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Division II
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No. 53282-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

BRIAN CORTLAND, BRIAN GREEN, AND CHRISTOPHER
HUPY

Cross-Appellants,

v.

LEWIS COUNTY,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellants Brian Cortland, Brian Green, and Christopher Hupy appeal the trial court's ruling on the statutory penalties awarded under RCW 42.56.550(4) for Respondent Lewis County's violation of the Public Records Act. This appeal argues the trial court erred as a matter of law when determining to apply aggravating and mitigating factors, under the *Yousoufian* multifactor framework. First, the court erred in failing to apply aggravating factors that would increase the statutory penalty. Second, the trial court erred in applying a mitigating factor that wrongly decreased the statutory penalty.

Relief is sought by Appellants by this Court to declare that aggravating factor number four and aggravating factor number five both fully apply, while conversely mitigating factor number five does not apply. This Court has all of the documentation needed to increase the statutory penalty based upon the newly applied aggravating factors and the non-applied mitigating factor. Alternatively, this Court should remand this appeal back down to the trial court to increase the statutory penalty based upon the newly applied aggravating factors and the non-applied mitigating factor.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to consider and apply aggravating factor number 4 to increase the statutory penalty. CP 134.
2. The trial court erred when it failed to provide a legal standard for bad faith when considering aggravating factor number five. CP 134
3. The trial court erred when it failed find that Respondent acted in bad faith under aggravating factor number five. CP 134.
4. The trial court erred when it applied mitigating factor number five to decrease the statutory penalty. CP 135.
5. Since the trial court erred in determining aggravating and mitigating factors, it erred in calculating the statutory penalty. CP 132-36.

III. ISSUES PRESENTED

1. Whether the trial court abused its discretion when it failed to apply *Yousoufian* aggravating factor number four that increases the statutory penalty if the agency's response is unreasonable, when it later found as a conclusion of law the agency's response was unreasonable.

2. Whether the trial court abused its discretion in applying *Yousoufian* mitigating factor number five when it found as a conclusion of law the agency's response was unreasonable.
3. Whether the trial court abused its discretion in applying *Yousoufian* aggravating factor number five when it failed provide a legal standard for bad faith.
4. Whether Appellant is entitled to an award of all costs and reasonable attorney's fees under the Public Records Act as the prevailing party in this appeal.

IV. STATEMENT OF THE CASE

Appellants Brian Cortland, Brian Green, and Christopher Hupy ("Appellants") made a series of three Public Records Act ("PRA") requests to Respondent Lewis County ("Respondent") seeking different court transcripts. CP 35-37. The trial court found that Respondent violated Appellants rights to copy and inspect records by claiming a legally wrong exemption.

Pretrial discovery

On July 07, 2018, in this above entitled lawsuit, Respondent's attorney of record Lewis County Chief Civil Deputy Prosecuting Attorney Eric Eisenberg, produced all three requested court transcripts within hours of receiving the first set of discovery requests from Appellants. CP 84.

Mr. Eisenberg produced the documents via email to Appellant's attorney Joseph Thomas. In the email, Mr. Eisenberg stated that all three court transcripts were being produced as "discovery in this case" and Mr. Thomas "client's benefit." CP 85.

Order on the Merits

The first PRA request at issue in the trial court was made by Appellants on April 14, 2017, which sought a court transcript from a March 03, 2017 hearing in case number 16-2-04941-34. CP 35. On April 21, 2017, Respondent's Public Records Officer denied the request for the court transcript citing the statutory exemption of RCW 42.56.290 because it "would not be available to another party under the rules of pretrial discovery." CP 35-36. The requested transcript is a transcript of a proceeding which occurred in open court. CP 36. The requested transcript was not requested by Appellants as pretrial discovery. CP 36.

The second PRA request at issue in the trial court was made by Appellants on May 03, 2017, which sought a court transcript from an April 21, 2017 hearing in case number 16-2-03960-34. CP 36. On May 05, 2017, Respondent's Public Records Officer denied the request for the court transcript citing the statutory exemption of RCW 42.56.290 because it "would not be available to another party under the rules of pretrial discovery." CP 36. The requested transcript is a transcript of a

proceeding which occurred in open court. CP 36. The requested transcript was not requested by Appellants as pretrial discovery. CP 36.

