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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

TRAVIS LEE PADGETT,

Appellant/Cross-Respondent,

v.

DEPARTMENT OF CORRECTIONS,
a Subdivision of the State of Washington,

Respondent/Cross-Appellant

**THE DEPARTMENT OF CORRECTIONS'
OPENING BRIEF**

ROBERT W. FERGUSON
Attorney General

Cassie B. vanRoojen, WSBA #44049
Timothy J. Feulner, WSBA #45396
Assistant Attorneys General
Corrections Division; OID #91025
PO Box 40116
Olympia WA 98504-0116
360-586-1445
CassieV@atg.wa.gov
TimF1@atg.wa.gov

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I. INTRODUCTION

Faced with a dynamic situation involving a number of public records requests for inmate phone logs by inmates—most of whom were housed at the same facility—the Department of Corrections (Department) changed its practice to begin providing inmate phone logs. When Travis Padgett requested his inmate phone logs in this case, the Department provided such phone logs consistent with that change in practice. The Department, however, did not initially provide copies of Mr. Padgett’s PAN (Personal Allowed Number) list and the “account statement balance form” based on the mistaken belief that only the Department’s third-party contractor had access to these records. The trial court correctly held that the Department did not deny Padgett these records in bad faith and declined to award him penalties under RCW 42.56.565(1). This Court should affirm the trial court’s denial of penalties.

In the Department’s cross-appeal that is unrelated to the merits, the Department requests that this Court reverse the trial court’s failure to impose sanctions for Padgett’s inaccurate discovery responses and failure to properly certify the response under CR 26(g). Such conduct interfered with the Department’s ability to defend itself, is against the spirit of discovery, and as a result sanctions are mandatory, rather than permissive.

As such, the trial court abused its discretion in declining to sanction Padgett for such conduct.

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

1. The trial court abused its discretion in declining to sanction Padgett for violating Civil Rule 26(g) by providing inaccurate discovery responses.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR AND COUNTERSTATEMENT OF ISSUES

1. Did the trial court correctly determine that the Department did not deny Padgett the right to inspect or copy a record in bad faith when the specialist handling the request reasonably relied upon her knowledge of available records and the Department was faced with a dynamic situation regarding inmate phone records?

2. Should this Court decline to address Padgett’s argument regarding any additional violations because any error is academic and would not provide Padgett any additional relief?

3. Does Civil Rule 26(g) require a sanction when a party submits a discovery answer that they know to be inaccurate and that is not properly certified under CR 26(g)?

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IV. STATEMENT OF THE CASE

A. The Phone System Available for Use by Department Offenders

The Department contracts with Global Tel*Link Corporation (GTL), a third party vendor, to provide phone services to offenders incarcerated in its facilities. CP 94. The phone service provides offenders a mechanism to call their families, friends, and other individuals in the community. CP 94. The Department has little to do with the operation, maintenance, or charging for phone services. CP 94. Under the contract between the Department and GTL, GTL provides, installs, owns, and maintains the equipment and network associated with the phone system. CP 94. If a facility has problems with the system, the Department contacts GTL and GTL addresses the issue, including sending GTL staff to repair the equipment. CP 94.

While the Department does not maintain or operate the phone system, the contract provides Department investigators access to phone records to monitor phone calls for possible criminal activity or other malfeasance. CP 94. Moreover, the language of the contract provides that “DOC shall own and hold all rights with respect to the data contained on the Recording Media” and provides payment of vendor commissions to the Department. CP 94. The money from the commission goes into the offender betterment fund with a portion of that money going to the Department of

Labor and Industries to provide benefits for crime victims. CP 94. Since the beginning of its contract with GTL, the Department has received only the flat rate guaranteed annual minimum commission as opposed to a commission based on the volume of calls placed or received. CP ___, Errata. The Department has never disputed the commission it has received, but in the event that it did, the Department would only review the aggregate data regarding total phone calls, not records of individual offenders or phone calls. *Id.*

The GTL system contains information about offender phone calls. CP 94. Each offender in Department custody is provided a phone IPIN, which is a unique identifying number offenders use to place phone calls and to bill against an offender's pre-paid phone balance. CP 94-95. GTL has the capability to generate a report of all calls associated with a particular IPIN. This report is frequently referred to as a "phone log." CP 95.

In order to place calls, offenders also have a PAN (Personal Allowed Number) list. CP 95. This list is maintained within the GTL system. CP 95. Per Department policy, offenders are responsible for establishing and maintaining their own PAN List and are not to be provided printed copies of PAN lists. CP 95. Each offender's initial PAN list is populated with telephone numbers of the first twenty-five successfully connected calls placed within the first fourteen days. CP 95. If an offender wants to change

their PAN list, the offender dials #57 from an inmate phone to request the change. CP 95. Once the change is made, the PAN list is updated or overwritten in the GTL system. CP 95. In this sense, an offender's PAN list is a dynamic record. CP 95. GTL does not retain historical information as to what phone numbers were previously on an offender's PAN list. CP 95. The Department only has access to an offender's current PAN list. CP 95. Investigators in the Department's Intelligence and Investigation Unit (IIU) may access an offender's PAN list if this information is relevant to an investigation, but IIU employees access PAN lists in only limited circumstances. CP 95.

