No. 96286-3

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

Court of Appeals No. 35091-6-III

RANDALL HOFFMAN,

Petitioner,

v.

KITTITAS COUNTY, a local agency, and the KITTITAS COUNTY SHERIFF'S OFFICE, a local agency,

Respondents.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY

This case involved an allegation of a violation of the Public Records Act (PRA) and a request for an extensive penalty for alleged bad faith on the part of the County Respondents. This case was initiated by a private citizen who is not an inmate of a correctional facility, and who was not required to prove, and not precluded from recovering an award of damages, for culpability less than bad faith.

The County denied the majority of factual claims and allegations made by the Petitioner Hoffman at the Trial Court level. The County did make two concessions in this litigation at the Trial Court Level:

1. The County conceded that Hayes applied a records exemption that was to broad in redacting seven (7) face sheets that were provided to Hoffman in June of 2016; and
2. The County conceded that if the trial court were to find that Hoffman ***had not*** narrowed the scope of his request during the phone call, that the County would have violated the PRA (competing factual accounts on this topic and others).

This case was not decided by summary judgment, rather the parties submitted certain agreed stipulations, some stipulated facts, and each presented conflicting testimony through affidavits and other documents in order to present their respective cases more economically. The facts, weight of the evidence and credibility of witnesses were all contested by the parties. The parties in their arguments at trial did not concede that the underlying facts, and their import as to a penalty, were agreed upon. The

trial judge and the parties recognized that factual determinations, including determinations of the credibility of witnesses would have to be made, but that in doing so the trial court judge was limited to the records, documents, and transcribed testimony as opposed to having the witnesses present for live testimony.

As a result of the posture of this case, the parties took different approaches in addressing the appeal of the trial court decision. As it related to findings of fact and conclusions of law the County Respondents requested that the Appellate Court review such findings and conclusions under the "substantial evidence standard of review. The Respondents argued for the more deferential "substantial evidence" standard, because the judge had to make factual and credibility determinations in deciding upon what facts were proven. The County requested the "abuse of discretion" standard be applied to the penalty award. The Petitioner Hoffman did not attack the trial court's factual findings. Petitioner focused upon his disagreement with the Trial Court not concluding that bad faith was present and challenged the penalty assessment and culpability determination of the trial court judge. The Petitioner Hoffman requested de novo review of the trial court's decision, focusing upon his belief that bad faith was the principal issue in ascertaining an award of damages, and that bad faith was an issue to be reviewed de novo.

All of the Court of Appeals justices correctly labelled the appeal as relating only to the penalty awarded and applied the abuse of discretion standard to the penalty assessment and affirmed the trial court judge's award of penalties. The concurring opinion by Judge Lawrence-Berrey, however, separated "culpability findings" and "penalty determinations" from each other, in essence adding a third prong to a non-prisoner PRA case: Violation; Culpability; and Penalty. In essence, Judge Lawrence-Berrey agreed that the more deferential substantial evidence standard applied to the trial court's findings and conclusions but extended it into the penalty phase. This is one basis for the Petitioner to suggest that review is appropriate – which standard to apply to review is confusing and the application of the incorrect standard in this case conflicts with holdings of other divisions and the Supreme Court precedent. Unfortunately for Petitioner, neither statement is correct.

The Petitioner also suggests that the Appellate Court's holding that bad faith is no longer the principal fact in setting PRA penalties created a direct conflict with this Court's precedent, suggesting that review is appropriate. Unfortunately for Petitioner, this statement is also incorrect.

The Petitioner also suggests that the Appellate Court's holding that a trial court need not support its PRA penalty determination with factual

findings also contradicts this Court's precedence and will create potential turmoil in the lower courts. Unfortunately for Petitioner, they have expanded the meaning of the Appellate Court's words in this regard, and no conflict exists between the analysis of the Court of Appeals and this Court's precedence.

Finally, the Petitioner requests this Court to entertain defining the legal standard for "bad faith" under the PRA, an issue Petitioner claims has not yet been addressed. It is a true statement that this Court has chosen not to set the parameters of the differing levels of culpability, but that was a clear decision on the part of this Court to give trial court's deference in setting penalties. It is not a true statement that "bad faith" under the PRA has not been addressed by the Appellate Courts, as they have been required to do so based upon a statutory change related specifically to prisoner litigation under the PRA and the heightened requirement upon such litigants to show "bad faith" to obtain an award of penalties for a violation of the PRA.

The issues raised by Petitioner are not sufficient to necessitate this Court in accepting review under the criteria set pursuant to RAP 13.4(b), regardless how strenuously Petitioner urges that a substantial public interest exists that should be determined by this Court.

IDENTITY OF RESPONDENT'S

Kittitas County is a municipal corporation and defined as a local agency for PRA purposes. The Kittitas County Sheriff's Office is a division of Kittitas County government led by an independently elected Sheriff, and is also defined as a local agency for PRA purposes. The Respondents believe that:

> There are no issues of a substantial public interest presented by the Petition in this case;
>
> That the correct legal standards of review were applied in this case;
>
> That no conflicts exist between the holding in this case and holdings in the other divisions or with this Court that necessitate acceptance of review; and
>
> That no compelling interest is presented to have this Court accept review to further clarify the concept of "bad faith".

Respondents request that review in this matter be declined.

CITATION TO COURT OF APPEALS DECISION

The published Court of Appeals decision was filed July 24, 2018 and amended August 20, 2018. The Court of Appeals decision is attached as Appendix A. The order amending the decision is attached as Appendix B. These documents are attached to this Response for ease of reference and because the Respondents desire to adopt the statement of the case as set forth in the Court of Appeals decision to reduce duplication and effort.

RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR

1. The "abuse of discretion" standard of legal review applies to a trial court's determination of a penalty award under the PRA when a ***wrongful*** withholding under the PRA was found. Bad faith is but one aggravating factor used to determine an appropriate penalty to assess for a violation of the PRA to deter future violations.

2. Agency "bad faith" is a prerequisite to be found by a trial court before an award of penalties can be determined in PRA cases involving incarcerated individuals. However, bad faith is still but one factor to consider in setting a penalty to deter future violations of the Act.

3. This Court has consciously chosen not to rigidly set the parameters of the differing levels of culpability for an assessment of a penalty under the PRA. That decision affirms the broad discretion granted to trial courts, with direction from this Court, in setting penalties.

4. Petitioner has expanded the breadth and scope of the meaning of the Court of Appeals discussion as to findings of fact and conclusions of law. The decision did not state

or imply that a trial court is not required to make and enter findings of fact and conclusions of law in PRA cases.