The third PRA request at issue in the trial court was made by Appellants on May 15, 2017, which sought a court transcript from a May 05, 2017 hearing in case number 16-2-03960-34. CP 36. On May 19, 2017, Respondent's Public Record Officer denied the request for the court transcript citing the statutory exemption of RCW 42.56.290 because it "would not be available to another party under the rules of pretrial discovery." CP 37. The requested transcript is a transcript of a proceeding which occurred in open court. CP 37. The requested transcript was not requested by Appellants as pretrial discovery. CP 37.

The trial court ruled upon the merits that Respondent's claimed an unlawful exemption of RCW 42.56.290, and violated Appellants' right to copy and inspect the records under RCW 42.56.550(4). CP 38-39. The order on the merits scheduled the hearing to determine the statutory penalty for Respondent's violation of the PRA. CP 39.

Statutory penalty arguments -- Appellants

In the opening penalty brief, Appellants argued that this is one of the most egregious violations of the Public Records Act because a court transcript is a "quintessential public records." CP 56-57. Appellants'

opening penalty brief argued specific enumerated *Yousoufian* factors that should aggravate the penalty.¹

Aggravating factor number four was argued by Appellants. CP 70-71. This aggravating factor increases the statutory penalty for the unreasonableness of any explanation for noncompliance by the agency. Appellants made four separate arguments why Respondent's explanation was unreasonable. First, Appellants argued the requested court transcripts were in the public domain as they are court transcripts of open court proceedings. CP 70-71. Second, Appellants argued that they claimed the court transcripts were never sought in discovery in a previous lawsuit. CP 71. Third, Appellants argued Respondent produced the requested court transcripts were produced to Appellants to stop the penalty, but irreconcilably Respondents still maintained the statutory exemption prohibited the court transcripts from being produced. CP 71. Fourth, Appellants argued that Respondent produced these court transcripts to others under the Public Records Act, while denying production to them. CP 71.

Aggravating factor number five was argued by Appellants. This aggravating factor increases the statutory penalty for negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the

¹ Not all of the trial court's rulings on the aggravating and mitigating factors are being contested. This factual recitation is only identify the pertinent parts of the argument.

agency. First, Appellants argued the statutory exemption was pretextually made in bad faith by Respondents. CP 60. Second, Appellants argued it was bad faith for Respondent produced the requested court transcripts were produced to Appellants to stop the penalty, but irreconcilably Respondents still maintained the statutory exemption prohibited the court transcripts from being produced. CP 62-63. Third, Appellants argued Respondent acted in bad faith by intentionally disregarding well-established past precedent construing Respondent's claimed statutory exemption. CP 63-64. Fourth,² Appellants argued Respondent's pattern and practice of violating the Public Records Act is indicative of bad faith. CP 66-68. ‘

Aggravating factor number six was argued by Appellants. This aggravating factor increases the statutory penalty for agency dishonesty. First, Appellants argued the Respondent was dishonest in failing to disclose the requested court transcripts because the documents were always public, as the information was in the public domain. CP 72. Second, Appellants argued that Respondent was dishonest when it produced the wrongfully withheld documents as pretrial discovery on June 07, 2018 while still maintaining the documents are exempt from pretrial discovery under RCW 42.56.290 during the litigation at the trial court. CP

² Not all of the arguments that Appellants made in support of bad faith will be made to this Court. Only the pertinent arguments are identified in the facts of this brief.

72. Third, Appellants argued that Respondent was dishonest when it claimed the requested court transcripts would not be available to another party under pretrial discovery, when the requested court transcripts were never requested as pretrial discovery. CP 72-73.

Trial court’s written penalty order

The trial court issued a written order on the statutory penalties which included findings of facts and conclusions of law. CP 132-36. The trial court incorporated the facts and conclusions from its merits order into the penalty order. CP 133. (emphasis in original).

The top of the first page of the written penalty order, trial court identifies its factual findings with a bold heading written in all capitalized letters, titled “**FINDINGS OF FACT.**” CP 132. The record is absent of any factual findings in the trial court’s penalty order concerning reasonableness, bad faith, and dishonesty. CP 132-33.

