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Division II
State of Washington
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No. 51081-2-II

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TRAVIS LEE PADGETT

Appellant

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Travis Padgett had questions about how his phone account was being handled by the Department of Corrections (“Department”). He seemed to be running out of money on his phone account more than he calculated. So he asked for three types of documents from the Department pursuant to the Public Records Act (“PRA”) to better understand how his money was being spent. The Department denied his request as to two sets of records, resulting in this timely lawsuit being filed against the Department for violations of the Public Records Act (“PRA”). After consideration, the trial court found the Department violated the PRA as to both documents but then found the denial was not in bad faith. This timely appeal followed.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

1. The trial court partially erred in entering its order granting the Mr. Padgett’s motion for partial summary judgment.
2. The trial court erred in entering its order denying Padgett’s show cause motion.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it failed to find the Department liable for not conducting a reasonable search for the account statement and balance? (Assignment of Error No. 1).

2. Did the trial court err when it failed to find the Department acted in bad faith by failing to conduct any search, much less a reasonable search, for the PAN list? (Assignment of Error No. 2).

2. Did the trial court err when it failed to find the Department acted in bad faith by failing to conduct any search, much less a reasonable search, for the account statement and balance? (Assignment of Error No. 2).

III. STATEMENT OF THE CASE

A. PADGETT' PUBLIC RECORDS ACT REQUEST AND THE DEPARTMENT'S RESPONSE.

Travis Padgett ("Padgett") had many questions about his phone calls and the amounts he was being charged. CP 667-69. To find answers to his questions, Padgett kited the prison's Intelligence and Investigation Unit ("IIU") to ask questions a phone call he felt he was overcharged on.¹ CP 668, 671. Subsequently, he submitted a PRA request to the Public Disclosure Unit ("PDU") of the Department of Corrections

¹ Padgett called the unit I.A. and I&I in his kites. CP 671-74.

(“Department”) dated December 15, 2015. CP 589, 668. In this request, he asked for phone logs, his Personal Allowed Number (“PAN”) list, and his phone account statement and balance (“ASB”) related to his Inmate Personal Identification Number (“IPIN”). *Id.*

In the five-day letter dated December 28, 2015, Public Disclosure Specialist Mara Rivera (“Rivera”) acknowledged receipt of Padgett’s request and assigned it tracking number PDU-39384. CP 590-91. In this letter, Rivera stated that the Department did not have telephone account balances or PAN lists. It stated he could review this information at the Kiosk. He was also told to contact GlobalTel*Link for any other records *besides* phone call logs. (Emphasis in the original). CP 590. The request for the PAN list and the account statement and balance was then closed.² Padgett was informed that the Department would respond within 30 business days to his request for phone logs. *Id.* Rivera did not conduct any search for these records. CP 596-97.

Padgett then proceeded to go to the Kiosk to try to access this information. The Kiosk is accessible to each inmate with a valid biometric hand scan. CP 656-57. Available in the Kiosk is a list of active activities available at the prison or in the unit. The inmate can request activities or

² The trial court referred to the account statement balance form but Padgett actually requested “the account statement and balance from and related to my phone IPIN (personal Identification Number number) between November 1st, 2014 thru. January 1, 2016.” CP 588.

look to withdraw from them. *Id.* Announcements are also available on the Kiosk. The inmate can also access his or her classification date, debt data, trust accounts, and legal financial obligation status. Staff members can send individual inmates messages which can be read on and relied to using the Kiosk. Finally, the inmate can view his or her approved visitor list. *Id.* Nowhere does the menu tree permit an inmate to access their phone balance accounts or PAN lists. CP 668. He signed in but did not find any menu options related to his phone account so he was unable to obtain any answers. CP 668.

In the February 9, 2016 cost letter, Rivera informed Padgett she had identified 43 responsive records and asked for a total of \$8.97. CP 598, 668. Meanwhile, Padgett submitted several more kites to IIU about phone problems. CP 668-69, 672-74. Padgett then responded to the cost letter on February 29, 2016 by letter to Rivera along with a check made out to the exact amount enclosed. CP 601. Rivera sent a letter dated March 21, 2015 (sic) with the phone logs.³ CP 602-03, 669. Padgett sent another kite to IIU further inquiring into the status of his phone account. CP 669, 674.

³ There is an obvious error in the year in the letter but the date seems appropriate given the language in the letter.