The GTL system also contains financial information regarding an offender's phone account, which may also be referred to as account balance information. CP 96. Offenders have direct access to their account balance information and can check it at any time through the GTL phone system. CP 96. Offenders can also check the cost of their last call through prompts within the phone system. CP 96. Department staff can view an offender's account balance information through the GTL system's administrative functions. CP 96. The reasons that Department staff may access an offender's account balance include responding to an offender's complaint regarding their phone account and suspicion of a compromised IPIN. CP 96. But a limited number of Department employees, primarily in IIU, have

access to the GTL phone system. CP 96. The GTL system can generate a report containing account balance information, including account debits, deposits, and withdrawals. CP 96. Although it is possible for IIU staff that have access to the GTL system to generate this report, it is unlikely to be of use to IIU staff. CP 96. Indeed most staff are likely unaware of the report. CP 96. For example, the Chief of Investigative Operations Ruben Rivera has never used it in the course of an investigation. CP 96. The only times that Mr. Rivera had ever generated these reports was in response to public records requests. CP 96.

PAN lists, phone logs, and account balance information all contain phone call history, including the phone numbers called, for that particular offender. CP 96. This sensitive information poses a security risk in the Department's facilities because the information could be used to strong-arm or intimidate the offender who is the subject of the records. CP 96-97. In April 2013, the Department dealt with a situation at Stafford Creek Corrections Center in which an inmate had requested another inmate's phone logs. CP 97. The requester was a member of a Security Threat Group (prison gang) and that raised additional concerns regarding the requester's ability to strong-arm the subject of the record. CP 82, 97.

As an offender in the Department's custody, Padgett uses an IPIN to facilitate his use of the GTL system. During Mr. Padgett's incarceration,

he has been housed at the Washington Corrections Center (WCC), the Coyote Ridge Corrections Center (CRCC), and the Airway Heights Corrections Center (AHCC). CP 96. These facilities have no record of ever conducting an investigation involving Mr. Padgett and have no indication or reason to believe they have ever accessed Mr. Padgett's PAN List or account balance information during the timeframe of his request. CP 96. Mr. Padgett also indicates that he has never been infraacted for use of the phones, that there is no reason for the Department to have investigated him, and that he has never used the phone system for illegal activity. CP 77-78.

B. Public Records Requests for Phone Records

In June 2013 Denise Vaughan, the Department's Public Records Officer, issued a written guideline entitled Newsbrief 13-01 to provide direction to public records staff regarding the processing of requests for phone logs. CP 82, 89. This Newsbrief indicated that the Department contracted with Global Tel*Link (GTL) to manage the inmate phone system and that the phone logs and other records were maintained within the GTL system. CP 89. Based on this, the Newsbrief indicated that phone logs were not public records unless the records were pulled from the GTL system for use in agency business. CP 83-84. In accordance with this Newsbrief, Department staff were instructed to notify requesters that phone logs were not public records and were not disclosable under the PRA. CP 89.

Newsbrief 13-01 was developed to address requests for phone logs and phone recordings and was not intended to apply to other GTL records. CP 83.

Meanwhile, a group of inmates noticed the change in policy and sensed an opportunity. The Department received its first lawsuit about phone logs from Joseph Jones, filed under Franklin County Cause No. 13-2-50864-1, in September 2013. Although the first lawsuit was filed by Joseph Jones, the instigator of this litigation was Jeffrey R. McKee. McKee outlines his plan in a letter to a “Jane Connelly.” McKee refers specifically to Jones’ case and says:

You need to make a PRA request to the AG’s for the complaint and Defendant’s Motion to Change Venue Under RCW 42.56.550(1) and CR 82 in the Joseph L. Jones v. WDOC, Franklin County Superior Court No. 13-2-50864-1 case. This will give you the contract the phone company has with DOC. Make a separate PRA request to DOC for all records for all phone calls you made in the past three years. You should make some quick cash on this PRA case.

CP 245. In this same letter, McKee proposes litigating cases through Mr. Kahrs and collecting the fees. CP 245. In another letter sent around the same time period to “Jane Connelly” McKee described his involvement in the phone log litigation. CP 254. McKee stated “I have an exhalent (sic) case right now were (sic) a guy requested the list detailing the dates and times he called his lawyers (sic) phone number.” CP 254. Jones, who was housed

with McKee in the I-Unit of CRCC, has indicated that he spoke to McKee about the lawsuit but Jones refused to describe the nature of those conversations. CP 264, 266, 269.

Shortly after Jones filed his lawsuit, a lawsuit was filed in Franklin County by McKee's former cellmate Karl Tobey. CP 272, 279. Those cases continued in the trial court through March 2015. In those cases, the Franklin County Superior Court found phone logs to be public records. CP 84-85. In response to these cases the Department changed practice in February 2015 and Department staff began retrieving phone logs from Global Tel*Link when requested through public records requests. CP 85.

During that litigation and prior to the Department's change in practice after the resolution of the Franklin County cases, a number of inmates and McKee's sister, Lisa Haar, submitted similar PRA requests for phone records. McKee was involved in submitting a number of these requests and provided his input into the language of the requests. CP 283, 286-87, 295, 297-98. The request from McKee's sister was actually submitted on McKee's behalf. CP 302.