Then in the middle of the second page of the written penalty order, the trial court identifies its conclusions of law with a bold heading written in all capitalized letters, titled “**CONCLUSIONS OF LAW.**” CP 133 (emphasis in original). The written penalty order clearly enumerates the separate *Yousoufian* aggravating and mitigating factors into separate paragraphs.

Aggravating factor number four was not applied by the trial court. The record is absent in the written penalty order of the trial court making a conclusion of law as to *Yousoufian* aggravating factor number four. CP 132-36. If applied aggravating factor number four increases the statutory penalty for the agency's unreasonableness of any explanation for noncompliance. The record is absent of a legal standard identified for reasonableness anywhere in the written penalty order. CP 132-36.

Aggravating factor number five was partially applied by the trial court. The written penalty order did specifically enumerate and address aggravating factor number five. CP 134. If applied aggravating factor number five increases the statutory penalty for the agency's negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA. The trial court did not find Respondent acted in bad faith but did find an element of recklessness by explaining that Respondent's claimed statutory exemption "cannot be considered reasonable because it was legally wrong." CP 134. The record is absent of a legal standard identified for bad faith or recklessness anywhere in the written penalty order. CP 132-36.

Aggravating factor number six was not applied by the trial court. The record is absent in the written penalty order of the trial court making a conclusion of law as to *Yousoufian* aggravating factor number six. CP

132-136. If applied aggravating factor six increases the statutory penalty for an agency's dishonesty. The record is absent of a legal standard identified for dishonesty anywhere in the written penalty order. CP 132-36.

Aggravating factor number seven was applied by the trial court.³ Aggravating factor was applied by the trial court.⁴ Aggravating factor number nine was applied by the trial court.⁵

Mitigating factor two was applied by the trial court.⁶ Mitigating factor number three was applied by the trial court.⁷

Mitigating factor number five was applied by the trial court. CP 135. The written penalty order did specifically enumerate and address mitigating factor number five. CP 134. If applied mitigating factor number five decreases the statutory penalty for the reasonableness of any explanation for noncompliance by the agency. The record is absent of a legal standard identified for reasonableness anywhere in the written penalty order. CP 132-36.

³ Aggravating factor number seven is not being challenged by Appellants in this appeal.

⁴ Aggravating factor number eight is not being challenged by Appellants in this appeal.

⁵ Aggravating factor number nine is not being challenged by Appellants in this appeal.

⁶ Mitigating factor number two is not being challenged by Appellants in this appeal.

⁷ Mitigating factor number three is not being challenged by Appellants in this appeal.

V. STANDARD OF REVIEW

Public Records Act decisions based on documentary evidence are not reviewed in the same manner as other determinations:

Public agency actions challenged under the PRA are reviewed de novo. An appellate court stands in the same position as the trial court when the record consists entirely of documentary evidence and affidavits. The reviewing court is not bound by the trial court's factual findings.

Cornu-Labat v. Hosp. Dist. No. 2 of Grant Cty., 298 P. 3d 741, 745 (Wash. 2013) (internal citation omitted). So, this Court has leeway to consider the evidence with regard to findings made or not made when determining the issues. Legal issues are reviewed de novo. *E.g. State v. Ramirez*, 426 P. 3d 714, 718-19 (Wash. 2018).

VI. ARGUMENT

The statutory penalty gives integrity to the Public Records Act, Chapter 42.56 RCW. Without the statutory penalty there is no incentive for an agency to comply with the law's broad mandate of public disclosure.

The purpose of the statutory penalty found is a punitive measure that is intended to hold agencies culpable for violating the people's sovereignty by deciding "what is good for the people to know and what is not good for them to know." RCW 42.56.030. When a violation is found

of the right to inspect and copy in RCW 42.56.550(4) agencies are then punished by “a penalty to enforce the strong public policies underlying the public disclosure act.” *Amren v. City of Kalama*, 929 P. 2d 389, 395 (Wash. 1997). But not just any enforcement of the statutory penalty will suffice to enforce the public policy of the Act. Only the “‘strict enforcement’ of fees and fines will discourage improper denial of access to public records.” *PAWS v. UW*, 114 Wn.2d 677, 686 (1990) (citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140 (1978)); *Spokane Research Fund v. City of Spokane*, 117 P. 3d 1117, 1123 (Wash. 2005); *Amren v. City of Kalama*, 929 P. 2d 389, 395 (Wash. 1997); *King County v. Sheehan*, 57 P. 3d 307, 320 (Wash. Ct. App. 2002); *ACLU v. Blaine School Dist. No. 503*, 975 P. 2d 536, 539 (Wash. Ct. App. 1999).