After Padgett received the phone logs, he did not recognize several numbers. Because he wasn't sure if he had called several numbers, he paid \$3.00 to change his IPIN as a precautionary measure. CP 669, 675-76.

On December 12, 2016 after this lawsuit was filed, Denise Vaughan, the Public Records Officer of the Department sent an email to Katie Nevra and Jessica Perva asking for copies of the missing records. CP 604-07. It was determined that the original relevant PAN list could not be located because only the most current was available. *Id.*

Rivera sent Padgett a cost letter dated January 5, 2017. CP 608-09,669. Padgett wrote back asking they be sent to his attorney, Michael Kahrs. CP 610, 669. Kahrs sent an email to Rivera on January 29, 2017, asking about the status of the documents. CP 611. On February 2, 2017, Rivera sent Kahrs an email/letter with both a copy of the PAN list dated December 13, 2016 and the ITS Inmate Reconciliation for the original time period requested.⁴ CP 612-15.

⁴ As noted on the top of the ITS Inmate Reconciliation, this is page 2 of 16, a representative document of what was provided. CP 585.

B. THE DEPARTMENT'S PHONE SYSTEM AND CONTRACTUAL RELATIONSHIP WITH THE TELEPHONE PROVIDER.

1. The Inmate Is Responsible for His or Her Own Phone Account per Departmental Policy and Rules.

Washington prisons provide phone services to inmates per Policy 450.200 (Telephone Use by Offenders). CP 616-25. Except for legal calls, the Department may monitor any phone call through a monitoring/recording system. The stated purpose is to “enhance security, increase offender and public safety, and reduce criminal activity or activity that could threaten the orderly operation of the facility.” CP 617. Inmates are required to use an IPIN to place calls so that the inmate “can be identified in the event of a security concern or a complaint from the public.” *Id.* An inmate’s IPIN can be changed if lost, stolen or compromised. CP 618. It is the inmate who is responsible for the security of their IPINs. *Id.*

Each inmate’s PAN list will have a maximum of 25 numbers. *Id.* The inmate may request to change their list by using the phone system. The Department may remove any phone number from the PAN list if the inmate is prohibited from contacting that individual, whether they are an employee, contract staff or volunteer. CP 619 (citing Policy 450.050 Prohibited Contact). Any violations of this policy may result in sanctions and having the IPIN number blocked. CP 620.

Inmates may also be sanctioned with an infraction for the unauthorized use of facility phones and other related equipment. WAC 137-08-030, Infraction 718 (Category 2, Level 2), 889 (Category C – Level 1). The second offense of either may result in a loss of good time. CP 626-28.

2. The Department's Relationship to the Inmate Phone Service Provider.

On August 1, 2005, the Department issued a Request for Proposal for an "Offender Telephone System and Recording/Monitoring," CP 629. On October 3, 2006, a proposal was submitted by FSH Communications, LLC. ("FSH"). CP 630-35. On April 17, 2006, the Department executed a contract with FSH for "offender phone services and associated offender monitoring and recording equipment and services" ("the Contract"). CP 636-49. Under the terms of the Contract, FSH owns all equipment and "Recording Media" used in providing telephone facilities to the Department. CP 638- 41. However, "all data on the Recording Media is owned and controlled by the Department." CP 641.

On May 19, 2009, FSH Communications assigned the Contract to Value Added Communications, Inc. ("VAC"). CP 650-51. The assignment by FHS and assumption of the contract by VAC was agreed and consented

to by Washington State contracts administrator, Gary Banning, on August 26, 2009. CP 651. The previous contract remained in force.

In a letter dated May 25, 2011, VAC informed the Department that it had been acquired by Global Tel*Link Corporation (“GTEL”). CP 652-54. The letter requested consent to the acquisition and a waiver of any violation, breach, or default under the contract in connection with the acquisition. *Id.* The Department gave its consent. CP 653. GTEL was the inmate phone service vender during the period of time for which Padgett requested phone records. CP 655. Inmates cannot directly obtain records from GTEL without a subpoena because they are the property of the Department. CP 663.

The Department is to receive a 51% commission from the amount billed for accepted calls. *Id.* Appendix 3.01, p. 2. At a minimum, it was to receive \$5,100,000 as its minimum commission. CP 648. The more recent minimum the Department receives was adjusted in 2014 to be \$4,028,400, to account for the lessening of the previous usurious price of prison phone calls.⁵ CP 655

⁵ As an article in Prison Legal News stated: “In 2010, a 15- minute call from the Washington Department of Corrections cost \$18.30 as one of the highest in the country, and now that same call costs \$1.65.” <https://www.prisonlegalnews.org/in-the-news/2016/hrdc-phone-justice-director-quoted-about-costs-prison-and-jail-phone-calls/>.