A number of these requesters, including Joseph Jones, waited almost a year and then filed lawsuits in Thurston County seeking penalties. As Jones honestly indicated, he chose to file in Thurston County because he had "not much success in Franklin County." CP 263. Throughout 2015 and

2016, the trial court in Thurston County was deciding the merits of those cases. In the case brought by McKee's sister, McKee denied being aware of his sister's request. CP 359. After carefully reviewing the deposition testimony and certain communications between McKee and his sister, the Court rejected this testimony and stated that "[i]t is beyond question that Ms. Haar was acting at the behest of her brother and that she submitted this request on McKee's behalf." CP 302. The trial court in these cases awarded penalties to the inmates upon a showing of bad faith. However, Division I of the Court of Appeals reversed the trial court's award of penalties in four of those cases because Division I found that the Department did not act in bad faith in denying the requested phone logs. *Cook v. Department of Corrections*, 197 Wn. App. 1061, 2017 WL 478321 (2017) (unpublished).

Padgett entered the Department's custody on December 24, 2014. Padgett was transferred to the CRCC on February 12, 2015, and less than two months later, he was transferred to I-unit of CRCC. CP 313, 318-20. Eleven of the twelve inmates who have filed cases in Franklin or Thurston County regarding phone records were housed at CRCC in 2015; nine were housed in I-unit. CP 199. It was at CRCC that Padgett met McKee. CP 348. McKee was actively involved in the litigation over phone logs and has also filed a declaration in support of Padgett in this case.

C. Padgett's Public Records Request for Phone Records

On December 21, 2015, the Department received a public records request from Padgett seeking a copy of his phone logs, PAN list, and the "account statement balance" from November 1, 2014 until January 15, 2016. CP 105. This request was assigned to Public Records Specialist Mara Rivera and assigned tracking number PRU-39384. CP 100.

Ms. Rivera was familiar with offender phone records and processing requests for phone records because she was previously employed as the GTL site administrator and had also processed other public record requests for phone records. CP 100. In processing these previous public records requests, Ms. Rivera contacted the Department's IIU seeking PAN lists and account balances. CP 100. In response, she was notified that the Department did not keep historical records of offender PAN lists nor did the Department keep records of offenders' phone account balances. CP 100. Ms. Neva of the Department's IIU indicated that offenders could check their account balances at any time by calling a number that is provided in their offender handbooks. She also indicated that the account balance records are managed by GTL. CP 100. Ms. Rivera also spoke to Ashley Zuber who was the GTL site administrator at the time, and Ms. Neva about offender telephone accounts in October of 2015. CP 100. During these conversations, Ms. Rivera learned that the Department could not produce any phone record

besides the actual phone log. CP 100. Although Ms. Zuber could look up balances through the GTL system, any records would have to be requested from GTL. CP 100. Ms. Rivera was also told by Ms. Zuber that offenders could review this information at the kiosk. CP 100.

Based on the information she had received from IIU in addition to the conversations she had with GTL in the months preceding Padgett's request, Ms. Rivera understood the Department did not have PAN lists or telephone account balances. CP 100-01. In accordance with this belief, Ms. Rivera acknowledged Padgett's request, assigned it tracking number PDU-39384, and notified Padgett that the Department did not have telephone account balances or PAN lists and that he could contact GTL for this information. CP 101, 107-08. In this same letter, Ms. Rivera told Padgett that she would gather his phone logs. CP 101, 107-08. On February 9, 2016, Ms. Rivera made 43 pages of phone logs available to Padgett. CP 110-11. After receiving payment, the Department provided Padgett records on March 21, 2016. CP 113. The request was then closed. CP 113.

On November 30, 2016, the Department reopened the request and worked to provide Padgett additional records. CP 101. The Department's Public Records Officer Ms. Vaughan contacted IIU and the GTL site administrator regarding the PAN list and Ms. Rivera contacted the Department's Business Services unit to obtain a copy of Padgett's trust

account statements. CP 101. The trust account statements were ultimately deemed non-responsive. CP 101. In response to Ms. Vaughan's inquiry regarding the PAN list, Ms. Vaughan learned that there was no way to retrieve historical PAN lists and that Department policy requires offenders to maintain their own PAN lists. CP 85-86. Specifically, Ms. Vaughan was told "Offenders will be responsible for maintaining their PAN list. Printed PAN lists will not be provided." CP 86. In an effort to identify and locate the "account statement" records Padgett sought, Ms. Vaughan consulted Clara Church, the GTL on-site administrator. CP 86. In response, Ms. Church stated that GTL did not provide such records and that she was unsure what records Padgett was seeking. CP 86. Specifically, Ms. Church wrote "Without context I can only guess at what information is being requested and try to pull some sort of report together in regards to this person's phone records....The GTL Billing department will need a court order before they provide any kind of accounting information on accounts held by whomever deposits funds with them, which would not be the person identified in this request." CP 86. Ms. Vaughan was later provided a record entitled "Inmate Reconciliation Report." CP 86. After gathering these additional records, they were made available to Padgett on January 5, 2017. CP 115. These records were provided to Padgett's attorney on February 2, 2017, and he indicated that they satisfied his request. CP 117-18, 532.

D. Procedural History

After Padgett filed the lawsuit, the parties appeared for a scheduling conference, and the trial court entered a scheduling order that set two hearings. CP ____, Scheduling Order. At the first hearing, the trial court indicated that it would address whether the Department violated the Public Records Act. *Id.* For the second hearing, the parties were to address “all remaining issues, including bad faith, penalties, and fees and costs.” *Id.* At the violation stage, the Department argued that the requested records did not meet the definition of public records. CP 47-64. Padgett argued that the records were public records and submitted a declaration from Jeffrey McKee in support of Padgett’s motion. CP 20-22. The trial court rejected the Department’s arguments and found that the Department violated the PRA. CP 531-533.