When the trial court incorrectly applies aggravating and mitigating factors, it frustrates the purpose of the statutory penalty, which is deter future violations of the PRA through a financial penalty. To effectuate the purpose of the PRA, this court must correct the errors of law the trial court made when determining the aggravating and mitigating factors.

A. The trial court erred when it failed to apply aggravating factor number four to increase the statutory penalty

The trial court erred when it failed to apply the *Yousoufian* aggravating factor number four. This wrongly decreased the statutory penalty.

If applied by a court aggravating factor number four increases the statutory penalty for “unreasonableness of any explanation for noncompliance by the agency.” *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 748 (Wash. 2010).

A common definition of unreasonable is “not governed by or acting according to reason.” Unreasonable, *Merriam-Webster Dictionary* (September 22, 2019, at 10:03 AM), <https://www.merriam-webster.com/dictionary/unreasonable>.

The trial court did not consider *Yousoufian* aggravating factor number four as an aggravator. CP 132-36. In the written penalty order the trial court enumerates both the aggravating and the mitigating factors it considered. CP 133-35. The record is absent of the trial court considering and applying *Yousoufian* aggravating factor number four to increase the statutory penalty.

1. The trial court abused its discretion in not considering aggravating factor number four

“A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons.” *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 743 (Wash. 2010) (citing *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684 (2006)). “A trial court's decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.” *Yousoufian*, 229 P. 3d at 743 (internal quotation marks omitted).

The trial court abused its discretion when it failed to consider *Yousoufian* aggravating factor number four to increase the statutory penalty. Here the trial court made multiple conclusions of law that Respondent’s explanation for its noncompliance was unreasonable. “[Respondent’s] claimed exemption was intelligible, but cannot be considered reasonable because it was legally wrong.” CP 134. Respondent’s noncompliance “cannot be reasonable because it was legally wrong.” CP 135.

The trial court’s failure to apply *Yousoufian* aggravating factor number four is manifestly unreasonable because it is a view that no reasonable person would take. No other reasonable person would find that

Respondent's explanation for noncompliance unreasonable in two other contexts in the written penalty order but fail to apply that same reasoning to *Yousoufian* aggravating factor number four. This is simply the trial court taking irreconcilable stances. On one hand the trial court in two separate instances found as a conclusion of law Respondent's explanation for its noncompliance was unreasonable. On the other hand, when to consider whether Respondent's explanation for noncompliance was unreasonable for aggravating factor number four, the trial court stayed silent.

No reasonable person would find that Respondent's explanation for noncompliance was unreasonable under other parts of the multifactor framework, but then fail to apply it to *Yousoufian* aggravating factor number four.

2. Respondent's explanation for the noncompliance was unreasonable because the documents were already in the public record

Respondent's explanation for noncompliance was unreasonable because it knew the documents were already in the public domain, when it claimed the documents were statutorily exempt from production. No reasonable agency objects to producing documents that are already in the public record.

It is well-established that Washington State court look towards “judicial interpretations” construing the Freedom of Information Act (“FOIA”), when construing the PRA. *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 132 (Wash. 2011); *Dawson v. Daly*, 120 Wn.2d 782, 792 (1993); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 129, 580 P.2d 246 (1978).

“Under [the] public-domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.” *Muslim Advocates v. US Dept. of Justice*, 833 F. Supp. 2d 92, 99 (D.C. Cir. 2011) (quoting *Cottone v. Reno*, 193 F.3d 550, 554 (D.C.Cir.1999) (citing *Niagara Mohawk Power Corp. v. United States Dep't of Energy*, 169 F.3d 16, 19 (D.C.Cir.1999))).