STATEMENT OF THE CASE

The Court of Appeals generated a statement of the case based upon the trial court's uncontested findings. That Court's decision has been attached as an appendix to this Response. That statement of the case is sufficiently detailed and accurate for purpose of this review, and it is adopted and incorporated by reference as the Respondents' statement for all pertinent purposes.

ARGUMENT AGAINST ACCEPTANCE OF REVIEW

1. LEGAL CONSIDERATIONS FOR ACCEPTANCE OF REVIEW:

This Court is not required to accept review in this case. RAP 13.4(b) provides the four (4) considerations this Court will examine in determining whether to accept review, and indicates that a petition for review will be **accepted by the Supreme Court only**: (Emphasis added)

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Petitioner seeks review under a theory that the opinion in this case merits review under prongs (1), (2), and (4). The bulk of Petitioner's allegations focus upon the proper standard to be applied in reviewing a trial court's determinations ***as to the importance and presence of "bad faith" and his perception that the Appellate Court placed to little importance upon precedence that placed "bad faith" at a higher level.*** Petitioner's final claim, relative to an issue of substantial public interest relates to his mischaracterization of the Court of Appeals comments as to Findings of Fact and Conclusions of Law related to the penalty assessment. The second prong of RAP 13.4(b) is not raised in this action.

2. LEGAL STANDARDS OF REVIEW IN PUBLIC RECORD CASE CONTEXT:

In the context of a Public Records case, a trial court is called upon to determine if records were wrongfully withheld from a person making a request for public records. The legislature has provided guidance to trial courts on their role in reviewing the actions of an agency in responding to public records requests.

a. Statutory Standards:

i. RCW 42.56.550(3) - VIOLATION

> *Judicial review of all agency* actions taken or challenged under RCW 42.56.030 through 42.56.520 *shall be de novo.* (Emphasis added).

The legislature through its authority has determined that a trial court is not required to give deference to agency determinations as to whether documents must be produced, whether an exemption to disclosure applies, whether redactions can be made, or even if their response was reasonable. A trial court is allowed to review an agency's actions without consideration of the determinations made by the agency.

The legislature created a second step for trial courts in the context of public records act cases which is a requirement to determine an appropriate penalty to levy if a violation is found (Reasonable attorney fees and costs flow from any finding of wrongdoing regardless of size of penalty). The award of penalties (and the discretion provided to judges in assessing the same) has expanded over time to its current limits of an award from $0 - $100 per day per record for wrongful withholding.

ii. RCW 42.56.550(4) - PENALTY

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal

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

b. Case Law Standards:

While the legislature established two prongs on how the trial court was to proceed in reviewing agency action and establishing the threshold for deference to the discretion of trial court judges, the act did not set the parameters for appellate review. The Courts, however, have created the guidance necessary to have a clear picture of the standards of review of trial court opinions.

i. Review of a trial court determination of wrongful withholding:

a. Summary Judgment;

A trial court's order granting summary judgment in a PRA lawsuit is reviewed de novo. *Robbins Geller Rudman & Dowd, LLP v. Office of Attorney Gen.*, 179 Wn. App. 711, 716 (Wash. Ct. App. Mar. 4, 2014) See also, *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012). When the trial court's decision under the PRA is based solely on documentary evidence **without testimony**, review is de novo and they are not bound by the trial court's factual findings. *Robbins Geller Rudman & Dowd, LLP.* Id at 720. See also, *Dragonslayer, Inc. v. Wash. State Gambling Comm'n,* 139 Wn. App. 433, 441-42, 161 P.3d 428 (2007).

Summary judgment is appropriate where, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Robbins Geller Rudman & Dowd, LLP* at 735-736; *Loeffelholz*, 175 Wn.2d at 271. "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Robbins Geller Rudman & Dowd, LLP* at 735-736 (citations omitted).

Grants of summary judgment are reviewed de novo, and we engage in the same inquiry as the trial court. *Neighborhood Alliance of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 715 261 P.3d 119 (2011) (Additional citations omitted). Unless express procedural rules have been adopted by statute or otherwise, the general civil rules control. Id at 715-716. CR 81 provides that the civil rules govern except where these rules are inconsistent with rules or statutes applicable to special proceedings. What constitutes a "special proceeding" is mostly governed by statute, and the PRA statutes do not create a special proceeding subject to special rules. Since the statutes are silent, the normal civil rules are appropriate for prosecuting a PRA claim. Id at 715-716.

b. Contested hearings; and

The general rule is that "where competing documentary evidence must be weighed and issues of credibility resolved, the substantial evidence standard is appropriate." *State v. Kipp*, 179 Wn.2d 718, 726 317 P.3d 1029 (2014) (citing *Dolan v. King County*, 172 Wn.2d 299, 310, 258 P.3d 20 (2011) (additional citation omitted)

When the trial court must assess credibility or competency of witnesses, and weigh evidence and reconcile conflicting evidence, then the appellate court reviews a trial courts' factual findings to determine whether substantial evidence supports them. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 247 884 P.2d 592 (1994); *Spokane Police Guild v. Liquor Control Bd.,* 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989); *Robbins Geller Rudman & Dowd, LLP v. Office of Attorney Gen.*, 179 Wn. App. 711, 716 (Wash. Ct. App. Mar. 4, 2014).

c. No Challenge to findings and conclusions of wrongful withholding

When findings of fact are not challenged on appeal they are considered verities and they are accepted as true facts. *Francis v. Wash. State Dep't of Corr.*, 178 Wn. App. 42, 52, 313 P.3d 457 (Wash. Ct. App. 2013) (citing *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 450, 229 P.3d 735 (2010)). (Additional citation omitted). See also, *Adams v. Wash.*

State Dep't of Corr., 189 Wn. App. 925, 939, 361 P.3d 749 (Wa. Ct. App. 2015).

When a trial court's determination that a violation of the PRA has occurred is not challenged, the appellate court's review is limited to the award of a statutory penalty (and in the prisoner litigation cases the underlying bad faith determination. *Francis v. Wash. State Dep't of Corr.*, 178 Wn. App. 42, 51, 313 P.3d 457 (2013).

ii. Review of a trial court's award of penalties for wrongful withholding:

When the trial court's penalty assessment is challenged on appeal, the standard of review is the "Abuse of Discretion Standard." *Wade's Eastside gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 277, 372 P.3d 97 (2016):

> A trial court's award of penalties for a PRA violation is reviewed for abuse of discretion. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010) (*Yousoufian* II). A court abuses its discretion only when it adopts a view "'that no reasonable person would take'" or when it bases its decision on "untenable grounds or reasons." *Id.* at 458-59 (internal quotation marks and additional citation omitted) .