The parties then briefed the issue of penalties. In support of his argument, Padgett argued that he was entitled to increased penalties because the records were of public importance because he needed the records to resolve issues that he had been having with the phone system. CP 173-193. In response, the Department argued that it did not act in bad faith because its response did not constitute a willful or wanton denial of records. CP 201-207. To rebut Padgett’s arguments about the purpose of his request, the Department presented extensive evidence that Padgett was part of a broader

scheme by inmates to submit requests for phone logs to profit from the PRA. CP 220-468. The Department had conducted discovery on this issue and submitted the discovery responses and deposition testimony to support its argument. CP 420-434. Padgett strenuously denied that argument and that he needed the records to obtain information about his phone usage. CP 469-478. Padgett asserted that there was no evidence of collusion with any inmates. *Id.* Interestingly, despite the clear language of the scheduling order requiring the resolution of all issues at this second stage of the case, Padgett merely mentioned the issue of attorney's fees in his penalty briefing and failed to provide any evidence in the form of billing invoices to support a specific fee award. CP 475-77; *See* CP ___, Scheduling Order. The trial court declined to award penalties because it found that the Department did not act in bad faith in denying Padgett the PAN list or account statement balance form. CP 534-37. The trial court also expressed surprise at the fact that Padgett had failed to sufficiently address the issue of attorney's fees despite the language of the scheduling order. CP 536-37.

After the hearing on bad faith, Padgett's attorney provided the Department's counsel billing invoices that showed Mr. Padgett's attorney had a phone call with Mr. McKee regarding Mr. Padgett's case back in October 2017. CP ___, Defendant's Response to Attorney's Fees Motion. Because inmates cannot receive calls, this phone call was presumably

placed by Mr. McKee to Mr. Padgett's attorney. This information would have been responsive to the previous discovery requests and undermined Mr. Padgett's arguments that there was no collusion between Mr. McKee and Mr. Padgett. *See* CP ____, Defendant's Response to Attorney's Fees Motion. The Department raised the issue of the insufficient discovery response and the fact that the response had not been properly supplemented under Civil Rule 26(g), and Padgett refused to supplement. *Id.*

The trial court then held a hearing on attorney's fees. The trial court concluded that Mr. Padgett was only entitled to \$559.25 in costs and attorney's fees. The trial court denied the Department any relief for the failure to provide an adequate discovery response. CP 554-58.

Mr. Padgett filed a notice of appeal, and the Department filed a timely cross appeal. CP 538, 559, 547, CP ____, Notice of Cross Appeal. A week after filing his notice of appeal, Padgett supplement his discovery response. CP ____, Defendant's Motion to Supplement the Record. A few weeks later, Padgett supplemented his discovery response again to reveal additional information about his contacts with McKee regarding this case. *Id.* Over Padgett's strenuous objection, this Court granted the Department's motion to supplement the record with these supplemental responses. *Id.*

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V. ARGUMENT

The trial court's determination that an agency acted in bad faith in responding to a Public Records Request under RCW 42.56.565(1) is a mixed question of law and fact that is reviewed de novo. *Faulkner v. Dep't of Corr.*, 183 Wn. App. 93, 101-02, 332 P.3d 1136 (2014); *Francis v. Dep't of Corr.*, 178 Wn. App. 42, 51-52, 313 P.3d 457 (2013).

A trial court's decision on discovery sanctions is reviewed for abuse of discretion. *Wash. State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.* at 339. When the record consists of entirely written documents and shows that a discovery violation has occurred, an appellate court can independently examine the evidence to determine if a violation occurred. *Id.* at 345-45.

A. **The Department Did Not Act in Bad Faith in Denying Padgett the Right to Inspect or Copy Records**

As an incarcerated individual, Padgett is entitled to daily penalties only if he proves that the Department acted in bad faith in denying him the opportunity to inspect or copy a public record. RCW 42.56.565(1). The bad faith inquiry has two interrelated components. First, the agency must have

acted with a sufficiently culpable state of mind, i.e., bad faith. Second, the agency's bad faith must have resulted in the denial of records.

Although RCW 42.56.565(1) fails to define "bad faith," the Court of Appeals has concluded that that bad faith requires "a wanton or willful act or omission by the agency." *Faulkner v. Wash. Dep't of Corr.*, 183 Wn. App. 93, 103-04, 332 P.3d 1136 (2014). A wanton act is one where the agency acted unreasonably or maliciously risks harm while being utterly indifferent to the consequences. *Id.* at 103.

Bad faith is not shown by a mere violation of the PRA; it only applies to an agency's most culpable acts that defeat the purposes of the PRA. Courts have interpreted this provision to require a showing of a wanton or willful act or omission by the agency. *Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 938-39, 361 P.3d 749 (2015). This standard is higher than simple or casual negligence. *Id.* The bad faith standard does not warrant penalties to an offender "simply for making a mistake in a record search or for following a legal position that was subsequently reversed." *Francis v. Wash. State Dep't of Corr.*, 178 Wn. App. 42, 63, 313 P.3d 457 (2013).

The trial court correctly concluded that Padgett was not entitled to penalties because the Department did not act in bad faith in denying him the right to inspect or copy records. First, as an initial matter, the trial court only

determined that the Department committed procedural violations of the PRA by failing to provide the fullest assistance with respect to the account balance information and failing to adequately search for the PAN lists. *See Hikel v. City of Lynwood*, 197 Wn. App. 366, 379-80, 389 P.3d 677(2016) (discussing procedural violations); *see also* CP 532-33 (finding only procedural violations). The trial correctly declined to award penalties for these procedural violations because the PRA does not allow for penalties for procedural violations, even for non-incarcerated individuals.¹ It would be absurd for courts to interpret RCW 42.56.565(1) to expand the opportunities for incarcerated individuals to recover penalties beyond those that would be available to non-incarcerated individuals.