C. PROCEDURAL POSTURE

On March 17, 2016, Padgett filed a partial motion for summary judgment. CP 23. After the Department responded (CP 47-64) and Padgett replied (CP 141-48), the trial court found the Department liable for violating the PRA. CP 531-33. The trial court concluded the Department conducted an unreasonable search for the PAN list. It also concluded the Department did not provide the fullest assistance in searching for the ASB.

Padgett then filed a show cause motion on penalties. CP 175-193. After the Department responded and Padgett replied (CP 469-78), the trial court found the Department did not act in bad faith. CP 534-37. An order on attorney fees and costs was subsequently signed, the amount claimed based on a CR 68 Offer of Judgment. CP 554-58.

A timely notice of appeal was filed challenging the summary judgment and show cause rulings. CP 538-46, 559-72. The Department filed a cross-appeal. CP 547-53.

IV. SUMMARY OF THE ARGUMENT

Padgett agrees with the trial court that the Department conducted an unreasonable search for the PAN list. He further believes and will show that the Department violated the PRA by also failing to conduct a reasonable search for the ASB. He will then show that the trial court abused its discretion by finding the Department did not act in bad faith

when it rejected Padgett's request for the PAN list and account statement and balance out of hand. The trial court's order on fees and costs is only challenged if this Court finds the Department acted in bad faith and the trial court awards Padgett penalties based on the violations. Finally, Padgett asks he be awarded reasonable attorney fees and costs on appeal.

V. ARGUMENT

A. STANDARD OF REVIEW

1. Summary Judgment

Appellate courts review agency actions under the PRA *de novo*. RCW 42.56.550(3). This Court "stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence." *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1995) ("PAWS"). Therefore, it is not bound by the trial court's factual findings when, like here, there was no evidentiary hearing.

Granting summary judgment is appropriate when the pleadings, affidavits, interrogatories, depositions and exhibits show there are no genuine issues of material fact. The moving party is then entitled to judgment on the issues presented as a matter of law. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 177, 876 P.2d 435 (1994). When reasonable minds could reach but one conclusion regarding the claims of

disputed facts, such questions may be determined as a matter of law. *Corbally v. Kennewick Sch. Dist.*, 94 Wn. App. 736, 740, 937 P.2d 1074 (1999). Any doubt as to the existence of genuine issue of material fact will be resolved against the movant. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact is a fact upon which the outcome of case depends, in whole or in part. *Clements v. Travelers Indem. Co.*, 121 Wn.2d. 243, 249, 850 P.2d 1298 (1993) (citation omitted). When a trial court makes a evidentiary determination on summary judgment the appellate court conducts the same inquiry as the trial court. *Folsom v. Burger King*, 135 Wn .2d 658, 663, 958 P.2d 301 (1998).

2. The Public Records Act

Appellate Courts review agency actions under the PRA *de novo* when the sole evidence is documentary. *Lindeman v. Kelso School Dist. No. 458*, 162 Wn.2d 196, 201, 172 P.3d 329 (2007). Appellate courts “stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence.” *PAWS*, 125 Wn.2d at 252. Because the record did not consist of any testimony, this Court is not bound by the trial court’s factual findings regarding the Department’s PRA violations.

Before deciding whether or not a person serving a criminal sentence is entitled to consideration of monetary penalties for violations of the PRA, the courts must consider whether or not the agency acted in bad faith. RCW 42.56.565(1). Unlike RCW 42.56.565(1), RCW 42.56.550(4) specifically grants discretion to the trial court to determine penalties. The courts have relied on this discretionary language in holding that a trial court's decision on penalties must be reviewed on an abuse of discretion standard.

We first note that this statute grants discretion to the trial court, not to this appellate court, to set the amount of the penalty within the minimum and maximum ranges. Our function is to review claims of abuse of trial court discretion with respect to the imposition or lack of imposition of a penalty, not to exercise such discretion ourselves.