See also, *Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 953-954, 361 P.3d 749 (2015); *Sargent v. Seattle Police Dep't.*, 179 Wn.2d

376 397, 314 P.3d 1093 (2013); *Francis v. Wash. State Dep't of Corr.*, 178 Wn. App. 42, 65, 313 P.3d 457 (2013).

The plain language of the PRA confers great discretion on trial courts to determine the appropriate penalty for a PRA violation. This grant of discretion to trial court judges from the legislature has been expanded over time, going from a range of not more than 25 dollars to not less than 5 and not more than 100 dollars (current range $0 - $100.00). *Wade's* at 278-279.

Case law has also established that trial courts have ample discretion to award penalties for a violation, and even when the Supreme Court has provided guidance on how they should approach the task of assessing penalties, the Court has stressed that the factors to be considered should not infringe upon a trial court's considerable discretion. *Wade's* at 279. This grant of discretion is given because the trial court is in the best position to undertake an individual and fact specific inquiry into an appropriate penalty that accomplishes the goal of deterring unlawful nondisclosure. *Wade's* at 280, see also *Yousoufian* II, 168 Wn.2d at 462-63.

Once a trial court finds an agency violated the PRA, daily penalties are mandatory, but the amount is subject to the trial court's discretion.

Neighborhood Alliance of Spokane Cty. v. Spokane Cty., 172 Wn.2d 702, 726, 261 P.3d 119 (2011) (*Yousoufian v. Office of King County Exec.*, 152 Wn.2d 421, 433, 98 P.3d 463 (2004).

3. PUBLIC RECORDS REQUEST CASES DISTINGUISHED BASED UPON CLASSIFICATION OF THE REQUESTOR:

In 2011, the Washington Legislature amended the Public Records act, creating two categories of Public Records cases: those brought by individuals who are not incarcerated for a crime when filing their action, and actions brought by those who are incarcerated for committing a crime. RCW 42.56.565(1) states:

> **(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. (Emphasis added).

The legislature's intent to treat individuals serving a criminal sentence in an institution differently is apparent on the face of the statute. This intent has been expounded upon by the Courts. In adding the bad faith requirement the legislature increased the level of culpability needed for an award to an inmate, in essence narrowing liability on the part of agencies from the expansive range of culpability for non-inmates (low end

of culpability that can form the basis for an award is agency good faith action but incorrect action, moving up the scale to the high end of culpability which entails to bad faith). *Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 938, 361 P.3d 749 (2015).

Petitioner has argued that there is not a distinction between prisoner cases and other PRA cases – this position is mistaken. The cases decided since the change to the statute make clear that a difference exists. In the prisoner context, a trial court must, as in the general PRA context, determine if an agency wrongfully withheld records. If the answer is yes, then the trial court must determine if the agency acted in bad faith. Finally, if the trial court determines that the agency acted in bad faith, then it must determine an appropriate penalty to assess for the wrongful withholding of public records. Accord, *Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 361 P.3d 749 (2015); *Faulkner v. Wash. Dep't of Corr.*, 183 Wn. App. 93, 332 P.3d 1136 (2014); and *Francis v. Wash. State Dep't of Corr.*, 178 Wn. App. 42, 313 P.3d 457 (2013)

Francis v. Wash. State Dep't of Corr., 178 Wn. App. 42, 313 P.3d 457 (2013) was a Division II case that set forth the different components, stating:

> When a trial court's determination that a violation of the PRA has occurred is not challenged, the appellate court's review is limited to the award of a statutory penalty and the underlying bad faith determination. Id at 51

The above statement clearly shows three distinct processes that must occur: Finding of violation, determination of bad faith, and determination of penalty to assess for violation if bad faith determined. The new "prisoner PRA litigation was further distinguished by setting a new standard for review of the determination of bad faith:

> Whether an agency acted in bad faith under the PRA presents a mixed question of law and fact, in that it requires the application of legal precepts (the definition of "bad faith") to factual circumstances (the details of the PRA violation. (Citations omitted). Id at 51-52.

The *Francis* Court noted that the PRA does not include a definition of "bad faith" and that they were not aware of any court having interpreted the meaning of the bad faith requirement in the context of penalty awards under the PRA for requests made by incarcerated persons. Id at 53. The Court then chose not to define "bad faith" and did not specifically decide if weighing the 16 *Yousoufian* applies in the prisoner litigation context. Instead, the Court indicated that the trial court had considered the *Yousoufian* factors which was a correct legal standard and therefore the Court did not act for untenable reasons, and that a reasonable person,

based upon the Court's findings and evidence could conclude that penalty assessed satisfied the requirements of the PRA.

Faulkner v. Wash. Dep't of Corr., 183 Wn. App. 93, 332 P.3d 1136 (2014) was the next prisoner litigation case and was brought in Division III of the Court of Appeals. That Court took a similar approach to the standards of review involved to three distinct determinations: violation determination; bad faith determination; and penalty determination. Like the Court in *Francis*, the *Yousoufian* framework was considered to remain viable for determining a penalty, but the Court determined that greater guidance was required as to a definition of "bad faith. The *Faulkner* Court utilized dictionaries and treatises to augment the degrees of agency culpability established in *Yousoufian v. Office of King County Exec.*, 152 Wn.2d 421, 435, 98 P.3d 463 (2004) and *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 151 P.3d 243 (2007). As a result, Division III extended the holding in Francis to find that "bad faith" equates to a requirement of showing that an agency acted, or omitted an act, in a wanton or willful fashion.

Division III of the Court of Appeals in *Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 361 P.3d 749 (2015) had another opportunity to review a prisoner litigant case brought under the PRA. The Court held

to the framework established by Division II and the earlier Division III case, but further clarified that the burden of proof, as to bad faith, belongs to the plaintiff. Additionally, the Court reiterated that while a finding of bad faith is required before an award can be assessed a trial court must still weigh the *Yousoufian* factors to determine a proper penalty to **deter future misconduct.**

4. RESPONSE TO PETITIONER'S ALLEGED GROUNDS FOR REVIEW:

The petitioner did not contest the findings of fact entered by the trial court, so they are treated as verities on appeal. Neither party contested the trial court's finding that a violation of the PRA had occurred. Because the petitioner is not, and was not a prisoner housed in a correctional facility, "bad faith" was not a principal consideration that had to be determined before a penalty could be assessed. For these reasons, the Court of Appeals was correct to proceed to review this as "only" a challenge to the penalty award, which required it to utilize the "abuse of discretion" standard in determining if the award was a proper exercise of the trial court's discretion based upon the uncontested findings of fact.