“[T]he logic of FOIA mandates that where information requested is truly public, then enforcement of an exemption cannot fulfill its purposes.” *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (internal quotation marks omitted) (quoting *Niagara Mohawk Power Corp. v. United States Dep't of Energy*, 169 F.3d 16, 19 (D.C.Cir.1999)).

As a preliminary, a court transcript of proceedings conducted in open court are well-established, by both the United States Supreme Court and the Washington State Supreme Court to be public events. “A trial is a

public event. What transpires in the court room is public property.” *Richmond Newspapers, Inc. v. Virginia*, 448 US 555, 593 (1980) (brackets omitted) (quoting *Craig v. Harney*, 331 US 367, 374 (1947)); *Nebraska Press Assn. v. Stuart*, 427 US 539, 596 (1976); *see also State v. Coe*, 101 Wn.2d 364, 380 (1984) (quoting *Craig v. Harney*, 331 US 367, 374 (1947)); *Cohen v. Everett City Council*, 85 Wn.2d 385, 388 (1975).

The public domain doctrine in FOIA cases adopts the analysis that proceedings conducted in open court are “public event[s], and what transpires in the court room is public property.” *Cottone v. Reno*, 193 F. 3d 550, 554 (D.C. Cir. 1999) (quoting *In re Nat'l Broadcasting Co.*, 653 F.2d 609, 614 (D.C.Cir.1981)); *Johnson v. FBI*, 118 F. Supp. 3d 784, 795 (E.D. Penn 2015).

These documents were always in the public domain. A court transcript of a hearing conducted open court is a quintessential public record. When hearings are conducted in open court, the public is allowed to come and go from the courtroom as they please. Consequently, there was no privacy in the courtroom and was considered a public event by well-established case law. The court transcripts in question are simply verbatim transcripts of words spoken at public events.

3. Respondent’s explanation for the noncompliance was unreasonable because Respondent produced the requested documents to Appellants as pretrial discovery, while maintaining the documents would not be producible under the rules of pretrial discovery under RCW 42.56.290

Respondent’s explanation for noncompliance was unreasonable because its actions in the lawsuit contradicted its stated claim of exemption of RCW 42.56.290. Consequently, Respondent took irreconcilable stances on whether the requested court transcripts could be produced as pre-trial discovery.

On July 07, 2018, in this above entitled lawsuit, Respondent’s attorney of record Lewis County Chief Civil Deputy Prosecuting Attorney Eric Eisenberg, produced all three requested court transcripts within hours of receiving the first set of discovery requests from Appellants. CP 84. Mr. Eisenberg produced the documents via email to Appellant’s attorney Joseph Thomas. In the email, Mr. Eisenberg stated that all three court transcripts were being produced as “discovery in this case” and Mr. Thomas “client’s benefit.” CP 85.

25 | Request for Admission No. 24: Admit that when Lewis County Chief Civil Deputy
26 | Prosecuting Attorney Eric Eisenberg produced all three court transcripts to Brian
LEWIS COUNTY'S ANSWERS TO 2 LEWIS COUNTY
PLAINTIFF'S SECOND REQUEST FOR PROSECUTING ATTORNEY'S OFFICE
DISCOVERY – REQUEST FOR 345 W. Main Street, 2nd Floor
ADMISSIONS Chehalis, WA 98532
360-740-1240 (Voice) 360-740-1497 (Fax)

1 | Cortland, Brian Green, and Christopher Hupy on June 07, 2018 he told Plaintiffs in the
2 | email the documents are being produced "to stop the clock on any potential penalties
3 | that may accrue if Lewis County is deemed to have incorrectly claimed an exemption on
4 | these three transcripts."
5 | **Response:** Admitted in part. Specifically, Mr. Eisenberg's email produced the
6 | transcripts to Joe Thomas, counsel representing the three Plaintiffs jointly. The email
7 | read, "Joe, As discovery in this case, and incidentally to stop the clock on any potential
8 | penalties that may accrue if Lewis County is deemed to have incorrectly claimed an
9 | exemption on these three transcripts, I herewith transmit to you for your clients' benefit
the three transcripts you sought in the requests at issue in this case." Otherwise, this
request is denied.