For non-incarcerated individuals, no court in any published or unpublished case has ever awarded daily penalties for the failure to provide the fullest assistance. Similarly, the Supreme Court has explicitly not decided whether the failure to search provides a daily penalty to non-incarcerated individuals. *See Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 724, 261 P.3d 119 (2011). The logic of this decision, however, suggests that the remedy for a failure to search violation is attorney's fees and costs, not penalties. The purpose of RCW

¹ The trial court addressed these issues as procedural violations because that is the manner in which Padgett framed the issues.

42.56.565(1) is to limit an inmate's ability to receive penalties. *See Faulkner*, 183 Wn. App. at 106 (citations omitted). As such, an inmate should not receive penalties in circumstances where a non-incarcerated individual could not recover such penalties. The Court should not interpret RCW 42.56.565(1) to have such a result. Because Padgett was only raising procedural violations of the PRA, the trial court correctly concluded that he was not entitled to penalties under RCW 42.56.565(1).

Even if the PRA permitted awarding penalties based on procedural violations, the trial court correctly declined to award any penalties to Padgett because he failed to show willful or wanton misconduct. The Department's response to Padgett's request does not demonstrate a willful attempt to deny him records. Instead, the specialist reasonably believed that the Department did not have access to the records, that inmates could access those records through another means, and that the records were actually maintained by GTL. CP 100-101. Ms. Rivera relied upon her training and previous information that she had gathered in making this determination. Although some of this information proved incorrect, an agency does not act in bad faith by merely making a mistake in a records response. *Faulkner*, 183 Wn. App. at 102. Nothing in Ms. Rivera's response demonstrates that she was utterly indifferent to the consequences of her actions. Rather, her actions demonstrate that she gave Padgett the records that she believed DOC

had access to and directed him in the appropriate direction for those they did not. Based on this record, Padgett failed to show that the Department acted in bad faith.

In order to get around these facts, Padgett makes a series of unsupported assertions to argue that bad faith is present. Padgett first argues that the Department failed to conduct a reasonable search consistent with how it previously interpreted phone records. This argument ignores, however, that the specialist reasonably believed that a search would be futile because the Department did not have access to these records. The argument also ignores the records at issue here. The previous litigation dealt with phone logs. Consistent with the Department's change in practice, Padgett's phones logs were provided to him by the Department. CP 110-11. Despite Padgett's arguments to the contrary, there are differences between phone logs and the records at issue in this case. Most importantly, there are differences in how the Department interacts with such records and the content of such records, and the specialist reasonably believed that these differences meant the other requested records were not available to the Department. CP 94-96. These differences could also be reasonably viewed as legally significant in terms of whether the requested records meet the definition of a public record. Ultimately, the Department's response was based on a reasonable but mistaken belief that the records were not available

to the Department to provide and that inmates could assess that information through other avenues.

Padgett argues further that the Department's conduct is unreasonable because it knew that courts have held there is no legal justification for withholding phone records, that the Department ignored these prior court rulings, and that this case is indistinguishable from *Adams v. Washington State Department of Corrections*, 189 Wn. App. 925, 361 P.3d 749 (2015). Padgett is wrong on all counts. As an initial matter, Padgett's argument again relies upon a faulty premise, i.e., that the Department's initial response was based on Newsbrief 13-01 and the determination that PAN lists and account statement balance information were not public records. This premise is unsupported. The specialist did not state that the records were not public records and did not use the language in Newsbrief 13-01 when responding to Padgett's request. *See* CP 107-08. Instead, it appears that Padgett is hinging this argument upon the fact that the Department made arguments in litigation after the records were turned over to Padgett. The Department should not be penalized for arguments made in litigation after the records were provided to Padgett.

Even considering the reasonableness of the Department's litigation position regarding PAN lists and account statement balance forms, the trial Court correctly rejected the argument that the Department knowingly acted

in bad faith because the records were clearly public records. Every court to address the issue has found that the Department's interpretation of "public record" as applied to inmate phone records was objectively reasonable. CP 204. An agency does not act in bad faith by relying on an invalid basis for nondisclosure as long as the basis is not farfetched or asserted with knowledge of its invalidity. *See King County v. Sheehan*, 114 Wn. App. 325, 356-57, 57 P.3d 307 (2002) (noting "although we do not find the County's arguments against disclosure to be persuasive, they are not so farfetched as to constitute bad faith." *Id.* at 356-57); *see also Adams*, 189 Wn. App. at 951. The Department's arguments in litigation were not farfetched.