King County v. Sheehan, 114 Wn. App. 325, 350-51, 57 P.2d 307 (2002);
accord Yousofian v. King County, 152 Wn.2d 421, 98 P.2d 463 (2004).
Because no such discretionary language is contained in RCW 42.56.565(1), the trial court's decision not to find the Department acted in bad faith must be reviewed *de novo*.

B. JUDICIAL REVIEW OF AN AGENCY'S RESPONSE TO A PUBLIC RECORDS ACT REQUEST IS REVIEWED WITH ALL INFERENCES TO BE CONSTRUED IN FAVOR OF THE PARTY SEEKING THE RECORDS.

The Public Records Act is set forth in RCW 42.56 et seq.

The purpose of the Public Records Act is to preserve 'the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.'"

O'Connor v. Dept. of Soc. & Health Servs., 143 Wn.2d 895, 905, 25 P.3d 426 (2001) (quoting *PAWS*, 125 Wn.2d at 251).

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

RCW 42.56.030.

It is "a strongly worded mandate for broad disclosure of public records." *Prison Legal News, Inc. v. Dept. of Corrections*, 154 Wn.2d 628, 635, 115 P.3d 316 (2005). Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 794, 791 P.2d 426 (1990) ("The agency must shoulder the burden of proving that one of the act's narrow exemptions shields the records it wishes to keep confidential.").

An agency must explain and justify any withholding, in whole or in part, of any requested public records. *Resident Action Council v. Seattle Housing Authority*, 117 Wn.2d 417, 432, 327 P.3d 600 (2013). An agency's failure to disclose or list documents on an exemption log that meet the requirements of a request and are public records violates the PRA. *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 537, 199 P.3d 393 (2009). This action is called silent withholding. Here, the Department is guilty of precisely this type of violation.

C. THE DEPARTMENT VIOLATED THE PRA BY FAILING TO CONDUCT ANY SEARCH MUCH LESS THAN A REASONABLE SEARCH FOR THE PAN LIST AND ACCOUNT STATEMENT AND BALANCE.

The trial court agreed with Padgett that the Department failed to conduct an adequate search for the PAN List. However, it did not find the Department conducted an adequate search for the account balance sheet, finding only that it failed to provide the fullest assistance. The trial court was wrong.

The Supreme Court addressed what constitutes an adequate search in its decision in *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011). After acknowledging the PRA was silent on what constitutes an adequate search, it adopted the

federal Freedom of Information standard. *Id.* at 719. It proceeded to make the following point: “[u]nder this approach, the focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate. *Id.* at 719-20 (citations omitted). Reasonableness is the key word by which a search is judged and it is fact specific to each case. *Id.* at 720. Agencies must do “more than a perfunctory search and follow obvious leads as they are uncovered. *Id.* (citations omitted). “This is not to say, of course, that an agency must search every possible place a record may conceivably be stored, but only those places where it is reasonably likely to be found.” *Id.* Citing to *Neighborhood Alliance* and RCW 42.56.100, the Supreme Court stated the following:

Agencies must make a sincere and adequate search for records. When an agency denies a public records request on the grounds that no responsive records exist, its response should show at least some evidence that it sincerely attempted to be helpful.

Fisher Broad.-Seattle TV LLC v. City of Seattle, 180 Wn.2d 515, 522, 326 P.3d 688, 692 (2014). This the Department did not do.

The Department had been involved in prior litigation involving phone logs with, for it, unfortunate results. Court after court ruled phone logs were public records. In each of these cases, all but one decided over a year prior to Padgett’s requests, phone logs were ruled public records.

TABLE 1

<u>Plaintiff</u> ⁶	<u>County</u>	<u>Cause No.</u>	<u>Date of Order</u>
Christopher Cook	Thurston	15-2-00479-1	September 18, 2015
Kevin Evans	Thurston	15-2-00215-2	September 29, 2015
Lisa Haar	Thurston	15-2-00866-5	February 3, 2014
Joseph Jones No. 1	Franklin	13-2-50864-1	March 10, 2015
Joseph Jones No. 2	Thurston	15-2-00012-5	October 7, 2015
Brady Lewis	Thurston	15-2-01279-4	June 24, 2014
Christopher Robinson	Thurston	15-2-00007-9	October 7, 2015
Karl Tobey	Franklin	14-2-50112-1	February 17, 2015

CP 152-56, 272-74, 301-04, 482-509, 512-20. Since the Department lost both Franklin County cases, it “reevaluated its position regarding inmate phone logs and in February 2015 decided to again provide inmate phone logs in response to public record requests.” CP 487-88. Which then requires an answer to this question – if phone logs meet the definition of public records, why don’t PAN Lists and ASBs also meet this definition? One need only engaged in a side-by-side comparison of each document Padgett requested to see that the Department was knew or should have known that the Pan List and ASB were both public records.⁷

⁶ In Cook, Evans, Jones No. 2, and Robinson, whose cases were consolidated on appeal before this Court, the Department had not challenged in the trial court whether or not the phone logs requested were public records. Instead, it challenged (and eventually won) on the issue of whether or not there was bad faith. CP 227-35. In all but Haar’s case, the Department did not challenge the fact of whether or not phone logs were public records.