This production of documents was pretrial discovery because it occurred in this above entitled lawsuit before the trial/merits hearing. The hearing on the merits occurred on November 30, 2018. CP 35-39. As a matter of fact, Respondent produced the three requested documents to Appellants as pretrial discovery. The trial court took note of this fact and included it in the written order on the merits. CP 39 (noting that Respondent had already produced the three requested court transcripts).

Up until the start of this appeal, Respondent continued to claim the court transcripts were exempt from production under RCW 42.56.290 because they would not be available to another party under the rules of pretrial discovery. CP 113-20.

No reasonable person would find that Respondent's explanation for noncompliance was sincere when producing the requested court transcripts as pretrial discovery to Appellants, while simultaneously claiming the statutory exemption of RCW 42.56.290 and stating the

documents could not be produced because they would not be able available as pretrial discovery.

B. The trial court erred when it wrongly applied mitigating factor number five to decrease the statutory penalty

The trial court erred when it wrongly applied mitigating factor number five. This wrongly decreased the statutory penalty.

Mitigating factor number five decreased the statutory penalty for “the reasonableness of any explanation for noncompliance by the agency.” *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 748 (Wash. 2010).

Here the trial court applied mitigating factor number five. CP 135. The trial court expressly enumerated the mitigating factors that it applied. CP 135. The trial court expressly listed mitigating factors two, three, and five in the written penalty order. CP 135. The record is absent of the trial court considering any of the other *Yousoufian* mitigating factors.

“A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons.” *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 743 (Wash. 2010) (citing *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684 (2006)). “A trial court's decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person

would take.” *Yousoufian*, 229 P. 3d at 743 (internal quotation marks omitted).

The trial court abused its discretion when wrongly applied *Yousoufian* mitigating factor number five to decrease the statutory penalty. Here the trial court made multiple conclusions of law that Respondent’s explanation for its noncompliance was unreasonable. “[Respondent’s] claimed exemption was intelligible, but cannot be considered reasonable because it was legally wrong.” CP 134. Respondent’s noncompliance “cannot be reasonable because it was legally wrong.” CP 135. No reasonable person would make two separate findings that Respondent’s explanation for its noncompliance was unreasonable, but then apply mitigating factor number five which decreases the statutory penalty because of the reasonableness of the explanation for the noncompliance. These are irreconcilable stances taken by the trial court.

In addition to the trial court’s irreconcilable stances is Appellant’s arguments that Respondent’s explanation for its noncompliance is unreasonable. First, the court transcripts were never exempt from production as they were always in the public domain. It contravenes the purpose of the PRA for agencies to conceal documents from disclosure which are in the public domain. Second, it was unreasonable for

Respondent to produce the requested documents to Appellants as pretrial discovery in the trial court, while maintaining the documents would not be producible under the rules of pretrial discovery under RCW 42.56.290. These arguments are explained in depth with legal citations in the previous section above regarding aggravating factor number four.

Since Respondent's explanation for its noncompliance was unreasonable, this Court was wrong to decrease the statutory penalty in applying mitigating factor number five.

C. The trial court misapplied aggravating factor number five by failing to find that Respondent acted in bad faith

The trial court misapplied aggravating factor number five by failing to find that Respondent acted in bad faith.

Aggravating factor number five increases the statutory penalty for “negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency.” *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 748 (Wash. 2010).

Here the trial court ruled on aggravating factor number five:

The Court does not find bad faith or intentional noncompliance by Lewis County, but this factor encompasses the full range of culpability. When deciding to claim an exemption that may not be justified, there is an element of recklessness. Lewis County's claimed exemption was intelligible, but cannot be considered reasonable because it was legally wrong.

CP 134.

1. The trial court erred in not applying a legal standard of bad faith to the facts

The trial court erred when it ruled on bad faith because it simply came to a conclusion. This can only be described as a conclusion because the analysis of bad faith is a mixed question of law and fact and the trial court did not identify what law or facts it used to make the determination.