The application of "public record" to records maintained by third party contractors is an evolving area of the law. This inquiry is fact specific and depends on the content of the record as well as the agency's interaction with the records. Indeed, in the past several years, three published appellate court opinions have addressed the application of the definition of public records to records held by private contractors. *See Nissen v. Pierce Cnty.*, 183 Wn.2d 863, 882-83, 357 P.3d 45 (2015); *West v. Vermillion*, 196 Wn. App. 627 (2016); *Cedar Grove Composing, Inc. v. City of Marysville*, 188 Wn. App. 695, 354 P.3d 249 (2015). These decisions demonstrate that many agencies are wrestling with the application of the definition of "public

record” to new forms of records. The Supreme Court’s decision in *Nissen* also illustrates that the ultimate outcome of the determination is a fact specific inquiry that depends on the nature of the record and the relationship of such records to the agency’s decision-making. *Nissen*, 183 Wn.2d at 882 (concluding call logs were not public records but text messages might be). This fact-specific inquiry was recognized by the trial court: “the prior litigation over phone logs did not necessarily require the Department to reformulate a different position with regards to the phone records....” CP 536. The nature of this fact specific inquiry and the evolving nature of this determination shows that the Department’s position in this litigation regarding PAN lists and account statement balance information was not farfetched or legally indefensible. The Department reasonably argued in litigation that these records that reflect an inmate’s communications with friends, family, and other private citizens might not be public records. To be a public record, a record must be 1) a writing 2) containing information relating to the conduct of government or the performance of any governmental or proprietary function and 3) be prepared, owned, used, or retained by any state or local agency. RCW 42.56.010(3); *Dragonslayer, Inc. v. Wash. State Gambling Cmm’n*, 139 Wn. App. 433, 444 (2007). It was reasonable for the Department to argue in litigation after the records had been provided to Padgett that the requested records—which had never been used for any

agency purpose—did not meet the definition of a public record because they did not relate to the conduct of government or were purely personal records. In claiming that the agency’s position was unreasonable, Padgett’s Opening Brief contains no analysis of the definition of a public record to these specific records and instead claims in a cursory fashion that the agency’s position was unreasonable. In light of this evolving case law and the “dynamic nature of the [various phone log litigation] and the Department’s response in this case,” the trial court correctly rejected Padgett’s arguments and concluded that Padgett had failed to show that the Department acted in bad faith. CP 536.

The trial court’s recognition of the dynamic nature of the Department’s approach to third-party phone records under the PRA deflates Padgett’s argument regarding the Department’s alleged failure to change its practice regarding all phone records. Instead, this argument is an overstatement of fact and law. First, as a matter of fact, Padgett’s request was for a new subset of phone records. The Department provided the records to Padgett after the filing of this lawsuit, and Padgett has not presented any evidence that the Department did not change its policy after this case. Second, the trial court explicitly made it clear that it was not determining that all phone records are public records. The trial court made this determination because it recognized that there might be some phone

records maintained by GTL that might not be public records and that further facts could mean such records were not public records. The trial court's recognition that some phone records maintained by GTL might not be public records, depending on the nature of the records, was certainly not contrary to common sense. Padgett's broad assertion about all phone records is unsupported and does not provide a basis for reversing the trial court's denial of penalties.

The trial court also correctly rejected Padgett's assertion that the Department ignores court rulings and that this case is indistinguishable from *Adams*. The Department did not ignore court rulings in Franklin County or Thurston County involving phone logs. After those decisions, the Department worked to change its practice and considered a number of options. CP 84-86. The Department ultimately did change its practice and began providing phone logs. *Id.* As Ms. Rivera's actions demonstrate, the Department also began attempting to analyze what records would be disclosable or retrievable to inmates from the GTL system. CP 85-86; 101-102. The specialist's determination in this case that PAN lists and account statement balance information could not be provided was based on her determination and research. CP 101-102. Therefore, as the trial court determined, the Department was not ignoring court rulings but was simply faced with a dynamic situation involving inmate phone records.

Finally, Padgett's attempt to equate the facts of *Adams* is wrong for a number of reasons. First, *Adams* did not deal with phone records but a completely different type of record, RAP sheets. *See Adams*, 189 Wn. App. at 930. Second, in *Adams*, the trial court found bad faith and awarded penalties based on a number of factors, including that the trial court found that the Department's reliance on certain exemptions was legally indefensible; that the Department simply relied upon the opinions of another agency; that the Department did not exercise other remedies available to it, such as an appeal, and simply chose to ignore a trial court's ruling. *Id.* at 940-41. In this case, the Department's initial determination that inmate phone logs were not public records was based on its own independent analysis of the definition of a public record. CP 83. For the reasons discussed above, the Department's argument that inmate phone records are not public records is legally defensible. Every court to address the issue has so determined. Third, the Department did not continue to use the same practice which a prior court had found to violate the PRA. The Department actually changed its practice regarding inmate phone logs after adverse decisions after considering all of its options. And with respect to the treatment of the types of phone records at issue in this case, the Department made those records available to Padgett shortly after receiving the lawsuit. CP 115. This conduct is distinct from *Adams* in which the agency relented

on only a third of the exemptions nine months after the first court's decision that the exemptions did not cover those records.

Finally, unlike *Adams*, which dealt with some of the same records being withheld, this case is one of first impression on the issue of whether PAN lists and "account statement balance forms" are public records. Despite an absence of court decisions, the Department disclosed those records as an act of good faith prior to receiving this Court's ruling on that issue. Although Padgett argues that the records contained similar information, this is not the proper inquiry and that this meant they should have been considered public records automatically. Whether something is a public record is a fact-specific inquiry and the Department's use and interaction with a particular record is legally significant. For the reasons discussed above, the Department's arguments in this case were not farfetched or legally indefensible. Therefore, the Court should reject Padgett's attempt to equate this case with *Adams*.

In conclusion, an agency does not act in bad faith by merely making a mistake in a records search. The specialist assigned to this request responded to the request in good faith based on her research and understanding of the relevant records. The trial court correctly held that the Department did not act in bad faith and declined to award Padgett penalties. This Court should affirm the denial of penalties.