⁷ The table organization reflects that the date and time information is very similar if not the same.

TABLE 2

<u>Phone Log</u>	<u>PAN List</u>	<u>ASB</u>
Inmate name	Inmate name	Inmate name
Inmate ID	Inmate ID	Inmate ID
Start Date/Time	Created/Activated/Deactivated	Date/Time
Telephone #	Telephone #	Telephone #
Jail Facility		Jail Facility
Completion Code		Duration
	Calls permitted	
	Alert status	
	Recording status	
	Language	
		Cost

CP 603, 614 and 615.

The Department’s argument for not providing the PAN List and ASB is exactly the same as was originally argued in cases in Table 1. This argument had been considered and rejected by many courts. The Department was on notice that any request for phone records would invoke the PRA. “[A]n agency’s failure to engage in any serious independent analysis of the exempt status of documents it withholds” is not only a violation of the PRA but an act of bad faith. *Adams v. Dept. of Corrections*, 189 Wn. App. 925, 929, 949, 361 P.3d 749 (2015). It cannot be clearer – the Department failed to conduct a reasonable search for responsive documents and violated the PRA.

D. THE DEPARTMENT ACTED IN BAD FAITH WHEN IT FAILED TO SEARCH FOR RESPONSIVE RECORDS.

1. The Trial Court Abused Its Discretion When It Failed to Find the Department Acted Wantonly When It Refused to Search for the PAN List and ASB.

A court may award penalties under the PRA to a person serving a criminal sentence when it finds that an agency acted in bad faith in denying the person the opportunity to inspect or copy a public record. RCW 42.56.565(1). The statute, however, does not define what bad faith is. Our courts have determined that a showing of bad faith need not require an intentional bad act. *See Francis v. Dept. of Corrections*, 178 Wn. App. 42, 313 P.3d 457 (2013).

The court in *Francis v. Dept. of Corrections* rejected the Department's assertion that “an agency acts in bad faith only when it knows that it has responsive records but intentionally fails to disclose them.” *Id.* at 54. Instead, it held that “among other potential circumstances, bad faith is present under RCW 42.56.565(1) if the agency fails to conduct a search that is both reasonable and consistent with its policies.” *Id.* at 63. Division II’s discussion of bad faith in *Francis* examined various PRA cases as well as cases outside PRA jurisprudence for authority. *See Id.* at 54-57 (citations omitted). In its formulation of a definition of bad faith, the court also considered excerpts from the

Restatement (Second) of Contracts § 205 cmt. d, quoted in Black’s Law Dictionary 159 (9th ed. 2009). *Id.* at 57. The *Francis* Court found that “FOIA cases have no bearing on the meaning of bad faith” in the context of the PRA, rejecting the Department’s argument to the contrary. *Id.* at 58-59.

The *Francis* Court then interpreted RCW 42.56.565(1) within the broader purpose of the PRA: “ensur[ing] the sovereignty of the people and the accountability of the governmental agencies that serve them by providing full access to information concerning the conduct of government.” *Id.* at 61 (internal quotations omitted). The court observed that the statutory mandate to liberally construe Chapter 42.56 RCW requires a broad interpretation of the term “bad faith” as used therein. *Id.* at 61, 63. Requiring a showing of an intentional bad act by an agency, the Court observed, would effectively insulate the Department from penalties. *Id.* (“[It] is notoriously difficult to prove agency intent, particularly from inside a prison cell.”) From this, the Court concluded that Francis was entitled to his penalties, holding:

...failure to conduct a reasonable search for requested records also supports a finding of “bad faith” for purposes of awarding PRA penalties to incarcerated requestors...In addition to other species of bad faith, an agency will be liable, though, if it fails to carry out a record search consistently with its proper policies and within the broad canopy of reasonableness.