A. CONFLICT WITH COURT OF APPEALS CASES:

The Petitioner is incorrect in stating that there is a conflict in the legal standard of review applied by the Court of Appeals to bad faith in this case as applied to other cases in Division 2 and 3. It is claimed that those case, involving prisoner litigation, indicated that when the "underlying facts are uncontested", an appellate court applies "de novo review to ascertain whether the facts amount to bad faith."

The problem for Petitioner is that there is a difference dictated by statute and a need to actually define "bad faith" as to prisoner litigation as a threshold question to determine if an award can be made. Thus, in the prisoner context, the appellate courts have more fully defined a legal standard for bad faith that must be applied to facts to ascertain whether an award can be made.

Confusion may have entered the case in arguing what standard of review was appropriate as to findings of fact and conclusions of law related to a violation of the PRA: summary judgment, de nova review is the proper standard; contested facts and credibility determinations, substantial evidence is the proper standard of review. Here neither is relevant because the findings were not challenged nor was the finding of a violation. The proper standard of review as it relates to an award of a

penalty is an abuse of discretion. The cases decided by all divisions of the Court of Appeals are in agreement on this issue.

B. CONFLICT WITH SUPREME COURT CASES

The Petitioner is simply incorrect on alleging that there is a conflict with Supreme Court precedence. We need only look at the most recent pronouncement by our Supreme Court in *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 277, 372 P.3d 97 (2016). This Court in that case held:

> A trial court's award of penalties for a PRA violation is reviewed for abuse of discretion. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010) (*Yousoufian* II).

Petitioner has also claimed that a conflict exists because the Court of Appeals by their holding has overturned this Court's precedence in determining that "bad faith" is not the principal consideration in an award of penalties. Again, the Petitioner is wrong, as this court stated in *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 398, 314 P.3d 1093 (2013) :

> Although bad faith is an important consideration under *Yousoufian 2010*, it cannot be the only consideration. *Yousoufian 2010* does cite bad faith both as a historical basis for awarding high penalties and as a newly established aggravating factor. *Id.* at 460, 468. But the *Yousoufian 2010* court also explicitly warned that "a strict and singular emphasis on good faith or bad faith is inadequate to fully consider a PRA penalty determination." *Id.* at 460-61. Although not all factors may apply in every case, "no one factor should

control" and the trial court here abused its discretion by not conducting its analysis within the *Yousoufian 2010* framework.

C. CLARIFYING THE PROPER STANDARD OF REVIEW TO APPLY TO A FINDING OF "BAD FAITH" IS NOT OF SUBSTANTIAL PUBLIC INTEREST

Petitioner alleges that clarification of the proper standard of review that applies to bad faith is itself an issue of substantial public interest. Petitioner indicates that the disagreement by the Court of Appeals as to the proper standard demonstrates confusion that only this Court can resolve. The problem is not confusion on the part of the different divisions of the Courts of Appeals – they are unanimous that in prisoner litigation the standard of review in determining whether "bad faith" exists, in order to exercise discretion in setting a penalty, is de novo review. Because no division of the Court of Appeals has reached a different decision, there is no public interest in this court settling what is already settled.

And there is no need, and no public interest in this Court further defining bad faith in the context of non-prisoner litigation. This court has chosen the legal standard for review of a penalty under the PRA (abuse of discretion) and this Court has chosen not to specifically define the parameters of the different levels of culpability. The fact that this Court has allowed that flexibility for the trial courts does not create a conflict in the proper standard of review for a penalty under the PRA between this

Court and the holding in the Court of Appeals – they are consistent in their application. Absent this Court suddenly deciding that they were wrong as recently as 2016 (*Wade's)* would strike me as astonishing.

This Court's approach in defining the spectrum of culpability and giving the trial court's guidance in fashioning penalties has been working. The trial court in this case demonstrated no difficulties in reviewing the factors set forth by this Court for such consideration and applying them to the facts of the case. There is not a compelling public interest presented by this case to shift gears.

D. THE COURT OF APPEAL'S STATEMENT THAT FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NOT NECESSARY TO DETERMINING A PENALTY AWARD IS SUPPORTED BY THE CASE LAW:

It is worth noting that the statement by the Court of Appeals, relative to the need for findings of fact and conclusions of law was in the context of addressing the concern that petitioner argued to penalize the trial court for its analysis as found in elaborate findings of fact and conclusions of law, which were crafted both as to the violation and as to the weighing of the *Yousoufian* factors.

Secondly, the statement by the Court of Appeals cannot be reasonably read to indicate a broad statement that findings of fact and conclusions of law are unnecessary in a PRA case. The Court of Appeals stated that in determining an appropriate penalty, the trial court was required to make findings of fact from the contested documents and testimony, and had to enter conclusions of law as to the violation. The Court of Appeals correctly indicated that once that is done, a trial court has the ability to exercise its discretion in determining what an appropriate penalty is for the violation. A review of cases from this Court, demonstrate differing degrees of analysis surrounding findings of fact and conclusions of law as it relates to articulating a penalty. It is clear, that once the court has done its job in determining what facts exist, and having concluded that legally a violation has occurred, that the only step left is to weigh those against the *Yousoufian* factors to reach a decision as to a proper penalty. And it is clear that the court will only overturn such a determination if there was an abuse of discretion. The Court of Appeals said no more and no less than it was applying the proper standards to the penalty imposed by the trial court. The decision of the Court of Appeals will not strike confusion into, or create chaos in the trial courts in future PRA case litigation.

CONCLUSION

This Court should not accept this petition for review. Because this was a non-prisoner litigation case, the Court of Appeals was only required to review the penalty assessed for an abuse of discretion. The Court of Appeals correctly performed its review under the proper standard of review. In considering the factors that guide this Court in a determination relative to accepting review, none of the factors are present in this case. There are no case law/court conflicts; no state or federal constitutional issues; and there is no issue of substantial public interest that needs to be addressed. For these reasons, review should not be granted.

