d 827, 848, 240 P.3d 120 (2010) (distinguishing between the right to receive a response and the right to inspect or copy a record). By using the phrase "denied an opportunity to inspect or copy a public record by an agency" the legislature explicitly permitted penalties only where records were denied in bad faith and not for technical violations of the PRA.

Because an agency can act in bad faith only when it "den[ies] the person *the opportunity to inspect or copy a public record*" under RCW 42.56.565(1), a court must find that the bad faith resulted in the denial of records to award penalties. The trial court here did not find bad faith because the Department's reason for denying the records was farfetched or otherwise in bad faith. It ruled that the Department's position that the phone logs were not public records was objectively reasonable and *not* in bad faith. Rather, it found the Department's failure to conduct a search that would have not resulted in a different response and failure to provide a complete explanation constituted bad faith. This ruling ignored the technical meaning of "denied an opportunity to inspect or copy a public record" and instead conflates it with the "right to receive a response." The trial court erred in ignoring this distinction and the causation requirement found in the plain language of RCW 42.56.565(1).

Indeed, even if the language of RCW 42.56.565(1) were ambiguous, the causation requirement is confirmed by the legislative history of the provision. RCW 42.56.565(1) was enacted in 2011 to severely limit an inmate's ability to recover penalties under the PRA. In enacting RCW 42.56.565(1), the legislature "increased the level of culpability needed for an award to an inmate." *Faulkner*, 183 Wn. App at 105. This statutory provision was intended to curb abuses by inmates and

allow "penalties for inmates only when the agency defeats the purpose of the PRA." *Id* at 106. The inmate penalty amendment first appeared in Senate Bill 5025 as a complete ban on inmates receiving penalties. Senate Bill 5025, 62nd Leg. Reg. Sess., § 1(5) (Wash. 2011). The Act itself was originally called: "An Act Relating to making requests by or on behalf of an inmate under the public records act ineligible for penalties." Laws of 2011, ch. 300, § 1 (adding RCW 42.56.565(1)). While the complete ban on inmate penalties was ultimately amended to provide a narrow exception, the progression of the bill in instructive.

This interpretation is confirmed by other aspects of the legislative history. When the legislature considered the adoption of the bad faith requirement, testimony supporting the bill indicated that the bill removed the financial incentive for inmates to submit burdensome requests but allowed penalties when the "inmate can prove that an agency has acted in bad faith *in failing to produce records*." House Bill Report Substitute Senate Bill 5025 (emphasis added), *available at http://app.leg.wa.gov/DLR/billsummary/default.aspx?Bill=5025&year=2011*. The legislature adopted the bill with the understanding that the bad faith requirement focused on whether or not the agency denied a record in bad faith.

The legislature's clear intent to impose a higher burden for inmates to recover penalties is not served by reading a causation element out of RCW 42.56.565(1) and would allow inmates to obtain penalties in circumstances not available to other requesters. Courts have not awarded freestanding daily penalties where a record was properly withheld but other technical violations of the PRA occurred. *See, e.g., Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 809, 246 P.3d 768 (2011) ("penalties are authorized only for denials of 'the right to inspect or copy'"); *City of Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014) (same; declining to award penalties for an insufficient brief explanation); *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011) (declining to award daily penalties for a freestanding violation for an inadequate search). Allowing inmates to obtain penalties where other requesters may not would turn the language and intent of RCW 42.56.565(1) on its head. The legislature's purpose in enacting RCW 42.56.565 was to restrict an inmate's ability to obtain penalties for public records requests. The trial court's ruling expands an inmate's ability to recover penalties as opposed to limiting it.

A contrary conclusion would mean that an inmate would have greater rights under the Public Records Act than non-inmate requesters. For example, under the trial court's theory, an inmate might be entitled to

daily penalties if the court found that the agency provided an inadequate brief explanation and that failure was bad faith. Although it is an open question whether non-incarcerated requesters would be entitled to penalties, it would be absurd to conclude that in enacting RCW 42.56.565(1) the legislature had intended to give inmates greater opportunities to receive penalties than non-incarcerated individuals.

Moreover, in enacting RCW 42.56.565(1) the legislature sought to adopt a requirement for penalties under the PRA that had previously been discussed and rejected by the courts for non-inmate requesters. In *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 301, 825 P.2d 324 (1992), the Court rejected the argument that a non-inmate requester must make a showing of bad faith to obtain penalties under the PRA. *Yacobellis*, 64 Wn. App. at 301 (*citing* former RCW 42.17.340, which was re-codified as RCW 42.56.550 in Laws of 2005, ch. 274, § 288). RCW 42.56.565(1) essentially reverses the *Yacobellis* decision as applied to inmate requests (but only as to inmate requests). And where the *Yacobellis* court observed that a penalty under former RCW 42.17.340 "does not depend upon a finding that the governmental agency's nondisclosure *was the result of* bad faith," *Yacobellis*, 64 Wn. App. at 301 (emphasis added), the legislature took the directly opposite approach in RCW 42.56.565,

making the award of penalties specifically dependent upon a finding that nondisclosure of a record was the result of bad faith.