B. If the Court Affirms the Trial Court’s Conclusion on Bad Faith, Any Error Related to the Violations Is Academic

Padgett asks this Court to find that the Department failed to conduct an adequate search for the “account statement balance form.” In doing so, Padgett argues that the trial court erred in not making such a finding. But as Padgett recognizes, the trial court concluded that the Department violated the PRA in its response to the request for the “account statement balance form.” In light of this finding and in the context of this case, a finding that the Department failed to conduct an adequate search would not provide Padgett any additional relief and is simply an abstract question of law that this Court does not need to reach. Regardless, the record supports the trial court’s conclusion that the Department did not violate the PRA by failing to conduct an adequate search for this record.

1. Padgett’s Argument That the Court Should Have Found an Additional Violation Based on an Inadequate Search Is a Purely Academic Question

An appellate court will not normally review issues that are purely academic questions of law. *See Norman v. Chelan Cnty. Pub. Hosp. Dist. No. 1*, 100 Wn.2d 633, 635, 673 P.2d 189 (1983); *Rosling v. Seattle Bldg. & Const. Trades Council*, 62 Wn.2d 905, 908, 385 P.2d 29 (1963).

Here, the trial court concluded that the Department violated the PRA in its response to the request for the “account statement balance form” but

did not make any explicit finding related to the Department's failure to search. In light of the fact that the trial court correctly concluded that the Department did not act in bad faith and that Padgett was not entitled to penalties under RCW 42.56.565(1) as a result, this question is simply an academic question. By the time of the hearing, Padgett had received the records and the Department had made an offer of judgment that limited the amount of costs and attorney's fees that Padgett could recover. In light of this circumstance, a reversal on this issue would not provide Padgett any additional relief. Therefore, if the Court affirms the denial of penalties, it should decline to reach this argument.

2. In the Context of This Case, The Department Did Not Violate the PRA by Failing to Conduct an Adequate Search

When examining whether an agency conducted an adequate search, the focus is not whether additional responsive documents were found but whether the agency's search was reasonably calculated to find the responsive documents. *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 719-20, 261 P.3d 119 (2011). What will be considered reasonable depends on the facts of each case. *Id.* at 720. The reasonable search requirement does not require an agency to "search *every* possible place a record may conceivably be stored, but only those places where it is *reasonably* likely to be found." *Id.* (emphasis in original). This

inquiry focuses on the scope of the agency's search as a whole and whether that search was reasonable, not whether the requester can identify alternatives that he believes would have more accurately produced records. *Hobbs v. State*, 183 Wn. App. 925, 944, 335 P.3d 1004 (2014).

The trial court correctly concluded that the Department did not fail to conduct an adequate search for the "account statement balance form" in the specific context of this case. Instead, when the Department received Padgett's request, the assigned Public records specialist contacted the Department's IIU and had a staff member pull Padgett's phone logs from the GTL system. CP 101-102; CP 596-97. Additionally, based on recent conversations with GTL and other Department staff, the specialist reasonably believed that the Department did not maintain copies of printed PAN lists and did not have access to account balance information. CP 101-02. Instead, the specialist's understanding was that these records would need to be obtained from GTL and the inmate had a way to access this information. *Id.* Although the specialist referred to the kiosk system in the Department's initial response, inmates have access to this information through the GTL phone system itself. Padgett acknowledges as much. CP 324, 327, 329-332. Under these circumstances, the specialist did not fail to conduct an adequate search when she relied upon information that she received from prior recent public records request searches to determine that

a search would not have yielded records. Even though that belief proved to be incorrect, this does not mean that the search itself was unreasonable.

In arguing to the contrary, Padgett ignores the record in this case by arguing that the Department should have known the “account statement balance form” was a public record. Padgett does not address at all the fact that the specialist relied upon her experience with similar requests and the fact that she believed that the Department did not have access to these records. Nothing in the PRA precludes a public records specialist from reasonably relying upon such prior experience to determine that the Department did not have responsive records. Indeed, the PRA’s search requirements require agencies to look in places where records reasonably likely to be found. Based on the specialist’s prior experience, she believed that there was no place that these records could be reasonably be found. As such, the Department’s response did not violate the reasonable search requirement of the PRA.

C. The Trial Court Abused its Discretion in Declining to Impose Sanctions for Padgett’s Violation of Civil Rule 26(g)

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Yousoufian v. Office of Ron Sims*, 168 Wn. 2d 444, 458-59, 229 P.3d 735 (2010). A trial court also abuses its discretion when it declines to exercise its discretion to

make a necessary decision. *State v. Stearman*, 187 Wn. App. 257, 364, 348 P.3d 394 (2015). Under Civil Rule 26(g), a represented-party’s attorney must sign discovery responses and certify that the attorney “has read the request, response, or objection and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and (2) not interposed for an improper purpose.” When a party violates CR 26(g), a sanction is mandatory. *Wash. Motorsports Ltd. Partnership v. Spokane Raceway Park, Inc.*, 168 Wn. App. 710, 715, 282 P.3d 1107 (2012). In determining whether an attorney or party complies with the rule, a court considers all of the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the responding party to comply with the request. *Panorama Village Homeowners Ass’n v. Golden Rule Roofing*, 102 Wn. App. 422, 10 P.3d 417 (2000). The broader question is whether the party’s conduct is consistent with the letter, spirit, and purpose of the discovery rules. *Carlson v. Lake Chelan Cmty. Hospital*, 116 Wn. App. 718, 738, 75 P.3d 533 (2003). Although the nature of the sanction is discretionary, there is no discretion to decline to award a sanction at all. *Id.*; *see also Rojas v. Town of Cicero, Ill.*, 775 F.3d 906, 909 (7th Cir. 2015).²

² Because Civil Rule 26(g) is essentially identical to Federal Rule of Civil Procedure 26(g), state courts have looked to the federal decisions interpreting the federal rule for guidance. *Fisons*, 122 Wn.2d at 341.