RESPECTFULLY SUBMITTED this 6th day of November, 2018

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DECLARATION OF SERVICE

On the day set forth below, I deposited in the U.S. Mail and via Email a true and accurate copy of:

- Response to Petition for Review;

to the following parties:

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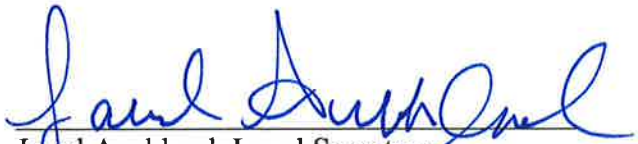
I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 6th day of November 2018, at Ellensburg, Washington.



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APPENDIX 1

DECISION OF THE COURT OF APPEALS

FILED
JULY 24, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

RANDALL HOFFMAN, Appellant, v. KITTITAS COUNTY, a local agency and the KITTITAS COUNTY SHERIFF'S OFFICE, a local agency, Respondents.	)	No. 35091-6-III PUBLISHED OPINION

PENNELL, J. — Trial courts have broad discretion to select appropriate penalties for violations of Washington's Public Records Act (PRA), chapter 42.56 RCW. In limited cases, we will overturn a trial court's exercise of authority on appeal. But this is not one of them. After finding Kittitas County and the Kittitas County Sheriff's Office (collectively the County) violated the PRA, the trial court considered the relevant PRA penalty factors and, based on substantiated facts, selected a reasonable penalty assessment. Nothing more was required for a fair exercise of PRA penalty discretion. We therefore affirm.

BACKGROUND

Facts[1]

Randall Hoffman submitted a public records request to the Kittitas County Sheriff's Office on June 29, 2015. The request sought police reports referencing an individual named Erin Schnebly. The request was received by Carolyn Hayes, the designated public records clerk for the sheriff's office. Hayes had 10 years of experience and training responding to PRA requests directed to the sheriff.

Hayes conducted an initial search for records and identified seven incident reports. Her initial search did not locate photos or videos. A careful review would have revealed the existence of numerous photos and two videos responsive to the request.

Hayes called Hoffman about his request. Hayes's primary concern was that her review did not show Hoffman had any involvement in the seven incidents. Hayes told Hoffman that because he was not involved in the incidents, she could not provide him the majority of the documents he requested. As the parties now agree, this information was incorrect. Based on Hayes's misinformation, Hoffman limited his request to face sheets of reports, which identified the type of incident, date, and location.

Kallee Knudson, a records clerk who began training under Hayes in the sheriff's office earlier that June, overheard Hayes's phone call to Hoffman. She could hear what

[1] The facts are based on the trial court's uncontested findings.

Hayes said but not what Hoffman said. Specifically, Knudson heard Hayes tell Hoffman she "would not be able to provide the majority of documents" per specific statutes. Clerk's Papers (CP) at 15-16, 459. Knudson had never noticed Hayes saying anything similar to this before, and it did not make sense to her.

Knudson questioned Hayes about Hoffman's request. Hayes discussed a statute that she believed supported her position. She also added that Hoffman had agreed to limit his request to the face sheets.

Hayes made the following notation on Hoffman's PRA request: "2009-2015 face sheet only." CP at 13. Hayes, relying on a statute that the parties now agree did not apply to the request, made significant and improper redactions to the face sheets. The next day, Hayes provided the redacted face sheets to Hoffman.

In early September 2015, Knudson was cleaning Hayes's desk prior to Hayes's pending retirement. Knudson saw a stack of PRA requests in Hayes's desk, including Hoffman's. Because she was still troubled by how Hayes handled Hoffman's request, Knudson discussed the request with her two supervisors. Both supervisors instructed Knudson to call Hoffman, to tell him that she was reviewing past requests, and to determine whether Hoffman was satisfied with the response of the sheriff's office.

Knudson called Hoffman. After Hoffman told her he had received records responsive to his request, Knudson thanked him and ended the call. Knudson did not express her concerns to Hoffman about the handling of his request.

Several days later, Hayes spoke with the same two supervisors about Hoffman's PRA request. Like what was told to Knudson, the supervisors instructed Hayes to call Hoffman to see if he was satisfied with what he received. Hayes called Hoffman to confirm he had received what he needed. Hoffman indicated that he had, but explained he had been looking for an incident where Schnebly allegedly ran someone over. Hayes remained on the phone with Hoffman while she looked for the report, but was unable to locate it.

On February 25, 2016, Hoffman returned to the sheriff's office. He told Knudson he should have received more documents in response to his June 2015 request, that he could sue, and that he might want to make another records request. Hoffman claimed Hayes and the person whom he sought information about, Schnebly, were drinking buddies, and this relationship was the reason he did not receive all appropriate records. Hoffman left with a blank PRA request form and said he needed to talk to some folks.

Although Hayes knew who Schnebly was, the two did not socialize. The fact that Hayes knew of Schnebly was not a factor in Hayes's handling of Hoffman's PRA request.

On February 29, 2016, Hoffman submitted a new request, which is not at issue in this appeal. The same day, he also resubmitted his old request. Knudson properly processed both requests and provided all documents to Hoffman on March 1, 2016. The documents relating to the resubmitted request total 126 records, and consist of 29 pages

of reports, 2 videos, and 95 photos.

Procedure

Two days after receipt of the response to his final PRA request, Hoffman filed this PRA action against the County. He asserted that Hayes and the County acted in bad faith when Hayes withheld the records he requested.

Hoffman filed a motion for summary judgment, but it was never heard. Instead, the parties conducted limited discovery and then agreed to waive their right to a jury trial and submit the matter to a bench trial based on stipulated facts, concessions of the parties, exhibits, and testimony through depositions, affidavits or declarations.

After reviewing the written submissions of the parties and hearing argument of counsel, the trial court ruled in Hoffman's favor, finding the sheriff's office improperly redacted and withheld 126 records for 246 days. The court concluded, however, that Hayes's error was a result of negligence, not bad faith. The court found that Knudson had not acted negligently, that the sheriff's office had provided appropriate supervision, and that the response to Hoffman's PRA request was timely, though inadequate.

The trial court weighed the penalty factors set by the Supreme Court in *Yousoufian v. Office of Ron Sims, King County Exec.*, 168 Wn.2d 444, 229 P.3d 735 (2010) (*Yousoufian* II), and ordered the County to pay Hoffman his reasonable attorney fees and a penalty of $0.50 per day for each document that the sheriff's office had failed to produce or improperly redacted. Because the penalty days totaled 246, and the number of

records totaled 126, the penalty totaled $15,498. Hoffman appeals the penalty award.