“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).” *Faulkner v. Wash. Dept. of Corrections*, 332 P.3d 1136, 1140 (Wash. Ct. App. 2014) (quoting *Francis v. Wash. Dept. of Corrections*, 313 P. 3d 457, 462 (Wash. Ct. App. 2013)); accord *Tapper v. Employment Security*, 122 Wn.2d 397, 403 (1993) (explaining “resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts”).

Here, the record is absent of any citation to legal authority to identify legal standard for bad faith used by the trial court. CP 132-36. The trial court appear to conflate bad faith with intentional noncompliance. CP 134.

Since bad faith is a mixed question of law and fact it is an abuse of discretion for the trial court to fail to use a legal standard when making a determination on bad faith.

2. Legal standard for bad faith

There is not a singular standard for bad faith when determining the fifth *Yousoufian* aggravating factor. This is illustrated in a line of cases starting with *Francis v. Wash. Dept. of Corrections*, 313 P. 3d 457 (Wash. Ct. App. 2013).

In *Francis* the Division II Court of Appeals for the State of Washington analyzed whether Francis, an inmate, was entitled to a statutory penalty under RCW 42.56.565(1). In terms of the statutory penalty, the PRA treats inmates differently from all other requestors because RCW 42.56.565(1) prohibits PRA penalties to an incarcerated person unless there is a specific showing of bad faith. There the Court looked at the plain language of RCW 42.56.565(1) and determined the Legislature's intent. The Court rejected the Department of Corrections argument that bad faith should be limited to only intentional acts. *Francis*, 313 P. 3d at 467. The Court explained that a "strict interpretation of the bad faith requirement urged by the Department runs contrary to these policies and to the intent of the legislature that added the bad faith

exception to the proposed ban on penalty awards to incarcerated requestors.” *Id.*

In the wake of the *Francis* court’s ruling, the Division III Court of Appeals for the State of Washington in *Faulkner* used a heightened standard for bad faith in the context of whether inmates can receive a statutory penalty under RCW 42.56.565(1) “hold[ing] that to establish bad faith, an inmate must demonstrate a wanton or willful act or omission by the agency.” *Faulkner v. Wash. Dept. of Corrections*, 332 P. 3d 1136, 1141 (Wash. Ct. App. 2014). The *Faulkner* court explains that the heightened level of bad faith used for inmates PRA requests, should not apply to all other requests. “By adding the bad faith requirement, the legislature increased the level of culpability needed for an award to an inmate.” *Id.* at 1142.

But either way, such a strict approach to bad faith is rejected outside of the inmate population because “such precision is simply not necessary in the general PRA context.” *Hoffman v. Kittitas County*, 422 P. 3d 466, 471 (Wash. Ct. App. 2018). In other words, for all other cases the statute must be liberally construed pursuant to RCW 42.56.030.

The best way to liberally construe the statute would be to use common definitions of the term bad faith. Generally, in Washington undefined terms “are given their ordinary meaning, and the court may look

to a dictionary for such meaning.” *Lake v. Woodcreek Homeowners Ass'n*, 243 P. 3d 1283, 1289 (Wash. 2010); *Legal News, Inc. v. DOC*, 115 P. 3d 316, 322 (Wash. 2005); *New York Life Ins. Co. v. Jones*, 86 Wash.2d 44, 47 (1975).

A common definition of bad faith is the “lack of honesty in dealing with other people.” Bad faith, *Merriam-Webster Dictionary* (September 22, 2019, at 10:22 AM), <https://www.merriam-webster.com/dictionary/bad%20faith>. To fully understand the term bad faith, a definition for honesty is needed. A common definition of the word honesty is the “adherence to the facts : sincerity.” Honesty, *Merriam-Webster Dictionary* (September 22, 2019, at 10:22 AM), <https://www.merriam-webster.com/dictionary/honesty>.

There is no intent in the definition of bad faith. No part of the definition can even be remotely said to identify a purpose. For bad faith it does not matter why an individual acted, only the result matters. The result of bad faith is whether an individual adhered to the facts with sincerity.

4. Respondent's noncompliance was done in bad faith because it was insincere with its claimed exemption of RCW 42.56.290 that documents could not be produced under the Public Records Act because it would not be available to another party under the rules of pretrial discovery

Respondent's noncompliance was done in bad faith because Respondent was insincere with its claimed exemption of RCW 42.56.290, which prohibits the production of documents that would not be available to another party under the rules of pretrial discovery.