Id. at 63.

In *Faulkner v. Wash. Dept. of Corrections*, Division III sought to further clarify the standard for “bad faith” in RCW 42.56.565(1), established in *Francis*. *Faulkner v. Wash. Dept. of Corrections*, 183 Wn. App. 93, 103, 332 P.3d 1136 (2014). *Faulkner* states that “[b]ad faith is associated with the most culpable acts by an agency. Penalties are owed when an agency acts unreasonably with utter indifference to the purpose of the PRA.” *Id.* at 105. It found that a finding of bad faith requires a finding of a wanton or willful act or omission by the agency. *Id.* at 103 (citing *Francis*, 178 Wn. App. at 63). The *Faulkner* Court defined bad faith as follows:

“Wanton” is defined as “[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences.” Further, “[w]anton differs from reckless both as to the actual state of mind and as to the degree of culpability. One who is acting recklessly is fully aware of the unreasonable risk he is creating, but may be trying and hoping to avoid any harm. One acting wantonly may be creating no greater risk of harm, but he is not trying to avoid it and is indifferent to whether harm results or not.”

Id. at 103-104 (citing *Black's Law Dictionary*, 1719–20 (9th ed. 2009) (quoting Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 879–80 (3d ed. 1982)). Putting it more succinctly, “[p]enalties are owed when an agency acts unreasonably with utter indifference to the purpose of the

PRA.” *Id.* at 105. The *Faulkner* Court endorsed the decision in *Francis* stating that

Francis is an example of a wanton act made in bad faith—the agency knew it had a duty to conduct an adequate search for the requested records but instead performed a “ cursory search and delayed disclosure well short of even a generous reading of what is reasonable under the PRA.

Id. (citing *Francis*, 178 Wn. App. at 63).

Padgett has shown that the Department conducted an unreasonable search when it refused to provide Padgett a copy of his PAN List and ASB when he requested it. The Department has accepted that phone logs are public records since 2015. Based on the Department’s position, the only sensitive information possibly contained in a PAN List or SAB is these same phone numbers. This Court must conclude that there is absolutely no difference of any consequence between the natures of these records as show in Table II. The Department acted in bad faith because there is no justifiable difference between the phone logs and the PAN list. As noted in *Francis*, an agency acts in bad faith if it does not conduct a reasonable search. Here, the Department failed to conduct a reasonable search that was consistent with how it had previously interpreted phone records under the PRA. It is clear that the Department was not “creating no greater risk of harm, but [it was] not trying to avoid it and [was] indifferent to whether harm results or not.” *Id.* at 104. The Department’s actions were wanton

pursuant to *Faulkner* because the Department was on notice that phone records were public records and it ignored the prior litigation which clearly established that all inmate phone records must be treated as public records.⁸

2. The Trial Court Errored by Failing to Find that the Department Acted in Bad Faith Based on a Legally Indefensible Position.

The scope of bad faith also includes those situations where an agency failed to engage in “serious independent analysis” of the claimed exemption and relied on a legally indefensible position in support of the exemption. *Adams*, 189 Wn. App. at 929. Adams had requested to review his central file. Before his file review, the Department records personnel withheld Adam’s 23-page criminal conviction records packet. *Id.* at 930. Among the documents withheld were 21 pages of Mr. Adams’ ACCESS printouts.⁹ After appealing the denial, he filed suit. *Id.* at 932. Critically, three days before he filed his complaint, the Spokane County Superior

⁸ The Denise Vaughan is currently the Public Records Office for the Department. She was in charge of developing statewide policies and rules for the Act. CP 080-86. She developed the original Newsbrief 13- 01 which the Franklin County courts held to be wrong. While she says she did not contemplate requests for other phone records, once the Franklin County courts made it clear that phone logs were disclosable, it was incumbent upon the Department to conduct a complete review of its current processes relevant to phone records including its policies and rules to comply with the spirit of the ruling. The Department failed in its basic obligation.

⁹ “A Central Computerized Enforcement Service System,” which is the Washington State Patrol’s telecommunications system providing linkage to law enforcement and other criminal justice agencies.” *Id.* at 930.

Court entered a decision holding these same documents were disclosable.

Id.