In each of the two Courts of Appeals' decisions which have considered RCW 42.56.565(1) and found that the agency acted in bad faith, the agency's bad faith conduct actually caused the denial of records. In *Francis*, 178 Wn. App. 42, the Court found that the agency acted in bad faith when it conducted a cursory search and failed to produce responsive records as a result of that cursory search. Similarly, in *Adams*, 189 Wn. App. 925, the Court held that the agency's position that RAP sheets were exempt from the PRA was "legally indefensible" and that the denial of records in accordance with this position amounted to bad faith. Indeed, even the case where the Court of Appeals found the agency did not act in bad faith focused on the agency conduct which actually resulted in the denial of records. In *Faulkner*, the Court analyzed the agency's inadvertent error which led to the denial of the record in finding that the Department did not act in bad faith. Specifically, the Court noted "[t]he error in production was the result of an inadvertent mistake in summarizing the request." *Faulkner*, 183 Wn. App at 107. These cases confirm that the specific and proper inquiry under RCW 42.56.565(1) is whether the agency denial of records was the result of bad faith. The trial court's ruling improperly expands this inquiry.

Finally, the policy behind the PRA's penalty provisions supports the requirement that there must be a causal connection between the bad faith and the denial. The purpose of the PRA's penalty provision is to "deter improper denials of access to public records," and more specifically the purpose of the inmate penalty provision is to limit an inmate's ability to receive penalties. *Faulkner*, 183 Wn. App at 106 (citing *Yousoufian V*, 168 Wn.2d at 461, 229 P.3d 735). Without the causal connection between the bad faith and the denial of records in RCW 42.56.565(1) this policy would not be furthered because conduct unrelated to the denial may give rise to penalties. It would also increase inmate litigation under the PRA because inmates would file actions against agencies to seek penalties for technical violations of the PRA.

Indeed, this case demonstrates the difficulty that adopting the trial court's approach would create in evaluating bad faith. Contrary to the plain meaning and the intent of the statute, the trial court shifted the bad faith inquiry from the denial of records to other aspects of the agency's conduct. This approach will create almost endless mini-trials over whether a specific, isolated aspect of the agency's response was in bad faith. That approach is inconsistent with the prior case law and unsupported by the statutory language. Here, the denial of records was not the result of any bad faith by the agency but rather it was based on an objectively

reasonable policy. As such, stand alone penalties for a technical violation divorced from the denial of records are contrary to the policies of the PRA and the bad faith provision because it would not deter any improper denials of records and would encourage inmates to file more PRA lawsuits.

Therefore, in order to award penalties under RCW 42.56.565(1), trial courts must consider whether the agency's bad faith *caused* the denial of records. Here, the trial court ignored the causation requirement in RCW 42.56.565(1). This was error and the trial court's decision should be reversed.

B. The Trial Court Erred in Finding Bad Faith Despite Its Ruling That the Policy upon Which the Department Relied Was Objectively Reasonable

The trial court correctly concluded that the Department did not act in bad faith in taking a position that inmate phone logs were generally not public records. This conclusion was correct. An agency does not act in bad faith for "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. And even when an agency violates the PRA in not disclosing a record, reliance on an invalid basis for nondisclosure does not result in a finding of bad faith, so long as the basis is not farfetched or asserted with knowledge of its invalidity. *See King County v. Sheehan*, 114 Wn. App.

325, 356-57, 57 P.3d 307 (2002) (noting "although we do not find the County's arguments against disclosure to be persuasive, they are not so farfetched as to constitute bad faith." *Id.* at 356-57); *see also Adams*, 189 Wn. App. at 951. Rather, a finding of bad faith requires a wanton or willful act or omission by the agency and incorporates "a higher level of culpability than simple or casual negligence." *Faulkner*, 183 Wn. App at 93.

The Department denied the requests at issue in this appeal based on its position that inmate phone logs were not public records unless the Department had obtained them from the private vendor and used them for agency business. This decision was reached after considering the nature of the requested records and the definition of a public record. Cook CP 24-25, 27, 31; Evans CP 26-27, 29, 33; Jones CP 33-31, 33, 37; Robinson CP 213-14, 216-17, 221. The trial court found this position reasonable.