ANALYSIS

This case is governed by the applicable standard of review. Unlike a substantive PRA violation decision, a PRA penalty determination is reviewed for abuse of discretion. *Compare* RCW 42.56.550(3) ("Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo.") *with* RCW 42.56.550(4) ("[I]t shall be within the discretion of the court to award" PRA penalties.); *Yousoufian v. Office of King County Exec.*, 152 Wn.2d 421, 431, 98 P.3d 463 (2004) (*Yousoufian* I) ("[T]he trial court's determination of appropriate daily penalties is properly reviewed for an abuse of discretion.").

The abuse of discretion standard is extremely deferential. *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 279, 372 P.3d 97 (2016) ("The plain language and legislative history of the PRA support trial courts having broad discretion to set appropriate penalties."). We will reverse a trial court decision under this standard only if the decision applies the wrong legal standard, relies on unsupported facts, or adopts a view that no reasonable person would take. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

The applicability of the abuse of discretion standard of review does not change because a trial judge, such as the judge here, decides to issue written findings of fact in support of a PRA penalty assessment. For one thing, there is no requirement that a trial

judge make findings in this context. *See Yousoufian* II, 168 Wn.2d at 468-69 (Supreme Court imposed penalty of $45 per day without issuing any findings or conclusions).[2] It would therefore be curious for us to engage in a heightened critique of a trial court's discretionary penalty decision simply because the court chose to articulate its decision in a way that was more transparent than necessary. But in addition, the abuse of discretion standard encompasses the ability to review a trial court's factual findings or assumptions. A trial court abuses its discretion when it relies on unsupported facts in issuing its decision. *Hundtofte v. Encarnación*, 181 Wn.2d 1, 7, 330 P.3d 168 (2014). An abuse of discretion also occurs if the factual assumptions made by a trial court do not meet the requirements of the governing legal standard. *Id.* As long as some factual basis exists to support a trial court's decision, the abuse of discretion standard is met and further scrutiny is unwarranted, regardless of how the trial court chooses to articulate its decision.

Viewed in the context of the applicable standard of review, Hoffman's main argument is that the trial court used the wrong legal standard in assessing PRA penalties. According to Hoffman, the primary consideration that must guide a trial court's PRA penalty assessment is the presence or absence of bad faith. Hoffman argues the record

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[2] In imposing a penalty assessment without accompanying findings of fact or conclusions of law, *Yousoufian* II deviated from a prior decision in *Armen v. City of Kalama*, 131 Wn.2d 25, 38, 929 P.2d 389 (1997), which held that a penalty decision should be supported by trial court findings.

indisputably shows the County engaged in bad faith when processing his PRA request. Thus, the trial court should have imposed a higher daily penalty amount.

Hoffman's myopic focus on bad faith is misplaced. Prior to the Supreme Court's decision in *Yousoufian* II, bad faith was considered the "principal factor" to be considered in a PRA penalty determination. 168 Wn.2d at 460. However, the *Yousoufian* II court took a more nuanced approach. *Yousoufian* II reversed a trial court's penalty assessment because it was too reliant on the absence of bad faith. Rather than focus on the presence or absence of bad faith, the Supreme Court held that trial courts should be guided by a series of aggravating and mitigating factors, only some of which address a violator's level of culpability. *See also Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 398, 314 P.3d 1093 (2013) (reversing PRA penalty decision that focused solely on bad faith).

Not only did *Yousoufian* II hold that agency culpability is merely one of a series of factors to be taken into account in assessing a PRA penalty, the court also declined to recognize bad faith as the primary type of relevant culpability. Instead, the Supreme Court listed agency "good faith" as a relevant mitigating factor and an agency's "negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA" as a relevant aggravating factor. *Yousoufian* II, 168 Wn.2d at 467-68.

Although *Yousoufian* II listed various tiers of culpability that might be attributed to an agency's PRA violation, the court declined to define the contours of each different level of culpability. As explained by the court, "culpability definitions do not lend

themselves to the complexity of PRA penalty analysis." *Id.* at 463. Rather than define each type of agency culpability that might be relevant to a trial court's penalty assessment, *Yousoufian* II took a broad approach and simply recognized that trial courts should impose "a penalty proportionate to the [agency's] misconduct." *Id.*

Given that *Yousoufian* II framed the issue of agency culpability in a broad, relative manner, we should not be overly critical of a trial court's choice of how to label agency misconduct. Indeed, *Yousoufian* II did not engage in this type of scrutiny. The trial court in *Yousoufian* II determined the defendant agency had engaged in prolonged negligence that "'amounted to a lack of good faith.'" *Id.* at 456. The trial also concluded "the [agency] did not act in 'bad faith' in the sense of intentional nondisclosure." *Id.* On appeal, both this court and the Supreme Court treated the trial court's conclusions as a determination of "gross negligence." *Id.* at 457; *see id.* at 474 (Owens, J., dissenting) (criticizing the majority for not differentiating between negligence and gross negligence). Despite the competing nature of these assessments, *Yousoufian* II did not find fault with any of the various culpability classifications that had been attributed to the agency.[3] Instead, the Supreme Court assessed the trial court's penalty decision holistically and

[3] Had precise labels been important, one would expect the Supreme Court would have criticized the trial court for refusing to find bad faith based merely on the absence of intentional noncompliance. After all, the court itself listed "bad faith" and "intentional" noncompliance as distinctive levels of relative culpability. *Yousoufian* II, 168 Wn.2d at 468. Yet the Supreme Court specifically upheld the trial court's finding of no bad faith in *Yousoufian* I. 152 Wn.2d at 435-36.

found the trial court's assessment inadequate in light of the totality of relevant circumstances.

The lack of precise culpability findings in the general PRA context contrasts with what is required in the circumstances of a PRA claim brought by an incarcerated person. Under RCW 42.56.565(1), a court is prohibited from awarding PRA penalties to an incarcerated person unless the court makes a specific finding of bad faith. Given the singular importance of bad faith in the context of incarcerated persons, our courts have appropriately analyzed the contours of what constitutes bad faith in the context of RCW 42.56.565(1). *See Faulkner v. Dep't of Corr.*, 183 Wn. App. 93, 332 P.3d 1136 (2014); *Francis v. Dep't of Corr.*, 178 Wn. App. 42, 313 P.3d 457 (2013). However, such precision is simply not necessary in the general PRA context.

Based on the foregoing, a trial court's choice of how to label agency noncompliance should not be the basis for affirming or reversing a penalty decision. Instead, it is sufficient under *Yousoufian* II for a trial court to recognize that culpability exists in matters of degree and that more culpable conduct merits a higher PRA penalty than less culpable violations.