In its *Adams* show cause motion, the Department made basically the same argument it had previously made in Spokane County. *Id.* at 934. The trial court asked for additional documentation from the Department to substantiate its position but no evidence of consequence was provided. *Id.* “The trial court found the Department's justification for its withholding indefensibly deficient.” *Id.*

The trial court in *Adams* made factual findings supporting its decision to find bad faith and award penalties. Among the findings was that the Department’s “explanation for noncompliance is not reasonable.” *Id.* at 939. Another reason is that the position was legally indefensible. *Id.* at 939-40. By not relying on a proper statutory exemption, relying on an outside opinion in another agency and ignoring the prior case in Spokane County, the act was intentional and in bad faith. Finally, the Department wrongfully ignored the prior decision holding the records were disclosable. *Id.* at 940.

Division III then held the Department’s ostensible reliance on federal law was indefensible. *Id.* at 949. In making its next ruling, the *Adams* Court pointed out that even a prior decision by the Spokane County Superior Court did not cause the Department to “stop to reconsider

its exemption claim.” *Id.* at 951. It finalized its holding by saying that “[t]he trial court reasonably viewed the DOC’s actions as illustrating its indifference to whether it was withholding records improperly.” *Id.*

The ruling in *Adams* is extremely relevant to the determination of bad faith for the Department’s withholding of the PAN List and the ASB. Like *Adams* where the relevant records had been subject to prior litigation, phone records have also been subject to prior litigation. Granted that the records in question in the prior litigation were phone logs which in this case were provided Padgett, there is no appreciable difference between the records requested and the phone logs.

The legal justification used by the Department in *Jones* is exactly the same justification used here. *Jones* Finding of Fact No. 3 states the following:

The Defendant indicated that because the offender phone system is run and maintained by an outside vendor and the records were not created, used, or maintained by the Defendant, the records were not public records. As such, the Defendant notified Plaintiff that no records would be disclosed and his request was considered closed.

CP 153. Other prior decisions on phone logs contained the same language.

The Department can no more justify withholding these records with the existing court orders at the time of Padgett’s request than it could with Adams’ request. Of course, the Department will argue the records are different but as shown, the comparison shows that the differences are

cosmetic and not based on any legally recognizable difference. Like in *Adams*, the disturbing fact is the Department's "failure to engage in any serious independent analysis of the exempt status of documents it withholds" *Id.* at 929. Given that the phone logs were already determined by our courts to be public records, it takes absolutely no leap of imagination to realize that the PAN list and the ASB must also public records. *Adams* is on point in this case, requiring this Court to find the Department acted in bad faith.

E. UPON A FINDING OF BAD FAITH THIS CASE MUST BE REMANDED BACK TO THE TRIAL COURT TO DETERMINE PENALTIES PURSUANT TO RCW 42.56.550(4).

If an incarcerated individual shows the agency acted in bad faith, he is entitled to have the trial court consider penalties. RCW 42.56.550(4).

When an appellate court holds that a trial court abused its discretion in awarding a PRA penalty, the usual procedure is to remand to the trial court for imposition of the appropriate penalty.

Yousoufian v King County, 168 Wn.2d 444, 229 P.3d 735 (2010). If this Court holds that the trial court abused its discretion in denying bad faith, it must be remanded back for the trial court's determination of penalty pursuant to *Yousoufian*.

F. PADGETT IS ENTITLED TO REASONABLE ATTORNEY FEES AND COSTS.

RAP 18.1 permits attorneys fees and costs on appeal if the applicable law grants this right for an appeal. The Washington Supreme Court had determined that under the PRA, an individual who prevails against the agency is entitled to all costs, including reasonable attorney fees. RCW 42.56.550(4); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990). If this Court finds the Department acted in bad faith when it responded to Padgett's requests, Padgett asks that reasonable attorneys fees and cost for this appeal be granted.

VI. CONCLUSION

Because the Department conducted no search for responsive records to Padgett's request for both his PAN list and the ASB it conducted an unreasonable search. Because the Department acted wantonly in refusing to look for responsive records, it acted in bad faith. Because the Department failed to acknowledge prior holdings of various courts holding that phone records are public records when refusing to search for responsive records, it acted in bad faith. Padgett asks this Court to remand this case back to the trial court for determination of penalties

and potentially reasonable attorney fees and costs. Padgett finally asks this Court to award reasonable attorney fees and costs on appeal.

Respectfully submitted this 20th day of February, 2018.

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CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on the date below in Seattle, County of King, State of Washington, I emailed and deposited the foregoing document with the United States Mail, postage prepaid and 1st class on the following parties:

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