The trial court abused its discretion by declining to order a sanction for Padgett's violation of Civil Rule 26(g). In response to the Department's discovery, Padgett—not his attorney—certified a discovery response that indicated that there had been no communications between Mr. McKee and Mr. Padgett and Mr. McKee and Mr. Padgett's attorney. CP 429-434. This answer proved to be inaccurate, and this inaccurate response was not correct. The Department brought the absence of certification to the attention of Padgett's attorney prior to the trial court's hearing on attorney's fees and costs. CP___, Defendant's Response to Motion for Attorney's Fees. Nonetheless, Padgett refused to correct this error and continued to refuse to correct the error until after Padgett had filed his notice of appeal in the trial court. CP ____, Defendant's Response to Motion for Attorney's Fees.

This conduct violates Civil Rule 26(g) as well as the purpose and the spirit of the discovery rules.³ First, the response was inaccurate. The interrogatory asked Padgett to identify specific conversations that Padgett and McKee and Padgett's attorney and McKee had related to phone logs and the case. The response stated that "none exist." CP 430. The Department

³ Although Padgett raised a procedural objection to the request for sanctions below, Padgett has conceded before this Court that the trial court "considered the Department's motion for sanctions and denied the motion." Padgett's Reply on the Amendment Motion to Modify Commissioner's Ruling. Having made such a concession, Padgett cannot now argue that the trial court failed to consider the motion for sanctions on the merits.

then relied on this information in filing its Response to Padgett's Show Cause on Penalties. CP 429-433. Padgett later supplemented the response with specific conversations, but not until well after he filed the notice of appeal. CP ____, Defendant's Motion to Supplement. Based on supplemental information provided by Padgett, it is clear that the initial response was wholly inaccurate. There is no apparent reason that Padgett declined to identify such conversations, and Padgett has not provided any plausible explanation for his inaccurate response. When a party submits a discovery response that it knows to be inaccurate, that conduct violates Civil Rule 26(g).

Despite this violation of CR 26(g), the trial court erred by declining to impose any sanction against Padgett and did not make any findings about the reason that no sanction was warranted. Because CR 26(g) is mandatory and the trial court was required to impose a sanction if a violation of CR 26(g) was found, the trial court abused its discretion in declining to impose a sanction without articulating any reason for its decision. Therefore, this Court should reverse and remand that portion of the trial court's decision. The precise nature of the appropriate discovery sanction is something that

the trial court should be allowed to consider in the first instance. *See Fisons*, 122 Wn.2d at 357 (remanding for determination of appropriate sanctions).⁴

D. Padgett Is Not Entitled to Costs or Attorney’s Fees for This Appeal Because He Has Not Prevailed on Any Issue

The PRA provides for costs and attorney’s fees to the prevailing party. RCW 42.56.550(4); *Sanders v. State*, 169 Wn.2d 827, 865, 240 P.3d 120 (2010). Because this Court should affirm the trial court’s decision on liability and the denial of penalties, Padgett is not entitled to attorney’s fees. Even if Padgett prevails on the reversal of the trial court’s decision on whether the Department violated the PRA in its search, Padgett is not the prevailing party unless he overcomes the Department’s offer of judgment in this case. Because the trial court appropriately denied penalties, Padgett would only be entitled to attorney’s fees incurred prior to the offer of judgment and he has been awarded such attorney’s fees and costs already. Therefore, this Court should decline to award Padgett his costs and attorney’s fees on appeal.

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⁴ The fact that Padgett and not his attorney certified the discovery response in question raises a question of which person—Padgett or his attorney—would be responsible for the violation of CR 26(g). The trial court can address this issue on remand.

VI. CONCLUSION

The Department respectfully requests that the Court reverse the trial court's failure to impose sanctions for Padgett's inaccurate discovery responses and failure to certify the response under CR 26(g). The Department further requests that the Court affirm the trial court's finding that the Department did not act in bad faith and affirms the trial court in all other respects.

RESPECTFULLY SUBMITTED this 20th day of April, 2018.

ROBERT W. FERGUSON
Attorney General

s/ Timothy J. Feulner
CASSIE B. vanROOJEN, WSBA #44049
Timothy J. Feulner, WSBA #45396
Assistant Attorneys General
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
CassieV@atg.wa.gov
TimF1@atg.wa.gov

CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed THE OPENING BRIEF OF THE DEPARTMENT OF CORRECTIONS' with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

MICHAEL C. KAHR
KAHR LAW FIRM, P.S.
2208 NW MARKET ST., STE. 414
SEATTLE, WA 98107

mike@kahrslawfirm.com

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

EXECUTED this 20th day of April, 2018, at Olympia, WA.

s/ Amy Jones _____
AMY JONES
Legal Assistant
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
AmyJ@atg.wa.gov

CORRECTIONS DIVISION ATTORNEY GENERAL'S OFFICE

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