Having clarified the nature of the trial court's legal inquiry, we turn to its application in the present case. Because Hoffman does not challenge any of the factual findings underlying the trial court's penalty assessment, our review is limited to the legality of the trial court's approach and overall reasonableness of its selected remedy.

We find no reversible error in the trial court's culpability assessment. Regardless of the exact nature of Hayes's individual fault, the trial court appropriately observed that the problems leading up to the County's PRA violation were attributable solely to Hayes and, given Hayes's retirement from employment, a large penalty would not be necessary to deter future PRA violations. Contrary to Hoffman's assertions, the trial court's culpability assessment need not have focused solely on Hayes's level of culpability. Hoffman cites *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 269, 884 P.2d 592 (1994) (*PAWS*) (plurality opinion) for the proposition that an agency's PRA violation should be assessed according to the agency's "weakest link." Br. of Appellant at 4. However, *PAWS* dealt only with issues of PRA liability, not a penalty. When it comes to liability, an agency's weakest link can cause a PRA violation. But because the question of penalty is guided by an overarching concern for deterrence, *Yousoufian* II, 168 Wn.2d at 462-63, it is appropriate for a trial court to consider an agency's overall level of culpability, not just the culpability of the worst actor. Looking at the County's overall level of culpability here, the trial court appropriately found that agency culpability was merely a moderately aggravating factor, thereby justifying a moderate penalty assessment.

In addition, the trial court fairly characterized the response of the sheriff's office to Hoffman's PRA request as "timely." CP at 903, 920. Unlike what may be true in some PRA violation cases, the sheriff's office maintained prompt contact with Hoffman

throughout the pendency of his PRA inquiry. It responded to each of Hoffman's PRA requests within five working days. In addition, Hayes and Kundson both acted immediately when requested by their supervisors to contact Hoffman for follow-up. While the response of the sheriff's office to Hoffman's initial PRA request was incomplete, that was not an independent aggravating factor. It is instead what caused the PRA violation in the first place. Based on the failure of the sheriff's office to provide an accurate response, the trial court awarded Hoffman daily penalties for 246 days. No further enhancement was required based on a lack of timely compliance.

In the end, the penalty chosen by the trial court was reasonable. Although the daily penalty was low, the court maximized the number of records eligible for the penalty by assessing an award for each individual page that had not been disclosed. In addition, the ultimate penalty of $15,498.00 amounted to an assessment of almost $3.00 per Kittitas County resident on a per capita basis.[4] This is commensurate with other PRA violation assessments. *See Zink v. City of Mesa*, ___ Wn.2d ___, 419 P.3d 847, 855 (2018). Given that Mr. Hoffman suffered no financial harm as a result of the County's PRA violation, and that the subject matter of Mr. Hoffman's PRA request was not of

[4] We take judicial notice of the most recent estimates from the U.S. Census Bureau calculating the population of Kittitas County, Washington as 46,205. *Quick Facts: Kittitas County, Washington*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/kittitascountywashington,US/PST045217 (last visited July 18, 2018).

public importance, the trial court's overall penalty amount was not unreasonably small.[5] The award was commensurate with the County's PRA violation and sufficient to deter future violations. Based on this overall reasonableness, we lack any basis to disturb the trial court's assessment.

CONCLUSION

The trial court appropriately exercised its discretion in assessing PRA penalties against the County. The matter is affirmed. Hoffman's request for attorney fees on appeal is denied.

Pennell, J.

I CONCUR:

Korsmo, J.

[5] Indeed, because the legislature has eliminated a statutory floor to PRA penalty assessments, the trial court could have refused to issue a penalty altogether. *Zink*, 419 P.3d at 855.

No. 35091-6-III

LAWRENCE-BERREY, C.J. (concurring in result) — I agree that the evidence supports the trial court's culpability findings and, because of this, its assessment of Public Records Act (PRA), chapter 42.56 RCW, penalties should be affirmed.

I write separately because the majority errs by reviewing culpability findings for an abuse of discretion. Findings are never reviewed for an abuse of discretion. Neither party argues for such a standard. Kittitas County (County) correctly argues that we should review culpability findings for substantial evidence.

A. THE ABUSE OF DISCRETION STANDARD OF REVIEW PERTAINS ONLY TO THE TRIAL COURT'S ASSESSMENT OF THE PER DIEM PENALTY RANGE; IT DOES NOT EXTEND TO THE FACTUAL FINDINGS THAT IMPACT THE RANGE

The majority correctly notes that we review a trial court's PRA penalty determinations for an abuse of discretion. *See, e.g.*, *Yousoufian v. Office of King County Exec.*, 152 Wn.2d 421, 430-31, 98 P.3d 463 (2004) (*Yousoufian* I). *Yousoufian* I explains that the abuse of discretion standard comes from former RCW 42.17.340(4) (1992),[1] which provides in relevant part, "'it shall be within the discretion of the court to award such person [a penalty range] for each day that he was denied the right to inspect or copy said public record.'" *Id.* at 430. The majority errs by extending this deferential standard beyond the trial court's assessment of the per diem penalty range. The majority extends

[1] Recodified as RCW 42.56.550 per the Laws of 2005, chapter 274, section 103, effective July 1, 2006.

this deferential standard to any of the trial court's factual findings that impact the per diem penalty range, including the trial court's culpability findings. Nothing in RCW 42.56.550 supports this extension.

B. IN PRA LITIGATION, CULPABILITY FINDINGS ARE MORE THAN MERE LABELS

Hoffman assigns error to the trial court's findings[2] that the County acted negligently and that he failed to prove that the County acted in bad faith. Assignments of Error 1 & 2, Br. of Appellant at 5. Throughout his brief, Hoffman extensively argues that Carolyn Hayes's actions constituted bad faith, that Kallee Knudson's actions constituted bad faith or negligence, and that the County's culpability should have been assessed in accordance with the worst actor, Hayes. Br. of Appellant at 22-43. The County responds by addressing the facts that support the trial court's culpability findings. Br. of Resp't at 25-27. The majority mostly ignores the parties' arguments by minimizing the importance of the trial court's culpability findings. Specifically, the majority holds that culpability determinations are mere labels for assessing PRA penalties.

I disagree. In PRA litigation, an agency's culpability is an important factor in assessing PRA penalties.

> "When determining the amount of the penalty to be imposed the existence or absence of [an] agency's bad faith is the principal factor which the trial court must consider."