Additionally, as the trial court correctly noted, the Department's decision to evaluate whether phone logs were public records was based on security concerns that were reasonable. Cook CP 51; Evans CP 49; Jones CP 53-54; Robinson CP 237-38. And when the Department received a decision by Franklin County that inmate phone logs were public records, the Department changed its policy and it provided the records promptly upon receiving the multiple lawsuits in Thurston County. Cook CP 24-25,

27, 31; Evans CP 26-27, 29, 33; Jones CP 33-31, 33, 37; Robinson CP 213-14, 216-17, 221. These factual circumstances are virtually indistinguishable from *Sheehan*. In *Sheehan*, the Court criticized the County's response for not providing an adequate explanation of why the records could be released to some individuals but not others. *Sheehan*, 114 Wn. App. at 340-41. The Court noted that the County refused to release the records to the requesters despite having a policy of routinely releasing the information to other requesters. *Id.* Yet, the Court found no bad faith on behalf of the agency in denying the records because its arguments were not farfetched and motivated by reasonable concerns. *Id.* at 356-57. Here, the trial court reached the same conclusion about the reasons that the Department denied the requesters the requested records. Cook CP 148; Evans CP 244-48; Jones CP 514-525; Robinson CP 313-17.

Despite the conclusion that the policy was objectively reasonable, however, the trial court went on to premise the award of penalty on its conclusion that the Department acted in bad faith by failing to search and failing to provide the requester notice of the fact that inmate phone records might be considered public records if they had been accessed by the Department for use in agency business. Cook CP 148; Evans CP 247-48; Jones CP 515-525; Robinson CP 317-18. This conclusion ignored the uncontested evidence that a search at the time of the request would not

have changed the Department's response because none of the requested phone records were ever accessed by the Department. Similarly, a letter notifying these four requesters that inmate phone logs could be public records if accessed or used by the Department would not have changed the response because the requested phone logs had not been accessed or used. In other words, based on its reasonable policy, the Department's response would have been the same regardless of whether or not it searched and regardless of whether it notified the requester of the possibility that phone logs might be public records. The trial court awarded the requesters free-standing penalties for conduct unrelated to the denial of records despite its conclusion that the Department had a good faith basis for denying the records.

Nothing in the PRA clearly establishes an agency's obligation to check to see if records that are typically maintained by a third party contractor have been accessed for use by the agency. Furthermore, the PRA does not require agencies to notify requesters of every contour of the agency's positon. Yet the trial court premised bad faith on these grounds, completely setting aside the objectively reasonable determination of the agency that the requested records are not public records. This conclusion is not supported by any of three cases that discuss bad faith. All three of those cases considered the agency's conduct as a whole to determine

whether or not the agency acted in bad faith in the denial of records. *See Adams*, 189 Wn. App. at 941-50; *Faulkner*, 183 Wn. App. at 107-08; *Francis*, 178 Wn. App. at 63-64. Although *Francis* discussed the adequacy of the agency's search as a factor to consider on bad faith, it was undisputed that the failure to search resulted in the failure to produce records and the *Francis* court recognized that a failure to search by itself did not necessarily constitute bad faith. *Francis*, 178 Wn. App. at 63 n.5. In contrast, the Department's decision not to search for records that it reasonably believed were not public records did not result in the denial of any records. And where the agency reasonably believed it did not have the requested records, it was not bad faith to omit from its response a statement that the agency would search for the records if it did have them. Here, however, the trial court erroneously viewed the failure to search in isolation because the Department's failure to search did not result in the denial of any records.

For the reasons discussed above, the trial court erred in finding bad faith and awarding penalties. The trial court should have found that the inmate requesters are not entitled to penalties because the Department did not deny records in bad faith. Thus, the trial court's award of penalties should be reversed and the case should be remanded with instructions that

the trial court enter a finding that the requesters are not entitled to penalties.

C. The Trial Court Should Remand for Determination of Costs and Attorney's Fees

As discussed above, the trial court erred in awarding the requesters penalties and that decision should be reversed. Based on the Department's concession in these cases that inmate phone logs are public records, the requesters are entitled to reasonable costs and attorney's fees in the trial court. Because the requesters were the prevailing parties in this case based on the Department's concessions, the award of costs was appropriate. RCW 42.56.540(4); *Francis*, 178 Wn. App. at 67. However, the award of costs must be viewed in light of the Department's offers of judgment in these cases. If the Court reverses, it should remand to the trial court for the trial court to evaluate its award of costs and attorney's fees to the inmate requesters.[8]

VII. CONCLUSION

The trial court erred in finding bad faith and imposing penalties upon the Department. The trial court found bad faith despite the fact that the purported bad faith did not result in the denial of any records. Instead, the Department did not initially provide records based on an objectively

[8] Some of the requesters did not get an order awarding a specified amount of costs below. Upon remand, the trial court can evaluate in the first instance whether those individuals have waived the entitlement to such costs at this point.

reasonable policy regarding phone logs maintained by a third-party contractor and not used in agency business. This Court should reverse and remand for the trial court to enter a finding that the Department did not act in bad faith and for the trial court to evaluate the award of attorney's fees and costs in light of the finding of no bad faith.

RESPECTFULLY SUBMITTED this 29th day of April, 2016.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the OPENING CONSOLIDATED BRIEF OF APPELLANT 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 participants:

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

EXECUTED this 29th day of April, 2016, at Olympia, WA.

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