On July 07, 2018, in this above entitled lawsuit, Respondent's attorney of record Lewis County Chief Civil Deputy Prosecuting Attorney Eric Eisenberg, produced all three requested court transcripts within hours of receiving the first set of discovery requests from Appellants. CP 84. Mr. Eisenberg produced the documents via email to Appellant's attorney Joseph Thomas. In the email, Mr. Eisenberg stated that all three court transcripts were being produced as "discovery in this case" and Mr. Thomas "client's benefit." CP 85.

Up until the start of this appeal, Respondent continued to claim the court transcripts were exempt from production under RCW 42.56.290 because they would not be available to another party under the rules of pretrial discovery. CP 113-20.

This production of documents was pretrial discovery because it occurred in this above entitled lawsuit before the trial/merits hearing. The hearing on the merits occurred on November 30, 2018. CP 35-39. As a matter of fact, Respondent produced the three requested documents to Appellants as pretrial discovery, contrary to its claimed statutory exemption of RCW 42.56.290. The trial court took note of this fact and included it in the written order on the merits. CP 39 (noting that Respondent had already produced the three requested court transcripts).

No reasonable person would find that Respondent's explanation for noncompliance was sincere when Respondent produced the requested court transcripts as pretrial discovery to Appellants, while simultaneously claiming a statutory exemption stating the documents could not be produced because they would not be able available as pretrial discovery.

D. Motion for All Costs and Attorney's Fees – Appellant is entitled to an award of all costs and reasonable attorney's fees under the Public Records Act as the prevailing party in this appeal

Should Appellant prevail on appeal in any respect, he should be awarded his fees and costs on appeal pursuant to the Public Records Act and RAP 18.1.

RCW 42.56.550(4) of the PRA provides:

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.

Washington courts recognize that “[s]trict enforcement of this provision discourages improper denial of access to public records.” *Spokane Research Fund v. City of Spokane*, 117 P. 3d 1117, 1125 (Wash. 2005); *see also ACLU v. Blaine Sch. Dist. No. 503*, 975 P. 2d 536, 539 (1999). The PRA does not allow for court discretion whether to award attorney fees to a prevailing party. *PAWS v. UW*, 114 Wn. 2d 677, 687-88 (1990); *Amren v. City of Kalama*, 929 P.2d 389, 394 (Wash. 1997). The only discretion the court has is in determining the amount of reasonable attorney’s fees. *Id.*

The Washington State Supreme Court in *Limstrom v. Ladenburg*, 136 Wn. 2d. 595, 616 (1998), remanded back to the trial court to determine whether a violation of the PRA occurred, but awarded attorney fees – “[including] fees on appeal” – to the requestor. Should Appellant prevail on appeal on appeal in any respect, he should be awarded his fees and costs on appeal pursuant to the Public Records Act and RAP 18.1.

VII. CONCLUSION

In conclusion, the trial court wrongly determined several aggravating and mitigating factors which resulted in a decreased penalty.

Relief is sought by Appellants by this Court to declare that aggravating factor number four and aggravating factor number five both fully apply, while conversely mitigating factor number five does not apply. This Court has all of the documentation needed to increase the statutory penalty based upon the newly applied aggravating factors and the non-applied mitigating factor. Alternatively, this Court should remand this appeal back down to the trial court to increase the statutory penalty based upon the newly applied aggravating factors and the non-applied mitigating factor.

Respectfully submitted,



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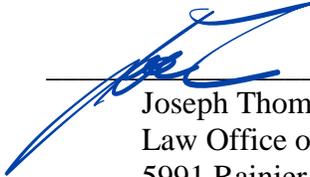
I declare under penalty of perjury under the laws of the State of Washington that on the date specified below, I caused to be served a copy of the following documents via email through the Court of Appeals electronic portal:

- Appellant's Opening Brief

To the following:

Mr. Eric Eisenberg
Lewis County Prosecuting Attorney
345 W. Main Street Chehalis WA 98532

Dated this 23 day of September 2019.



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