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[2] Findings of fact erroneously denominated as conclusions of law are reviewed as findings of fact. *State v. Ross*, 141 Wn.2d 304, 309, 4 P.3d 130 (2000).

Yousoufian v. Office of Ron Sims, King County Exec., 168 Wn.2d 444, 460, 229 P.3d 735 (2010) (*Yousoufian* II) (alteration in original) (internal quotation marks omitted) (quoting *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997)).

Nor is culpability a mere label. A determination of culpability is of sufficient consequence that the absence or incorrectness of a culpability finding warrants remand. This point was made clear in *Amren*.

> The Appellant argues that certain actions by the City constitute bad faith and asks this court to determine the penalty amount . . . . [W]e decline to resolve this issue. A determination of the amount of the award necessitates a fact finding concerning the allegations made by the Appellant that the City has acted in bad faith and any potential evidence of economic loss incurred by the Appellant as a result of the delay. No findings of fact were made regarding these issues for this court to review on appeal. Since it is not the province of this court to engage in fact finding, we remand the issue of the proper penalty amount to the trial court to resolve.

Amren, 131 Wn.2d at 38.

C. IN PRA CASES DECIDED ON COMPETING WRITTEN EVIDENCE, WE REVIEW A TRIAL COURT'S FINDINGS OF FACT FOR SUBSTANTIAL EVIDENCE

The parties raise an important legal issue that is subject to reasonable debate: *In PRA cases decided on competing written evidence, what is the appropriate standard of factual review?* Hoffman argues that we must review a trial court's findings of fact de novo. The County argues that we must review the trial court's findings of fact for substantial evidence. Neither party argued for the abuse of discretion standard adopted by the majority. Nor, in my opinion, does any precedent support it.

The PRA states, "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(3).

In *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) (*PAWS*) (plurality opinion), the Supreme Court noted that the PRA permitted a trial court to decide the case based on competing documentary evidence. Citing former RCW 42.17.340(3)—RCW 42.56.550(3) as amended—and *Smith v. Skagit County*, 75 Wn.2d 715, 718-19, 453 P.2d 832 (1969), a plurality of the court held, "Under such circumstances, the reviewing court is not bound by the trial court's findings on disputed factual issues." *PAWS*, 125 Wn.2d at 253.

More recently, in *State v. Kipp*, 179 Wn.2d 718, 317 P.3d 1029 (2014), the Supreme Court construed *Smith* but arrived at a different standard for appellate review. The court held, "'[W]here competing documentary evidence must be weighed and issues of credibility resolved, the substantial evidence standard is appropriate.'" *Kipp*, 179 Wn.2d at 727 (quoting *Dolan v. King County*, 172 Wn.2d 299, 310, 258 P.3d 20 (2011)).

There is obvious tension between *PAWS* and *Kipp*. Both cases discuss appellate review of trial court findings based on competing documentary evidence. Both cases arrive at different standards of review. For two reasons, I believe *Kipp* is correct.

First, the statement in *PAWS* is dicta. There, the Supreme Court was not asked to review any findings of fact. Instead, the lower court granted summary judgment, and a plurality of the court reversed because it found there were genuine issues of material fact. *PAWS*, 125 Wn.2d at 253; *see also Fisher Broadcasting-Seattle TV LLC v. City of*

Seattle, 180 Wn.2d 515, 521-22, 326 P.3d 688 (2014) (reviewing PRA summary judgment de novo); *Gendler v. Batiste*, 174 Wn.2d 244, 250-51, 274 P.3d 346 (2012) (reviewing PRA summary judgment de novo).

Second, RCW 42.56.550(3)'s grant of de novo review likely applies only to a superior court's review of an agency's actions. A court's goal in interpreting a statute is to effectuate the legislature's intent. *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007). We effectuate the legislative intent by ascertaining the plain meaning of the statute. *Id.* "Plain meaning [of a statute] is discerned from viewing the words of a particular provision in the context of the statute in which they are found, together with related statutory provisions, and the statutory scheme as a whole." *Id.*

RCW 42.56.550 provides in relevant part:

> **Judicial review of agency actions.** (1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, *the superior court* . . . may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. . . .
>
> (2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request or a reasonable estimate of the charges to produce copies of public records, *the superior court* . . . may require the responsible agency to show that the estimate it provided is reasonable. . . .
>
> (3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest . . . . *Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.*
>
> (4) . . . [I]t 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.

(Emphasis added.)

In discussing judicial review, subsections (1) and (2) explicitly describe superior court authority, not appellate court authority. Subsections (3) and (4) strongly imply superior court authority, not appellate court authority. *See also Yousoufian* I, 152 Wn.2d at 430-31 (construing former RCW 42.17.340(4), now RCW 42.56.550(4), as not describing appellate court authority).

Also, only superior courts review agency actions. Appellate courts review superior court decisions. If the legislature intended appellate courts to exercise de novo review, RCW 42.56.550(3) would read, "Judicial review of all agency actions *and trial court decisions* . . . shall be de novo." But RCW 42.56.550(3) does not say this.

For these reasons, I would construe RCW 42.56.550(3)'s grant of de novo review of agency actions as descriptive of superior court review, not appellate court review.

Here, the trial court made findings of fact after reviewing competing documentary evidence. In accordance with *Kipp*, I would review the trial court's challenged findings for substantial evidence. But the appropriate standard of review is open for judicial debate and awaits clarification from our highest court.

Lawrence-Berrey, C.J.

APPENDIX 2

ORDER AMENDING OPINION

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DIVISION THREE

RANDALL HOFFMAN, Appellant, v. KITTITAS COUNTY, a local agency and the KITTITAS COUNTY SHERIFF'S OFFICE, a local agency, Respondents.	)	No. 35091-6-III ORDER AMENDING OPINION

IT IS ORDERED that the third, fourth and fifth sentences in the second paragraph on page 12 (lines 11 through 15) of the majority opinion filed July 24, 2018, are amended as follows: "In addition, the ultimate penalty of $15,498.00 amounted to an assessment of almost $0.34 per Kittitas County resident on a per capita basis.[4] This is commensurate with other PRA violation assessments. *See Zink v. City of Mesa*, 4 Wn. App. 2d 112, 128, 419 P.3d 847 (2018) (penalty assessment of $0.19 per resident)."

PANEL: Judges Pennell, Korsmo, Lawrence-Berrey

FOR THE COURT:

Lawrence-Berrey C.J.
ROBERT LAWRENCE-BERREY
Chief Judge

KITTITAS COUNTY PROSECUTOR'S OFFICE

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